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Recommended citation(APA):

Goldsworthy, T. (2020, Jan 31). Submission to the Queensland Law Reform Commission's review of "Queensland's laws relating to consent and the excuse of mistake of fact". Manuscript submitted for publication. Queensland Law Reform Commission.

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31 January 2020

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Submission¹ to the Queensland Law Reform Commission’s review of “Queensland’s laws relating to consent and the excuse of mistake of fact”, by Associate Professor Terry Goldsworthy².

INTRODUCTION

The Queensland Government has asked the Queensland Law Reform Commission (QLRC) to examine the operation of Queensland's existing laws regarding consent and the defence of mistake of fact as they apply to rape and sexual assaults. This follows a string of decisions in which defendants successfully relied upon the defence to convince a jury that there was a reasonable doubt that the defendant thought they had consent to perform the sexual act. This submission shall address the series of issues raised in the consultation paper released by the QLRC.

ISSUES THAT LED TO THE REFERRAL TO THE QLRC

There has been much public and media discourse and concern regarding the use of Section 24, mistake of fact, as a defence in sexual assault matters. Such public concern follows on a number of high-profile decisions in which the defendant successfully relied upon the defence to convince a jury that there was a reasonable doubt that the defendant thought they had consent to perform the sexual act. The public debate was dubious of the facts used to successfully ground such defences.

Despite this we need to remember that in the matters that led to the referral, properly instructed juries were not convinced beyond a reasonable doubt that there was not a mistake of fact in the matters before them. This is a corner stone of our justice system that must remain. However, we must accept that the reporting of the facts of these matters has created something of a public

¹ I make this submission with a view to examining the existing legislation referred to, and considering potential problems of such. Specifically, I examine Sections 24 “mistake of fact” and section 348 “consent” of the Criminal Code 1899 (Qld). I stress that, throughout this submission, the views expressed are those of the author; they do not necessarily reflect the opinions of my employer, Bond University.

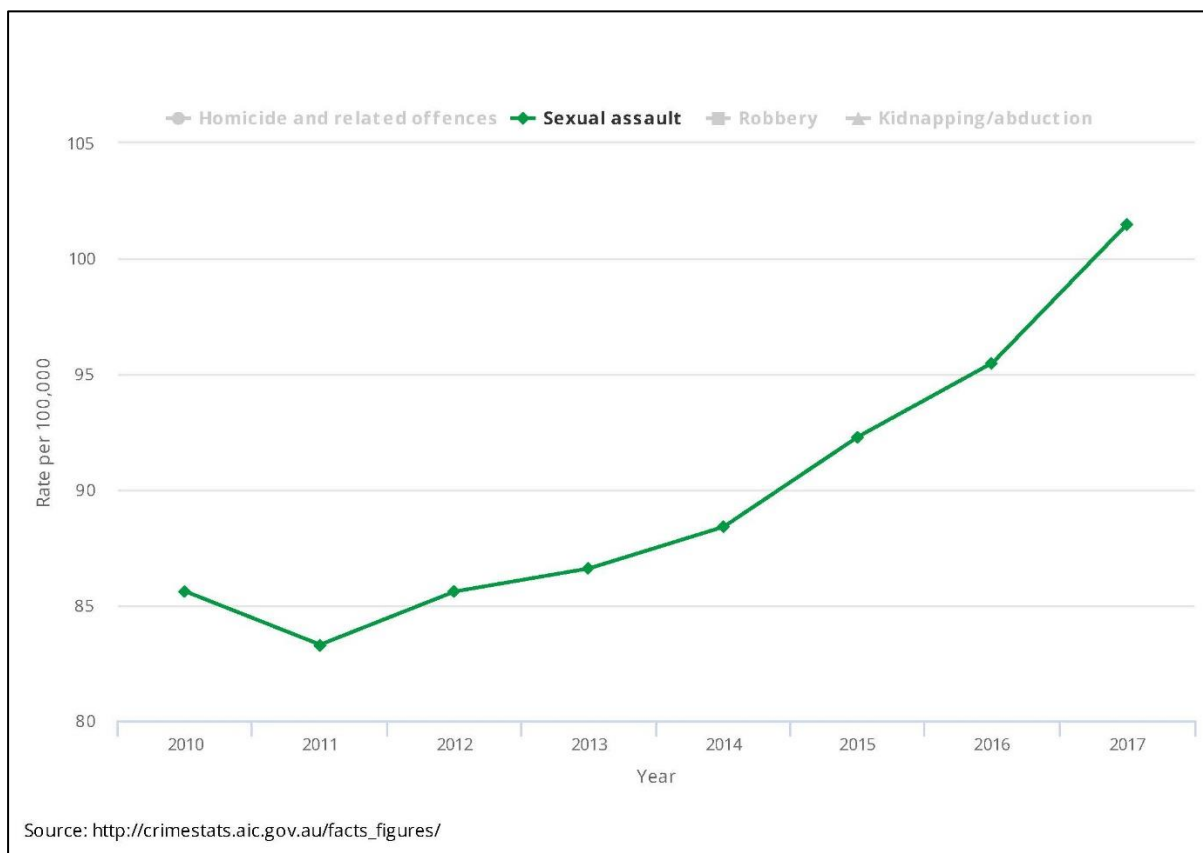
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perception that the defence of Section 24 is being misused. This may be the case or not. The issue of sufficiency of evidence with which to rely on the defence is in reality what the legal system is designed to test. There needs to be sufficient evidence before a jury to decide to accept or reject such claims in regard to criminal responsibility, with the burden of proof being beyond a reasonable doubt. In the cases cited in the media the jury's decisions were subject to critique, yet the jury are the ones who heard the totality of evidence, and where satisfied that Section 24 applied in each particular case.

Despite this, perceptions and public concerns remain. One particular theme that seems to make itself present in the public debate is the confusion over what is consent, and the extent to which someone can reasonably believe that they have consent, despite having no positive verbal agreement or an exceedingly clear or obvious non-verbal indication of agreement. Here lies the crux of the matter. The issue of consent is blurry and opaque, in reality it should be clear and easily discernible.

THE EXTENT OF THE SEXUAL ASSAULT PROBLEM

The Australian Bureau of Statistics (ABS) defines sexual assault as an act of a sexual nature carried out against a person's will or without a person's consent. It involves physical contact and/or the use of physical force, intimidation or coercion (Australian Bureau of Statistics, 2017, p. 1). The Australian Institute of Criminology (AIC) indicates that the rate of sexual assault recorded by police in Australia has increased steadily since 2011, with the rate of 83.3 per 100,000 increasing to 101.5 per 100,000 in 2017 (Australian Institute of Criminology, 2020, p. 1).



Data from the ABS shows that in 2018 there were 4849 sexual assaults in Queensland (Australian Bureau of Statistics, 2019). In 72.5% of matters the offender was known to the

victim. Females accounted for 85% of victims in sexual assault matters in Queensland for 2018 according to the ABS data. Eight five per cent of females assaulted were under the age of 34 years. According to ABS figures from 2015–16, only some 30% of sexual assault matters were reported to police (Australian Bureau of Statistics, 2017, p. 1). This is an issue with a clear focus on women as victims and affecting young people.

Victims of sexual assault, Queensland, females by age group 2014-2018	Total				
	2014	2015	2016	2017	2018
Sex and age					
Females					
0–9 years	409	459	366	448	458
10–14 years	941	891	949	930	942
15–19 years	871	967	942	1,058	1,124
20–24 years	333	329	399	444	454
25–34 years	348	392	418	531	523
35–44 years	230	220	249	267	324
45 years and over	176	176	236	269	300
Total	3,325	3,453	3,570	3,954	4,136

As a former senior detective, I saw these matters often reduced to a battle of credibility between the accused and the accuser. Where the victim and offender are known to each other the sexual act is often not in dispute, the context is. This is where the issue of consent becomes crucial. In acquaintance sexual assaults, consent becomes a central evidentiary element required to be proven.

WE NEED TO MAKE THE ISSUE OF CONSENT CLEAR

The rise of the #MeToo and #Time’s Up movements have put an unprecedented focus on the issue of what is acceptable sexual behaviour. An explosion of high-profile allegations in the Hollywood movie industry and in the Australian theatre scene have only added to the public concern around non-consensual sexual activity. With this society’s acceptance of what constitutes consent is changing. There is now pressure to move away from consent that can be implied or inferred, to a pure affirmation model, where only yes means yes.

In Australian jurisdictions, including Queensland, consent is generally held to include agreement given by someone when it is free and voluntary. The definitions of consent generally do not outline the manner or way such agreements need to be formulated. Rather, they go to the context of how the consent is given, and the ability of someone to give consent. Consent in Queensland is defined in Section 348, of the Queensland Criminal Code.

*“Consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
 A person’s consent to an act is not freely and voluntarily given if it is obtained
 (a) by force; or
 (b) by threat or intimidation; or
 (c) by fear of bodily harm; or
 (d) by exercise of authority; or
 (e) by false and fraudulent representations about the nature or purpose of the act; or*

(f) by a mistaken belief induced by the accused person that the accused person was the persons sexual partner.”

Tasmania and Victoria are exceptions in that consent can be held to mean that a person does not freely agree to a sexual act if the person does not say or do anything to communicate consent. A precis of consent by jurisdiction is contained in the below table.

State	Act	Meaning of Consent
ACT	Section 67, Crimes Act 1900 ACT	Does not define consent but provides a list of circumstances in which consent can be deemed to be negated. ... the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused— (a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or ...etc to section (j)
NT	Section 192Criminal Code Act (NT)	Consent means free and voluntary agreement. Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where: (a) the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person; (b) the person submits because he or she is unlawfully detained; (c) the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing; (d) the person is incapable of understanding the sexual nature of the act; (e) the person is mistaken about the sexual nature of the act or the identity of the other person; (f) the person mistakenly believes that the act is for medical or hygienic purposes; or (g) the person submits because of a false representation as to the nature or purpose of the act.
NSW	Section 61HA, Crimes Act 1900.	A person "consents" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse. A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if: (a) the person knows that the other person does not consent to the sexual intercourse, or (b) the person is reckless as to whether the other person consents to the sexual intercourse, or (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.
TAS	Schedule 1, Criminal Code Act 1924	In the Code, unless the contrary intention appears, "consent" means free agreement. Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person – (a) does not say or do anything to communicate consent; or (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 he or she or another person is unlawfully detained; or (e) agrees or submits because he or she is overborne by the nature or position of another person; or (f) agrees or submits because of the fraud of the accused; or (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; 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 (i) is unable to understand the nature of the act.
VIC	Section 36, Crimes Act 1858	Consent for the purposes of Subdivisions (8A) to (8E), consent means free agreement. (2) Circumstances in which a person does not consent to an act include, but are not limited to, the following— (a) the person submits to the act because of force or the fear of force, whether to that person or someone else; (b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal; (c) the person submits to the act because the person is unlawfully detained; (d) the person is asleep or unconscious; (e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act; (f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;
WA	Section 319 (2), Criminal Code 1913	Consent means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means

There are problems with the consent model that relies on a victim actively saying no, or a negative denial of consent. The Queensland Court of Appeal³ has noted:

A complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it. Failing to do so may, however, depending on the circumstances ... provide a basis for exemption from criminal responsibility under s.24 of the Criminal Code [mistake of fact].

The above logic places the responsibility back on the victim to say no, as failure to do so may aid an accused. This should simply no longer be the case given the shifts that we have seen in the expectation of society when it comes to the issue of consent in sexual matters. Relying on a negative denial of consent only aids to confusion around the sexual interaction and its lawfulness. Rather, any party seeking to engage in a sexual act should seek and obtain positive approval from the other party. There is much more clarity of consent in such instances.

The *UK Sexual Offences Act* Section 74 defines consent as 'if he agrees by choice, and has the freedom and capacity to make that choice'. The Crown Prosecutor Service outlines that prosecutors should consider the issue of consent in two stages. They are:

Whether a complainant had the capacity (i.e. the age and understanding) to make a choice about whether or not to take part in the sexual activity at the time in question.

Whether he or she was in a position to make that choice freely, and was not constrained in any way. Assuming that the complainant had both the freedom and capacity to consent, the crucial question is whether the complainant agrees to the activity by choice. (Crown Prosecutor Service, 2020, p. 1)

There is no mention of the form the agreement should take. The United Nations Handbook for Legislation on Violence against Women states that consent requires:

the existence of 'unequivocal and voluntary agreement' and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting. (United Nations, 2009, p. 26)

THE AFFIRMATION MODEL OF CONSENT

Rather than removing mistake of fact as a criminal defence we need to revisit what consent is and how we obtain it. I am talking here about the affirmation model of consent.

As a university professor, I talk to students about sexual offences and issues around them, during these discussions we talk about the issue of consent. In classes, which are overwhelmingly female, I ask the question; how do you know you have consent for a sexual act? Such a question usually garners giggles and embarrassment and the answer "you just know". This answer is based on the assumption that certain non-verbal cues and non-voluntary physiological reactions equal to consent. The fact that a person who is interpreting such stimuli

³ *Queen v Shaw* [1995] QCA 045.

may be affected by drugs or alcohol makes such situations even more precarious, especially for young people.

This is where the affirmation model comes into play. In such a model you need to ask the other person if they are agreeable to the act. Essentially it relies on a positive agreement between the parties before sexual interaction can begin – in simple terms, a clear and unequivocal “yes” is required.

MAKING CONSENT COOL

When this is put to my students they laugh and say it would kill the moment, my response is why would you not want to ask? What could be the downside? The only downside is that the other party may say no. Some argue that such a requirement would remove the spontaneous nature of sexual interactions, this is not correct. Compounding this is the need to obtain consent for each act of sexual interaction, particularly if the nature of the act changes. The premise being to ask first and ask often.

While such a requirement may appear awkward, it can be turned into “enthusiastic consent” where it can be entwined with foreplay and turned into an integral part of a sexual encounter as partners banter back and forth, tease, and check in with each other on what they are (and aren’t) going to do.

When I ask my criminology students what consent in sexual assault matters means, few are able or willing to answer. Such questions are met with embarrassment and the inevitable answer is “you just know”. Of note is that my classes are overwhelming female. There are differences as to how males and females seek and interpret consent (Jozkowski & Peterson, 2013). A study of university students highlighted the below differences between genders in regards to how consent is obtained and when it is given (Jozkowski & Peterson, 2013).

How men say they get consent		When women say they indicate consent		
27%	Give a directive (<i>"We are going to have sex."</i>)	47%	Only after being asked by the man (<i>"I believe the male should always chase the female."</i>)	
22%	Ask if she wants to have sex			
14%	Use aggressive strategies (<i>"I would tell her, let's have sex! Before she could say anything, I would just take off her pants."</i>)			
13%	Pretend intercourse occurred by mistake (<i>"Start having sex and then say, oops, didn't mean for it to go in, so too late now."</i>)			
			How women say they give consent	How men interpret a woman's consent
		Body language	10%	61%
		Verbal cues	50%	9%
		Verbal and nonverbal	23%	22%
		Just let it happen or not say no	14%	6%

Source: University of Arkansas

Similar attitudes were found in 2017 Australian study into young Australians’ attitudes to violence against women and gender equality. The study noted:

There is also a high level of support among young people for attitudes suggesting a disregard for the need to gain consent in sexual matters. Almost one in five (18%) young Australians support the statement, 'Women find it flattering to be persistently pursued, even if they are not interested', with young men (24%) nearly twice as likely to agree than young women (13%). One in eight (12%) young people agree that 'Women often say 'no' when they mean 'yes'. (Politoff et al., 2019, p. 29)

Similar misconceptions about what is consent and what is rape were found in a survey conducted in the UK in 2018 with 3,922 participants.

A third (33%) of people in Britain think it isn't usually rape if a woman is pressured into having sex but there is no physical violence. A third of men think if a woman has flirted on a date it generally wouldn't count as rape, even if she hasn't explicitly consented to sex (compared with 21% of women). A third of men also believe a woman can't change her mind after sex has started. Almost a quarter (24%) think that sex without consent in long-term relationships is usually not rape. 'Stealthing': 40% think it is never or usually not rape to remove a condom without a partner's consent. (YouGov, 2018, p. 2)

These studies highlight that not only must we focus our efforts on educating on appropriate sexual behaviours, but we must also educate those most at risk as to what levels and forms of consent they should seek and are entitled to expect.

In the United States, the primary focus of affirmative consent is on how sexual assaults are handled in universities and colleges. California and a handful of other states, and hundreds of educational institutions, have now enacted affirmative consent laws and policies. The Californian law *SB-967 Student safety: sexual assault* Section one states:

"Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity

Under the Californian law a person must take reasonable steps, in the circumstances, to ascertain whether the other participant affirmatively consents. Tasmania does reference the fact that consent does not exist if the person "does not say or do anything to communicate consent". In other words, in the absence of positive affirmation there is no consent. Section 36A of the *Crimes Act 1958 (Vic)* outlines the following: "Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents".

WHERE TO FROM HERE?

What is clear is that we can no longer expect, nor accept, that victims need to say no, we need to set a standard where defendants must show that they had a definite yes. I would support the retention of Section 24 mistake of fact and its use in sexual assault matters provided the issue of consent is addressed. I would argue that the use of this section would be much less

problematic if the definition of consent in Queensland was modified to reflect an affirmation model of consent. A move to this type of model would leave little room for ambiguity around whether consent was sought or gained.



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