

Response to QLRC Report on Consent and Mistake of Fact

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The report does not strengthen the law

The QLRC report recommends five amendments to the *Criminal Code*. It has been reported that the report will strengthen Queensland law to better protect survivors of sexual violence. **This is inaccurate. The report's recommendations make no significant difference to the existing law.**

The QLRC's first three reforms address the definition of consent. The **first recommendation** would state that a person is not taken to have consented to a sexual act *just because* they don't actively say no. This is an important principle. However, it is already well established in case law. Importantly, this proposal means **passivity can still amount to consent** in some circumstances.

The **second recommendation** would clarify the same definition of consent applies to rape and other sexual assaults. This is a technical reform that does not change the definition of consent itself.

The **third recommendation** would state there is no consent in situations where a sexual act is done or continues after consent is withdrawn.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. This reform is problematic insofar as it seems to **put the onus on people who are subjected to unwanted sexual acts to withdraw their consent**. This is not realistic when a previously consensual sexual encounter turns violent.

The QLRC's fourth and fifth reforms address the mistake of fact excuse. The **fourth recommendation** 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. Notably, the proposal **falls short of requiring defendants show they took positive steps** to ascertain consent — as is the case in Tasmania. Defendants could point to anything they said or did to determine consent, no matter how inadequate, to bolster their mistake of fact argument.

The QLRC's **fifth recommendation** 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. **The defendant's drunkenness can therefore lower the bar for the mistake of fact excuse.** The QLRC's proposal does nothing to change this.

The report ignores the problems with the current law

The QLRC's report ignores the most serious problems with the current law. It leaves open the possibility that **consent can be inferred from lack of resistance**. This is the antithesis of an affirmative consent model.

The report ignores the serious issues with the mistake of fact excuse. **The excuse can be used even if a person is asleep, unconscious or heavily intoxicated** when a defendant has sex with them. The report says nothing about this.

There is no mention of 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 trying to placate an attacker. This **allows the defendant to use the victim's freezing response to avoid conviction**.

The report does not acknowledge or 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". All these factors have been found to support a defendant's mistaken belief in consent. This **undermines attempts to eradicate rape myths from the law**.

The report is based on flawed research

The QLRC report relies heavily on research from the UK to dismiss the idea that jurors are influenced by rape myths. This research, as the QLRC admits, **"has not yet been published or peer reviewed"**.

Serious doubts have been raised by UK scholars about the methodology of this research. However, even if it were sound, it would reveal nothing about the attitudes of Australian jurors, since it was based on a survey of jurors in England, Wales and Northern Ireland. It cannot simply be assumed that the attitudes and beliefs of Australian jurors are identical to those in foreign countries. This is a **glaring and fundamental methodological flaw** in the QLRC's report.

The report completely **overlooks a significant body of recent peer-reviewed Australian research** showing rape myths continue to influence rape trials. The main Australian research referred to is the National Community Attitudes towards Violence against Women Survey (NCAS). However, the report **misstates and cherry-picks** the findings of that research.

The QLRC claims that the NCAS shows that adherence to rape myths is low and declining. While there is a general decline on some of the measures outlined in the NCAS, the change is not linear, and there are still concerning number of Australians who believe in rape myths. The QLRC has cherry-picked the results of the NCAS, for example, leaving aside the finding that **two in five Australians believe that women make up false reports of sexual assault to punish men**.

What do we recommend?

At a minimum, we recommend the following amendments to the QLRC's draft *Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020*. These recommendations represent a compromise position to address some of the most glaring problems in the current law. ***(Amendments to the draft Bill are in bold italics.)***

5 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.]

6 Insertion of new s 348A

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 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.

[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.]