Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

The Secretary,
QLRC,
PO Box 13312,
George Street Post Shop,
BRISBANE QLD 4003

By email:

lawreformcommission@justice.qld.gov.au

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RE: WP 78 REVIEW OF CONSENT LAWS AND THE EXCUSE OF MISTAKE OF FACT

We welcome and appreciate the opportunity to make a submission in relation to the Consultation Paper on this important area of law. We appreciate the opportunity to provide feedback about the proposed options and do so in the context of the obligation to safeguard an accused person's right to fair trial.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives

(which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

OVERVIEW

It takes two to tango and whether sex is consensual often turns on the subjective state of mind of both[1] parties.

The law needs to be certain and the law needs to be fair, and how the law grapples with both subjective and objective aspects of the state of mind of two people presents challenges for both of those requirements.

The law has to deal with what is often circumstantial evidence as to consent and knowledge or awareness of consent. In sexual conduct, as noted in the consultation paper, the giving of consent has not, for understandable reasons, been reduced to a formula. Or to put it more descriptively:

> "In a society where much consensual sexual intercourse takes place, it is unrealistic to expect that verbalisation of consent should invariably observe set formalities. In many cases, and perhaps desirably, it does. But in other cases, consent is sufficiently indicated by conduct and implication. The law would defy reality if it endeavoured to stamp the necessity of a particular verbal formula upon conduct usually so intimate, individual and private."[2]

A survey of the various jurisdictions, for jurisdictions with either common law criminal law or criminal codes, show different permutations and variations of the interrelation of consent and mistake of fact as to consent as outlined in the Consultation Paper. What is clear is that no one jurisdiction holds a clear answer to gnarly problems in what is a very complex area. The steps from charge to a finding of guilt or acquittal involve much more than just the elements of the offence and legal excuses or defences; it also involves directions to the jury and how the jury steps through key decision points when applying the law to the evidence or how they deal with the evidence when undertaking the task set for them by law. That is most heavily influenced by the directions they receive on the application of the law.

With respect to Code law, as noted in *Vallance v The Queen* [1961] HCA 42; (1961) 108 CLR 56 at 58 per Dixon CJ and cited in *DPP (NT) v WJI* (2004) 219 CLR 43 at 75, the difficulty may lie in the use in the introductory part of the Code of wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do. Central to the discussion points in

[1] For sake of the discussion we will assume two and leave the gender undefined.
[2] Per Kirby J in *DPP (NT) v WJI* [2004] HCA 47,(2004)219 CLR 43 at para [100].

this reference paper, are the questions: should qualifications be added, and should those qualifications be added to the notion of consent or should they be added to the notion of mistake of fact ? It is important that any reform remains consistent with the structure and logic of the Criminal Code as it operates in Queensland. Whether proposed qualifications should apply to definitions of consent or definitions of mistake of fact raise structural questions. Whether concepts from common law jurisdictions could or should be grafted onto our Code law also raises structural questions. In our view any changes should make the law clearer not introduce more intricacies that could leave the state of the law more unclear and harder for juries to apply. Further, we must never move towards undermining the 'presumption of innocence' – so fundamental to our democracy.

Questions 3-6 and Consent as an evidentiary issue

Response to Questions 7-11:

With respect to additional circumstances in which a person's consent to a sexual act is not freely and voluntarily given, we would suggest that section 348 of the Criminal Code should also encompass:

> where a person submits to the conduct due to a threat to spread embarrassing material over social media is a circumstance that should be considered as to whether such negates consent having been freely and voluntarily given. Ultimately a question of degree and the factual matrix in any given case (i.e. such a threat, if substantiated, should not be taken to automatically trigger the negation of consent).
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> Where a person consented to protected sex but not to unprotected sex. If consent was freely and voluntarily given to protected sex, the law should not treat that as consent being freely and voluntarily given to unprotected sex. Again, strict absolutes should not apply however – for example, a condom breaking during the course of sex could otherwise be said (and we would say unfairly), to move across the divide from consensual to non-consensual sex on that basis alone.

We note that section 376H of the Singapore Penal Code which criminalises non-consensual condom removal also contains 376H(e) which requires that " A knows or has reason to believe that the consent was given in consequence of such deception or false representation." To remove the potential ambiguity of such amendments, an additional requirement such as that contained in section 376H(e) of the Singapore Penal Code should also be included.

Response to Questions 15 -17:

It is a feature not a bug that the Queensland and Western Australian Codes do not refer to recklessness in relation to mistake of fact.

In the criminal code, state of mind is not an element of the offence of rape or sexual assault, all that needs to be proven for rape or sexual assault is that there was the relevant sexual act and this act was done without the consent of the complainant.

The defendant may however rely upon mistake of fact which if the fact were true would not make the defendant criminally responsible. However, a mere mistake is not enough, the mistaken belief in consent must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant and to be reasonable, the belief must be one held by the defendant, in his particular circumstances, on reasonable grounds. So instead of just a subjectively honest belief in a state of affairs which if true would make the acts not criminal,[3] the Criminal Code requires the belief to be not only subjectively honest but also objectively reasonable.

Section 24 applies to all persons charged with any criminal offence against the statute law of Queensland. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject. That wording concerning the exclusion of section 24 remains unchanged from the original drafting of section 26 (now part of section 24) of the Criminal Code. During the review of the Western Australian Criminal Code by his Honour J Murray, which included consideration of the introduction of notions of recklessness into offences in that Code, section 24 was deliberately left undisturbed. As noted by His Honour, the section is not free from difficulty but its meaning and operation are reasonably clear[4] and so it was left unchanged

In the particular circumstances of rape and sexual assault, the defendant must have a reasonable belief that there was both consent and the giving of consent: *R v Makary* [2018] QCA 258 per Sofronoff P at [50]. As the President observed, the giving of consent can be done by words or actions, or depending on the circumstances can be also be made by remaining silent and doing nothing. It remains the law that a complainant who at or before the time of sexual penetration fails by word or action to manifest … dissent is not in law thereby taken to have consented to it.[5] But if there is no consent, the offence is made out.

In our view the introduction of elements of recklessness would create a confusion to what is a conceptually clear description of criminal responsibility for sexual assault and rape.

Response to Questions 18-21 (and also questions 12-14)

Section 24(1) requires the defendant's belief to be reasonable, not on the basis as to whether a reasonable person would have held that belief, but rather whether the belief held by the

[3] Our law provides that a person who does an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist.
[4] MJ Murray,'The Criminal Code. A General Review.'
[5] *R v Shaw* [1996] 1 Qd R 641, per Davies and McPherson JJA at 646. *R v Makary* [2018] QCA 258 per Sofronoff P at [50]

defendant was held on reasonable grounds, based on the circumstances as he or she perceived these to be.[6]

Since the focus is on the defendant's belief rather than that of a theoretical reasonable person, the information available to the defendant and the defendant's circumstances (such as an intellectual impairment or language difficulty) are of relevance in considering whether a belief was reasonably held: *R v Mrzljak* at 321, 329-330.

A jury may already take into account any steps taken by the defendant as part of the circumstances surrounding whether the belief of the defendant was reasonable. Given the very wide variety of factual circumstances under which the law is meant to operate and be applied to sexual relations, there is strength and logic and flexibility in this approach.

The interpretation of the New South Wales Court of Criminal Appeal in *R v Lazarus*[7] that 'reasonable steps' may not necessarily be a positive act but may also include consideration of things or events which the accused hears, observes or perceives, or reasoning in response to those things, is an interpretation which accords with common sense. The risk of the statutory form of words of positive steps is that it would bias a jury towards looking for something more concrete for positive acts. As noted in the earlier New South Wales Court of Criminal Appeal judgment in *Regina v XHR* [2012] NSWCCA 247 at para [62]:

> "The relevance of whether an accused person took any steps to ascertain consent is inextricably bound up with all the other factors in the case. The words of the section expressly indicate this is so, but it must follow as a matter of ordinary human experience. Thus, if the accused and complainant are in an ongoing relationship, the failure to take steps to ascertain consent may not be surprising and so may not be of any or much assistance in the fact finding task posited by s 61HA(3). If the accused and complainant are in a relationship of service provider and client, the failure to take steps to ascertain consent may be and would likely be very relevant to the question of the accused person's knowledge. There are many factual situations in between these two, some much more nuanced than others."

By the time those necessary qualifications are made as to what reasonable steps may encompass, we would argue that the law would be clearer and more certain in its application without resorting to the language of "reasonable steps."

Further, the introduction of a formal requirement "The accused did not take reasonable steps" to ascertain that the complainant was consenting effectively creates a requirement for the accused to go into evidence to establish their innocence. There are many sound reasons why in our criminal justice system does not require an accused to go into evidence to prove their innocence.

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[6] *R v Julian* (1998) 100 A Crim R 430 at 434; *R v Mrzljak* [2005] 1 Qd R 308 at 321, 326; *R v Wilson* [2009] 1 Qd R 476 at [20]).
[7] [2017] NSWCCA 279, at [146]-[147]

Take a simple example involving a husband and wife. Let's say that a wife decides to give her a husband a 'treat' by performing fellatio on him during the middle of the night. At the commencement of such, the husband is asleep, although once he awakes and realises what is going on, he enjoys himself. Imagine however a situation where a husband and wife had been arguing the night before, and the husband upon waking, rather than indicating enjoyment, pushes his wife away. No reasonable steps could have been taken by the wife originally to confirm consent – the husband was asleep. Conversely, a husband performing cunnilingus on his initially sleeping wife. Raising such conditions precedent could lead to gross injustices and manipulations.

Response to Questions 22 -24:

Section 24 already operates so that a defendant may not rely upon a belief derived from self-induced intoxication as an honest and reasonable mistake of fact: *R v Hopper* [1993] QCA 561, 10.[8] It is the requirement that a belief be reasonable as well as honest that prevents a defendant from relying on self-intoxication to rely on an unreasonable belief as to consent. In our view it is unnecessary to amend or qualify the operation of the excuse of mistake of fact in section 24.

Response to Questions 27 -29:

The admission of expert evidence in trials is governed by the common law in Queensland. It is already possible to bring expert evidence of the kind provided for by section 388 of the *Criminal Procedure Act* 2009 (Vic) without any legislative amendment. Whether such evidence would be required, necessary or even appropriate would turn very much on the particular factual circumstances of the case. Whether such evidence should be excluded in the exercise of the judge's discretion would also turn very much on the particular factual circumstances of the case. As new fields of expert evidence develop or become discredited,[9] the common law is flexible enough to address their admission into evidence in appropriate cases. There is a danger that a statutory formula would permit otherwise impermissible forms of expert evidence such as reliance on attitudinal surveys to be automatically adduced into evidence.

CONCLUSION

As described above, the law needs to be certain and the law needs to be fair (and not undermine the presumption of innocence), and how the law grapples with both subjective and objective aspects of the state of mind of two people presents challenges for both those requirements. Any proposed reforms which seek to add further qualifications to the existing

[8] And see also *R v O'Loughlin* [2011] QCA 123 per Muir JA at [33]; *R v Ducksworth* [2016] QCA 30, per Philippides JA at [25] and Burns J at [106].
[9] Munchausen's Syndrome by proxy evidence being one recent example. *R v LM* [2004] QCA 192 (4 June 2004)

principles contained in the Criminal Code runs the risk of making the law less clear and consequently less certain and less fair. We thank you for the opportunity to provide feedback in this important area.

Yours faithfully,

Shane Duffy

Chief Executive Officer