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The Secretary
Queensland Law Reform Commission
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RE: Discussion Paper: Review of consent laws and the excuse of mistake of fact

Please accept our submission responding to your Consultation Paper.

Respect Inc is the state-wide sex worker organisation in Queensland. Our organisation provides a comprehensive health promotion and peer education program for sex workers. Respect Inc has offices and sex worker drop-in spaces in Cairns, Brisbane, Townsville and the Gold Coast and provides regional outreach in other locations.

Respect Inc supports reform of the definition of consent in section 348 of the Criminal Code, and the excuse of mistake of fact in section 24 as it applies to rape and sexual assaults in Chapter 32 of the Criminal Code.

We note that the Queensland *“Prevent, Support, Believe. Queensland’s Framework to Address Sexual Violence”* includes sex workers among the groups impacted by sexual violence. In addition, we note that the current legislative framework in Queensland criminalises many basic sex worker safety strategies and sex work workplaces, which contribute to reduce sex worker safety. Until the repeal of the Prostitution Act, Criminal Code Section 22A and Police Powers and Responsibility Act sections that enable entrapment and provide immunity for police to request illegal services from sex workers, and sex work is decriminalised, there will remain legislative barriers to sex worker safety. In addition, police practices create significant barriers to sex workers reporting crimes including those relevant to this submission.

Respect Inc is a member of Scarlet Alliance, Australian Sex Workers Association, and we endorse their submission and we thank you for considering our submissions to this process.

Sincerely,

Kayla Rose
Respect Inc Management Committee
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General comment

The criminal process and procedures to address sexual assault, family violence, stalking, sexual abuse and other sexual violence in Queensland is deeply flawed. Individuals rely on the good will of front-desk police, who in our experience are rarely emotionally equipped to deal with sexual crimes, stalking, or family violence. The sex worker community feed back to us that there is a culture of police finding a reason to discourage reporting of these crimes. Mistake of fact is a tool by which reports are not taken by police. The reforms of these laws are important, but not an end point.

We support amendments to consent however we remain concerned for the potential and unforeseen use of Criminal Code laws against sex workers. The overall criminalisation of sex workers in Queensland - with at least 80% of sex workers at risk of arrest for using safety strategies - means that as a community we are vulnerable to inappropriate policing. Wording of these amendments must take into account and mitigate against any potential use by police of gathering intelligence in order to prosecute sex workers. **Respect Inc recommend an amnesty clause for sex workers coming forward to report crime, such as has been introduced in California recently.**¹

Queensland Police Service process

Sex workers in Queensland experience the same significant barriers to reporting rape and sexual assault as other community members. In addition, sex workers making these reports in Queensland are met with additional blocks at the point of reporting.

Respect Inc has received countless reports, leading us to believe it is common practice, that police refuse to take reports or make a discretionary decision on the perceived validity of the account, fail to recognise the crime², focus not on the sexual assault but the persons' work, use the interaction for intelligence gathering, advise sex workers there is no point or their treatment of the sex worker is such that the person does not progress with the report.

Recent cases, where the sex workers who experienced sexual assault persisted until their report was taken seriously by Queensland Police Service, demonstrate that when reports are handled with sensitivity, respect and due process they can, and have, resulted in successful cases.

Once a sex worker has attempted to report sexual violence, the fact that they are a sex worker is recorded and raised in future unrelated interactions with police. The level of stigma and discrimination against sex workers in Queensland is such that this knowledge can be used against a sex worker in relation to future employment, family court cases, and how they are treated by police in relation to unrelated interactions. Respect Inc has received a number of complaints from sex workers, whose sexual assault cases were not progressed by QPS, but who in reporting other crime (not related to sex work) were referred to as a sex worker.

¹

<https://sd11.senate.ca.gov/news/20190502-senate-passes-senator-wiener%E2%80%99s-legislation-protect-sex-workers-arrest-when-reporting>

² <https://www.buzzfeed.com/ginarushton/sex-worker-assault-sentencing-queensland>

As such, we believe there is a need for recommendations in relation to the process of QPS receiving sexual assault and rape reports if there is to be any change in the percentage of cases reported. Respect Inc has recommended to the Minister for Police and the Police Commissioner the need for a police liaison program throughout Queensland with dedicated contact offices who have received training on working respectfully with sex workers and who are able to receive a wide variety of reports including reports related to sexual violence.

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

The main concern is that the rape and sexual assault laws in Queensland currently take into account extraneous evidence unrelated to the incident and consider it a reason for the accused being misled about consent. The amendments should be seeking to remove from potential evidence factors such as: how a person looks, what their job is, gender, ethnicity, age, previous sexual activity, whether they were able to defend themselves, their intoxication level, mental incapacity, their work as a sex worker and language barriers.

What is the basis of these concerns or problems?

The basis is the numerous cases that have launched this defence successfully, and discredited witnesses based on factors listed above. None of these factors are excuse or justification for rape or sexual assault. The mistake of fact excuse is detrimental to an understanding of consent. A persons standing in the community, their ability (or not) to fight back in such a situation, their gender, appearance or work as a sex worker should not be able to be used as a reason a defendant was 'confused' about consent.

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

Self determination of women. Sexual agency. A challenge to transphobia. Striking out race, gender, and age markers as reasons for 'mistaken consent'. These reforms should aim to challenge slut shaming as it exists within the law.

CHAPTER 3: THE DEFINITION OF CONSENT Affirmative consent model

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

It is well below community expectation and needs to be reformed.

Q-4 Should the definition of consent in section 348 of the Criminal Code be amended, for example, to expressly require affirmative consent? Why or why not?

Yes. This would bring it into line with community expectation.

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

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

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

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

Respect Inc supports (c)

Q-6 What differences and what advantages or disadvantages might result from such changes?

The advantage to such changes is that it provides courts with clear direction. Another advantage is that police would hopefully be more willing to take reports seriously.

Withdrawal of consent

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

Respect Inc supports this amendment. Consent must be understood within the law as being able to be withdrawn. Within sex work bookings, if consent is withdrawn, continuing the activity should be understood as rape.

Prior sexual activity, including immediately prior sexual activity, is not an open ended consent to future sexual activity. Sex workers within and outside of sex work settings should not be considered to have consented simply because they have agreed to a certain type of booking or social engagement.

If a person engaged in sexual activity asks to stop that activity, continuation of that act is non consensual. This includes sex work bookings.

Respect Inc suggests the Queensland Law Reform Commission consult with our organisation during the drafting of the wording of these laws, to ensure that sex work settings are captured within the wording, and to match the intent of the reforms.

Circumstances when consent is not freely and voluntarily given

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

We have answered yes to some of the sections below, and no to (c) "where the person agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease."

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

(a) where: (i) the person is asleep or unconscious when any part of the sexual act occurs; or (ii) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual act?

Yes.

Respect Inc supports Q-9(a) (i) and (ii). Where consent cannot be freely given, such as in the situation of intoxication, there should be grounds for report of sexual assault and rape.

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

Respect Inc supports this objective, however our suggested amendment wording is 'where the person sabotages or removes a condom without consent'. Respect Inc does not support the amendment including "fails to use a condom".

In sex worker terminology sabotage or removal of condom in contravention to agreed conditions of the booking is commonly known as stealthing.

Sabotage or unagreed removal of condom should be seen as assault, regardless of the exchange of money. For sex workers this is an important reform. Consent, if based on prophylactic use, should not be considered open-ended consent to sexual activity without a prophylactic.

Our reservation of this matter being included in the Criminal Code is that there are many examples of legislation for which the intent was to protect but in practice it is used to harass and criminalise consensual sex worker activities.

The specific wording of this section and the consequential direction given to courts must ensure it can not be used to criminalise consensual activity. Respect Inc suggests the Queensland Law Reform Commission consult with us during the drafting of the wording of these laws, to ensure that there are no unintended consequences.

We also note that reform of the laws alone is not going to improve the level of reporting of the removal or sabotage of condom without consent. There are cases in progress that would give us the impression that police, when well trained or personally inclined, are able to take reports of condom removal seriously, and do understand this to be rape and sexual assault. Public awareness campaigns, individualised training, and a better societal understanding of gendered violence must accompany any changes to this law. There should be assessment and exams on values and attitudes for police, in particular regarding gender, assault and consent.

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

No, Respect Inc does not support this amendment. The definition of 'serious disease' is extremely broad, unworkable and not applicable.

In relation to Sexually Transmissible Infections, Australia has generally taken the approach that a public health response, rather than a criminal response results in better outcomes for the community and individuals involved.³

Changes to available treatments, for example HIV, strongly negate a risk of transmission. The Criminal Code reference to 'whether or not treatment is or could have been available' does not recognise these advancements in treatment.

As referred to in the consultation paper, this matter is addressed already in other areas of law. An example of current robust measures is the *National Guidelines for Managing HIV Transmission Risk Behaviours (2018)*.⁴ In relation to people who place others at risk, the Guidelines outline a set of progressively inhibitive management steps that are appropriate to the individual case. Criminal law has no ability to tailor a response to the individual case and as such is not workable.

We would like to refer QLRC to the submission by NAPWHA on (c) of this question. We agree with NAPWHA that the inclusion of this amendment would likely result in criminalisation of people living HIV and contribute to excessive levels of stigma.

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

Yes, with concerns. Respect Inc support (d) above.

In recent cases in Queensland, lack of payment after an agreed-to sex act is, for sex workers, prosecuted as fraud.⁵

In these cases the judicial responses have been promising (State v Reihana, 2018. Presiding Magistrate: A Thacker. Fraud, 408c(1)D, Criminal Code. Magistrate Court, Brisbane, 22 August 2018.) Based on these recent cases, Respect Inc believes that if the (d) was implemented there would be support from the judicial system to more accurately penalise offenders of non-payment.

In the ACT the same cases above would have been prosecuted as sexual assault.⁶

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[https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/\\$File/HIV-Eight-Nat-Strategy-2018-22.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/$File/HIV-Eight-Nat-Strategy-2018-22.pdf)
[https://www1.health.gov.au/internet/main/publishing.nsf/Content/B4D7BD21A78763EDCA257BF0001F951B/\\$File/Nat-Guide-HIV-Risk-Behaviours-2018.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/B4D7BD21A78763EDCA257BF0001F951B/$File/Nat-Guide-HIV-Risk-Behaviours-2018.pdf)

⁵ <https://respectqld.org.au/media-release-oct-2018-sex-workers-win-in-court-despite-bad-laws-queensland/>

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<https://www.brisbanetimes.com.au/national/act/prostitute-felt-violated-after-man-tricked-her-for-free-sex-20150206-137q6z.html>

Extending “consent not freely given” to non-payment is in line with Respect Inc’s understanding of the overall spirit of proposed reforms. For this Law Reform Commission inquiry to be inclusive it is essential to include (d) above.

The adoption of proposal (d) within the consent reforms would provide clarity to police, prosecutors and the courts. Respect Inc suggests the Queensland Law Reform Commission consult with our groups during the drafting of the wording of these laws, to ensure that sex worker needs are captured respectfully within the wording, to match the intent.

Sex worker community issues were identified during the consultation for the [Prevent. Support. Believe. Queensland’s Framework to Address Sexual Violence](#):

Population groups disproportionately represented in data or at a higher risk of experiencing sexual violence

- Aboriginal and Torres Strait Islander people
 - 12.9% of all reported victims of sexual assaults in Queensland in 2018
 - (85.3% female) (ABS 2019)
- People with disability
- LGBTIQ+ people
- People from culturally and linguistically diverse backgrounds
- Sex workers
- People in the custodial system

CHAPTER 4: EXCUSE OF MISTAKE OF FACT The operation of section 24

Q-12 *Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code, as it applies to the question of consent in rape and sexual assault?*

Yes.

Why or why not?

There is a desperate need for Queensland to update these laws. It is inexcusable that the laws have remained in place for so long. Sex workers reporting sexual assault should not be confronted with excuses by police that mistake of fact means their report won’t be taken further. Police use mistake of fact as a excuse to not take sex worker reports of assault. When a report is taken seriously, police prosecutors use mistake of fact as a reason to not progress the case. If a case makes it to court, defendants can use mistake of fact against sex workers to avoid prosecution.

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

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

(b) be changed, so that it is for the defendant to prove the mistaken belief was honest and reasonable?

Why or why not?

This submission supports 'Mistake of Fact' being removed.

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

This submission supports 'Mistake of Fact' being removed.

Recklessness

Q-15 *Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to introduce the concept of 'recklessness' with respect to the question of consent in rape and sexual assault?*

No

Why or why not?

Respect Inc are not convinced that the concept of recklessness is in keeping with the spirit or intent of these reforms.

Reasonable steps

Q-18 *Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to require a person to take 'steps' or 'reasonable steps' to ascertain if the other person is consenting to the sexual act?*

Yes

Why or why not?

Consent is an action and agreement between parties. 'Steps' or 'Reasonable Steps' are required and appropriate to determine consent.

Q-19 *If yes to Q-18, how should a 'steps' or 'reasonable steps' requirement be framed? For example:*

(a) Should the requirement be framed as a threshold test, to the effect that the excuse is not available to a person who did not take positive and reasonable steps, in the circumstances known to them at the time of the offence, to ascertain that the complainant was consenting to the sexual act?

(b) Alternatively, should the requirement be framed as a matter to be taken into account by the trier of fact when assessing whether a person's mistaken belief as to consent was reasonable?

Respect Inc does not have an opinion at this time.

Q-20 If a 'steps' or 'reasonable steps' requirement were introduced, should the Criminal Code specify what steps or reasonable steps should be considered? If yes, what should the specific steps or reasonable steps be?

Yes. Clear verbal consent is best practice.

Q-21 What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes? For example:

(a) Might a 'steps' or 'reasonable steps' requirement have the effect of reversing the onus of proof for a defendant? Why or why not?

No. Each case would still be reliant upon a jury being convinced that the defendant did or did not take reasonable steps. It is still fair.

2 (i) If a 'reasonable steps' requirement is introduced, should the onus fall on the defendant to show that they took steps or reasonable steps?

Yes.

(b) Might a 'steps' or 'reasonable steps' requirement unfairly exclude the availability of the excuse of mistake of fact to particular categories of defendants? Why or why not?

Sexual assault, rape and other forms of sexual violence should be based on consent, not mistaken beliefs on behalf of the defendant. Removal of the excuse of mistake of fact is central to the reforms being considered by QLRC. Excuse of mistake of fact should no longer be available to defendants.

Intoxication of the defendant

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

No. Intoxication should not be a reason for mistake of fact defence to be used. The spirit of the reforms should ensure there would not be a repeat of *R v Soloman*-type cases where a defendant who voluntarily consumes large quantities of alcohol and drugs can still potentially use the mistake of fact defence to excuse actions. In order for these reforms to fully address the issue of consent, all opportunities for mistake of fact excuse should be removed from the law.

CHAPTER 5: OTHER MATTERS Statement of objectives and guiding principles

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

Yes. The Courts do require clear direction on this matter.

Q-26 What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes?

Consent would be better understood in a legal context with these amendments. It is an advantage to the courts and individuals seeking justice. Mistake of fact excuse should be clearly and explicitly identified as inadmissible.

Expert evidence

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

Yes.

Respect Inc suggest the Queensland Law Reform Commission consult with our groups during the drafting of the wording of these laws, to ensure that sex worker organisations are recognised explicitly. Experts on the topic of sex work should come from the peer base and community itself, not draw on third-hand expertise from people who have not had direct sex work experience.

Q-28 If such an amendment were to be made, what areas of expertise may be relevant?

We note that in regard to sexual assault in sex worker settings, it would be useful for the court to draw upon expert evidence from peer groups such as Respect Inc. This includes situations such as court proceedings, trials, pre-trial hearings, sentencing hearings and similar.

As above, Respect Inc supports the intent of these suggestions, however we have some apprehension about how it could be interpreted in practice. Experts on the topic of sex work should come from the peer base and community itself, not draw on third-hand expertise from people who have not had direct sex work experience. It is our strong recommendation that the Queensland Law Reform Commission consult with our groups during the drafting of the wording of these laws, to ensure that sex worker needs are captured within the wording, to match the intent. Without further consultation at drafting stage, the wording could unintentionally create a situation where 'experts' who have no concrete expertise in sex work itself are called upon to give what would amount to misleading 'expertise'.

Q-29 What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes?

There are advantages to having well recognised and community identified experts give evidence in sexual assault, rape and other cases of sexual violence. Sex worker witness testimonies about specific cases will be better understood by the courts when contextualised by experts who can share knowledge about industry practice generally. Admitting expert evidence in trials of sexual assault relating to sex workers can fill this gap.

The disadvantage is if the courts rely solely upon individual academics or other non-expert 'acceptable' voices. This sensitivity could be addressed in the amendments with wording such as "Community Expertise" and "Community Representation."

Education and awareness

Q-30 Should there be public education programs to educate the community about issues of consent and mistake of fact?

Yes. Respect Inc supports a community education but it must not reinforce stereotypes or create stigma toward sex workers.