

Law Reform Submission: Review of Consent Laws and the Excuse of Mistake of Fact

Brisbane Rape and Incest Survivors Support Centre (BRISSC)

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About the Authors

This law reform submission was researched and authored by UQ law students **Rachael Blackman** and **Lucy Noble-Dickinson** under the academic supervision of **Professor Heather Douglas**. This submission was prepared for and on behalf of BRISSC, a feminist not-for-profit organisation that provides support to women survivors of sexual violence. Student researchers and Professor Heather Douglas undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

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06th February 2020

The Secretary Queensland Law Reform Commission
PO Box 13313
George Street Post Shop QLD 4003

By email: lawreform.commission@justice.qld.gov.au

Dear Commissioner,

Re Review of Consent Laws and the Excuse of Mistake of Fact

BRISSC was established in 1973 and is a community-based not-for-profit organisation in Brisbane that provides support to women survivors of sexual violence. Our services include phone support, individual counselling, advocacy, community education and training. BRISSC's initial inception was underpinned by the lack of services available to women survivors of sexual violence and the shared belief in the need for radical change and activism in order to promote women's rights and needs. BRISSC offers service delivery from Woolloongabba, Nundah and Inala/Richlands.

The current aims of BRISSC are:

- Women working towards ending violence towards women.
- Supporting women (and the community) who have experienced sexual violence through telephone support info and referral, face to face support, group work.
- Engaging in preventative community education and development which aims to promote healthy relationships, grounded in a critique of gender inequality.
- Promoting recognition of sexual violence as a gendered crime and challenging community beliefs and structures that oppress women.

BRISSC welcomes the review of the Queensland consent laws and excuse of mistake of fact in relation to rape and sexual assault cases. It is clear that the current Queensland laws pertaining to sexual assault and rape cases are not effective in advocating for victims of sexual assault or protecting the community from perpetrators of sexual violence. This is evidenced in the Prevent. Support. Believe. Queensland's Framework to address Sexual Violence¹ which states that 87% of women who experienced sexual assault by a male since the age of 15 did not report their most recent incident to police. Of the women who did report, only 27% reported their perpetrator was charged; even fewer reports result in conviction.

Sexual violence is a unique form of violence insofar as it relies on power and control. The culture of sexual violence that exists in our society is normalised by attitudes about gender and sexuality as well as 'rape myths'. The concept of rape myths is explored further in our submission.

Common rape myths include:

- Women and children lie about experience sexual violence;
- You can tell if a woman has been raped by how she behaved while being attacked and how she presents after experiencing sexual violence;

¹ Department of Child Safety, Youth and Women, Queensland Government (2019). Prevent. Support. Believe. Queensland's Framework to address Sexual Violence, p.6.

- Women provoke sexual violence by the way they act or dress;
- Rapists are pathological or insane;
- Rape only occurs between strangers in dark urban alleys.

This attitudes and beliefs must be considered when legislating to protect our community against sexual violence.

The following BRISSC service statistics (2019-2020) illustrate the gendered nature of sexual violence, as well challenge many common rape myths.

In 2019-2020:

- 12.73% of women accessing BRISSC were 19-24 years of age; 83.64% were 25 years and older. BRISSC is funded to provide services to women aged 15+.
- 66.36% of women identified as white/Caucasian. 7.48% identified as Aboriginal or Torres Strait Islander. 15.89% identified as Culturally or Linguistically Diverse.
- 70.79% of service-users were born in Australia.
- 82.73% of service-users preferred a women's only service.
- 72.22% of service-users experienced sexual violence as an adult; 55.56% experienced sexual violence as a child; 31.48 experienced Intimate Partner Sexual Violence; 13.89% experienced sexual harassment. These figures indicate the predominance of sexual violence throughout women's lives. It also highlights the relational nature of sexual violence insofar as sexual violence is most frequently perpetrated by a person known to the survivor.
- 65.74% of service-users have experienced more than one incident of sexual violence.
- 35.24% of service-users experienced sexual violence in the past year (1-52 weeks); 24.76% experienced sexual violence in the past 1-5 years; 8.57% experienced sexual violence in the past 6-10 years; 15.24% experienced sexual violence in the past 11-20 years; 8.57% experienced sexual violence in the past 21-30 years. This highlights the long-lasting impacts of sexual violence across a survivor's life-span.
- 47.66% of service-users had reported their experience of sexual violence to the police. 46.73% had not reported to police. This statistic is higher than average, indicative of the fact that 51.89% of BRISSC service-users are referred to us, many through the Redbourne system which links the Queensland Police to nearby support services. As stated earlier, Queensland's 'Prevent. Support. Believe' Framework to address Sexual Violence states that 87% of women who experienced sexual assault by a male since the age of 15 did not report their most recent incident to police.
- 68.63% of service-user experienced an incident of sexual violence perpetrated by 1 person; 13.73% survived 2 perpetrators; 7.84% survived 3 perpetrators; 1.96% survived 4 perpetrators; 2.94 survived 5+ perpetrators.
- 99.03% of service-users experienced sexual violence perpetrated by a male. Again, this critically illustrates the gendered nature of sexual violence.
- 77% of service-users indicated the perpetrator was known to them. The most common perpetrators included; intimate partners, family members (grandfather, father, step-father,

brother), friend (co-worker, acquaintance). This highlights how relationships are used by perpetrators to gain and exploit a victim's trust.

Given these statistics and the unique circumstance and social norms that allow sexual violence to continue to be perpetrated at unprecedented rates, we believe there is a need to change the current laws on consent and mistake of fact (as it relates to sexual offences) in Queensland.

We submit that the following changes should be made to Queensland law:

1. Section 348 of the *Criminal Code 1899 (Qld)* should be amended to introduce the affirmative consent model into Queensland legislation that includes the concept of a 'voluntary agreement' between two parties.
2. Section 348 of the *Criminal Code 1899 (Qld)* should be amended to establish a comprehensive definition of consent that includes:
 - A non-exhaustive list of examples of scenarios where consent is not to be considered a voluntary agreement to assist with understanding by professionals in the system, including police and the community at large.
 - These examples be extended to include the following scenarios where consent is not a free and voluntary agreement;
 - a. Where the person is asleep or unconscious when any part of the sexual act occurs; where the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual act; where the person fails to use a condom as agreed or sabotages the condom; where the person agrees;
 - b. Where the person (victim) agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease; and,
 - c. Where the person consents to a sexual act under a mistaken belief induced by the other person that there will be a monetary exchange in relation to the sexual act.
3. A new and discrete mistake of fact defence should be included in Chapter 32 of the *Queensland Criminal Code 1899 (Qld)* that requires a defendant to prove that the defendant took reasonable steps to ascertain consent, that the defendant's mistaken belief was not due to self-induced intoxication, and they were not reckless as to whether or not the complainant consented before being able to rely on the defence.
4. That a history of domestic violence be expressly required to be considered in sexual violence offences, where it is relevant.

In addition:

5. We agree with amendments to make jury directions clear and understandable and not overly legalistic, confusing and technical.
6. We agree with the need for the *Criminal Code* to introduce a 'statement of objectives' or 'guiding principles', which the court should have regard to when interpreting sexual violence offences, and that attempts to counter 'rape myths'.
7. There should be an extensive community education campaign supporting the changes to the law that specifically includes professionals in the criminal justice system, including the police, and enhances their understanding of trauma to assist better responses.
8. A broader community awareness campaign should take place that, for example, informs the community about the legal changes, counters rape myths and victim blaming, and promotes respectful relationships.

Background

The definition of consent (s348 *Queensland Criminal Code*) and the current operation of mistake of fact (s24 *Queensland Criminal Code*) have significant negative impacts on the reporting, investigation, charge and prosecution of rape and sexual assault, and result in injustice to many sexual assault survivors.

Section 348 (Meaning of consent) and the operation of s24 (Mistake of fact) should be amended to better reflect the modern understanding of the circumstances and facts surrounding sexual assault and rape.

The current definition of consent for Chapter 32 offences does not adequately address all instances where consent may not be present and in our view this has led to injustices.

There is consistent research that shows traumatic events, particularly instances of sexual assault and rape, can elicit an involuntary 'freeze' or immobility response to fear which prevents the victim from physically or verbally resisting the attacker. Studies dating back to 1993 show a consistent reporting of a 'freeze' response in at least 37 percent of sexual assault and rape survivors who were surveyed.²

Another concern regarding the prosecution of Chapter 32 offences is that the general defence of mistake of fact (s24 *Criminal Code 1899 (Qld)*) is inadequate when applied to Chapter 32 offences. Currently, once mistake of fact is raised on the evidence, it is for the prosecution to negate the excuse, that is, to establish beyond reasonable doubt that the defendant did not have a mistaken belief or that if the defendant did, the belief was not honest or not reasonable. These are questions of fact for the jury to determine.³

Placing the onus of proof on the prosecution raises serious concerns because:

- the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the complainant;
- the defendant is in a better position than the prosecution to provide proof of whether they had an honest and reasonable belief there was consent;
- reversing the onus will lead to more clearly articulated claims of mistake of fact, which is fairer to all concerned including the jury;
- reversing the onus will enhance the capacity of the trial judge to prevent unmeritorious claims being raised such as stereotypes and myths regarding rape and sexual assault victims.

Based on these reasons there is a strong argument that the burden of proof should shift to the defendant.

² Jennifer Heidt, Brian Marx and John Forsyth, 'Tonic immobility and childhood sexual abuse: a preliminary report evaluating the sequela of rape-induced paralysis' *Behaviour Research and Therapy* (2005) 43(9): 1157-71; Grace Galliano, Linda Noble, Carol Puechl and Linda Travis, *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of Immobility Response and its Correlates* (Report March 1993) 107-114; Avigail Moor, Enav Ben-Meir, Dikla Golan Shapire and Moshe Farchi, 'Rape: A Trauma of Paralyzing Dehumanisation' *Journal of Aggression, Maltreatment and Trauma* (2013) 22(10): 1051-1069.

³ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Consultation Paper, December 2019) 43-44.

Although this raises concern regarding the presumption of innocence, such a reversal would not be unique to the *Criminal Code 1899 (Qld)*. In the case of reform of the provocation defence to a murder charge,⁴ similar concerns were determined to justify the reversal of the onus of proof.⁵

In addition, the current state of law in sections 348 and 24 of the *Criminal Code 1899 (Qld)* facilitates the perpetuation of stereotypes, myths and biases that influence decision making by police and prosecution services regarding investigation and charge and jury opinion on the presence of consent and mistake of fact.

Myths, biases, stereotypes and other issues

Rape myths can be defined as

*pervasive stereotypes that somehow shift the blame for the incident onto the complainant because of her actions such as drinking, voluntarily going somewhere alone with a man not well known to her, or being dressed or acting provocatively as in some way contributing to or even causing the offender's behaviour.*⁶

The most recent national survey of community attitudes towards violence against women found the prevalence of various preconceptions about sexual assault offending⁷, including:

- 42% of people agreed that it is 'common for sexual assault accusations to be used as a way of getting back at men'.⁸
- 31% agreed that 'a lot of the times women who say they were raped had led the man on then had regrets'.⁹
- 16% agreed that many of the allegations of sexual assault made by women are false.¹⁰
- 11% 'thought it likely that a woman who waited weeks or months to report sexual assault was lying'.¹¹
- 7% agreed that if 'a woman doesn't physically resist - even if protesting verbally - then it isn't really rape'.¹²

⁴ s269 *Criminal Code 1899 (Qld)*.

⁵ Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2010, 3.

⁶ Rebecca Scott, Heather Douglas, and Caitlin Goss, *Prosecution of Rape and Sexual Assault in Queensland: Report on a Pilot Study* (Report, February 2017) 4.

⁷ K Webster, K Diemer, N Honey, S Mannix, J Mickle, J Morgan, A Parkes, V Politoff, A Powell, J Stubbs and A Ward, *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research Report, March 2018) 1-185.

⁸ Webster & colleagues, 2018:48-50.

⁹ Webster & colleagues, 2018: 86.

¹⁰ Webster & colleagues, 2018:48-50.

¹¹ Webster & colleagues, 2018: 84.

¹² Webster & colleagues, 2018:48.

Case studies of how 'rape myths' impact on our clients:

Rape myths impact survivors access to justice in a variety of ways, including:

- Where police and/or others in the community do not believe the person because of delayed reporting.
- Where the person's credibility was undermined due delayed reporting.
- Where the person's credibility was undermined because their choice of clothing at the time of the incident.
- Where the person's credibility was undermined due to being intoxicated at the time of the incident.
- Where the person's reporting is considered to be an act of retaliation, revenge and/or regret
- Where the accused's account is favoured over the complainant's without clear reason.
- Where the absence of physical resistance and/or verbal resistance by the person is taken to be evidence of consent.
- Where the person's conduct prior to the event (such as flirtation and/or other sexual activity) is taken to be evidence of consent or undermines their credibility.
- Where the person's credibility was undermined because they were in or had been in a sexual relationship with the accused.

For example:**GY, rape survivor:**

In December 2019 I was raped by an acquaintance. We rented an apartment on the coast. I woke up to him forcing himself on me. I kept saying no, but he didn't listen. I was too weak to force him off, so I froze.

The next day I went to the Royal Brisbane Women's Hospital to have a forensic medical assessment done. I decided to report to police. I waited 4 weeks for the detective assigned to my case to return from holidays. When she finally returned we booked an appointment. The statement took 5 hours. Afterwards, I asked my detective what was going to happen. She said she didn't think the case would go any further. She said there wasn't enough evidence and it came down to the matter of 'he said, she said'. She told me that no one would believe I was raped if I willingly stayed in the same apartment with a male acquaintance overnight. My case hasn't gone any further.

I believe my case hasn't gone further because my detective interpreted my absence of physical resistance as evidence of consent. I believe my case has stalled because my conduct leading up to the rape (agreeing to stay with the perpetrator overnight) was taken as evidence of consent. Since then I haven't feel safe to work. I have a Master's Degree in Engineering. I haven't been able to earn any money. I am now homeless.

BR, sexual assault survivor, age 64

In August 2017, I was sexually assaulted by a physio-therapist. I went to the physio to get assistance for chronic pain in my lower back and hip. While lying on my back on the bench, the doctor inappropriately touched my genitals. It felt like he was enjoying himself at my expense. I felt shocked that this doctor had done this to me. I'm an older woman and it was difficult to move. This assault has made my chronic back pain worse. I couldn't sleep. I felt terrible and outraged.

The next day, I called the police and spoke to the officer at the police station. It felt very embarrassing to explain to the officer what had happened. I felt disgusted that a professional had taken advantage of an

elderly woman. The police officer asked for the details and that they would look into the complaint. The police said that it's difficult to prove situations like this.

There was no immediate follow up by the police. I wasn't asked to come and make a formal statement. I kept calling the police station to find out if they had spoken to the doctor and to know what had happened. Eventually, the police called me and said that they had to drop the case, not enough evidence. I believe that the police dropped my case because my credibility as an elderly woman is not as compelling as a healthcare practitioner. I believe the police dropped my case because they didn't believe anyone would assault an elderly woman.

Implementation of an Affirmative Consent Model

To address these issues surrounding the inadequacy of s348 and s24, an affirmative consent model which has been adopted by other common law jurisdictions should be implemented into the *Criminal Code*.

The affirmative consent model can be defined and characterised as:

- A knowing, voluntary, and mutual decision by all participants to engage in sexual activity which is maintained or re-affirmed at every stage of the activity.
- An acknowledgment that consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- That silence or lack of resistance, of itself, does not demonstrate consent.
- In simple terms, it is a clear and unequivocal 'yes' (through words or actions) and highlights that it is the responsibility of each person involved in the sexual activity to ensure the affirmative consent of the other to engage in the sexual activity.¹³

Proposed amendments to s348 (meaning of consent)

BRISSC believes that the definition of consent in s348 of the *Criminal Code 1899 (Qld)* needs to be amended. We believe that Queensland legislation regarding consent should reflect an affirmative consent model. Such a model would be more in line with modern understandings regarding expectations about sexual relations and the facts and circumstances surrounding rape and sexual assault.

Case studies of how definitions of 'positive consent' impact on our clients:

J.McMahon, childhood sexual abuse survivor, age 14 – 20:

I was lucky enough attend a support group facilitated by BRISSC that centred sex and intimacy for survivors. I learnt there about the positive consent. It totally realigned my idea of consent into a healthy positive view of what I can do with my body. I survived years of sexual abuse which started when I was a child and continued into young adulthood. My innate sense of consent was severely altered by these years of grooming and abuse, as was my self-worth, so that even though my age ticked over into adulthood, I felt that emotionally I was still a child and was incapable of expressing lack of consent as the abuse continued. I definitely was not consenting and my abuser knew this, as he had groomed me from a young age not to react. I did not have the skills, support or emotional ability at the time to stop the abuse.

¹³ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Consultation Paper, December 2019) [88] 21.

My ability to positively consent to intimate healthy sexual experiences, after my abuse had ended, was also severely impaired. It has only been through the experience of attending a group facilitated by BRISSC and practising a positive model of consent in safe spaces that I have learnt to start listening to my own body about what and how to consent appropriately and positively. I think it is absolutely imperative, especially for survivors of abuse, that everyone learns positive models of consent. Like me, they will then be able to engage positively in healthy sexual relationships which will lead to enriched, fulfilled lives. If everyone is taught about positive models of consent, then surely blurred lines would become clearer and perpetrators of sexual abuse would be more readily held to account for the lifelong damage they cause when they steal peoples' ability to express consent or lack thereof.

Inclusion of 'agreement'

We submit that consent should be defined as a 'free and voluntary agreement' in section 348 *Criminal Code 1899 (Qld)* to clarify that consent requires positive communication for consent to be present.

The 2018 proposal by the Canadian Senate¹⁴ to amend the Canadian *Criminal Code* and the *Department of Justice Act* through Bill C-51 should also be included in the proposed reformed s348 *Criminal Code 1899 (Qld)* for clarification of when the complainant cannot be found to have consented:

(b) the complainant is incapable of consenting to the activity in question for any reason, including, but not limited to, the fact that they are

(i) unable to understand the nature, circumstances, risks and consequences of the sexual activity in question,

(ii) unable to understand that they have the choice to engage in the sexual activity in question or not, or

(iii) unable to affirmatively express agreement to the sexual activity in question by words or by active conduct¹⁵

Inclusion of list of examples where consent is not present

We then propose that to provide further clarity and a comprehensive definition, a list of non-exhaustive examples of where consent is not present should be included. The kinds of examples we recommend are already found in the *Criminal Code 1899 (Qld)* and *Criminal Code 1924 (Tas)*.

This list of examples could be structured in a similar manner to the examples identified in section 8(5) of the *Domestic and Family Violence Protection Act 2012 (Qld)*.

A person does not freely and voluntarily agree to an act if the person –

(a) does not say or do anything to communicate consent; or

¹⁴ Senate of Canada, 'Bill to Amend – Third Reading – Motion in Amendment Adopted – Debate Continued' *1st Session, 42nd Parliament* (Web Page, 30 October 2018)

https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#33

¹⁵ Senate of Canada, 'Bill to Amend – Third Reading – Motion in Amendment Adopted – Debate Continued' *1st Session, 42nd Parliament* (Web Page, 30 October 2018)

https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#33

(b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or

(c) agrees or submits because of a threat of any kind against him or her or against another person; or

(d) agrees or submits because of intimidation; or

(e) agrees or submits because he or she or another person is unlawfully detained; or

(f) agrees or submits because he or she is overborne by the nature or position of another person; or

(g) agrees or submits because of the fraud of the accused about the nature or purpose of the act, or the accused's identity; or

(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or

Stealthing / contraceptive sabotage:

We submit, as considered on page 30 of the QLRC Consultation Paper, that an example (or sub-section) should be included in *s348 Criminal Code 1899 (Qld)* identifying that a *person does not freely agree to an act where the other person fails to use a condom as agreed or sabotages the condom.*

Harm or threats of harm to an animal:

We submit that a *person does not freely agree to an act if the person agrees or submits because of force, or a reasonable fear of force, to an animal;*

We note that the Victorian legislation (section 36(2) *Crimes Act 1958 (Vic)*) includes this example, but we believe the example involving an animal should be separated out from force of reasonable fear of force to another person.

Evidence provision

Drawing on the proposal by the Canadian Senate¹⁶ to amend the Canadian *Criminal Code* and the *Department of Justice Act* through Bill C-51, we propose that the following provision should be included as a sub-section in a remodelled section *348 Criminal Code 1899 (Qld)*:

*for greater certainty, capacity to consent at the time of the sexual activity that forms the subject-matter of the charge cannot be inferred from evidence on capacity to consent at the time of another sexual activity.*¹⁷

Withdrawal of consent

¹⁶ Senate of Canada, 'Bill to Amend – Third Reading – Motion in Amendment Adopted – Debate Continued' *1st Session, 42nd Parliament* (Web Page, 30 October 2018)

<https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#33>

¹⁷ Senate of Canada, 12.

We propose that an express provision providing that consent can be withdrawn at any time should also be included as a sub-section of the proposed section 348 *Criminal Code 1899 (Qld)*. This would not be unique to Queensland and is already included in South Australian legislation.¹⁸

Application of consent definition to sexual assault

We propose that it is expressly legislated that the definition of consent found in the proposed section 348 is directly applicable to s352 (sexual assaults) and all other Chapter 32 offences.

Grievous bodily harm

We propose that a separate provision for when a person suffers grievous bodily harm as a result of or in connection with a Chapter 32 offence should be included. The s2A(3) of the *Criminal Code Act 1924 (Tas)* provides a model that we believe addresses the concern appropriately:

*(3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX [ie Chapter 32 Criminal Code 1899 (Qld)], suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.*¹⁹

Operation of the affirmative consent model in Tasmania

The case of *State of Tasmania v Mark Anthony Fox*²⁰ ('Fox') demonstrates how, in a case in the Tasmanian jurisdiction, consent was found not to be present even when the victim 'froze'. In Fox, the accused climbed into the victim's bed and had sexual intercourse with her. The complainant 'froze and did not say anything, except that during the sexual intercourse she made noises and moans of displeasure'. The court found there was no consent. Importantly, the court stated that the accused was 'indifferent as to whether she [the complainant] consented or not'. This case presents a good example of the affirmative consent model in action as the absence of the victim's positive affirmation of consent resulted in there being no consent found.

In *State of Tasmania v Arvind Ravinesh Prasad*²¹ ('Prasad'), the complainant had pretended to be asleep while the accused raped her from behind. The judge held that there was no consent 'because of the law, since 2004, that a person does not consent to an act unless she says or does something to communicate consent'. This demonstrates an interpretation of the *Criminal Code Act 1924 (Tas)* that is in line with the intentions of introducing an affirmative consent model.

¹⁸ s47 *Criminal Law Consolidation Act 1935 (SA)*

¹⁹ s2A(3) *Criminal Code Act 1924 (Tas)*

²⁰ Porter J, 'State of Tasmania v Mark Anthony Fox', *Supreme Court of Tasmania Sentences 2008* – (Sentence, 10 June 2010) <http://catalogues.lawlibrary.tas.gov.au/dbtw-wpd/exec/dbtwpub.dll?AC=GET_RECORD&XC=dbtw-wpd/exec/dbtwpub.dll&BU=http%3A%2F%2Fcatalogues.lawlibrary.tas.gov.au%2Ftextbase%2FSentSearch.htm&GI=&TN=TasSent&SN=AUTO7497&SE=1849&RN=39&MR=20&TR=0&TX=1000&ES=0&XP=&RF=SentResult1&EF=&DF=SentResult2&RL=1&EL=1&DL=1&NP=3&ID=&MF=&DT=&ST=0&IR=966&NR=0&NB=23&SV=0&SS=0&BG=&FG=&QS=SentSearch>.

²¹ Crawford CJ, 'State of Tasmania v Arvind Ravinesh Prasad', *Supreme Court of Tasmania Sentences 2008* – (Sentence, 22 July 2009) <http://catalogues.lawlibrary.tas.gov.au/dbtw-wpd/exec/dbtwpub.dll?AC=GET_RECORD&XC=dbtw-wpd/exec/dbtwpub.dll&BU=http%3A%2F%2Fcatalogues.lawlibrary.tas.gov.au%2Ftextbase%2FSentSearch.htm&GI=&TN=TasSent&SN=AUTO7497&SE=1849&RN=32&MR=20&TR=0&TX=1000&ES=0&XP=&RF=SentResult1&EF=&DF=SentResult2&RL=1&EL=1&DL=1&NP=3&ID=&MF=&DT=&ST=0&IR=651&NR=0&NB=13&SV=0&SS=0&BG=&FG=&QS=SentSearch>.

In *TGW v Tasmania* ('TGW'), the accused placed the complainant's penis in his mouth and sucked it without his consent.²² The complainant was found not to have consented even though there was no physical force or threat.²³ The complainant reluctantly but willingly went over to the bed after being coaxed by the accused to do so.²⁴ Even though the judge commented that the complainant 'could simply have declined and walked out the door without impediment' this did not prevent a finding, by the jury, that there was a lack of consent.²⁵

Concerns regarding current affirmative consent models:

1. Erroneous interpretations of the legislation by judges

Some concerns have been raised in academic analysis regarding the effectiveness of the implementation of the affirmative consent model introduced in Tasmania in 2004. One of the more serious issues is that the interpretation of these reforms falls short of creating the intended new affirmative model of consent, instead continuing to operate as an extension of the existing law. For example, Cockburn analysed several cases that applied the post-2004 reforms. She identified instances where courts have constructed the meaning of s 2A(2)(a) differently to parliament's intention, finding that in some cases judges found that "the absence of positive signs of consent does not negate consent".²⁶ She points out that this fails to meet the standard of affirmative communication and positive consent notions, thus enabling existing and problematic constructions of consent to remain unchanged.

2. Failure of Tasmanian legislation to refocus attention on the defendants behaviour and the positive steps they took to ascertain whether there was consent

An additional area of concern identified by Cockburn is the focus on the complainant's behaviour, and lack of emphasis placed on what positive steps the defendant took to ascertain consent, during cross-examination and other stages of the pre-trial and trial process.²⁷ There is a concern that such a form of cross-examination focuses on stereotypes about what is 'appropriate female behaviour and typical victim responses to sexual assault'.²⁸ She argues that there needs to be a more holistic approach to determining affirmative consent, thus shifting the focus of inquiry onto the defendant particularly during the trial process, in order to make the 2004 reforms operate effectively.²⁹

Proposed amendment to include a new discrete defence of mistake of fact for rape and sexual assault and other Chapter 32 offences

Separate defence for mistake of fact in relation to rape and sexual assault and other Chapter 32 (Criminal Code 1899 (Qld)) offences

²² *TGW v Tasmania* [2017] TASCCA 10, 4 [10].

²³ *Ibid* 6 [24].

²⁴ *Ibid* 6 [23].

²⁵ *Ibid* 6 [24].

²⁶ Helen Mary Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, June 2012) 157.

²⁷ *Ibid* 142, 145.

²⁸ *Ibid* 9.

²⁹ *Ibid* 143.

We propose and support the introduction of a separate and unique mistake of fact provision for Chapter 32 offences. This change will address problems highlighted above in relation to how the current onus is unsuitable in relations to Chapter 32 offences. Additionally, it will further strengthen the presence of the affirmative consent model in Queensland's legislation.

Section 14A in the *Criminal Code Act 1924* (Tas) (mistake as to consent in certain sexual offences) is the recommended form for such a provision.

14A. Mistake as to consent in certain sexual offences

(1) In proceedings for an offence against section 124, 125B, 127 or 185, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) 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 to the act.

Introduction of reverse onus of proof

We propose that the onus of proof should be reversed, for mistake of fact relating to rape, sexual assault, and other chapter 32 offences, meaning that the defendant must prove that they held an honest and reasonable, but mistaken belief that the complainant was consenting. Mistake of fact currently requires the prosecution to disprove, beyond reasonable doubt, that the mistaken belief held by the defendant was honest and reasonable.³⁰ As outlined above, the defendant is in a better position to prove they held an honest and reasonable, but mistaken belief for similar reasons outlined in the explanatory notes amending provocation (s 304).³¹ Further, by reversing the onus of proof, the perpetuation of stereotypes, myths and biases regarding sexual offences may be lessened, leading to fairer and more just outcomes for rape and sexual assault survivors.

Objective test for what constitutes reasonable in determining whether there was an honest and reasonable belief of consent

We are concerned about the current interpretation of 'reasonable' in the context of the mistake defence under section 24 *Criminal Code 1899* (Qld). Currently, what is 'reasonable' is not a purely objective assessment in the sense of what a 'theoretical ordinary, reasonable person would or should' have done.³² Rather, the personal circumstances of the defendant must be considered, with the understanding that the defendant's belief cannot be assessed separately from the relevant information on which it was based.³³

³⁰ *R v Lafaele* [2018] QCA 42, [40-41] (North J) referring to *Loveday v Ayre and Ayre: Ex parte Ayre* [1995] St R Qd 264, 267-68.

³¹ Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2010, 3.

³² *R v Wilson* [2009] 1 Qd 476, 482 [20] (McMurdo P).

³³ *R v Mrzljak* [2004] QCA 420 [90] (Holmes J).

This interpretation may enable unjust outcomes for rape and sexual assault survivors, and contribute to the stereotypes and myths about rape and sexual assault. A purely objective approach may be considered more appropriate for a mistake of fact defence developed specifically for operation with Chapter 32 *Criminal Code 1899 (Qld)* offences.

It is noted, however, that a theoretically objective test may also have unintended consequences on particularly vulnerable classes of defendants such as those with intellectual impairments. However this concern may be mitigated by introducing a new form of the mistake of fact defence as suggested above, for application to Chapter 32 offences, including the reverse onus of proof and the requirements for the defendant to show they took 'reasonable steps' to ascertain consent, was not reckless when ascertaining consent, and was not making the mistaken belief based on self-induced intoxication.

Other matters

Guiding principles

We recommend that Chapter 32 should also include guiding principles to assist in interpreting the legislation and in discouraging the perpetuation of rape myths and stereotypes. A good example of guiding principles can be found at page 71 of the QLRC Consultation Paper. Specifically, the Consultation Paper refers to the guidelines suggested by reviews undertaken by the Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC) in their Joint Report on Family Violence in 2010 and the Victorian Law Reform Commission. We think this is a good approach and should be included at the beginning of Chapter 32.

Education and awareness

BRISSC believe that any change to legislation in regards to consent and the mistake of fact defence necessitates extensive awareness raising and community education. The aim of such proposed reforms is creating cultural change to minimise sexual violence and promote healthy, consensual relationships.

We thank you for the opportunity to make this submission.

Yours sincerely,
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