



Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

**Report No. 3, 57th Parliament
Legal Affairs and Safety Committee
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Legal Affairs and Safety Committee

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All web address references are current at the time of publishing.

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Abbreviations

AMAQ/AMA Queensland	Australian Medical Association Queensland
ASD	Autism Spectrum Disorder
ATSILS	Aboriginal and Torres Strait Islander Legal Service (Qld)
BAQ	Bar Association of Queensland
Bill	The Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020
BRISSC	Brisbane Rape and Incest Survivors Support Centre
CNL Act	<i>Co-operatives National Law Act 2020</i>
committee	Legal Affairs and Safety Committee
department/DJAG	Department of Justice and Attorney-General
the Fund	the Legal Practitioners' Fidelity Guarantee Fund
Gaming Machine Act	<i>Gaming Machine Act 1991</i>
GCCASV	Gold Coast Centre Against Sexual Violence
HRA	<i>Human Rights Act 2019</i>
Interactive Gambling Act	<i>Interactive Gambling (Player Protection) Act 1998</i>
LAQ	Legal Aid Queensland
Liquor Act	<i>Liquor Act 1992</i>
LPA	<i>Legal Professional Act 2007</i>
LSA	<i>Legislative Standards Act 1992</i>
NCPF	National Consumer Protection Framework
PBNs	police banning notices
PPRA	<i>Police Powers and Responsibilities Act 2000</i>
previous Consent Bill	The previous Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020, which was introduced in the 56th Parliament and referred to the former Legal Affairs and Community Safety Committee
QCAA	Queensland Coalition for Action on Alcohol
QCCL	Queensland Council of Civil Liberties
QCOSS	Queensland Council of Social Service
QHRC	Queensland Human Rights Commission
QLRC	Queensland Law Reform Commission

QLRC report	The report of the Queensland Law Reform Commission titled <i>Review of consent laws and the excuse of mistake of fact</i> , June 2020
QLS	Queensland Law Society
QPS	Queensland Police Service
QSAN	Queensland Sexual Assault Network
Racing Integrity Act	<i>Racing Integrity Act 2016</i>
RASARA	Rape and Sexual Assault Research and Advocacy
RDVSA	Rape and Domestic Violence Services Australia
SNP	safe night precinct
SOC	Statement of Compatibility
TAFV/Policy	Tackling Alcohol-Fuelled Violence/Policy
TASCOSS	Tasmanian Council of Social Service
Wagering Act	<i>Wagering Act 1998</i>
WLSQ	Women's Legal Service Qld
YAC	Youth Advocacy Centre Inc
Zig Zag	Zig Zag Young Women's Resource Centre

Chair's foreword

This report presents a summary of the Legal Affairs and Safety Committee's examination of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

It is abundantly clear from the evidence of victim support groups that the reporting of sexual assaults is under-reported. Any civilised society would find this troubling. It would appear that some victims are fearful of coming forward to register their complaints with the authorities because they do not believe that they will receive fair treatment from the criminal justice system. If victims feel this way then more work needs to be done in this area.

Caution must however be exercised when considering changes to the onus of proof in criminal offences because it is a long established tenet of our legal system that it is better that 10 guilty people go free than one innocent person be convicted.

As Chair I look forward to the review into the experience of women in the criminal justice system to ensure that they, and all victims of sexual violence, are supported, and perpetrators are held accountable.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General, the Queensland Police Service, and the Queensland Racing Integrity Commission.

I commend this report to the House.



Peter Russo MP

Chair

Recommendations

Recommendation 1

4

The committee recommends the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 be passed.

Recommendation 2

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The committee recommends that in light of the comments of submitters, the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence undertake consultation with key stakeholder groups as a matter of urgency in regards to addressing sexual violence in Queensland, including examining the experience of women in the criminal justice system as a whole and possible future areas for reform such as attitudinal change, prevention, early intervention, service responses and legislative amendments as necessary.

Recommendation 3

29

The committee recommends that the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence give consideration to the application of section 32 of the Criminal Code as it relates to youth offenders.

Recommendation 4

41

The committee recommends that further amendments be made to permit the Fidelity Guarantee Fund to provide resourcing for measures likely to have a material effect in minimising the risk or magnitude of misappropriations.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Women and the Prevention of Domestic and Family Violence
- Police and Corrective Services
- Fire and Emergency Services.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019* (HRA)
- for subordinate legislation – its lawfulness.²

The Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Bill) was introduced into the Legislative Assembly and referred to the committee on 26 November 2020. The committee was required to report to the Legislative Assembly by 12 February 2021.

1.2 Previous Bill process

The previous Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (previous Consent Bill) was introduced on 13 August 2020 by the Attorney-General and Minister for Justice, the Hon Yvette D'Ath MP, and referred to the former Legal Affairs and Community Safety Committee on the same day. The former committee called for submissions on 24 August 2020. Fifty-two submissions were received.

Queensland Parliament was dissolved by proclamation dated 6 October 2020. Stakeholders and submitters for the previous Consent Bill were informed that the inquiry had lapsed and that a successor committee would have access to the submissions and other evidence collected by the former committee in relation to the previous Consent Bill if the Bill was re-introduced under the new government.

1.3 Current Bill inquiry process

On 30 November 2020, the committee invited stakeholders, previous submitters, and subscribers to make written submissions on the Bill by 12 January 2021. Forty-seven submissions were received.

The committee received a public briefing about the Bill from the Department of Justice and Attorney-General (the department/DJAG), the Queensland Police Service (QPS), and the Queensland Racing Integrity Commission on 16 December 2020. See Appendix B for a list of officials.

The committee received written advice from the department about the Bill and in response to matters raised in submissions.

¹ *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

² *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019*, ss 39, 40, 41 and 57.

The committee held a public hearing on 21 January 2021. See Appendix C for a list of witnesses.

The submissions, correspondence from the department, and transcripts of the briefing and hearing are available on the committee's webpage.

1.4 Policy objectives of the Bill

The previous and current Consent Bills are in the same form.

The objectives of the Bill include implementing all 5 recommendations of the Queensland Law Reform Commission (QLRC), as detailed in its report *Review of consent laws and the excuse of mistake of fact* (QLRC report), by clarifying aspects of the existing law in the Criminal Code (the Code) on consent and the excuse of mistake of fact.³

The Attorney-General stated:

The bill implements all five of the commission's recommendations by amending the Criminal Code to make explicit four legal principles that can be distilled from the current case law of Queensland. Those principles are: silence alone does not amount to consent; consent initially given can be withdrawn; regard may be had to anything the defendant said or did to ascertain consent when considering whether the defendant was mistaken about whether the other person gave consent; and that a defendant's voluntary self-intoxication is not relevant to the reasonableness aspect of the excuse of mistake of fact.

The bill also implements the commission's recommendation to fix an inconsistency in the Criminal Code by clarifying that the definition of 'consent' in section 348 applies to all offences in chapter 32 including the offence of sexual assault contained in section 352(1)(a). These amendments to the code are intended to strengthen and clarify the operation of the law, ensuring a consistent and correct application of these important legal principles by judges, juries and legal practitioners. A transitional provision provides that the amendments to the code are to apply prospectively to offences in chapter 32 that are charged after the date of commencement but will be able to be applied to offences that are committed before commencement.⁴

The Bill also amends other legislation, including:

- the *Legal Profession Act 2007* to facilitate additional payments by the Queensland Law Society (QLS) from the Legal Practitioners' Fidelity Guarantee Fund to claimants who have had a statutory cap applied to claims prior to 2016, and to provide clearer guidance as to when the statutory caps should be applied in the future⁵
- the *Interactive Gambling (Player Protection) Act 1998* (Interactive Gambling Act), the *Racing Integrity Act 2016* (Racing Integrity Act), and the *Wagering Act 1998* (Wagering Act) to prohibit inducements and wagering using free bets, and impose restrictions on direct marketing, in the context of online wagering, and
- the *Liquor Act 1992* (Liquor Act), *Gaming Machine Act 1991* (Gaming Machine Act) and *Police Powers and Responsibilities Act 2000* (PPRA), as part of the government's response to the final evaluation report of the tackling alcohol-fuelled violence policy.

The Bill also contains miscellaneous amendments to the Liquor Act and the *Co-operatives National Law Act 2020* (CNL Act).

³ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact*, report 78, June 2020, at <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T1217.pdf>.

⁴ Queensland Parliament, Record of Proceedings, 26 November 2020, p 91.

⁵ Explanatory notes, p 4.

1.5 Government consultation on the Bill

In regards to the Bill's proposed amendments to the Criminal Code, the explanatory notes advise that the QLRC report was based on wide consultation with a range of stakeholders and the public generally. Further:

The QLRC released a detailed Consultation Paper outlining the key issues raised in the review and called for submissions on a number of specific questions. The Commission received 87 submissions from respondents including legal professional bodies, community legal centres, academics, individuals who had experienced sexual violence, organisations that support and represent victims and survivors of sexual violence, and members of the public.

The Commission also held a consultation workshop with representatives from organisations that support and represent victims and survivors of sexual violence, as well as victims and survivors who wished to attend.⁶

In regards to proposed amendments to the *Legal Profession Act 2007*, the QLS was consulted and supported the amendments.⁷

In regard to the Tackling Alcohol-Fuelled Violence (TAFV) Policy amendments, the explanatory notes state:

The final TAFV Policy evaluation report was publicly released together with the Government's interim response on 26 July 2019. The Department of Justice and Attorney-General consulted extensively with licensees, peak bodies and community organisations to invite their comment on the relevant evaluation report recommendations which are now the subject of the amendments. Comment was sought via targeted letters and stakeholder forums held in Brisbane on 22 August 2019 and Townsville on 25 September 2019. The results of these stakeholder consultation processes have demonstrated significant stakeholder support for the TAFV Policy amendments.⁸

In regards to other amendments contained in the Bill, the explanatory notes state:

Clarifying 'designated authority' for the Co-operatives National Law

The CNL Act itself was subject to stakeholder consultation prior to its introduction and passage by the Legislative Assembly. As the amendment to the CNL Act contained in the Bill is a minor technical correction, no community consultation has been undertaken.

Exemption from cartel provisions for liquor accords and safe night precinct local boards

No consultation was undertaken in respect of the proposed amendments as they reflect the current administrative processes of OLGR's [the Office of Liquor and Gaming Regulation's] five yearly application to the ACCC for a conditional authorisation of the existing pro-forma liquor accord agreement.

Wagering inducement restrictions

Consultation with wagering stakeholders was undertaken in October 2019. Public consultation on the NCPF [National Consumer Protection Framework] inducements ban was also undertaken at the national level via the Commonwealth Government's regulatory impact statement A National Consumer Protection Framework for online wagering in Australia.

The release of the discussion paper *Racing Integrity Reforms: Review of the Racing Integrity Act 2016* outlined the changes to the Racing Integrity Act and informed stakeholders of the implementation of inducement restrictions on racing bookmakers.

⁶ Explanatory notes, p 21.

⁷ Explanatory notes, p 21.

⁸ Explanatory notes, p 22.

Provide for discretionary minimum dividends under the Wagering Act

Consultation has been undertaken with Queensland's exclusive sports wagering and race wagering licensee, UBET QLD Limited.⁹

In response to comments from stakeholders about consultation on the amendments to the Criminal Code, DJAG advised:

The amendments in the bill before us actually implement the recommendations of the Queensland Law Reform Commission report. In the report itself, you will note that the Law Reform Commission did extensively consult with survivor groups and advocacy groups. The appendices to the QLRC report actually list all of the attendees at various forums and submissions that they received. ...[I] refer you to the Attorney-General's introductory speech, where she made it clear that the implementation of these recommendations in the bill is not the end of the government's commitment to those concerns. She actually referred specifically to the concerns raised by stakeholders in her introductory speech. She did say that we would be consulting with stakeholders further in a wider review of women's experiences in the criminal justice system.¹⁰

The department clarified that it had not consulted with stakeholders on the Bill's proposed amendments to the Criminal Code since the introduction of the Bill.¹¹

1.6 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 be passed.

⁹ Explanatory notes, pp 22, 23.

¹⁰ Briefing transcript, Brisbane, 16 December 2020, p 3.

¹¹ Briefing transcript, Brisbane, 16 December 2020, p 3.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

2.1 Amendments to the Criminal Code

The Bill proposes to amend the Criminal Code to implement the 5 recommendations of the QLRC report. In regards to the QLRC report and its recommendations, the explanatory notes advise:

The recommendations in the QLRC's report are based on a rigorous examination of the operation of the laws on consent and excuse of mistake of fact in Queensland. The transcripts from 135 rape and sexual assault trials during 2018 and 40 appellate decisions from between 2000 and 2019 were examined in addition to another 76 trials referred to it at its invitation. The QLRC's analysis should be recognised as extensive constituting an almost exhaustive and entirely forensic examination of the current operation of the relevant laws in Queensland. The rigorous approach of the QLRC has produced an objectively solid evidence base for the most appropriate form of legislative amendment in response to the community concerns which gave rise to its Terms of Reference.

The QLRC's extensive and rigorous review did not find evidence to support a conclusion that Queensland's current laws should be the subject of extensive change. However, the QLRC concluded that some aspects of the existing law of Queensland would benefit from being made more explicit in the Criminal Code.¹²

The 5 recommendations of the QLRC report were:

- 5-1 Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that a person is not taken to give consent to an act only because, at or before the time of the relevant act, the person does not say or do anything to communicate that they do not consent to that act.
- 5-2 Chapter 32 of the Criminal Code should be amended to apply the definition of 'consent' in section 348 to the offences provided for under sections 351(1) (assault with intent to commit rape) and 352(1)(a) (sexual assault).
- 5-3 Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that, if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.
- 7-1 The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act.
- 7-2 The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance.

The QLRC also recommended that an inconsistency as to the application of the definition of consent, to different offences in chapter 32 of the Criminal Code, be remedied.¹³

The department advised that 4 of the recommendations relate to principles that can be distilled from the current case law in Queensland but are not currently explicitly spelled out in the Criminal Code.¹⁴ The Bill proposes amendments to the Criminal Code that would make these principles of case law explicit.

¹² Explanatory notes, p 2.

¹³ Explanatory notes, pp 2-3.

¹⁴ DJAG, correspondence, 10 December 2020, p 1.

The principles are:

1. silence alone does not amount to consent
2. consent initially given can be withdrawn
3. a defendant is not required to take any particular 'steps' to ascertain consent but the jury can consider anything the defendant said or did when considering whether they were mistaken about consent
4. the voluntary intoxication of the defendant is irrelevant to the reasonableness of their belief about consent, though it can be relevant to the honesty of that belief¹⁵

Clauses 8 and 9 of the Bill insert these principles into the Criminal Code.

Clauses 6 and 7 'fix an anomaly in the Criminal Code whereby the definition of consent differs for some sexual offences'.¹⁶

Clause 10 inserts a new Chapter 104 (Transitional provision for Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2020) into the Criminal Code.¹⁷

The explanatory notes advise that the objectives of these amendments to the Criminal Code is to 'strengthen, modernise and make the law more accessible for all Queenslanders and facilitate a more consistent and correct understanding of the law by judges, legal practitioners and juries' ensuring that it is 'clear and unambiguous in its statement of the law'.¹⁸

In regards to providing 'clear and correct instructions and guidance to juries', the department further advised:

Subsequent to the delivery of the QLRC's report, in the recent decision of *R v Sunderland* [2020] QCA 156 (the Sunderland decision) the Queensland Court of Appeal reiterated the importance of clear and correct instructions and guidance to juries about the law of consent and it is intended the proposed amendments will assist Courts in this regard.¹⁹

2.1.1 General submitter comments on Criminal Code amendments

A number of submitters expressed support for the proposed amendments in Part 3 of the Bill in relation to the Criminal Code.²⁰ For example, the Australian Lawyers Alliance stated the amendments 'were acceptable and appropriate'.²¹ QLS also expressed its support for the 'substantive amendments to the Criminal Code', stating:

We acknowledge that they are the result of an extensive and thorough review by the Queensland Reform Commission and that they are soundly based on evidence of what actually occurred in numerous trials. We acknowledge that other submissions consider that the amendments do not go far enough to address the concerns about women's safety and sexual violence. While we understand those perspectives, we believe that the amendments as drafted do strike an appropriate balance in what is a very difficult area. We welcome the government's acknowledgement that more is needed across the system to examine the

¹⁵ DJAG, correspondence, 10 December 2020, p 2.

¹⁶ DJAG, correspondence, 10 December 2020, p 2.

¹⁷ Explanatory notes, p 26.

¹⁸ Explanatory notes, p 3.

¹⁹ DJAG, correspondence, 10 December 2020, p 2. NB: an in-text reference has been removed. Refer to original source for further information.

²⁰ Australian Lawyers Alliance, submission 2; Soroptimist International Brisbane Inc, submission 25; Queensland Council for Civil Liberties, submission 26; Queensland Law Society, submission 28.

²¹ Submission 2.

experience of women in the criminal justice system and to identify options for more extensive system reform.²²

The Queensland Council for Civil Liberties (QCCL) also expressed support for the amendments, stating:

The purpose of our submission is to support the amendments contained in the bill to implement the recommendations of the very thorough report of the Law Reform Commission in relation to the law of mistake and consent as it applies to sexual assault. In short, it seems to us that the amendments incorporate or at least state explicitly in our law the principle that no means no.²³

The LGBTI Legal Service advocated for updating the Criminal Code to make it easier for all Queenslanders to understand by 'revising inconsistent, non-inclusive and outdated terminology' in the Code and stated that any changes to the Criminal Code 'must carefully consider the impact upon equitable access to justice for priority populations'.²⁴

Submitters also raised a number of concerns about the Bill's proposed amendments to the Criminal Code. These issues are outlined in the sections below.

2.1.2 Commentary on the QLRC report as the foundation for the Bill

Several submitters commented on the QLRC report and the potential impact of its recommendations on the application of the Bill if passed.

While the Aboriginal and Torres Strait Islander Legal Service (Qld) (ATSILS) agreed with the 'general approach that the specific case law principles identified by the Queensland Law Reform Commission should be explicitly included in the Criminal Code' to enhance clarity and ensure it was unambiguous,²⁵ the Queensland Sexual Assault Network (QSAN) saw the Bill as a missed opportunity 'to broadly assess the operation and practical application of current legislation that would improve the safety of women, encourage them to report to police and engage with the criminal justice system'.²⁶

The Women's Legal Service Qld (WLSQ) agreed, stating:

The QLRC recommendations, for all intents and purposes maintain the status quo and will do little if anything to improve the safety of women, encourage women to report incidents of rape and sexual violence when they occur, or the accountability of offenders. This, in our view, is not consistent with the expectation of the community (refer for example, to the broad community support for the #MeToo Movement). We believe the government has an opportunity to align the law with those expectations and deliver clarity and justice for all, in relation to matters of consent but it will not be through this bill which will achieve little.

This bill as is, is a missed opportunity to draft legislation in a way that provides a clear and unequivocal benchmark for the whole community about acceptable norms for the community to expect in consensual sexual relationships.²⁷

QSAN stated that the QLRC's 'recommendations do not address the failings of legislation and the criminal justice system that were actively raised in submissions from women's services and in consultation with victims/survivors and advocates'.²⁸

Rape and Domestic Violence Services Australia (RDVSA) also commented on the QLRC's recommendations, consultation process, and the Bill's proposed amendments as follows:

²² Public hearing transcript, Brisbane, 21 January 2021, p 8.

²³ Public hearing transcript, Brisbane, 21 January 2021, p 18.

²⁴ Submission 19, p 4.

²⁵ Submission 27, p 2.

²⁶ Submission 9, p 1.

²⁷ Submission 12, p 2.

²⁸ Submission 9, p 1.

The Bill does not venture beyond the QLRC recommendations, despite the QLRC considering (and rejecting) a number of options advanced by respondents for amending the legislation. When introducing the [former Consent] Bill, the Hon YM D'Ath, Attorney-General and Minister for Justice, gave little explanation for the government's wholesale adoption of the QLRC's recommendations beyond stating, "The rigorous approach of the QLRC gives the Palaszczuk government confidence in accepting and implementing all of the QLRC report's five recommendations." Our submission will therefore proceed on the basis that, in confining itself to the QLRC's five recommendations, the government accepts the QLRC's reasoning and conclusions.

The most striking feature of Part 3 of the Bill is what it omits. It fails to go beyond a negligible tinkering with the legislation concerning consent and the excuse of mistake of fact in Queensland.²⁹

The QLS, however, expressed the view that the amendments 'do in fact provide clarity in that they are a codification of what has developed in case law in recent years'.³⁰ QLS continued:

Because we are a codified state and the elements of the offence are clearly set out in writing in law, we say the amendments to the act to incorporate what has been the case law is actually an important clarifying step for the parliament to take.³¹

When questioned whether the amendments were necessary given that the Bill 'codifies case law', the Bar Association of Queensland (BAQ) responded:

Not technically, no. I do think that if the law is more readily understandable by juries, if it is more readily understandable by members of the public who read the Criminal Code—because at the moment, even though it is absolutely there in the case law it would not be readily apparent to someone reading the Criminal Code. In that sense—and there has been some discussion about the educative aspect of legislation—we do not oppose it on that basis. We see that it serves a purpose. Our committee's view is that it does reflect the state of the law at the moment. It is not inappropriate for legislation to do that. We would not have said it was strictly necessary, but we support the Queensland Law Reform Commission's view that it would be useful, and on that basis we support the bill.³²

2.1.3 Clauses 5, 6 and 7 - Making the definition of consent consistent for all offences in Chapter 32

Clauses 5 and 6 in the Bill implement recommendation 5-2 of the QLRC's report. The effect of clauses 6 and 7 of the Bill will be that the definition of consent will be the same for all sexual offences that are in Chapter 32 of the Criminal Code. The offences in chapter 32 are rape, attempted rape, assault with intent to commit rape and sexual assault.³³

DJAG advised:

As set out in the explanatory notes to the Bill, the definition of consent has historically been interpreted by Queensland Courts to be different for some offences in Chapter 32 of the Criminal Code than for other offences in the same chapter.

This historical inconsistency was considered by the Court of Appeal in *R v Sunderland*. The effect of that decision is that the definition of consent is the same for an offence of sexual assault as it is for an offence of rape. At the time that the QLRC delivered its report, the decision in *Sunderland* had not yet been delivered.³⁴

²⁹ Submission 7, p 2. NB: in-text references have been removed. Refer to original source for further information.

³⁰ Public hearing transcript, Brisbane, 21 January 2021, p 11.

³¹ Public hearing transcript, Brisbane, 21 January 2021, p 11.

³² Public hearing transcript, Brisbane, 21 January 2021, p 21.

³³ DJAG, correspondence, 10 December 2020, pp 9-10.

³⁴ DJAG, correspondence, 10 December 2020, p 10. NB: an in-text reference has been removed. Refer to original source for further information.

2.1.4 Clause 8 – Meaning of consent

Clause 8 of the Bill inserts new sections 348(3) and (4) (Meaning of consent) in the Criminal Code giving effect to recommendation 5-3 of the QLRC report.³⁵

New subsection (3) provides that a person is not taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.³⁶

New subsection (4) provides that if a person does or continues to do an act after the consent to the act has been withdrawn by words or conduct, then the act is done or continues without consent.³⁷

DJAG advised:

Case law in Queensland already provides that consent must be given or communicated; and that a failure to manifest an absence of consent by words or actions is not sufficient by itself to prove that consent was given.

As was recently affirmed by the Court of Appeal in *R v Sunderland*, 'in cases where the complainant has communicated neither consent nor dissent by words or actions, the inaction cannot be considered in a vacuum. It too must be considered with all of the relevant circumstances surrounding the sexual act.' Relevant circumstances can include both past and present matters, and evidence of relationship and previous interactions. At law, mere submission to a sexual act, even where feelings of repugnancy result, is different from an absence of consent.

This proposed amendment captures the current case law and explicitly provides for it in legislation. Where the application of the Criminal Code, through case law, has evolved, it is sometimes appropriate to amend the Criminal Code to reflect that position. It serves to provide clarity and assists judges to direct the jury.³⁸

DJAG continued:

Offences of rape and sexual assault include, as a key element, that a sexual act is done without consent.

Section 348 of the Criminal Code does not include any express provision dealing with the withdrawal of consent. However, case law in Queensland confirms that the offence of rape can arise from a point in time after consent is initially given, has been withdrawn and the withdrawal has been communicated by the complainant. The proposed amendment at Clause 8 makes plain and clear this aspect of the law.

Broadly respondents to the QLRC's Consultation Paper supported an amendment that made some express provision for withdrawal of consent. Those respondents who did not support it, did so on the basis that it was unnecessary to make explicit provision for withdrawal of consent, it already being a part of case law. However, the QLRC considered it desirable that the provisions of Chapter 32 in the Criminal Code be clear and unambiguous and recommended that there should be explicit provisions dealing with the withdrawal of consent.

The proposed amendment requires that the withdrawal of consent be communicated by 'words or conduct'. That is distinct from the communication of an initial consent which must be 'given' or communicated and there are no requirements about how that consent is given or how a representation is made.³⁹

³⁵ DJAG, correspondence, 10 December 2020, p 8.

³⁶ Explanatory notes, p 25.

³⁷ Explanatory notes, p 25.

³⁸ DJAG, correspondence, 10 December 2020, p 8. NB: an in-text reference has been removed. Refer to original source for further information.

³⁹ DJAG, correspondence, 10 December 2020, pp 8-9. NB: an in-text reference has been removed. Refer to original source for further information.

The explanatory notes clarify why the amendment is necessary:

The QLRC found that there may not be wide understanding about the current law in Queensland within the general community or even amongst legal stakeholders. This is, in the QLRC's view, partly a consequence of some of those matters being found in case law rather than in the express terms of the Criminal Code.

The amendment creating the new section 348(3) makes the current case law in Queensland explicit in the Criminal Code.⁴⁰

In relation to the application of the consent definition to sexual assault and offences in Chapter 32 of the Criminal Code, DJAG advised:

Consistent with recommendation 5.2 of the Queensland Law Reform Commission (QLRC) Report, the Bill amends sections 1 (Definitions) and 347 (Definitions for ch 32) of the Criminal Code to clarify that the definition of 'consent' in section 348 applies to all offences in Chapter 32 of the Criminal Code, including section 352(1)(a) (sexual assault).⁴¹

2.1.4.1 General proposed amendments to clause 8

Mr Heron suggested that the QLRC's comment at paragraph 5.144 of the QLRC report be integrated into the Bill.⁴² The paragraph states:

As a matter of fairness, it is necessary that the other person is made aware that consent is withdrawn and given the opportunity to respond to that withdrawal by ceasing to engage in the relevant act.⁴³

DJAG provided the following response to this suggestion:

The intention of new section 348(4) is to implement recommendation 5-3 of the QLRC Report regarding withdrawal of consent; even though it is not explicitly stated, the provision allows a defendant the opportunity to respond to the withdrawal of consent.⁴⁴

Legal Aid Queensland (LAQ) advised that it did not consider any amendment to section 348 of the Criminal Code was necessary, stating:

The Criminal Law Practice has no issues regarding how the current provisions operate. In the Criminal Law Practice's experience, there is no common outcome or pattern of outcomes either way in the application of the excuse in combination with the definition of consent that would warrant a change in the legislation.⁴⁵

However, if the Bill was to pass, LAQ advocated that further consideration be given to the wording of clause 8 in the Bill as it 'may be confusing to a jury, resulting in a risk of an unsafe verdict'. In this regard, LAQ recommended the following alternative wording:

A person who does not say or do anything to communicate a lack of consent does not necessarily, by reason only of that fact, give consent to the act.

or

Depending on the facts of the case, a person does not necessarily give consent only because the person did not say or do anything to communicate that they did not consent to the act.⁴⁶

⁴⁰ Explanatory notes, pp 8, 9.

⁴¹ DJAG, correspondence, 19 January 2021, p 14.

⁴² Submission 1.

⁴³ QLRC, Review of consent laws and the excuse of mistake of fact, June 2020, pp 104-105, https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf.

⁴⁴ DJAG, correspondence, 19 January 2021, p 1.

⁴⁵ Submission 5, p 2.

⁴⁶ Submission 5, p 3. NB: in-text reference has been removed. Refer to original source for further information.

DJAG noted the redrafting suggestions but advised that the Bill in its current form is drafted to implement the QLRC's recommendations.⁴⁷

2.1.4.2 *Affirmative model of consent*

A number of submitters advocated that the Bill amend section 348 of the Criminal Code to introduce an 'affirmative and communicative model of consent' and that consent be defined by reference to a free and voluntary agreement between parties.⁴⁸

Several submitters, including Leah Pabst, the Queensland Council of Social Service (QCOSS), WLSQ, and QSAN stated that an affirmative model of consent would assist in addressing incidences of 'freezing', which the Bill currently does not address.⁴⁹ QSAN stated:

That the inclusion of the word 'only' in new section 348(3) of the Criminal Code allows, in some circumstances, for passivity to amount to consent and that this is problematic because victims may 'freeze' in traumatic situations such as sexual assault and rape, preventing them from being able to verbally communicate or physically resist.⁵⁰

The LGBTI Legal Service supported the view that the Bill's provisions could result in passivity still being considered consent in some circumstances.⁵¹

While RDVSA expressed support for the policy underlying proposed subsections 348(3) and 348(4), RDVSA proposed that an affirmative model of consent be introduced in the Bill because the current amendments 'do little to address concerns about how consent is understood in the context of proceedings for sexual offences'.⁵² Rape and Sexual Assault Research and Advocacy (RASARA) expressed a similar view, stating that the Bill represents the 'antithesis of an affirmative consent model, where consent is mutual, ongoing and communicative'.⁵³

QCOSS agreed that an affirmative consent model should be introduced as the Bill as currently drafted will do little to improve outcomes for victims of sexual violence. QCOSS explained how an affirmative consent model would 'enshrine the concept of "voluntary agreement" between individuals and provide for greater sexual autonomy':

An affirmative model of consent would better align with current medical and psychological understanding of how humans respond in moments of rape and sexual assault ie. 'freezing' (tonic immobility) is a very common behavioural response and recognised survival tactic.

⁴⁷ DJAG, correspondence, 19 January 2021, p 4.

⁴⁸ Rape and Domestic Violence Services Australia, submission 7, pp 3, 4. Other submissions that support the introduction of an affirmative consent model into Queensland legislation that incorporates the concept of a 'voluntary agreement' between two parties include: Zig Zag Young Women's Resource Centre, submission 10; Women's Legal Service Qld, submission 12; Gold Coast Centre Against Sexual Violence Inc, submission 20; Bravehearts, submission 21; LawRight, submission 23; Leah Pabst, submission 24; Adela Brent of Australia Solidarity with Latin America, submission 31; Britnee Chamberlain, submission 32; Ending Violence Against Women Queensland Inc, submission 33; Laura Anderson, submission 34; Madeline Price, submission 35; Name withheld, submission 36; One Woman Project, submission 37; Name withheld, submission 38; Sophia Leen, submission 40; Women's Health Queensland, submission 42; Form submission, submission 45.

⁴⁹ Submissions 8, 9, 12, and 24. NB: clause 8 amends s 348(3) of the Criminal Code to: A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.

⁵⁰ Submission 9, p 4.

⁵¹ Submission 19, p 3.

⁵² Submission 7, p 3.

⁵³ Submission 18, p 5.

'Affirmative consent' is centred on the idea a person who wants to have sex with another person must actively confirm, by taking positive steps, that the other person also wants to have sex. Some jurisdictions frame this as the need for an 'enthusiastic yes' to sex.

Introducing an affirmative model of consent would prevent passivity being accepted as a reasonable belief as to consent on the part of the accused. Currently this provides a basis for the mistake of fact excuse under section 24, which absolves the accused from criminal responsibility when successfully pleaded.⁵⁴

WLSQ supported a definition of consent that required and reflected a 'positive "agreement" between parties engaged in sexual activity' and that the definition of consent as proposed by the QLRC was 'inadequate and should be modified to reflect an affirmative model of consent', citing the model of consent found in the Tasmanian Criminal Code.⁵⁵ WLSQ continued:

Unfortunately, QLRC's proposed definition of consent (and adopted by this bill) literally means that "if a person does not say or do anything to indicate consent, the finder of fact can infer that they may not be consenting".

This approach ignores the overwhelming neurological and sociological evidence which highlights the relationship between an individual's reaction to fear and the involuntary, automatic "freeze" response. Consequently, the amendment articulates and underscores an accused's existing capacity to rely upon a victim complainants "freeze" response to danger and threat as being evidence of consent.⁵⁶

WLSQ also stated that an injury to the victim should automatically negate consent and supported the inclusion of 'agreement' into the definition of consent.⁵⁷

In this regard, WLSQ made the following recommendations in relation to meaning of consent in the Bill:

Amendment of s 348 (Meaning of Consent)

insert-

(3) A person does not consent to an act if the person does not say or do anything to communicate consent to the act.

(4) A person does not consent to an act having given consent to the act, where the person later withdraws consent to the act taking place or continuing.

(5) If a person, against whom a crime is alleged to have been committed under Chapter 32, and Chapter 22 (other than section 224, 225 or 226), suffers an injury as a result of, or in connection with, such a crime, the injury so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.

(6) Insertion of the word 'agreement' into the definition of consent.⁵⁸

As per WLSQ's proposed amendment above to include section 348(5), Zig Zag Young Women's Resource Centre (Zig Zag) also proposed an amendment that would include a separate provision to provide that grievous bodily harm suffered as a result of, or in connection with a Chapter 32 offence, is evidence of the lack of consent unless the contrary is shown.⁵⁹ In addition, Zig Zag proposed:

⁵⁴ Submission 8, p 2. NB: in-text references have been removed. Refer to original source for further information.

⁵⁵ Submission 12, p 5.

⁵⁶ Submission 12, p 5.

⁵⁷ Submission 12, p 4.

⁵⁸ Submission 12, p 7.

⁵⁹ Submission 10, p 7.

- section 348 of the Code be amended to provide that a person does not consent where the other person fails to use a condom as agreed; or because of force, or a reasonable fear of force, to an animal
- an amendment to expressly provide that the definition of consent found in section 348 is directly applicable to section 352 (sexual assaults) and all other Chapter 32 offences
- an amendment to provide that capacity to consent cannot be inferred from evidence regarding capacity to consent at the time of another sexual activity.⁶⁰

RASARA recommended the following amendments to clause 8 (proposed changes to the Bill are in bold italics):

Clause 8 Amendment of s 348 (Meaning of *consent*)

Section 348—

insert—

(3) A person does not consent to an act if the person does not say or do anything to communicate consent to the act.

(4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.⁶¹

RASARA provides the following explanation for this proposed change:

This amendment would strengthen the Bill to clarify that a person does not consent where they do not say or do anything to indicate consent. This would adopt the current legal position in Victoria. The current Bill leaves it open that passivity can amount to consent in some cases.⁶²

The committee notes that the Brisbane Rape and Incest Survivors Support Centre (BRISSC) submission agreed with the comments and proposed amendments to clause 8 of the Bill as recommended in the RASARA and QSAN submissions.⁶³ The committee also notes that the Domestic Violence Action Centre and the Centre Against Sexual Violence Inc endorsed QSAN's submission.⁶⁴

In relation to submitter comments advocating for the introduction of an affirmative model of consent and whether elements of the model were incorporated into the Bill, DJAG advised:

The QLRC did talk about the fact that affirmative consent can be defined in a lot of different ways. The QLRC found that the elements that already exist in Queensland law provide for a model of affirmative consent. Consent as it is defined in section 348 has a couple of elements. The first one is that the person has to actually consent—their actual state of mind—and then it has to be voluntarily given. That requirement is indicative of an affirmative consent model. The other part of Queensland's law that is currently in case law—but the amendment to the bill at clause 8 will make it clearer in the code—is that silence alone does not amount to consent. Those attributes that already exist in our law in Queensland form part of the affirmative consent model. The amendment at clause 8 should reinforce that.⁶⁵

Intimate partner sexual violence

QSAN stated that the Bill 'does not protect victims who are sexually assaulted by and raped by someone they know'.⁶⁶ WLSQ also expressed concern that the Bill did not address how domestic

⁶⁰ Submission 10.

⁶¹ Submission 18, p 2.

⁶² Submission 18, p 2. NB: in-text references have been removed. Refer to original source for further information.

⁶³ Submission 11, p 2.

⁶⁴ Submissions 13 and 14.

⁶⁵ Public briefing transcript, Brisbane, 16 December 2020, p 3.

⁶⁶ Submission 9, pp 4-5.

violence evidence should be addressed in cases of intimate partner sexual violence and that 'this failure is extremely concerning, especially given the importance to the Queensland community of improving responses to domestic violence'.⁶⁷

In relation to sexual violence in a relationship, BAQ, however, stated that evidence of violence in a relationship 'will almost always be relevant to a question of consent in a sexual matter and in fact it could be relevant, for example, in cases where we know people do freeze and those freezing cases'.⁶⁸ BAQ continued:

The question of previous domestic violence would be highly relevant there to whether there was consent or whether there was a reasonable but mistaken belief as to consent. The provision about the withdrawal of consent is entirely consistent with the QLRC's discussion of this very difficult issue. There are two issues around freezing. One probably is a classic freeze where a woman just does not respond at all and then there is a much more difficult issue, which the QLRC look into, which is freezing during the course of a consensual act, and that is really where their discussion around withdrawal of consent had to come down in the way that it did and as an association we agree with that position ultimately.⁶⁹

In relation to submitter concerns that the Bill would not protect victims who are sexually assaulted and raped by someone they know, DJAG advised:

The QLRC did specifically consider that. In the QLRC report ... they did consider that sexual violence often occurs in a domestic violence context. In examining the current law of Queensland, they looked at the definition of consent at section 348. Section 348(1) obviously provides that 'consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent'. Subsection (2) actually sets out a non-exhaustive list of situations in which consent will not be taken to be given freely. They include whether that is by force, by threat or intimidation, by fear of bodily harm or by exercise of authority. Those provisions are what allows evidence to be presented in sexual assault matters and rape matters about whether that occurred in a domestic violence context. Currently, that can be taken into account. Of course an offence can be noted as a domestic violence offence under the Penalties and Sentences Act.⁷⁰

Affirmative models of consent in other jurisdictions

Several stakeholders supported the introduction of an affirmative model of consent into Queensland law similar to those of Tasmania and Victoria.⁷¹

WLSQ stated:

We support the Tasmanian model (which includes positive consent and reasonable steps) which has been in place since 2004 with no controversy. The Tasmanian model was itself based on the Canadian model that introduced the need for "reasonable steps" (associated with the operation of Mistake of Fact) in 1992 again with no controversy or evidence of 'unjust outcomes'.

We note the QLRC summarises the Canadian and Tasmanian laws but does [not] examine their approaches, nor therefore undertake any critical analysis of the evidence that exists in these jurisdictions to support a changed approach to consent.⁷²

QCOSS commented on the elements of an affirmative consent model, including a defendant taking 'reasonable steps' to determine consent:

Victoria and Tasmania have already modernised their criminal laws by adopting an affirmative model of consent. Victoria defines consent to mean 'free agreement' and also sets out a non-exhaustive list of

⁶⁷ Submission 12, p 3.

⁶⁸ Public hearing transcript, Brisbane, 21 January 2021, p 23.

⁶⁹ Public hearing transcript, Brisbane, 21 January 2021, p 23.

⁷⁰ Public briefing transcript, Brisbane, 16 December 2020, p 4.

⁷¹ Women's Legal Service Qld, submission 12; LGBTI Service, submission 19; QCOSS, submission 8.

⁷² Submission 12, p 3.

circumstances in which a person is seen not to consent. The Tasmanian law expands on this and provides that a mistake of fact will not be considered honest or reasonable where the accused 'did *not* take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act'.

The Tasmanian model of consent has been in place for sixteen years. Affirmative consent is international best practice. The United Nations Handbook for Legislation on Violence Against Women states that consent requires, 'the existence of 'unequivocal and voluntary agreement' and requires proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting'.⁷³

In summary, QCOSS was of the view that the Tasmanian model would make the law clearer:

As far as we read the proposed changes, they are putting into statute the case law, what we already know the cases say about how the law is to be interpreted, which gives some certainty and is an incremental step forward. However, when we have the opportunity to reform, and consistent with community expectation, we should be doing more than just modifications to technical definitions in the legislation. I find it difficult to understand the proposed changes in layman's terms, but our laws are supposed to be understood by everyday people. After a deep and wide-ranging inquiry by the Law Reform Commission, what we are ending up with still is very much a technical lawyers' game about what these laws ought to be and how they ought to read. I cannot speak to the practical day-to-day Tasmanian example, but I can say that the people that we have looked to, to write our submission, have all said that the Tasmanian example is a clearer legislative phrasing and it is a step forward.⁷⁴

WLSQ expanded on why it supported the Tasmanian model:

I would say that the way the Tasmanian law introduces this is that it says essentially that a mistaken belief by the accused as to the existence of consent is not honest and reasonable if and then it goes on to say they did not take reasonable steps in the circumstances known to him or her at the time of the offence to ascertain that the complainant was consenting, so that is the way that it is iterated in the Tasmanian Criminal Code. What they are saying is that if the defendant has not taken reasonable steps to ascertain consent then they cannot even rely on the defence for the excuse.⁷⁵

When questioned on the number of successful prosecutions there have been under the Tasmanian model, WLSQ advised that it did not know but stated:

It has been law for 17 years. It is not like there has been a swathe of cases that have gone to the High Court in relation to the Tasmanian law talking about unlawful convictions. It is a solid law that has stood the test of time for 17 years.⁷⁶

Following the committee's public hearing, QCOSS provided further information on the Tasmanian model, including evidence from a 2012 PhD thesis, *The impact of introducing an affirmative model of consent and changes to the defence of mistake in Tasmanian rape trials*, by Helen Cockburn. Cockburn's key finding, according to QCOSS, was that the 'Tasmanian reforms have not lived up to their promise because judges and the legal profession have been reluctant to fully implement them'.⁷⁷ QCOSS concluded that 'clearly, legislative reform as part of a larger suite of reforms—including judicial education—will most likely deliver better outcomes for sexual assault survivors'.⁷⁸

QCOSS confirmed that while it was difficult to obtain conviction data, or data on responses to family violence or sexual assault, members of the Tasmanian Council of Social Service (TASCOSS) 'reiterated that the positive model of consent is considered best practice because it is trauma-informed'. Further:

⁷³ Submission 8, p 3.

⁷⁴ Public hearing transcript, 21 January 2021, p 6.

⁷⁵ Public hearing transcript, 21 January 2021, p 2.

⁷⁶ Public hearing transcript, 21 January 2021, p 2.

⁷⁷ QCOSS, correspondence, 28 January 2021, p 1.

⁷⁸ QCOSS, correspondence, 28 January 2021, p 1.

TASCOSS members stated that if judges aren't applying the law as intended, '**education is needed rather than weaker legislation**'.⁷⁹ [Emphasis added by QCOSS]

QCOSS also quoted statistics from an ABC News data investigation published on 28 January 2020 that showed that, at the time, Tasmania had the lowest rate of sexual assault charges being withdrawn (9%) compared to Queensland (27%), Victoria (26%), Western Australia (29%), South Australia (20%) and the ACT (17%). As QCOSS stated, 'this equates to nearly one in three sexual assault reports being withdrawn in Queensland, compared to one in 10 in Tasmania'.⁸⁰

However, QLS expressed the view that, while the Tasmanian model differed from the Queensland law in a number of ways, it was 'easy to overstate the differences' and that there was 'enormous capacity for reasonable steps to be something that is taken into account' in Queensland law:

Tasmania does have provision for affirmative consent in the form of reasonable steps. The other aspect of those Tasmanian consent provisions is in relation to how intoxication may be used by a defendant. I think it is important to note though that under the Tasmanian provisions a defendant can rely upon reasonable steps in the context of raising the mistake of fact defence.

One of the things that is overlooked in the current discussion is the way the Queensland provision works. There is enormous capacity for reasonable steps to be something that is taken into account. That is because of the objective test that is inherent in section 24—the requirement for a jury to look at what a reasonable person would think in the circumstances. That operates as a really effective safety valve that captures a lot of these issues in a clean and arguably more elegant way than the Tasmanian provisions, which are unwieldy and which have created issues for jury directions and issues in terms of understanding those directions. It is always in the interests of everybody in the community that laws be clear.

Reasonable steps is a very interesting concept, but it is probably more of a social concept in many respects, although obviously it is a legal test. What constitutes reasonable steps differs across jurisdictions. What the QLS is concerned about is the potential for a reasonable steps provision to be discriminatory. Part of why this issue is so vexed is probably because of the multitude of ways—the nuance, the social, the non-verbal—that consent can be communicated in this context. We are concerned in the case of vulnerable defendants—adolescents and intellectually impaired persons—that the idea of an objective test of reasonable steps could create injustice for victims, for that particular class of defendant. It is a complicated issue. Being prescriptive in the legislation has the potential to hurt victims. It has the potential to hurt vulnerable classes of defendants, and that probably ultimately hurts the community.⁸¹

BAQ also commented on the Tasmanian model:

It is really quite a nuanced difference between the Tasmanian system and the Queensland system. They are actually quite similar. The difference really is just in the wording around those reasonable steps. We have a form of affirmative consent in Queensland. The QLRC are quite clear about that. In some ways other jurisdictions across Australia have been moving closer to our model.⁸²

Onus of proof on complainant

In relation to new section 348(4), several submitters expressed concern that the Bill, without an affirmative model of consent, would place the onus on the victim to withdraw their consent.⁸³

⁷⁹ QCOSS, correspondence, 28 January 2021, p 2.

⁸⁰ QCOSS, correspondence, 28 January 2021, p 2.

⁸¹ Public hearing transcript, 21 January 2021, p 9.

⁸² Public hearing transcript, 21 January 2021, p 22.

⁸³ LGBTI Legal Service, submission 19, p 3; Gold Coast Centre Against Sexual Violence, submission 20; Bravehearts, submission 21.

QSAN stated that, as drafted, the Bill would put 'the onus on the victim to withdraw consent even when the sexual encounter changes in nature (for example when the encounter becomes violent or the condom is removed)'.⁸⁴

Ending Violence Against Women Queensland agreed with QSAN, stating:

An affirmative model of consent needs to be reaffirmed if there is a change in the nature of sexual engagement and does not place onus on the victim to verbally withdraw consent after the sexual encounter has begun consensually. This is particularly problematic when the sexual encounter changes in nature - where a condom is removed without the consent of the other person; where the situation becomes violent e.g. strangulation or a physical assault which may render the victim unable to use their voice. In an affirmative consent model, consent would need to be maintained or reaffirmed at every stage of the activity.⁸⁵

WLSQ opposed new section 348(4) and argued that the provision could 'make matters worse for complainants', explaining:

We believe that if the definition of consent reflected an affirmative model of consent, then passivity and lack of resistance by a victim to a variation or change to the sexual act could also not amount to consent.

This proposed amendment **places the onus of withdrawing consent on the victim/complainant**. Again, instead of requiring the accused to turn their mind and take 'reasonable steps' to ascertain consent to the new, novel sexual act within the course of sexual engagement, the finder of fact is required to assess the behaviour of the victim complainant - that is: what did she say and do to withdraw consent.

This proposed inclusion of the definition of consent will move the test even further away from an affirmative model of consent, because instead of requiring both parties to say or do something to indicate consent, the test requires the victim in a potentially compromised circumstances, to do or say something to withdraw consent and again codifies the involuntary freeze response to threat as "consent". This recommendation is a potentially dangerous and wholly unsatisfactory outcome of the QLRC's report into the QLD criminal justice systems responses to sexual violence.⁸⁶ [Emphasis in original]

However, BAQ stated that the Bill would not make matters worse for victims as it 'essentially restates the law but in a legislative form'.⁸⁷ BAQ continued:

It could be hoped if it does make it clearer to juries, if it does simplify things for juries and if it makes the Criminal Code more readily accessible as a document for the general public that it could have a positive impact, both from an educative view and from the point of view of juries understanding the task that they are posed with.⁸⁸

Zig Zag also supported the view that the Bill maintains the onus on the victim to say no or prove that there was no consent through their own actions and words rather than considering the actions of the defendant. Zig Zag explained its concern:

Placing the onus of proof on the prosecution raises serious concerns because:

- the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the complainant;
- the defendant is in a better position than the prosecution to provide proof of whether they had an honest and reasonable belief there was consent;
- reversing the onus will lead to more clearly articulated claims of mistake of fact, which is fairer to all concerned including the jury; and

⁸⁴ Submission 9, p 5.

⁸⁵ Submission 33, p 1.

⁸⁶ Submission 12, p 6.

⁸⁷ Public hearing transcript, 21 January 2021, p 22.

⁸⁸ Public hearing transcript, 21 January 2021, p 22.

- reversing the onus will enhance the capacity of the trial judge to prevent unmeritorious claims being raised such as stereotypes and myths regarding rape and sexual assault victims.⁸⁹

Non-exhaustive list of circumstances in relation to giving of consent

The RDVSA and Zig Zag proposed that the non-exhaustive list of circumstances where a person's consent is not freely and voluntarily given, at section 348(2) of the Code, should be expanded to include:

- when a person does not do or say anything to indicate consent to sexual activity
- the person is asleep or unconscious
- the person is so affected by alcohol or other drug as to be incapable of consenting
- force, threats, intimidation and fear are present
- the person is unlawfully detained
- in cases of fraudulent representation⁹⁰

Zig Zag stated this would 'assist with understanding by professionals in the system, including police and the community at large'.⁹¹

The LGBTI Legal Service also supported the view that:

The list of circumstances in s 348(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. Alternatively, the Act should be reframed to mandate the use of a social entrapment framework when domestic or family violence is present.⁹²

2.1.5 Clause 9 – Mistake of fact in relation to consent

Clause 9 of the Bill inserts new section 348A into the Criminal Code, implementing recommendations 7-1 and 7-2 of the QLRC report.⁹³ The explanatory notes state:

Subsection (1) provides that the section applies when deciding whether, for section 24 (Mistake of fact), a person charged with an offence under Chapter 32 of the Criminal Code did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.

Subsection (2) provides that in deciding whether a belief of a person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.

Subsection (3) provides that in deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.⁹⁴

DJAG explained the reasons for these provisions as follows:

Currently there is no explicit reference in the Criminal Code to what use if any the jury can make of any 'steps' taken by a defendant to ascertain consent. Whilst section 24 makes no express provision as to what use the jury should make of any 'steps', where the excuse of mistake of fact is raised, a jury can nonetheless take account of any steps that were taken, or the absence of any steps that were taken depending on the facts of the case. Proposed new section 348A codifies this existing law.

⁸⁹ Submission 10, p 3.

⁹⁰ Submission 7, pp 5-7.

⁹¹ Refer to submissions 7 and 10.

⁹² Submission 19, p 5.

⁹³ DJAG, correspondence, 10 December 2020, p 9.

⁹⁴ Explanatory notes, pp 25-26.

The QLRC considered the use of the term 'steps' to be problematic based on the experience in New South Wales. The amendment is instead phrased in terms of anything a defendant 'said or did' to ascertain consent, as recommended by the QLRC.

In Queensland, voluntary intoxication of a defendant is not relevant in determining whether a defendant's mistaken belief that the complainant gave consent was reasonable. It can be relevant to a consideration of whether the mistaken belief was honest. Cases for this proposition date back to as far as 1993.

The review of the 2018 trials conducted by the QLRC suggested that the issue here is to some extent one of the existing law not always being properly communicated to the jury, rather than some need for substantive change in the law. The QLRC found that:

In 28 of the 2018 trials, mistake of fact was left to the jury to consider where there was evidence of voluntary intoxication by the defendant. In eight of those trials the jury was not directed that the evidence of the defendant's voluntary intoxication was irrelevant to the reasonableness of the defendant's belief. Two cases in the Court of Appeal raised a legal point about the inadequate directions by a trial judge as to the relevance of voluntary intoxication to the assessments of the honesty and reasonableness of a defendant's belief as to the giving of consent.

It is intended that by stating the law explicitly in the Criminal Code it will encourage more consistency in trial directions to juries.⁹⁵

The explanatory notes further clarify that the amendment in the Bill is not 'intended to shift the burden of proof onto a defendant' as:

It will remain for the prosecution at all times to prove beyond a reasonable doubt each element of the offence and negate the excuse of mistake where it is raised on the evidence. The amendment also does not mean that a person is required by law to take any particular step or steps to ascertain consent. What the amendment provides for is that anything said or done by a defendant to ascertain consent can be taken into account along with any other relevant circumstances in determining whether a defendant acted under an honest and reasonable, but mistaken, belief about consent. However, if a jury is directed in terms of the proposed new section 348A, it will to an extent properly tilt their focus towards the actions of a defendant. This tilt in focus is consistent with the type of affirmative model of consent which already exists in the Criminal Code by requiring consent to be *given*.⁹⁶

2.1.5.1 General stakeholder comments

Several submitters commented that clause 9 would not substantively change the status quo in terms of requiring a defendant to show they took reasonable steps to ascertain consent.⁹⁷ RDVSA stated that the Bill only proposes two minor amendments to the Criminal Code in relation to the excuse of mistake of fact:

First, anything the person said or did to ascertain whether the other person was consenting may be considered (proposed s 348A(2)). The QLRC acknowledges that this reflects the existing law in Queensland. Furthermore, simply requiring that the trier of fact have regard to anything the defendant said or did to ascertain whether the other person was consenting achieves little in the absence of an affirmative model of consent, ie. if consent is effectively presumed.

Second, self-induced intoxication is not to be taken into account (proposed s 348A(3)). RDVSA supports this proposed amendment. Again, the QLRC acknowledged that an express provision was unnecessary.

Apart from those two minor proposed amendments, the Bill does not amend the excuse of honest and reasonable mistake of fact in s.24 of the Code in its application to offences in Chapter 32 (Rape and sexual

⁹⁵ DJAG, correspondence, 10 December 2020, p 9. NB: an in-text reference has been removed. Refer to original source for further information.

⁹⁶ Explanatory notes, p 9.

⁹⁷ Rape & Domestic Violence Services Australia, submission 7; QSAN, submission 9; Zig Zag Young Women's Resource Centre Inc, submission 10.

assaults). The failure of the QLRC to recommend any substantive change to the operation of s.24 as it applies to sexual offences—and the reflection of this omission in the Bill—is disappointing given that dissatisfaction with the way the excuse has been raised in sexual proceedings was a key impetus for the referral of terms of reference to the QLRC for its review and investigation. Proposed s.348A does little, if anything, to address these concerns.⁹⁸

QSAN submitted that the Bill ‘falls significantly short of requiring defendants to show they took positive steps to ascertain consent’.⁹⁹ QSAN further commented:

... under s 348A(2), defendants could identify **any** words or actions they used to determine consent, **no matter how unreasonable**, to support their defence of mistake of fact.

Under common law, a representation of consent may be made by “remaining silent and doing nothing”, particularly when “evaluated against a pattern of past behaviour”. This problematic rule is also reflected in the current operation of mistake of fact, where the factual issue about whether the accused believed the complainant had freely and voluntarily given consent can be proven by “an omission to act” in some circumstances. This is particularly concerning as there is no requirement that the defendant take any reasonable and positive steps to ensure consent, and consent itself can be established by remaining silent, thus discounting the above evidence regarding the common ‘freeze response’ experienced by victims.

Under s 348A(2) juries **may** consider the words and conduct the defendant used to determine whether the other person was consenting.¹⁰⁰ [Emphasis in original]

In this regard, QSAN recommended the following amendment to section 348A of the Criminal Code:

(2) A mistaken belief by the person as to the existence of consent is not honest or reasonable if the person did not take positive and reasonable steps, by words or conduct, in the circumstances known to the person at the time of the act, to ascertain that the other person was giving consent to the act.¹⁰¹

WLSQ was also of the view that the Bill would not alter the existing operation of the excuse of mistake of fact, stating:

The application of the mistake of fact excuse should not be available, or left to the jury, where there is no evidence of reasonable steps taken by the Defendant to determine the victim complainant was consenting. The proposed amendments do not alter the existing operation of the excuse of mistake of fact in any way, and making the consideration of the defendant's behaviour discretionary falls far short of a legal requirement upon a party engaging in consensual sex to take positive, reasonable steps to ascertain consent.¹⁰² [Emphasis in original]

WLSQ expanded on its concern around the use of the word ‘anything’ as it relates to proposed new section 348(A)(2):

The department of justice in a recent consultation advised us that this ‘anything’ [section 348(4)(2)] would be read down or confined by the term ‘honest and reasonable’. However, we strongly disagree. We believe as drafted ‘anything’ will widen what the court or jury considers honest and reasonable to in fact anything. In order to determine reasonableness and honesty, anything can be taken into account by the court. This wording is extremely dangerous and at best introduces ambiguity and should be changed to ensure that the defendant at least took reasonable steps to ensure consent.¹⁰³

⁹⁸ Submission 7, p 8. NB: in-text references have been removed. Refer to original source for further information.

⁹⁹ Submission 9, p 6.

¹⁰⁰ Submission 9, p 6. NB: in-text references have been removed. Refer to original source for further information.

¹⁰¹ Submission 9, p 6.

¹⁰² Submission 12, p 6.

¹⁰³ Public hearing transcript, 21 January 2021, p 2.

In this regard, WLSQ proposed the following amendment to the mistake of fact provisions:

Amendment of s 24 (Mistake of Fact)

insert –

(3) In proceedings for an offence against Chapter 32 and Chapter 22 (other than section 224, 225 or 226), a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused

–

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or
- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.¹⁰⁴

Zig Zag held a similar view, stating that the Bill does not ‘meet the required need for more substantive change to the mistake of fact defence as it relates to sexual offences in Queensland’ and that:¹⁰⁵

... there is a strong argument that the burden of proof should shift to the defendant to demonstrate that they took *positive and reasonable steps by words and actions* in the circumstances known to them at the time of the act to ascertain that the other person is giving consent to the act. Although this raises concern regarding the presumption of innocence, such a reversal would not be unique to the *Criminal Code Act 1899* (Qld). [Emphasis in original]¹⁰⁶

Zig Zag also proposed that the onus of proof be reversed for mistake of fact relating to rape, sexual assault and other Chapter 32 offences, meaning that the defendant must prove that they held an honest and reasonable, but mistaken belief that the complainant was consenting. Zig Zag explained further:

Mistake of fact currently requires the prosecution to disprove, beyond reasonable doubt, that the mistaken belief held by the defendant was honest and reasonable. As heretofore mentioned, the defendant is in a better position to prove they held an honest and reasonable, but mistaken, belief for similar reasons outlined in the explanatory notes amending provocation (Section 304). Further, by reversing the onus of proof, the perpetuation of stereotypes, myths, and biases regarding sexual offences may be lessened, leading to fairer and more just outcomes for rape and sexual assault survivors.¹⁰⁷

In this regard, Zig Zag recommended:

A new and discrete mistake of fact defence should be included in Chapter 32 of the *Criminal Code Act 1899* (Qld) that requires a defendant to prove that the defendant took reasonable steps to ascertain consent, that the defendant’s mistaken belief was not due to self-induced intoxication, and that they were not reckless as to whether or not the complainant consented, before being able to rely on the defence.¹⁰⁸

RASARA recommended the following amendment to clause 9 and section 348A(2) of the Criminal Code:

Clause 9 Insertion of new s 348A

After section 348—

insert—

348A Mistake of fact in relation to consent

¹⁰⁴ Submission 12, p 7.

¹⁰⁵ Submission 10, p 3.

¹⁰⁶ Submission 10, p 3.

¹⁰⁷ Submission 10, p 8.

¹⁰⁸ Submission 10, p 4.

(2) A mistaken belief by the person as to the existence of consent is not honest or reasonable if the person did not take positive and reasonable steps, by words or conduct, in the circumstances known to the person at the time of the act, to ascertain that the other person was giving consent to the act.

RASARA stated this change 'would impose a positive and reasonable steps requirement on the mistake of fact excuse' and adopt the current legal position in Tasmania.¹⁰⁹

In response to submissions that were concerned clause 9 would widen the scope around regard being had to *anything* the defendant said or did to ascertain whether the complainant consented, BAQ stated:

That is, in a sense, really our 'reasonable steps' equivalent. It is not saying that has to occur; it is saying that the jury can have regard to anything the defendant said or did. The corollary of that, of course, could be that a jury might wonder about whether nothing was said or done. All of this discussion really needs to be considered in the context of a criminal trial. The only way this defence will go to the jury is if there is evidence raised that the judge considers raises the mistake of fact defence. You cannot rely on it if there is not evidence that reaches a certain threshold. Ordinarily, that will mean that the individual client will have to give evidence, because it is very difficult to assert that there is evidence of the state of mind of a defendant if that individual does not give evidence. It is very difficult to assert on the basis of an inference from an action or even something which was said. There may be some exclusions to that or exceptions.

As I understand it, the intent of the amendment is simply to reflect the fact that the jury could consider things that were said which tend to militate against the accused person thinking that the complainant was consenting or even having that belief but also steps or actions or things that were said in order to confirm consent. This does not change the state of the law as it is at the moment. We have seen how this has played out in jury trials to date, and we understand that it will not change the way these matters are conducted because it really codifies what is already being done. That is sometimes lost a little bit in the discussion. With respect, that is because, unlike the Queensland Law Reform Commission's very detailed response—which really went into each of those jury trials and looked at how it was operating in practice—a lot of the concerns that are being raised often come from anecdotal concerns. They are very genuine, but they are not necessarily able to be tied into how that particular jury trial worked. This particular amendment says that these things are relevant and that the jury can have regard to them, and that really would go both ways. It does not, in our view, change anything for victims.¹¹⁰

In regard to the inclusion of 'reckless disregard', BAQ stated:

Reckless disregard is really interesting because when you think of the actual test— that a belief as to consent has to be honest and reasonable—you cannot have an honest and reasonable belief as to something if you are also simultaneously reckless. It does not make sense, so you cannot be reckless as to whether someone is consenting—that is really not turning your mind to it—and at the same time hold an honest and reasonable belief as to it. We say that while recklessness certainly is relevant—it is relevant because a prosecutor could say, 'They didn't even turn their mind to it. They can't have a reasonable belief about it'—it is relevant to the consideration of it. It does not need to be enshrined in the test because it is already there. With regard to recklessness typically, it is a difficult concept. It can actually confuse juries when you have to break something down and then tell them what recklessness is. There are numerous Court of Appeal judgements, as you are probably aware, where the test of recklessness really causes all sorts of headaches. It is already there in honest and reasonable mistake as to someone's belief. It does not need to be included in it.¹¹¹

The committee also notes QLS's comments in relation to the requirement for intent, or lack of it, in rape laws in Queensland and discussions about recklessness and reasonable steps:

¹⁰⁹ Submission 18, p 3. NB: in-text references have been removed. Refer to original source for further information.

¹¹⁰ Public hearing transcript, Brisbane, 21 January 2021, p 21.

¹¹¹ Public hearing transcript, Brisbane, 21 January 2021, p 23.

It goes more to the discussions of recklessness that have been canvassed in some of the submissions as well. I think sometimes it can be artificial to compare different jurisdictions because the underlying structure of the criminal provisions is different.

Queensland is not like New South Wales, for instance. In Queensland there is no need for the prosecution to prove intent to rape. For rape to occur in Queensland you need penetration and you need lack of consent. In other jurisdictions such as New South Wales the prosecution, in effect, has to prove that the defendant intended to rape the complainant by showing that they knew they were not consenting. It is actually a higher threshold than what we have in Queensland. It also means that those discussions about recklessness or reasonable steps occur in the context of a different legislative structure. It is like comparing, in a sense when you go down to the level of detail, apples with oranges.¹¹²

The committee notes comments from QCCL that supported the amendments relating to mistake of fact:

the amendments improve the protection the law gives to sexual freedom for women whilst preserving the operation of the fundamental principle of criminal responsibility that a person who makes a genuine mistake about a central feature of a claim cannot be said to have the necessary guilty mind.

...

We support the amendments because they do reflect an appropriate rebalancing whilst not going so far as some commentary in the community, which seems to suggest that we should get rid of mistake of fact as a defence entirely, which would really reflect a fundamental change of fundamental principles in our criminal law. We think it is a very good report and the amendments are excellent.¹¹³

BAQ also stated its support for the amendments relating to mistake of fact:

Mistake of fact as it relates to consent raised its head as an issue in this space over the last few years. There has been considerable coverage of various views as to the operation of that defence in Queensland. The view of the Bar Association's Criminal Law Committee is that there were some significant misconceptions in some of the views being promulgated. At the same time, it appreciated that, if those views were being held and there was a level of misunderstanding or concern in the community, then that needed to be addressed. Our view is that that was done exceptionally well in the report by the Queensland Law Reform Commission. Those concerns were addressed in a thorough and evidence based approach, including a detailed analysis of 135 trials which I can turn to later when I am answering questions, because I think that approach really provided great scope for the consideration of this difficult issue.

In the result, the recommendations which now form the proposed amendments in the bill codify the position reached in the case law. I have been present for the balance of the evidence this morning, and I have heard questions as to whether or not that will help in the prosecution of sexual assault matters. That will obviously remain to be seen. In our view, the inclusion of those clauses will clarify matters for juries. They are already matters which were established in case law, but they certainly codify and make very clear some really important issues.¹¹⁴

2.1.5.2 Intoxication and the mistake of fact defence

Several submitters commented specifically on the issue of a defendant's intoxication in relation to the mistake of fact defence. The LGBTI Legal Service expressed concern that the Bill does not appropriately address the issue of a defendant's intoxication and lowers the bar for a mistake of fact excuse to be successful.¹¹⁵

RASARA recommended the following amendment to clause 9 and section 348A(3) of the Criminal Code (proposed change to the Bill is in bold italics):

¹¹² Public hearing transcript, Brisbane, 21 January 2021, p 10.

¹¹³ Public hearing transcript, Brisbane, 21 January 2021, p 18.

¹¹⁴ Public hearing transcript, Brisbane, 21 January 2021, p 20.

¹¹⁵ Submission 19, p 4.

Clause 9 Insertion of new s 348A

After section 348—

insert—

348A Mistake of fact in relation to consent

(3) In deciding whether a belief of the person was **honest and** reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.¹¹⁶ [Emphasis in original]

RASARA advised this proposed amendment would mirror the current law in Tasmania, New South Wales and Victoria and that:

... it would state that a defendant's drunkenness cannot be used to establish either the honesty or the reasonableness of a mistaken belief in consent.¹¹⁷

ATSILS submitted an alternate view in regards to voluntary intoxication and the reasonableness of a mistaken belief defence, stating it was 'undesirable to codify a blanket rule making all evidence of voluntary intoxication irrelevant as to reasonableness of mistake of fact':

The Criminal Code does not expressly provide that either intoxication or voluntary intoxication is relevant to whether a defendant's mistaken belief that the complainant gave consent was honest and reasonable.

As noted by the QLRC, whether a defendant's mistaken belief was honest, fairness demands that a person is not judged against a hypothetical standard but by a standard that asks what was reasonable for the defendant in their actual circumstances. These actual circumstances can include intellectual disability, mental illness and language difficulties.

Under the existing case law, voluntary intoxication is not relevant in determining whether a defendant's mistaken belief as to consent was reasonable. The policy reasons for that is obvious. While in 90% of cases this is an uncontroversial statement, there is potential for real unfairness in a small number of other instances...

We accept that the proposed amendment reflects the case law as it presently stands and its inclusion in the Code would help avoid confusion when directions are given to juries on how to deal with intoxication and whether a mistake of fact was reasonable.

However, there will remain a small number of cases where there has been voluntary consumption by both the complainant and defendant of substances, whether those substances be prescribed, over the counter medications or illicit drugs remains problematic. In those circumstances, it may be relevant in determining whether a defendant's mistaken belief as to consent was reasonable and it may constitute a legitimate defence.

For that reason it is undesirable to codify a blanket rule making all evidence of voluntary intoxication irrelevant as to reasonableness of mistake of fact without a saving passage for the discretion of a judge to admit the evidence if it would otherwise be in the interests of justice to admit it.¹¹⁸

DJAG responded:

DJAG notes the Aboriginal and Torres Strait Islander Legal Service is largely supportive of the Bill and the recommendations of the QLRC.

The Bill as introduced by the Government implements the QLRC recommendations.

¹¹⁶ Submission 18, p 3.

¹¹⁷ Submission 18, p 3. NB: in-text references have been removed. Refer to original source for further information.

¹¹⁸ Submission 27, p 7.

The Bill does not alter or impact the admissibility of evidence of voluntary intoxication; new section 348(3) of the Criminal Code codifies the existing law and provides that regard may not be had to the voluntary intoxication of the defendant in deciding whether a belief in consent was reasonable.¹¹⁹

The committee also notes BAQ's comments that the Bill will codify into law matters already established in case law, stating that 'intoxication of a defendant was never relevant to a reasonableness of belief as to consent'.¹²⁰ BAQ explained further:

It may have been relevant to an honest belief, but that second limb, which has always been the saving grace of that defence in Queensland from a public policy point of view, is that that belief has to be reasonable. That reasonableness relates back to whether or not it was reasonable for that person to hold that belief in those particular circumstances. It cannot be, and it never has been the case—at least over the last 30 or 40 years—that the intoxication of a criminal defendant could have any bearing on whether or not the belief they held was reasonable. If the question is does the proposed amendment help, I think it will because it absolutely signals that—with the imprimatur of the parliament and as the courts have stated on a number of occasions—that simply cannot have any bearing on a case involving the proposed operation of the mistake of fact defence.¹²¹

2.1.6 Department response to comments on clauses 8 and 9

In relation to submitter comments and recommendations regarding clause 8 (Meaning of consent) and clause 9 (Mistake of Fact) of the Bill, DJAG stated:

The Department acknowledges there are a range of views on the Bill and its scope, including stakeholders that are concerned the reforms in the Bill do not go far enough in reforming the law of consent and mistake of fact. The Bill as introduced by the Government implements the Queensland Law Reform Commission's (QLRC) recommendations. The QLRC's extensive review of the operation of the existing law did not find evidence to support making wide ranging changes to Queensland's laws on consent and the excuse of mistake of fact. The transcripts from 135 rape and sexual assault trials and 40 appellate decisions were examined in addition to other trials referred to it at its invitation. The QLRC's analysis should be recognised as extensive constituting an almost exhaustive and entirely forensic examination of the operation of the relevant law.

The Department notes that in response to the Queensland Law Society's Call to Parties during the election, the Government committed to re-introduce the Bill in its present form.

The Department notes the comments of the Attorney-General in the introductory speech for the Bill that, *'The commission acknowledged that this complex issue needs to be addressed to change social practices which contribute to sexual violence and goes far beyond what can be addressed by legislative amendments in the area of consent and mistake of fact. I want to assure those who want to see more done to address sexual violence that the Palaszczuk government's commitment to improving women's safety and experiences in the criminal justice system goes far beyond the commission's review and the implementation of its recommendations. The government's sexual violence prevention framework Prevent. Support. Believe. Queensland's framework to address sexual violence states that the government will continue to review and evaluate justice processes and relevant laws in Queensland to ensure that victims of sexual violence are supported and perpetrators are held accountable. The Palaszczuk government will consult broadly with key stakeholders in the coming months to ensure that we examine the experience of women in the criminal justice system as a whole, to identify possible future areas for reform including attitudinal change, prevention, early intervention, service responses and legislative amendments where necessary.'*¹²²

The committee notes QLS's comments in regards to the Bill:

The QLS supports the recommendations of the Queensland Law Reform Commission report, which was thoughtful, detailed and thorough. It is no secret that the legal system in the past has not dealt well with

¹¹⁹ DJAG, correspondence, 19 January 2021, pp 45-46.

¹²⁰ Public hearing transcript, 21 January 2021, p 20.

¹²¹ Public hearing transcript, 21 January 2021, pp 20-21.

¹²² DJAG, correspondence, 19 January 2021.

victims of sexual assault—female and child victims—just as it has not dealt well with other classes of victims. It is no secret that, as our knowledge of the effects of trauma or whatever increases, it needs to inform our legal policy and the way that the legal system works. Arguably focusing on consent and mistake of fact is not going to achieve the solution to those problems. The solution to those problems probably lies in other areas of education, of social policy reform, of adequate resourcing across the multitude of government and not-for-profit bodies that support those people.¹²³

2.1.7 Committee comment

The committee notes comments and proposed amendments from submitters in relation to clauses 8 and 9 of the Bill, as well as support for the Bill, particularly from legal bodies such as the QCCL and the QLS which expressed the view that ‘the amendments as drafted do strike an appropriate balance in what is a very difficult area’.¹²⁴

The committee understands that matters relating to consent and the mistake of fact defence are complex and acknowledges the experiences of victims and complainants and the wide-range of views that stakeholders hold in this space.

The committee supports the statements regarding the comprehensive nature of the QLRC report, which forms the foundation for the amendments to the Criminal Code as proposed in the Bill. The committee notes the statements from key legal bodies and DJAG that the Bill will achieve its objectives of implementing the recommendations of the QLRC and codifying into law what currently exists in case law. The committee supports the view that the Bill will make the current case law explicit in the Criminal Code and that ‘the inclusion of [these] clauses will clarify matters for juries’.¹²⁵

In regards to submitter comments about introducing an affirmative model of consent, the committee notes the advice of DJAG that the Bill will reinforce attributes that form part of the affirmative consent model:

The first one is that the person has to actually consent—their actual state of mind—and then it has to be voluntarily given. That requirement is indicative of an affirmative consent model. The other part of Queensland’s law that is currently in case law—but the amendment to the bill at clause 8 will make it clearer in the code—is that silence alone does not amount to consent. Those attributes that already exist in our law in Queensland form part of the affirmative consent model. The amendment at clause 8 should reinforce that.¹²⁶

However, the committee supports the call from advocacy groups for more to be done to address sexual violence and support victims and complainants, and the committee notes the government’s commitment ‘to improving women’s safety and experiences in the criminal justice system’ and its acknowledgement that this ‘goes far beyond the commission’s [QLRC] review and the implementation of its recommendations’. The committee considers that addressing sexual violence in Queensland and bringing perpetrators to justice requires urgent attention. The committee notes that the government has committed to consulting with key stakeholders on matters relating to this, including examining the experience of women in the criminal justice system as a whole, possible future areas for reform including attitudinal change, prevention, early intervention, service responses and legislative amendments where necessary.¹²⁷

¹²³ Public hearing transcript, 21 January 2021, p 9.

¹²⁴ QLS, public hearing transcript, Brisbane, 21 January 2021, p 8.

¹²⁵ BAQ, public hearing transcript, 21 January 2021, p 20.

¹²⁶ Public briefing transcript, Brisbane, 16 December 2020, p 3.

¹²⁷ DJAG, correspondence, 19 January 2021, p 10.

Recommendation 2

The committee recommends that in light of the comments of submitters, the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence undertake consultation with key stakeholder groups as a matter of urgency in regards to addressing sexual violence in Queensland, including examining the experience of women in the criminal justice system as a whole and possible future areas for reform such as attitudinal change, prevention, early intervention, service responses and legislative amendments as necessary.

2.1.8 Application of law to young people

The Youth Advocacy Centre Inc (YAC) called for the government to further consider the application of the Criminal Code on young people in relation to the Bill's proposed amendments. YAC explained:

In particular, I think we just need to be really clear that the Criminal Code applies to everyone, so from the age of 10 it applies in full. We make no allowance for children or those of vulnerability really within our Criminal Code to a large extent in terms of actual offences except by virtue of some sections such as the *doli incapax* section in 29(2), I think it is, and we have grave concerns about the ability of that section to in fact protect the younger children—the 10- to 13-year-olds.

We would also argue that issues around sexuality are probably of significance to adolescents as they are maturing and growing in a whole range of ways, so it is not just about the use of *doli incapax*; it is also about that 15-, 16- or 17-year-old group in particular who are fighting their own bodies and their own development as well as trying to understand the rules of the world and how that should work. We would not like it in any way to be thought that we do not appreciate the trauma that is experienced by those who may be the subject of sexual assault. We certainly represent, provide advice and provide court support to young women in particular, as well as young men, who find themselves having to participate in the process as a result of something that has happened to them. This is in fact a very challenging area for adolescents and that is why we thought it would be appropriate to raise that.¹²⁸

In its submission, YAC also made the following comment in regards to the explanatory notes of the Bill which state:

Chapter 32 (Rape and Sexual Assaults) of the Criminal Code deals with sexual offending **against adults** where the absence of consent is an element of the offence.¹²⁹ [Emphasis in original]

In relation to this, YAC stated:

This is not correct. Chapter 32 deals with sexual offending against any person, and therefore age is irrelevant.¹³⁰

YAC continued:

This may be because 16- and 17-year olds are able to consent to sexual activity in the same way as adults, and so are not covered by the provisions in relation to the offence of *carnal knowledge with or of children under 16* (s 215 Criminal Code which is contained in Chapter 22: *Offences against morality* rather than Chapter 32) where consent is irrelevant to criminality. Sixteen and seventeen year olds are, of course, still considered to be minors for general legal purposes.

No distinction is drawn between adult (18 years and over) and youth offenders (10-17 years) in the Criminal Code in relation to commission of offences in Chapter 32 (or indeed the Criminal Code generally) beyond where s 29(2) may be relevant. This provides some additional requirements for the prosecution in relation to children aged 10-13 years. However, in reality, the section provides little protection to this cohort. Section s29(2) does not require proof of any actual knowledge of wrongfulness, permitting a

¹²⁸ Public hearing transcript, 21 January 2021, p 13.

¹²⁹ Submission 22, p 2. DJAG noted the error in the explanatory notes and thanked YAC for bringing it to the department's attention.

¹³⁰ Submission 22, p 2.

lower bar to be set for children than in some other Australian jurisdictions: all that need be established in Queensland is that the child in question has the **capacity** to know in order to bear criminal responsibility.

It is noted that in 2018-19:

- 108 males and 4 females aged 10 to 17 were charged with rape
- 343 males and about 74 females were charged with other sexual offences
- 64 males and 317 females aged 0 to 14, and 23 males and 462 females aged 15 to 19, were reported as victims of rape or attempted rape.
- A further 332 males and 1078 females aged 0 to 14, and 83 males and 660 females aged 15-19, were reported as victims of other sexual assault.¹³¹ [Emphasis in original]

YAC was concerned that the QLRC position as stated in its *Review of consent laws and the excuse of mistake of fact* did 'not provide any analysis of Chapter 32 offences or alleged offences where the complainant and the defendant were both minors/children, that is, under 18 years'.¹³² YAC was concerned that the following matters relating to young people had not been considered as part of the drafting process for the Bill:

- Adolescence is a confusing time for young people with many changes during this key phase of emotional, psychological and physical development.
- Teenagers are programmed to seek out new experiences, risks and sensations, do not always have a lot of self-control or good judgement and are more prone to risk-taking behaviours, including sexual activity.
- Some children have particular challenges that may be relevant, including children with Autism Spectrum Disorder.
- The use of alcohol or other substances may also be relevant.
- No consideration of, or provision for, the challenges faced by both complainants and defendants who are minors/children with the potential for misunderstanding or miscommunication on the part of one or both in relation to consent or mistake of fact.¹³³

Finally, YAC sought further examination of the cases of child defendants and complainants to 'consider whether the recommendations made in the [QLRC] report should apply to minors or whether the legal response should be modified to some extent in certain situations – noting that the harm experienced by the complainant must be properly acknowledged'.¹³⁴

When asked what changes to the Bill could be made to reflect their views, YAC advised that it had not drafted a specific amendment but that consideration could be given to a new provision in the Youth Justice Act that 'recognised the immaturity of young people' and said that 'to the extent that the requirements, the conditions or characteristics of immaturity are inconsistent with the provision of the Criminal Code, the immaturity should be given some overriding priority'.¹³⁵

YAC also stated that education was 'absolutely critical in this space', stating further:

Good role models would also help some young people of course learn their behaviours from what they see happening around them, including at home, which is highly problematic. We need to probably put more emphasis with young people into positive relationships. I know we do some of that already, but

¹³¹ Submission 22, p 2. NB: in-text references have been removed. Refer to original source for further information.

¹³² Submission 22, p 3.

¹³³ Submission 22, pp 3, 4.

¹³⁴ Submission 22, p 4.

¹³⁵ Public hearing transcript, Brisbane, 21 January 2021, pp 13-14.

clearly things are happening which are not good behaviour, are not respectful, or young people have not had the ability to learn. It is not simply about us saying that you would not sentence or not punish, but if we even do sentence young people in this space there needs to be some meaningful responses which help them to understand and address what might have gone wrong. Even where we think there is a level of culpability, I still think there is a responsibility on us more generally to help those young people to ensure that this does not become a pattern of behaviour.¹³⁶

YAC acknowledged, however, the difficulty of educating young people in these matters:

We need to encourage those adults who have contact with children to be exploring these issues with them and giving them the resources to be able to do that as well as perhaps there being quite formal programs that might be attached—for example, a service which was supporting youth justice and supporting educating those who may be found to have broken the law. It is a multifaceted approach. It is one that I do not think any jurisdiction that I have witnessed has ever properly addressed—how do we ensure that people know what their rights and responsibilities are under the law? That all needs to be targeted in a way that is appropriate to the relevant groups to which you are trying to make available that information.

...

I think that is a very good question, particularly challenging because of the age group we are talking about and because we do have a culpability at the age of 10 in Queensland. It is a very young age to start an education program and there will be very disparate views in the community about wanting children at that very young age to be educated in relation to those very issues. It would be quite challenging.

One of the other issues we see of young people being charged or engaging in some of this behaviour is that often those young people are not engaged in formal education structures. We do not necessarily have systems within our state care system. Those young people in the child protection system who often are not in home or in residential care often are not provided with appropriate information in relation to sexual education. It is often not part of case plans. We see young people being more vulnerable. Often our most vulnerable young people are going to miss out on some of those formal education processes that we would hope would be part of this process of educating people around this issue.¹³⁷

2.1.8.1 Committee comment

The committee acknowledges the work of YAC and their experience with young people. The committee notes YAC's comments on adolescence, including how factors such as maturity and physical, psychological and emotional elements that are unique to this age group may impact on the potential for misunderstanding or miscommunication on the part of one or both parties in relation to consent or mistake of fact. The committee considers the evidence of YAC requires further consideration in regards to the application of section 32 of the Criminal Code as it relates to youth offenders (10 to 17 years of age).

Recommendation 3

The committee recommends that the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence give consideration to the application of section 32 of the Criminal Code as it relates to youth offenders.

2.1.9 Transitional arrangement for the Criminal Code amendments

Clause 10 of the Bill contains a transitional provision for the operation of the amendments to the Criminal Code. The explanatory notes state:

Clause 10 inserts a new Chapter 104 (Transitional provision for Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2020) into the Criminal Code. Proposed new section 754

¹³⁶ Public hearing transcript, Brisbane, 21 January 2021, p 14.

¹³⁷ Public hearing transcript, Brisbane, 21 January 2021, pp 14-15.

(Offences charged before or after the commencement) provides that the amendments to the Criminal Code in this Bill apply to a person charged with an offence after the amendments' commencement regardless of whether the charge is for an offence committed before or after the commencement.¹³⁸

The department advised that 'this will be the only difference in the amendments to the Criminal Code in the Bill and the draft Bill that was attached to the QLRC's report'.¹³⁹ The department further advised:

All of the amendments in the Bill clarify the existing law, however, making that law explicit in the Criminal Code may change the way that legal representatives approach a given case and the forensic decisions in that case. For that reason and out of fairness, the transitional provision provides for the amendments to apply from the point of charge. The QLRC did not consider this issue in its report.¹⁴⁰

Several submitters, including ATSILS and QLS, commented on clause 10 and the retrospective application it provides for. ATSILS commented:

We note the insertion of section 754 to allow for the new provisions to apply to any charges laid after the commencement, regardless of whether the offence was committed before or after the commencement of the provisions.

We agree that it is undesirable to change the law for proceedings which are already on foot or where the defendant has already been charged. We additionally are concerned with an approach which would allow for retrospective application of the laws when a historic offence is charged. Clauses 6 and 7 contain changes designed to address the difficulties described in *R v BAS* and *R v Sutherland* and part of Clause 8 brings Queensland law into line with the laws of other states and territories. The incursion into the principle of legality is not insignificant. The clearly available alternative is to make the changes prospective not retrospective. Prospective application of the changes would be less restrictive on human rights and fundamental legal principles and are reasonably available.¹⁴¹

In regards to clause 10, QLS stated:

We note the intent and effect of the Bill is to create uniformity with the drafting of the Criminal Code, and its application arising from developments in case law and therefore, the amendments do not substantively change the current state of the law in Queensland. However, consistent with the Society's position on retrospective legislation, QLS submits the provisions ought to only apply to offences committed after commencement.¹⁴²

In regards to the potential for the transitional provision to impact on historical offences, DJAG advised that the Bill's amendments in relation to clause 10 'should not impact on historical [offences]', noting:

The four amendments in the bill to the Criminal Code are really just reaffirming principles that are in current case law, so the only thing they might change are directions given to a jury or the nature of directions given to a jury, the language. That is why we have provided that it will only apply from when a person is charged, just because of proceedings that are currently on foot. That is really the purpose of that transitional provision. It is not to disrupt proceedings that have actually started in a procedural sense.¹⁴³

The committee notes that the Queensland Human Rights Commission (QHRC) agreed with the analysis contained in the Statement of Compatibility 'that the prohibition against retrospective criminal laws [under section 35 of the *Human Rights Act 2019*] is not engaged by the transitional provision, as the

¹³⁸ Explanatory notes, p 26.

¹³⁹ DJAG, correspondence, 10 December 2020, p 10.

¹⁴⁰ DJAG, correspondence, 10 December 2020, p 10.

¹⁴¹ Submission 27, p 8. See further discussion in chapter 3 of this report.

¹⁴² Submission 28, p 3.

¹⁴³ Public briefing transcript, Brisbane, 16 December 2020, p 3.

amendments seek to confirm, not change, the existing law'.¹⁴⁴ However, the QHRC provided the following qualifying statement:

The QHRC welcomes the commitment of the Government to provide fulsome discussions of rights limitations. However, while the HR Act states that all rights may be subject to reasonable limitations under law, the prohibition against retrospective criminal laws is considered an absolute right under international law. If the Committee forms the view through this Inquiry that the amendments do more than clarify the existing law, and do indeed engage the prohibition against retrospective criminal laws by changing the law, the QHRC suggests that the commencement of the amendments should be reconsidered. In particular, these amendments would better reflect the protection of this right if they applied to alleged conduct that occurs after they commence (as opposed to applying at the time a person is charged).¹⁴⁵

2.1.9.1 *Committee comment*

The committee notes the concerns of ATSILS and QLS in regards to clause 10 and transitional provisions for the Criminal Code amendments in the Bill. However, the committee also notes DJAG's advice and QHRC's analysis that the amendments affirm principles in current case law rather than change the existing law, and hence do not engage section 35 of the *Human Rights Act 2019* in relation to the prohibition against retrospective criminal laws.

2.1.10 Consideration of human rights of victims/survivors

A number of submitters expressed the view that the Bill does not consider the human rights of sexual assault and rape victims/survivors.¹⁴⁶ Gold Coast Centre Against Sexual Violence Inc. (GCCASV), for example, stated:

In this Bill, the human rights of a defendant to a fair trial have eclipsed the human rights of victims/survivors of sexual assault. *The Human Rights Act 2019* provides for equal protection without discrimination and the right to liberty and security of person. These rights have been overlooked in relation to victims/survivors of rape and sexual assault.¹⁴⁷

ATSILS made the following comments in regards to human rights:

Modern Human Rights standards require full respect of the rights of the accused to a fair trial and due regard to the protection of complainants. How the law grapples with the evidentiary and legal issues around sexual assault trials presents challenges for the fundamental goals of certainty of the law and fairness in criminal proceedings and due regard to the protection of complainants.

...

Both international human rights law and the fundamental principles of the common law systems protect the right to a fair trial. While the right is not unlimited and other rights and considerations can be relevant, the right of an accused person to a fair trial is strongly protected. The task of the court is to afford full respect of the rights of the accused to a fair trial and to give due regard to the protection of complainants.¹⁴⁸

¹⁴⁴ Queensland Human Rights Commission, submission 15, p 3; DJAG, correspondence, 19 January 2021, p 25.

¹⁴⁵ Submission 15, p 3. NB: in text references have been removed. Refer to original source for further information.

¹⁴⁶ Gold Coast Centre Against Sexual Violence, submission 20; LawRight, submission 23; Adela Brent of Australia Solidarity with Latin America, submission 31; Britnee Chamberlain, submission 32; Ending Violence Against Women Queensland Inc, submission 33; Laura Anderson, submission 34; Madeline Price, submission 35; Name withheld, submission 36; One Woman Project, submission 37; Name withheld, submission 38; Sophia Leen, submission 40; Women's Health Queensland submission 42; Form submission, submission 45.

¹⁴⁷ Submission 20, p 2.

¹⁴⁸ Submission 27, p 2.

QCOSS also expressed the view that the Bill is one-sided and solely considers the rights of defendants to a fair trial and their protection from retrospective criminal laws.¹⁴⁹ When queried about balancing the rights of a victim with the right of an accused to a fair trial, QCOSS responded:

You need to give consideration to it in a fulsome way. It is a balancing act. Rights do not trump rights. There is always that tension and that balance. It is the view of our membership and our supporters that the pendulum has just swung too far in terms of the rights in this proposed bill to accused and alleged perpetrators, and has overlooked the rights of sexual assault victims through the criminal justice process.¹⁵⁰

The committee notes that the QHRC supported the recommendations in the QLRC's report in regards to amending the Criminal Code and that the QHRC also agreed with the Statement of Compatibility that 'to the extent these amendments limit the right to fair trial, that limitation is reasonable and proportionate given the amendments seek to modernise the Criminal Code by giving effect to contemporary standards about sexual behaviour'. Importantly, the QHRC notes the Statement's comment that, in doing so, 'the standards reinforce the rights of victims to security of the person'.¹⁵¹

DJAG stated that, consistent with its role and responsibilities, 'the impact of legislative amendments will be reviewed on an ongoing basis'.¹⁵²

2.1.11 Submitter comments outside the scope of the Bill

2.1.11.1 Consent and people with disability

A number of submitters expressed concern that the Bill would fail to address the negation of consent for a person with disability and stated that the Bill represents a missed opportunity to correct a law (at section 216 of the Criminal Code) that unfairly discriminates against people with a disability.¹⁵³

QCOSS stated that the Bill 'fails to address deficiencies in Queensland's consent laws with regard to people with disability'.¹⁵⁴ QCOSS explained:

Under section 216 of the *Criminal Code 1899* (Qld) it is an offence to have sexual contact with a person who has an impairment of the mind. Under section 229L, it is an offence to cause or permit a person with an impairment of the mind to be at the place used for the purposes of prostitution.

These laws discriminate against people with disability. They engage a number of statutory human rights including the right to recognition as a person before the law, the right to privacy and the right to enjoy human rights without discrimination. The UN *Convention on the Rights of Persons with Disabilities* expressly provides for the right of people with disability to 'give consent for intimate relationships'.

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 and captures people whose ability to consent to sexual contact is unaffected by their impairment.

QCOSS acknowledges the important purpose of these provisions in protecting people with a disability from sexual exploitation. However, we note the sustained advocacy of frontline community organisations like Queensland Advocacy Inc. to improve consent laws for people with disability. We also note the considered analysis of the Queensland Human Rights Commission on this point. On balance, QCOSS

¹⁴⁹ Submission 8, p 4.

¹⁵⁰ Public hearing transcript, Brisbane, 21 January 2021, p 5.

¹⁵¹ Submission 15, pp 2, 3.

¹⁵² DJAG, correspondence, 19 January 2021, p 24.

¹⁵³ Gold Coast Centre Against Sexual Violence, submission 20; Adela Brent of Australia Solidarity with Latin America, submission 31; Britnee Chamberlain, submission 32; Ending Violence Against Women Queensland Inc, submission 33; Laura Anderson, submission 34; Madeline Price, submission 35; Name withheld, submission 36; One Woman Project, submission 37; Name withheld, submission 38; Sophia Leen, submission 40; Women's Health Queensland, submission 42; Form submission, submission 45.

¹⁵⁴ Submission 8, p 5.

considers that the Bill's silence on this issue is a missed opportunity to correct a law that unfairly discriminates against people with disability.¹⁵⁵

DJAG advised that the issue was outside the scope of the Bill:

There are other provisions in the Criminal Code—in section 216—that deal with that. I can take you to the beginning of the QLRC report. They did note that they received submissions on that issue but that it was outside their terms of reference, so that was not dealt with directly by the commission. As this just implements the commission's recommendations, there are no amendments with respect to that in the bill.¹⁵⁶

Committee comment

While the committee notes this matter is outside the scope of the Bill, it acknowledges the views of stakeholders and supports further evaluation by the government on the application of the Bill to people with a disability.

2.1.11.2 Consent and application to sex workers

Both the Scarlet Alliance—Australian Sex Workers Association—and Respect Inc raised the issue of consent and that its legal application must apply to sex workers as it does to other Queenslanders.¹⁵⁷ Respect Inc noted that 'in a sex work setting consent can be altered, withdrawn or expanded at any time, at the discretion of the sex worker'.¹⁵⁸

Respect Inc expanded on this point, noting:

In sex work, a key aspect of consent for sexual services is payment for the services negotiated. If payment is not made or is withdrawn, whether or not the sex worker is yet aware, consent is also withdrawn. When the payment and therefore consent is breached access to a person's body and sexual labour is sexual violence. This Bill must recognise that consent is not freely or willingly given by a sex worker when payment for sexual services is withdrawn or not given. Whilst an amendment to section 348 'Meaning of consent' is included in this Bill, it does not encompass this protection for sex workers which recent cases have demonstrated is essential to provide clear direction to police and the justice system. A minor amendment would align Queensland with the ACT legislation that has seen a number of successful charges where consent was fraudulently obtained in relation to non-payment or withdrawal of payment for sex work services. The Queensland Criminal Code section 348(2)(e) states that consent is not "freely and voluntarily given" if it is obtained "by false and fraudulent representations". However, unlike the ACT legislation this subsection is limited to "the nature or purpose of the act", making it unlikely to apply to this matter without amendment.¹⁵⁹

Respect Inc also commented at the public hearing:

Section 348(2)(e) of the Criminal Code states that consent is not 'freely and voluntarily given' if it is obtained 'by false and fraudulent representations' about the 'the nature or purpose of the act'. While this section could and should cover the situation where consent to sex with a sex worker is fraudulently obtained, particularly in the case of payment being withdrawn, currently in practice it does not. Even sex workers who surmount the significant barriers to reporting rape or sexual assault are being told by police, 'I don't see the crime,' or 'It is a civil, not a criminal, matter.' This happens regularly, as our organisation has progressed formal complaints about this behaviour, as well as bringing it to the attention of the Minister for Police and the Police Commissioner. In other cases a charge is prosecuted under section 408C of the Criminal Code which relates not to consent but primarily to property fraud and has resulted in fines of only \$300 to \$750. The QLRC report acknowledges that this outcome does not recognise the total

¹⁵⁵ Submission 8, p 5. NB: in-text references have been removed. Refer to original source for further information.

¹⁵⁶ Public briefing transcript, Brisbane, 16 December 2020, p 3; DJAG, correspondence, 19 January 2021.

¹⁵⁷ Refer to submissions 46 and 47.

¹⁵⁸ Submission 46, p 1.

¹⁵⁹ Submission 46, pp 1-2.

criminality of the offending. Respect Inc believe that it is far from ideal that cases end up tried under this clause because the victim is a sex worker.

The bill does not provide any clarification to police or the justice system on this particular matter. If the bill progresses, our recommended very small addition to the Criminal Code would provide protection to some degree and, importantly, a recourse to justice for sex workers in Queensland. Currently, while there has been a government commitment to refer the full decriminalisation of sex work to the QLRC, there is no date, and that creates a risk that sex workers will be left behind.¹⁶⁰

In relation to its reference to the ACT legislation, Respect Inc stated:

Our reference to the ACT legislation is also referenced in the QLRC report. It clarifies that section 348(2)(e) in the Queensland legislation is somewhat limited by the clause that ties it to ‘the nature or purpose of the act’. That is not in place in the ACT, so their legislation is slightly less refined or restricted and it has resulted in a number of successful cases.¹⁶¹

Scarlet Alliance also commented on the ACT legislative amendments and their impact on convictions and the number of incidents of clients refusing to pay or withdrawing a fee:

This was significant in the remarks by the justices in those cases. They made clear statements that it should be clearly understood that consent to sexual intercourse obtained by fraudulent activity such as non-payment was not consent and that for sex workers this fraudulent activity constitutes rape rather than a dishonesty offence. I think that was very clearly stated in those cases. In the more recent case, the Mynott case, Chief Justice Helen Murrell stated that sexual consent given can be negated because it has been caused by fraudulent misrepresentation—that is, by not paying as promised and withholding payment. This has been extremely significant in that it sends a clear message to sex workers and to clients that this is criminal behaviour that can be prosecuted. Unfortunately, predators see sex workers as easy targets because they think that sex workers are unable or unwilling to go to the police because these cases will not be taken seriously. It has definitely had a significant effect for sex workers in the ACT and I think in making sex workers around Australia hopeful that this would be replicated in the other states and territories.¹⁶²

Both advocacy groups recommended the repeal of s 229H of the Code and that s 348(2)(e) ‘by false and fraudulent representations about the nature or purpose of the act;’ be amended to include ‘or the withdrawal of payment or non-payment of a sex worker’.¹⁶³

The submission from Shine Lawyers suggested that a new offence be created where consent to a sexual act is obtained by way of mistaken belief, induced by the defendant, that there will be a monetary exchange for the sexual act, noting that:¹⁶⁴

The QLRC did not recommend such a change because it raised broader policy questions about the protection of sex workers and their experiences with the criminal justice system which were outside the scope of the QLRC’s review.¹⁶⁵

Shine Lawyers also suggested the following be given consideration:

An offence should also be enacted for circumstances where consent to a sexual act is obtained, but where the defendant fails to use a condom or sabotages the condom. Consideration should also be given to creating an offence where consent is given but under a mistaken belief, induced by the defendant, that the defendant does not suffer a serious disease.¹⁶⁶

¹⁶⁰ Public hearing transcript, Brisbane, 21 January 2021, p 24.

¹⁶¹ Public hearing transcript, Brisbane, 21 January 2021, p 24.

¹⁶² Public hearing transcript, Brisbane, 21 January 2021, pp 25-26.

¹⁶³ Respect Inc, submission 26, p 2; Scarlet Alliance, submission 47, p 1.

¹⁶⁴ Submission 44, p 3.

¹⁶⁵ Submission 44, pp 3-4.

¹⁶⁶ Submission 44, p 4.

DJAG responded:

DJAG notes the Government in its previous term committed to consulting on the issue of whether stealthing should be a standalone offence. DJAG notes the Government committed in its previous term to incorporate the issue of non-payment of sex workers into a proposed review of the regulation of the sex work industry by the QLRC.¹⁶⁷

Committee comment

The committee notes submitters' comments in relation to amending the Bill to include that consent can be withdrawn on the basis of withdrawal of payment or non-payment of a sex worker, and submitters' evidence that withdrawal of payment would constitute rape rather than a dishonesty offence under ACT legislation.

Whilst the committee notes that these matters are outside the scope of the Bill, it endorses the earlier government commitment to consider the issue of non-payment of sex workers in a proposed review of the regulation of the sex work industry by the QLRC.

2.1.11.3 Protecting victims and the role of education

Several stakeholders expressed concern that the Bill does not go far enough in relation to protecting victims.¹⁶⁸

In this regard, several submitters canvassed education in relation to matters that the amendments address.¹⁶⁹ For example, Soroptimist International Brisbane called on government to consider public programs and additional school programs for young people around the issue of consent to sexual matters and to address the stigma that can attach to victims of sexual assault.¹⁷⁰

When questioned how clarity regarding matters considered in the Bill would be enhanced with education in the community to ensure the law is more understandable and delivers better outcomes, QLS responded:

That is a great question, and I have to say that is one that has occupied us at the QLS for some time because these are really abstract concepts. They are highly conceptual. They are not intuitive. It is hard to communicate those laws in a meaningful way to the community. It is very clear as well that in the last couple of years the discussion has changed and the focus of the discussion has changed. It was very heartening to see in the Queensland Law Reform Commission report, for example, that there is no evidence of pervasive rape myths being used by juries in their consideration of these issues. The view is that there is cultural change happening, but this is not just a legal issue: it is a social issue and a health issue. It is across multiple domains, so any strategy has to target that.¹⁷¹

QLS expressed the view that the Bill 'will assist in providing clarity to the various stakeholders and interest groups who are engaged in this process of education and social reform'.¹⁷²

Both DJAG and the QLRC report acknowledged that 'legislation is only one aspect of the criminal justice system's response to sexual offending' and that education would play an important role in supporting the Bill's proposed amendments to the Criminal Code.¹⁷³ DJAG advised:

The amendments to the Criminal Code in the Bill complement *Prevent. Support. Believe.* Queensland's Framework to address Sexual Violence which includes a range of strategies under the priority areas of

¹⁶⁷ DJAG, correspondence, 19 January 2021, p 66.

¹⁶⁸ See, for example, Women's Legal Service Qld, submission 12, p 2, and Rape and Domestic Violence Services, submission 7, p 2.

¹⁶⁹ See, for example, submissions 22 and 25.

¹⁷⁰ Submission 25, p 1.

¹⁷¹ Public hearing transcript, Brisbane, 21 January, p 10.

¹⁷² Public hearing transcript, Brisbane, 21 January 2021, p 11.

¹⁷³ DJAG, correspondence, 10 December 2020, p 2.

prevention, support and healing, and accountability and justice to provide a whole-of-government response to sexual violence.

A targeted education program supporting the amendments will be developed by officers from across Government.

The QLRC considered many different options for reform. Where the QLRC did not recommend a particular option for reform, the QLRC report sets out the reasons why at length.

...

The Government has acknowledged that further work is required across government to examine the experience of women in the criminal justice system, with a view of reducing the high attrition rates of sexual assault complaints.¹⁷⁴

DJAG acknowledged that this work would build on efforts already underway, and the committee notes the government has committed to continue to review and evaluate justice processes and relevant laws in Queensland to ensure that victims of sexual violence are supported and perpetrators are held accountable.¹⁷⁵

In terms of protecting victims, several submitters also commented on the reporting rates of sexual assault. The LGBTI Legal Service stated that the 'proposed reforms will likely not improve the low rates of reporting within the LGBTI community'.¹⁷⁶

WLSQ also commented on reporting rates:

Sexual violence is a violent and insidious crime that takes away women's feelings of independence, safety, identity, control and privacy. It has severe and deleterious impacts on a victim's physical and mental health, often for a lifetime. Unfortunately it is a crime with little to no accountability, as the reporting statistics make abundantly clear, with only 14 per cent ever reported pursuant to research. The reality is that it is probably much lower than this as well in our experience. There is also significant attrition for those who do report, with only 20 per cent of cases judged in court and 6.5 per cent resulting in convictions. Research also shows that conviction rates for sexual offences have decreased over time, including in Australia. National and international research has consistently demonstrated the incidence of sexual violence is significantly under-reported, under-prosecuted and under-convicted. There are myriad barriers to reporting, including confusion, guilt, fear of the perpetrator, fear they will not be believed, rape myths and the criminal justice system itself. The Queensland Law Reform recommendations, which this bill is based on, have, for all intents and purposes, maintained the status quo and will do little, if anything, to improve the safety of women or encourage women to report to make perpetrators accountable. Our clients continuously report to us that they do not report to police because of a fear of what will happen in the criminal justice system. If they have proceeded through formal channels, they report that they are just as traumatised by the legal system as by the rape. The police response is in turn influenced by the law and court outcomes. The police are constantly evaluating whether a matter should proceed and if they feel they can get a conviction as a result of the matter.¹⁷⁷

QCOSS supported the view that there are low reporting rates of sexual offences, stating:

What we hear from the sexual assault counsellors is that there is a reticence of women to actually even report. If we are to believe the statistics of about 45,000 rapes and sexual assaults and then a shrinking number of that statistic actually even making it to reporting to police, there is arguably something wrong at that step, and it whittles down until a very, very small number end up with a prosecution.¹⁷⁸

¹⁷⁴ DJAG, correspondence, 10 December 2020, pp 2-3.

¹⁷⁵ DJAG, correspondence, 10 December 2020, p 3.

¹⁷⁶ Submission 19, p 7.

¹⁷⁷ Public hearing transcript, Brisbane, 21 January 2021, pp 1-2.

¹⁷⁸ Public hearing transcript, Brisbane, 21 January 2021, p 6.

BAQ commented on the rates of conviction:

Perhaps on that note, we as members of the community are similarly concerned with the offences of sexual assault and rape. The fact that we defend the perpetrators of it or prosecute the perpetrators of it is neither here nor there. That is our profession. That is what we do. However, there is some danger in assuming that the reason conviction rates are low, if that is to be accepted, can be shafted home to the operation of the defence of mistake of fact really needs serious scrutiny. With regard to those 135 trials, that is why in my initial comments I said that that really I think is quite pivotal in consideration of this issue. Of those 135 trials, only a proportion turned on mistake of fact and in fact when mistake of fact was raised the conviction rates were higher. That is at paragraph 3.44 of the QLRC report.

While there are, I do not doubt, legitimate concerns about rates of conviction—or rates of reporting as well probably more properly—of these offences in Queensland, there are numerous reasons that might be the case. In considering these matters in sitting and listening to the comments of the individuals coming before the committee this morning, I did reflect on the fact that there might be numerous reasons—quite apart from some of the issues we know with shame, with an unwillingness to come forward, perhaps sometimes a concern with the appropriateness of a police response—where there might also be considerations around this fact, and that is if you are going to allege rape against your 18-year-old boyfriend and he is convicted he will go to jail for five years. That is the case in Queensland now and that is a significant prospect, I think, for any young person making a complaint. Rightly or wrongly, that might deter people from making complaints. Really of course this is speculation, but it is not inconceivable that those sorts of issues play on the minds of complainants. These issues around perhaps lack of reporting or under-reporting of sexual offences certainly need closer scrutiny. Our position is that you cannot address them by fundamentally altering the approach of the criminal law.¹⁷⁹

QLS questioned whether there were low conviction rates for rape and sexual assault as a personal offence, stating:

I just do not know if that is true though. I think that the idea of what is happening at the coalface with police charging rates and what proportion of victims go to the police is an issue. It is well known that there are structural and cultural reasons victims do not go to the police in terms of sexual assault and domestic violence.

As a criminal practitioner, the vast experience is that most of the time the people who come to us who are charged with these offences plead guilty, so they are convicted and they go to jail. That is the majority of people. I wish I had statistics, but they would be very easy to find. In fact, it would be on the Queensland courts Queensland Sentencing Information Service, QSIS. In terms of the number of matters that go to trial, mistake of fact is a small proportion of the defences that are run. As I said, defence lawyers do not like the defence very much. It is hard to establish. It can be a difficult threshold; however, there are some cases where the availability of that defence prevents serious injustice. That is not to say that there are not issues surrounding the experience of victims in the criminal justice system. There are, and there is work to be done there. The Queensland Law Society supports the recommendations contained in the Queensland Law Reform Commission report as striking the right balance.¹⁸⁰

2.1.11.4 Inclusion of objectives and guiding principles

A number of submitters suggested that guiding principles be inserted into Chapter 32 of the Criminal Code.¹⁸¹ QSAN stated that inserting guiding principles would ‘assist in interpreting the legislation’ and discourage ‘the perpetuation of rape myths and stereotypes’. QSAN stated:

¹⁷⁹ Public hearing transcript, Brisbane, 21 January 2021, pp 21-22.

¹⁸⁰ Public hearing transcript, Brisbane, 21 January 2021, p 12.

¹⁸¹ Rape & Domestic Violence Services Australia, submission 7; QCOSS, submission 8; Queensland Sexual Assault Network, submission 9, pp 7, 8; Gold Coast Centre Against Sexual Violence, submission 20; Leah Pabst, submission 24; Adela Brent of Australia Solidarity with Latin America, submission 31; Britnee Chamberlain, submission 32; Ending Violence Against Women Queensland Inc, submission 33; Laura Anderson, submission 34; Madeline Price, submission 35; Name withheld, submission 36; One Woman Project, submission 37; Name withheld, submission 38; Sophia Leen, submission 40; Women’s Health Queensland submission 42; Form submission, submission 45.

the guidelines suggested by reviews undertaken by the Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC) in their Joint Report on Family Violence in 2010 and the Victorian Law Reform Commission are best practice examples.¹⁸²

LawRight expressed the view that the excuse of mistake of fact perpetuates myths about rape and sexual assault and that the Bill fails to address these. LawRight continued:

Factors such as previous sexual contact, flirting, going home with a person, or kissing a person have all been found to support a defendant's honest belief of consent. The failure to address this in the proposed legislation not only sustains pernicious myths about sexual offences, it also disempowers and diminishes the rights of survivors, particularly survivors who are experiencing homelessness or other vulnerabilities.¹⁸³

QCOSS supported the insertion of guiding principles as a means of achieving equality by 'recognising the disproportionate impact on women and people with disability'. QCOSS also noted the Victorian Law Reform Commission's stance that guiding principles have the potential to be an 'important educational tool to address the need for cultural change'.¹⁸⁴

RDVSA also supported the inclusion of objectives and guiding principles to govern the interpretation and application of Chapter 32 of the Code, stating that the development of judicial directions and the admission of expert evidence would:

address myths and misconceptions in sexual offence proceedings. There has been growing support for these initiatives, including recommendations by the Australian and NSW Law Reform Commissions and the New Zealand Law Commission.¹⁸⁵

However, QLS was of the view that guiding principles can sometimes 'serve to create more uncertainty and more avenues for interpretation and misinterpretation than if they did not exist'.¹⁸⁶ QLS continued:

Guiding principles in the criminal law I think can be something of a vexed concept although there is real precedent for it; for instance, in the Penalties and Sentences Act which sets out important principles that govern that legislation. With regard to the idea of the criminal law being educative, at a broad level laws obviously exist to showcase what the values of the particular community are. Criminal law is a part of that, and I do not want to be seen to be saying the contrary. The point is that the criminal law has some very different purposes from other types of laws and carries with it very different profound consequences. For that reason, I think it can be easy to overstate the educative purpose because there are other purposes that have more priority. My recollection is that the Queensland Law Reform Commission report was lukewarm on the idea of guiding principles and said, in essence, why complicate what is already simple and elegant that, in the view of the QLS, strikes the right balance.¹⁸⁷

The committee notes the comments of the Attorney-General in her introductory speech for the Bill that:

The Palaszczuk government will consult broadly with key stakeholders in the coming months to ensure that we examine the experience of women in the criminal justice system as a whole, to identify possible future areas for reform including attitudinal change, prevention, early intervention, service responses and legislative amendments where necessary.¹⁸⁸

¹⁸² Submission 9, p 3.

¹⁸³ Submission 23, p 4.

¹⁸⁴ Submission 8, pp 5, 6.

¹⁸⁵ Submission 7, pp 12, 13.

¹⁸⁶ Public hearing transcript, Brisbane, 21 January 2021, p 11.

¹⁸⁷ Public hearing transcript, Brisbane, 21 January 2021, pp 11-12.

¹⁸⁸ Hon S M Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, record of proceedings, 26 November 2020, p 91.

2.1.11.5 *Interdepartmental review*

Zig Zag and GCCASV advocated for a broad based, interdepartmental review with GCCASV stating that the review should consider barriers to reporting, the process of reporting to police, attrition and progression through the criminal justice system, and issues at trial.¹⁸⁹ Zig Zag added the following matters for consideration as part of the review:

- Introduction of Guiding Principles within Chapter 32 (Criminal Code Act 1899 (Qld)) offences.
- Challenging rape myths and misconceptions.
- The development of a comprehensive Sexual Assault Education Framework and campaign supporting the changes to legislation that specifically includes professionals in the criminal justice system including police officers, magistrates, judges, and tribunal members on issues relating to sexual offences that enhances their understanding of sexual violence and trauma, and improves judicial responses to sexual offences.
- The introduction of a broader community awareness campaign that informs the community about the legal changes, counters rape myths and victim blaming, and promotes affirmative consent within sexual relationships.
- Review of police responses in investigating sexual offences.
- The training and compliance of police officers with interagency guidelines, protocols, and operational procedures in responding to sexual offences requires further attention and monitoring.
- Specialised training packages on investigating sexual offences have been developed and should be a requisite for all new police officers, and compulsory for officers employed in the Sexual Crimes Investigation Unit (SCIU), Child Protection Investigation Units (CPIU), and Criminal Investigations Bureaus (CIB). Engaging specialist sexual assault services to deliver aspects of this training package is highly recommended as it has been demonstrably successful in promoting positive attitudinal and behavioural change in responding to victims/survivors of sexual violence.
- Review of the progression and outcomes of prosecutions within the criminal justice system
- Improved transparency and accountability of decision making within the Queensland Police Service (QPS) and Office of the Director of Public Prosecutions (ODPP) in relation to all matters that do not proceed to prosecution. An independent review of decisions should be considered.
- The introduction of a separate legal representative and advocate for victims of crime during criminal justice proceedings in Queensland to improve justice responses to victims of sexual offences.
- The introduction of specialist courts for sexual offences to be trialled in Queensland.
- Implementing time restrictions and other processes in order to expedite court proceedings for sexual offences.¹⁹⁰

The committee notes the commitment of the Attorney-General to ‘improving women’s safety and experiences in the criminal justice system’ and that ‘the government will continue to review and evaluate justice processes and relevant laws in Queensland to ensure that victims of sexual violence are supported and perpetrators are held accountable’.¹⁹¹

2.2 **Amendments to the *Legal Profession Act 2007***

The Bill proposes to amend the *Legal Professional Act 2007* (LPA) to authorise payment of any claim not paid in full since the commencement of the LPA from the Legal Practitioners’ Fidelity Guarantee Fund (the Fund) due to the operation of the statutory caps as defined under section 396(2), and will

¹⁸⁹ Submission 20, p 3.

¹⁹⁰ Submission 10, pp 4-5.

¹⁹¹ Hon S M Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, record of proceedings, 26 November 2020, p 91.

also provide clearer guidance to the QLS, who administers the Fund, as to when the statutory caps should be applied in the future.¹⁹²

The Fund was established to provide a source of compensation for persons who have lost trust money or property due to a dishonest default by a solicitor law practice.¹⁹³ The statutory caps under section 396 of the LPA were introduced as protection against an extraordinary claim against the Fund which, if paid in full, would result in the Fund being exhausted to the detriment of subsequent claims. For a period, the QLS applied the caps to all claims. As a result of this approach, a number of claimants did not have their claims against the Fund paid in full.¹⁹⁴

The explanatory notes advise:

Section 76 of the Legal Profession Regulation 2017 provides that the maximum amount that may be paid from the Fund for a single claim is \$200,000 and the maximum aggregate amount that may be paid from the Fund for all claims made in relation to a single law practice is \$2 million (the statutory caps).

Section 396(2) of the LPA prohibits payment from the Fund of amounts in excess of the statutory caps. However, section 396(4) of the LPA provides that the QLS may authorise payment of a larger amount if satisfied that it would be reasonable to do so after taking into account the position of the Fund and the circumstances of the particular case.

...

On 24 November 2016, the QLS adopted a new policy in relation to the statutory caps which has the effect of persuading the QLS Council to determine any application to exceed the statutory caps in favour of an applicant unless there are strong policy reasons to the contrary.¹⁹⁵

According to DJAG, the Fund currently has a 'substantial balance' of 'over \$29 million', and the QLS is 'supportive of legislative amendments to facilitate additional payments being made to claimants who had the statutory cap applied to their claims prior to 2016'.¹⁹⁶

In response to a question from the committee regarding what benefits the Bill would provide to someone who has brought a claim under the Fund, DJAG advised:

Basically, the intent of the provision is to deal with a class of historical claims where the caps of the \$200,000, and the larger cap in relation to the legal practice of \$2 million, were actually applied. Say, for example, a person who, if they had been paid in full for the claim that was accepted by the Law Society, would have received an additional amount of money, the caps were applied. What is happening as a result of the bill is the Law Society will revisit those claims and pay the people what they were entitled to, not being capped.

The secondary aspect is also clarifying guidance to the Law Society moving forward as to when the cap should apply. It has a retrospective aspect and a prospective aspect to it as well.¹⁹⁷

2.2.1 Stakeholder comments

QLS supported the proposed amendments in the Bill to authorise the full payment of any claim not paid in full since the commencement of the LPA due to the operation of statutory caps and to provide clarity about the application of statutory caps. QLS stated:

¹⁹² Explanatory notes, p 4.

¹⁹³ DJAG, correspondence, 10 December 2020, p 6.

¹⁹⁴ Explanatory notes, p 4.

¹⁹⁵ Explanatory notes, p 4.

¹⁹⁶ Explanatory notes, p 4; public briefing transcript, Brisbane, 16 December 2020, p 4.

¹⁹⁷ Public briefing transcript, Brisbane, 16 December 2020, p 4.

The fidelity guarantee fund is an important commitment by solicitors of Queensland to ensure consumers are protected from trust account defaults. We take pride in the fact that we provide that fund for the benefit of the community.¹⁹⁸

According to the QLS, the proposed amendment 'is necessary as the previous drafting of the *Legal Profession Act 2007* did not empower the Queensland Law Society to revisit previous decisions on claims and make payments to claimants where statutory caps had historically been applied'.¹⁹⁹ If the proposed amendment is passed, and noting the current financial position of the Fund, the QLS stated that this could now occur.²⁰⁰

The QLS noted, however, that the LPA does not permit the Fund to support any preventative or claims reduction activities, but historically it did so.²⁰¹ The QLS submitted that further amendments be made to permit the Fund to provide resourcing for measures likely to have a material effect in minimising the risk or magnitude of misappropriations, such as:

- programs to prevent or more expeditiously identify trust account defaults
- educational programs to improve compliance and trust accounting systems in law firms to prevent claims.²⁰²

In response, DJAG advised it would consider the further suggested amendments.²⁰³

Recommendation 4

The committee recommends that further amendments be made to permit the Fidelity Guarantee Fund to provide resourcing for measures likely to have a material effect in minimising the risk or magnitude of misappropriations.

2.3 Tackling Alcohol-Fuelled Violence Policy amendments

The Bill proposes amendments to the *Liquor Act 1992* (Liquor Act), *Gaming Machine Act 1991* (Gaming Machine Act) and *Police Powers and Responsibilities Act 2000* (PPRA) as the second tranche of the government's legislative response to the final report of the independent evaluation of the Tackling Alcohol-Fuelled Violence Policy (TAFV Policy), which aims at reducing the risk of harm from alcohol-fuelled violence.²⁰⁴ The proposed amendments in the Bill:

- provide greater rigour around ID scanning and the banning regime
- ensure the ongoing effectiveness of safe night precincts
- increase transparency around liquor and gaming machine decisions.²⁰⁵

¹⁹⁸ Public hearing transcript, Brisbane, 21 January 2021, p 8.

¹⁹⁹ Submission 28, p 5.

²⁰⁰ Submission 28, p 5.

²⁰¹ Submission 28, p 5.

²⁰² Submission 28, p 6.

²⁰³ DJAG, correspondence, 19 January 2021, p 47.

²⁰⁴ A copy of the final report, titled 'QUEENSLAND Alcohol-related violence and Night Time Economy Monitoring (QUANTEM)', April 2019, and the government's interim response to the report can be found at: <https://www.publications.qld.gov.au/dataset/quantem-report/resource/bff18db2-8891-4532-8661-9d86f8ac0c76>.

²⁰⁵ Explanatory notes, p 5.

DJAG noted that the government has ‘an ongoing commitment to creating a safer night-time environment, cultural change around drinking practices in entertainment precincts and a balanced regulatory framework’ via its TAFV Policy.²⁰⁶

An independent evaluation of the effectiveness of the TAFV Policy was legislatively required to be undertaken. The evaluation found:

The TAFV Policy has made modest but promising reductions in some indicators of alcohol-related harm State-wide. However, the evaluation report recommended 38 enhancements to the TAFV Policy to reduce the high levels of consumption, harm and alcohol-related violence in Queensland, particularly in and around licensed premises.²⁰⁷

The government supported 7 recommendations in-principle, accepted 21 recommendations for further consideration, and did not support 10 recommendations. DJAG advised that relevant stakeholders were consulted and ‘expressed general support for the Government’s proposed response; in particular, the further measures to be introduced to enhance the ID scanning regime’.²⁰⁸

2.3.1 ID scanning regime and enhancing the operation of police banning notices

Clauses 28 to 37 of the Bill propose amendments to the Liquor Act to provide greater rigour around the ID scanning regime. Clauses 46 to 61 relate to proposed amendments to the PPRA and focus on enhancing the effectiveness of police banning notices (PBNs).²⁰⁹ DJAG further advised:

According to the evaluation report, the ID scanning network has been effective in reducing anti-social behaviour in and around late-trading premises and has been associated with some reductions in harm. The report recommended retaining mandatory networked ID scanning with amendments.

The Government's interim response to the evaluation report included consideration of implementing measures to improve the safety of the night-time economy by enhancing means of policing and enforcing compliance. Specific measures recommended by the evaluation report include extending the duration of PBNs from 10 days to up to one month to ensure they can function as a genuine deterrent.²¹⁰

In regards to the Bill’s proposed amendments to the PPRA to increase the duration of an initial PBN from 10 days to up to one month, the explanatory notes state:

This amendment will enhance public safety in relevant public places by excluding disorderly, offensive, threatening or violent persons for longer periods of time where their ongoing presence poses an unacceptable risk of violence or compromising the safety or reasonable enjoyment of others at the relevant place.²¹¹

The Bill will achieve its objective of providing greater rigour around ID scanning by amending the Liquor Act to:

- create a vexatious ban offence by amending section 185 of the Liquor Act (Obstruction of investigators), to include that a licensee is taken to obstruct an investigator in the exercise of a power under the Liquor Act if the licensee bans the investigator from entering the licensee’s licensed premises (unless relating to an investigator’s behaviour as a patron of the licensed premises)
- require an approved ID scanning operator to remove licensee bans 30 days after a licence transfer, unless otherwise requested by the new licensee

²⁰⁶ DJAG, correspondence, 10 December 2020, p 3.

²⁰⁷ DJAG, correspondence, 10 December 2020, p 3.

²⁰⁸ DJAG, correspondence, 10 December 2020, p 3.

²⁰⁹ DJAG, correspondence, 10 December 2020, p 4.

²¹⁰ DJAG, correspondence, 10 December 2020, p 4.

²¹¹ Explanatory notes, p 5.

- create an offence to ensure a staff member responsible for controlling entry to a regulated premises complies with the ID scanning entry requirements for each patron the staff member allows entry to the premises
- provide the Commissioner with discretion to notify only affected (rather than all) licensees when an approved operator has been directed to address ID scanning system errors and malfunctions.²¹²

The Bill also makes a number of minor amendments to the PPRA to enhance the operation and effectiveness of police banning notices.²¹³ DJAG advised:

In addition to extending the duration of initial PBNs from 10 days to up to one month, there are also a number of complementary amendments which will address practical issues with the current PBN provisions, which impact frontline police. These minor amendments, although not specifically recommended by the evaluation report, are consistent with the policy objective of the recommendation to create a safer night-time environment, through enhancing the operation and effectiveness of the PBN framework.²¹⁴

The explanatory notes advise that the Bill will amend the PPRA to:

- increase the duration of an initial police banning notice from 10 days to up to one month to lengthen the time that the respondent is banned from the places or events stated in the police banning notice
- improve procedural fairness for the respondent of an initial police banning notice by increasing the period within which the respondent can apply for an internal review from 5 days to 15 days
- provide a power for a police officer, of at least the rank of senior sergeant, to cancel an extended police banning notice
- remove the prescriptive and impractical requirement that a photograph of the respondent for a banning order must only be of the respondent's face, neck and hair and instead allowing the photograph to be of the person generally but limiting the purpose of taking the photograph to attaching an image to a banning order for the respondent
- enable police to serve a police banning notice on a person electronically by sending the notice to a unique electronic address voluntarily nominated by the person
- provide broad examples of the behaviours for which an initial police banning notice can be given to aid interpretation and enhance the consistency of police decision-making in issuing initial police banning notices.²¹⁵

In regards to the government's consultation process after the evaluation report into the effectiveness of the TAFV Policy was released, DJAG advised:

The final evaluation report, led by Professor Miller, was publicly released, together with the government's interim response, back in July 2019. The Department of Justice and Attorney-General sent approximately 105 letters to industry and community stakeholders, seeking feedback on the government's interim response to the evaluation report. This included approximately 15 letters sent to the local boards for the safe night precincts—they use the scanning devices within their businesses—and, where no local board existed, to key licensee associations within those areas to seek feedback on the safe night precincts. We also sent approximately 57 letters to licensees located in the Ipswich CBD, inner west Brisbane and Caxton Street safe night precincts regarding the recommendations, particularly about removing those precincts, as was originally mooted in the report. There were also two stakeholder forums, I understand, that were led by the Office of Liquor and Gaming Regulation. On 22 August 2019 in Brisbane approximately 40 participants turned up to that forum and in September 2019 in the Townsville region approximately 45 participants turned up.

²¹² Explanatory notes, pp 10-11.

²¹³ Explanatory notes, p 5.

²¹⁴ DJAG, correspondence, 10 December 2020, p 4.

²¹⁵ Explanatory notes, p 11.

Overall, it would be fair to say that there was widespread support for the tackling alcohol fuelled violence evaluation report and its recommendations.²¹⁶

In regards to consultation on the issue of police banning, DJAG advised:

During the consultation period ... the issue of police banning was canvassed. To give you a little bit of background, Professor Miller's recommendation was to increase bans to one month with an option to go up to six months. The bill does not implement that change. It implements changes that increase the duration of the initial police ban from 10 days to one month. The interim government response to Professor Miller and some stakeholders also supported in principle the recommendation to increase it up to six months, but in the end the government proposed, and the bill obviously reflects, that it be retained for the existing extended police banning notice to three months. That is in terms of extension. The reason for the diversions from the recommendation was that there was not a lot of evidence or justification, either from stakeholders or when we looked around other jurisdictions, and we thought things through in terms of how it might engage human rights principles. In the end, the bill landed on an initial ban of one month and then an extension to no more than three months.

We also took into account—this was mentioned by some stakeholders, from memory—the existing legal mechanisms that allow for movement restrictions, such as bail conditions and banning orders by the courts, remembering that this provision is about police making the ban. Those other mechanisms, like bail conditions and banning orders, are still there and they provide sufficient and effective power to achieve the policy intent that Professor Miller was after. It was a balancing act in the end. If it is necessary or the circumstances dictate that greater than one month initially or greater than three months as an extension is warranted, it is appropriately then in the hands of the courts. However, the initial police ban, under this bill, will go from 10 days to a month.²¹⁷

2.3.2 Ensure ongoing effectiveness of safe night precincts

Clauses 44 and 45 of the Bill contain provisions that relate to the review of safe night precincts by amending the Liquor Act. These provisions provide a framework for regular review of areas prescribed as safe night precincts to ensure a precinct continues to achieve the purposes outlined in the relevant Part of the Liquor Act.²¹⁸

In regards to clause 44:

Subsection (1) provides that the review must consider whether the prescribing of the relevant safe night precinct area, or part of the area, continues to achieve the purposes outlined for Part 6AB (Safe night precincts) of the Liquor Act. Subsection (2) ensures that the Minister must start a review of a safe night precinct as soon as practicable after the amendments commence. Further, subsection (3) ensures the ongoing, periodic review of safe night precincts by providing that a further review of a safe night precinct must start no later than 3 years after the previous review is completed.²¹⁹

Clause 45:

... makes amendments to section 173NCA as a consequence of the insertion of new section 173NCAA by clause 44. Clause 45 amends the heading for section 173NCA to clarify that the section applies to both changing or revoking an area of a safe night precinct. Similarly, the clause also amends subsection 173NCA(1) to clarify that the section applies to an amendment of a regulation under section 173NC to change or revoke the area of a safe night precinct. These amendments ensure the existing requirements under 173NCA for changing a safe night precinct area also apply if the area is revoked.²²⁰

²¹⁶ Public briefing transcript, Brisbane, 16 December 2020, p 5.

²¹⁷ Public briefing transcript, Brisbane, 16 December 2020, p 5.

²¹⁸ Explanatory notes, p 11.

²¹⁹ Explanatory notes, p 35.

²²⁰ Explanatory notes, p 35.

DJAG advised that requiring reviews of safe night precinct boundaries to be done on a periodic basis will ensure that resources are targeted to where they are needed and relevant venues are included within safe night precinct boundaries.²²¹

2.3.3 Increase transparency around liquor and gaming machine decisions

The explanatory notes advise that an objective of the Bill is to increase transparency around liquor and gaming machine decisions by amending the Liquor Act and the Gaming Machine Act to:

... require relevant information (including details of the application and a summary of the reasoning) about decisions made for advertised applications to be published online, if community comments, or representations, submissions or objections were received. Further, the Commissioner will be required to notify objectors, and those making representations on gaming machine applications of significant community interest, of the decision made on the application.²²²

2.3.4 Stakeholder comments

2.3.4.1 *General comments*

The Queensland Coalition for Action on Alcohol (QCAA) and Australian Medical Association Queensland (AMAQ) supported the Bill's proposed amendments relating to the TAFV Policy.²²³

AMAQ stated these amendments 'are in the public interest and will ensure fairness and effectiveness in the regulatory framework'. However, AMAQ also commented it was difficult to see what additional actions beyond the Bill that the Queensland Government would be taking in relation to all 38 recommendations contained in the evaluation report.²²⁴

In addition, QCAA expressed support for recommendation 18 of the final evaluation report to introduce a minimum unit price on alcohol across Queensland as 'increasing the price of alcohol, either through taxation or minimum unit price, is the most evidence-based measure to reduce alcohol consumption'. The QCAA noted its absence from the Bill.²²⁵

In response to submitter comments on the government's interim response to the evaluation report, which was released in July 2019, DJAG stated:

A first phase of legislative amendments giving effect to aspects of the Government's response was progressed in late 2019, via the *Holidays and Other Legislation Amendment Act 2019* and the Liquor Amendment Regulation 2019.

The current Bill contains a second phase of legislative amendments giving effect to further approved aspects of the Government's response to the independent evaluation.

Consideration of the remaining legislative and non-legislative evaluation recommendations is ongoing and will inform the final Government response to the evaluation once determined.

Outlined below are further submitter concerns relating to the Bill's TAFV Policy amendments.

2.3.4.2 *Increased rigour around ID scanning*

In regards to the Bill's provisions relating to ID scanning, QCCL stated that while it accepted that licensees are 'entitled to comply with their lawful obligations by sighting proof of age', in their view, 'the copying of a driver's licence represents a gross violation of the right to privacy'.²²⁶ QCCL advised further, however, that it did not object to licensed venues being supplied with photographs of persons

²²¹ DJAG, correspondence, 10 December 2020, p 4.

²²² Explanatory notes, p 11.

²²³ Submission 43, p 1; Submission 6, p 1.

²²⁴ Submission 6, p 1.

²²⁵ Submission 43, p 1.

²²⁶ Submission 26, p 2.

who are banned by Court orders from their premises, as ‘this no doubt is a necessary and proportionate measure to effectively enforce such orders’.²²⁷

In response to QCCL’s comments, DJAG stated:

ID scanning is an existing function under Part 6AA of the Liquor Act, which was inserted by the *Safe Night Out Legislation Amendment Act 2014*. This includes the requirement under section 173EH for patron photo IDs to be scanned by an ID scanner prior to entry to the premises, which records the photo and other permitted information contained in or on the photo ID.

Given this, the matters raised by the submitter are outside the scope of the current Bill, and the Department cannot comment.²²⁸

2.3.4.3 *Police banning notice scheme*

AMAQ stated that the Bill as it relates to PBNs strikes the right balance on the one hand ‘by increasing the period of the banning notice and on the other hand by introducing changes to the period which the respondent who receives a banning notice can seek an internal review (from five days to 15 days)’.²²⁹

QLS, QCCL and ATSILS, however, expressed concern about extending the duration of initial PBNs from 10 to 30 days (clause 50 of the Bill).²³⁰ ATSILS was concerned about the ‘substantial’ increase to the length of PBNs and its potential impact on freedom of movement, the disproportionate response to different behaviours and how ‘a reasonable limitation’ would be applied, and potential hardships encountered by persons under a PBN caused by limiting access to services. ATSILS explained:

While temporary banning notices are used as a means of excluding people from public places or events as a protective measure, in our experience practices that have sprung up around the use of banning notices is disproportionate to their legitimate protective use.

As noted in the Statement of Compatibility [SOC], the use of banning notices impacts on freedom of movement, peaceful assembly and freedom of association, and fair hearing, which are provided for in sections 19,22, and 31 of the *Human Rights Act*. Several comments can be made about the proposed substantial increase in police powers:

First, banning notices are imposed in response to behaviour that is disorderly, offensive, threatening or violent. What is a reasonable limitation on someone who has been disorderly is substantially different from a reasonable limitation on someone who has been violent, yet the justification seems to attach to the lesser behaviours as well. When police have existing powers to issue an extended banning notice a week later for an additional three months, the justification is not clear for the need for longer notices.

Secondly the banning notices can cause real hardship and exceed the purpose for which they were imposed. Although the statement of compatibility refers to exemptions contained in *Police Powers and Responsibilities Act 2000*, s 602J for residence or place of employment or place of education, it fails to exclude places such as Centrelink offices, rehab centres and services, late night pharmacies and transport hubs.²³¹

ATSILS, QCCL, and QLS questioned whether restricting a person’s freedom of movement using a PBN should be the responsibility of police or judicial officers. In this regard, ATSILS stated:

Section (b) [s 602J] which refers to the nature of the purpose of the limitation in the SOC refers to purposes such as “increase accountability”, “provide a sufficient deterrent”, and “highlight the seriousness”, all of which are judicial functions exercised in the course of sentencing, and should properly be exercised by a judicial officer, not a police officer.

²²⁷ Submission 26, p 2.

²²⁸ DJAG, correspondence, 21 January 2021, p 45.

²²⁹ Submission 6, p 1.

²³⁰ ATSILS, submission 27; QLS, public hearing transcript, Brisbane, 21 January 2021, p 8; QCCL, submission 26.

²³¹ Submission 27, pp 9-10.

Section (d) refers to existing banning mechanisms which is court imposed banning orders. In our view judicial officers are the proper persons to exercise independent oversight and consideration of justification for longer banning orders.²³²

QCCL 'reluctantly' accepted the power being granted to the Court to issue banning orders, saying that this 'at least has the advantage that the orders are made by a Court in the context of a sentencing regime having heard argument and been presented with evidence'.²³³ However, QCCL expressed concern about granting this power to police officers, explaining:

We have a basic problem with the increasing tendency to introduce preventive laws that detain people or restrain people from doing things on the basis of what they might do and not what they might have done. We also have particular problems with vesting this power in police officers. As we say in the submission, if the power is to exist then it should be exercised by a court. People should be prosecuted for some offence and then, at the end of it, the court should be asked to impose the order as a part of the sentencing process so that it is subject to judicial review. It is controlled and it is not being exercised by police officers with all of the attendant risks of it being used disproportionately against disadvantaged people, Indigenous people or other groups in the community against whom these powers are usually disproportionately used.²³⁴

QLS was concerned about the proposed extension from 10 to 30 days of banning notices as it represents 'a significant restriction on a person's freedom of movement and not something that is appropriately done administratively through the police'. QLS also contended 'that a restriction of that length requires some judicial process'.²³⁵

QCCL questioned whether the banning orders were intended to be preventative or punitive in nature and, if punitive, then the notices should not be issued by a police officer. QCCL noted that the evaluation report at page 694 states 'that these bans are intended as a form of punishment'.²³⁶ QCCL stated:

As noted above, these types of orders are usually characterised as preventative in nature. Though it has always been our view that they are in fact punitive. The frank acknowledgement that these orders are in fact punitive, means in our view that they should under no circumstances be issued by a police officer. Under our system, the infliction of punishment is the exclusive domain of the judiciary. It should not be being inflicted by police officers.²³⁷

For this reason, QCCL opposed the granting to the police of the power to ban persons from being in or around licensed venues on the basis that 'these are a type of preventative measure which tend to be based on over predictions of the likelihood of further offending and on the assumption that the person in question cannot be changed and cannot be trusted to comply with the law'. QCCL was of the view that the move-on power was adequate in these situations as the proposed power could be 'open to abuse' and 'most likely to be used against indigenous and other disadvantaged members of the community as had been the case with the move on power'. For these reasons, QCCL opposed the amendment which increases the period of the banning order made by a police officer to up to one month.²³⁸

²³² Submission 27, pp 9-10.

²³³ Submission 26, p 2.

²³⁴ Public hearing transcript, Brisbane, 21 January 2021, p 19.

²³⁵ Public hearing transcript, Brisbane, 21 January 2021, p 8.

²³⁶ Refer to A copy of the final report, titled 'Queensland Alcohol-related violence and Night Time Economy Monitoring (QUANTEM)', April 2019: <https://www.publications.qld.gov.au/dataset/quantem-report/resource/bff18db2-8891-4532-8661-9d86f8ac0c76>.

²³⁷ Submission 6, pp 2-3.

²³⁸ Submission 26, p 2.

QLS was also concerned that the PBN scheme was not intended 'to exact extra-curial punishment on persons who are not necessarily convicted of a criminal offence for alleged anti-social conduct'.²³⁹

QLS raised other concerns relating to PBNs, including

- intoxicated persons at risk of committing acts of violence in a safe night precinct (SNP) are not the only persons who may be the subject of these orders.
- members of the public subject to 24 hour bans for 10 days or the proposed 30 days may also be unable to access various service providers who operate in the listed SNPs such as doctors or support workers.
- reports that their clients have been charged for breaching notices when they were going into the area for medical or other support purposes.
- the use of PBNs in relation to homeless persons.²⁴⁰

In regards to its concerns about breach allegations, QLS explained further:

In addition, where there has been a breach allegation, and the originating encounter with the police officer was recorded and provided, our members advise the encounters are often instigated by a police street check on an intoxicated person, whose conduct would not have met the requirements of section 602C(3) and that banning notices are often issued without the approval of a sergeant pursuant to section 602C(2). These experiences heighten our members concern about the proposed expansion of the banning notice regime and the unintended impacts on persons who may be the subject of them.²⁴¹

In regards to clause 55 of the Bill, which inserts a new section 602G of the PPRA,²⁴² QLS expressed the following concern:

We have a difficulty with section 602G, which we say creates a reverse onus on somebody to prove that they did not know that a banning notice had been sent to them. We acknowledge that there are reasons given for this in the explanatory notes. Because contravening an order is a serious matter—it carries an offence of 60 penalty units and it imposes significant restrictions of movement on a person—we think in those circumstances it is essential to ensure that they are adequately informed about the existence and effect of the notice and that the onus should remain on the police to prove that.²⁴³

In regards to reviewing PBNs, QLS stated:

Whilst we do not support the expansion, if the notices are extended to one month, fixed timeframes should be imposed upon Police to review the issue of an initial notice. Currently, section 6020 of the PPRA states that the Commissioner must decide an application "as soon as reasonably practicable" for an initial banning notice or no later than 5 business days if the application is in relation to an extended police banning notice. If initial police banning notice periods are extended as proposed, then similar timeframes for review should be imposed.²⁴⁴

In relation to clause 59 of the Bill, which amends section 602S of the PPRA to omit the requirement that a photograph taken by a police officer under section 602S may only be of the person's face, neck and hair, QLS queried:

the drafting and effect of section 602S which expands the powers of police to photograph a person for the purpose of attaching an image of the person to a banning order, removing the current prescription

²³⁹ Submission 28, p 3.

²⁴⁰ Submission 28, p 4; Public hearing transcript, Brisbane, 21 January 2021, p 8.

²⁴¹ Submission 28, p 4.

²⁴² Explanatory notes, p 38: Clause 55 inserts a new section 602G before section 602H to broaden the methods of service available to a police officer to serve a police banning notice on a person by including electronic service in addition to personal service.

²⁴³ Public hearing transcript, Brisbane, 21 January 2021, p 8.

²⁴⁴ Submission 28, p 4.

that the photograph for this purpose must be limited to the person's face, neck and hair. An individual's fundamental right to privacy and reputation may potentially, be negatively impacted by the power for police to photograph a respondent not having safeguards or sufficient limitations.²⁴⁵

QLS also contended that there appeared to have been 'no consultation with legal service providers about the policy intent of the expansion nor the practical issues encountered with the current regime'.²⁴⁶

2.3.5 Department response to comments on TAFV Policy amendments

2.3.5.1 Police banning notices

In regards to comments regarding increasing the duration of an initial PBN from 10 days to up to one month, QPS advised that this provision will implement recommendation 17 of the independent evaluation report of the TAFV Policy.²⁴⁷

In response to submitter concerns about the need for judicial review and the granting to the police of the power to ban persons from being in or around licensed venues, QPS explained the reasons why police have been given these powers and the legislative safeguards built into the PBN scheme to ensure the rights of the public are protected:

PBNs enable police to provide immediate protection to members of the community in licensed venues and at licensed events who are placed at risk by individuals who display disorderly, offensive, threatening or violent behaviour. The need to immediately remove individuals from specified places whose ongoing presence poses an unacceptable risk of causing violence, impacting on the safety of others or disrupting or interfering with the peaceful passage, or reasonable enjoyment of others persons is balanced by the ability for the banned person to seek administrative review of the ban and the limited application of the ban.

The legislative safeguards built into the PBN scheme ensure the rights of the public are protected and there is appropriate levels of oversight over decisions to issue PBNs, including:

- PBNs can only be issued in limited circumstances, with the elements set out in PPRA s 602C required to be satisfied before a PBN can be issued.
- A senior police officer of at least the rank of Sergeant must approve the issue of a PBN, and an officer of at least the rank of Senior Sergeant must approve the issue of an extended PBN.
- The police officer issuing the PBN is required to explain to the person receiving the PBN the PBN's duration and effect, consequences of contravening the PBN, that an extended PBN may be given or the initial PBN cancelled, as well as that the respondent has rights of appeal.
- The respondent currently has 5 days and will have, subject to the passage of this Bill, 15 days to apply to the Commissioner of Police to vary or revoke the PBN. For an extended PBN, the respondent can appeal the Commissioner's decision to QCAT.
- PBNs do not prevent someone from entering or remaining in their residence, place of employment or place of education.²⁴⁸

QPS addressed specific comments by ATSILS and QCCL explaining why the police have the power to issue PBNs:

Banning periods can be imposed through venue bans, by police through PBNs and special bail conditions and by the courts through special bail conditions and court orders. The key advantage of PBNs compared

²⁴⁵ Submission 28, p 4.

²⁴⁶ Submission 28, p 3.

²⁴⁷ DJAG, correspondence, 21 January 2021, p 69.

²⁴⁸ DJAG, correspondence, 19 January 2021, pp 69-70.

to court ordered bans is the ability to provide immediate, on the spot protection to the community at the time when a person is causing violence or otherwise impacting the safety of others.²⁴⁹

In regards to QCCL's comments that PBNs may disproportionately disadvantage Indigenous people or other groups in the community, QPS advised that there was no evidence in the independent evaluation report of the TAFV Policy 'that would support the contention that PBNs are most likely to be used against indigenous persons and other disadvantaged members of the community'.²⁵⁰

In regards to ATSILS's comments that PBNs may be imposed on persons who are disorderly, offensive, threatening or violent and that these behaviours are not all equal in seriousness, QPS advised:

The PBN scheme contains sufficient flexibility to ensure the most appropriate conditions are imposed on a person in response to their unacceptable behaviour. For example, a respondent may only be prohibited from a stated licensed premise or a stated class of licensed premise, as opposed to being prohibited from entering or remaining in a safe night precinct. The PBN may also state that its conditions only apply during stated days and times.²⁵¹

In regards to ATSILS's comments that PBNs may cause hardship and exceed the purpose for which they were imposed, particularly in relation to restricting access to services including Centrelink offices, rehab centres and other services, QPS advised:

A respondent can apply to the Commissioner to have the conditions of a PBN amended if necessary, including on the grounds of hardship.

The offence provision in PPRA s 602Q requires a person not to contravene the notice *without reasonable excuse*. Depending on the circumstances of an alleged offence, a respondent's need to attend places such as Centrelink offices, rehabilitation centres and public transport hubs may constitute a reasonable excuse. In addition, before charging a person with any offence, police must be satisfied there is sufficient evidence of an offence and public interest in doing so.

If the sufficiency of evidence and public interest tests are satisfied for a police officer to charge a respondent with contravening a PBN, and the respondent believes they had a reasonable excuse for contravening the PBN (for example, the need to use a transport hub), the respondent could raise evidence of this for the court's consideration.²⁵²

In relation to QLS's similar comments regarding the application of PBNs to homeless persons or breaches of a PBN for seeking medical or other support, QPS advised:

The threshold for issuing a PBN is set out in the PPRA. If a respondent believes their PBN was incorrectly issued, they can apply to the Commissioner for the PBN to be revoked.²⁵³

In regards to QLS's concerns about new section 602G of the PPRA and that it creates a reverse onus on the person subject to the banning order by providing that unless the contrary is proved, a PBN sent by electronic communication to a nominated email address provided by the respondent is taken to be received at the time of it being sent, QPS advised:

Without new section 602G, police would not be able to prove the respondent received the PBN in the event the respondent provided false details. As a result, the provision disincentivises a respondent from providing false details. Without this provision, the PBN scheme would be operationally ineffective and not achieve the policy objectives. Further, even if a respondent did provide false details, police are still required to explain the contents and effect of the PBN and consequences for breaching it, ensuring the respondent is at least alive to these issues.²⁵⁴

²⁴⁹ DJAG, correspondence, 19 January 2021, pp 71-72.

²⁵⁰ DJAG, correspondence, 19 January 2021, p 70.

²⁵¹ DJAG, correspondence, 19 January 2021, p 71.

²⁵² DJAG, correspondence, 19 January 2021, p 71.

²⁵³ DJAG, correspondence, 19 January 2021, p 72.

²⁵⁴ DJAG, correspondence, 19 January 2021, p 72.

In regards to QCCL's comments that move-on directions are adequate for removing a person from a safe night precinct, QPS stated:

the independent evaluation report noted key stakeholders were of the view that the 10-day period for an initial PBN did not realistically represent a punishment for people attending safe night precincts. Move-on directions can only require a person to leave an area for up to 24 hours. Whilst move-on directions may be appropriate in some circumstances, in light of the independent evaluation's findings they cannot be said to be adequate in all circumstances instead of PBNs.²⁵⁵

In regards to comments that PBNs may be interpreted as a form of punishment, QPS advised:

PBNs, similar to Police Protection Notices issued by police under the *Domestic and Family Violence Protection Act 2012*, are intended to be a protective measure and not a punishment. Removing the respondent from specified licensed venues, licensed events or safe night precincts protects others at risk from the disorderly, threatening, violent or offensive behaviour of the respondent. In the case of PBNs, they are also intended to be a deterrent to anti-social behaviour in licensed vicinities having regard to the rates of alcohol-fuelled violence in these locations. Banning periods can also be imposed by police as part of special bail conditions.²⁵⁶

In response to QLS comments regarding the removal of the current prescription that a photograph for the purpose of attaching an image to a PBN be limited to a person's face, neck and hair on the basis that a person's right to privacy may be negatively impacted, QPS stated:

The rationale for removing the requirement to limit a photograph to a person's face, neck and hair is set out in the Explanatory Notes at page 17. It outlines that it is not a realistic limitation, given people being issued PBNs, particularly initial PBNs, are often intoxicated, violent, obstructive and non-compliant.

A person's right to privacy is impacted to a very minimal extent, given the person is being photographed in a public space and only when a threshold of misbehaviour is identified. In any event, safeguards exist to mitigate any potential impact, including that the photograph is only used to attach to a PBN, and is subject to destruction provisions under PPRA ss 602V and 602W.²⁵⁷

In regards to QLS's comments on a lack of consultation with legal service providers about the police intent for increasing the duration of initial PBNs and practical issues encountered under the current regime, QPS advised:

With respect to consultation, the Government released its interim response to the evaluation report in April 2019, supporting in-principle the recommendation to increase the duration of initial PBNs to up to one month. In circumstances where these amendments are partially implementing a recommendation of the independent evaluation report, and otherwise enhancing the operation of the PBN scheme, the QPS did not undertake additional consultation.²⁵⁸

Committee comment – TAFV Policy amendments

The committee notes the key concerns of submitters in relation to the Bill's proposed amendments to the TAFV Policy, including:

- extending the duration of initial PBNs from 10 days to up to 30 days
- the ability of police officers to issue PBNs
- freedom of movement and the potential hardships a person may face in terms of accessing essential services inside a safe night precinct
- that PBNs may disproportionately disadvantage Indigenous people or other groups in the community

²⁵⁵ DJAG, correspondence, 19 January 2021, p 70.

²⁵⁶ DJAG, correspondence, 19 January 2021, p 70.

²⁵⁷ DJAG, correspondence, 21 January 2021, p 69.

²⁵⁸ DJAG, correspondence, 19 January 2021, p 72.

- that PBNs provide a blanket response to differing levels of behaviour and may not always be appropriate to the behaviour for which the PBN has been issued
- that the provision to omit the requirement that a photograph taken by a police officer may only be of the person's face/neck on the basis that a person's right to privacy may be negatively impacted
- that PBNs are punitive rather than preventative in nature
- that the government did not consult with legal service providers about the policy intent for increasing the duration of initial PBNs nor the practical issues encountered with the current regime.

The committee notes the government's detailed responses to these issues as outlined in the section above.

In relation to banning periods, the committee notes that they may be imposed through venue bans, by police through PBNs and special bail conditions, and by the courts through special bail conditions and court orders. In keeping with the intent of PBNs, the committee supports the view that police officers need to be able to issue PBNs 'to provide immediate, on the spot protection to the community at the time when a person is causing violence or otherwise impacting the safety of others'.²⁵⁹

The committee notes the Bill implements recommendation 17 of the evaluation report by increasing the duration of an initial PBN from 10 days to up to 30 days and that the government has noted a number of legislative safeguards that are built into the PBN scheme to ensure the rights of the public are protected, including, but not limited to: PBNs can only be issued in limited circumstances and by a senior police officer; the respondent will have 15 days to apply to the Commissioner of Police to vary or revoke the PBN; and PBNs do not prevent someone from entering or remaining in their residence or place of employment or education.

For these reasons, the committee is satisfied with the government's response to submissions and the issues raised relating to the Bill's proposed TAFV Policy amendments.

2.3.5.2 Review of safe night precincts

AMA Queensland (AMAQ) disagreed with the provision that licencees in safe night precincts be granted extended trading hours on the basis that the premises are within the safe night precinct boundaries.²⁶⁰ AMAQ explained further:

Despite the Safe Night Precinct project achieving some modest improvements in rates of serious assault and reductions in violence, ambulance call-outs in high-alcohol areas and a decrease in ocular bone fractures, more needs to be done, because the report also identified a 19% increase in serious assault between the hours of 8.00pm and midnight.

AMA Queensland believes the combined effect of pre-loading by patrons and the fact that patrons continue to be served alcohol despite already being under the influence (in the Quantum report as having higher BAC of patrons in the Safe Night Precinct than when the project started) creates the perfect scenario for people who are alcohol dependent and who also become violent, disorderly or offensive.²⁶¹

In this regard, AMAQ called for 3 additional actions to be included in the Bill:

1. Introducing more stringent controls over responsible service of alcohol obligations for online liquor sales:
 - a) introduce a penalty for not complying with risk assessment management plans for online sales, and
 - b) for compliance checks to be conducted at the point of delivery of alcohol.

²⁵⁹ DJAG, correspondence, 19 January 2021, p 72.

²⁶⁰ Submission 6, p 1.

²⁶¹ Submission 6, p 2.

2. Undertake a review of measures related to the safe and responsible service of alcohol, namely, strategies used to assess patrons' levels of intoxication before effecting service of alcohol.
3. Include actions related to recommendation 11 and recommendation 27 from the Quantum report [evaluation report]:

Recommendation 11 Amend the Liquor Act to include, and document, consideration of violence rates, family violence rates and the current density of outlets in any granting of new liquor licences or changes to existing licences.

Recommendation 27 Commission ongoing Independent evaluation and monitoring of alcohol-related harm in Queensland.²⁶²

The AMAQ stated that it was proposing these actions for inclusion in the Bill for the following reasons:

Firstly, the link between alcohol being consumed at harmful levels, certain cancers and poor mental health and the link between alcohol consumption and levels of domestic violence (DV) at the community level, something which the Queensland government should be congratulated for taking serious concerted actions to address, particularly since the high profile campaign led by Rosie Batty.

Secondly, Doctors working in Queensland hospitals and ambulance services continue to witness the devastating injuries and deaths caused by excessive alcohol consumption including fractured jaws, facial lacerations and eye and head injuries, which occur as a result of excessive alcohol consumption. A troubling fact is that alcohol-affected patients create more of a disruption to Emergency Departments when compared to patients affected by ice.²⁶³

DJAG responded to AMAQ's concerns

The Bill contains provisions to wind back extended trading hours for a licensed premises from 3am to 2am if the safe night precinct in which the premises is located is removed. The Bill will not automatically grant extended trading hours to 3am to premises located within safe night precincts. Licensees in safe night precincts will need to apply and be approved for extended trading hours in accordance with existing processes under the *Liquor Act 1992* (Liquor Act), and will be subject to the ordinary requirements associated with this process (such as public advertising requirements).

Under Part 4, Division 7 of the Liquor Act, licensees in safe night precincts may seek extended trading hours approval to serve liquor on a regular basis between 12am and 3am. Licensees outside safe night precincts may only apply for regular extended trading hours from 12am to 2am. These are existing provisions.

Clause 44 will insert new section 173NCAA (Review of safe night precincts) which provides a framework for reviews of areas prescribed as safe night precincts to be undertaken every three years, to ensure the area continues to achieve the purposes of Part 6AB of the Liquor Act.

As a consequence of the insertion of new section 173NCAA, clause 45 will make clarifying amendments to section 173NCA of the Liquor Act. Section 173NCA of the Liquor Act currently provides if a licensed premises with approved extended trading hours to 3am ceases to be in a safe night precinct as a result of a regulation change to the safe night precinct area, the premises' hours will reduce to 2am and no compensation is payable. Clause 45 will make amendments to section 173NCA to clarify the section also applies in circumstances where a safe night precinct is completely removed (i.e. if a safe night precinct is removed, all licensed premises within the area will have their hours reduced to 2am without compensation).²⁶⁴

In regard to AMAQ's proposed additional amendments to be included in the Bill, DJAG advised that the matters were outside the scope of the Bill and that consideration will be given to the remaining

²⁶² Submission 6, p 2.

²⁶³ Submission 6, p 2. NB: in-text references have been removed. Refer to original submission for further information.

²⁶⁴ DJAG, correspondence, 19 January 2021, pp 5-6.

legislative and non-legislative recommendations of the evaluation report and will inform the final government response to that report.²⁶⁵

Committee comment – safe night precincts

The committee notes AMAQ's concerns in relation to extending trading hours on the basis that the premises is located within safe night precinct boundaries. The committee, however, notes that the Bill will wind back extended trading hours for a licensed premises from 3am to 2am if the premises cease to be located in a safe night precinct and that the Bill will not automatically grant extended trading hours to 3am for premises located within safe night precincts. An application and approval process will continue to be required under the Liquor Act. The committee also notes that the Bill will provide a framework for areas as prescribed as safe night precincts to be reviewed every 3 years.

For these reasons, the committee is satisfied with DJAG's response.

2.4 Amendments to the Interactive Gambling Act and Wagering Act

2.4.1 Wagering inducement restrictions

The Australian Government and the Australian states and territories committed to the National Consumer Protection Framework for Online Wagering (NCPF) in November 2018.²⁶⁶ The NCPF is a response to 'the borderless nature of the internet' that presents challenges in providing 'consistent and effective protections across jurisdictions for interactive wagering consumers'.²⁶⁷ As part of the Queensland Government's commitment to the NCPF, which contains 10 consumer protection measures, the Bill proposes amendments to *the Interactive Gambling (Player Protection) Act 1998* (Interactive Gambling Act) and *Wagering Act 1998* (Wagering Act) to prohibit inducements to open an account, or refer a friend to open an account, with an online wagering provider. The explanatory notes state 'the prohibition applies whether the wagering provider is licensed in Queensland under the Wagering Act, or, by virtue of amendments to the Interactive Gambling Act, in any other jurisdiction'.²⁶⁸

In regard to the 10 overarching consumer protection measures within the NCPF, of particular note are the following restrictions on wagering inducements that interactive wagering operators can provide to customers:

- the offer of any credit, voucher, reward or other benefit as an incentive to open an account or refer another person to open an account is prohibited
- winnings from a complimentary betting credit or token (ie a bonus or free bet) must be able to be withdrawn without being subject to any turnover requirements
- direct marketing may only be sent to customers who provide their express consent to receive this material
- a customer must be able to unsubscribe from receiving direct marketing materials and, in the case of direct marketing materials sent electronically, the link to unsubscribe must be functional and easily accessible
- no further direct marketing materials may be sent to a customer from the time their unsubscribe request is received.²⁶⁹

²⁶⁵ DJAG, correspondence, 19 January 2021, p 7.

²⁶⁶ DJAG, correspondence, 10 December 2020, p 4.

²⁶⁷ DJAG, correspondence, 10 December 2020, p 4.

²⁶⁸ Explanatory notes, p 6.

²⁶⁹ DJAG, correspondence, 10 December 2020, pp 4-5.

The department provided further information on the necessity for introducing legislative protections for interactive wagering consumers:

Wagering operators Australia-wide are generally restricted in offering wagering inducements due to the implementation of the NCPF in each jurisdiction. However, differing approaches adopted in each jurisdiction have the potential to lead to coverage gaps, which may result in exposure of Queenslanders to continuing offers of inappropriate wagering inducements. Accordingly, the Bill amends the *Interactive Gambling (Player Protection) Act 1998* (Interactive Gambling Act) and the *Wagering Act 1998* (Wagering Act) to codify the NCPF restrictions on wagering inducements and to protect Queensland punters, regardless of the jurisdiction in which the wagering operator is licensed. Amendments around wagering inducements are also made to the *Racing Integrity Act 2016* (Racing Integrity Act) to ensure punters who bet in an interactive capacity through on-course bookmakers are protected from account opening inducements.²⁷⁰

In regards to the application of the NCPF National Policy Statement to betting activities of racing bookmakers, the explanatory notes advise:

The NCPF National Policy Statement also applies to the betting activities of racing bookmakers where they are approved under the *Racing Integrity Act 2016* (Racing Integrity Act) to conduct offcourse betting through a telecommunications system (telephone, internet or other electronic means) from a place other than the licensed venue, or where the bettor is not present at the licensed venue.

Racing bookmakers currently take bets from a licensed venue by telephone only and there are currently no bookmakers approved for offcourse betting in Queensland. However, the Racing Integrity Commission has received four applications which will be subject to the Minister's approval.

The Racing Integrity Act allows the Minister to impose conditions which would allow for the administrative implementation of the restrictions of inducements if the offcourse approval is granted but there is no provision for the Racing Integrity Commission to administratively restrict betting inducements in circumstances where the bettor is at a location other than the licensed venue.²⁷¹

The Racing Integrity Commissioner, Ross Barnett, summarised the view on the proposed legislative changes for the committee:

... they create a level playing field for bookmakers and online betting companies regulated in Australia by adopting measures from the national consumer protection framework which have been agreed to by all states, it harmonises the betting landscape across Australia, it minimises potential risks associated with gambling addiction and it creates a further measure of accountability and protection for bookmakers in their dealings with those who wish to bet, recognising the significance of betting and wagering in racing which emphasises the need for quality control measures to protect bookmakers and punters alike.²⁷²

The Bill proposes, at clauses 20 and 68, to amend the Interactive Gambling Act and Wagering Act to prohibit:

- inducements to open an account, or refer a friend to open an account, with an online wagering provider
- a licence operator, or a person acting for a licence operator, from offering a free bet to an interactive wagering customer who is in Queensland and has an interactive wagering account with the licence operator, unless the interactive wagering customer can withdraw any payouts arising from the free bet at any time, and

²⁷⁰ DJAG, correspondence, 10 December 2020, p 5.

²⁷¹ Explanatory notes, p 6.

²⁷² Public briefing transcript, Brisbane, 16 December 2020, p 6.

- a licence operator, or a person acting on behalf of a licence operator, from sending promotional or advertising material directly by email, SMS message or other direct means to a person who is in Queensland without their express and informed consent.²⁷³

DJAG clarified that the Bill's provisions do not prohibit an online bookmaker sending an existing customer a text or advertisement; the provisions apply to new customers.²⁷⁴ However, the Bill does include some offences applying to online bookmakers offering an existing customer an additional bet:

You may have heard where you cannot get your money unless you spend it again. Those turnover requirements are being crimped, but it is not a full prohibition on all inducements in respect of online corporate bookmakers. For online corporate bookmakers it is a prohibition on inducing someone to open an account. It is quite specific.

This codifies what is already in place. The agreement was 2018. Every state had the opportunity to condition the particular wagering providers licensed in their state, so we conditioned our provider. The risk we have for all Queensland punters is that, if they bet with an online book from another state and that other state or territory has only conditioned that licence in respect of punters in that jurisdiction, it is possible that the Queensland punter could end up with an inducement, being induced to open an account. The government has moved, in this bill, to basically put in legislation that says: if you are an online corporate bookmaker and you advertise into Queensland, you are prohibited from inducing any Queenslanders to open an account. You will see the detail of how that then would be administered. That means that, regardless of what other providers and other jurisdictions do to implement the national framework, Queensland has covered all Queenslanders who are subject to these kinds of potential inducements to open an account.²⁷⁵

DJAG clarified for the committee that the Bill's provisions do not contain powers to sanction international wagering providers who are set up in another country but who are targeting Queenslanders:

No, the issues there are extraterritorial. As part of the national framework, the state and territory ministers, along with the Commonwealth, have been working on broader national approaches to that issue. The Commonwealth, through ACMA, the Australian Communications and Media Authority, at the moment tries to chase down these illegal offshore wagering providers and then goes to the internet service provider and directs them to shut them down. They have had some success in that space, but with the internet if you close somebody down here they pop up again. For the first time, through this national process and the national officials working group that Victoria is on, there is a process at least to try to address that offshore issue.

...

To the extent that they, therefore, have an entity in Australia we cover them, but for those that do not then we work with the Commonwealth. Our compliance people, if they become aware of the existence of one of these offshore illegal entities, will then talk to ACMA about dealing with them.²⁷⁶

2.4.1.1 Stakeholder comments

FamilyVoice Australia submitted that reforms to the Wagering Act, which prohibit gambling inducements, 'should be supported'.²⁷⁷ The submission further recommended that 'a state educational campaign be undertaken to ensure that both gamblers and gambling providers are aware of the illegality of 'inducements''.²⁷⁸

²⁷³ Explanatory notes, p 12.

²⁷⁴ Public briefing transcript, Brisbane, 16 December 2020, p 6.

²⁷⁵ Public briefing transcript, Brisbane, 16 December 2020, p 6.

²⁷⁶ Public briefing transcript, Brisbane, 16 December 2020, p 6.

²⁷⁷ Submission 3, p 2.

²⁷⁸ Submission 3, p 2.

Tabcorp was also supportive of the Queensland Government's approach to codify the provisions of the NCPF, including the introduction of the ban on offering inducement to open accounts.²⁷⁹

FamilyVoice Australia was supportive of the ban on the use of free bets that cannot be withdrawn, calling for the reform to 'be supported with an advertising campaign highlighting the penalties for breaches', and submitted that penalties should be reviewed after 12 months 'to ensure that [they] are adequate'.²⁸⁰

Concerning the Bill's proposed new restrictions on direct marketing, FamilyVoice Australia supported the banning of gambling marketing directly but noted that 'governments need to do more to address the problem of gambling advertisements which are not directly marketed'.²⁸¹ The submission recommended:

That the Queensland Government work together with the Federal Government to [address] gambling advertisements during sports and TV news bulletins, particularly between the hours of 6:00pm and 8:00pm.²⁸²

Tabcorp also suggested that the committee consider further restrictions on outdoor wagering advertising, wagering advertising on television, radio and other broadcast channels as well as social media and online channels.²⁸³

However, in relation to the Bill's provisions referring to 'express and informed consent' to direct marketing, Tabcorp submitted that the term 'informed' is 'unnecessary and goes beyond the parameters of the NCPF'.²⁸⁴ Tabcorp submitted that 'express' consent is sufficient to apply to all promotional and adverting material, rather than requiring consent for each medium.²⁸⁵

Tabcorp was supportive of the Bill's provisions relating to consent withdrawal timeframes proposed at clause 68, but recommended that the 'shorter period' prescribed by regulation be no less than 24 hours 'to ensure retail and licensed venues and Contact Centre personnel have a reasonable amount of time [to] process requests'.²⁸⁶ Tabcorp also submitted that proposed new section 228E in clause 68, which requires a licence operator, when receiving a bet made from an interactive wagering account, to take 'reasonable steps' to identify the location of the person, be removed to avoid confusion or inadvertent non-compliance.²⁸⁷

2.4.1.2 Department response

In response to FamilyVoice Australia's submission, DJAG stated that the department will:

... consider communication activities to inform gamblers and betting operators about the changes to inducements. It is envisaged that these activities could include media statements, emails and website updates.²⁸⁸

²⁷⁹ Submission 17, p 3

²⁸⁰ Submission 3, p 3.

²⁸¹ Submission 3, p 4.

²⁸² Submission 3, p 5.

²⁸³ Submission 17, p 3.

²⁸⁴ Submission 17, p 4.

²⁸⁵ Submission 17, p 4.

²⁸⁶ Submission 17, p 4.

²⁸⁷ Submission 17, p 5.

²⁸⁸ DJAG, correspondence, 19 January 2021, pp 1-2.

In respect of FamilyVoice Australia's submission, specifically in relation to wagering using free bets, DJAG stated:

The department will consider communication activities to inform gamblers and betting operators about the changes to free bets (and the penalties for breaching those changes).²⁸⁹

The department also noted that:

The maximum penalties have been developed with regard to the existing penalty framework under the *Interactive Gambling (Player Protection) Act 1998* and are appropriate and commensurate to the seriousness of the offence.²⁹⁰

In response to Tabcorp's submission relating to the Bill's consent to direct marketing provisions, DJAG stated:

The Bill seeks to ensure that a person is adequately informed before giving consent to receive promotional or advertising materials. At a minimum, it is expected that they will be provided with information about the types of communication mediums through which the advertising or promotional materials may be sent; and when and how consent may be withdrawn to assist their decision about whether to consent. It is also considered appropriate that a person should be able to choose which methods of direct marketing they wish to opt-in for. For example, a person may prefer to receive promotions via email instead of by SMS and should be able to opt-out of any advertising or promotions by SMS.²⁹¹

To Tabcorp's suggestion that the timeframe for the withdrawal of consent for direct marketing be prescribed at not less than 24 hours, DJAG stated, 'appropriate consultation will be undertaken with betting operators should the Government be inclined to prescribe by regulation a period less than five business days by which withdrawals of consent take effect'.²⁹²

In response to Tabcorp's submission concerning knowledge or suspicion that a specified address is not the location where the bet is made, DJAG stated:

The Bill requires betting operators to take reasonable steps to identify the location of a person making a bet with the betting operator. The betting operator may rely on the address given to the betting operator by the person, unless the betting operator knows or has grounds to suspect that the address given is not the location of the person when the bet is made.

...

Additionally, the Department wishes to clarify that nothing in the Bill obligates a betting operator to amend the address provided by an account holder if the betting operator identifies that the account holder is not in Queensland.²⁹³

In response to calls for wider restrictions on gaming advertising, DJAG stated that such measures 'exceed the Government policy presented in the Bill, which seeks to codify the existing NCPF ban on inducements to open an account or refer a friend to open an account'. The department noted that it is the Australian Government, through the Australian Communications and Media Authority, who is responsible for regulating broadcast and online advertising.²⁹⁴

²⁸⁹ DJAG, correspondence, 19 January 2021, p 2.

²⁹⁰ DJAG, correspondence, 19 January 2021, p 3.

²⁹¹ DJAG, correspondence, 19 January 2021, p 29.

²⁹² DJAG, correspondence, 19 January 2021, pp 29-30.

²⁹³ DJAG, correspondence, 19 January 2021, p 30.

²⁹⁴ DJAG, correspondence, 19 January 2021, p 28.

2.4.2 Provide for discretionary minimum dividends under the *Wagering Act 1998*

The Bill proposes to provide for the validity of discretionary minimum dividends declared by the wagering licensee under the Wagering Act and under existing provisions of the Wagering Rule 2010. The department further advised:

Section 164 of the Wagering Act currently requires the wagering licensee to round dividends down to the nearest 5c, regardless of any declared minimum dividend. The Bill proposes that if this rounding requirement would result in a dividend that is lower than a declared minimum dividend, the wagering provider must pay the declared minimum dividend. The amendment will be beneficial to punters, while also making Queensland's wagering licensee more competitive with corporate bookmakers licensed in other jurisdictions.²⁹⁵

Tabcorp supported the proposed amendments to introduce the minimum dividend. According to the submission, the amendments are 'an accurate reflection of the changes sought and requested by Tabcorp'.²⁹⁶

2.5 Miscellaneous amendments to liquor, gaming and fair trading legislation

The Bill proposes several miscellaneous amendments to liquor, gaming and fair trading legislation as detailed below.

2.5.1 Clarifying 'designated authority' for the Co-operatives National Law

The Bill proposes to rectify an unintended omission in the *Co-operatives National Law Act 2020* (CNL Act) by clarifying that the chief executive is the 'designated authority' for the operation of certain provisions of the *Corporations Act 2001* (Cth), which are modified and applied as part of the Co-operatives National Law.²⁹⁷

2.5.2 Exemption from cartel provisions for liquor accords and safe night precinct local boards

The Bill proposes to amend the Liquor Act 'to ensure that Queensland liquor accords and Safe Night Precinct (SNP) local boards seeking to implement controls on the price and/or supply of liquor for the purposes of harm-minimisation are not captured by the cartel provisions of the *Competition and Consumer Act 2010* (Cth)'.²⁹⁸

The explanatory notes provide the following background on the proposed amendment:

In 2017, the Australian Competition and Consumer Commission (ACCC) Deputy Chair wrote to the former Queensland Liquor and Gaming Commissioner (the Commissioner), to request that consideration be given to amending the Liquor Act to provide a legislative exemption for Queensland liquor accords, in accordance with section 51 of the Competition Act.²⁹⁹

²⁹⁵ Explanatory notes, p 6.

²⁹⁶ Submission 17, p 5.

²⁹⁷ Explanatory notes, p 5.

²⁹⁸ Explanatory notes, p 5.

²⁹⁹ Explanatory notes, p 6.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

Clauses 10, 21, 25, 26, 32, 37, 43, 45, 50, 59, 63 and 68 raise issues of fundamental legislative principle.

Note that the committee considers:

- Some potential issues of fundamental legislative principle identified and considered briefly in the explanatory notes are not considered to raise significant issues of fundamental legislative principle. (These issues include a possible reversal of the onus of proof and the issue of appropriate delegation of legislative power.) On this basis, these matters are not considered in this section.
- A number of the issues canvassed below regarding rights and liberties of individuals are also canvassed in section 4 of this report on the human rights aspects of the Bill. (These include aspects of the right to privacy arising from clauses 18, 32 and 42; the creation of new offences by clauses 21, 63 and 68; and, to a lesser extent, issues of retrospectivity arising from clause 10.)

The following table provides a summary of the breaches of fundamental legislative principle in the Bill, which are then discussed in detail later in this section.

SUMMARY TABLE OF ISSUES OF FUNDAMENTAL LEGISLATIVE PRINCIPLE

CLAUSES	ISSUES OF FUNDAMENTAL LEGISLATIVE PRINCIPLE
<p>Various offence and penalty provisions:</p> <p>Clause 21 (for the Interactive Gambling Act)</p> <p>Clause 63 (for the Racing Integrity Act)</p> <p>Clause 68 (for the Wagering Act):</p> <ul style="list-style-type: none"> • prohibitions on inducements, wagering using free bets, and restrictions on direct marketing. Maximum penalty of 20 penalty units for an individual and 200 penalty units for a corporation. • offence for failure to take reasonable steps to identify the location of a person making a bet from an interactive wagering account. Maximum penalty of 100 penalty units. <p>Clauses 32, 37 and 43 (for the Liquor Act):</p> <ul style="list-style-type: none"> • new offence where a staff member controlling an entry to a regulated premises fails to ensure ID scanning entry requirements are complied with. Maximum penalty of 10 penalty units. 	<p>Rights and liberties of individuals – new offences</p> <ul style="list-style-type: none"> – ordinary activities should not be unduly restricted – penalties should be reasonable and proportionate. <p>The committee considers the various offences and penalties are reasonable and proportionate and relevant to the conduct being proscribed.</p>

<ul style="list-style-type: none"> • offence for an approved operator, following the transfer of a liquor licence, to not remove the details of licensee bans as soon as practicable after the end of the 30 day transfer period. Maximum penalty of 25 penalty units. • provision applying the existing offence of obstructing an investigator where a licensee bans an investigator from entering licensed premises. Maximum penalty of 200 penalty units or 1 year’s imprisonment. 	
<p>Clause 45 amends section 173NCA of the Liquor Act to ensure the section applies to both changing and revoking a safe night precinct area.</p> <p>(Section 173NCA provides if a licensed premises with approved 3am trading ceases to be in a safe night precinct as a result of a regulation changing the area of a safe night precinct the approved hours automatically reduce to 2am and no compensation is payable.)</p>	<p>Rights and liberties of individuals – legislation should have sufficient regard to the rights and liberties of individuals.</p> <p>– general rights and liberties - an activity (including a business activity) should be lawful unless there is a sufficient reason to declare it unlawful by an appropriate authority.</p> <p>The amendment clarifies the reach of an existing provision, and does not of itself effect a major change. The committee is satisfied that any breach of fundamental legislative principle is justified.</p>
<p>Clause 18 inserts new section 55FB to provide that when a comment or representation is received from a member of the public or an entity objecting to the approval of an application of significant community impact, relevant information for the application, once decided, must be published on the department’s website and remain available for 3 months.</p> <p>The provisions outline that relevant information must include details of the nature of the application, location of the premises to which the application relates, the day the decision was made, whether the decision was to approve or refuse the application and a brief summary of the reasons for the decision. The provisions also ensure that personal and commercially sensitive information cannot be published.</p>	<p>Rights and liberties of individuals</p> <p>– general rights and liberties - legislation should have regard to an individual’s right to privacy</p> <p>The committee considers the breach of fundamental legislative principle is justified.</p>
<p>Clause 32 inserts new sections 173EH and 173EHAAA in the Liquor Act, substantially replicating the current section 173EH of the Act, dealing with the ID scanning of patrons in regulated licensed venues. The ID scanning regime has the effect that operators of such premises are required to collect and store personal information of individual patrons.</p> <p>Clause 59 amends section 602S of the PPRA, replacing the current police power to photograph a person’s ‘face, neck and hair’ with a power to ‘photograph a person for the purpose of attaching</p>	<p>Rights and liberties of individuals</p> <p>– general rights and liberties - legislation should have regard to an individual’s right to privacy</p> <p>The committee considers the breaches of fundamental legislative principle are justified.</p>

<p>an image of the person to a banning order for the person’.</p>	
<p>Clause 25 (QLS Fidelity Fund) has the effect that the QLS may decide to limit a payment from the Fidelity Fund in certain circumstances, with no review of such a decision possible.</p> <p>Clause 50 (amendment to PPRA allowing an initial police banning notice period of up to one month)</p>	<p>Administrative power – rights, obligations and liberties of individuals should be dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.</p> <p>The committee is satisfied in each instance that the power is sufficiently defined.</p> <p>The committee considers in each instance there is appropriate review, such that the breach of fundamental legislative principle is justified.</p>
<p>Clause 10 has the effect that the amendments to the Code apply in respect of offences charged after, but committed before, the commencement of those amendments.</p> <p>Clause 26 has the effect that certain amendments to the <i>Legal Profession Act 2007</i> will apply to claims that arise before the commencement of the amendments.</p> <p>(These amendments allow QLS to make additional payments from the Fund to claimants who had a statutory cap applied to claims prior to 2016.)</p>	<p>Retrospectivity – a Bill should not adversely affect rights and liberties, or impose obligations, retrospectively.</p> <p>Clause 10 - the amendments to the Code do not change the current law. On this basis, it could be argued that any retrospectivity does not adversely affect any rights or liberties. In any event, the committee is satisfied that any retrospective effect is justified.</p> <p>Clause 26 - any adverse impact of the retrospective effect is limited, in terms both of its scope and of the numbers of persons affected.</p> <p>The committee is satisfied that any retrospective effect is justified.</p>

RIGHTS AND LIBERTIES OF INDIVIDUALS

3.1.1 LSA, section 4(2)(a) – rights and liberties of individuals

Does the Bill have sufficient regard to the rights and liberties of individuals?

- ordinary activities should not be unduly restricted
- proportionality and relevance of penalties.

Clauses 21, 32, 37, 43, 63, 68

3.1.1.1 *Summary of provisions*

The Bill creates offences and penalties in relation to offering inducements and direct marketing in the area of gambling, contained in three sets of substantially identical amendments to the Interactive Gambling Act, the Racing Integrity Act and the Wagering Act.

Interactive Gambling Act

Clause 21 creates new offence provisions in the Interactive Gambling Act:

- New section 166B (prohibited inducements) prohibits an interactive wagering operator from offering reward or other benefit to a person in Queensland as an incentive to open, or not close, an interactive wagering account with the interactive wagering operator.
- New section 166C (wagering using free bets) provides that an interactive wagering operator must not offer a free bet to an interactive wagering customer who is in Queensland and has an

interactive wagering account with the operator unless the customer can withdraw payouts arising from the free bet at any time.

- New section 166D (restrictions on direct marketing) prescribes new offences relating to direct marketing practices of interactive wagering operators and persons acting for an interactive wagering operator:
- New section 166D(1) provides that an interactive wagering operator must not send promotional or advertising material directly by email, SMS message or other direct means to a person in Queensland unless the person has given express and informed consent to receiving promotional or advertising material directly by that means.
- New section 166D(2) requires an interactive wagering operator to provide a person who has given such consent with a means to easily withdraw consent at any time. Further, an interactive wagering operator must not offer any inducement for the person to not withdraw consent.
- New section 166D(3) requires that if an interactive wagering operator sends promotional material to a person electronically, the operator must provide a mechanism in the material (including for example an electronic link), allowing the person to easily withdraw consent from receiving promotional material.

Failure to comply with any of the above requirements is an offence, with a maximum penalty of 20 penalty units for an individual and 200 penalty units for a corporation (one penalty unit is currently \$133.45. Twenty penalty units currently equates to \$2,669.00).

Clause 21 also inserts new section 166E in the Interactive Gambling Act, requiring an interactive wagering operator to take reasonable steps to identify the location of a person placing a wager from an interactive wagering account. There is a maximum penalty of 100 penalty units for a failure to comply.

Racing Integrity Act

All these offences and penalties are mirrored by new offence provisions inserted in the Racing Integrity Act by **Clause 63**, relating to conduct of racing bookmakers:

- proposed sections 134B, 134C, and 134D, regarding prohibited inducements, wagering using free bets, and restrictions on direct marketing respectively
- proposed section 134E (mirroring section 166E of the Interactive Gambling Act), requiring a bookmaker to take reasonable steps to identify the location of a person making a bet from an interactive wagering account.

Wagering Act

Similarly, all these offences—and penalties—are mirrored by new offence provisions inserted in the Wagering Act by **Clause 68**:

- proposed sections 228B, 228C, and 228D, regarding prohibited inducements, wagering using free bets, and restrictions on direct marketing respectively
- proposed section 228E (mirroring section 166E of the Interactive Gambling Act), requiring a licence operator to take reasonable steps to identify the location of a person making a bet from an interactive wagering account.

Liquor Act

The Bill also creates offences and penalties in the Liquor Act:

- **Clause 32** inserts a replacement section 173EH in the Liquor Act, including a new offence where a staff member responsible for controlling an entry to a regulated premises fails to ensure ID scanning entry requirements are complied with for each patron. A maximum penalty of 10 penalty units applies.

- **Clause 43** inserts new sections 173EJ(6A) and 173EJ(6B) in the Liquor Act, requiring an approved operator, following the transfer of a liquor licence, to remove the details of licensee bans as soon as practicable after the end of the 30 day transfer period (unless the new licensee requests, within the transfer period, that the licensee ban not be removed from the system). A maximum penalty of 25 penalty units applies.
- **Clause 37** inserts new sections 185(3) and 185(4) in the Liquor Act to provide that a licensee who bans an investigator from entering the licensee's licensed premises is taken to obstruct an investigator, thus applying the existing offence of obstructing an investigator in the exercise of a power under the Act to such banning behaviour. The maximum penalty for this offence is 200 penalty units or one year's imprisonment.

3.1.1.2 *Fundamental legislative principles issues*

The creation of new offences and penalties affects the rights and liberties of individuals.

Ordinary activities should not be unduly restricted

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals.

The concept of liberty requires that an activity (including a business activity) should be lawful unless there is a sufficient reason to declare it unlawful by an appropriate authority.

Proportion and relevance

Whether legislation has sufficient regard to rights and liberties of individuals also depends on whether, for example, penalties and other consequences imposed by the legislation are proportionate and relevant to the actions to which the consequences relate. A penalty should be proportionate to the offence, and penalties should be consistent:

In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.

... Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.³⁰⁰

Gambling-related offences

[Note that the restrictions imposed by the new offences in clauses 21, 63 and 68 are also canvassed in the human rights section of this report.]

In relation to the offences in new sections 166B, 166C and 166D of the Interactive Gambling Act, and the corresponding proposed offences in the Wagering Act, the explanatory notes set out these justifications:

The penalties imposed for offences under these provisions are considered reasonable and appropriate given the serious nature of the offences and the potential risk of harm posed to interactive wagering customers and persons in Queensland. The penalties are consistent with existing penalties for serious offences under the respective Acts and are lower than penalties applied for contravention of codified NCPF restrictions in other jurisdictions, such as New South Wales.³⁰¹

In relation to corresponding offences in the Racing Integrity Act, the explanatory notes state:

These restrictions will protect a person from Queensland from incentive-based marketing measures and new section 134C prevents the application of turnover requirements to prevent withdrawing winnings

³⁰⁰ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

³⁰¹ Explanatory notes, p 19.

from free bets. This will assist individuals who are at-risk of, or already experiencing, significant harm caused by online gambling.

The maximum penalty ... is at an appropriate level given the nature of the offence and the harm that may arise from excessive online wagering in response to an inducement. The penalty is also consistent with the amendments proposed for the Interactive Gambling Act and Wagering Act.³⁰²

In relation to the offences in new section 166E of the Interactive Gambling Act and new section 228E of the Wagering Act (requiring operators to identify the location of a person making a wager or bet), the explanatory notes offer this justification:

This requirement is essential to the enforceability of the inducement bans, as they apply only in respect of interactive wagering customers and persons who are in Queensland. The maximum penalty for this offence under each of the two Acts is 100 penalty units, which is consistent with the penalty imposed for a similar offence under section 22 of the *Betting Tax Act 2018*.³⁰³

Regarding the penalty for the corresponding offence in new section 134E of the Racing Integrity Act, the explanatory notes state:

The maximum penalty of 100 penalty units is an appropriate level as it reflects the importance of identifying the location of the person to ensure the enforceability of the inducements ban will apply to all bets placed by an interactive bettor who has an interactive betting account and who are in Queensland. The penalty is also consistent with equivalent provisions proposed for the Interactive Gambling Act and Wagering Act.³⁰⁴

Liquor Act offences

The current offence of obstruction of a licensing officer (in section 185 of the Act) attracts a relatively high maximum penalty of 200 penalty units or one year's imprisonment.³⁰⁵ As mentioned above, clause 37 extends the current scope of this offence of obstruction, but does not change the currently applicable penalty.

In justifying the impact of the extension of the current scope of the offence on rights of licensees, the explanatory notes state:

As the proposed penalty only applies to inappropriate bans imposed on investigators with the intent of impacting behaviour in their professional capacity, it is considered to be a justifiable restriction on a licensee's common law right that is in the public interest and protects the integrity of the regulatory framework. Further, licensees will retain their ability to ban any persons based on their behaviour in a personal capacity.³⁰⁶

The explanatory notes also state the application of the existing penalty to circumstances where a licensee bans entry by an investigator:

... is appropriate given the circumstances of vexatious banning practices would readily align with the obstructive behaviour contemplated by section 185.³⁰⁷

The explanatory notes also address the impact on rights of licensees of the amendment in clause 43 (to section 173EJ of the Liquor Act) providing that, unless specifically requested to remain in place by the new licensee, all licensee bans must be removed in the event of the transfer of the licence:

... this amendment does not limit the ability for the new licensee to continue to ban a particular person, nor does it limit the placement of new bans. Accordingly, it is considered a licensee's common law right

³⁰² Explanatory notes, p 21.

³⁰³ Explanatory notes, p 19.

³⁰⁴ Explanatory notes, p 21.

³⁰⁵ *Liquor Act 1992*, s 185.

³⁰⁶ Explanatory notes, p 15.

³⁰⁷ Explanatory notes, p 19.

is not substantively impacted by the proposed amendment. Further, the amendments will ensure affected patrons are not indefinitely excluded from licensed venues without proper review and consideration by a new venue operator. This will also mitigate potential long-term impacts on a person's right to freedom of movement.³⁰⁸

The penalties for the two new Liquor Act offences are relatively low. Regarding these penalties, the explanatory notes state:

- clause 32 (replacement section 173EH, maximum penalty of 10 penalty units)
The penalty applying to staff members is the same as the existing penalty applied to licensees and the penalty amount is relatively low. The implementation of the penalty is considered consistent and appropriate to the intent of the legislation.³⁰⁹
- clause 43 (new section 173EJ(6B), maximum penalty of 25 penalty units)
The penalty is considered justifiable as the penalty amount is consistent with other penalties in section 173E.³¹⁰

A number of the new offences under the various gambling-related Acts attract a maximum penalty of 20 penalty units for individuals and 200 penalty units for corporations.

The committee notes that, where a provision does not expressly prescribe a maximum fine for a corporation different from that for an individual, a court may impose on a corporation a maximum fine of an amount equal to 5 times the maximum fine for an individual.³¹¹

In practice, many of these offences could reasonably be expected to be more likely to be committed by corporate entities (especially in the context of interactive wagering and gaming operators, though less so in the context of racing bookmakers). The fundamental legislative principles are concerned with rights and liberties of individuals, rather than corporations.

The maximum penalty of 20 penalty units for these offences (for individuals, as opposed to corporations) could be considered to be relatively low.

3.1.1.3 Committee conclusion

Given the explanations outlined in the explanatory notes, the committee considers the various offences and penalties are reasonable and proportionate and relevant to the conduct being proscribed.

3.1.2 LSA, section 4(2)(a) – rights and liberties of individuals

Does the Bill have sufficient regard to the rights and liberties of individuals?

- general rights and liberties – ordinary activities should not be unduly restricted

Clause 45

3.1.2.1 Summary of provisions

Clause 45 amends section 173NCA of the Liquor Act. Section 173NCA currently provides if a licensed premises with approved extended trading hours to 3am ceases to be in a safe night precinct as a result of a regulation changing the area of a safe night precinct, the approved hours of the premises automatically reduce to 2am and no compensation is payable. The amendment aims to ensure the section applies to both changing and revoking a safe night precinct area.

³⁰⁸ Explanatory notes, p 15.

³⁰⁹ Explanatory notes, p 19.

³¹⁰ Explanatory notes, p 19.

³¹¹ *Penalties and Sentences Act 1992*, s 181B.

3.1.2.2 Issue of fundamental legislative principle

A change of safe night precinct status, or of precinct boundaries, might result in a loss of approved trading hours for a licensee whose premises cease to be in such a precinct. The removal of an existing right to trade during those 'lost hours' might be seen to breach the fundamental legislative principle that legislation should have due regard to the rights and liberties of individuals.

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals.

The concept of liberty requires that an activity (including a business activity) should be lawful unless there is a sufficient reason to declare it unlawful by an appropriate authority.

3.1.2.3 Comment

The explanatory notes state:

... section 173NCA of the Liquor Act already provides that no compensation is payable to a person if their licensed premises ceases to be located within a safe night precinct as the result of a regulatory amendment under section 173NC of the Liquor Act. As such, Parliament has already determined that any potential breach is justified as the sale of liquor is a regulated industry, involving a potentially harmful product. Businesses operate within this regulated environment and are aware that conditions around trading may be subject to change.³¹²

Fundamental legislative principles require that legislation has sufficient regard to rights and liberties of individuals.³¹³

Here, many of the licensees will be corporate entities; however, the fundamental legislative principles are engaged as licensees who are individuals might be directly affected and other individuals (such as employees and shareholders of corporate licensees) will also be indirectly affected in some ways.

3.1.2.4 Committee conclusion

The amendment clarifies the reach of an existing provision, and does not of itself effect a major change. The committee notes that existing section 173NCA(7) already expressly provides for no compensation to be payable.

The committee is satisfied that any breach of fundamental legislative principles is justified.

3.1.3 LSA, section 4(2)(a) – rights and liberties of individuals

Does the Bill have sufficient regard to the rights and liberties of individuals?

- general rights and liberties - right to privacy

Clauses 18 and 42

3.1.3.1 Summary of provisions

Clause 18 inserts new section 55FB in the Gaming Machine Act to provide that when a comment or representation is received from a member of the public or an entity objecting to the approval of an application of significant community impact, 'relevant information' for the application, once decided, must be published on the department's website and remain available for 3 months. 'Relevant information' must include the nature of the application, location of the premises to which the application relates, the day the decision was made, whether the decision was to approve or refuse the application, and a brief summary of the reasons for the decision.

Under proposed section 55FB(3), 'sensitive information about a person and commercially sensitive information cannot be published'. Proposed section 55FB(6) states that 'sensitive information about a person' means information about:

³¹² Explanatory notes, p 18.

³¹³ *Legislative Standards Act 1992*, s 4(2).

- the person's reputation
- the person's history of behaviour or attitude in relation to the management and discharge of the person's financial obligation.

This definition is narrow in scope. Given this definition, it appears that the information to be published could include personal information, including the name and address of a member of the public.

Clause 42 inserts a substantially identical provision in the Liquor Act.

3.1.3.2 Issue of fundamental legislative principle

The right to privacy is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

These provisions could be seen to raise an issue of fundamental legislative principle relating to the rights and liberties of individuals, in that an individual's right to privacy is infringed by the proposal to publish names on the website. Further clarification was sought from the department. The response is provided in the comment section below.

3.1.3.3 Comment

This issue is also canvassed in the human rights section of this report.

The explanatory notes broadly set out the aim of provisions such as clauses 18 and 42:

The Bill increases transparency around liquor and gaming machine decisions by amending the Gaming Machine Act to require relevant information (including details of the application and a summary of the reasoning) about decisions made for gaming machine licensing applications to be published online if community comments or representations were received.³¹⁴

However, the explanatory notes, in considering issues of fundamental legislative principle raised in the Bill, do not consider the right to privacy in the context of these clauses (contrast clause 59, below).

One objective of the *Information Privacy Act 2009* is to provide for the 'fair collection and handling in the public sector environment' of personal information.³¹⁵ 'Personal information' is defined in that Act as:

... information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.³¹⁶

Noting the aim for increased transparency surrounding decisions on applications, the committee sought further clarification from the Department of Justice and Attorney-General in regard to the publication of personal or identifying information of individuals, including names and addresses. The department advised:

At the moment, as the Commissioner for Liquor and Gaming I make a lot of decisions about significant liquor and gaming applications. To backtrack, the tackling alcohol fuelled violence evaluation made recommendations that we should have an increased focus on and transparency about significant liquor licences. In fact, they said we should basically be publishing all of our liquor licensing decisions. Given that I receive nearly 14,000 liquor and gaming applications a year, that is probably administratively too burdensome.

We will be looking at publishing—and what the amendments propose—significant decisions around liquor and gaming applications. TAFV recommended liquor. When the previous Attorney-General was at estimates last year, she made a commitment around providing more clarity about gaming machine applications. At the moment, if it is a significant gaming machine application—for example, if people want to get new gaming machines or they want to increase their gaming machines by a significant number, 10

³¹⁴ Explanatory notes, p 11.

³¹⁵ *Information Privacy Act 2009*, s 3.

³¹⁶ *Information Privacy Act 2009*, s 12.

in the case of a hotel and 20 in the case of a club—or anything else that I deem to be significant, there are certain processes for advertising. People can object, but there is no requirement on me as the commissioner to then publish my decisions about that gaming machine application.

The bill proposes that there be requirements on me, and that would include the nature of the application, the location of the premises, the day that I made my decision, whether I have approved or refused the application and a brief summary of the details of the decisions. It will serve the right of privacy by ensuring any sensitive or commercially confidential information is not publicly released. That might include matters that I have to consider, particularly in gaming machine applications, around people’s criminal past and their integrity, reputation and character. That will not be published. Their financial position will not be published. The information will be published consistent with the protections that are currently under the legislation.

TAFV said that you should publish liquor applications. We are making it consistent so that it will be for both significant liquor and gaming applications so that we improve transparency in the community. The community obviously has a strong interest in significant liquor and gaming applications. This provides the community with, I guess, closing the loop of what the commissioner has decided about gaming machine applications but in a way that protects the privacy of the applicants.³¹⁷

3.1.3.4 Committee conclusion

The committee considers any breach of fundamental legislative principle is justified.

3.1.4 LSA, section 4(2)(a) – rights and liberties of individuals

Does the Bill have sufficient regard to the rights and liberties of individuals?

- general rights and liberties - right to privacy

Clauses 32 and 59

3.1.4.1 Summary of provisions

Clause 32 inserts new section 173EH and 173EHAAA in the Liquor Act. These two new sections together replace and substantially replicate the current section 173EH of the Act, dealing with the ID scanning of patrons in regulated licensed venues.

Clause 59 amends section 602S of the PPRA, which deals with police powers to photograph a person. Currently, a police officer can only photograph a person’s face, neck and hair.³¹⁸ Clause 59 replaces this with a power to ‘photograph a person for the purpose of attaching an image of the person to a banning order for the person’.

3.1.4.2 Issue of fundamental legislative principle

The right to privacy is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

Clause 32 raises an issue of fundamental legislative principle relating to the rights and liberties of individuals as an individual’s right to privacy is infringed by the ID scanning regime that requires operators of regulated premises to collect and store personal information of individual patrons.

Clause 59 raises an issue of fundamental legislative principle relating to the rights and liberties of individuals, in that an individual’s right to privacy is infringed by the proposed power that the photograph of a respondent attached to a banning order is to no longer be limited to only capturing an image of the person’s face, hair and neck.

3.1.4.3 Comment

[Note that the impact of clause 32 on the right to privacy is also canvassed in the human rights section of this report.]

³¹⁷ Public briefing transcript, Brisbane, 16 December 2020, pp 7-8.

³¹⁸ *Police Powers and Responsibilities Act 2000*, s 602S(3)(c).

The explanatory notes are silent on this issue in the context of clause 32. It might be noted that clause 32 replaces provisions in the Liquor Act which already provide for the ID scanning regime.

Regarding clause 59, the explanatory notes offer the following justification, based on what is said to be the physical impracticality of limiting photographs to the face, neck and hair in the context of banning orders:

... this amendment seeks to enhance the practicality of the banning order photography provisions in the context of the circumstances in which photographs of banned persons are taken. Generally, it is not realistic to limit the parts of a person photographed by a police officer for a banning order to just the person's face, neck and hair as the majority of individuals being issued, in particular, an initial police banning notice, are intoxicated, violent, obstructive and non-compliant. As an appropriate safeguard, the purpose for which a police officer may take a photograph of a banned person is limited to attaching the image to a banning order. The existing photo destruction provisions under sections 602V and 602W of the PPRA will continue to apply.³¹⁹

3.1.4.4 Committee conclusion

The committee considers the breaches of fundamental legislative principle are justified.

3.1.5 LSA, section 4(3)(a) – administrative power

Clauses 25 and 50

Fundamental legislative principles require consideration of whether rights, obligations and liberties of individuals are dependent on administrative power only where the power is sufficiently defined and subject to appropriate review.

3.1.5.1 Summary of provisions

Clause 25 inserts a replacement section 396 in the *Legal Profession Act 2007*, providing that the QLS may limit a payment from the Fund in circumstances where, despite taken certain specified measures, the QLS believes the Fund is likely to become insufficient if the allowed amount for the claim were to be paid in full. The QLS may limit the payment to the capped amount for the claim (capped amounts are fixed by regulation). Proposed section 396(3) provides that no proceedings can be taken by appeal against, or review of, a decision by the QLS to limit payment on a claim to the capped amount.

Clause 50 replaces section 602D of the PPRA. New section 602D(b) extends the period for which an initial police banning notice can have effect from the current ten days to up to one month (or, if the notice applies to a stated event, the end of the day on which the event ends).

3.1.5.2 Issue of fundamental legislative principle

These clauses could be argued to raise an issue of fundamental legislative principle regarding review of administrative power:

- Proposed section 396(3) excludes any review of an administrative decision by the QLS to reduce the amount of a claim to the statutory caps.
- The PPRA empowers QPS officers to administratively impose a ban on an individual by issuing an initial police banning notice. Clause 50 would extend the period of time for which police can administratively ban a person.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

³¹⁹ Explanatory notes, p 17.

Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.³²⁰

Committees carefully scrutinise provisions that do not sufficiently express or define the matters to which a decision-maker must have regard in exercising a statutory administrative power.³²¹

3.1.5.3 *Comment*

There are two elements to any consideration of this issue:

- Is the power sufficiently defined?
- Is the power subject to appropriate review?

Regarding the amendment to the *Legal Profession Act 2007*, the explanatory notes state:

... the QLS can only apply the statutory caps to reduce the amount of a claim if it believes that full payment of the claim would result in the Fund being insufficient to meet its present and future liabilities. The amendments are therefore considered justified as they allow the QLS to ensure that the Fund continues to be sufficient to meet any future claims made against it.³²²

The committee notes that the Act as it currently stands has a provision in substantively identical terms to the proposed section 396(3).³²³

In reference to a previous provision, the then Attorney-General explained the reasoning for the prohibition on review in more detail:

The purpose of the cap on claims is to ensure that, while providing for reasonable amounts of compensation, the viability of the fund cannot be jeopardised by a single large claim or groups of claims. This maximises the availability of the fund for all potential claimants. At the same time, the Society can exceed the cap having regard to the position of the fund and the circumstances of a particular case. As outlined in the explanatory notes for the Bill, if the cap is not exceeded, the Society is already paying the maximum claim generally allowed under the legislation and to provide a right of appeal for payments not made in excess of the cap would not be workable.

... the clause can be justified having regard to the finite resources of the Fund and the foreseeable possibility of the insufficiency of the Fund due to extraordinary claims.³²⁴

In relation to the PPRA provision regarding banning notices, the explanatory notes state:

... the power is sufficiently defined by providing that the banning period associated with an initial banning notice can only be of a duration up to one month.

Initial police banning notices have limited scope in terms of the places from which a respondent is banned and must be stated on the notice. Additionally, initial police banning notices can only be issued for limited reasons outlined in section 602C of the PPRA, such as, in response to disorderly, offensive, threatening or violent behaviour by the respondent and for reasons associated with the prevention of violence at the places stated in the notice and preservation of the safety and reasonable enjoyment of other persons at the places stated in the notice.

³²⁰ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 18.

³²¹ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 15, citing Scrutiny of Legislation Committee, *Annual Report 1998-1999*, para 3.10.

³²² Explanatory notes, p16.

³²³ *Legal Profession Act 2007*, s 396(5).

³²⁴ Comment to the former Scrutiny of Legislation Committee on an equivalent provision in s 182 of the *Legal Profession Act 2004* (referred to at p 24 of the explanatory notes to the Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Bill 2009).

Existing safeguards including the requirement for a police officer to obtain approval from a police officer of at least the rank of sergeant, unless the police officer giving the notice has that rank, are retained.³²⁵

As noted earlier, the PPRA amendment changes the period for which a ban can be administratively imposed – the power to impose a ban administratively exists in the PPRA as it currently stands. Also, there currently exists an internal review process, as adverted to in the explanatory notes:

The decision of a police officer to issue an initial police banning notice will continue to be subject to internal review via an application to the Police Commissioner to amend or cancel the notice. It is proposed that, as part of the Bill, procedural fairness for the respondent will be improved by increasing the period within which the respondent can apply for an internal review from 5 to 15 days. This ensures the time available to a respondent to apply for an internal review is proportionate to the increased duration of the banning period for the initial banning notice.

The Police Commissioner is required to decide an application for internal review as soon as practicable in the case of initial police banning notices. A police officer of at least the rank of senior sergeant may also decide, at any time and on the officer's own initiative, to cancel an initial police banning notice if reasonably satisfied and having regard to the circumstances in which the notice was given that the notice should not have been given to the respondent or the notice is causing, or will cause, undue hardship.³²⁶

3.1.5.4 Committee conclusion

The committee is satisfied in each instance that the power is sufficiently defined.

The committee considers in each instance there is appropriate review, such that the breach of fundamental legislative principle is justified.

3.1.6 LSA, section 4(3)(g) – retrospectivity

Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

Clauses 10 and 26

3.1.6.1 Summary of provisions

The Bill contains a number of transitional provisions, two of which arise for consideration here.

Clause 10 has the effect that the amendments to the Code apply in respect of offences charged after, but committed before, the commencement of those amendments.

Clause 26 has the effect that the amendments to the *Legal Profession Act 2007* apply to claims that arise before the commencement of the amendments.

3.1.6.2 Issue of fundamental legislative principle

Both clauses could be seen to have some retrospective effect. Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.³²⁷

Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

Clause 10 (re Criminal Code)

The explanatory notes state:

The retrospective element of the transitional provision is justified on the basis that the amendments are only intended to clarify and make the existing law more accessible with modernised language (therefore

³²⁵ Explanatory notes, p 16.

³²⁶ Explanatory notes, p 16.

³²⁷ *Legislative Standards Act 1992*, s 4(3)(g).

not altering existing rights). It is further justified on the basis that the criminal justice system could benefit immediately from the increased clarity the amendments will provide.³²⁸

In regards to this provision and retrospectivity, ATSILS stated:

Protections against retrospective criminal laws are contained in section 35 of the *Human Rights Act 2019*, which in turn is based on Article 15 of the ICCPR [International Covenant on Civil and Political Rights]: A person must not be prosecuted or punished for conduct that was not a criminal offence at the time the conduct was engaged in. A person must not receive a penalty that is greater than the penalty that applied at the time they committed the offence.

Similarly, the Legislative Standards Act, section 4 provides:

(1) For the purposes of this Act, *fundamental legislative principles* are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation— (g) does not adversely affect rights and liberties, or impose obligations, retrospectively;

In our view, laws should be enacted retrospectively only in the rarest of cases and for the clearest of reasons. The changes contained in the provisions of this bill do not fall under the exceptional category and should not be applied retrospectively.³²⁹

3.1.6.3 Committee conclusion

As noted earlier, the amendments to the Code do not change the current law. On this basis, it could be argued that any retrospectivity does not adversely affect any rights or liberties. In any event, the committee is satisfied that any retrospective effect is justified.

Clause 26 (re Legal Profession Act)

As to clause 26, the explanatory notes state:

The amendments are considered justified because they operate for the benefit of previous claimants under the Fund and are only adverse to the QLS and its membership. Given that the additional payments can be made without affecting the sufficiency of the Fund, on balance the amendments do not have a significant adverse impact on the rights of legal practitioners who may be required to make future contributions to the Fund.³³⁰

3.1.6.4 Committee conclusion

Any adverse impact of the retrospective effect is limited, in terms both of its scope and of the numbers of persons affected. The committee is satisfied that any retrospective effect is justified.

3.2 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.³³¹

³²⁸ Explanatory notes, p 14.

³²⁹ Submission 27, p 9.

³³⁰ Explanatory notes, p 14.

³³¹ Some minor errors were identified in the explanatory notes.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.³³²

A Bill is compatible with human rights if the Bill:

- (a) does not limit a human right, or
- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.³³³

The HRA protects fundamental human rights drawn from international human rights law.³³⁴ Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

4.1 Human rights compatibility

4.1.1 Amendments to the Criminal Code (Clauses 8, 9 and 10)

Human rights issue

Criminal Code – rape – elements of offence – consent and mistake of fact – Queensland Law Reform Commission inquiry and recommendations – amendments proposed – codification of case law principles – silence alone does not amount to consent – consent given initially may be withdrawn – no requirement for a defendant to take reasonable steps to ascertain consent, but the jury can consider anything the defendant said or did when considering whether they were mistaken about consent – voluntary intoxication of the defendant is irrelevant to the reasonableness of their belief about consent, but can be relevant to the honesty of that belief – right to a fair hearing protected in HRA s 31(1) – right to presumption of innocence protected in HRA s 32(1) – whether amendments limit rights – transitional provision – amendments apply to offences charged after commencement for offences committed before or after commencement – whether provisions limit the prohibition on retrospective criminal laws – HRA, s 35(1) – no limitation

Analysis

The amendments to the Criminal Code contained in clauses 8, 9 and 10 of the Bill are compatible with the HRA. These clauses engage the following rights protected by the HRA: the right to a fair hearing (section 31(1)); the presumption of innocence (section 32(1)); and the prohibition on retrospective criminal laws (section 35(1)). Although the statement of compatibility did not identify section 32(1) of the HRA, this right is an incident of the right protected in section 31, which was examined in the statement of compatibility.

The amendments to the law on consent and mistake of fact do not limit any of these rights. They do not limit, in the sense of infringing, an accused's right to a fair hearing or presumption of innocence. The High Court of Australia has stated that there is no exhaustive list of attributes for a fair trial.³³⁵ In comparative Australian jurisprudence, the Courts have said that the protection of this right in a

³³² HRA, s 39.

³³³ HRA, s 8.

³³⁴ The human rights protected by the HRA are set out in sections 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

³³⁵ *Dietrich v The Queen* (1992) 177 CLR 292, 353 (Toohey J).

statutory human rights instrument confers a positive right to a fair hearing and not only a negative right to be tried unfairly, as is the position under the common law.³³⁶ The amendments do not infringe an accused's right to a fair hearing: an accused retains the right to have a criminal charge for rape decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The right to be presumed innocent until proven guilty according to law is protected in section 32(1) of the HRA. This right is not limited by the amendments to the law on consent and mistake of fact. The onus of proof beyond reasonable doubt in respect of every element of the offence remains on the prosecution.

Clause 10 contains the transitional provision for the legislative amendments to the law on consent and mistake of fact set out in clauses 8 and 9. The new provisions will apply to a person charged with an offence after the commencement of the Bill, whether the charge is for an offence committed before or after the commencement. Therefore, the legislative amendments will apply to an accused person who is alleged to have committed an offence before the amendments commenced but charged after the commencement of the Bill.

Section 35(1) of the HRA sets out a person's right not to be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. Clause 10 does not limit this right because the changes made to the Criminal Code are already part of the law of Queensland. According to the QLRC, the amendments 'are almost entirely declaratory of the existing (case) law of Queensland'. It states in the QLRC Report (at [4.129]):

The Commission considers that the case law in Queensland has reached a settled position on a number of points raised in the submissions to this review, and that it is appropriate in some cases for this to be reflected in the words of the statute. This will add visibility and continuity to the current law. Accordingly, the amendments the Commission recommends in this Report are mainly declaratory of the existing law.³³⁷

4.1.1.1 Committee conclusion

Relying on this statement from the QLRC, the committee considers there is no retrospective application of the criminal law involved in the legislative amendments. As for whether it may be said that the amendments limit this right because they clarify ambiguity, there is nothing to suggest that the current law lacks the required qualities of accessibility and foreseeability to satisfy the threshold for attaching these descriptions to the current law in Queensland. Unlike in the case of *Kafkaris v Cyprus*³³⁸, an accused is able to reasonably discern, if necessary with appropriate legal advice, the law on rape including consent and mistake of fact.

The fact that the QLRC notes 'concerns raised in submissions about ambiguity in the current provisions' and 'sees merit in amendments that aid in providing clarity to the existing provisions'³³⁹ does not objectively mean that the current law on consent and mistake of fact lacks the requirements for accessibility and foreseeability. The committee considers the current law on consent and mistake of fact is compatible with these requirements and there is no limitation on section 35(1) of the HRA. It is therefore unnecessary to analyse whether the limitation is reasonable and justified under section 13 of the HRA.

³³⁶ *DPP v Mokbel (Orbital and Quills Ruling No 1)* [2010] VSC 331 at [162] (Whelan J); *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [76] (Warren CJ).

³³⁷ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact*, 2020 [4.129].

³³⁸ [2009] 49 EHRR 25; [2008] ECHR 143.

³³⁹ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact*, 2020 [4.128].

4.1.2 Amendments to the *Legal Profession Act 2007* (Clauses 24-26)

Human rights issue

Legal fidelity fund – compensation for persons who have lost trust money or property due to dishonest default by solicitor law practice – removal of statutory capped claims – full payment of past claims – right not to be arbitrarily deprived of property, section 24(2) – whether the property rights of individual solicitors who are required to contribute to the Fund may be limited – no limitation

Analysis

Clause 26 requires QLS to make additional payments to a claimant who has in the past received a capped payment from the legal fidelity fund. Clause 25 sets out when QLS may limit the payment of a claim.

The committee considers that neither clause limit a person's right to not be arbitrarily deprived of property. Not every denial of property infringes the right in section 24(2). The right is a right not to have one's property 'arbitrarily' deprived. The expression 'arbitrary' is not defined in the HRA. In other jurisdictions, the expression has been interpreted to mean an unreasonable, unjust or disproportionate interference.³⁴⁰

4.1.2.1 Committee conclusion

The legal fidelity fund is established by the *Legal Profession Act 2007*. Contribution to the Fund is governed by the LPA and administrative rules made under it. The fact that 'additional amounts to support the balance of the Fund in the future' may be required to administer the legislative amendments does not mean that the legislative provisions unreasonably or disproportionately limit a practitioner's property. Whether that occurs will depend on the administration of the scheme: the clauses do not provide for such a deprivation. For this reason, the amendments do not limit a person's right to not be arbitrarily deprived of property.

4.1.3 Alcohol fuelled violence policy amendments – Publication of liquor and gaming decisions by Commissioner: Part 4, Division 3, Clause 18; and Part 7, Division 3, Clauses 42

Human rights issues

Requirement for publication of information about decisions made on particular liquor and gaming machine licence applications – decisions concern applications of significant community impact – information to be published on department website – 'sensitive information' excluded and defined – commercially sensitive information excluded, as well as information concerning a person's criminal history – information to be published for 'a period of three months' and 'for at least three months' – whether amendments compatible with right to privacy protected in HRA section 25 – whether amendments compatible with reputation right protected in HRA section 25

Analysis

Clauses 18 and 42 impose requirements for the Commissioner for Liquor and Gaming to publish information concerning particular decisions made under the Gaming Machine Act and Liquor Act. The particular applications to which the publication requirement relates, as well as the information to be published (and not published), is set out in these provisions. The publication is to occur on a departmental website. Clause 18 provides that the information must be published 'for at least 3 months'. Clause 42 provides that the information must be published 'for a period of 3 months'. Therefore, the information to which clause 18 relates may be available online for more than 3 months.

Both clauses 18 and 42 prohibit the publication of 'sensitive information' about a person. 'Sensitive information' is defined to mean information about a person's reputation or information about the

³⁴⁰ The so-called 'human rights meaning'. See, for example, *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [74]-[85] (Bell J). Cf *WBM v Chief Commissioner of Police* (2010) 27 VR 469 at [51]-[57] (Kaye J).

person's history of behaviour or attitude in relation to the management and discharge of the person's financial obligations.

The definition of 'sensitive information' does not appear to capture personal information about an applicant, such as an applicant's name (if an individual) or a director of a company. The statement of compatibility, while identifying that applicants for liquor and gaming machine licences are required to disclose information and personal details to the Commissioner in order to determine their suitability for a licence, does not sufficiently explain how the requirement to publish an individual's personal information (such as their name) is compatible with the right to privacy.

While the purpose of the Commissioner collecting this information is apparent – to enable the Commissioner to investigate the suitability of an applicant and its associates to hold a licence – the purpose for which the information is published is a secondary purpose. The statement of compatibility does not sufficiently explain how the publication requirement is a reasonable limitation on the right not to have one's privacy unlawfully or arbitrarily interfered with. In particular, the statement does not sufficiently explain how publication of personal information achieves the purpose of 'providing greater rigour and transparency around the liquor and gaming machine licensing regimes'.

4.1.3.1 Committee conclusion

The committee sought clarification from the department to facilitate an understanding of why personal information is not excluded from the information required to be published by the Commissioner for Liquor and Gaming on a departmental website. The Commissioner for Liquor and Gaming advised:

At the moment, as the Commissioner for Liquor and Gaming I make a lot of decisions about significant liquor and gaming applications. To backtrack, the tackling alcohol fuelled violence evaluation made recommendations that we should have an increased focus on and transparency about significant liquor licences. In fact, they said we should basically be publishing all of our liquor licensing decisions. Given that I receive nearly 14,000 liquor and gaming applications a year, that is probably administratively too burdensome.

We will be looking at publishing—and what the amendments propose—significant decisions around liquor and gaming applications. TAFV recommended liquor. When the previous Attorney-General was at estimates last year, she made a commitment around providing more clarity about gaming machine applications. At the moment, if it is a significant gaming machine application—for example, if people want to get new gaming machines or they want to increase their gaming machines by a significant number, 10 in the case of a hotel and 20 in the case of a club—or anything else that I deem to be significant, there are certain processes for advertising. People can object, but there is no requirement on me as the commissioner to then publish my decisions about that gaming machine application.

The bill proposes that there be requirements on me, and that would include the nature of the application, the location of the premises, the day that I made my decision, whether I have approved or refused the application and a brief summary of the details of the decisions. It will serve the right of privacy by ensuring any sensitive or commercially confidential information is not publicly released. That might include matters that I have to consider, particularly in gaming machine applications, around people's criminal past and their integrity, reputation and character. That will not be published. Their financial position will not be published. The information will be published consistent with the protections that are currently under the legislation.

TAFV said that you should publish liquor applications. We are making it consistent so that it will be for both significant liquor and gaming applications so that we improve transparency in the community. The community obviously has a strong interest in significant liquor and gaming applications. This provides the community with, I guess, closing the loop of what the commissioner has decided about gaming machine applications but in a way that protects the privacy of the applicants.³⁴¹

The committee is satisfied with the Commissioner's response.

³⁴¹ Public hearing transcript, Brisbane, 16 December 2020, pp 7-8.

4.1.3.2 Nature of the human right

The right to privacy is a right not to have one's privacy 'unlawfully or arbitrarily' interfered with. There is no definition of 'privacy' in the HRA. It is a right that defies precise definition. In comparative Australian human rights legislation, a person's name has been held to be an aspect of their right to privacy.³⁴²

4.1.3.3 Nature of the purpose of the limitation

The purpose of the limitation is to improve transparency about liquor and gaming machine licences by requiring the Commissioner to publish information about the decisions on a departmental website for members of the public to access. This is intended to promote public confidence in the licensing process. For example, members of the public will be able to see decisions made by the Commissioner on licence applications and understand the reasons why applications were granted or refused.

4.1.3.4 The relationship between the limitation and its purpose

The limitation achieves the purpose of improving transparency by making decisions of the Commissioner publicly available on a website.

4.1.3.5 Whether there are less restrictive and reasonably available ways to achieve the purpose

There may be a less restrictive and reasonably available way to achieve the purpose. This is to define 'sensitive information' more broadly to include personal information, within the meaning of that expression in the *Information Privacy Act 2009*. If this were done, the Commissioner would be precluded from publishing personal information about named individuals on the department website.

4.1.3.6 The importance of the purpose of the limitation

There does not appear to be any compelling reason for personal information of individuals to be published in order to achieve the purposes of the publication requirement.

4.1.3.7 The importance of preserving the human right

This factor does not have any particular relevance in the proportionality analysis.

4.1.3.8 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

It is not apparent that publication of personal information will achieve the purpose of 'providing greater rigour and transparency around the liquor and gaming machine licensing regimes'. The committee notes the response from the Commissioner for Liquor and Gaming given at the public hearing that the publishing requirements include the nature of the application, the location of the premises, the day the Commissioner made the decision, whether the application was approved or refused, and a brief summary of the details of the decision. The Commissioner noted that this approach 'will serve the right of privacy by ensuring any sensitive or commercially confidential information is not publicly released' and that it would create consistency between 'both significant liquor and gaming applications so that we improve transparency in the community'.³⁴³

The committee is satisfied that any limitation on human rights is reasonable and demonstrably justified.

4.1.4 Alcohol fuelled violence policy amendments – Police banning notices: Part 8

Human rights issues

Police banning notice – disorderly, offensive, threatening or violent behaviour at or in vicinity of public place – unacceptable risk of violence, impacting on safety of other persons or disrupting or interfering with the peaceful passage, or reasonable enjoyment of other persons at the place – notice bans person from entering or remaining on particular premises, attending or remaining at public event at which

³⁴² *DPP v Kaba* (2014) 44 VR 526 at [132]-[134], [447], [463] (Bell J).

³⁴³ Public hearing transcript, Brisbane, 16 December 2020, pp 7-8.

liquor will be sold or entering or remaining in 'stated area' designated by reasonable distance or location from these places or events – licenced premises and safe night precincts – events at which liquor will be sold

Police banning notices – duration of initial notice – proposed extension from 10 days to 1 month – extended police banning notice for up to 3 months from start of initial banning notice – police banning notices do not prohibit person from entering or remaining in their residence, place of employment or place of education – freedom of movement, HRA section 19 – Limitation on right – right of peaceful assembly, HRA section 22(1) – whether rights limited – limitations justified

Analysis

The police banning notice scheme is established in Part 5A of the *Police Powers and Responsibilities Act 2000* (PPRA). A police banning notice prevents a person from entering or remaining on licenced premises or safe night precincts, or attending or remaining at a public event at which liquor will be sold. The notice may also prevent a person from entering or remaining in a 'stated area' designated by a reasonable distance or location from a particular premises or public event.

The proposed amendments increase the duration of an initial police banning notice from 10 days to one month.

Freedom of movement

The amendments to the PPRA limit the right to freedom of movement in section 19 of the HRA by preventing a person subject to an initial police banning notice from freely moving into and around particular locations or designated areas for a greater period of time. For the reasons given below, the committee considers that the limitation is justified in accordance with section 13 of the HRA.

4.1.4.1 Nature of the human right

The right to freedom of movement protects a person's right to move freely in Queensland.

The right has been described by the United Nations Human Rights Committee as 'an indispensable condition for the free development of a person'.³⁴⁴ It is also a frequently qualified right, for example, by procedural impediments such as a requirement for prior authorisation before entering public land.

4.1.4.2 Nature of the purpose of the limitation

The purpose of limiting people's freedom of movement in and around licenced venues and safe night precincts is to reduce alcohol-fuelled violence and increase public safety at licenced venues and safe night precincts.

4.1.4.3 The relationship between the limitation and its purpose

The limitation seeks to achieve the purpose of increasing the efficacy of initial police banning notices, in order to reduce alcohol-fuelled violence and increase public safety at licenced venues and safe night precincts. The proposed amendment was recommended in the April 2019 Final Report of *Queensland Alcohol-related violence and Night Time Economy Monitoring* (QUANTEM), which states:

The current police banning system in conjunction with ID scanning does not appear to have made major changes to levels of violence in SNPs across Queensland, although there are some promising signs. However, it is clear that the system has been successful in limiting the number of people on bans trying to enter licenced venues. Key informants suggested that the current 10 day police ban is amenable to review, as it does not realistically represent a punishment for most people attending SNPs. While a ban of 10 days is only effectively one weekend, and would not be seen as a penalty for many people, a three month ban as a minimum might be seen as being too punitive by operational police, and use of the ban might decline. Following this reasoning, a two-year trial is recommend for month-long bans, escalating to a 6 month ban with an attached youth services assessment for repeat offenders. Key variables to be considered would include recidivism rates in this population, assault rates in the community and officer

³⁴⁴ United Nations General Comment No 27, Freedom of movement (Art 12), [1].

willingness to use longer bans. The scheme should also include provisions for appeal to the bans. It may be that the Magistrates Court is the appropriate body to manage appeals, and it might also be appropriate that normal fees be waived for people with low incomes.³⁴⁵

4.1.4.4 Whether there are less restrictive and reasonably available ways to achieve the purpose

While a shorter increase in the duration of the ban may be less restrictive, a shorter extension may not sufficiently promote the public safety purpose. Further, increasing the duration of the notice to one month is less restrictive than a longer ban, for example, of three months, which was rejected by the QUANTEM review.

4.1.4.5 The importance of the purpose of the limitation

Reducing alcohol-fuelled violence and increasing public safety at licenced venues and safe night precincts by the use of initial police banning notices are important purposes.

4.1.4.6 The importance of preserving the human right

This factor does not have any particular relevance in the proportionality analysis.

4.1.4.7 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

While a temporary restriction on a person's right to enter and remain in a licenced venue or safe night precinct limits their freedom of movement at that place, the limitation is justified by a number of factors. The first of these is the important purposes for which initial police banning notices are given, set out above. Secondly, the circumstances in which a police banning notice may be made are carefully circumscribed in Part 5 of the PPA, including the requirements in section 602C. A notice may only be imposed when a police officer is reasonably satisfied that giving a notice is 'reasonably necessary' because, among other things, the person's presence at a place poses an unacceptable risk of violence or other public safety risk. Thirdly, the notices are time limited and will be subject to internal review up to 15 days from the making of the notice. Finally, the notice cannot prohibit a person from entering or remaining in their residence, place of employment or place of education (PPRA, section 602H). For these reasons, the committee considers the limitation on the right to freedom of movement imposed by Part 8 of the Bill is proportionate.

4.1.5 Is the right to freedom of assembly and association limited by the amendments?

The protection in s 22(1) of the HRA of freedom of assembly protects a person's right to peacefully assemble with others. In order to fall within the scope of this right, an assembly must be 'peaceful'. The right is unlikely to guarantee a right to assembly for purely social or recreational purposes.³⁴⁶ The right to peaceful assembly is a fundamental right in a democratic society.

Freedom of association is concerned with allowing people to pursue common interests in formal groups, such as a trade union or political party.

The amendments do not expressly engage either right, for example, by prohibiting a person from being able to assemble for peaceful purposes, such as attending a peaceful political protest. However, because police banning notices may preclude a person from being in a designated area, it is conceivable that a person could be indirectly precluded from attending a peaceful assembly by operation of an initial police banning notice. For example, a person may be precluded from gathering at a licenced venue at which an assembly is organised to take place.

The committee considers any limitation on the right in section 22(1) that may be imposed by the amendment is reasonable and demonstrably justified.

³⁴⁵ Final Report of *Queensland Alcohol-related violence and Night Time Economy Monitoring* (QUANTEM), at [9.3.1], pp 718-719; see also p 694.

³⁴⁶ *R (Countryside Alliance) v Attorney-General* [2008] AC 719; [2007] UKHL 52 (fox-hunting not protected by the right to freedom of assembly).

4.1.5.1 Nature of the human right

The right to peaceful assembly protects a person's right to peacefully assemble with others. In order to fall within the scope of this right, an assembly must be 'peaceful'.

4.1.5.2 Nature of the purpose of the limitation

The purpose of the amendments is to reduce alcohol-fuelled violence and increase public safety at licenced venues and safe night precincts. The amendments restrict the free movement of persons subject to a notice from being at particular locations. The amendments do not expressly engage the right, for example, by prohibiting a person from being able to assemble for peaceful purposes, such as attending a peaceful political protest. Because police banning notices may preclude a person from being in a designated area, it is conceivable that a person may be indirectly precluded from attending a peaceful assembly by operation of an initial police banning notice. For example, a person may be precluded from gathering at a licenced venue at which an assembly is organised to take place.

4.1.5.3 The relationship between the limitation and its purpose

The purpose of the amendments is to reduce alcohol-fuelled violence and increase public safety at licenced venues and safe night precincts. The amendments restrict the free movement of persons subject to a notice from being at particular locations in order to achieve these purposes. As noted above, the amendments do not expressly engage the right, for example, by prohibiting a person from being able to assemble for peaceful purposes, such as attending a peaceful political protest.

4.1.5.4 Whether there are less restrictive and reasonably available ways to achieve the purpose

There is no less restrictive way of achieving the purpose of the amendment while protecting the right to peaceful assembly. A person subject to a notice precluding him or her from assembling at a place that he or she is prohibited from may have other means by which to exercise his or her freedom of assembly, for example, joining a protest at a different location, or expressing his or her protest in another way.

4.1.5.5 The importance of the purpose of the limitation

Reducing alcohol-fuelled violence and increasing public safety at licenced venues and safe night precincts by the use of initial police banning notices are important purposes.

4.1.5.6 The importance of preserving the human right

This factor does not have any particular relevance in the proportionality analysis.

4.1.5.7 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

As noted above, the amendments do not expressly engage the right, for example, by prohibiting a person from being able to assemble for peaceful purposes, such as attending a peaceful political protest. Because police banning notices may preclude a person from being in a designated area, it is conceivable that a person may be indirectly precluded from attending a peaceful assembly by operation of an initial police banning notice. For example, a person may be precluded from gathering at a licenced venue at which an assembly is organised to take place.

For the reasons set out above in relation to freedom of movement, the committee considers any limitation on the right to freedom of assembly imposed is proportionate.

4.1.6 Is the right to a fair hearing limited by the amendments?

The right to a fair hearing is not limited by the amendments. The right to a fair hearing, protected in section 31 of the HRA, applies to a person 'charged with a criminal offence or a party to a civil proceeding'. The imposition of an initial police banning notice is not a criminal charge for an offence. The threshold requirements for the right in section 31 to be engaged are not satisfied and this right does not therefore have to be considered in the statement of compatibility.

Wagering inducement restrictions: Parts 5, 9 and 10

Human rights issues

Consumer protection – gambling – bookmaking – prohibition on inducements to open accounts or refer friends to open accounts with online wagering providers – restrictions on direct marketing – penalties imposed on individuals and corporations – freedom of expression, HRA section 21 – whether limitations reasonable and demonstrably justified

Analysis

The Bill imposes wagering inducement restrictions which seek to give effect to the National Consumer Protection Framework for Online Wagering. The relevant amendments are set out in Parts 5, 9 and 10 of the Bill and involve amending the Interactive Gambling Act, the Racing Integrity Act and the Wagering Act.

Clauses 21, 63 and 68 impose restrictions on direct marketing by wagering operators, racing bookmakers and licence operators. These restrictions are imposed on both corporations and individuals.

The HRA protects an individual's right to freedom of expression in section 21(2). It does not protect a corporation's right to freedom of expression: see HRA, section 11(2). In other jurisdictions, freedom of expression has been found to encompass not only political expression but also commercial speech.³⁴⁷

The committee considers any limitation imposed by the Bill on an individual's right to freedom of expression is reasonable and demonstrably justified.

4.1.6.1 Nature of the human right

The right to freedom of expression has been described by the United Nations Human Rights Committee as one of the 'indispensable conditions for the full development of a person' and 'the foundation stone for every free and democratic society'.³⁴⁸ The right protects not only political expression but can also protect commercial speech. However, in comparative jurisprudence, commercial expression is often given less significance than other forms of expression such as political or artistic expression.³⁴⁹

4.1.6.2 Nature of the purpose of the limitation

The purpose of the amendments is consumer protection. The statement of compatibility notes (p 13) that 'there has been a significant increase in the number of active wagering accounts' and 'online gambling has become the fastest growing form of gambling due to developments in digital technologies'. It identifies the ease and prevalence of this form of gambling and the harm it can cause. The Commonwealth, State and Territory governments, including Queensland, have developed the National Consumer Protection Framework for Online Wagering. The amendments give effect to that framework. They aim to limit the harmful effects of online gambling by prohibiting wagering operators, racing bookmakers and licence operators from sending direct marketing material to consumers without their consent.

4.1.6.3 The relationship between the limitation and its purpose

The prohibition of direct marketing protects consumers by minimising the risk of consumers being induced to gamble.

³⁴⁷ See for example *Ballantyne v Canada* (Communications Nos 359 and 385/1989); *Ford v Quebec (Attorney-General)* [1988] 2 SCR 712; *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199. These cases concern the freedom of speech of corporate entities cf HRA, s 11(2).

³⁴⁸ United Nations General Comment No 34 on Art 19, [2].

³⁴⁹ See for example *Campbell v MGN Ltd* [2004] 2 AC 457, [117] (Lord Hope); [148]-[149] (Baroness Hale).

4.1.6.4 Whether there are less restrictive and reasonably available ways to achieve the purpose

There is no less restrictive way of achieving the purpose of the amendments. The restrictions are necessary to protect consumers.

4.1.6.5 The importance of the purpose of the limitation

Consumer protection from problematic gambling is an important purpose. The statement of compatibility identifies (p 14) that the limitations also ‘allow for greater consumer choice, which may improve harm minimisation outcomes for interactive bettors and interactive wagering customers in Queensland’. The restrictions on direct marketing do not apply if a person has given express and informed consent to directly receiving promotional material from a licence operator, bookmaker or wagering operator.

4.1.6.6 The importance of preserving the human right

The amendments do not destroy the right, but rather limit it. As the statement of compatibility notes (p 15), the amendments ‘will not limit the ability of a racing bookmaker or licence operator to advertise or promote their business by other means; or to distribute this material directly to bettors or customers who give their consent, or who are located interstate.’

4.1.6.7 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

The committee considers that the statement of compatibility properly concludes that the limitation on the right to freedom of expression is reasonable and demonstrably justified, having regard to the scope of the prohibition on direct marketing and important purpose for which the amendments are directed.

4.1.7 ID scanning: Part 7, Division 2

Human rights issues

Liquor Act 1992 – entry to licenced premises – ID scanning entry requirements – recording photo ID information – right to privacy, HRA section 25 – whether limitation is reasonable and demonstrably justified

Analysis

The HRA protects a right to privacy in section 25. A person has the right not to have his or her privacy unlawfully or arbitrarily interfered with. As noted above, there is no definition of ‘privacy’ in the HRA. A person’s name has been held to be an aspect of their right to privacy under the equivalent right protected in the Victorian Charter of Human Rights and Responsibilities.³⁵⁰ The information contained on an ‘ID’ document – including the person’s name and photograph of their face – will also be protected by the privacy right.

Clause 32 imposes ID scanning requirements on regulated premises. The regulated premises must scan the photo ID and record the photo and other permitted information contained in or on the photo ID. Through these requirements, the premises is collecting and storing personal information of individuals.

The statement of compatibility does not address whether the provisions concerning ID scanning in Part 7, Division 2, in particular, clause 32, are compatible with the right to privacy in section 25. Privacy is protected in the HRA from both unlawful and arbitrary interferences. There will not be any unlawful interference with an individual’s privacy if a registered premises collects and stores personal information in accordance with the legislative amendments because the interference is in accordance with the law. However, different considerations arise with respect to the requirement that a person’s privacy not be ‘arbitrarily’ interfered with.

³⁵⁰ *DPP v Kaba* (2014) 44 VR 526 at [132]-[134], [447], [463] (Bell J).

The committee notes the privacy implications for individuals that arise in respect of ID scanning at licensed venues and the legislative requirements around the use, storage and disposal of such identifying information. The committee considers that the safety of patrons, staff and the community in and around licensed venues justifies the ID scanning requirements.

4.1.8 Relevant precedents from Queensland or other jurisdictions

Relevant precedents from other jurisdictions have been cited in the above analysis.

4.2 Statement of compatibility

Section 38 of the HRA requires a statement of compatibility to be tabled for the Bill. Section 38(2) sets out the following two requirements for a statement of compatibility:

- (a) whether, in the member's opinion, the Bill is compatible with human rights, and if so, how it is compatible
- (b) if, in the member's opinion, a part of the Bill is not compatible with human rights, the nature and extent of the incompatibility.

The meaning of the expression 'compatible with human rights' is set out in section 8 of the HRA. A statutory provision is compatible with human rights if the provision either (a) does not limit a human right; or (b) limits a human right in accordance with section 13 of the HRA.

The statement of compatibility was tabled with the introduction of the Bill and with the exception of the following areas, provide a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

4.2.1 ID scanning

The statement of compatibility does not address whether the provisions concerning ID scanning in Part 7, Division 2 of the Bill are compatible with the right to privacy in section 25.

4.2.2 Publication of gaming and liquor decisions

The statement of compatibility does not sufficiently explain how the publication requirement reasonably limits the right to privacy. In particular, it does not explain how publishing personal information of individuals named in a decision achieves the purpose of 'providing greater rigour and transparency around the liquor and gaming machine licensing regimes'.

4.2.3 Other comments

The statement of compatibility was lengthy because it identified rights that were not limited by the clause,³⁵¹ although the section 38 obligation to prepare a Statement of Compatibility does not require the identification of rights that may be promoted by a Bill to be identified³⁵² but only rights that are limited by the Bill.

The statement set out a proportionality analysis on several occasions that was of questionable utility.

Finally, the statement of compatibility addressing the miscellaneous amendments in the Bill (ie the amendments other than to the Criminal Code and Legal Profession Act) would have been improved by identifying the particular clause of the Bill being addressed and applying the limitations analysis to each human right being addressed.³⁵³

³⁵¹ Cf statement of compatibility, pp 4-9 (amendments to Criminal Code); pp 15-17 concerning the amendments to the PPRA (right to a fair hearing); pp 9-10 concerning the amendments to the Legal Profession Act (property rights).

³⁵² Cf statement of compatibility, pp 9-10 concerning the amendments to the Legal Profession Act.

³⁵³ Cf statement of compatibility, pp 15-17.

Appendix A – Submitters

Sub #	Submitter
001	Robert Heron
002	Australian Lawyers Alliance
003	FamilyVoice Australia
004	Confidential
005	Legal Aid Queensland
006	Australian Medical Association Queensland
007	Rape & Domestic Violence Services Australia
008	Queensland Council of Social Service (QCOS)
009	Queensland Sexual Assault Network
010	Zig Zag Young Women's Resource Centre Inc
011	Brisbane Rape and Incest Survivors Support Centre
012	Women's Legal Service Qld
013	Domestic Violence Action Centre
014	Centre Against Sexual Violence Inc
015	Queensland Human Rights Commission
016	Believe Queensland Women
017	Tabcorp
018	Rape and Sexual Assault Research and Advocacy
019	LGBTI Legal Service Inc
020	Gold Coast Centre Against Sexual Violence Inc
021	Bravehearts
022	Youth Advocacy Centre Inc
023	LawRight
024	Leah Pabst
025	Soroptimist International Brisbane Inc
026	Queensland Council for Civil Liberties
027	Aboriginal and Torres Strait Islander Legal Service (Qld) Limited
028	Queensland Law Society
029	Queensland Domestic Violence Services Network
030	Women's Health Service Alliance
031	Adela Brent
032	Britnee Chamberlain
033	Ending Violence Against Women Queensland

- 034 Laura Anderson
- 035 Madeline Price
- 036 Name Withheld
- 037 One Woman Project
- 038 Name Withheld
- 039 Confidential
- 040 Sophia Leen
- 041 Confidential
- 042 Women's Health Queensland
- 043 Queensland Coalition for Action on Alcohol (QCAA)
- 044 Shine Lawyers
- 045 Form Submission
- 046 Respect Inc
- 047 Scarlet Alliance, Australian Sex Workers Association

Appendix B – Officials at public departmental briefing

Queensland Racing Integrity Commission

- Mr Ross Barnett, Queensland Racing Integrity Commissioner

Department of Justice and Attorney-General

- Ms Imelda Bradley, Director, Strategic Policy and Legal Services
- Ms Sarah Kay, Director, Strategic Policy and Legal Services
- Mr David McKarzel, Executive Director, Office of Regulatory Policy
- Mrs Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Ms Victoria Thomson, Deputy Director-General, Liquor, Gaming and Fair Trading

Queensland Police Service

- Inspector Simon James, Manager, Drug and Alcohol Coordination Unit, Organisational Capability Command

Appendix C – Witnesses at public hearing

Women’s Legal Service Queensland (via teleconference)

- Ms Angela Lynch, Chief Executive Officer
- Ms Julie Sarkozi, Solicitor

Queensland Council of Social Service

- Ms Monica Taylor, Principal Advisor, Community Services

Queensland Law Society

- Mr Matt Dunn, General Manager, Advocacy, Guidance and Governance
- Ms Rebecca Fogerty, Chair, Criminal Law Committee
- Ms Elizabeth Shearer, President

Youth Advocacy Centre Inc.

- Ms Janet Wight, Chief Executive Officer
- Mr Damian Bartholomew, Solicitor

Aboriginal and Torres Strait Islander Legal Service

- Ms Kate Greenwood, Barrister

Queensland Council for Civil Liberties

- Mr Michael Cope, President

Bar Association of Queensland

- Ms Laura Reece, Member, Criminal Law Committee

Respect Inc. (via teleconference)

- Ms Janelle Fawkes, #DecrimQLD Campaign Leader
- Dr Elena Jeffreys, State Coordinator

Scarlet Alliance, Australian Sex Workers Association (via teleconference)

- Ms Jules Kim, Chief Executive Officer

Statement of Reservation

Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

Statement of Reservation

There should be a simple question, as part of inquiry criteria attached to every Bill, that we should be able to clearly answer; Does the piece of legislation we are scrutinizing benefit the people we serve?

Unfortunately, in considering the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020* it was difficult to find the answer to this question.

With a wide range of submitters that work daily with sexual assault victims and alleged perpetrators including advocates, prosecutors and defense attorneys, there was a clear delineation between needs. Submissions between legal entities had opposing views as to whether the amendments were even needed. There was a lack of clarity whether these amendments would deliver increased convictions, reporting rates, or the needed change to the experience of victims who report being traumatized by our systems.

The Queensland Law Society (QLS) accepts the Queensland Law Reform Commission's (QLRC) position, that there should be some amendments to the Criminal Code to 'clarify, reinforce and update the current operation of the law'. However, this Bill in its current form, makes no significant changes towards seeking justice for survivors of sexual violence, holding perpetrators accountable for their actions, or increasing safety for Queenslanders.

My statement of reservation is to highlight the following concerns:

1. The prioritisation of a Bill that does not appear to provide tangible outcomes to address the statistics we are confronted with regarding sexual assault. It would have made greater sense for a suite of changes that worked together emanating from a broad review requested by submitters, versus the disconnect we have seen during the assessment of this Bill.
2. The diverse opinions between those in the legal realm as to whether these amendments are even needed. As legislators this alone raises concerns on how our systems operate.
3. That in the process, there is no mechanism to translate this legislation into education for those who will need to utilise it. This has been raised in several submissions and has not been addressed in the Committee recommendations.

The Queensland Domestic Violence Service Network (QDVSN), and the Queensland Sexual Assault Network (QSAN), believe the opportunity has been missed to broadly assess the operation and practical application of current legislation. This would contribute to improving the safety of people, encourage them to report to police and engage with the criminal justice system.

These are the issues that matter to our communities, not how the current provisions are clarified, reinforced, updated, and operate, but how they impact on people.

As the Queensland Law Reform Commission noted, the community is 'the ultimate user of a law'. And as ultimate users of a law, this Bill falls short of both understandability, and application.

The Minister has stated that the review sought by submitters will be addressed as a matter of urgency, and our report has 3 recommendations to further these efforts. This gives a level of reassurance that this inquiry, and the resources utilised, will ultimately deliver tangible outcomes sought by Queenslanders.

**Criminal Code (Consent and Mistake of Fact)
and Other Legislation Amendment Bill 2020**

However, the question remains. How is it that priority is given to ensure that the mechanisms between prosecutors and defense lawyers takes precedence over ensuring our system is better equipped to meet the expectations of our communities and those who work on the front line to keep Queenslanders safe?

As previously requested, there is a need for an independent review of our committee system. This inquiry has demonstrated further the refinements that could be utilised for greater efficiencies, including around Bills that relate to the technicalities of the law.

I thank our Chair and fellow Committee members, secretariat, Departmental staff and all submitters for the work you have undertaken. To take complexity and confusion and endeavour to make it less so, is not easy. As we heard at the public hearing, the absence of clarity makes the job of those who work tirelessly in this space so much harder. Your attendance and insights were deeply appreciated, and I trust in your frustration that the recommendations from the Committee assure you that your voices have been heard, and that your efforts during this inquiry have not been in vain. Thank you again for all that you do.



Sandy Bolton MP
Member for Noosa

11 February 2021

