Queensland Law Society
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

4 February 2020

Our ref: KS-CrLC

Confidential

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop
Brisbane Qld 4003

By email: [redacted]

Dear Secretary

QLRC Review of consent laws and the excuse of mistake of fact

Thank you for the opportunity to provide comments on the Queensland Law Reform Commission's (**QLRC**) Review of consent laws and the excuse of mistake of fact (**the Review**). The Queensland Law Society (**QLS**) appreciates the opportunity to provide its' input to this important Review.

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. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by members of the QLS Criminal Law Committee, whose members have substantial expertise in this area.

The Society is pleased that the proposed review is being undertaken by the QLRC to consider whether the current laws are appropriate and responsive to current community standards. In our view, any change to the existing laws must be evidence-based.

We do wish to express our concerns with the timeframes allowed for consultation on what are, complex issues. The Consultation paper was released on 20 December 2019, just prior to the holiday break. Submissions were due by 31 January 2020. This is an incredibly compressed consultation period, particularly when many of our volunteer Committee members have been absent on leave. The Review Consultation Paper (**the Consultation paper**) poses a number of important questions. Due to the time constraints, our responses are limited to those matters outlined below.

Preliminary comments

QLS acknowledges the long-lasting trauma associated with rape and sexual assault cases, regardless of an outcome in a legal sense. Recent media reports continue to demonstrate an

urgent need for broad changes to how our society responds to victims, particularly in the early stages of medical assistance and reporting to police[1].

We are cognisant there is growing concern toward ensuring our laws adequately reflect the contemporary community standards in this context. In providing this submission, the Society has considered the state of the existing laws and the need to ensure just outcomes for victims and accused persons. We agree that more needs to be done to prevent, respond to and improve the standard of responses to sexual violence.

We strongly support the paramountcy of ongoing community education and social campaigns to achieve cultural change. This requires an open dialogue on the drivers and factors which enable sexual violence to occur[2] and careful consideration of whether criminalisation can and should be "a preferred tool of social change".[3]

We also support practical reforms to ensure that all complainants are supported in the earliest stages of reporting, investigation and throughout any subsequent interactions with the criminal justice system. Our responses to the questions posed, are as outlined:

Chapter 2: Background and overview

Q-1 What aspects, if any, of the definition of consent in section 348 and the excuse of mistake of fact in section 24 of the Criminal Code, as it applies to rape and sexual assault, give rise to particular concern or cause recurrent problems in practice? What is the basis of these concerns or problems?

The definition of 'consent'

Consent is a central concept in rape and sexual assault cases and is defined in section 348 of the Code as follows:

> *(1) ...**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 –*
>
> *(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.*

---

[1] https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364
[2] See evidence referred to in https://www.csyw.qld.gov.au/resources/dcsyw/violence-prevention/prevent-support-believe-qld-framework-to-address-sexual-violence.pdf.
[3] Page 446 of Consent confusion

Whilst we acknowledge concerns raised within the community, the Society is of the view that there are no aspects of the definition of consent in section 348 which give rise to or cause problems in practice.

The section 348 definition should apply to a charge of sexual assault. The Society would support an amendment to apply the s.348 definition to a charge of sexual assault, to overcome the problem of statutory construction identified in *R v BAS*[4].

There are also no aspects of the excuse of mistake of fact in section 24 which give rise to concern or cause problems in practice.

Q-2 What considerations and principles should be taken into account in determining whether the definition of consent in section 348 and the excuse of mistake of fact in section 24 of the Criminal Code, as it applies to rape and sexual assault, should be changed?

The law must be workable in its practice and application. It must not create criminals of people freely engaging in consensual sexual activity. A fundamental principle of our criminal justice system is that a conviction requires proof of guilt beyond reasonable doubt. It follows that people who might be innocent must not be convicted. This is a central tenet of our justice system.

A person who honestly and reasonably believes that they have been given consent is innocent. If there is reasonable doubt about whether an honest and reasonable mistake has been made, then the accused receives the benefit of the doubt.

The alternative (to say that the accused should bear an onus, or that the mistake should be proved to a civil standard), would be to accept convictions of people who might be innocent. That would undermine public confidence in convictions, and therefore undermine public confidence in the criminal justice system as a whole.

While the focus of popular media in Queensland has been to assert that the law is no longer reflective of community standards and ought to be changed, in practice, the wording of section 24 is flexible. It allows for the evolution of the application of the defence along *with* changing community expectations that is, circumstances in which a mistaken belief may have been considered reasonable by a previous generation of jurors, may no longer be considered to be reasonable.

Chapter 3: The Definition of Consent

Q-3 To what extent does the definition of consent in section 348 of the Criminal Code accord with community expectations and standards about the meaning of consent?

The definition of consent in section 348 accords well with community expectations and standards about the meaning of consent - in the context of what conduct, in the absence of consent, should be a crime. The difficulty in our view, are misconceptions, about its application in practice.

---

[4] [2005] QCA 97.

Q4- Should the definition of consent in section 348 of the Criminal Code be amended, for example, to expressly require affirmative consent? Why or why not?

The Consultation Paper describes the intent of proposed models of 'affirmative consent', which aim to shift 'the focus of inquiry away from the conduct of the complainant and onto the conduct of the defendant'.

Section 348 of the Criminal Code already requires a positive representation of consent and arguably, some aspects of an affirmative consent model already form part of the current law in Queensland. The definition in section 348 requires that consent be "given" – that is, communicated. The courts have also recognised that a complainant who fails to communicate dissent "by word or action" cannot necessarily be taken to have consented[5].

QLS submits that no purpose would be served by including additional requirements about the form of that communication. The law has to accommodate two scenarios in which a sexual partner may remain silent and do nothing.

> In the first scenario, for example, a couple in an intimate relationship for many years may know that each enjoys spontaneous sexual activity, and they may trust each other to communicate when sexual conduct is unwanted. It is likely that sort of context which President Sofronoff had in mind when he said in *R v Makary*, "a representation [of consent] might also be made by remaining silent and doing nothing."[6]
>
> In the second scenario, a person might freeze, or submit to an attack through fear of worse happening if they resist. As the Court of Appeal held in *R v Shaw,* "A complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it."[7]

Properly understood, the two statements from *Makary* and *Shaw* do not contradict each other. Silence may be a communication of consent, or it may not be, depending on the context.

The many and varied expressions of human sexuality, and the many and varied contexts in which sexual interaction takes place, mean that assessments of whether consent was given are best made on a case by case basis on the evidence in each case. Prescriptive rules of general application are apt to lead to injustice. For those reasons the Society does not support any additional legislative words to the existing requirement for consent to be affirmatively given.

There is another separate basis for questioning affirmative consent models, and it relates to the justification behind them. Supporters argue that shifting to an affirmative consent model is necessary to encourage people to think more deeply or thoughtfully about their sexual and social interactions. Careful consideration must be given as to whether this is the purpose of the criminal law and indeed, whether such changes alone, would be effective[8]or lead to just outcomes.

---

[5] *R v Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA); see also *R v Makary* [2018] QCA 258, [49] – [50] (Sofronoff P).
[6] *R v Makary* [2018] QCA 258 at [49]-[50]
[7] *R v Shaw* [1996] 1 Qd R 641 at 646 per Davies and McPherson JJA, [1995] QCA 45
[8] https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf at page iii.

Q-5 If yes to Q-4, how should the definition be amended, for example:

(a) by expressly including the word 'agreement'?

The legal meaning of consent in Queensland presently includes an agreement to sexual activity. Re-defining consent for the purposes of Chapter 32 of the *Code* to include the word "agreement" would have no legal effect. It would not meaningfully shift the focus of the enquiry away from the complainant. Nor will it affect issues pertaining to credibility and reliability of evidence. It might however, serve to remind the general public that the essence of consent is agreement, and that consent is not a question of desire.

A person may, for many reasons, freely agree to do something that they would prefer not to do. Their preference, wish, want, or desire, does not determine whether they consented. For that reason, use of the word "agreement" is more precise than the word "willingness" adopted by President Sofronoff in *R v Makary*[9]. Therefore, whilst it would not alter the legal position in Queensland, inclusion of the word 'agreement', may be of some assistance in informing community understanding of the legal position.

(b) by expressly providing that a person does not consent if the person does not say or do anything to indicate consent to the sexual act?

A provision deeming that consent has not been given if a person remains still and silent would have the effect of transforming acts where there is real consent (in the sense of an internal state of mind) into crimes. In the first scenario discussed in relation to Question 4, for example, the couple in a long-established intimate relationship may trust each other to communicate when sexual conduct is unwanted. Where the inactive party enjoyed and desired what happed while they were still and silent, it would be manifestly unjust to say that they had been assaulted or raped. It is likely that sort of context which President Sofronoff had in mind when he said in *R v Makary*, "a representation [of consent] might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle of ways, or by nuance, evaluated against a pattern of past behaviour."[10]

It might be thought that no person would be prosecuted in a case of still and silent mental consent, but complaints often come about in curious ways. Consider the following scenario:

> Al and Bob are in a long-term sexual relationship. Bob initiates sexual activity while Al is reading a book. Al remains still and silent while Bob has sexual intercourse with Al. The next day, Al sends an electronic chat message to a friend, Cam, excitedly recounting Al's experience with Bob. Cam reacts in horror saying, "That's rape! You did not give consent!" Al laughs it off, saying, "It was fine by me." Three years later Al and Bob separate acrimoniously. They are in a dispute about property and children. Al remembers Cam's comment, and makes a complaint of rape.

[9] [2018] QCA 258.
[10] *R v Makary* [2018] QCA 258 at [49]-[50]

(c) by expressly providing that a person must take steps or reasonable steps to ascertain that the other person is consenting to the sexual act (and that they must do so in relation to each type of sexual act involved)?

This second aspect is, in our view, even more problematic, that is, in placing a positive requirement on an accused to take reasonable steps. As has been identified elsewhere, it does not just shift the focus to the defendant's actions. It shifts the evidentiary onus to the defendant to show that they made reasonable efforts to ascertain consent. This is a significant change.

A requirement that people take reasonable steps to ascertain the consent of their sexual partner could transform sexual interactions where there was real consent (in the sense of an internal state of mind) into crimes. The interaction between Al and Bob described in the example to question (b) above, would become a crime.

Determining consent within the current legal framework is already difficult and highly emotive, particularly for victims. QLS is of the view that this difficulty will not be resolved by a change to the affirmative consent model. There would for example, remain uncertainty around what is acceptable communicative "affirmative consent"[11]. Therefore we query if the policy objectives sought would ultimately be achieved by amendments to the definition and that such changes, would not improve the experiences of victims going through the process and could potentially lead to unjust outcomes.

The Society submits that the present state of the law in Queensland, as decided in *R v Makary*[12], better deals with these situations, by allowing the jury to determine from the context, having heard all of the evidence, whether consent was given.

Withdrawal of consent

Q-7 Should section 348 of the Criminal Code be amended to include an express provision that a sexual act that continues, after the withdrawal of consent, takes place without consent? Why or why not?

The present state of the law in Queensland is that an offence of sexual assault or rape is committed if sexual activity continues after consent is withdrawn.[13] Accordingly, there is no need for express words to that effect to be added to the *Criminal Code*. Adding such words would make no change to law or practice.

Circumstances when consent is not freely and voluntarily given

Q-8 Should section 348(2) of the Criminal Code be amended to extend the list of circumstances in which 'a person's consent to a sexual act is not freely and voluntarily given'? Why or why not?

---

[11] See discussion in Aya Gruber, *Consent Confusion*, 38Cardozo L. Rev.415 (2016), available at http://scholar.law.colorado.edu/articles/11 at p 430

[12] [2018] QCA 258.

[13] The authorities are cited in the Consultation Paper at [107] to [108].

We do not agree that section 348(2) of the Criminal Code should be amended to extend a list of circumstances in which a person's consent is not freely and voluntarily given. The obvious circumstances which might be included in such a list are those listed at Q9(a)(i) and (ii). The present state of the law in Queensland already provides that a person in these circumstances does not have the cognitive capacity to consent.

Q-9 If yes to Q-8, should the list of circumstances in section 348(2) of the Criminal Code be extended, to include:

(a) where:

(i) the person is asleep or unconscious when any part of the sexual act occurs; or

The present state of the law in Queensland is that a person who is asleep or unconscious does not have the cognitive capacity to consent.[14] There is no need to include express words in the *Criminal Code* to that effect. Adding such words would not change the law. It can be noted that the strict application of this rule makes criminal some conduct which might be considered inoffensive. For example, before going to sleep, Al asks Bob, "Please wake me up in the morning with [a sexual act]." If Bob carries out Al's wishes, Bob commits a crime.

(ii) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual act?

The present state of the law is that consent cannot be given by a person who lacks the cognitive capacity to consent, including where the lack of cognitive capacity is caused by intoxication.[15] There is no need to include express words in the *Criminal Code* to that effect. Adding such words would not change the law.

(b) where the person fails to use a condom as agreed or sabotages the condom?

We consider that such circumstances would constitute a conceptually different offence to rape and sexual assault and should therefore properly form a separate and distinct offence.

(c) where the person agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease?

We again submit that such circumstances would constitute a conceptually different offence to rape and sexual assault and should therefore properly form a separate and distinct offence.

---

[14] *R v Singh* [2012] QCA 130.
[15] *R v Singh* [2012] QCA 130.

The offence might for example, be a variation of the offence of unlawfully transmitting a serious disease to another under section 317(b) of the Criminal Code which requires the Crown to establish recklessness rather than intent. This would capture the circumstance where a person flagrantly engages in unprotected sexual act/s knowing they suffer from a serious disease. It would also alleviate the need for the Crown to prove the person intended to produce a particular result i.e. to transmit the disease[16].

(d) where the person consents to a sexual act under a mistaken belief induced by the other person that there will be a monetary exchange in relation to the sexual act?

QLS considers that a distinct offence is not necessary as such conduct is already captured by the broad definition of fraud in section 408C of the Criminal Code.

Chapter 4: Excuse of mistake of fact: Section 24 of the Code

Q-12 Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code, as it applies to the question of consent in rape and sexual assault? Why/why not?

QLS does not support the amendment or qualification of section 24 of The Criminal Code as it applies to sexual offences. We are concerned that this may lead to potentially unsafe convictions and undermine fundamental tenets of our justice system, including the presumption of innocence and the accused's right to a fair trial.

Section 24 is a fundamental part of the Criminal Code and therefore, any efforts to clarify or restrict its scope must be scrutinised with extreme caution in a comprehensive and empirical manner which carefully balances the rights of the accused to avoid the potential miscarriage of justice.

Q-13 Where the excuse of mistake of fact as to consent is relied upon in rape or sexual assault, should the onus of proof:

(a) remain unchanged, so that it is for the prosecution to disprove the defendant's mistaken belief; or

(b) be changed, so that it is for the defendant to prove the mistaken belief was honest and reasonable? Why or why not?

The burden of proving guilt should remain with the Crown to the requisite standard. Any deviance to this would be significant and place persons charged with such offences at a significant disadvantage in the criminal justice system.

It should be remembered that the present law requires an evidentiary onus to be met before a section 24 mistake may be considered by a jury. That is, there must be some evidence which raises the possibility of an honest and reasonable mistake. The evidence must be capable in a

[16] *Zaburoni v The Queen* [2016] HCA 12.

real sense of giving rise to an honest and reasonable belief that consent was given. A speculative possibility is not enough to meet the evidentiary burden.[17]

Q-14 If the onus of proof were changed, what advantages or disadvantages might result?

As touched upon above, a person who honestly and reasonably believes that they have been given consent is innocent. The law currently provides that, if there is reasonable doubt about whether an honest and reasonable mistake has been made, then the accused must be given the benefit of the doubt.

The alternative (to say that the accused should bear an onus, or that the mistake should be proved to a civil standard), would be to accept convictions of people who might be innocent.

Take for example the situation where Dale threatens Evelyn to perform a sexual act with Gil. The issue in the trial is Gil's knowledge of the threat. Suppose the jury:

a) had a reasonable doubt that Gil knew of Dale's threats;
b) had a reasonable doubt that Gil might have held an honest and reasonable belief that Evelyn freely and voluntarily consented; BUT,
c) was not satisfied on the balance of probabilities that Gil knew nothing of the threats; and,
d) was not satisfied on the balance of probabilities that Gil's belief in Evelyn's consent was reasonable.

If the trial were held today, that jury would conclude that Gil was probably guilty, but Gil's guilt was not proved beyond reasonable doubt. True to their oaths, the jurors would return a verdict of Not Guilty.

If the burden were placed on Gil, the jurors would be bound to return a verdict of Guilty, despite substantial doubt in their minds as to whether guilt was proved by the evidence.

Recklessness

Q-15 Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to introduce the concept of 'recklessness' with respect to the question of consent in rape and sexual assault? Why or why not?

Section 24 of Queensland's *Criminal Code* applies to an honest and reasonable "belief in the existence of any state of things". When Queensland's rule is compared to the law in jurisdictions which include recklessness, or reckless indifference, as an element of the offence, it can be seen that the inclusion of recklessness would make no change to the rule in Queensland.

Take for example the three limbs of recklessness in the South Australian legislation.[18] In the first limb, a person is recklessly indifferent if they are aware of the possibility that the other person might not be consenting, or has withdrawn consent, but decide to proceed. If a Queensland jury decided that the first limb applied, it is difficult to see how they could conclude that the accused might honestly have believed consent had been given. It is still more difficult

[17] *R v Makary* [2018] QCA 258 at [54] to [72].
[18] Section 47 *Criminal Law Consolidation Act 1935 (S.A.).*

for a jury to conclude that the accused's belief about consent was reasonable. A verdict of Guilty would almost certainly follow, under the law as it presently stands in Queensland.

In the second limb provided in South Australia, a person is recklessly indifferent if they are aware of the possibility that the other person might not be consenting, but they fail to take reasonable steps to ascertain consent. Again, awareness of the possibility is inconsistent with the holding of a positive belief that consent has been given. Although Queensland's law does not require the taking of reasonable steps, it does require that consent be communicated. If jurors in a Queensland case find that consent has not been given, and that the accused is aware of the possibility that consent has not been given, it is difficult to see how they could imagine that the accused had an honest and reasonable belief that consent had been given. A verdict of Guilty would almost certainly follow, under the law as it presently stands in Queensland.

In the third limb of reckless indifference as defined in South Australia, a person is recklessly indifferent if they do not give any thought as to whether or not the other person is consenting. In that situation, the person would hold no belief as to their partner having given consent. A verdict of Guilty would almost certainly follow, under the law as it presently stands in Queensland.

Accordingly, the Society submits that there is no purpose to be served by including an element of *reckless indifference* in the Queensland *Criminal Code*. Where consent is not given, a person who is reckless, or recklessly indifferent, to the consent of their partner is criminally liable under the law as it presently stands.

As the *Consultation Paper* observed, advertence to concepts of recklessness played an important role in reforming the law in those jurisdictions where it was necessary for the prosecution to prove that the accused knew that the other party was not consenting.[19] In Queensland, there is no requirement for the prosecution to prove the accused's state of mind.

Reasonable steps

Q-18 Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to require a person to take 'steps' or 'reasonable steps' to ascertain if the other person is consenting to the sexual act? Why or why not?

Section 24 requires jurors to consider whether the accused's belief was reasonable in all of the circumstances. It is un-necessary, for determining guilt, to include any checklist of matters the jurors must consider. The introduction of a "reasonable steps" requirement would encourage a dangerous degree of hindsight and speculation. It is important to bear in mind in this context that, in sexual cases, section 24 applies only once the jurors have found that consent was not in fact given. Where a reasonable mistake has been made, with grave consequences, it is human nature to consider what else might have been done to prevent the mistake. Rather than judging the accused's conduct in the context of its time and circumstances, if a jury is asked to consider questions of "if only" alternative courses of action can seem reasonable, obvious even, with the benefit of hindsight. "If only Gil had asked Evelyn why Evelyn decided to initiate sexual contact, then Gil might have learned that Dale had threatened Evelyn", "If only Gil had noticed the hesitation in Evelyn's, 'Yes, okay then.'"

[19] Consultation Paper [221] to [225].

The question of what steps the accused took to establish a belief in consent is already a proper matter for the jury to consider in deciding whether the belief was honestly or reasonably held.

As President Sofronoff observed in *Makary* what communication is required to give consent is a matter of context, nuance, and subtlety. The same may be said as to what steps are reasonable to satisfy oneself that a partner is consenting.

The Society submits that there is no need to amend section 24 to include a requirement that the accused must have first taken reasonable steps before forming an honest and reasonable belief that they have been given consent.

It is difficult to imagine how such a requirement could be included without placing a burden of proof on the defendant, which the Society opposes for reasons given earlier.

Q-22 Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to specify in what way a defendant's intoxication affects the assessment of mistake of fact as to consent? Why or why not?

The defendant's intoxication is not relevant to deciding whether their belief was reasonable.[20] A defendant cannot rely on their own intoxication to establish a defence. Accordingly, there is no need to amend or qualify section 24 in relation to how intoxication affects the assessment of mistake of fact. Adopting the wording of the Tasmanian provision[21] would make no substantive change to the law of Queensland.

Chapter 5: Other matters

Statement of objectives and guiding principles

Q-25 Is there a need to amend the Criminal Code to introduce a 'statement of objectives' and/or 'guiding principles' to which courts should have regard when interpreting provisions relating to rape and the sexual offences in Chapter 32 of the Criminal Code? Why or why not?

The provisions of the *Criminal Code* set out clearly the elements of conduct which expose a person to criminal liability. The elements are currently clearly defined. There are few, if any, areas of uncertainty as to their meaning or application. The two objectives in the Victorian legislation would not aid in the interpretation of the *Code's* provisions. Of the five "guiding principles", none are of any assistance to statutory interpretation, and only the final two have any relevance to the determination of guilt in any particular case.

The Society agrees with the Victorian Law Reform Commission that the criminal law has both a regulatory and educative function. The educative function, in the Society's submission, is achieved by identifying clearly for the public the conduct that will attract the sanctions and opprobrium of the criminal law. The criminal statute book is not well suited to pronouncing aspirational slogans, nor to effecting changes in cultural mores or ethics. That is to say, the criminal law is particularly ill-suited to improving behaviour that remains legal, but inconsiderate, rude, or socially undesirable.

---

[20] *R v Hopper* [1993] QCA 561 at [10].
[21] Section 14A *Criminal Code Act 1924 (Tas).*

Q-27 Is there a need for legislation to specifically permit the admission of expert evidence in trials of sexual offences in chapter 32 of the Criminal Code, subject to the discretion of the court? Why or why not?

Expert evidence, from an expert in a specialised field of knowledge, is permitted if an ordinary person, without instruction or experience in the area, would not be able to form a sound judgement on the matter without the assistance of an expert.[22] No statutory authority is required for the prosecution to rely upon an expert. If the prosecution seek to call an expert witness to inform the jury, for example, that there is no typical way in which victims of sexual crimes respond to an attack, and that many do not report the crime for many years, then the current law allows an appropriately qualified expert to be called.

The utility of such evidence is often over-stated. The real focus of most criminal trials is on the particular circumstances of the allegation- that is, whether the complaint before the jury is credible and reliable. Generalities, in the experience of our members, are of much less importance, than particulars. Such experts are of no assistance with the particulars.

The use of such experts also adds to the cost and length of trials, and creates the potential for battles of experts on both sides, and disputes about collateral issues, such as the expected behaviour of lying complainants, and how to assess the true incidence of false complaints.

In Queensland, the utility of such evidence has been rendered largely moot by the development of judicial directions. A typical direction may include something similar to:

> "there's no rule in relation to how people behave when they're being abused, sexually. There's no rule in relation to how victims respond, and if you haven't been a victim of a crime, particularly of a sexual crime, you shouldn't presume that you've got any way of assessing how a victim should behave. Obviously, that goes for sexual crimes, but it probably also goes for normal assaults. You know, some people react aggressively; some people react passively. It depends very much on the personality and situation."[23]

A recent direction considered by the Court of Appeal was:[24]

> "This matter took some time to be revealed to [the appellant], so I need to direct you in this respect to that particular issue. [The appellant] indicated that he was first informed of these allegations on the 26th of April 2016. Remember that, in the particular indictment, they go from early 2012 onwards. Now, this is a matter for you and, well, this is a comment and you can accept it or reject it as you see fit, but you may think that common experience and much public discussion indicates there are many cases of sexual abuse with children that do not result in a complaint being made for many years later. For instance, you may be aware of this yourselves – and, again, you can accept or reject any comment I make of this kind, particularly from what has been published in the press about the Royal Commission into Institutional Responses to Child Sexual Abuse."
>
> "You may also consider that consistent with your own common sense and your everyday experience, it is to be expected that different people will react in different ways to the same or similar situations: that is, there is no right or wrong way for people to react. Again, I comment to you: again, it is a matter for you. You might think there are no rules

[22] *Osland v R* (1998) 197 CLR 316 at 336.
[23] Extract from summing up of Richards DCJ in Brisbane District Court on 13 December 2019, indictment 403/19.
[24] *R v SCY* [2018] QCA 44 at [19].

about how people who engage in sexual abuse of children behave and no rules about how a person who has been sexually abused may behave. So, although it is a matter for you, it is probably best to avoid acting on any preconceived notions of what someone in either position might or might not do. But the facts of this case are important and you must look at the facts of this case to determine the outcome - but you may think that those kind of things that I have commented upon are useful in your evaluation."

Policy considerations

Whilst we do not agree that any substantive change to the law is required, QLS submits that more work must be done to address systemic social issues which contribute to the commission of these offences and to improve the experiences of victims who interact with the criminal justice system.

This includes adequately and appropriately resourcing police and other Departments including Queensland Health, to ensure that victims are supported and empowered throughout the complaint and investigation processes.

Should there be public education programs to educate the community about issues of consent and mistake of fact?

As noted at the outset, the Society strongly supports a need for public education programs to inform and educate the community, law enforcement agencies and service providers about these issues.

We acknowledge the work which has already been undertaken by the Department of Child Safety, Youth and Women who released a Sexual Violence Prevention Framework in October 2019[25]. There are a number of important priorities which focus on prevention, education and providing better support and resources to victims.

We note for example, proposed initiatives include:

- *Making respectful relationships education compulsory in all Queensland state schools via strengthening implementation of the Australian curriculum, and ensuring the quality of programs delivered*
- *Strengthening a victim-centric focus in the Queensland Police Service*
- *Conducting a pilot of a dedicated sexual violence liaison officer within the Townsville QPS District*
- *Establishing a sexual violence champions group to guide cultural change*
- *Strengthening sexual violence initiatives and responses at key events and locations involving young people, including Schoolies events*

[25] https://www.csyw.qld.gov.au/violence-prevention/sexual-violence-prevention/sexual-violence-prevention-framework.

- *Raising the profile of Sexual Violence Awareness Month, including the delivery of an annual Sexual Violence Awareness Grants Program*[26]

The Department has indicated it will outline how it will monitor and evaluate its progress in its 'Action Plan' to address sexual violence. QLS would urge the Government and successive governments to maintain momentum on these proposals.

Resourcing of forensic services

There is also more work to be done to ensuring that victims are adequately supported from the earliest stage in reporting of these offences.

QLS highlights the issues raised in the 'Delivering forensic services Report 21: 2018-19' which identified a number of challenges in the delivery of forensic medical examinations for victims of sexual assaults. These included:

- *victims experiencing lengthy delays waiting at hospitals for examinations to occur, or being transferred to another hospital several hours away*
- *some hospitals refusing to perform forensic medical examinations*
- *victims being refused a forensic medical examination unless they report the sexual assault to police*
- *victims waiting several hours for the forensic medical examination in hospitals' general admissions areas in the clothes in which they were assaulted.*

There are also particular concerns about the experiences of victims in regional Queensland. [27]

We note that a number of reforms have been proposed in consultation with the Queensland Police Service. QLS considers that streamlining these processes is essential and victims, including in regional areas must have the ability to receive timely and sensitive examinations, counselling and guidance about their options for formal reports to police.

Queensland does not currently have an option to store evidence gained through forensic medical examination in case a victim decides to later make a complaint to police, an option available in other states. This is particularly concerning in circumstances where "[t]he Department of Health and the hospital and health services have no clear and consistent policy or processes to enable victims to undergo a forensic medical examination if they have not officially reported the sexual assault to police."[28]

Queensland Health must be adequately resourced to ensure that all victims can access forensic medical examinations if they wish to do so. We acknowledge that Queensland Health intended to progressively implement policy and structural changes during the second half of 2019. QLS is supportive of improvements to address these issues and recommends that Queensland Health progress these improvements as a matter of priority.

---

[26] http://statements.qld.gov.au/Statement/2019/10/15/queensland-launches-first-framework-to-prevent-sexual-violence.
[27] https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2019/5619T1037.pdf at p 23.
[28] https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2019/5619T1037.pdf at p 25.

Specialist sexual assault services

Finally, QLS remains concerned about the experiences of victims who make complaints of sexual assault to police. The recent ABC report suggests that 1 in 12 sexual assault reports are determined to be "unfounded" by police, which rises to 1 in 4 in some regions, is a stark reminder of the need for structural change.[29]

QLS advocates for a specialist sexual assault response team within the QPS which is adequately resourced to support Police Commands across the State. We note the examples presented in other jurisdictions:

- **NSW**

  State Crime Command includes the Child Abuse and Sex Crimes Squad. This squad was established "to ensure provision of a specialist sexual assault response to support Police Area Commands across NSW".

- **VIC**

  Sexual Offences and Child Abuse Investigation Teams are made up of specialist detectives who are trained to investigate the complex crimes of sexual offences and child abuse. Teams manage a case from the time of disclosure throughout investigation and court proceedings. This continuity is essential.

  https://www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams-1

- **WA**

  The Sex Crime Division operates as part of the Specialist Crime Portfolio and investigates crimes throughout the state.

  Information about reporting a sexual assault: https://www.police.wa.gov.au/Your-Safety/Sexual-assault

Ensuring the appropriate support to police officers engaged in these roles is also a necessary consideration to be made.

Governments and service providers must also ensure that these services adequately respond to the reality that certain groups are at a particularly high risk of sexual violence.[30] Therefore, law enforcement and service providers should be equipped to provide respectful, culturally appropriate counselling which includes access to adequate legal and translation services at the earliest opportunity.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
President

[29] https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364.
[30] https://www.csyw.qld.gov.au/resources/dcsyw/violence-prevention/prevent-support-believe-qld-framework-to-address-sexual-violence.pdf at p 6.