Brisbane Rape & Incest Survivors Support Centre
15 Morrisey Street, Woolloongabba Q 4102 Admin: 07 3391 2573
Support Line: 07 3391 0004 Fax: 07 3391 4735
Email: admin@brissc.org.au Website: www.brissc.org.au
ABN 43 009 935 488

23rd September 2020

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Mr Peter Russo MP, Chair, Legal Affairs and Community Safety Committee.

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

BRISSC 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. BRISSCs 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 Recommendations

BRISSC believes that the opportunity has been missed to broadly assess the operation and practical application of current legislation that would improve the safety of women, encourage them to report to police and engage with the criminal justice system. Furthermore, that the recommendations do not address the failings of legislation and the criminal justice system that were actively raised in submissions from women's services and in consultation with victim/survivors and advocates.

BRISSC aligns with the Queensland Sexual Assault Network (QSAN) Women's Legal Service Queensland (WLSQ) and Rape and Sexual Assault Research and Advocacy's (RASARA) recommendations for amending the QLRC's draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020. ***(Amendment to the draft Bill are in bold italics.)***

We propose:

1. **THAT ANY REFORM MAKES QUEENSLAND SAFER FOR THE VICTIMS OF SEXUAL AND DOMESTIC VIOLENCE AND HOLDS OFFENDERS ACCOUNTABLE**

2. **THAT THE PASSAGE OF THE BILL BE SLOWED/HALTED TO ALLOW TIME TO UNDERTAKE A BROADER REVIEW**

3. **THAT A BROAD-BASED REVIEW BE UNDERTAKEN**
   That this broad-based review positions the experiences of victim/survivors of sexual violence at the centre, from barriers to reporting, the process of reporting to police, attrition through the criminal justice system through to trial.

4. **THAT AN AFFIRMATIVE MODEL OF CONSENT IS ADOPTED**
   Amendment of s 348 (Meaning of *consent*)

   Section 348 –

   Insert-

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

   (4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.

   [Note: This amendment would strengthen the QLRC's recommendation to clarify that a person does not consent where they do nothing to indicate consent. This would adopt the current legal position in Victoria. The QLRC's current recommendation leaves it open that passivity can amount to consent in some cases.]

5. **THAT SPECIFIC PROVISIONS ARE INTRODUCED TO TAKE INTO ACCOUNT CONSENT IN THE CONTEXT OF DOMESTIC VIOLENCE**

6. THAT MISTAKE OF FACT IS FURTHER CLARIFIED

Insertion of new s348A

After section 348—

insert—

Section 348A Mistake of fact in relation to consent

(1) This section applies for deciding whether, for section 24, a person charged with an offence under this chapter did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.

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

(3) In deciding whether a belief of the person was honest and reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance

[Note: This amendment would strengthen the QLRC's recommendation in two ways. First, it would impose a reasonable steps requirement on the mistake of fact excuse, as in Tasmania. Second, it would state that a defendant's drunkenness cannot be used to establish either the honesty or the reasonableness of a mistaken belief in consent.]

7. THAT GUIDING PRINCIPLES ARE INCLUDED

Insertion of Guiding Principles into Chapter 32

That Chapter 32 of the Criminal Code 1899 (Qld) include guiding principles to assist in interpreting the legislation and in discouraging the perpetuation of rape myths and stereotypes. BRISSC believes the guidelines suggested by 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 are best practice examples.

Discussion of concerns and analysis of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill

BRISSC offers the following critique of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill:

Response to Clause 8 - Amendment of s 348 (Meaning of *consent*) – subsection 3

Section 348

(3) *A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.*

a) Passivity may amount to consent

The Bill rejected the proposal that Queensland law reflect that of Victoria and Tasmania, where there is no consent when a person 'does not say or do anything to communicate consent to the act'.[1] By the introduction of the word 'only' the Bill allows, in some circumstances, for passivity to amount to consent.

This is problematic as the recent Queensland Law Reform Commission (QLRC) *Review of consent laws and the excuse of mistake of fact* (Review) acknowledges that victims may 'freeze' in traumatic situations such as sexual assault and rape, preventing them from being able to verbally communicate or physically resist.[2] The QLRC presents research demonstrating 37 percent of sexual assault and rape survivors surveyed reported a 'freeze' response.[3]

b) Does not protect victims who are sexually assaulted and raped by someone they know

The reasoning that was given by the QLRC for not recommending a definition of consent similar to Tasmania and Victoria (as above) in the Bill was due to the

[1] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020), 94 [5.90].
[2] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020), 67 [4.87].
[3] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 93 [5.85], discussing J Heidt, B Marx and J Forsyth, 'Tonic immobility and childhood sexual abuse: a preliminary report evaluating the sequela of rape-induced paralysis' (2005) 43(9) Behaviour Research and Therapy 1157; G Galliano et al, 'Victim reactions during rape/sexual assault: a preliminary study of immobility response and its correlates' (1993) 8(1) Journal of Interpersonal Violence 109; A Moor et al, 'Rape: A Trauma of Paralysing Dehumanisiation' (2013) 22(10) Journal of Aggression, Maltreatment and Trauma 1051.

possibility that it would not allow the context of the relationship between the two parties to be considered in determining whether there was consent.[4]

In 77 percent of cases the perpetrator was known to the victim and 31.48 percent of victims experienced sexual violence at the hands of an intimate partner.[5] The QLRC's emphasis on the context of a relationship between parties in determining the presence of consent may fail to protect the overwhelming number of victims who are raped by someone they know, such as existing sexual partners.

Response to Clause 8 - Amendment of s 348 (Meaning of *consent*) – subsection 4

Section 348

> **(4)** *If an act is done or continues after consent to the one act is withdrawn by words or conduct, then the act is done or continues without consent.*

a) Puts the onus on the victim to withdraw consent even when the sexual encounter changes in nature such as becoming violent

The amendment puts the onus on the victim to withdraw consent after the sexual encounter has begun consensually. This is particularly problematic when the sexual encounter changes in nature, for example if it becomes violent or where the condom is removed without the consent of the other person. In this situation, the victim may be exposed to sexually transmitted diseases and infections or pregnancy. Instead the defendant should ensure consent is given before changing the nature of the sexual encounter.

Under the affirmative consent model consent needs to be maintained or reaffirmed at every stage of the activity.[6] This would require that permission needs to be sought when the other party wishes to change the nature of the sexual act. The Bill fails to reflect this.

---

[4] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020), 94 [5.90].
[5] Brisbane Rape and Incest Survivors Support Centre to Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (6 February 2020), 4.
[6] Ibid 80 [5.13].

Response to Clause 9 – Insertion of new s 348A (Mistake of Fact) – subsection 2

Section 348A

> **(2)** *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 to the act.*

a) Not requiring the defendant to take reasonable and positive steps to ensure the other person is consenting

The amendment of s348A falls significantly short of requiring defendants to show they took positive steps to ascertain consent - a requirement which currently exists in Tasmania.[7] Furthermore, under s348A (2), defendants could identify **any** words or actions they used to determine consent, **no matter how unreasonable,** to support their defence of mistake of fact.

Under common law, a representation of consent may be made by "remaining silent and doing nothing", particularly when "evaluated against a pattern of past behaviour".[8] This problematic rule is also reflected in the current operation of mistake of fact, where the factual issue about whether the accused believed the complainant had freely and voluntarily given consent can be proven by "an omission to act" in some circumstances.[9] This is particularly concerning as there is no requirement that the defendant take any reasonable and positive steps to ensure consent, and consent itself can be established by remaining silent, thus discounting the above evidence regarding the common 'freeze response' experienced by victims.

Under s348A (2) juries ***may*** consider the words and conduct the defendant used to determine whether the other person was consenting.

To better improve the law surrounding Mistake of Fact, we propose that s 348A should be amended to include:

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

---

[7] *Criminal Code Act 1924* (Tas) s 14A.

[8] R v Makary [2018] QCA 258, 273 [50] (Sofronoff P); Demagogue Pty Ltd v Ramensky (1992) 39FCR 31 at 32; Hardman v Booth (1863) 1 H & C 803.

[9] R v Makary [2018] QCA 258, 273 [54] (Sofronoff P).

Response to Clause 9 – Insertion of new s 348A (Mistake of Fact) – subsection 3

Section 348A

> **(3)** *In deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.*

a) Amendment is weak without inclusion of reasonable steps requirement

s 348A (3) clarifies that a defendant cannot rely on their voluntary intoxication to argue a mistake about consent was reasonable.[10] This recommendation should be accepted however would be strengthened by the inclusion of the reasonable steps requirement as seen above.

Response to the failure of the Bill to introduce guiding principles that counteract rape myths and false preconceptions

The Bill has failed to introduce guiding principles, the objective of which was to counter myths and false preconception surrounding rape. The Victorian Government's guiding principles found in s 37B of the *Crimes Act 1958* (Vic) include statements such as that 'sexual offenders are commonly known to their victims'.[11]

The QLRC Report that influenced the amendments within the Bill, has cherry picked and minimised data regarding the high prevalence of rape myths and stereotypes held by the Australian public therefore incorrectly dismissing the need for guiding principles. Even though the QLRC themselves reported that:

- 31% agreed that "'a lot of the time women who say they were raped had led the man on and then had regrets'";[12]
- 42% agreed that it is "'common for sexual assault accusations to be used as a way of getting back at men'"[13]

---

[10] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 201.

[11] *Crimes Act 1958* (Vic) s 37B(d).

[12] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 quoting Kim Webster et al, Australians' attitudes to violence against women and gender equality (Report, 2018) 7.

[13] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 citing Kim Webster et al, Australians' attitudes to violence against women and gender equality (Report, 2018) 12.

- 1 in 3 Australians are unaware that a woman is more likely to be sexually assaulted by someone she knows, than by a stranger[14]

The QLRC summary of the data stated that the data suggests that false preconceptions about rape are 'low and is in decline'. This is a misleading claim as the decline is not linear and there remains a concerning number of Australian people who believe in 'rape myths'.[15]

The Review also failed to mention that in the same report they drew data from it was reported that

- '33% of Australians believe that 'rape results from men being unable to control their need for sex',[16] and
- '28% believe that, when sexually aroused, 'men may be unaware a woman does not want to have sex.'[17]

The QLRC, was correct in finding that there is insufficient research to determine what impact false preconceptions have on jury members. However, guiding principles are important for influencing persons at every stage of the justice system, from the police decision to investigate and charge, to the ODPP decision to prosecute as well as at trial.

In addition, in a 2002 study within Queensland it was found that convictions by a jury were more likely when the defendant and complainant were strangers and less likely when they had a prior relationship.[18] This underlying assumption is troublesome considering that as mentioned above '1 in 3 Australians are unaware that a woman is more likely to be sexually assaulted by someone she knows, than by a stranger'.[19] The QLRC Report did not mention this study.

To support the argument that jurors are not heavily influenced by false preconceptions on rape and sexual assault the QLRC Report relied on unpublished opinions of jurors in England, Wales and Northern Ireland.[20] The Report therefore relied on non peer reviewed evidence of attitudes and beliefs of individuals outside of Australia and

---

[14] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 citing Kim Webster et al, Australians' attitudes to violence against women and gender equality (Report, 2018) 6.

[15] Rape & Sexual Assault Research & Advocacy 'Breaking: Queensland Law Reform Commission fails to make substantive recommendations to improve rape law', (Blog Post, 2020) < https://rasara.org/qlrc>.

[16] Kim Webster et al, Australians' attitudes to violence against women and gender equality (Report, 2018) 89.

[17] Ibid.

[18] Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) (14) *Women Against Violence: An Australian Feminist Journal* 14, 19.

[19] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 citing Kim Webster et al, Australians' attitudes to violence against women and gender equality (Report, 2018) 6.

[20] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 207.

ignored research conducted within Queensland itself. Therefore, the research which influenced the Bill is insufficient.

Conclusions

The Bill, in its current form, makes no significant changes towards seeking justice for survivors of sexual violence, holding perpetrators account for their actions or increase safety for the Queensland community. Furthermore, the recommendations on which the Bill is based, do not reflect the views of survivors or survivor advocates. BRISSC calls for a broad-based review of the experience of survivors following sexual assault. This review should examine the barriers to reporting, the process of reporting to police, attrition through the criminal justice system through to trial and the court outcomes. This review should prioritise and highlight the views and voices of survivors and survivor advocates. BRISSC requests that the Bill, in its current form, to be repealed and rewritten utilising the outcomes of a broad-based review.

Yours sincerely,

Kendra Russell
On Behalf of the BRISSC Collective

BRISSC would like to thank Lucy Noble-Dickinson (UQ Pro Bono) and Rachael Blackman (UQ Pro Bono) for their assistance with preparing this submission.