Submission to Queensland Parliament Legal Affairs and Community Safety Committee: Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

Rape & Sexual Assault Research & Advocacy (RASARA); Crowe, Jonathan; Burgin, Rachael; Lee, Bri; Mullins, Saxon

Rape & Sexual Assault Research & Advocacy

SWINBURNE UNIVERSITY OF TECHNOLOGY

BOND UNIVERSITY

FACULTY OF LAW

Bond University
Gold Coast, Queensland 4229
Australia

Phone: +61 7 5595 1111
Email: law@bond.edu.au

CRICOS Provider Code 00017B

Professor Jonathan Crowe
Phone: 07 5595 1291
Email: jcrowe@bond.edu.au

22 September 2020

SUBMISSION TO QUEENSLAND PARLIAMENT LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

CRIMINAL CODE (CONSENT AND MISTAKE OF FACT) AND OTHER LEGISLATION AMENDMENT BILL 2020

[1] This submission is authored by **Professor Jonathan Crowe**, **Dr Rachael Burgin, Ms Bri Lee** and **Ms Saxon Mullins** on behalf of **Rape and Sexual Assault Research and Advocacy (RASARA).** It is endorsed by RASARA's Board of Directors. Professor Crowe is Professor of Law at Bond University and Director of Research at RASARA. Dr Burgin is Lecturer in Law at Swinburne University of Technology and Chairperson of RASARA. Ms Lee is Copyright Agency Writer-in-Residence at University of Technology Sydney. Ms Mullins is Director of Advocacy at RASARA.

[2] RASARA is an independent, not-for-profit organisation established to develop an evidence base for addressing sexual violence across Australia and to advocate for best practice in community and legal responses to rape and sexual assault. RASARA's mission is to produce and amplify research that drives reform to the laws and systems that help prevent and respond to sexual violence. More information about RASARA is available at http://rasara.org.

Outline of submission

[3] This submission addresses Part 3 of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill). This Part amends the *Criminal Code* provisions dealing with sexual consent and mistake of fact.

[4] Part 3 of the Bill implements the recommendations of the Queensland Law Reform Commission (QLRC)'s *Review of Consent Laws and the Excuse of Mistake of Fact*.[1] The QLRC Report has been heavily criticised since its release by sexual violence survivors

[1] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf>.

and advocacy groups, including RASARA, Women's Legal Service Queensland and the Brisbane Rape and Incest Survivors Support Centre.

[5] This submission **proposes amendments** to Clauses 8 and 9 of the Bill. These amendments were jointly drafted by RASARA and Women's Legal Service Queensland (WLSQ). They represent a compromise position to address some of the most glaring problems in the current law.

[6] A letter writing campaign initiated by RASARA has resulted in **more than 1,065 letters** to date expressly endorsing our proposed amendments to the Bill. These letters were addressed to the Queensland Attorney-General and copied to both the Premier and the Minister for Women.

[7] Our core concerns with the Bill are threefold. First, the Bill **does not substantially change the current Queensland law** on rape and sexual assault. Second, the Bill **ignores serious problems with the current law** which our amendments would address. Third, the QLRC Report, and therefore the current Bill, **ignores survivors' perspectives,** including demands for more robust reforms.

Proposed amendments

[8] At a minimum, we recommend the following amendments to the Bill. ***Changes to the current Bill are in bold italics.***

Clause 8 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.

[Explanatory Note: This amendment would strengthen the Bill to clarify that a person <u>does not</u> consent where they do not say or do anything to indicate consent. This would adopt the current legal position in Victoria.[2] The current Bill leaves it open that passivity can amount to consent in some cases.]

[2] *Crimes Act 1958* (Vic) s 36(2)(l).

Clause 9 Insertion of new s 348A

After section 348—

insert—

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 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.

(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.

[Explanatory Note: This amendment would strengthen the Bill in two ways. First, it would impose a positive and reasonable steps requirement on the mistake of fact excuse. 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. Both these changes would adopt the current legal position in Tasmania.[3] The latter amendment also mirrors the current law in New South Wales and Victoria.[4]]

The Bill does not strengthen the law

[9] The current Bill follows the QLRC Report in making five technical changes to the *Criminal Code*. It has been claimed that the Bill will strengthen Queensland law to better protect survivors of sexual violence. This is inaccurate. The current Bill would make no significant difference to the existing law.

[10] Clauses 6 and 7 of the Bill would clarify that the same definition of consent applies to rape and other sexual assaults. This is a technical reform that responds to an

[3] *Criminal Code Act 1924* (Tas) s 14A(1).
[4] *Crimes Act 1900* (NSW) s 61HE(4)(b); *Crimes Act 1958* (Vic) s 36B(1)(a).

interpretive problem in the relevant provisions of the *Criminal Code*.[5] It does not change the definition of consent itself.

[11] Clause 8 makes two technical changes to the definition of consent. The first would state that a person is not taken to have consented to a sexual act *just because* they did not actively say 'no'. This is an important principle. However, it is already well established in case law.[6]

[12] Importantly, the current wording of Clause 8 means a failure to resist can still amount to consent in some circumstances. Recent case law confirms this.[7] Our proposed amendment would clarify that a person *does not* consent where they do not say or do anything to indicate consent—as is the case in Victoria.[8]

[13] Clause 8 further provides there is no consent in situations where a sexual act is done or continues after consent is withdrawn. This principle, too, is already part of case law.[9] This reform is potentially problematic insofar as it seems to put the onus on people who are subjected to unwanted sexual acts to withdraw their consent.[10] This is not realistic when a previously consensual sexual encounter turns violent. However, our amendment leaves this change intact, since it brings Queensland into line with other Australian jurisdictions.[11]

[14] Clause 9 of the Bill concerns the application of the mistake of fact excuse to sexual offences. It also makes two technical changes. The first would allow juries to consider anything a defendant said or did to determine if the other person wanted to have sex in deciding whether the defendant made an honest and reasonable mistake. This principle, too, is already part of case law.[12]

[15] Notably, the Bill falls short of *requiring* defendants show they took positive steps to ascertain consent—as is the case in Tasmania.[13] Defendants could point to anything they said or did to determine consent, no matter how inadequate or unreasonable, to bolster their mistake of fact argument, but would not actually be

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[5] See *R v BAS* [2005] QCA 97, [51]-[52] (Fryberg J; Davies and McPherson JJA agreeing).
[6] See, for example, *R v IA Shaw* [1996] 1 Qd R 641; *R v CV* [2004] QCA 411; *R v Everton* [2016] QCA 99.
[7] *R v Makary* [2018] QCA 258, [50] (Sofronoff P).
[8] *Crimes Act 1958* (Vic) s 36(2)(l).
[9] See, for example, *R v OU* [2017] QCA 266; *R v Johnson* [2015] QCA 270.
[10] For discussion, see Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?' (2020) *Current Issues in Criminal Justice*, DOI: 10.1080/10345329.2020.1801151.
[11] For an overview, see Theodore Bennett, 'Consent Interruptus: Rape Law and Cases of Initial Consent' (2017) 19 *Flinders Law Journal* 145, 155-7.
[12] QLRC (n 1) 182, 188.
[13] *Criminal Code Act 1924* (Tas) s 14A(1)(c).

required to show any steps were taken. Our proposed amendment follows Tasmania's lead in imposing a positive and reasonable steps requirement.

[16] Clause 9 also clarifies that a defendant cannot rely on their voluntary intoxication to argue a mistake about consent was reasonable. This principle, like the others, is already part of case law. Under the existing law, a defendant's intoxication does not make their mistaken belief more likely to be reasonable. It can, however, make the mistake more likely to be honest.[14] The defendant's drunkenness can therefore lower the bar for the mistake of fact excuse. The Bill does nothing to change this.

[17] Our amendment on this issue would follow the current law in New South Wales, Victoria and Tasmania in clarifying that a defendant's intoxication cannot be used to establish either the honesty or the reasonableness of a mistaken belief in consent.[15] We note that the Queensland Law Society (QLS)'s submission to the QLRC Review, which has recently been publicly released, claims that '[a]dopting the wording of the Tasmanian provision [on intoxication and mistake of fact] would make no substantive change to the law of Queensland.'[16]

[18] This statement is blatantly wrong in law. The current Queensland law, as noted above, holds that a defendant's intoxication is relevant to the honesty of their mistake, although not its reasonableness.[17] The Tasmanian provision, by contrast, renders intoxication irrelevant to both honesty and reasonableness. Adopting a similar provision in Queensland would unambiguously change the law. It is remarkable that the QLS would claim otherwise.

The Bill ignores serious problems with the current law

[19] There are serious problems with the current law that the Bill ignores. As noted above, the Bill leaves open the possibility that consent can be inferred from mere lack of resistance. This is the antithesis of an affirmative consent model, where consent is mutual, ongoing and communicative.

[20] There are several legitimate reasons why a victim of sexual violence may not resist or express lack of consent. This may happen due to the express or implicit threat of violence; the 'freezing response' (or 'tonic immobility') that is a common

[14] *R v Duckworth* [2016] QCA 30, [106] (Burns J; McMurdo P agreeing).
[15] *Crimes Act 1900* (NSW) s 61HE(4)(b); *Crimes Act 1958* (Vic) s 36B(1)(a); *Criminal Code Act 1924* (Tas) s 14A(1)(a).
[16] Queensland Law Society, *Submission to QLRC Review on Consent Laws and the Excuse of Mistake of Fact* (4 February 2020) 11 <https://bit.ly/32JNKeC>.
[17] For detailed discussion of the case law on this issue, see Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39 *University of Queensland Law Journal* 1, 14-17.

psychological reaction to aggression or trauma;[18] the 'tend and befriend' response that leads victims to pacify the aggressor, rather than confronting them directly;[19] or a rational judgment that it is preferable to endure the assault, rather than risk escalating the encounter. Requirements that victims actively express their lack of consent are therefore inappropriate.

[21] The current Bill also ignores the serious problems with the mistake of fact excuse. These problems have been outlined by Professor Crowe and Ms Lee in peer reviewed research.[20] The excuse can currently be used even if a person is asleep, unconscious or heavily intoxicated when a defendant has sex with them.[21] The current Bill does nothing to address this.

[22] The Bill does not address the role of the freezing response in mistake of fact cases, where rape victims 'freeze' and are unable to vigorously fight off their attackers. The QLRC's own research found the mistake of fact excuse was raised more often in cases where a victim gives evidence of freezing during an attack or attempting to placate an attacker.[22] The excuse potentially allows the defendant to use the victim's freezing response to avoid conviction.

[23] The Bill does not respond to the role of rape myths in mistake of fact cases. Rape myths are false beliefs about sexual violence, like the idea that flirting with someone, kissing them or going to their house means you are 'asking for sex'.[23] All these factors

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[18] See, for example, S D Suarez and G G Gallup, 'Tonic Immobility as a Response to Rape in Humans: A Theoretical Note' (1979) 29 *Psychological Record* 315; G C Mezey and P J Taylor, 'Psychological Reactions of Women who Have Been Raped: A Descriptive and Comparative Study' (1988) 152 *British Journal of Psychiatry* 330; G Galliano, L M Noble, L A Travis and C Puechl, 'Victim Reactions during Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates' (1993) 8 *Journal of Interpersonal Violence* 109.

[19] See, for example, S E Taylor, L C Klein, B P Lewis, T L Gruenewald, R A R Gurung and J A Updegraff, 'Biobehavioral Responses to Stress in Females: Tend-and-Befriend, Not Fight-or-Flight' (2000) 107 *Psychological Review* 441; S E Taylor, L C Klein, B P Lewis, T L Gruenewald, R A R Gurung and J A Updegraff, 'Sex Differences in Biobehavioral Responses to Threat: Reply to Geary and Flinn' (2002) 109 *Psychological Review* 751.

[20] Crowe and Lee (n 17). For an overview, see <http://consentlawqld.com>.

[21] *R v SAX* [2006] QCA 397. [20]-[21] (Keane JA; Jerrard JA and Jones J agreeing); *R v CU* [2004] QCA 363, 12 (Jerrard JA).

[22] QLRC (n 1) 41.

[23] For discussion, see Rachael Burgin and Asher Flynn, 'Women's Behaviour as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2019) *Criminology and Criminal Justice*, DOI: 10.1177/1748895819880953; Anastasia Powell, Nicola Henry, Asher Flynn and Emma Henderson, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22 *Griffith Law Review* 456.

have been found to support a defendant's mistaken belief in consent.[24] This undermines attempts to eradicate rape myths from the law.

[24] The Bill also does nothing to prevent defendants from relying on their self-induced intoxication in asserting an alleged mistaken belief in consent. As previously noted, a defendant's intoxication currently makes their mistake more likely to be honest, although not reasonable. Defendants can effectively claim they were so drunk they thought the victim was consenting.

[25] The amendments proposed in this submission, while falling short of those recommended by Crowe and Lee, RASARA, WLSQ and other bodies in their submissions to the QLRC, would take steps to address the problems summarised above. In so doing, they would bring Queensland law into line with best practice in other Australian jurisdictions.

The Bill ignores survivors' perspectives

[26] On 26 February 2020, the four authors of this submission were present at a consultation session convened by the QLRC to seek the input of survivors of sexual violence on the subject matter of the review. Thirty-nine people attended the session, including survivors and their advocates. None of the QLRC Members attended in person, although members of the Secretariat did so.

[27] The QLRC Report mentions the consultation session in passing.[25] However, it does not report or acknowledge the views expressed. The attendees at the session voted unanimously in favour of amendments drafted by Crowe and Lee to limit the applicability of the mistake of fact excuse to the issue of consent in rape and sexual assault cases.[26] There was near unanimous support for removing the mistake of fact excuse from the issue of consent altogether.

[28] The QLRC Report and the current Bill, in declining to make any substantive changes to the mistake of fact excuse, wilfully neglect survivors' perspectives. Our proposed amendments, while not going so far as the reforms endorsed unanimously at the consultation session, would at least implement some of their core components, by imposing a positive steps requirement on the excuse and removing the relevance of the defendant's intoxication.

[24] See, for example, *R v Elomari* [2012] QCA 27, [5] (McMurdo P). For detailed discussion of this issue, see Crowe and Lee (n 17) 5-13.

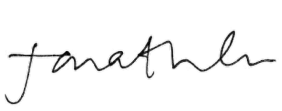
[25] QLRC (n 1) iii, 4.

[26] For details of the reforms, see Crowe and Lee (n 17) 28-31.

Conclusion

[29] We commend our amendments to the Legal Affairs and Community Safety Committee and thank the members for their consideration.

Yours faithfully,



Jonathan Crowe

Rachael Burgin

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