



30 July 2021

Women's Safety and Justice Taskforce  
GPO Box 149  
BRISBANE QLD 4001

Submission by website: <https://www.womenstaskforce.qld.gov.au/consultation/make-a-submission>

Dear Women's Safety and Justice Taskforce

**Response to Discussion Paper 2: Women and girls' experience of the criminal justice system (the Second Discussion Paper)**

Thank you for the opportunity to make a submission in response to the Second Discussion Paper.

The Queensland Council of Social Service (QCROSS) is the peak body for the social service sector in Queensland. Our vision is for equality, opportunity and wellbeing for every person, in every community.

Our submission to the Second Discussion Paper is limited to the following points:

1. Queensland's *Human Rights Act 2019* should be used to guide the Taskforce's considerations and recommendations.
2. The Taskforce should focus on women and girls' experience of the criminal justice system as victim-survivors and particular attention must be given to improving laws relating to consent and mistake of fact.

Due to time and capacity constraints, we have not had the opportunity to engage properly with our members in relation to other issues raised in Discussion Paper 2. On that basis, we have limited our comments to the issues outlined above.

**Using a human rights framework**

The *Human Rights Act 2019* requires the Queensland Government to act in a way that is compatible with human rights.

We welcome the Taskforce's commitment to carefully consider human rights.

As information in the Second Discussion Paper demonstrates, sexual violence is a gendered crime. It is therefore appropriate that the Taskforce's human rights consideration be conducted through a gendered lens.

According to the 2020 United Nations Handbook, acts of sexual violence limit the rights to life, liberty, privacy, equality, discrimination and not to be subjected to torture or other cruel,

inhumane or degrading treatment or punishment.<sup>1</sup> These human rights are explicitly protected in Queensland's Human Rights Act.

Protection of women and girls' human rights should be a central focus of any recommendations made by the Taskforce, including those that relate to improving laws relating to consent and mistake of fact.

### **Improving laws relating to consent and mistake of fact**

QCOSS is supportive of the Taskforce's proposal to focus on the adequacy of current sexual offences in Queensland, particularly in relation to consent, and the operation of the excuse of honest and reasonable mistake of fact in the prosecution of sexual offences.

On 7 September 2020, QCOSS co-hosted a forum to examine the application of Queensland's *Human Rights Act 2019* to the proposed *Criminal Code (Consent and Mistake of Fact) & Other Legislation Amendment Bill 2020* ('the Bill'). We partnered with the peak body for sexual assault services, the Queensland Sexual Assault Network (QSAN) and the Women's Legal Service Queensland (WLSQ) to host this event. The event attracted more than 100 registrants across the state.

This engagement indicated a near consensus view that the Bill would have no tangible benefit for rape and sexual assault survivors. QCOSS wrote the **enclosed** submission to the Legal Affairs and Community Safety (LACS) Committee inquiry opposing the passage of the Bill as drafted.

Unfortunately, the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* was passed in March 2021 without addressing key issues highlighted by the community services sector and leading academics.

Our concern with the current legislation is that it:

1. **Excludes the affirmative consent model:** Exclusion of affirmative consent was identified as the number one concern for QCOSS members and supporters. Currently, legislation provides a basis for the mistake of fact excuse to be used to absolve the accused from criminal responsibility when successfully pleaded. Introducing an affirmative model of consent would prevent passivity from being accepted as a reasonable belief for consent.
2. **Uses a biased human rights analysis:** Legislation solely considers the rights of defendants to a fair trial, and their protection from retrospective criminal laws while failing to give adequate consideration to the human rights of sexual assault complainants. Of respondents at the QCOSS online event, 94 per cent did not believe that human rights of sexual assault survivors were adequately protected by proposed changes to the Bill.
3. **Discriminates against people with disability:** Queensland's current consent laws limit the ability of people with a mental impairment to pursue a safe, satisfying sexual life and to decide matters regarding their choice of partner and their bodily integrity. The current definition of a 'person with an impairment of the mind' is also very broad

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<sup>1</sup> Handbook for the United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (2020) page 20; See further, Office of the United Nations High Commissioner for Human Rights, (Report, 2018) page 30.

and captures people whose ability to consent to sexual contact is unaffected by their impairment.<sup>2</sup>

4. **Has missed an opportunity to include guiding principles in the Queensland Criminal Code:** Guiding principles should be incorporated within the Queensland Criminal Code as has been recommended by the Women's Legal Service<sup>3</sup> and QSAN.<sup>4</sup> This mechanism is important because it provides a framework for stakeholders within the justice system to understand sexual violence. Criminal law reform can help to promote cultural change as it has both a regulatory and an educative function.<sup>5</sup>
5. **Continues to apply the mistake of fact excuse:** The continued application of the mistake of fact excuse in Queensland law enshrines deeply sexist rape myths. Rape myths jeopardise complainants' access to justice by causing police, jurors and other community members to undermine their credibility from the reporting stage to trial. Yet, several rape myths are embodied by Queensland law. Most significantly, the excuse of mistake of fact in section 24 endorses perpetrators, who believe that the lack of verbal or physical resistance is a reasonable basis to assume consent.

### Consultation limitations

Our response to the Second Discussion Paper is limited and we are concerned that many of our members and the broader community may not have had sufficient time to make a submission to the Second Discussion Paper to inform this important discussion.

We ask that consideration be given to the consultation process to ensure that stakeholders have an ability to provide their views and so that important intersectional perspectives are included.

Thank you again for the opportunity to provide our submission to the Taskforce.

Yours faithfully,



Aimee McVeigh  
Chief Executive Officer

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<sup>2</sup> Queensland human Rights Commission. Review of consent laws and the excuse of mistake of fact. Accessed 28/07/2021. [https://www.qhrc.qld.gov.au/\\_\\_data/assets/word\\_doc/0015/24351/2020.01.31-QHRC-Submission-Consent-Laws.docx](https://www.qhrc.qld.gov.au/__data/assets/word_doc/0015/24351/2020.01.31-QHRC-Submission-Consent-Laws.docx)

<sup>3</sup> Sexual Assault Review Recommendations: A Step in the Right Direction But Do Not Go Far Enough says Women's Legal Service. Accessed 28/07/2021. <<https://wlsq.org.au/sexual-assault-review-recommendations/>>.

<sup>4</sup> A submission to the Queensland law reform Commission by the Queensland Sexual Assault Network. Accessed 28/07/2021. <https://qsan.org.au/wp-content/uploads/2020/06/QSAN-QLRC-Review-of-Consent-Laws-the-Mistake-of-Fact>.

<sup>5</sup> Australian Law Reform Commission. Guiding principles and objects clauses. Accessed 28/07/2021. <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/25-sexual-offences-3/guiding-principles-and-objects-clauses-2/>