

ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

Queensland Law Reform Commission

Attn: The Secretary

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Review of consent laws and the excuse of mistake of fact (QLD)

Dear Chair

Australia's National Research Organisation for Women's Safety (ANROWS) would like to thank the Queensland Law Reform Commission for the opportunity to make a submission to the Review of consent laws and the excuse of mistake of fact in the *Criminal Code Act 1899 (QLD)*.

ANROWS is an independent, not-for-profit organisation established as an initiative under Australia's *National Plan to Reduce Violence against Women and their Children 2010-2022*. ANROWS is jointly funded by the Commonwealth and all state and territory governments of Australia. ANROWS was set up with the purpose of establishing a national level approach to systematically address violence against women and their children.

Our mission is to deliver relevant and translatable research evidence which drives policy and practice leading to a reduction in the incidence and impacts of violence against women and their children. Every aspect of our work is motivated by the right of women and their children to live free from violence in safe communities. We recognise, respect and respond to diversity among women and their children, and are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

This submission applies relevant ANROWS research evidence to the issues raised in *Consultation Paper WP No. 78*.

We would be very pleased to assist the Commission further, as required.

Yours sincerely



Dr Heather Nancarrow
Chief Executive Officer

30 January 2020

Summary of ANROWS recommendations

RECOMMENDATION 1: When making changes to the *Criminal Code Act 1899 (QLD)* there is a strong need to consider how any changes render visible, and respond better to, the prevalence of intimate partner sexual violence.

RECOMMENDATION 2: Consider revising inconsistent, non-inclusive and outdated terminology to make the updated *Criminal Code Act 1899 (QLD)* easier for all Queenslanders to understand.

RECOMMENDATION 3: Any changes to the *Criminal Code Act 1899 (QLD)* must carefully consider the impact upon equitable access to justice for priority populations.

RECOMMENDATION 4: Affirmative consent and withdrawal of consent should both be essential parts of the updated *Criminal Code Act 1899 (QLD)*.

RECOMMENDATION 5: The list of circumstances in *s348(2)* of the *Queensland Criminal Code Act (1899)* should be extended to include the acts described in Q-9(a)(i) & (ii), Q-9(b) (with ANROWS's proposed revisions) & Q-9(d), but not Q-9(c).

RECOMMENDATION 6: The list of circumstances in *s348(2)* of the *Queensland Criminal Code Act (1899)* should either be extended to include non-imminent threats, fear of harm (either to the person, another person, or an animal); fear of degradation, humiliation, exposure, outing, or harassment; intimidation, blackmail, and coercion as part of a pattern of harmful behaviour; or the Act should be reframed to mandate the use of a social entrapment framework when DV is present.

RECOMMENDATION 7: The *Queensland Criminal Code Act (1899)* should mandate a jury direction that utilises social entrapment theory when sexual assault matters involve intimate partner sexual violence to ensure acts of survival are not misconstrued as consent.

RECOMMENDATION 8: There are strong and compelling reasons to remove or modify mistake of fact (*s24*) with respect to sexual assault offences.

RECOMMENDATION 9: Insert a section 24A that modifies mistake of fact for offences against *s349* and *s352* which explains mistaken belief as to the victim's consent is not honest or reasonable if the accused is reckless as to whether the complainant consented, or if the accused did not take positive and reasonable steps to ascertain the complainant was consenting to each sexual act.

RECOMMENDATION 10: Include in *s24A* that modifies mistake of fact for offences against *s349* and *s352* a clause that makes the mistaken belief unreasonable if the accused was in a state of self-induced intoxication, and the mistake is not one they would make if they were not intoxicated; and if

the complainant was in a state of intoxication and did not clearly and positively express their consent to each sexual act.

RECOMMENDATION 11: Include in s24A that modifies mistake of fact for offences against s349 and s352 a clause that makes the mistaken belief unreasonable if the complainant was unconscious or asleep when any part of the sexual act or sequence of sexual acts occurred.

RECOMMENDATION 12: A statement of objectives and guiding principles, the admission of expert evidence, and education and awareness programs would all make positive improvements to the operation an updated *Criminal Code Act 1899 (QLD)* with respect to sexual consent offences.

Intimate partner sexual violence

Sexual violence is common. The 2016 Personal Safety Survey (Australian Bureau of Statistics, 2017) found that approximately one in five women and one in twenty men had experienced sexual violence since the age of 15. This submission focuses upon violence against women only, in line with the remit of ANROWS, and noting that women comprise the majority of victims/survivors of sexual assault.

ANROWS wishes to highlight that most adult sexual assaults are perpetrated by intimate partners (Black et al.; Logan, Walker, & Cole; Tjaden & Thoennes, all cited in Cox, 2015). The category of intimate partners spans dating relationships, as well as longer-term relationships that may be characterised by ongoing violence. Intimate partner sexual violence can be harder to label as sexual assault by both victim/survivors and perpetrators due to cultural and social misconceptions of sexual violence as something more likely to be perpetrated by strangers outside of the home.

Despite the fact that women are more likely to be sexually assaulted by an intimate partner than by a stranger or acquaintance (Cox, 2016), intimate partner sexual violence continues to lack public visibility. Heenan (cited in Breckenridge, Rees, Valentine & Murray, 2015) noted that it is only since 1985 that Australian laws have allowed for the possibility of rape being recognised as a criminal offence when occurring in marriage or an intimate partnership. Parkinson (cited in Breckenridge et al., 2015) identifies that women themselves do not always recognise their partners' sexually aggressive actions as rape or sexual assault, even in extreme circumstances, and therefore may not disclose.

There is evidence that the community consistently views intimate partner sexual violence as both less serious and more justifiable than sexual violence by a stranger or acquaintance (Christopher & Pflieger, cited in Cox, 2015). Research has found that the greater the familiarity between the victim and perpetrator, the more likely it is that an incident of intimate partner sexual violence will be construed as a lie, or a "miscommunication", rather than as an assault. Police officers, as well as victims themselves, have been found to be prone to making such interpretations (McLean & Goodman-Delahunty; Orchowski, Untied, & Gidycz, 2013, both cited in Cox, 2015).

Intimate partner sexual offences are difficult to prosecute in large part because they typically happen within the context of consensual sexual relations, before and after the assault, as well as inside patterns of sexual activity that are established and do not include verbalised consent (Easteal; Heenan; Logan et al.; Martin, Taft, & Resick; all cited in Cox, 2015). Domestic violence (DV) can further complicate intimate partner sexual offences, because the "provision of freely given consent for sexual activity within the context of the perpetration of DV, is, arguably, not possible" (ANROWS, 2019). By creating a climate of ongoing fear or control, women experiencing DV may have issues safely negotiating sex

or contraception, and may submit (rather than consent) to sex in order to prevent the escalation of physical violence (Kerr, 2018 cited in ANROWS, 2019) either to themselves or toward other people.

RECOMMENDATION 1: When making changes to the *Criminal Code Act 1899 (QLD)* there is a strong need to consider how any changes render visible, and respond better to, the prevalence of intimate partner sexual violence.

Terminology

As highlighted by the jurisdictional comparative table (Appendix E) in *Consultation Paper WP No 78*, there is inconsistency in the terminology used to define sexual offences in state and territory legislation across Australia. While noting that the *Criminal Code Act 1899 (QLD)* has separate definitions for rape and sexual assaults, in this submission ANROWS will use sexual assault to refer to both penetrative and non-penetrative acts of sexual violence. The terminology issue is compounded by differing language and definitions used in Australia's key national surveys reporting on sexual violence. For example, the Australian Bureau of Statistics, who put out the Personal Safety Survey, define sexual assault as:

an act of a sexual nature carried out against a person's will through the use of physical force, intimidation or coercion, including any attempts to do this. This includes rape, attempted rape, aggravated sexual assault (assault with a weapon), indecent assault, penetration by objects, forced sexual activity that did not end in penetration and attempts to force a person into sexual activity. Incidents so defined would be an offence under state and territory criminal law. (ABS, 2016)

The National Community Attitudes towards Violence against Women Survey (NCAS) conducted by ANROWS refers to both sexual assault and rape. While the 2017 NCAS instrument read out to respondents includes a definition of the more contemporary term, sexual assault (added to the survey in 2017), it does not include a definition of rape. Specifically, at item SV3i the survey states: "I'm now going to read out some statements about rape and sexual assault. By sexual assault we mean any form of sexual contact that a person has not agreed to (Webster et al., 2018, Appendix 4)."

There is scope for the Queensland Law Reform Commission to make both the language and terminology in this section of the *Criminal Code Act 1899 (QLD)* simpler and more accessible to the general public. In the recent NSW Inquiry into Consent in Relation to Sexual Offences (still in process), the NSW Law Reform Commission placed an emphasis upon "simple, modern and inclusive" language (NSW Law Reform Commission, 2019, p. 3) in their draft proposals. For example, in their draft legislation, there is a focus upon "sexual activity" which is defined as sexual intercourse, sexual touching or a sexual act. There is a de-emphasis on penetration, removing the hierarchy and heteronormativity of the law, making it more inclusive toward the different ways that different people

engage in sexual activity. Specific body parts like “penis” and “vulva” have been replaced with gender-non-specific terms like “genital area” (NSWLRC, 2019, p. 36). ANROWS would also highlight that particular terms currently in the *Criminal Code Act 1899 (QLD)* like “carnal knowledge” (an archaic term that dates back to biblical usage), “indecent assault” (NSW has instead suggested “sexual touching” (NSWLRC, 2019, p. 36)) and “gross indecency” (originally used to criminalise homosexual men whose sexual activity fell short of sodomy and for child sexual offences) should be removed and replaced (where relevant) with contemporary terms that the general public understand.

RECOMMENDATION 2: Consider revising inconsistent, non-inclusive and outdated terminology to make the updated *Criminal Code Act 1899 (QLD)* easier for all Queenslanders to understand.

Priority populations

ANROWS also would also like to emphasise that some groups are disproportionately affected by sexual violence. ANROWS research (Cox, 2015; Mitra-Kahn, Newbiggin, & Hardefeldt, 2016) identifies that these groups include:

- culturally and linguistically diverse women
- Aboriginal and Torres Strait Islander women
- women with disability
- LGBTIQ people
- women living in rural or remote areas, and
- women in prison
- sex workers.

Members of these priority groups often experience multiple and intersecting barriers to reporting the violence they experience, and to accessing appropriate support. These barriers might include historical/cultural reasons to distrust authorities; being ‘legally compromised’ perhaps with outstanding fines, incorrect visas, or working contrary to visas/legislation; difficulties with the formal language of policing and courts; geographical isolation; inaccessibility of services for women with disability; and cultural inappropriateness of those services (Mitra-Kahn et al., 2016). Any changes to the *Criminal Code Act 1899 (QLD)* must carefully consider the impact upon equitable access to justice for these priority groups.

RECOMMENDATION 3: Any changes to the *Criminal Code Act 1899 (QLD)* must carefully consider the impact upon equitable access to justice for priority populations.

Affirmative consent model / Withdrawal of consent

Contemporary understandings of consent have shifted in the last decade. Well publicised Australian cases, including *R v Lazarus* that hinged upon the freeze response (a common physiological response to trauma), prompted a review of NSW's consent laws because it left the public with the perception that justice had not been served. With the global news cycle, international cases like *People v. Turner*, formally *People of the State of California v. Brock Allen Turner* (2015) which hinged upon the sexual assault of a comatose woman by a prestigious university's star athlete, also fed into the underlying frustration from victim/survivors of sexual assault and the general public, that criminal justice systems worldwide do not take sexual assault of women seriously. These cases have fuelled public interest in affirmative consent, and highlight the need for Australia-wide updates to affirmative consent in all legislation dealing with sexual offences.

In Queensland, the bulk of the public outcry has tended to focus less upon the definition of consent, and more upon the way that mistake of fact excuses allow for issues like recklessness with respect to consent, intoxication of either party, lack of consciousness, language barriers of either party, and passivity (the freeze response) taken as consent, continue to be raised. Closing this avenue to defendants reintroducing situations that contemporary Australians clearly recognise as non-consent is in ANROWS's view, the most important change that can come out of this process. While we address this issue separately in our response to Chapter 4, we would like to note here that modifying mistake of fact to reflect notions of affirmative consent is key to making positive change.

In terms of the questions proposed by *Consultation Paper WP No. 78* in this chapter on definitional changes, ANROWS is supportive of the use of the term "agreement" Q-5(a) as it implies two equal parties coming to a shared decision to engage in sexual activity. This could also be strengthened as "free and voluntary agreement". Agreements can be modified, so we are supportive of the way the "agreement" interacts with the essential inclusion of "withdrawal of consent" Q-7. Together they reflect the idea that sexual consent needs to be an ongoing and modifiable agreement, and indeed that initial consent to engage in sexual activity does not mean agreement to ongoing participation in sexual activity, for example, if that activity begins to cause pain, or become humiliating or degrading.

ANROWS is supportive of "reasonable steps" Q-5(c) being included in the updated legislation, both here in this definition, and in relation to modifying mistake of fact excuses if that section remains relevant to sexual consent offences. ANROWS research into domestic and family violence highlights the importance of "pivoting to the perpetrator" to maintain the onus of responsibility for abuse on the perpetrator of violence (Mandel, 2014 cited in Healey et al., 2018). Requiring a defendant to detail the "reasonable steps" they took to ensure consent is one way we can attempt to keep focus on perpetrator's positive actions to ascertain consent, rather than the victim/survivor's attempts to avoid being sexually assaulted.

RECOMMENDATION 4: Affirmative consent and withdrawal of consent should both be essential parts of the updated *Criminal Code Act 1899 (QLD)*.

Circumstances when consent is not freely and voluntarily given

ANROWS is supportive of extending the non-exhaustive list of circumstances in *s348(2)* of the *Criminal Code Act 1899 (QLD)* to reflect widespread, contemporary problems with specific acts of non-consent. ANROWS supports the inclusion of Q-9(a)(i) which refers to the complainant being asleep or unconscious during any part of the sexual act; and with Q-9(a)(ii) which refers to the complainant being so affected by alcohol or another drug as to be incapable of consenting to the sexual act.

With respect to Q-9(b), ANROWS would like to highlight there is an inextricable connection between reproductive coercion and intimate partner sexual violence (Bagwell-Gray et al., 2015, cited in Toivonen & Backhouse, 2018; Cox, 2015). Intimate partner sexual violence refers to sexual activity without consent in heterosexual and non-heterosexual intimate relationships (Bagwell-Gray et al., 2015, cited in Toivonen & Backhouse, 2018). It includes vaginal, oral or anal sex which is obtained by physical force or psychological/emotional coercion, any unwanted, painful or humiliating sexual acts, and tactics used to control decisions around reproduction (for example, refusing to wear a condom) (Bagwell-Gray et al., 2015, cited in Toivonen & Backhouse, 2018).

Research highlights that intimate partner violence interferes with reproductive and sexual autonomy through pregnancy promotion, contraceptive sabotage and pregnancy outcome control (Kerr, 2018). While contraceptive sabotage and pregnancy outcome control are self-explanatory, pregnancy promotion refers to the ignoring or disregard by a sexual partner for reproductive preferences through behaviours that prevent effective contraceptive use, including the removal or sabotage of contraceptive devices (i.e. vaginal rings and intrauterine devices) (Kerr, 2018). Research suggests that domestic and family violence does not facilitate safe negotiation of contraception or sexual activity; reproductive coercion often co-occurs with other violent controlling behaviours; and women may consent to sexual activity to prevent the escalation of physical violence (Kerr, 2018). In a study of women attending Australian general practices, almost half the women had experienced sexual violence at some stage in their adult lives, with more than 40 percent experiencing more than one type of sexual violence (Tarzia et al., 2017). Of the women studied, “7% had had a partner refuse to use a condom when they were asked to do so” (Tarzia et al., p. 522). Further, when a pregnancy is unintended, women are four times more likely to experience physical violence from their partner (Kerr, 2018).

To this end, ANROWS is supportive of the inclusion of Q-9(b), particularly if widened to include circumstances where a person fails to use a condom as agreed, refuses to use a condom, removes the condom (an act commonly referred to as “stealthling”) or sabotages the condom/contraceptive device.

Recent research studying service users of a Melbourne sexual health clinic demonstrates prevalence justifies this legislative change: “stealthing was commonly experienced by our clinic population, with a third of women and a fifth of MSM [men who have sex with men] reporting it, with situational contexts often involving alcohol and/or drugs in women, and geosocial networking applications in MSM” (Latimer et al., 2018, p. 20). Despite research documenting prevalence, condom removal has long been a legislative gap in relation to sexual offences across the country: “It has been argued that despite the decades of extensive reform of the law relating to sexual offences in Australia, a significant gap and confusion exists in relation to non-consensual condom removal which is not specifically covered under existing legislative provisions” (Crowe, 2011).

ANROWS cautions against the inclusion of Q-9(c) as the issue of serious disease is more appropriately (and already) addressed in other areas of Queensland law. For example, the *Queensland Public Health Act* (2005) defines HIV as a “controlled notifiable condition” which attaches responsibilities to the entire community. Under *s143* a HIV-positive person has a responsibility to “not recklessly put someone else at risk of contracting a controlled notifiable condition”. At the same time, a HIV-negative person has a responsibility under *s66(1)(b)* to: “take all reasonable precautions to avoid contracting or being infected with the condition”. Criminalising HIV transmission contradicts best practice public health messaging, which highlights that every person has a responsibility to take all reasonable precautions to avoid contracting sexually transmitted infections.

Intent to harm through the transmission of a serious disease is also already a part of the *Queensland Criminal Code Act* (1899), in *s317(b)* which states: “Any person who, with intent to do some grievous bodily harm or transmit a serious disease to any person; is guilty of a crime, and is liable to imprisonment for life.” In matters of sexual health, “serious disease” terminology is not in keeping with contemporary understandings of HIV or other blood-borne viruses like hepatitis, which in most cases can either be cleared or managed to the point where transmitting the virus is virtually impossible (zero viral load) via appropriate medication. The *Queensland Public Health Act* (2005) uses notifiable condition terminology which is less stigmatising.

An alternative might be to combine the intent behind Q-9(b) & Q-9(c) and legislate that any person engaging in sexual activity can indicate that their consent hinges upon the use of a condom (or other safer sex paraphernalia), irrespective of whether the intended use is to prevent the transmission of sexually transmitted infections, or for reason of reproductive control, or indeed, for any other reason. You can see a similar clause at 61HI(6) of NSW’s draft legislation (NSWLRC, 2019) that describes agreement to sexual activity being performed in a particular manner. It uses a note to clarify that this provision relates to sexual intercourse being contingent upon using a device that prevents transmission of sexually transmitted infections. If Queensland chooses to follow NSW’s lead with this proposed change, ANROWS would advise strengthening the note to indicate support for women experiencing reproductive coercion without losing the emphasis on safer sex paraphernalia. We suggest the note should read: *For example, a person who consents to sexual intercourse using a device*

that prevents transmission of sexually transmitted infections and/or reproduction is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.

ANROWS agrees with the inclusion of Q-9(d) which supports sex workers being able to base their consent to sexual activity upon an agreement involving monetary exchange. As one of the priority groups we mentioned in Chapter 2, sex workers can experience multiple and intersecting barriers to reporting violence and to accessing appropriate support, whether that violence occurs at work, or in their private life. Recent research on non-consensual condom removal at a Melbourne sexual health clinic confirmed earlier work by Perkins (1991) showing outside the workplace “sex workers experienced higher levels of sexual assault compared with non-sex workers, with 46.9% reporting rape, compared to 21.9% of health workers and 12.7% of students... consistent with these findings that sex workers are at increased risk of non-consensual sex acts” (Latimer et al., 2018, p. 15). While codifying the right of sex workers to agree to specific sexual activities for monetary exchange in the *Queensland Criminal Code Act* (1899) will not solve increased levels of violence experienced outside the workplace, it will provide in principle support to sex workers having the same right to free and voluntary sexual consent as all other Queenslanders.

RECOMMENDATION 5: The list of circumstances in *s348(2)* of the *Queensland Criminal Code Act* (1899) should be extended to include the acts described in Q-9(a)(i) & (ii), Q-9(b) (with ANROWS’s proposed revisions) & Q-9(d), but not Q-9(c).

Additional circumstances when consent is not freely and voluntarily given

In terms of additional circumstances that should be included in *s348(2)* of the *Queensland Criminal Code Act* (1899), contemporary understandings of domestic violence point to the need for this section to be expanded to include non-imminent threats that are part of a wider pattern of coercive control, including threats to other people and animals. Sexual assault that occurs within the context of intimate partner relationships is often repetitive and forms part of a larger pattern of coercive control that is intended to dominate, humiliate and denigrate (Kerr, and Schafran, both cited in Cox, 2015; Fredericton Sexual Assault Crisis Centre, cited in Toivonen & Backhouse, 2018). In the context of sexual assault, domestic and family violence would most commonly be intimate partner sexual violence, however, some women may participate in sexual activity under duress to protect other members of the family (or indeed non-family members, as evidenced in the quote below) from their partner’s violence (see *Liyanage v The State of Western Australia*, 2017 cited in Tarrant, Tolmie & Giudice, 2019).

Chamari was managing her own immediate safety by strategies such as enduring painful anal and vaginal rapes whilst trying to look as though she was enjoying herself. However, whilst too terrified of him and exhausted by his behaviour at this point to overtly defy him, she continued covert acts of resistance. For example, when she was alone with K, she warned her

that she could not protect her from Dinendra and told her not to answer the phone if she didn't want to pursue the "relationship" with them (Tr, p. 1031).

Tarrant, Tolmie & Giudice, 2019

It is ANROWS view that *s348(2)* of the *Queensland Criminal Code Act* (1899) is the obvious place to better address sexual assault where it overlaps with domestic violence because the non-exhaustive list of circumstances that limit consent already covers a number of tactics used by perpetrators of domestic and family violence. It is ANROWS's view that force, threat or intimidation, and fear of bodily harm don't adequately capture the complete range of behaviours that might be employed by a perpetrator in situations of sexual non-consent. These tactics are developed over time by trial and error by the aggressor, and are uniquely tailored for the individual victim/survivor (Tarrant, Tolmie & Giudice, 2019). Some of these behaviours can be subtle, and can appear non-violent to an observer, requiring a social entrapment model of intimate partner sexual violence to make sense as non-consent: "It reached the point where it was enough for him to give her a "look" and she became extremely scared and would do as he wanted (Tr, p. 1096)." (Tarrant, Tolmie & Giudice, 2019).

Social entrapment theory provides a multi-dimensional framework for realistically analysing the facts of any particular case involving DFV, by drawing upon the significant body of literature documenting the particular manner in which entrapment is experienced by, and compounded for, women facing multiple forms of disadvantage (Tarrant, Tolmie & Giudice, 2019). In situations where DFV complicates criminal matters involving sexual consent, the court needs a clear process that renders visible the aggressor's pattern of abuse behaviour to understand how it constrains the primary victim's resistance and ability to escape the abuse, while simultaneously considering the wider operations of power in play in her life (Tolmie, Smith, Short, Wilson & Sach, 2018). This will involve determining the coercive and controlling behaviours employed by the aggressor and how they specifically limited the victim's ability to be self-determining (for example, provide genuine consent). The court would also need to consider how informal networks and agencies responded to any of the victim's help-seeking behaviour. Finally the court would need to look at how structural inequities (poverty, historical trauma, colonisation, disability, racism, sexuality and gender, geographic isolation) exacerbated both of the previous dimensions (Tolmie et al., 2018). It is only with this analysis that the actions (including any perceived inaction) of a complainant can be fairly assessed for women experiencing DFV.

The aforementioned ANROWS research, *Transforming Legal Understandings of Intimate Partner Violence* (2019) by Stella Tarrant, Julia Tolmie and George Giudice, has been used as the basis for amendment to the *Evidence Act 1906 (WA)*. These proposed amendments concern the admissibility of evidence about family and domestic violence and the introduction of jury directions about family violence. They form the basis for the amendments to the *Evidence Act 1906 (WA)* in the *Family Violence Legislation Reform Bill 2019 (WA)*. The aims of the amendments are to help rectify misunderstandings about intimate partner violence (IPV) by all decision makers in the criminal justice system in the context where a primary victim of IPV raises self-defence (and possibly duress).

While this is a different application to sexual consent offences, we thought the Committee might like to see how this proposed amendment is structured:

Section [C] Evidence of family violence

- (1) *Evidence of family violence includes evidence of:*
 - (a) *violence by the deceased/complainant against the accused;*
 - (b) *the availability of effective safety options to stop violence by the deceased/complainant against the accused;*
 - (c) *ways in which violence by the deceased/complainant against the accused (in paragraph [C] (1)(a)) or the lack of availability of effective safety options (in paragraph [C] (1)(b)) were exacerbated by structural inequities experienced by the accused, including inequities associated with (as the case may be) race, gender, poverty, disability or age.*

- (2) *Evidence of family violence includes expert evidence [specialised knowledge] of:*
 - (a) *the nature and patterns of violence enacted by family members;*
 - (b) *the availability of effective safety options to stop violence by family members;*
 - (c) *ways in which violence by family members (in paragraph [C] (2)(a)) or the lack of availability of effective safety options (in paragraph [C] (2) (b)) may be exacerbated by structural inequities experienced by a person the subject of family violence, including inequities associated with (as the case may be) race, gender, poverty, disability or age.*

Section [D] Family violence

“Family violence” means violence enacted by a family member against a person.

Section [E] Violence

- (1) *In this [Part] “violence” means harmful behaviour or a course of harmful behaviour which includes:*
 - a) *behaviour directed at the accused that is physically violent, including sexually violent, threatening or intimidating;*
 - b) *behaviour directed at the accused, at a child of the accused, at another person or at property that either –*
 - i. *has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (2); or*
 - ii. *would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (2).*

- (2) *The relevant effects are of –*
 - a) *making (or keeping) the accused dependant on, or subordinate to, the deceased/complainant;*
 - b) *isolating the accused from friends, relatives or other sources of support;*

- c) *controlling, regulating or monitoring the accused's day-to-day activities;*
- d) *depriving the accused of, or restricting the accused's, freedom of action;*
- e) *restricting the accused's ability to resist violence;*
- f) *frightening, humiliating, degrading or punishing the accused, including punishing the accused for resisting violence.*

While the structure of the *Queensland Criminal Code Act* (1899) makes it difficult to list domestic and family violence directly as a limiting factor (as opposed to adding it to a list of circumstances that might mean consent is not freely and voluntarily given), it is ANROWS's view that the current list could alternatively be improved with greater detail at *348(2)(b)* and *348(2)(c)* that better addresses common perpetrator behaviour. The consultation paper draws some useful suggestions from legislation in other states and territories. ANROWS would prioritise the inclusion of non-imminent threats, and the expansion of fear beyond bodily harm to include fear of degradation, humiliation, exposure, outing, harassment and blackmail.

ANROWS also supports the addition of the *Crimes Act 1958 (VIC) s36(2)(b)* provision that extends fear of harm to fear of harm to someone else or to an animal. ANROWS research confirms that cruelty and harm directed to pets and other animals can indicate future/more severe violence, and is often used as a control tactic by perpetrators (Toivonen & Backhouse, 2018). By the legislation directly referencing "a pattern of harmful behaviour", this section could help to render visible non-consent in situations of intimate partner sexual violence.

RECOMMENDATION 6: The list of circumstances in *s348(2)* of the *Queensland Criminal Code Act* (1899) should either be extended to include non-imminent threats, fear of harm (either to the person, another person, or an animal); fear of degradation, humiliation, exposure, outing, or harassment; intimidation, blackmail, and coercion as part of a pattern of harmful behaviour; or the Act should be reframed to mandate the use of a social entrapment framework when DV is present.

In terms of advantages and disadvantages of changing just the list of circumstances (Q-11), as well as covering unwilling participation in sexual acts achieved through subtle emotional or psychological manipulation, these changes would help the resulting law be more effective in recognising non-consent when it involves humiliating, unwanted or painful sexual acts. In practical terms, adding this criterion would make it easier to identify non-consent when it includes pressure to perform sexual acts that the victim is not comfortable with, or to engage in acts at a time when they do not wish to do so (Cornelius & Resseguie, 2007; Macleod, 2014a; Shorey, Cornelius, & Bell, 2008, cited in Cox, 2015). This would make the law better able to address non-consent within the context of ongoing intimate partner relations: "He felt entitled to her assistance in satisfying his desires no matter how distasteful, morally repugnant, painful and humiliating she found those desires to be (*Tr.* p. 462, 986)." (Tarrant, Tolmie & Giudice, 2019).

This is a danger that when removed from the wider context of domestic and family violence, some of these terms can be levelled at the victim by the perpetrator of domestic and family violence, creating a false impression of mutuality, rather than seeing their impact as part of “a pattern of harmful behaviour” (Tarrant, Tolmie & Giudice, 2019). Jury directions about domestic and family violence could assist in this area, as could reframing the law to incorporate a social entrapment framework as suggested above. If jury directions are the preferred solution, ANROWS recommends a review mechanism similar to *s119 Victims’ Rights and Support Act (NSW)*. We also think there would be value in research into effective jury directions and the testing of jury directions, which could inform the reviews of the legislation (including jury directions).

While it also involves mistake of fact, *R v Motlop* is one matter that might have had a different outcome if the Queensland definition of consent included non-imminent threats, fear of harm that extends beyond bodily harm, and coercive control; particularly if the legislation mandated the use of social entrapment theory in situations of intimate partner sexual violence. In this matter, the physical and sexual violence began with disproportionate jealousy over a Facebook message asking if the victim/survivor was single. In response to seeing this message, the defendant injured the victim/survivor in a vicious attack with “a stick, a chair and a knife” (*R v Motlop*, [39]), and later subjected her to two separate acts of “intercourse when she was in extreme pain” (*R v Motlop*, [61]). This defendant’s actions are demonstrative of the “fragile masculinity and sense of entitlement to sex” that are common individual factors for perpetrators in Laura Tarzia’s recently published ecological model of intimate partner sexual violence (Tarzia, 2020, p. 1) which utilises the World Health Organisation’s ecological framework for the prevention of gender-based violence (Krug et al., 2002).

In *R v Motlop* the defendant was only convicted on the first sexual assault, largely because the victim/survivor expressed love and wanting to be with the defendant between the two acts. Despite this declaration, “[b]oth occasions involved a statement by the appellant that he wanted to have sex, a statement by the complainant questioning why he would want to do that when she was in pain, and each act occurring without expressed resistance, either by verbal statements or by physical actions” (*R v Motlop*, [53]). The inconsistency of verdicts opened the way for the defendant to claim an honest and reasonable but mistaken belief that the complainant was consenting. The appeal was overturned, however we are still left with the impression that justice was not done because “the complainant’s evidence could not satisfy a jury beyond reasonable doubt that any consent given by the complainant was “obtained” by the appellant by the use of force or other factors set out in s 348 of the Criminal Code (*R v Motlop*, [30]).”

Queensland’s definition of consent is manifestly inadequate if a verbal act of survival between two closely co-located sexual assaults that occurred after a vicious physical assault means both sexual assaults cannot be understood as non-consensual. Intimate partner sexual violence can look very different from other forms of sexual assault because it occurs within the context of sexual routine, among experiences of prior consensual activity and within a presumption of continuous consent. This can create contexts where unwanted sex is agreed to, or where asking for sex to stop is not seen as a

possibility (Clark & Quadara, 2010; Lazar, 2010; Schafran, 2010, cited in Cox 2015). In this particular occasion: “She said she was scared and it was “my way of survival” (*R v Motlop*, [30]).

The complainant’s mid-violence declaration was not unfounded. Intimate partner sexual violence is associated with a higher risk of homicide than other types of violence (Campbell & Soeken, 1999 cited in Tarzia, 2020). Intimate partner sexual violence also puts someone at a much higher risk of being killed, particularly if they are also being physically assaulted (Campbell et al., cited in Toivonen & Backhouse, 2018). The Australian Domestic and Family Violence Death Review Network reviewed intimate partner homicides that followed an identifiable history of domestic violence between 1 July 2010 and 30 June 2014 (Domestic Violence Death Review Team, 2018). Of the 152 cases identified, the majority involved a male killing their current or former intimate partner (79.6%) and the majority of those males who killed a female had been the primary abuser against that female prior to her death (92.6%) (DVDRT, 2018). Going back further, figures remain similar: from mid-2002 to mid-2012, 488 women in Australia were killed by an intimate partner, which represents 75 percent of total victims killed by an intimate partner (Bryant & Bricknell cited in ANROWS, 2018). Almost a quarter (24%) of the males who killed their current or former female partners were named as respondents in Domestic Violence Orders protecting the female homicide victim at the time of the death (DVDRT, 2018).

The Domestic Violence Death Review Team report points out that these homicides do not occur without warning. In the cases where a male domestic violence abuser killed a female intimate partner:

- 76.2 percent had previously used physical violence against that partner;
- 80 percent had been emotionally or psychologically abusive;
- 61 percent had been socially abusive; and
- 2.4 percent were known to be sexually abusive (DVDRT, 2018).

Over a third (36.2%) of the males who killed their female partners had stalked the woman either during the relationship or after it had ended (DVDRT, 2018). Actual or intended separation was a characteristic in over half of the male homicide offender cases (DVDRT, 2018). Almost 20 percent of males who killed a female partner, and over 20 percent of females who were killed by a male partner identified as Aboriginal. The report notes that this statistic needs to be interpreted cautiously and understood in conjunction with other literature on domestic and family violence in Aboriginal and Torres Strait Islander communities (DVDRT, 2018). The standout characteristics of the homicides identified by the Domestic Violence Death Review Team, therefore, show that men are killing their female intimate partners as part of a pattern of abuse and control. The incidence and impact of intimate partner sexual violence is significant, with Australian domestic and family violence workers estimating 90-100% of their female clients have experienced intimate partner sexual violence (Heenan, cited in Toivonen & Backhouse, 2018).

RECOMMENDATION 7: The *Queensland Criminal Code Act (1899)* should mandate a jury direction that utilises social entrapment theory when sexual assault matters involve intimate partner sexual violence to ensure acts of survival are not misconstrued as consent.

The operation of s24

While Queensland rape and sexual assault offences on the surface look to have a simple two-step process to prove – that the sexual act took place, and that the sexual act took place without consent – the mistake of fact provision in s24 of the *Queensland Criminal Code Act* (1899) makes getting a conviction more complex, and is arguably the area most in need of reform. Even if it is accepted that the sexual act took place, and that the sexual act took place without the complainant’s consent, under s24, the defendant can still argue that they had an honest and reasonable but mistaken belief that renders them not culpable for a sexual assault. The most common mistake relied upon in sexual assault matters is a mistaken belief that the victim was consenting. In this way, mistake of fact essentially operates as a back door for defendants to use excuses that the definition of consent disallows, and has thus been the focus of outcry from the general public, women’s legal services, and from some members of the legal profession.

Bri Lee, a non-practising lawyer, academic and author, and Bond University law professor, Jonathon Crowe, have created a body of work examining all Queensland appeal decisions dealing with the mistake of fact excuse in rape and sexual assault cases that occurred after 1990.

Many of the cases we identified involved vulnerable complainants, including children, women with disabilities, survivors of domestic violence and linguistic minorities. The excuse has been successfully used in cases where the evidence indicated the complainant was asleep when initial sexual contact occurred, as well as where the complainant was, in fact, so intoxicated that she was comatose and therefore legally incapable of consenting (but where the defendant alleged a mistake to the precise degree of her incapacity).

(Crowe, 2019)

While NSW law is constructed differently, hinging upon the notion of reasonable belief, the same miscarriage of justice that inspired that state to undergo its own review of sexual consent legislation, *R v Lazarus*, is replicated in Queensland matters relying upon mistake of fact:

Ms Lee and I found several cases where the lack of robust and sustained resistance by the complainant allowed the defendant to rely on mistake of fact. This is concerning given that a ‘freezing response’ (or ‘tonic immobility’) is a very common psychological reaction to sexual aggression or trauma. (Crowe, 2019)

Research has shown that “a definition of rape that turns on whether the accused may have had a reasonable belief in consent, is perceived as biased in favour of the defendant” (Larcombe, Fileborn, Powell, Hanley & Henry, 2016, p. 624). This perceived bias of the law reduces victim/survivors’

confidence in justice, and is a disincentive to victim/survivors reporting sexual assault. “Reasonable belief in consent was also perceived to enable jury members to apply assumptions and expectations about reasonable sexual conduct and inferred or continuing consent that many of our participants personally rejected” (Larcombe et al., 2016, p. 624), leading those participants to believe their own interpretations and attitudes were more progressive than the law. This research provides an indication that “rape law is perceived as failing to keep pace with evolving attitudes and thinking about sexual assault” (Larcombe et al., 2016, p. 624). Attitudes and assumptions about the sexual consent law being biased toward defendants, and unable to keep pace with contemporary understandings of sexual consent, represent significant and compelling reasons to remove or modify mistake of fact as it applies to sexual consent in Queensland law.

RECOMMENDATION 8: There are strong and compelling reasons to remove or modify mistake of fact (*s24*) with respect to sexual assault offences.

The onus of proof

Another compelling reason to change mistake of fact as it applies to sexual consent is that it is often used to the detriment of women who are members of the priority populations outlined in our response to Chapter 2. These groups already experience considerable barriers to accessing support and justice after experiencing violence. In the case of culturally and linguistically diverse women, including migrant women, a linguistic barrier between sexual participants should increase the burden of communicative consent. However, Queensland’s current law:

puts complainants at a significant disadvantage if they don’t speak the same language as the person who is initiating intercourse. Defence counsel may exploit language differences to paint pictures of grey areas or miscommunications, meaning in effect that women who speak a different language are expected to fight back more vigorously than others. (Crowe, 2019)

ANROWS research highlights that Australian literature consistently raises four barriers to culturally and linguistically diverse women even reporting domestic and family violence and/or sexual assaults perpetrated against them (Mitra-Kahn, Newbiggin & Hardefeldt, 2016). These four barriers include personal barriers, like shame and isolation; cultural barriers, like community pressure to be silent about violence; information barriers, like accessing culturally sensitive support in the language they speak, write and read; and institutional barriers, like fear of authorities stemming from exposure to systematic violence in their home country (Mitra-Kahn, Newbiggin & Hardefeldt, 2016). It’s thus a heinous miscarriage of justice when a matter does make it to court, to see the same language barriers the complainant has overcome to even access justice, used against them as a justification for the perpetrator’s mistaken belief in their consent.

This is apparent in the Queensland case *R v Lennox*, where the defendant was charged with five counts of rape and sexual assault:

the evidence of the complainant (who clearly had poor English and required some questions to be repeated), both in chief and in cross examination, was consistently to the effect that she told the appellant that she did not want him to do what he was doing. On her evidence she said no and started to cry and pushed him when he inserted his finger into her vagina and penetrated her vagina with his penis. The complainant did not waiver from her account that she did not respond to the appellant's penile penetration physically in any manner capable as signifying she consented. Indeed, it was open to the jury to accept her consistent evidence that she commenced crying and continued to do so during the act of penile penetration as signifying her lack of consent. (*R v Lennox*, [59])

The defendant was acquitted on three counts, with the jury unable to agree upon a fourth count, and convicted on one count of rape by penile penetration. The defendant appealed the conviction on the basis of the verdicts being inconsistent, and it was overturned by the Court of Appeal, leaving it open for the defendant to rely upon mistake of fact. The impact of language was highlighted by the jury having to ask for direction as to whether "I don't want" equals no by law (*R v Lennox*, [46]). Women's lack of consent should not come down to whether they are able to successfully deliver particular consent scripts verbatim – we need sexual consent legislation to make this obvious.

Reasonable steps and recklessness

By shifting the onus of proof onto the perpetrator of sexual violence, as per Q-13(b), perhaps by requiring "reasonable steps", in this particular matter (*R v Lennox*) there might have been more of an emphasis on the perpetrator having to justify why he chose to escalate his sexual activity despite the victim/survivor saying "I don't want" at virtually every stage of this sexual assault. It could be argued (as per Q-15) that this defendant was reckless with respect to whether or not the victim/survivor was consenting, and more concerned with his own sexual gratification timetable. After the sexual assaults the defendant was asked by the victim/survivor why he did not stick to the agreement he had made not to have sex with her if she consented to see him, and he replied: "because I was going away for the week, okay. If I'd seen you during the week I would have waited, but because I was going away for the week, that was to make sure you don't forget about me." (*R v Lennox*, [34]).

While ANROWS would recommend making mistake of fact not apply in sexual assault offences, we concede that improved operation of the law could also come from inserting a section (24A) that modifies mistake of fact for offences against *s349* and *s352*. This idea has precedent in the *Criminal Code Act 1924 (TAS)* that modifies their own mistake of fact provision *s14*, to pertain to consent in certain sexual offences. This is done in *s144*, which explains mistaken belief as to the victim's consent is not honest or reasonable if the accused is reckless as to whether the complainant consented, or if the accused did not take positive and reasonable steps, in the circumstances known to them at the time of the offence, to ascertain the complainant was consenting to each sexual act.

RECOMMENDATION 9: Insert a section 24A that modifies mistake of fact for offences against s349 and s352 which explains mistaken belief as to the victim’s consent is not honest or reasonable if the accused is reckless as to whether the complainant consented, or if the accused did not take positive and reasonable steps to ascertain the complainant was consenting to each sexual act.

Intoxication

In terms of the perceived bias of the *Queensland Criminal Code Act* (1899) towards defendants (discussed above) issues relating to intoxication require urgent amendment. Currently:

Defendants can point to their own intoxication in arguing their mistake was honest; they can also point to the complainant’s intoxication as showing that their mistake was both honest and reasonable, even though it may also have been what made the complainant vulnerable. (Crowe, 2019)

As ANROWS argued with linguistic capacity, intoxication should raise rather than lower the burden of communicative consent. “We have the most archaic legislation around consent with the “mistake of fact” defence allowing defendants to use their own drunkenness to secure acquittals” (Lee, 2018, Dec 13). In addition to Lee’s work advocating for legislative reform in this area, Australian outcry about overseas cases like *People v Turner* (where the drunk complainant was comatose when the sexual assault occurred) reflects the social importance of this issue. Queenslanders are already clearly aware that being intoxicated is not an excuse to sexually assault someone; and they are also aware that intoxication is not an invitation to be sexually assaulted. It is critical that Queensland law reflects this knowledge in a way that is not undermined by mistake of fact excuses relating to the intoxication of either party.

RECOMMENDATION 10: Include in s24A that modifies mistake of fact for offences against s349 and s352 a clause that makes the mistaken belief unreasonable if the accused was in a state of self-induced intoxication, and the mistake is not one they would make if they were not intoxicated; and if the complainant was in a state of intoxication and did not clearly and positively express their consent to each sexual act.

ANROWS would also suggest including unconscious or asleep when any part of the sexual activity occurred as part of the modifications made to s24. As per *R v Motlop* discussed above, which involved the perpetrator feeling entitled to sex after violence, research has demonstrated that in intimate partner sexual violence the “sense of entitlement extended to the perpetrator penetrating a woman vaginally or anally while she was asleep, even when she had previously expressed her wishes not to engage in sexual activity” (Tarzia, 2020, p. 9).

RECOMMENDATION 11: Include in s24A that modifies mistake of fact for offences against s349 and s352 a clause that makes the mistaken belief unreasonable if the complainant was unconscious or asleep when any part of the sexual act or sequence of sexual acts occurred.

Response to Consultation Paper - Chapter 5: Other matters

Statement of objectives and guiding principles

ANROWS is supportive of the inclusion of a statement of objectives and guiding principles. While the consultation paper outlines that only Victoria has adopted objectives and guiding principles in s37A of the *Crimes Act 1958 (VIC)*, there are proposed principles in the NSW Law Reform Commission's draft proposals (NSWLRC, 2019, p. 36):

Crimes Act 1900 (NSW)

Draft s 61HF Principles to be used in interpreting and applying Subdivision

Regard must be had to the following principles when interpreting or applying this Subdivision—

- (a) every person has a fundamental right to choose whether or not to participate in a sexual activity,
- (b) a person's consent to a sexual activity should not be presumed,
- (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

(NSWLRC, 2019, p. 36)

In ANROWS's view, these principles form a good basis for Queensland law, but could be enhanced further with the inclusion of "intimate partner" terminology. For example: *(a) every person, including an intimate partner, has a fundamental right to choose whether or not to participate in a sexual activity.* Alternatively, the interpretive principles could state: *(b) a person's consent to a sexual activity should not be presumed, including in the context of an intimate partner relationship.*

The value of including this terminology directly within the interpretive principles is that it emphasises that (most) sexual assault is perpetrated by intimate partners. We have provided extensive information on the prevalence of intimate partner sexual violence above, but wish to again highlight ANROWS research, the National Risk Assessment Principles (Toivonen & Backhouse, 2018), that identify intimate partner sexual violence as high risk for intimate partner homicide. Making this addition would also provide a firm foundation for community education initiatives around consent, and put intimate partner sexual violence directly upon Queensland's agenda.

Expert evidence

Normative understandings of “real rape” sometimes called “rape myths” are prevalent and may be highly influential to juries. The 2017 NCAS conducted by ANROWS (Webster et al., 2018) identified that 18 percent of Australians disagreed with the statement that “women are more likely to be raped by someone they know than by a stranger”, and 16 percent said they didn’t know the answer. On the contrary, the majority of rapes are committed by someone known to the victim, in their home or another familiar residential location (Australian Institute of Family Studies & Victoria Police, 2017). This is just one of the myths explored in [Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners](#) that would be useful to share with juries. Another rape myth worth addressing is, contrary to 2017 NCAS finding that 42 percent of Australians agree “it is common for sexual assault accusations to be used as a way of getting back at men” (Webster et al., 2018) the rate of false allegations of sexual offences is very low (around 5%) (AIFS & Victoria Police, 2017).

ANROWS is also in favour of expert evidence that might improve juries’ understanding of:

- how common it is for victims/survivors not to report the assault, or not report it immediately
- the reasons why victims/survivors may not report, or not immediately.
- the freeze response
- the impact of trauma on memory.

Express provision in the law for the introduction of expert evidence would give weight to the importance of addressing rape myths.

ANROWS would also suggest that in matters involving intimate partner sexual violence, expert evidence relating to domestic violence and social entrapment theory would also be useful to juries. ANROWS research highlights the impact social entrapment theory can make in understanding victim/survivor behaviour (Tarrant, Tolmie & Giudice, 2019) and better ensure justice.

Education and awareness

ANROWS is in favour of public education programs that educate the wider community about issues of consent and mistake of fact, if indeed mistake of fact excuses remain relevant to Queensland’s updated *Criminal Code*. As mistake of fact excuses have been shown to operate as a back door way to reintroduce rape myths, we would particularly urge extensive public education initiatives if mistake of fact is modified (rather than removed) for sexual consent offences.

As well as potentially assisting Queenslanders to avoid perpetrating sexual assaults in the first place, public education on consent has the propensity to restore victim/survivor’s confidence in Queensland law; improve victim/survivor ability to identify a wide variety of non-consensual sexual acts as crimes (particularly when they occur in the context of an intimate partner relationship); and increase the

likelihood that victim/survivors will report these sexual assaults perpetrated against them. With a better educated Queensland populace, there may also be an improvement to criminal justice outcomes, as juries will also be better able to understand the nuances of sexual consent.

Educating the public on consent is in line with National Outcome 2 of the [National Plan to Reduce Violence against Women and their Children: Relationships are Respectful](#). It is also in line with the growing body of evidence on techniques that are effective in preventing violence against women and their children (Our Watch, Australia's National Research Organisation for Women's Safety & VicHealth, 2015), which include direct participation programs; community mobilisation and strengthening; organisational development; communications and social marketing; and civil society advocacy. ANROWS research R4Respect elucidates how these ideas can be rolled out peer-to-peer for young Queenslanders (Struthers, Parmenter & Tilbury, 2019). As part of our work with NCAS, ANROWS produces a suite of resources that would be useful in designing educative initiatives, particularly the [Australians' attitudes to violence against women and gender equality: The 2017 National Community Attitudes towards Violence against Women Survey \(NCAS\) Stakeholder Kit](#).

RECOMMENDATION 12: A statement of objectives and guiding principles, the admission of expert evidence, and education and awareness programs would all make positive improvements to the operation an updated *Criminal Code Act 1899 (QLD)* with respect to sexual consent offences.

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