



22nd September 2020

Legal Affairs and Community Safety (LACS) Committee
By email: lasc@parliament.qld.gov.au

Dear LACS Committee,
Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020.

Thank you for the opportunity to provide feedback on this Bill. EVAWQ's submission responds to the proposed amendments to the Criminal Code regarding the law of consent and the excuse of mistake of fact.

EVAWQ is a Statewide peak body that provides a representative and united voice for Queensland women and children affected by gender-based violence, and the individuals and service agencies that provide specialist support. EVAWQ aims to inform and share the depth and diversity of knowledge from specialist services within the women's sector (including the Sexual Violence, Women's Health and Domestic and Family Violence sectors) to a broad range of government and non-government stakeholders in relation to all aspects of gender-based violence against women, women's health, women's refuges, sexual violence and domestic + family violence services in Queensland.

EVAWQ oppose the Bill for the following reasons:

1. The Bill retains an outdated model of consent. The proposed amendments to the definition of consent s348 Criminal Code 1899 (Qld) recommendations 1 to 3 continue to fail in protecting victims of rape and sexual assault. Unlike current laws in Victoria and Tasmania, these recommendations allow a passive response to be considered as consent. There are many varied reasons a person is unable to verbalise consent and a passive response should never be considered as agreement. Many people experience a freeze response in relation to trauma thus disabling their capacity to consent. EVAWQ strongly advocates for an affirmative model of consent whereby an individual is required to enthusiastically and clearly affirm their willingness to have sex through words or actions.

An affirmative model of consent needs to be reaffirmed if there is a change in the nature of sexual engagement and does not place onus on the victim to verbally withdraw consent after the sexual encounter has begun consensually. This is particularly problematic when the sexual encounter changes in nature - where a condom is removed without the consent of the other person; where the situation becomes violent e.g. strangulation or a physical assault which may render the victim unable to use their voice. In an affirmative consent model, consent would need to be maintained or reaffirmed at every stage of the activity.

Proposed amendments to mistake of fact (s 24 Criminal Code 1899 (Qld)) Recommendations 4 and 5 fail to protect victims of rape and sexual assault by not requiring the defendant to



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take reasonable and positive steps to ensure the other person is consenting. The fourth recommendation falls significantly short of requiring defendants to show they took positive steps to ascertain consent - a requirement which currently exists in Tasmania.

Furthermore, under the QLRC's proposed amendment, defendants could identify any words or actions they used to determine consent, no matter how unreasonable, to support their defense of mistake of fact.

2. The Bill fails to uphold the human rights of sexual assault survivors. The human rights analysis for this Bill is one-sided and solely considers the rights of defendants to a fair trial, and their protection from retrospective criminal laws. The Attorney-General's statement of compatibility is silent on the human rights of sexual assault survivors. Sexual violence is disproportionately a gendered crime. Human rights to equal protection of the law without discrimination (section 15 Human Rights Act 2019); the right to life (section 16 Human Rights Act 2019); protection from torture and cruel, inhuman or degrading treatment (section 17 Human Rights Act 2019); and the right to liberty and security of person (section 29 Human Rights Act 2019) all apply to all survivors of rape and sexual assault, yet these rights have been entirely overlooked.

3. The excuse of mistake of fact will continue to be used to perpetuate rape myths. The Bill retains the mistake of fact excuse which defendants will be able to argue in situations where a person is asleep, heavily intoxicated or unconscious. The proposed changes do not require defendants to show they took positive steps to ascertain consent. This leaves open the possibility that consent can be inferred from a lack of resistance, even though victims 'freezing' (tonic immobility) during an assault is a very common behavioural response and recognised survival tactic.

4. The Bill fails to address the negation of consent for a person with disability. Section 216 of the Criminal Code makes it unlawful for any person to have sex with another person who has an impairment of the mind. This is a discriminatory provision as it assumes that people with disability are not capable of consenting to sex. Pages 11 to 15 of the Queensland Human Rights Commission's submission to the Queensland Law Reform Commission (Review of consent laws and the excuse of mistake of fact, available on the QHRC website <www.qhrc.qld.gov.au/resources/submissions> addresses this point at length. This is a missed opportunity to correct a law that unfairly discriminates against people with disability in Queensland.

EVAWQ ascertains that this Bill is a missed opportunity to reform consent laws and the excuse of mistake of fact in Queensland. Reform of these laws is long overdue.



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EVAWQ proposes that the passage of the Bill be slowed or halted to allow time to undertake a broader review that positions the experiences of survivors at the centre and includes a review of barriers to reporting and attrition through the criminal justice system.

EVAWQ ask that the LACS Committee reject the Bill in its current form and requires government to make amendments that incorporate the issues we have outlined.

EVAWQ strongly endorses the submission made by the Queensland Sexual Assault Network (QSAN) and its affiliate members.

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. EVAWQ implores the LACS to seize this opportunity to make a significant contribution to ending violence against women in Queensland.

Yours faithfully

Anne Butcher
(President – EVAWQ)