Queensland Law Society

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Office of the President

31 July 2018

Our ref: BDS-CrLC

The Honourable Yvette D'Ath MP
Attorney-General and Minister for Justice and Leader of the House
GPO Box 149
Brisbane Qld 4001

By email: [redacted]

Dear Attorney

Consent in Queensland criminal law

Thank you for your letter dated 18 June 2018 and the opportunity to provide comments on the issue of consent in Queensland criminal law. Queensland Law Society (**QLS**) notes the complexity surrounding this subject and greatly appreciates being consulted on this important issue.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Our Criminal Law Committee who have a thorough awareness and understanding of the operation and practice of criminal law in Queensland has carefully considered the matters raised in your correspondence.

1. Response to questions

In response to the questions posed in your letter, we are not aware of any compelling evidence to:

- amend the current definition under section 348 of the *Criminal Code Act 1899* Criminal Code; or
- amend the applicability of section 24 of the Criminal Code to chapter 32 offences.

However, we recommend that a reference be made to the Queensland Law Reform Commission for full and proper examination of the issue. We also suggest that the Queensland Sentencing Advisory Council be tasked with preparing public education materials on this matter.

As such, we reserve our right to provide more fulsome submissions in response to any inquiry or consultation process.

2. Section 348 of the Criminal Code

It is the view of the Society that the current definition under section 348 of the Criminal Code is sufficient.

Section 348 defines the meaning of consent and states:

> **348 Meaning of consent**
>
> (1) In this chapter, consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
>
> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
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> (a) by force; or
>
> (b) by threat or intimidation; or
>
> (c) by fear of bodily harm; or
>
> (d) by exercise of authority; or
>
> (e) by false and fraudulent representations about the nature or purpose of the act; or
>
> (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

We note that section 348(2) of the Criminal Code commences "*without limiting subsection (1)…*". This aspect of the definition has been the subject of academic and journalistic criticism as being vague or uncertain. However, in our view, we consider the non-exhaustive definition of consent in Queensland enables an appropriate level of discretion. In our view, this is preferable to having a static list of non-consensual scenarios.

The Society has considered the need for legislative change to include active, affirmative consent. Such a change would be regarded as being inconsistent with the basic proposition of the Australian Criminal Code jurisdictions that the prosecution bears the onus in criminal trials. However, as we mentioned earlier, an examination of the issue by the Queensland Law reform Commission would be welcomed.

On a further point, we do note that Queensland is the only Australian jurisdiction where the legislation does not specifically deal with the scenario where intercourse continues after consent is withdrawn. That is not to suggest in any way that the present law of Queensland permits sexual intercourse to continue after consent is withdrawn. It does not. There is authority that carnal knowledge continues after initial penetration (*R v Mayberry* [1973] Qd R 211 at 229). The Society would in principle support an amendment to clarify the common law position and obtain consistency in approach with the other Australian jurisdictions.

3. Section 24 of the Criminal Code

It is the view of the Society that section 24 of the Criminal Code must remain applicable to chapter 32 offences.

The Society does not support the NSW approach to consent and maintains that section 24 of the Criminal Code should not be restricted.

We understand that section 61HA(3) in the *Crimes Act 1900* (NSW) has effectively dispensed with the common law defence of honest and reasonable belief.

Instead, the prosecution, in addition to proving an intention to have carnal knowledge, must also show that the defendant knew that the complainant did not consent, or was reckless to that fact. The Queensland offence provisions do not provide for these additional fault elements, and it is here that the recent controversies have been focused.

NSW has specifically legislated to include an objective fault element to determine if there has been consent by virtue of s61HA(3)(c) *Crimes Act 1900* (NSW) – "*the person has no reasonable grounds for believing that the other person consents to the sexual intercourse*". There are also subjective fault elements.

Queensland's *Criminal Code* is structured in a completely different way. The general rule in Queensland is that it is the conduct that is punishable. Mental (or fault) elements are not a necessary part of an offence, unless specified to be so. There is no mental element to the offence of rape. Nor is there any mental element to the offence of sexual assault. So a prosecutor in Queensland does not have to prove that a defendant had any particular state of mind. The accused's intent is not an essential part of the prosecutor's case. The prosecutor must simply prove the accused's conduct in penetrating the body of the complainant, and the complainant's lack of consent. That is enough to prove a charge of rape. However, if there is any evidence to suggest that the accused might have been mistaken about consent, then the prosecution case must exclude the possibility of an honest and reasonable mistake.

The NSW provision is deeply problematic for several reasons and has been the subject of criticism by the NSW Bar Association and NSW Law Reform Commission. First, it places a negligent defendant on par with one with deliberate intent. Secondly, negligence offences in respect of serious criminal conduct should be the exception and not the rule. These charges are among the most serious in the criminal law.

The Australian Law Reform Commission has also recommended that honest and reasonable belief as to consent should continue to be a defence to the charge.

4. Conclusion

The Society restates the position put forth in our original letter that the issue of consent in criminal law in Queensland be referred to the Queensland Law Reform Commission for thorough examination, consideration and public consultation. The Queensland Law Society would be very keen to engage in any review or consultation process and be consulted on any proposals for reform.

We note that there is level of public misunderstanding in relation to issues of consent in criminal law proceedings. As such, it might be appropriate for the Queensland Sentencing Advisory Council to prepare some material in order to educate the community about these matters.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy Manager, Ms Binny De Saram on [redacted] or [redacted].

Yours fai[redacted]

Ken Tayl[redacted]
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