

Appendix A

Terms of reference

Queensland's laws relating to consent and the excuse of mistake of fact

Background

In the second half of 2018, the Attorney-General sought the views of key legal stakeholders about the operation of Queensland's existing laws regarding consent and the excuse of mistake of fact as they apply to rape and sexual assaults.

In the first half of 2019 sexual violence service providers, victims and survivors, and other members of the community were consulted on the development of a Sexual Violence Prevention Framework for Queensland.

The results of this consultation revealed many and varied views on the operation of laws regarding consent and the excuse of mistake of fact, which has informed the Queensland Government's decision to refer these matters to the Queensland Law Reform Commission.

Consent, for the purposes of rape and sexual assaults in Chapter 32 (Rape and sexual assaults) of the Criminal Code, is defined in section 348 (Meaning of consent). Under section 348(1), consent means 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent. Under section 348(2), 'without limiting' section 348(1), 'a person's consent to an act is not freely and voluntarily given if it is obtained:

- a) by force;
- b) by threat or intimidation; or
- c) by fear of bodily harm; or
- d) by exercise of authority; or
- e) by false and fraudulent representations about the nature or purpose of the act; or
- f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner'.

Unless expressly or impliedly excluded by statute, section 24 (Mistake of fact) of the Criminal Code, applies to all Queensland criminal offences, barring regulatory offences. Under section 24(1), a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist'. Section 24 is relevant to the issue of consent in Chapter 32 of the Criminal Code.

Terms of Reference

1. I, YVETTE MAREE D'ATH, Attorney-General and Minister for Justice and Leader of the House, refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the Law Reform Commission Act 1968 for review and investigation, the definition of consent in section 348 (Meaning of consent) in Chapter 32 (Rape and sexual assaults) of the Criminal Code and the operation of the excuse of mistake of fact under section 24 (Mistake of fact) as it applies to Chapter 32.

Scope

2. The Commission is asked to examine the operation and practical application of:
 - a) the definition of consent in section 348; and
 - b) the excuse of mistake of fact in section 24 as it applies to rape and sexual assaults in Chapter 32 of the Criminal Code.
3. The Commission is asked to make recommendations on:
 - a) whether there is a need for reform of:
 - i. the definition of consent in section 348;
 - ii. the excuse of mistake of fact in section 24 as it applies to rape and sexual assaults in Chapter 32 of the Criminal Code; and
 - b) any other matters the Commission considers relevant having regard to the issues relating to the referral.
4. If the Commission recommends reform of the relevant Criminal Code provisions, or other legislative reforms, the Commission is asked to prepare draft legislation based on its recommendations.
5. In making its recommendations the Commission should have regard to:
 - a) the need to ensure Queensland's criminal law reflects contemporary community standards;
 - b) existing legal principles in relation to criminal responsibility;
 - c) the need for Queensland's criminal law to ensure just outcomes by balancing the interests of victims and accused persons;
 - d) the experiences of sexual assault victims and survivors in the criminal justice system;
 - e) the views and research of relevant experts;
 - f) recent developments, legislative reform, and research in other Australian and international jurisdictions; and
 - g) any other matters that the Commission considers relevant having regard to the issues relating to the referral.

Consultation

The Commission shall consult with:

- a) legal stakeholders;
- b) people who have experienced sexual violence and relevant bodies that represent victims and survivors of sexual violence;
- c) the public generally; and
- d) any group or individual, in or outside of Queensland, the Commission considers relevant having regard to the issues relating to the referral.

Timeframe

The Commission is to provide a report on the outcomes of the review to the Attorney-General and Minister for Justice and Leader of the House by ~~17 April 2020~~ 30 June 2020.¹

Dated the 2nd day of September 2019

YVETTE D'ATH MP

Attorney-General and Minister for Justice
Leader of the House

¹

This amendment to the terms of reference was made, at the request of the Commission, by a letter from the Attorney-General and Minister for Justice, Leader of the House, the Hon Yvette D'Ath MP, to the Chair of the Queensland Law Reform Commission, the Hon Justice David Jackson, dated 30 March 2020.