

29th July 2021

Women's Safety and Justice Taskforce

Via submission portal: <https://www.womenstaskforce.qld.gov.au/consultation/make-a-submission>

Women's Health Queensland submission in relation to Discussion Paper 2.

Dear Women's Safety and Justice Taskforce,

Women's Health Queensland (WHQ) would like to thank the Women's Safety and Justice Taskforce (the Taskforce) for the work that is being done to ensure the future safety of women and children in Queensland. WHQ offers free gendered violence recovery services to women in Brisbane and has been operating in Queensland supporting women for almost forty years. We support the focus areas proposed by Discussion Paper 2. In particular, WHQ sees a need for legislation to better support the human rights of victim-survivors, police and judicial system responses to be trauma informed and introduction of state-wide primary prevention initiatives including consent, respectful relationships and gender equality education introduced across Queensland schools. Thank you for taking this submission into consideration when the Taskforce advises the Attorney General.

1.0 The Criminal Code Act 1989 (the *Criminal Code*) must be amended to introduce an affirmative consent model and guiding principles. The mistake of fact defence must not be applicable to sexual offences in Criminal Code.

The recent amendments to sexual assault and rape legislation put forward in the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020* (Qld) (the *Bill*) retains an outdated model of consent and does not go far enough to protect the human rights of a victim-survivor.

1.1 The *Bill* retains an outdated model of consent (clause 8).

This is a historic opportunity to reframe and modernise Queensland's outdated sexual assault laws. Unfortunately, this *Bill* only legislates a definition of consent already established in case law.¹ The recommended changes fail to strengthen consent law because:

- a. passivity could still amount to consent in some circumstances,²
- b. the onus is placed on the person who is being subjected to unwanted sexual acts to withdraw their consent,³ and
- c. the amendment to section 347 is no more than technical reform.⁴

WHQ would prefer to see the *Bill* introduce an ***affirmative consent model***. Such a model would require individuals to enthusiastically and clearly affirm their willingness to have sex through words or actions. This model would provide greater protection for individual sexual autonomy. It would also send a clear message to the community that a person seeking consent is responsible for taking active and reasonable steps to ensure that consent exists.

1.2 The excuse of mistake of fact (clause 9) will continue to be used to perpetuate rape myths.

The *Bill* retains the mistake of fact excuse which allows a defendant to argue mistaken belief rather than requiring the defendant to show the positive steps they took to gain consent. The excuse also does not recognise that victims may 'freeze' (tonic immobility) a common and recognized response during an assault.⁵ A victim may be afraid of an implied threat of violence, attempt to pacify the aggressor or it may be safer for them to not resist during an assault.⁶ Queensland case law, which these amendments are based on, demonstrate that the mistake of fact defence regularly undermines the model of consent included in the proposed *Bill*.⁷ The proposed changes do not require defendants to show they took positive steps to ascertain consent. This will continue a dangerous precedence that undermines the proposed consent legislation and fails to protect victims.

1.3 The *Bill* fails to uphold the human rights of sexual assault survivors.

WHQ is grossly disappointed that the Human Rights analysis for this *Bill* is one-sided and only considers the rights of the defendant to a fair trial. The *Statement of Compatibility* is completely silent on the rights of the sexual assault survivors. As mentioned above, sexual

¹Statement of Compatibility, Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld) 2 ('Statement of Compatibility').

²*R v Makary* [2019] 2 Qd R 528, [50] (Sofronoff P) ('*R v Makary*').

³Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld) cl 8 ('Consent and Mistake of Fact Bill').

⁴Consent and Mistake of Fact Bill (n 4) cl 8.

⁵Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on consent and sexual offence: a missed opportunity?' (2020) 8 *Current Issues in Criminal Justice*, DOI: 10.1080/10345329.2020.1801151 ('Burgin and Crowe').

⁶Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1, 4-5 ('Crowe and Lee').

⁷Crowe and Lee (n 7) 5-6.

violence is disproportionately a gendered crime. The human rights to equal protection of the law without discrimination, protection from torture and cruel, inhuman, or degrading treatment, and to liberty and security of person – all apply to all survivors of rape and sexual assault.⁸ However, these rights have been entirely overlooked.

1.4 The Criminal Code should include a set of guiding principles in relation to sexual assault and rape offences.

WHQ supports the introduction of guiding principles to Chapter 32 of the *Criminal Code*. Guiding principles would assist the criminal justice system in handling rape and sexual assault and would assist in improving broader social and cultural issues about the understandings of consent. The law should provide clarity and guidance to society and play a role in addressing ‘rape myths’ and ideas of ‘real rape’ and dispel beliefs that rape is normally perpetrated by violent strangers.⁹ Interpretive or guiding principles would ensure that the interpretation of this law represents the suggested strengthening of the legislation. They can also ensure the proper and adequate function of the law in practice.¹⁰ The Victorian *Crimes Act 1958* sets itself apart by having included guiding principles at section 37B for over a decade now.¹¹ It is time that Queensland’s outdated legislation caught up. A model of guiding principles drafted for the *Australian Feminist Legislation Project* is a suitable example for the Taskforce to consider.¹²

Guiding principles

It is the intention of Parliament that in interpreting and applying this chapter, courts are to have regard to the following matters—

- (a) there is a high incidence of sexual violence within society;*
- (b) sexual offences are significantly under-reported;*
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment or mental illness;*
- (d) sexual offenders are commonly known to their victims;*
- (e) sexual offences most frequently occur in residential locations;*
- (f) there are legitimate reasons why victims of sexual violence may not physically resist an assault, including, but not limited to, physiological responses to aggression and fear of escalating or prolonging the attack;*

⁸*Human Right Act 2019* (Qld) ss 15 – 17 and 19 (*‘Human Rights Act’*).

⁹ Burgin and Crowe (n 6) 4-5.

¹⁰ Burgin and Crowe (n 6) 6.

¹¹*Crimes Act 1958* (Vic) s 37B.

¹² Burgin and Crowe (n 6) 6.

(g) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred; and

(h) there are legitimate reasons why victims of sexual violence may not immediately report an assault to police or another person and a failure to make an immediate report, on its own, does not discredit an allegation. (Crowe, Flynn & Lee, unpublished manuscript.)¹³

2.0 The Division 3 and 4 of the Evidence Act 1977 (Qld) (the Evidence Act) must be reviewed as they relate to the examination and cross-examination of witnesses and evidence of special witnesses where the witness is the victim-survivor of domestic, family and/ or sexual violence.

The *Evidence Act* does not substantially protect victim-survivors from re-traumatisation as witnesses in court proceedings. The current sections¹⁴ that allow the court to protect rights of witnesses and special witnesses must be reviewed to further restrict inappropriate lines of questioning and cross examination techniques commonly used by defence. These sections are also often used in contradiction to the original intention of law makers. For example, the direction that questions for a special witness be kept simple can be used by those conducting the questioning to lead special witness by only asking closed questions.¹⁵ Evidence across Australia demonstrates that victims-survivors of sexual violence continue to be subjected to questions designed to undermine their character and/ or testimony.¹⁶ Experts have identified that in some cases the treatment of victim-survivors as witnesses has regressed.¹⁷ The Taskforce has an opportunity to review the treatment of victim-survivors in court and recommending the *Evidence Act* be amended to better protect their rights.

3.0 State-wide training to ensure a consistent trauma-informed police and judicial system response to victim-survivors of sexual violence underpinned by the principle of 'start by believing.'

¹³J. Crowe, A. Flynn, and B. Lee, Unpublished manuscript.

¹⁴*Evidence Act 1977* (Qld) ss 17-21AAA ('*Evidence Act*').

¹⁵*Ibid* s 21A(2)(f)(ii).

¹⁶Mary Iliadis and Kerstin Braun, 'Sexual assault victims can easily be re-traumatised going to court – here's one way to stop this', *The Conversation* (News Article, 25 March 2021) <<https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428>>

¹⁷Elise Kinsella, 'Questioning of sexual assault victims during trials 'worse' than in the 1950s, criminologist finds', *ABC News* (News Article, 25 March 2021) <<https://www.abc.net.au/news/2021-03-25/experts-question-how-justice-system-deals-with-sexual-offences/13248172>>

One of the main concerns raised across the sector is the lack of training for our policing and judicial system. It is evident that there are many barriers for women and children when reporting violence.

In 2020 WHQ conducted The *Gendered Violence Recovery* survey received 102 responses and was shared with the public via WHQ social media platforms, quarterly newsletter, and sector network via email in 2020. Gendered violence includes sexual violence, domestic and family violence and coercive control. Results demonstrated that 48% of women did not report or seek help and 49% of women felt too ashamed. It is imperative that further barriers such as police response or re-traumatisation by the judicial system are reduced.

Respondents of WHQ's *Gendered Violence Recovery* survey were asked what help or support would have been beneficial; holistic, accessible, trauma-informed, and non-judgmental were key words that appeared throughout the responses.

"... importance of acceptance and non-judgemental support."

"Trauma-informed police would aid hugely in recovery ..."

"... non-judgemental information about my rights ..."

Police, judges, prosecutors, defence lawyers and court workers require further training on general principles, current societal data and the drivers of gendered violence which could be in the form of guiding principles. There would also need to be a state-wide and consistent effort into the delivery of training in trauma-informed best practice and improved evidence collection and treatment methods. There are too many examples where police fault has resulted in no conviction.¹⁸ The recent legislation review of the sexual assault and rape offences did not go far enough to adequately protect victim-survivors of sexual violence further highlighting the need for improved policing, first responder and judicial responses.

WHQ recently hosted *Understanding Pathways to Safety: Domestic and Family Violence 2021 Forum* attended by 136 individuals and 86 organisations. The role of police and justice system in DFV crisis situations was a key discussion point throughout the forum. Key recommendations developed from the forum were increase in interpreter use and training to support culturally and linguistical diverse women and the state-wide implementation of

¹⁸Josh Roberston, 'Victim of alleged gang rape says senior Queensland police sought her silence over detective's failures', *ABC News* (News Article, 3 February 2021) <<https://www.abc.net.au/news/2021-02-03/alleged-rape-victim-says-police-sought-her-silence-over-failures/13114262>>

and
Josh Robertson, 'Inside one woman's legal nightmare from a sexual assault case', *ABC News* (News Article, 17 June 2021) <<https://www.abc.net.au/news/2021-06-17/former-crime-agency-official-sexual-assault-case/100013962>>

DFV-informed practitioner embedded models. The current framework in place fails to provide a space where they can safely report their experience. Without making changes to the system and comprehensive training for police, first responders, court workers, judges, prosecution, and defence, new or amended legislation may not ensure the safety of women and children.

3.0 State-wide primary prevention initiatives and funding are needed to stop gendered violence, including sexual violence, before it occurs.

Women and children will continue to be subjected to sexual violence if the gendered drivers of violence are not addressed. Current sexual assault and rape legislation does not go far enough to protect women and children. Even with amendments proposed above, in isolation, legislation is not the most effective prevention tool. Therefore, it is critical the Taskforce consider all avenues to substantially reduce the rates of sexual violence including state-wide primary prevention initiatives. The *National Community Attitudes towards Violence Against Women Survey* ([NCAS 2017](#)) found some concerning trends. That is, community knowledge and attitudes to violence against women (VAW) do not align with evidence; young people's knowledge of VAW is declining; and attitudes towards sexual consent are concerning. Two in five Australians believe that women make up false reports of sexual assault in order to punish men.¹⁹

Evidence based primary prevention initiatives that target the whole of a community including schools, childcare, health systems, sporting clubs, community centres, media, families and workplaces dismantle the gendered drivers and can prevent violence before it occurs. This would substantially reduce the cost of violence on our communities and economy. Currently, Queensland does not have a funded, state-wide approach to the primary prevention of men's violence. There is an opportunity for the Government to create a significant impact in the prevention of violence. [Our Watch](#) have developed numerous frameworks for programs across all areas of our community that could be delivered state-wide by community-based organisations, with government funding and support. This would produce long-term outcomes and prevent gendered violence from occurring.

In Discussion Paper 2 there is consideration for the potential of consent and respectful relationships programs in Queensland schools. The current *Australian Curriculum Review of Foundation – Year 10 curriculum* (the Review) proposed by the *Australian Curriculum, Assessment and Reporting Authority* (ACARA) has included some additional sexual health,

¹⁹Australian National Research Organisation for Women's Safety, *Are we there yet? Australians' Attitudes towards violence against women and gender equality*, *Summary Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Report, 2017) 12
<https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/300419_NCAS_Summary_Report.pdf>

consent and respectful relationship content but it is not substantial enough to make real impact. Queensland has an opportunity to lead change and introduce whole-school-approach programs focused on consent, sex positive concepts, gender equality and respectful relationships. This creates a huge shift in culture, that is well supported by evidence.

Respectful Relationships Education in Schools has been developed by [Our Watch](#) and uses a whole of school approach to address the gendered drivers of violence and promote equality. This program has been introduced in Victorian schools and piloted in some Queensland schools. Over the course of the delivery in Victoria 64% of teachers saw an improvement in student relationships and behaviour.²⁰ The program was piloted in Queensland schools focusing on year 1 and 2 students. This demonstrated numerous positive results including students' gendered attitudes tending to be less stereotypical. A whole of school approach as outlined by Our Watch³ is shown to be more effective method of introducing and reiterating these concepts. To ensure they are inclusive these programs must apply an intersectional lens and be informed by LGBTQIA+ people, Aboriginal and Torres Strait Islander peoples and culturally and linguistical diverse people. These programs need to be introduced in schools in an age-appropriate manner from formative years before children reach the age group, of around 15 years old, where they are at increased risk for both experiencing and perpetrating sexual assault. It is recommended the government introduce incentives or mandates for schools to receive expert training and or support for staff and teachers. This ensures a consistent state-wide evidence-based whole-of-school approach to consent, sexuality and respectful relationships education addressing the drivers of gendered violence such as harmful stereotypes and norms leading to inequality, disrespect, and sexual violence.²

Thank you again for the opportunity to consult with the Taskforce. WHQ appreciates the important work that is being done to keep women and children in Queensland safe.

Kind regards,



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²⁰Sarah Kearney, Cara Gleeson, Loksee Leung, 'Respectful Relationships Education in Schools: The Beginnings of Change', *Final Evaluation Report* (Report, 2016) 49 <https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2019/06/24034138/RREiS_R3_Final_AA.pdf>