LEGAL AFFAIRS AND SAFETY COMMITTEE

Members present:
Mr PS Russo MP (Chair)
Ms SL Bolton MP (via teleconference)
Ms JM Bush MP
Mrs LJ Gerber MP
Mr JE Hunt MP
Mr AC Powell MP

Staff present:
Ms R Easten (Committee Secretary)
Ms M Telford (Assistant Committee Secretary)

PUBLIC HEARING—INQUIRY INTO THE CRIMINAL CODE (CONSENT AND MISTAKE OF FACT) AND OTHER LEGISLATION AMENDMENT BILL 2020

TRANSCRIPT OF PROCEEDINGS

THURSDAY, 21 JANUARY 2021

Brisbane

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The committee met at 9.30 am.

CHAIR: Good morning. I declare open the public hearing for the committee's inquiry into the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. I acknowledge the traditional owners of the land on which we gather today and pay my respects to elders past, present and emerging. On 26 November 2020 the Hon. Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, introduced the bill into the parliament. The parliament has referred the bill to the Legal Affairs and Safety Committee for examination, with a reporting date of 12 February 2021. My name is Peter Russo, the member for Toohey and chair of the committee. Other committee members here with me today are Mrs Laura Gerber, the member for Currumbin and deputy chair; Ms Jonty Bush, the member for Cooper; Mr Jason Hunt, the member for Caloundra; and Mr Andrew Powell, the member for Glass House. Ms Sandy Bolton, the member for Noosa, is joining us via teleconference.

The purpose of today is to hear evidence from stakeholders who made submissions as part of the committee's inquiry. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence. You have previously been provided with a copy of instructions to witnesses, so we will take those as read. These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard, I remind members of the public that, under the standing orders, the public may be admitted to or excluded from the hearing at the discretion of the committee.

The proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and will be subject to my direction at all times. The media rules endorsed by the committee are available from committee staff if required. All those present today should note that it is possible you might be filmed or photographed during the proceedings by media and images may also appear on the parliament's website or social media pages. The program for today has been published on the committee's webpage and there are hard copies available from committee staff. I would also ask that if you take a question on notice today you provide the information to the committee by 12 pm on Thursday, 28 January 2021.

LYNCH, Ms Angela, Chief Executive Officer, Women's Legal Service Queensland (via teleconference)

SARKOZI, Ms Julie, Solicitor, Women's Legal Service Queensland (via teleconference)

CHAIR: I now welcome from the Women's Legal Service via teleconference Angela Lynch and Julie Sarkozi. Good morning. I invite you to make an opening statement, after which committee members may have some questions for you.

Ms Lynch: Thank you for asking us to provide evidence this morning. Sexual violence is a violent and insidious crime that takes away women's feelings of independence, safety, identity, control and privacy. It has severe and deleterious impacts on a victim's physical and mental health, often for a lifetime. Unfortunately it is a crime with little to no accountability, as the reporting statistics make abundantly clear, with only 14 per cent ever reported pursuant to research. The reality is that it is probably much lower than this as well in our experience. There is also significant attrition for those who do report, with only 20 per cent of cases judged in court and 6.5 per cent resulting in convictions. Research also shows that conviction rates for sexual offences have decreased over time, including in Australia.

National and international research has consistently demonstrated the incidence of sexual violence is significantly under-reported, under-prosecuted and under-convicted. There are myriad barriers to reporting, including confusion, guilt, fear of the perpetrator, fear they will not be believed, rape myths and the criminal justice system itself. The Queensland Law Reform recommendations, which this bill is based on, have, for all intents and purposes, maintained the status quo and will do little, if anything, to improve the safety of women or encourage women to report to make perpetrators accountable. Our clients continuously report to us that they do not report to police because of a fear of

what will happen in the criminal justice system. If they have proceeded through formal channels, they report that they are just as traumatised by the legal system as by the rape. The police response is in turn influenced by the law and court outcomes. The police are constantly evaluating whether a matter should proceed and if they feel they can get a conviction as a result of the matter.

We acknowledge and congratulate the government on establishing an investigation into women and the criminal justice system. However, this bill, as is, is a missed opportunity to draft legislation in a way that provides a clear and unequivocal benchmark for the whole community about acceptable behaviour for the community when engaging in consensual sexual relations. We are particularly concerned that one of the suggested amendments is dangerous. In relation to the suggested amendment of section 24 with regard to mistaken belief when 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.

The department of justice in a recent consultation advised us that this 'anything' would be read down or confined by the term 'honest and reasonable'. However, we strongly disagree. We believe as drafted 'anything' will widen what the court or jury considers honest and reasonable to in fact anything. In order to determine reasonableness and honesty, anything can be taken into account by the court. This wording is extremely dangerous and at best introduces ambiguity and should be changed to ensure that the defendant at least took reasonable steps to ensure consent. Thank you. We are happy to take questions.

Mrs GERBER: In your submission you say that you support the Tasmanian model. I ask you to expand upon how you see that might apply or how you might make that work in the Queensland jurisdiction and why you support that model.

Ms Lynch: Sure. I will hand over for the substantive answer to Julie Sarkozi, a solicitor at the service, so Julie will speak to that. I also want to note that that law has been in Tasmania since 2004, so this is the 17th year of operation and it is also a Criminal Code state. I will hand over to Julie to talk about why we are in favour of it.

Ms Sarkozi: Thank you. Did I understand the question to be how is this reflected in the Tasmanian law or why do we support it?

Mrs GERBER: Yes, both. It was a double-barrelled question, sorry. It was both those points.

Ms Sarkozi: Firstly I would say that the way the Tasmanian law introduces this is that it says essentially that a mistaken belief by the accused as to the existence of consent is not honest and reasonable if and then it goes on to say they did not take reasonable steps in the circumstances known to him or her at the time of the offence to ascertain that the complainant was consenting, so that is the way that it is iterated in the Tasmanian Criminal Code. What they are saying is that if the defendant has not taken reasonable steps to ascertain consent then they cannot even rely on the defence for the excuse. To be clear, I am going to refer to a 2018 case, R v Lennox; Ex parte Attorney-General (Qld) [2018] QCA 311.

This is the evidence that the jury had from the defendant about whether or not she was consenting, and I should say he was acquitted—that is, that move of your hips around, seemed happy with it, seemed to be in the mood to do things and she was saying, 'I don't want'. She was from a non-English-speaking background. She led evidence saying, "I kept saying, "I don't want"'. His evidence as to the reason he thought she was consenting was, 'She seemed into it. She was moving her hips and I thought she liked it.' This is what our state of law is at the moment. That is why we are asking for this change.

Mrs GERBER: Thanks, Julie and Angela.

Ms BOLTON: Ms Lynch, you stated that this is a missed opportunity and you covered a lot in there, but ultimately what difference will this particular bill and the amendments make to victims of sexual assault and their preparedness to report?

Ms Lynch: It will have no impact, but the potential is that it could have a really negative impact because it could widen what is defined as honest and reasonable in relation to the mistaken belief excuse because of the way it is drafted. In terms of how it is drafted in the legislation at present, it says—

> In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent ...

In order to determine whether something is honest and reasonable you can take anything into account, so it actually makes it worse. It is actually really very concerning. If this is introduced, the trickle-down effect in relation to how the police are going to respond is going to be dreadful because

the police are always making decisions in relation to when a complaint comes in whether they are going to get a conviction here. If anything is taken into account in relation to his perspective about what was consent, then it is going to be very difficult for the police to make decisions around, 'Well, we are going to get a conviction here and we're going to pursue this.'

Ms BOLTON: As a follow up-question, I think in some of the submissions that I have read there was an agreeance there. Has there to your knowledge been an alternative drafted to that or suggested to that actual component?

Ms Lynch: I think we have. I think Rape and Sexual Assault Services Australia have. The Human Rights Commission may well have. There is the Tasmanian legislation that has been in place for 17 years and Professor Heather Douglas. There is a variety of different proposals, but this drafting is particularly concerning. At best it is ambiguous and if there is ever a law where you require clarity—we are sending messages to teenagers in our society who are about to engage in consensual sexual acts via the Criminal Code—it is this law. To have there in that legislation in black and white that anything can be taken into account in determining honest and reasonable belief around consent is highly concerning—highly concerning—and we request, we advocate and we plead with you to look again at this law. We are very concerned it will have a devastating impact as written. It can be changed, but it does have to be redrafted.

Ms BOLTON: Wonderful. Thank you.

Mr POWELL: How many successful prosecutions have there been under the Tasmanian model?

Ms Lynch: I would not have a clue. I do not know; we do not know. It has been law for 17 years. It is not like there has been a swathe of cases that have gone to the High Court in relation to the Tasmanian law talking about unlawful convictions. It is a solid law that has stood the test of time for 17 years.

Mr POWELL: Thank you. That is an equally good read on it in that cases have not gone to higher courts.

Ms Lynch: Yes.

Ms BUSH: First, I want to acknowledge the work you do and the time you took in writing your submission. I have read it thoroughly, have looked into some of the areas you also raised in that and looked at the Tasmanian model as well. A bit of a change of direction—in your submission you said that conviction rates for sexual assault have fallen over about 30 years. You may or may not be able to answer this on the spot. Can you offer any insights in your professional observations and experience into why that is?

Ms Lynch: Yes. Over time as you get fewer and fewer convictions in the criminal justice system—because the criminal justice system in many ways and in terms of this law specifically is very favourable to defendants—and as police take action in relation to sexual violence, if they are not getting the convictions that they believe they should be they are then less willing to take matters forward. As they talk to women about withdrawing and place pressure on women to withdraw their complaints, those ultimately are withdrawn. There are probably issues in relation to possible increases in sexual violence, but we do not really know. We know that during COVID there have been increases in sexual violence in the community. The support services are under pressure to be able to respond.

The Me Too movement and the royal commission into institutional child sexual abuse in Australia enlivened issues and people were realising what happened to them. They are sort of coming forward, but there may well not be sufficient services to meet the demand or give them the support they need to take matters forward. It is quite rare. We have heard from sexual assault services which support women all the way through the criminal justice system that it is quite rare for action to be taken by our system in responding to women sexually violated. Anecdotally, that is our feedback of what has happened over time. Those sexual assault services are very busy in terms of assisting women just recovering from the trauma. It is just that if they go forward or go to the police, they are knocked back as well and it does not proceed.

Ms BUSH: Thank you. That is really useful.

CHAIR: When you did your submission, did you consider the current Supreme and District Court *Criminal Directions Benchbook*?

Ms Lynch: Yes.

Ms Sarkozi: I note with great approval the recent Supreme Court judgements in the case of Sunderland 2020 and the judgement of president Sofronoff. That is great case law, but in my view it highlights how much the law needs to be clarified because, even in paragraph 46 of that judgement,

he says that questions raised in this appeal case invite attention as to whether the acquittal on count 1 might have been the result of directions not doing justice to the prosecution case. That is what we are advocating for. We are advocating for justice for victims as well as for defendants. We understand and appreciate that defendants are entitled and have a right to a fair trial, but the way that the evidence law and directions are crafted as well as the independence of the judiciary means that often it does fall short of maintaining the rights of the victim as well.

Ms Lynch: The Human Rights Act of Queensland upholds the rights of defendants in the criminal justice system, including child defendants as it should, but does not uphold the rights of victims, including child victims. Child victims of sexual violence or other violence in Queensland who are witnesses in criminal matters are not recognised in the Human Rights Act of Queensland.

CHAIR: I am not concerned who answers this, but you say that the Queensland Law Reform recommendations, which I understand this bill implements in full, maintain the status quo. On what basis do you reach that conclusion?

Ms Lynch: The main reason we reach that conclusion is that they either articulate a little bit of what is in existing law or remain silent in relation to advancing the recommendations and amendments made by advocates in this space, including lawyers and, in particular, survivors. Again, this is outlined in the Sunderland case where the president said it is the case where it may be that somebody making absolutely no behaviour that indicates consent means that they do not give consent. The Queensland Law Reform Commission has indicated that we include that. All of the advocates in this space asking for change are saying that we want a definition of consent that is about affirmative consent. We have asked that consent be defined as two people indicating that they consent the other way or the colloquial way of 'enthusiastic consent'. Both parties need to give enthusiastic consent. The Law Reform Commission's recommendation only says to let us amend the definition of consent so that it says it might be the case that, if the complainant does nothing, she might not be consenting. That is just not far enough. That is just one example.

Ms Sarkozi: Another example is intimate partner sexual violence which, according to the Australian Bureau of Statistics, is 33 per cent of sexual domestic violence. The commission itself said that there was variability in application of how evidence of domestic violence was introduced into cases. It acknowledged that there is an inconsistent approach in the courts but did not take the opportunity to provide real clarity or provide direction via legislation to the courts, the jury and the community. It just said that the fact that domestic violence in some cases is taken into account in evidence is fine. Rather than saying that there is inconsistency, which is a real reason for having legislative intervention, they chose to do nothing. That kind of status quo remains.

Mr HUNT: In your submission you express concerns about the amendment that provides that acts are done or continued after consent is withdrawn are acts done/continued without consent and claim that this amendment could make matters worse for the complainants. Could you expand on that please?

Ms Lynch: Certainly. What we are saying in that—and it really is underscored by the inadequate definition of consent—is that the research overwhelmingly shows that people who are frightened, women who are frightened, say that they freeze when they are scared of violence. The proposed amendment says that, if you do something active like withdraw your consent, we will consider that your consent has been withdrawn but, again, if you are too frightened to do anything, if you freeze—which all of the research suggests you will—you are probably consenting. Again, we say that that amendment is not helpful. We have an outdated definition of consent. If that is maintained and reinforced in this next iteration, which is if a novel or new act is introduced and you do not actively withdraw your consent, then the opposite is true. It means that you have consented.

CHAIR: I thank you for your written submission and for also presenting evidence to the committee today.

TAYLOR, Ms Monica, Principal Advisor, Community Services, Queensland Council of Social Service

CHAIR: I invite you to make an opening statement after which committee members may have some questions for you.

Ms Taylor: Good morning everybody and thank you very much for the opportunity to present this morning. I would like to acknowledge the traditional owners of the land on which this committee meeting is taking place. QCOSS is the peak body for the Queensland social services sector. Our vision is to achieve equality, opportunity and wellbeing for every person in every community in our great state. Our submission is informed by our membership and our supporters, many of whom have deep and direct experience in working with victims and survivors of rape and sexual assault.

Sexual assault is a gendered crime. I invite the committee to reflect really on basic principles and on the purpose of this proposed legislation. The reason we are here is due to the efforts of Queensland's civil society and of academics who campaigned very strongly for the laws of consent to be reformed. That is why the original referral to the Queensland Law Reform Commission, prompted by the prior Attorney-General, took place. Essentially, we are here because the current laws are harmful to survivors of sexual assault and do not meet community expectations. This law reform is an opportunity to reimagine the laws of consent and bring them into line with best practice nationally and internationally and not merely tinker with technicalities. We need laws that clarify that an enthusiastic 'yes' gives consent to sex. We need laws that take into consideration that freeze response that has been mentioned—tonic immobility; a recognised evolutionary survival response that is designed to keep people alive.

Acts of sexual violence in the experience of women right through the criminal justice system—from the moment they report to police, to charge, to trial, if they get to trial—limits their human rights: their right to life, their right to recognition and equality before the law, their right to be protected from torture and cruel, inhuman and degrading treatment, protection in particular if they are children in cases of child sexual abuse. Regrettably, the statement of compatibility that accompanies this legislation is silent on the human rights of survivors as contained in the Human Rights Act. The statement which is required now under the Human Rights Act must give fulsome consideration of potential considerations of human rights, and it only considers the rights of defendants to a fair trial and their protection of retrospective criminal laws. In our view, and the view of our membership and supporters, that is not a fair and balanced consideration of human rights under Queensland law.

The Human Rights Act seeks to build a culture of human rights in Queensland. QCOSS was instrumental in lobbying for that act. We are very excited about its potential, but, unfortunately, this narrow technical recommendation from the Law Reform Commission has shaped that dialogue and it has removed the voice of survivors in the passage of this bill to parliament. We do not think that is an equality approach to sexual assault law reform.

Your obligation is to carefully scrutinise that legislation, to examine it and to consider whether the bill is compatible. I am hopefully reassured that that statutory obligation will come to light and you understand that the importance of victim rights need to be reflected in changes to this law. Thank you. I am happy to take questions.

CHAIR: Monica, I start on that point that you just referred to. Our whole system is based on the right of an accused to a fair trial. You are referring to our current legislation in relation to victims. How do you balance that?

Ms Taylor: You need to give consideration to it in a fulsome way. It is a balancing act. Rights do not trump rights. There is always that tension and that balance. It is the view of our membership and our supporters that the pendulum has just swung too far in terms of the rights in this proposed bill to accused and alleged perpetrators, and has overlooked the rights of sexual assault victims through the criminal justice process. I take your point that laws can only do so much, but they can certainly help to build culture. We do not often get the opportunity to engage in meaningful law reform. If this goes through, it may not happen for a decade that we get the chance to have another crack at it, so it is really our hope that we can—the evidence is very much before you in the various submissions—take the laws further to make that balancing act more fair and equitable.

CHAIR: Again, I come back to, how do you enshrine the rights of a victim into legislation?

Ms Taylor: The legislation worded in a way that is more likely to result in prosecution would go some way to achieving that end. I was listening just previously to the comments of the Women's Legal Service and many of the other submissions that have framed the section in a more affirmative way and that would go some way to achieving that end.

CHAIR: Is it not dangerous to rely on the number of convictions as a reason for changing legislation? It seems to be a stepped process and there seems to be some steps being missed in the process. You have a piece of legislation which then is interpreted by the prosecution and then on the ground at the coalface you have the police. A victim goes to the police. Are not a lot of the shortcomings in the system at the coalface when the victims go to report offences?

Ms Taylor: Yes, that is true, but decisions are made at the policing level. I should, with respect, say that I am not a criminal lawyer; I am here representing the interests of the stakeholders of QCOSS, so I do not want to make a misstep in terms of practicalities.

CHAIR: Don't worry about that, Monica, just engage with me.

Ms Taylor: Sure. What we hear from the sexual assault counsellors is that there is a reticence of women to actually even report. If we are to believe the statistics of about 45,000 rapes and sexual assaults and then a shrinking number of that statistic actually even making it to reporting to police, there is arguably something wrong at that step, and it whittles down until a very, very small number end up with a prosecution.

Mrs GERBER: Something you said in your oral submission really resonated with me in that you are hoping to achieve reform that does not just tinker around the technicalities in relation to consent. We have heard submissions from other organisations that affirmative consent—and I note that it is in your submission as well—is something that is required in relation to reform in this space. Can you expand upon that, and also expand upon whether or not you think the Tasmanian model will achieve that and whether you think this reform should have gone further, more in line with the Tasmanian model?

Ms Taylor: As far as we read the proposed changes, they are putting into statute the case law, what we already know the cases say about how the law is to be interpreted, which gives some certainty and is an incremental step forward. However, when we have the opportunity to reform, and consistent with community expectation, we should be doing more than just modifications to technical definitions in the legislation. I find it difficult to understand the proposed changes in layman's terms, but our laws are supposed to be understood by everyday people. After a deep and wideranging inquiry by the Law Reform Commission, what we are ending up with still is very much a technical lawyers' game about what these laws ought to be and how they ought to read. I cannot speak to the practical day-to-day Tasmanian example, but I can say that the people that we have looked to, to write our submission, have all said that the Tasmanian example is a clearer legislative phrasing and it is a step forward. Certainly the Queensland Sexual Assault Network who are friends and supporters of QCOSS have given us that feedback.

Ms BOLTON: So far, the Tasmanian model keeps coming up, but ultimately, what I am trying to get to is do we have any evidence or statistics or data that can demonstrate that the Tasmanian model has made a difference in Tasmania for survivors? If we do not have that, how do we know it is a better model to go to?

Ms Taylor: I have all the material here, but there is no time to go and have a look because off the top of my head, Sandy, I cannot honestly answer that question.

CHAIR: Is it too onerous, Monica, to take it on notice?

Ms Taylor: I would like to take that on notice if possible, yes, thank you.

CHAIR: We have asked for questions taken on notice to be returned by 28 January.

Ms BUSH: Firstly, Monica, thank you for the work that QCOSS does and for your submission. I know you consulted with your membership as part of the submission, which I thought was excellent. We have talked a little bit here about conviction rates as one measure of success. I am interested in your views, from a survivor's experience, that there is more to it than conviction rates; it is the way that you are dealt with through the system. That is my view. What is your view on that and perhaps can you explain any observations you have made in relation to what justice looks like in addition to a guilty conviction?

Ms Taylor: At our forum, when we co-hosted our forum with the Women's Legal Service and the Queensland Sexual Assault Network, very much the perspectives given by a sexual assault counsellor in Cairns was that when women realise, because they froze, that they actually had not done something wrong and that it was actually a natural thing to have happened, a breakdown occurs. The internalisation of blame worthiness for somebody who has had a crime of violence acted upon them is so deeply wounding and so stitched into even commencing a process of seeking justice. I am sure this committee will be hearing directly from, hopefully, some survivors, but if not then stakeholder groups

on that process. I suppose if your car was burgled this afternoon you would not blame yourself necessarily for that. The mythologising has such a deep impact on how people experience the criminal justice system.

CHAIR: I will have to pull it up there unless someone has a burning question because we are definitely behind time. In relation to taking the question on notice, it is midday on Thursday, 28 January.

Ms Taylor: I have noted that, thank you very much.

CHAIR: Thank you for your presentation and for giving evidence today. It has been very helpful.

Ms Taylor: It has been a privilege, thank you.

DUNN, Mr Matt, General Manager, Advocacy, Guidance and Governance, Queensland Law Society

FOGERTY, Ms Rebecca, Chair, Criminal Law Committee, Queensland Law Society

SHEARER, Ms Elizabeth, President, Queensland Law Society

CHAIR: I now welcome representatives from the Queensland Law Society. Good morning. I invite you to make an opening statement if you feel it necessary. If not, we could go straight into questions. We are about 15 minutes behind.

Ms Shearer: Just a brief one with your indulgence, Chair. Firstly, thank you for inviting us this morning. In opening, I would like to respectfully acknowledge the traditional owners and custodians of the land on which this meeting is taking place and pay our respects to their elders past, present and emerging.

There are a couple of things to highlight from our submission. First, QLS supports the substantive amendments to the Criminal Code. We acknowledge that they are the result of an extensive and thorough review by the Queensland Reform Commission and that they are soundly based on evidence of what actually occurred in numerous trials. We acknowledge that other submissions consider that the amendments do not go far enough to address the concerns about women's safety and sexual violence. While we understand those perspectives, we believe that the amendments as drafted do strike an appropriate balance in what is a very difficult area. We welcome the government's acknowledgement that more is needed across the system to examine the experience of women in the criminal justice system and to identify options for more extensive system reform. While supporting the substantive amendments, I draw your attention to the fact that we do have a problem with the transitional provisions. They apply to all persons charged after their commencement rather than at the date the offence was committed. I can talk more about that if you have questions.

We did want to say something briefly about the Police Powers and Responsibilities Act. We have a difficulty with section 602G, which we say creates a reverse onus on somebody to prove that they did not know that a banning notice had been sent to them. We acknowledge that there are reasons given for this in the explanatory notes. Because contravening an order is a serious matter—it carries an offence of 60 penalty units and it imposes significant restrictions of movement on a person—we think in those circumstances it is essential to ensure that they are adequately informed about the existence and effect of the notice and that the onus should remain on the police to prove that.

Also, on that amendment, we do not support the extension from 10 to 30 days of banning notices. We think it is a significant restriction on a person's freedom of movement and not something that is appropriately done administratively through the police. We consider that a restriction of that length requires some judicial process. We also think it is likely to have some unintended consequences. Our members report some practical difficulty with the legislation already. There is the example of somebody banned from a precinct which they need to go to to access essential services. That is a real example that our members report.

Finally, we support the amendments to the Legal Profession Act. The fidelity guarantee fund is an important commitment by solicitors of Queensland to ensure consumers are protected from trust account defaults. We take pride in the fact that we provide that fund for the benefit of the community. The amendment is required so that we can retrospectively pay claims that were previously capped. We would, while this amendment is being considered, like to call for a further amendment to enable a portion of the interest on the fund to be used by us for regulatory purposes to try to prevent claims on the fund. We are thinking about initiatives that would identify in a more timely manner the risk of default, take action more swiftly and perhaps prevent claims—so a mix of regulatory action and education to ensure compliance while this issue is before the parliament.

As you can see, I am joined by Rebecca Fogerty, who is the Chair of our Criminal Law Committee, and Matt Dunn, our General Manager for Advocacy, Guidance and Governance. We are happy to take your questions.

CHAIR: It was remiss of me to not ask you to make an opening statement, and I regret doing that. When you talked about consent, I lost the train—you said we could ask you questions about it. Can you go back to that part?

Ms Shearer: The consent part?

CHAIR: Yes.

Ms Shearer: It is our view that the laws do strike an appropriate balance.

CHAIR: Yes, and then you went on—

Ms Shearer: To talk about retrospectivity. Then I talked about the Police Powers and Responsibilities Act. There were just the two points about consent laws.

Mrs GERBER: I am interested in the QLS's view in relation to the application of the Tasmanian model around consent in Queensland. We have heard from a number of interest groups in a number of submissions that this reform does not go far enough, that it tinkers around the edges of technicality and that they would like to see what has been termed as 'affirmative consent' being enshrined in legislation. The Tasmanian model has been thrown up as a model that in fact does that. I am interested in the QLS's perspective as to whether or not the Tasmanian model would be applied in Queensland and your view as to whether or not you think the reforms go far enough in light of that.

Ms Shearer: I will ask Rebecca, as a criminal lawyer, to address that issue.

Ms Fogerty: The Tasmanian model differs from the Queensland law in a number of respects, although I think it is easy to overstate the differences. Tasmania does have provision for affirmative consent in the form of reasonable steps. The other aspect of those Tasmanian consent provisions is in relation to how intoxication may be used by a defendant. I think it is important to note though that under the Tasmanian provisions a defendant can rely upon reasonable steps in the context of raising the mistake of fact defence.

One of the things that is overlooked in the current discussion is the way the Queensland provision works. There is enormous capacity for reasonable steps to be something that is taken into account. That is because of the objective test that is inherent in section 24—the requirement for a jury to look at what a reasonable person would think in the circumstances. That operates as a really effective safety valve that captures a lot of these issues in a clean and arguably more elegant way than the Tasmanian provisions, which are unwieldy and which have created issues for jury directions and issues in terms of understanding those directions. It is always in the interests of everybody in the community that laws be clear.

Reasonable steps is a very interesting concept, but it is probably more of a social concept in many respects, although obviously it is a legal test. What constitutes reasonable steps differs across jurisdictions. What the QLS is concerned about is the potential for a reasonable steps provision to be discriminatory. Part of why this issue is so vexed is probably because of the multitude of ways—the nuance, the social, the non-verbal—that consent can be communicated in this context. We are concerned in the case of vulnerable defendants—adolescents and intellectually impaired persons—that the idea of an objective test of reasonable steps could create injustice for victims, for that particular class of defendant. It is a complicated issue. Being prescriptive in the legislation has the potential to hurt victims. It has the potential to hurt vulnerable classes of defendants, and that probably ultimately hurts the community.

Mrs GERBER: Is it the QLS's view that reform is needed in this space in relation to rape and mistake of fact?

Ms Fogerty: The QLS supports the recommendations of the Queensland Law Reform Commission report, which was thoughtful, detailed and thorough. It is no secret that the legal system in the past has not dealt well with victims of sexual assault—female and child victims—just as it has not dealt well with other classes of victims. It is no secret that, as our knowledge of the effects of trauma or whatever increases, it needs to inform our legal policy and the way that the legal system works. Arguably focusing on consent and mistake of fact is not going to achieve the solution to those problems. The solution to those problems probably lies in other areas of education, of social policy reform, of adequate resourcing across the multitude of government and not-for-profit bodies that support those people.

CHAIR: In relation to the issue of consent in criminal trials, one of the biggest difficulties for juries is that a lot of cases are borne out by the individual factual circumstances of the case. You have a varying disproportion between the victim's ability to recant their story and the defendant's ability to articulate the factual circumstances. I do not want to put words in your mouth, Rebecca, but does that in itself create complexities in relation to these types of offences that perhaps are not seen in other breaches of the Criminal Code?

Ms Fogerty: Undoubtedly. I do not mean to be all lawyerly—

CHAIR: No, but you are allowed to be.

Ms Fogerty: I appreciate that there is this monopoly on lawyers in the way they talk about law. I do think that this discussion is really difficult to have if you have not been in a courtroom and seen a criminal trial and understood the interplay of the laws of evidence and the role of the prosecution and

the role of the defence. I think it is often forgotten as well that mistake of fact is a very hard defence to successfully run. Much of the focus has been on hard cases or exceptional cases or marginal cases. We know that hard cases make bad law.

The reality with a rape charge is that most of the time there are two witnesses and nobody else: there is the complainant and there is the defendant. Their versions may be diametrically opposed or their versions may only differ very subtly, by degrees of nuance. It is hard to see as a reasonable proposition why both sides should not be canvassed as evidence of what happened in the lead-up to the incident to enable a jury to be properly informed. It is a way then of artificially constraining what can go to a jury—for instance, by having a reasonable steps test, which might mean that an intellectually impaired juvenile defendant did something to ascertain consent but might not reach the level of reasonable steps prescribed by the legislation, he cannot put his version to be assessed by the jury. I should say as well that defence lawyers do not like mistake of fact. It is a very hard defence to run. It usually results in convictions, not acquittals.

Ms Shearer: Further to that question, did you want to speak a bit, Rebecca, about the requirement for intent, or the lack of it, in rape laws in Queensland as a different context?

Ms Fogerty: That is a really interesting point as well. It goes more to the discussions of recklessness that have been canvassed in some of the submissions as well. I think sometimes it can be artificial to compare different jurisdictions because the underlying structure of the criminal provisions is different.

Queensland is not like New South Wales, for instance. In Queensland there is no need for the prosecution to prove intent to rape. For rape to occur in Queensland you need penetration and you need lack of consent. In other jurisdictions such as New South Wales the prosecution, in effect, has to prove that the defendant intended to rape the complainant by showing that they knew they were not consenting. It is actually a higher threshold than what we have in Queensland. It also means that those discussions about recklessness or reasonable steps occur in the context of a different legislative structure. It is like comparing, in a sense when you go down to the level of detail, apples with oranges.

CHAIR: Sandy, do you have any questions for representatives from the Queensland Law Society?

Ms BOLTON: Yes, I do, Chair. Rebecca, I think there has been a consistent theme that laws should be understandable and accessible. In this hearing we are seeing how difficult that seems to be to achieve. Ultimately, what we have to do is achieve better outcomes for sexual survivors. Do you believe this bill and its amendments are going to deliver better outcomes on the ground for these survivors?

Ms Fogerty: Your question is capable of being interpreted in a number of ways, and I feel that to answer it properly I need to make sure we share some of the same assumptions. It is one thing to talk about the purpose of law, but the sole purpose of the criminal law is to make sure that people who commit offences are punished. There is a whole other body of law, civil law, which is probably the area of law most concerned with ensuring victims of crime are properly looked after, for want of a better word. The purpose of the criminal law is not to build culture and it is not to educate the public. That is the purpose of other bodies and other areas of law. The purpose of the criminal law is to punish offenders and to make sure there are processes so that guilty people are convicted and innocent people are not convicted.

In terms of the idea of whether these reforms go far enough, there are advocacy groups who say that the proposed reforms put forward do not go far enough. The reforms are probably not the bits of legislation that you want to be playing around with if your goal is to enhance the experience of victims in the criminal justice system. The QLS has previously raised the issue of education and awareness campaigns across multiple domains to achieve some of those objectives.

Ms BOLTON: Rebecca, you have mentioned education a number of times. If we go forward with this bill and if we have what seems to be a lack of clarity, how do we translate that into education for the community so that it is more understandable and delivers those better outcomes?

Ms Fogerty: That is a great question, and I have to say that is one that has occupied us at the QLS for some time because these are really abstract concepts. They are highly conceptual. They are not intuitive. It is hard to communicate those laws in a meaningful way to the community. It is very clear as well that in the last couple of years the discussion has changed and the focus of the discussion has changed. It was very heartening to see in the Queensland Law Reform Commission report, for example, that there is no evidence of pervasive rape myths being used by juries in their consideration of these issues. The view is that there is cultural change happening, but this is not just a legal issue: it is a social issue and a health issue. It is across multiple domains, so any strategy has to target that.

Ms Shearer: I think we also say that the amendments do in fact provide clarity in that they are a codification of what has developed in case law in recent years. Because we are a codified state and the elements of the offence are clearly set out in writing in law, we say the amendments to the act to incorporate what has been the case law is actually an important clarifying step for the parliament to take.

Ms BOLTON: What you are saying is that yes, it is something to translate to be able to educate. If we cannot translate it for the community then ultimately that education can fail. I think what you said is that you are actually struggling with that as well.

Ms Fogerty: No, I did not say that. I said that the concepts in relation to mistake of fact and consent are difficult ones. They are abstract, but that is a separate question as to how you educate and communicate those issues. We think that the amendments will assist in providing clarity to the various stakeholders and interest groups who are engaged in this process of education and social reform.

CHAIR: In relation to directions that juries receive in relation to mistake of fact and other elements around these type of offences, are you able to outline some of those directions for us?

Ms Fogerty: I did not bring my bench book with me.

CHAIR: I can well understand that. Perhaps if I rephrase the question. A lot of reliance these days is put on what the judge's directions would be in a case. We have heard the president tell us that these are good reforms because they are actually bringing the code up to date with the precedents that have been handed down by the courts. In relation to directions, do you have a view in relation to how those directions actually work? Are they working or do they work?

Ms Fogerty: They do work. I think one of the things that we do not appreciate or we do not acknowledge enough is how clean and elegant the Queensland provisions are relative to other jurisdictions. The elements of rape are very simple to understand: penetration and consent or lack of consent. There is no requirement for the prosecution to even prove that the accused knew the victim was not consenting. The way those provisions interact with section 24 is very flexible and it allows for all of the huge range of circumstances in which human beings have these situations to come into play. The thing about section 24 and how it works in Queensland is that we all talk about these two elements: the subjective and the objective. The subjective test has been the focus of a lot of attention, but in focusing on the subjective aspect—that is, what the defendant thought—you forget that the really effective aspect of the provision is the objective test, because in a sense if what the defendant thought was not reasonable objectively then it does not matter what he thought. It is this safeguard and it is very, very broad, so it is not going to restrict the circumstances. Peter has been talking about the facts. As criminal lawyers, sometimes when facts come before you you think, 'I'll never see anything as crazy as this,' and then the next day you do. You are constantly being exposed to things that you just could not imagine could happen.

CHAIR: I will stop asking questions now. Andrew, do you have any questions?

Mr POWELL: No, thank you.

Ms BUSH: Thank you for your submission. It has been really interesting hearing from you, particularly Rebecca. I think you made a statement that the laws are not there to serve an educative purpose: they are there to deliver justice.

Ms Fogerty: The criminal law has different purposes from other types of law. I am so sorry, I do not mean to interrupt you but I just want to make sure that what I was trying to say was accurate.

Ms BUSH: That is okay. I think it is up to us to define the purpose of the legislation and to look at it as serving an educative purpose. In fact, many submissions have included the fact that it does serve an educative purpose. I am interested in your views. Some of the submissions have talked about the insertion of guiding principles into chapter 32 around consent. I was interested in your views on what benefit that may have to survivors and to jurors.

Ms Fogerty: Sometimes guiding principles can serve to create more uncertainty and more avenues for interpretation and misinterpretation than if they did not exist. Guiding principles in the criminal law I think can be something of a vexed concept although there is real precedent for it; for instance, in the Penalties and Sentences Act which sets out important principles that govern that legislation. With regard to the idea of the criminal law being educative, at a broad level laws obviously exist to showcase what the values of the particular community are. Criminal law is a part of that, and I do not want to be seen to be saying the contrary. The point is that the criminal law has some very different purposes from other types of laws and carries with it very different profound consequences. For that reason, I think it can be easy to overstate the educative purpose because there are other

purposes that have more priority. My recollection is that the Queensland Law Reform Commission report was lukewarm on the idea of guiding principles and said, in essence, why complicate what is already simple and elegant that, in the view of the QLS, strikes the right balance.

CHAIR: Is there anything else, Jonty?

Ms BUSH: I do have another question. I am just trying to think how to frame it.

CHAIR: This will be the last question.

Ms BUSH: I am just interested in your views. Given the simplicity and elegance of the system and the act, why do you think we do have historically such low conviction rates for rape and sexual assault as a personal offence?

Ms Fogerty: I just do not know if that is true though. I think that the idea of what is happening at the coalface with police charging rates and what proportion of victims go to the police is an issue. It is well known that there are structural and cultural reasons victims do not go to the police in terms of sexual assault and domestic violence.

As a criminal practitioner, the vast experience is that most of the time the people who come to us who are charged with these offences plead guilty, so they are convicted and they go to jail. That is the majority of people. I wish I had statistics, but they would be very easy to find. In fact, it would be on the Queensland courts Queensland Sentencing Information Service, QSIS. In terms of the number of matters that go to trial, mistake of fact is a small proportion of the defences that are run. As I said, defence lawyers do not like the defence very much. It is hard to establish. It can be a difficult threshold; however, there are some cases where the availability of that defence prevents serious injustice. That is not to say that there are not issues surrounding the experience of victims in the criminal justice system. There are, and there is work to be done there. The Queensland Law Society supports the recommendations contained in the Queensland Law Reform Commission report as striking the right balance.

CHAIR: That brings to a conclusion this part of the hearing. I would like to thank you for your written submission and the fulsome evidence you have given to the committee today. Thank you for your attendance.

Proceedings suspended from 10.46 am to 10.55 am.

BARTHOLOMEW, Mr Damian, Solicitor, Youth Advocacy Centre Inc.

WIGHT, Ms Janet, Chief Executive Officer, Youth Advocacy Centre Inc.

CHAIR: I now welcome Janet Wight and Damian Bartholomew from the Youth Advocacy Centre. Good morning. I invite you to make an opening statement, after which committee members may have some questions for you.

Ms Wight: Thank you; I will make them brief as per your earlier requests. Thank you for the opportunity to come here this morning. I think in the broad our submission is reasonably clear, but we do think it is an issue which has perhaps been overlooked. The Law Reform Commission has, as it always does, done an extraordinarily thorough job and produced an excellent report, but from our perspective there is a gap in terms of how consent and mistake of fact work in relation to children and young people where you have a complainant and a defendant under the age of 18. We have articulated in our submission what we see some of those issues to be and are happy to discuss those a little further to the extent that we can because, of course, we are lawyers and not psychologists and do not have training in those sorts of areas. In particular, I think we just need to be really clear that the Criminal Code applies to everyone, so from the age of 10 it applies in full. We make no allowance for children or those of vulnerability really within our Criminal Code to a large extent in terms of actual offences except by virtue of some sections such as the doli incapax section in 29(2), I think it is, and we have grave concerns about the ability of that section to in fact protect the younger children—the 10- to 13-year-olds.

We would also argue that issues around sexuality are probably of significance to adolescents as they are maturing and growing in a whole range of ways, so it is not just about the use of doli incapax; it is also about that 15-, 16- or 17-year-old group in particular who are fighting their own bodies and their own development as well as trying to understand the rules of the world and how that should work. We would not like it in any way to be thought that we do not appreciate the trauma that is experienced by those who may be the subject of sexual assault. We certainly represent, provide advice and provide court support to young women in particular, as well as young men, who find themselves having to participate in the process as a result of something that has happened to them. This is in fact a very challenging area for adolescents and that is why we thought it would be appropriate to raise that.

CHAIR: Thank you.

Ms BUSH: Firstly, thank you for your submission and for the wonderful work that you do. I probably struggled a bit with your submission, but I really understand and appreciate what you have put forward and also appreciate that for some in the community they would say that, regardless of the age of a perpetrator, a rape is a really serious crime. I am interested in how you would conceptualise changes to this piece of legislation to cater for young people both in a relationship and young people as the defendant and whether that would be pulled out or codified in a different way. How would that appear?

Ms Wight: As we said at the end of our submission—and I am not trying to avoid the question—we are a small organisation. Our main focus is case work. That informs what we respond to in relation to these types of inquiries. As I said at the end of our submission, we really are asking for greater consideration to be given to this group. I do not think we have the answers. I do not think we are saying that we know that this needs to be fixed in this way, but, to the extent that this has been missed as part of the commission's review, we would like to see the commission asked to consider this now in that context, to take some more detailed advice and information and perhaps be able to come back and say, 'Well, it is as it is and we think that is fine for these reasons' or 'These are the things that we think need to change.' I do not think it is in the capability of our organisation at this point to be able to answer that question in any meaningful way. Really, that is the point we got to. We see a problem. It was not addressed. We ask that that be done.

I would also like to broaden that out and suggest that, for any piece of criminal law amendment addition, there should always be consideration of what the impact might be for those in the youth justice system. To what extent does that immaturity need to be considered by the main offence provisions and/or whether in fact we need to look at the youth justice process more broadly to see whether in fact we are adequately addressing offending behaviour? Section 29(2) is a problem, we would submit, because it does not in Queensland adequately protect particularly the younger age group, but that does not mean we should not consider how the law operates for the older cohort.

Mr Bartholomew: As Janet said, I do not think we have the answer to exactly how you would address this, but certainly consideration of a provision in the Youth Justice Act which perhaps recognised the immaturity of young people and said that, to the extent that the requirements, the

conditions or characteristics of immaturity are inconsistent with the provision of the Criminal Code, the immaturity should be given some overriding priority. That is certainly not how you would word it in the legislation, but something that recognised that principle might help to address this. It certainly should not only apply to this particular piece of legislation, but it is very obvious that there might be serious problems for young people in terms of this legislation.

Ms BUSH: I did wonder about amendments to the Youth Justice Act.

Ms Wight: As I think the QLS also alluded to—and others may have earlier—education is absolutely critical in this space. It is absolutely critical for young people. Good role models would also help some young people of course learn their behaviours from what they see happening around them, including at home, which is highly problematic. We need to probably put more emphasis with young people into positive relationships. I know we do some of that already, but clearly things are happening which are not good behaviour, are not respectful, or young people have not had the ability to learn. It is not simply about us saying that you would not sentence or not punish, but if we even do sentence young people in this space there needs to be some meaningful responses which help them to understand and address what might have gone wrong. Even where we think there is a level of culpability, I still think there is a responsibility on us more generally to help those young people to ensure that this does not become a pattern of behaviour.

CHAIR: Are there any other jurisdictions that deal with this issue in relation to minors and their maturity?

Mr Bartholomew: The ACT is certainly taking a step in the right direction in terms of addressing the issue of raising the age of criminal culpability, but not that I am aware of that specifically deals with this issue. As Janet said, in the course of our work we do not have a lot of time to do that examination, which is why we are essentially suggesting that it needs to have a thorough examination of how that can be addressed in relation to young people.

CHAIR: Your suggestion that there be something incorporated into the juvenile justice legislation—

Mr Bartholomew: Certainly something needs to be examined. We are not putting forward the wording or what that legislation looks like, but it is certainly something that we think needs to be considered and would support.

CHAIR: Is it wrong to describe that piece of legislation as the overarching piece of legislation that enables the judiciary, prosecutors and defence lawyers to navigate their way through the system—that is, the go-to book?

Mr Bartholomew: You are certainly not wrong.

Ms BOLTON: Again, this issue of education has come up. For example, if this legislation or these amendments were to apply or there were an examination of it regarding youth, how would it be translated into that education, the actual changes within the legislation, and how would that apply in real time?

Ms Wight: This is always a failure that we have in the broad. Whenever there is a change in legislation which affects people, there is not an appropriate matching process to ensure that the public in general, particularly those who might be affected, are aware of changes to the law or how the law applies. I would always argue that every piece of legislation should have attached to it a sum of money which allows for a proper education of the public around what the law is, particularly where people have a right or particularly where there is a penalty proposed. I do not think there is a one size fits all. I think there has to be a general education of the public and adults about what consent and mistake of fact means in a very robust way. We need to encourage those adults who have contact with children to be exploring these issues with them and giving them the resources to be able to do that as well as perhaps there being quite formal programs that might be attached—for example, a service which was supporting youth justice and supporting educating those who may be found to have broken the law. It is a multifaceted approach. It is one that I do not think any jurisdiction that I have witnessed has ever properly addressed—how do we ensure that people know what their rights and responsibilities are under the law? That all needs to be targeted in a way that is appropriate to the relevant groups to which you are trying to make available that information.

Mr Bartholomew: I think that is a very good question, particularly challenging because of the age group we are talking about and because we do have a culpability at the age of 10 in Queensland. It is a very young age to start an education program and there will be very disparate views in the community about wanting children at that very young age to be educated in relation to those very issues. It would be quite challenging.

One of the other issues we see of young people being charged or engaging in some of this behaviour is that often those young people are not engaged in formal education structures. We do not necessarily have systems within our state care system. Those young people in the child protection system who often are not in home or in residential care often are not provided with appropriate information in relation to sexual education. It is often not part of case plans. We see young people being more vulnerable. Often our most vulnerable young people are going to miss out on some of those formal education processes that we would hope would be part of this process of educating people around this issue.

Ms BUSH: In terms of youth justice conferencing and whether these types of matters—sexual assault, rape—get referred to youth justice conferencing, can they at all be dealt with under this legislation?

Mr Bartholomew: It can. There is no prohibition to it and certainly there are many matters that are of that kind. We do see a number of those matters that are referred there, but there are a number of matters which also proceed to court.

Ms Wight: Of course it is a very difficult area, the whole notion around the victim having to meet with the perpetrator, which I am sure you are more than aware of. That is obviously the challenge. That means perhaps matters then do go to court which might otherwise be better dealt with, but because you cannot have the conference because that is too confronting, that is where you end up. Maybe there are some thoughts in that space, too, that the commission could perhaps look at.

CHAIR: That brings to a conclusion this part of the hearing. I thank you for your written submission and for attending.

Ms Wight: Thank you for the opportunity.

GREENWOOD, Ms Kate, Barrister, Aboriginal and Torres Strait Islander Legal Service

CHAIR: Good morning. I invite you to make an opening statement, after which the committee members may have some questions for you.

Ms Greenwood: Good morning. I come from the Aboriginal and Torres Strait Islander Legal Service, a community based public benevolent organisation. We have a particular focus on looking at areas of disproportionate disadvantage for our client base and provide criminal, civil and family law representation. Without a doubt, our largest area of practice is within criminal law. In terms of an overview of our approach and our submission, our criminal law system is—and especially the principles enunciated in the code—a coherent set of principles which require practical application. We note that deep level of work and analysis done by the Queensland Law Reform Commission, especially doing the deeper dive into jury trials and how the principles played out in terms of the results of those jury trials. We support the evidence based approach that it took and the level of analysis applied in making its recommendations.

In a sense, the Criminal Code is a very broad set of principles on which it is often very hard then for juries to apply in the particular circumstances that they have been asked to make decisions upon, find facts and conclude guilt or innocence. In our view, the Queensland Law Reform Commission took a very sensible approach in terms of saying that often these principles are too abstract. There needs to be greater articulation of the principles which do exist in the common law, but it would make it easier in particular for juries to understand those principles and to apply them and for judges to articulate those principles to the jury. We support the approach taken by the Queensland Law Reform Commission.

Ms BUSH: Kate, thank you for coming in and for your submission. I want to acknowledge the work that ATSILS has done over a 40-year history, I think, in Queensland, which is fantastic. Can I clarify: of the clients that you represent, what percentage would be the defendants in a criminal matter versus victims or survivors?

Ms Greenwood: You cannot always put victims and perpetrators in different camps. That would be the first comment that I would make. Obviously, in terms of the criminal defence work that we do—because we are not prosecutors—we do a great deal of criminal defence work but we also do a great deal of family law, child protection and domestic violence work. Certainly this was written from the point of view of how the principles apply within jury trials in particular, but we also take a very broad view. We take a very broad view of areas where the law might act disproportionately and create disadvantage and where we see risks that people might be charged when they should not be charged, convicted when they should not be convicted and given extended jail sentences when that would be inappropriate. We do also have a watching brief over areas of law reform that might bring about unintended consequences.

In terms of sexual assault law, this is a very complex area. I think one of the earlier speakers pointed out that focusing on these particular areas of law and attributing their discontent with the whole system might have been a misplacing of their concerns about the criminal law system and how much these particular principles might actually contribute to their discontent. I think that was one reason the Queensland Law Reform Commission deep dive was so important, to actually look at the jury trials and look at what actually happened in those specific trials and to do the analysis themselves. The level of expertise of criminal law lawyers—and at the end of the day there are judges, there are prosecutors, there are defence lawyers.

I have defended many a sexual assault trial but also as a woman I understand that you step back and you have a look at the system as to how it operates. In terms of the number of times when I have been making submissions to juries, I have been very aware of how difficult it is. The jury is essentially being asked to memorise all of the elements of a golf swing and get it right. What can be done to make their job better so that the guilty are convicted but also so that the innocent are acquitted? I can tell you as someone who has done a lot of defence work that that is hard. It is really hard to make sure that the innocent get acquitted. In my view, the Queensland Law Reform Commission has done a tremendous balancing act to try to come up with the best way of making these principles easier to apply without having the unintended consequences that many of us could see happening if other amendments were brought in to play.

Ms BUSH: As a follow-up question, I think at around page 6 of your submission you talk about the formulaic approach and the rationale for not going down that path because it can have a detrimental impact on victims and offenders. I think that you also referenced that there is potential for innocent conduct to be considered criminal. I was interested in understanding that a little bit more. Could you give an example or explain a little bit about what you mean?

Ms Greenwood: Essentially this law applies to a very wide range of circumstances. It could be a couple who have never met each other before meeting up on a Tinder date. It could be a husband and wife of 20 years marriage where there is a certain level of context as to what is consensual without any words or acts and that that is understood within the context of that marriage and that married couple. We were talking explicitly about any sort of formula of getting consent and that that could create problems. Again, those with intellectual disabilities or behavioural issues, the very young or whatever may not be capable of coming out with that formula yet if you look at the circumstances that would point to a more consensual situation.

I always hate to bring in new examples without doing the proper research to go with it, but context is everything. Sometimes getting that formulaic consent can occur in circumstances where the consent is not real. Why should that be relied upon when you look at all the surrounding circumstances? It is not consent. The Tinder dates—'Here, sign this'—when that would not necessarily signify consent. As part of my background, I worked for the International Criminal Tribunal for the former Yugoslavia. Part of this paper is written about how you deal appropriately with the rights to fair trial and the rights of the complainants and the victims. There were rape camps there where there were individual relationships to avoid being chucked back into the wider swirl. That was not necessarily consent because it was in the circumstances of a woman who was confined in this particular camp and not able to escape. On whether that sex with just one particular person for the entire length of the conflict could then be considered consent to sex you had to look at the wider context. It is the same thing here: with some sort of formula you still need to look at that wider context. In that sense, I think the Queensland Law Reform Commission proposal that a jury may take into account any steps that were taken and any circumstances around it is the better way to look at it.

CHAIR: If there are no more questions, it is my intention to go on to the next witness. Thank you for coming along and for your written submission and your testimony here today. It has been very helpful.

Ms Greenwood: Thank you. I appreciate it.

COPE, Mr Michael, President, Queensland Council for Civil Liberties

CHAIR: I now welcome Michael Cope. I invite you to make an opening statement, after which the committee members may have some questions for you.

Mr Cope: Thank you. I should say that for these purposes I am the President of the Queensland Council for Civil Liberties. Special counsel is my real job.

On behalf of the council I thank you for the opportunity to appear before the committee today. The purpose of our submission is to support the amendments contained in the bill to implement the recommendations of the very thorough report of the Law Reform Commission in relation to the law of mistake and consent as it applies to sexual assault. In short, it seems to us that the amendments incorporate or at least state explicitly in our law the principle that no means no.

I think the basic logic of this position was set out well by Justice L'Heureux-Dube of the Canadian Supreme Court in a decision relating to similar amendments to the Canadian Criminal Code some years ago. In that case, Her Honour said—

> Few would dispute that there is a clear communication gap between how most women experience consent, and how many men perceive consent. Some of this gap is attributable to genuine, often gender-based, miscommunication between the parties. Another portion of this gap, however, can be attributed to the myths and stereotypes that many men hold about consent.

She went on to speak of the new law that she was interpreting in that case—

> Under such an analytic approach, although the communication gap between the sexes may still avail confusion and miscommunication, the consequences will accrue more equally to both. Women, as a practical matter, still run the risk of being sexually assaulted unless they communicate non-consent in a manner that is sufficiently clear for others to understand. Men, by contrast, must assume the responsibility for that part of the communication gap that is driven by androcentric myths and stereotypes, rather than by genuine misunderstanding due to gender-based miscommunication.

In our view, the amendments improve the protection the law gives to sexual freedom for women whilst preserving the operation of the fundamental principle of criminal responsibility that a person who makes a genuine mistake about a central feature of a claim cannot be said to have the necessary guilty mind.

Mr POWELL: I do not have a question at this stage, but I might come back.

Mr HUNT: Michael, on the gender communication gap, could you drill down a little further into that. What does that entail? It made me raise one eyebrow as to where that might go.

Mr Cope: I think that there is well accepted—and I think in that judgement she refers to some of this—research that says that men and women—whether it is natural, psychological or whatever it is—do have different perceptions about matters and in particular in this context they have different perceptions. As she says, some of that is attributable to that and some of it is attributable to stereotypes and myths. The amendment seeks to readjust that balance and to amend the law in a way that shifts some burden in relation to overcoming those things, such as levels of communication and interpretations of events being different between men and women, by shifting more of the responsibility in relation to it onto the male side. I think she is just talking about the ordinary miscommunications that go on between men and women all the time, but I think it was particularly focused in this context.

Ms BUSH: I have a follow-up question to that. Given that suggestion that there is a gap between men's and women's understanding of consent, I am interested in your views on the bill in its current form and whether you feel the reforms suggested close that gap a little bit? Can you clarify that position?

Mr Cope: Yes, I think they do. That is why we support them. We think that it is an appropriate change to the law. As I say in the submission, there are some people on the council who practise in criminal law—and I do not—who think that what happens in jury directions is pretty similar to this anyway. I think the Law Reform Commission basically says that. As Ms Greenwood said before me, it is appropriate for it to be put into legislation so that it is made clear and it can be of assistance to juries and to courts in making these things. If you look at the cases, the jury directions—taking my colleagues' statements as being accurate—have obviously moved on from what you read in some of the early decisions.

We support the amendments because they do reflect an appropriate rebalancing whilst not going so far as some commentary in the community, which seems to suggest that we should get rid of mistake of fact as a defence entirely, which would really reflect a fundamental change of fundamental principles in our criminal law. We think it is a very good report and the amendments are excellent.

Ms BOLTON: Michael, referring to your opposition to the granting of powers to police, can you explain how you see that could be used in that situation and why you are opposing it?

Mr Cope: We have a basic problem with the increasing tendency to introduce preventive laws that detain people or restrain people from doing things on the basis of what they might do and not what they might have done. We also have particular problems with vesting this power in police officers. As we say in the submission, if the power is to exist then it should be exercised by a court. People should be prosecuted for some offence and then, at the end of it, the court should be asked to impose the order as a part of the sentencing process so that it is subject to judicial review. It is controlled and it is not being exercised by police officers with all of the attendant risks of it being used disproportionately against disadvantaged people, Indigenous people or other groups in the community against whom these powers are usually disproportionately used.

Mr POWELL: That was where my question was going.

CHAIR: As there are no further questions, I intend to bring this part of the hearing to a conclusion. That is no reflection on you, Michael.

Mr POWELL: Very succinct and well explained in both your written and oral submissions.

Mr Cope: Thank you.

CHAIR: Thank you for attending. Thank you for your written submission and the evidence given today. We will have a break and resume at 11.45 am.

Proceedings suspe**nded from 11.32 am to 11.45 am.**

REECE, Ms Laura, Member, Criminal Law Committee, Bar Association of Queensland

CHAIR: Good morning. I invite you to make an opening statement, after which committee members may have some questions for you.

Ms Reece: Thank you, Mr Chair and members of the committee. The Bar Association thanks the committee for the opportunity to give evidence at this hearing. There was, unfortunately, an as yet undetected administrative error in our systems which meant that a submission was not forthcoming from our association on this important bill. That was certainly an oversight. It was not the intention of the Criminal Law Committee of the Bar Association, or indeed the association as a whole, to not put forward our views to the committee. I will try to do that in as succinct a way as I can today. However, we were involved in the process of submitting to the Queensland Law Reform Commission, and some of those comments are reflected in the report itself and have already been discussed at some length in the other submissions today. I do apologise on behalf of the Bar Association. It was certainly not a reflection of any attitude on behalf of the association to the bill, which is supported.

The Bar Association is the professional association for barristers in Queensland. Those of us who practise criminal law both defend and prosecute sexual assault and rape matters in our courts. We are also members of our community, and as such we are aware of changing attitudes towards sexual behaviours and offending. Over time we see these changes and we adapt our approaches in court. We see the law adapt over time, which is exactly what the criminal law should do. It should always be reflective of broad community attitudes. It cannot be a fixed point in time where certain attitudes are reflected which now we simply do not hold as a community; for example, in relation to recent reforms around age of consent for homosexual sexual acts, abortion and other very personal issues which have been over time the subject of significant reform. Criminal lawyers, including members of the Bar Association, have often been involved in those reforms. We do not operate outside of or in a bubble, away from community attitudes generally. As I said before, we do see these changes occurring; we adapt our approaches. You can no longer get away with—if I can put it that way—things that used to be done on a regular basis in rape trials and sexual assault trials in Queensland. Everyone's approach has changed. The law has changed and we have changed with it.

It is worth reflecting on how far community attitudes and the law itself have come in the last 30 to 40 years. Sexual offending and the regulation of it by the criminal law and other associated acts really has experienced a time of intense change in the way those offences are legislated for or against. There is an increased awareness of barriers to reporting and there have been numerous attempts to break down those barriers. These issues are the subject of legitimate concern and public discussion. They are emotive issues, they are important issues and they should be readily discussed in the community.

Mistake of fact as it relates to consent raised its head as an issue in this space over the last few years. There has been considerable coverage of various views as to the operation of that defence in Queensland. The view of the Bar Association's Criminal Law Committee is that there were some significant misconceptions in some of the views being promulgated. At the same time, it appreciated that, if those views were being held and there was a level of misunderstanding or concern in the community, then that needed to be addressed. Our view is that that was done exceptionally well in the report by the Queensland Law Reform Commission. Those concerns were addressed in a thorough and evidence based approach, including a detailed analysis of 135 trials which I can turn to later when I am answering questions, because I think that approach really provided great scope for the consideration of this difficult issue.

In the result, the recommendations which now form the proposed amendments in the bill codify the position reached in the case law. I have been present for the balance of the evidence this morning, and I have heard questions as to whether or not that will help in the prosecution of sexual assault matters. That will obviously remain to be seen. In our view, the inclusion of those clauses will clarify matters for juries. They are already matters which were established in case law, but they certainly codify and make very clear some really important issues.

One of them, for example, is something that seemed to be a common misconception around intoxication. The intoxication of a defendant was never relevant to a reasonableness of belief as to consent. It may have been relevant to an honest belief, but that second limb, which has always been the saving grace of that defence in Queensland from a public policy point of view, is that that belief has to be reasonable. That reasonableness relates back to whether or not it was reasonable for that person to hold that belief in those particular circumstances. It cannot be, and it never has been the case—at least over the last 30 or 40 years—that the intoxication of a criminal defendant could have any bearing on whether or not the belief they held was reasonable. If the question is does the proposed amendment

help, I think it will because it absolutely signals that—with the imprimatur of the parliament and as the courts have stated on a number of occasions—that simply cannot have any bearing on a case involving the proposed operation of the mistake of fact defence. Perhaps I could leave it there. That really provides my introductory comments but also goes into a little bit more detail about some of the matters that we wish to bring forward to the committee in relation to the bill itself.

Mrs GERBER: In your oral submission you mentioned that, with regard to rape and mistake of fact, the bill largely codifies what is already in existence in case law.

Ms Reece: Yes.

Mrs GERBER: Is it the Bar Association's view that law reform was needed in relation to rape and mistake of fact, given it is already in existence and the bill simply codifies what is in case law?

Ms Reece: Not technically, no. I do think that if the law is more readily understandable by juries, if it is more readily understandable by members of the public who read the Criminal Code—because at the moment, even though it is absolutely there in the case law it would not be readily apparent to someone reading the Criminal Code. In that sense—and there has been some discussion about the educative aspect of legislation—we do not oppose it on that basis. We see that it serves a purpose. Our committee's view is that it does reflect the state of the law at the moment. It is not inappropriate for legislation to do that. We would not have said it was strictly necessary, but we support the Queensland Law Reform Commission's view that it would be useful, and on that basis we support the bill.

Ms BUSH: You have touched on this, but maybe if we can get you to expand a little bit. If you have been listening today you would have heard a submission put forward that the bill in its current form presents an additional risk for victims and survivors. I think it is in relation to mistake of fact and honest and reasonable belief and how a jury can have regard to anything that the defendant said or did. I am interested in your views on that.

Ms Reece: Yes, I heard those comments this morning. I was present for those submissions. As I understand it, that concern is around the amendment where, essentially, regard may be had to anything the defendant said or did to ascertain whether the accused was mistaken about whether the complainant consented. That is, in a sense, really our 'reasonable steps' equivalent. It is not saying that has to occur; it is saying that the jury can have regard to anything the defendant said or did. The corollary of that, of course, could be that a jury might wonder about whether nothing was said or done. All of this discussion really needs to be considered in the context of a criminal trial. The only way this defence will go to the jury is if there is evidence raised that the judge considers raises the mistake of fact defence. You cannot rely on it if there is not evidence that reaches a certain threshold. Ordinarily, that will mean that the individual client will have to give evidence, because it is very difficult to assert that there is evidence of the state of mind of a defendant if that individual does not give evidence. It is very difficult to assert on the basis of an inference from an action or even something which was said. There may be some exclusions to that or exceptions.

As I understand it, the intent of the amendment is simply to reflect the fact that the jury could consider things that were said which tend to militate against the accused person thinking that the complainant was consenting or even having that belief but also steps or actions or things that were said in order to confirm consent. This does not change the state of the law as it is at the moment. We have seen how this has played out in jury trials to date, and we understand that it will not change the way these matters are conducted because it really codifies what is already being done. That is sometimes lost a little bit in the discussion. With respect, that is because, unlike the Queensland Law Reform Commission's very detailed response—which really went into each of those jury trials and looked at how it was operating in practice—a lot of the concerns that are being raised often come from anecdotal concerns. They are very genuine, but they are not necessarily able to be tied into how that particular jury trial worked. This particular amendment says that these things are relevant and that the jury can have regard to them, and that really would go both ways. It does not, in our view, change anything for victims.

Perhaps on that note, we as members of the community are similarly concerned with the offences of sexual assault and rape. The fact that we defend the perpetrators of it or prosecute the perpetrators of it is neither here nor there. That is our profession. That is what we do. However, there is some danger in assuming that the reason conviction rates are low, if that is to be accepted, can be shafted home to the operation of the defence of mistake of fact really needs serious scrutiny. With regard to those 135 trials, that is why in my initial comments I said that that really I think is quite pivotal in consideration of this issue. Of those 135 trials, only a proportion turned on mistake of fact and in fact when mistake of fact was raised the conviction rates were higher. That is at paragraph 3.44 of the QLRC report.

While there are, I do not doubt, legitimate concerns about rates of conviction—or rates of reporting as well probably more properly—of these offences in Queensland, there are numerous reasons why that might be the case. In considering these matters in sitting and listening to the comments of the individuals coming before the committee this morning, I did reflect on the fact that there might be numerous reasons—quite apart from some of the issues we know with shame, with an unwillingness to come forward, perhaps sometimes a concern with the appropriateness of a police response—where there might also be considerations around this fact, and that is if you are going to allege rape against your 18-year-old boyfriend and he is convicted he will go to jail for five years. That is the case in Queensland now and that is a significant prospect, I think, for any young person making a complaint. Rightly or wrongly, that might deter people from making complaints. Really of course this is speculation, but it is not inconceivable that those sorts of issues play on the minds of complainants. These issues around perhaps lack of reporting or under-reporting of sexual offences certainly need closer scrutiny. Our position is that you cannot address them by fundamentally altering the approach of the criminal law.

Mr POWELL: I think I know what the answer is going to be based on the way you just summarised the end of that question, but we are about to hear from two organisations that represent sex workers.

Ms Reece: Yes.

Mr POWELL: They are both calling for amendments to the meaning of 'consent' to include protection for sex workers in relation to the withdrawal of consent when payment is not made. I do not want to answer it for you, but I guess the question is: do you have a response to that?

Ms Reece: Off the top of my head, no.

Mr POWELL: I am putting you on the spot; I apologise for that.

Ms Reece: Yes, and I apologise. I did see that they were raising those issues and I do not discount that they are important. I confess that I had focused more on the general application of the defence of mistake of fact and the issues around the concern that somehow it was either creating unjust outcomes or difficulties for sexual assault victims. I am not in a position to give you a genuine considered response on that. However, in response to a question you asked of an earlier panellist, I did look at the Tasmanian statistics. I could not see necessarily any reported rape statistics that I thought would be useful for the committee to consider, but I did see some coverage of the fact that it is considered in Tasmania that rapes are significantly under-reported still. The news item that I saw referred to—I do just have a note of it; I took it down at the time—an ABC article referencing levels of non-reporting which indicated that less than a third of Tasmanian sexual assaults are reported to police.

That, I suppose, is relevant when considering this so-called Tasmanian model, and I would adopt the comments of my colleague Ms Fogerty from the Queensland Law Society. It is really quite a nuanced difference between the Tasmanian system and the Queensland system. They are actually quite similar. The difference really is just in the wording around those reasonable steps. We have a form of affirmative consent in Queensland. The QLRC are quite clear about that. In some ways other jurisdictions across Australia have been moving closer to our model. If you look at the case of Craig McLachlan recently, it is quite apparent that there used to be quite a significantly different scheme operating in some of those states, but I do feel like I have perhaps gone over time.

Mr POWELL: No, I pushed the time with my question, so my apologies.

CHAIR: Do not worry about us, Laura; we are working around the program. There have been submissions made that the provisions of this bill will make matters worse for victims. Do you have a comment as to whether these amendments will make it worse for victims?

Ms Reece: I tried to cover off on that a little in response to Ms Bush's question, or the member for Cooper. I do not think it will. I do not think it is the view of the committee that it will make things worse—certainly not—because really, ideally, it should not have any negative impact at all on complainants because it essentially restates the law but in a legislative form. It could be hoped if it does make it clearer to juries, if it does simplify things for juries and if it makes the Criminal Code more readily accessible as a document for the general public that it could have a positive impact, both from an educative view and from the point of view of juries understanding the task that they are posed with.

Some of the difficulty with mistake of fact often comes in cases where it is raised but it is also sort of like a second-run defence like, 'Oh, it didn't happen but if it did there was a mistake.' It can get really complicated, so anything really that helps juries would be a positive step forward. There are directions of course in the benchbook which really step out, and there is a direction as to mistake of fact and sexual offences in the Queensland District and Supreme Court benchbook. I think the sample

direction there is really clear and it makes it clear that this overarching question of reasonableness is what these cases turn on, if they even get there—if you even get it to a jury—because there has to be some evidence. You cannot just say, 'I'm charged with rape. I'll claim it was reasonable—an honest and reasonable mistake.' You just cannot do that. There has to be some evidence.

I do not think it is the position of the committee that it will make things worse. Of course we hope it will assist the system in general. There have been a number of comments made about some concerns with the QLRC report. For example, there is a concern raised by the Women's Legal Service around the operation of section 132B of the Evidence Act. Their concern is that that precludes evidence of domestic violence being led in sexual assault cases. That is a misconception of the law. Section 132B specifically relates to assaults because it is a way of admitting evidence which would otherwise be subject perhaps to some of the restrictions around propensity evidence and that would be quite difficult for prosecutors to argue, so it takes some of that drama out of it for them, if I can put it that way.

Relationship evidence—that is, evidence of violence in a relationship—will almost always be relevant to a question of consent in a sexual matter and in fact it could be relevant, for example, in cases where we know people do freeze and those freezing cases. The question of previous domestic violence would be highly relevant there to whether there was consent or whether there was a reasonable but mistaken belief as to consent. The provision about the withdrawal of consent is entirely consistent with the QLRC's discussion of this very difficult issue. There are two issues around freezing. One probably is a classic freeze where a woman just does not respond at all and then there is a much more difficult issue, which the QLRC look into, which is freezing during the course of a consensual act, and that is really where their discussion around withdrawal of consent had to come down in the way that it did and as an association we agree with that position ultimately.

CHAIR: Thank you. Are there any more questions?

Mrs GERBER: Do we have time for just a quick one?

CHAIR: All right. We do not have time, but—

Mrs GERBER: I just want to follow the thread that you have just touched upon. The Women's Legal Service and a couple of other advocacy groups called on reckless disregard to be included in the definition and that the word 'agreement' be included in relation to those concepts you just discussed. What is the Bar Association's view on that?

Ms Reece: Reckless disregard is really interesting because when you think of the actual test—that a belief as to consent has to be honest and reasonable—you cannot have an honest and reasonable belief as to something if you are also simultaneously reckless. It does not make sense, so you cannot be reckless as to whether someone is consenting—that is really not turning your mind to it—and at the same time hold an honest and reasonable belief as to it. We say that while recklessness certainly is relevant—it is relevant because a prosecutor could say, 'They didn't even turn their mind to it. They can't have a reasonable belief about it'—it is relevant to the consideration of it. It does not need to be enshrined in the test because it is already there. With regard to recklessness typically, it is a difficult concept. It can actually confuse juries when you have to break something down and then tell them what recklessness is. There are numerous Court of Appeal judgements, as you are probably aware, where the test of recklessness really causes all sorts of headaches. It is already there in honest and reasonable mistake as to someone's belief. It does not need to be included in it.

Mrs GERBER: Thanks, Laura.

CHAIR: That brings this part of the hearing to a conclusion. Thank you for your attendance. Thank you for your evidence here today. It has been very helpful.

Ms Reece: Thank you, members of the committee.

FAWKES, Ms Janelle, #DecrimQLD Campaign Leader, Respect Inc. (via teleconference)

JEFFREYS, Dr Elena, State Coordinator, Respect Inc. (via teleconference)

CHAIR: I now welcome Janelle Fawkes and Dr Elena Jeffreys. Good afternoon. I invite you to make an opening statement, after which committee members may have some questions for you.

Dr Jeffreys: Thank you so much, Peter. Respect Inc. is the Queensland sex worker organisation. It is the opinion of Respect Inc. that this bill does not go far enough to clarify matters of consent and mistake of fact. Others have already outlined the limitations of the bill. As an organisation made up of and representing a membership of sex workers, we will only comment on a few key matters today specific to sex workers. To begin, we want to assert that in a sex work setting consent can be altered, withdrawn or expanded at any time at the discretion of the sex worker and sex workers face systemic barriers to recording and prosecuting sexual violence. The criminal laws and licensing system that regulate sex work in Queensland, criminalising aspects of our work and the majority of our workplaces, is the most significant barrier. While police remain the regulators of the majority of our industry, access to redress for sexual violence will always be prohibitive. In order to be effective, a response to sexual violence must include the removal of these laws and the decriminalisation of sex work. However, there are some urgent amendments to the bill, should it go forward, which would go some way to protect sex workers.

Section 348(2) (e) of the Criminal Code states that consent is not 'freely and voluntarily given' if it is obtained 'by false and fraudulent representations' about the 'the nature or purpose of the act'. While this section could and should cover the situation where consent to sex with a sex worker is fraudulently obtained, particularly in the case of payment being withdrawn, currently in practice it does not. Even sex workers who surmount the significant barriers to reporting rape or sexual assault are being told by police, 'I don't see the crime,' or 'It is a civil, not a criminal, matter.' This happens regularly, and our organisation has progressed formal complaints about this behaviour, as well as bringing it to the attention of the Minister for Police and the Police Commissioner. In other cases a charge is prosecuted under section 408C of the Criminal Code which relates not to consent but primarily to property fraud and has resulted in fines of only $300 to $750. The QLRC report acknowledges that this outcome does not recognise the total criminality of the offending. Respect Inc believe that it is far from ideal that cases end up tried under this clause because the victim is a sex worker.

The bill does not provide any clarification to police or the justice system on this particular matter. If the bill progresses, our recommended very small addition to the Criminal Code would provide protection to some degree and, importantly, a recourse to justice for sex workers in Queensland. Currently, while there has been a government commitment to refer the full decriminalisation of sex work to the QLRC, there is no date, and that creates a risk that sex workers will be left behind. That is our opening statement. Thanks for listening.

Ms BUSH: In your submission I think you reference some amendments that were made in the ACT act similar to those you are suggesting. Have I interpreted it right that that has resulted in successful prosecutions for rape?

Ms Fawkes: Our reference to the ACT legislation is also referenced in the QLRC report. It clarifies that section 348(2) (e) in the Queensland legislation is somewhat limited by the clause that ties it to 'the nature or purpose of the act'. That is not in place in the ACT, so their legislation is slightly less refined or restricted and it has resulted in a number of successful cases. I believe that our colleagues from Scarlet Alliance, Australian Sex Workers Association, are speaking next. They are familiar with those cases.

Ms BUSH: I am interested in the ACT model. Ultimately, what we want to see is a reduction in the number of rapes that occur or fewer occasions of clients refusing to pay sex workers. I was curious about whether amendments to the ACT legislation had improved that experience for sex workers, as in that they had resulted in fewer clients refusing to pay.

Ms Fawkes: It certainly has resulted in more people being able to take those kinds of cases forward and successful cases. Unlike what some other people might have said today, I think criminal law does have an educative aspect particularly for our type of organisation—community based organisations who are often left to translate, with the help of lawyers et cetera, the laws to our communities and put out information that advise people on what is legal and what is not and what people's rights are. I think the message that those practices are not acceptable certainly go some way to changing attitudes within the community.

CHAIR: There being no further questions, I thank you for your attendance and for your written submission.

KIM, Ms Jules, Chief Executive Officer, Scarlet Alliance, Australian Sex Workers Association (via teleconference)

CHAIR: I welcome Jules Kim, Chief Executive Officer, Scarlet Alliance, Australian Sex Workers Association. I invite you to make an opening statement, after which committee members will have some questions for you.

Ms Kim: Thank you for the opportunity to be heard in relation to the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. The Scarlet Alliance, Australian Sex Workers Association, is the national peak organisation with a membership of individual sex workers and sex worker organisations and networks throughout Australia including Respect Inc in Queensland. I would like to start by stating that Scarlet Alliance supports in full Respect Inc's submission and statements to this public hearing.

As you have heard, sex workers face unique risks and barriers in reporting and prosecuting sexual violence. A key barrier to reporting and prosecuting sexual offences include existing criminal and licensing laws that regulate sex work in Queensland. Access to redress for sexual violence will always be prohibitive to sex workers while police remain the regulators of the sex industry. In order to be effective, a response to sexual violence must include the removal of these laws and the complete decriminalisation of sex work.

While the intention to refer the matter of sex work legislation to the Queensland Law Reform Commission to contend with those broader policy, regulatory and legislative questions that arise around the issue of consent for sex workers has been acknowledged and stated by various ministers, including the Minister for Police, the Minister for Child Safety, Youth and Women and the Minister for the Prevention of Domestic and Family Violence, at this time this is yet to happen. This is an urgent matter that continues to risk leaving sex workers with less access to justice in relation to sexual violence than the rest of the Queensland community.

We urge the committee to recommend the urgent commencement of the QLRC review into the regulation and law governing sex work in Queensland in 2021. However, referring these matters to the commission does not replace some urgent actions that must be taken. In short, we support recommendations by Respect for legislation to protect sex workers when reporting crime—for example, the legislation in California SB 233 Immunity from arrest 2019-2020 has passed into law. This legislation ensures that, if a sex worker has engaged in the act of sex work at or around the time they were a victim or a witness to a crime, this is inadmissible in a separate prosecution of that victim or witness to prove criminal liability for that act of sex work. Further, the criminalisation of sex worker safety strategies via section 229H of the Criminal Code increases the risk of sex workers in Queensland experiencing sexual violence. The committee should seriously consider recommending the repeal of section 229H of the Criminal Code.

In sex work, as we heard, a key aspect of consent for sexual services is payment for the services negotiated. If payment is not made or withdrawn, whether or not the sex worker is aware, consent is also withdrawn. As you heard from Respect, section 348(2) (e) 'by false and fraudulent representations about the nature or purpose of the act' must be amended and the examples that were referred to of successful prosecution of cases of non-payment of a sex worker as rape in the ACT and the recognition by the justices in those cases that fraud in itself was an aspect of the offending but was inadequate protection of full criminality of the act which was more accurately to be referred to as rape.

I am happy to add to any questions you may have in relation to the cases. Probably the most recent cases prosecuted under that legislation related to the raping of two male escorts by non-payment are R v Mynott in 2020 and R v Livas in 2015. Respectively, they were sentenced to three years in the Mynott case and to 25 months for non-payment as rape in the Livas case. I would be very happy to answer any specific questions that you may have in regard to those cases.

Ms BUSH: You possibly heard the question I just put to Elena in relation to the ACT legislation amendments and what impact that had had on both convictions but also on the number of incidents of clients refusing to pay or withdrawing the fee. Ultimately we are wanting to stop that type of behaviour from occurring in the first instance. I was interested in your observations on that.

Ms Kim: Absolutely. This was significant in the remarks by the justices in those cases. They made clear statements that it should be clearly understood that consent to sexual intercourse obtained by fraudulent activity such as non-payment was not consent and that for sex workers this fraudulent activity constitutes rape rather than a dishonesty offence. I think that was very clearly stated in those cases. In the more recent case, the Mynott case, Chief Justice Helen Murrell stated that sexual consent given can be negated because it has been caused by fraudulent misrepresentation—that is, by not

paying as promised and withholding payment. This has been extremely significant in that it sends a clear message to sex workers and to clients that this is criminal behaviour that can be prosecuted. Unfortunately, predators see sex workers as easy targets because they think that sex workers are unable or unwilling to go to the police because these cases will not be taken seriously. It has definitely had a significant effect for sex workers in the ACT and I think in making sex workers around Australia hopeful that this would be replicated in the other states and territories.

Ms BUSH: Your submission asks for the repeal of section 229H of the Criminal Code. I appreciate that that is outside the scope of this inquiry. I was interested if you could outline the impacts that that type of repeal might have on the sex worker industry.

Ms Kim: As Respect has spoken about, what we have is a situation where 80 per cent of the Queensland sex industry are criminalised for their safety strategies. Unfortunately, this creates significant risk for sex workers by continuing to criminalise the safety strategies that sex workers use in order to reduce the risk of sexual violence. This include such things as working in pairs, hiring a receptionist, even making a call or sending a text to another sex worker when they are going into a booking or when a booking is finished. Unfortunately, under that legislation, this is still criminalised in Queensland. Sex workers in Queensland are effectively forced to work either safely or legally. This is obviously an untenable situation that significantly exacerbates the risk of sexual violence for sex workers.

CHAIR: There being no further questions, thank you for your attendance and for your written submission. That concludes the public hearing. Thank you to all the witnesses who have participated today. Thank you to our Hansard reporters. I would also like to thank the secretariat for their hard work. A transcript of these proceedings will be available on the committee's parliamentary webpage in due course. I declare the public hearing for the committee's inquiry into the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill closed.

The committee adjourned at 12.31 pm.