

Implementing Affirmative Consent in Sexual Offences

A Model Law for Queensland

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Extract from *Hansard* (Parliament of Queensland)

Criminal Code Amendment (Sexual Offences) Bill (Qld) 2024

Second Reading

HON JONATHAN CROWE, HON ASHER FLYNN and HON BRI LEE:
We jointly move –

That the Bill now be read a second time.

Rape and sexual assault cause significant and devastating harms to victims. Our Bill seeks to address Queensland's complex and outdated laws governing sexual violence by introducing vital reforms which better recognise the lived experience of victims of sexual violence and respond to changing attitudes towards what constitutes appropriate and respectful sexual relations.

The Bill has three main objectives. It aims to:

- uphold the fundamental right of every person to make decisions about their sexual behaviour and choose not to engage in sexual activity;
- protect children and persons with a cognitive impairment, mental illness or other vulnerability from sexual exploitation; and
- protect every person from unlawful threats or deprivation of their liberty.

To achieve these aims, we propose four main changes to add clarity to rape and sexual assault law and modernise outdated language:

1. Introducing guiding principles to recognise the unique nature of rape and sexual assault offences, which should be considered by the court and relevant criminal justice agents in dealing with these crimes;

2. Introducing a clear definition of consent as free and active agreement that embraces an affirmative consent standard, including a non-exhaustive list of consent-negating circumstances;
3. Replacing the outdated reference to ‘carnal knowledge’ in defining rape; and
4. Removing the problematic and outdated mistake of fact excuse in rape and sexual assault cases.

These changes build upon existing laws in other jurisdictions, including New South Wales, the Australian Capital Territory, Victoria, Tasmania, Canada and New Zealand. Importantly, the proposed legislation will advance existing rape law to ensure that perpetrators will not escape liability for rape where they mistakenly believed the other person was consenting. In this way, the Bill will enable Queensland to lead the way in sexual offence reform both in Australia and internationally.

Guiding Principles

There are a number of broad systemic problems in the criminal justice system’s handling of rape and sexual assault. Sexual violence remains significantly underreported in Australia, with national survey data revealing 4 out of 5 Australian women did not report their sexual assault to police.¹ When complaints are made, a further winnowing occurs at the prosecution stage which sees between 15% and 20% of those accused of such crimes brought to trial,² with 3.5% ultimately convicted.³ These figures demonstrate a fundamental problem with the law, as well as with current service delivery, support mechanisms and criminal justice processes for victims.

The law should play a distinct role in addressing these problematic figures by providing clear guidance on the circumstances in which rape and sexual assault occur and offering a clear definition of consent that reflects contemporary respectful sexual relations.⁴ There are, of course, limits to what laws can achieve in bringing about social change. Nonetheless, the law can be used to classify what is and what is not acceptable conduct, and what is expected prior to and during sexual activity.

Too often, the complexity of rape is reduced to a simple narrative informed by ‘rape myths’, where rape is understood as a violent act committed by a stranger, generally because of risky activities by the victim (particularly women victims).⁵ This leads us to assume a certain perspective on rape, and that victims (again, particularly women) are in some way responsible for preventing their own assaults. These assumptions are frequently evident in cases featuring circumstances at odds with the prevailing narrative, such as a delay in the victim reporting a rape or where the victim was intoxicated when they were assaulted.

The law also struggles to deal with rapes occurring in the context of an intimate relationship, or indeed most situations where the victim and perpetrator were known to each other. The persistence of ‘rape myths’ means that these assaults are often regarded as not meeting the stereotype that people associate with ‘real rape’.⁶ Given that most sexual crimes in Queensland (and Australia more broadly) occur in a residential location⁷ and are carried out by someone known to the victim,⁸ it is particularly troubling that the law has traditionally and consistently failed victims in these circumstances. The Bill seeks to address this.

The Bill begins by stating some key facts around rape and sexual assault victimisation. These are designed to counteract misconceptions of rape, including ‘rape myths’ and victim-blaming attitudes. Among other key principles, this section of the Bill requires courts to consider the following:

- There is a high incidence of sexual violence within society;
- Sexual offences are significantly under-reported;
- Sexual offenders are commonly known to their victims;
- Sexual offences most frequently occur in residential locations;
- There are common and legitimate reasons why victims of sexual violence may not physically resist an assault, including, but not limited to, physiological responses to aggression and fear of escalating or prolonging the attack;
- Sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred; and
- There are common and legitimate reasons why victims of sexual violence may not immediately report an assault to police or another party and a failure to make an immediate report, on its own, does not discredit an allegation.

The Bill also seeks to place rape and sexual assault victimisation in context. Globally, an estimated 35% of women have experienced either physical and/or sexual intimate partner violence, or sexual violence by a non-partner (not including sexual harassment) in their lifetime.⁹ The Australian Bureau of Statistics reports that 19% of Australian women experience some form of sexual violence in their lifetime, while 8 out of 10 victims of sexual violence are women.¹⁰ Similarly, the most recent victimisation data from the Australian Bureau of Statistics finds that women make up 84% of reported sexual violence victims in Australia.¹¹

Broader patterns of sexual victimisation are also evident on the basis of age,¹² cognitive and physical impairment,¹³ sexuality,¹⁴ as well as Indigeneity, ethnicity and cultural and linguistic diversity.¹⁵ The Bill’s guiding principles place these experiences in context by stating that ‘a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment or mental illness’.

Definition of Consent and Rape

Rape and sexual assault occur when sexual penetration or sexual touching takes place without consent.¹⁶ Consent continues to be the primary issue at play in rape trials. The way consent is understood also contributes to low reporting rates for rape and sexual assault, as well as high attrition rates throughout the investigation and prosecution process. The Bill seeks to clarify the meaning of consent in law by providing a clear definition of consent as ‘free and active agreement’ using an affirmative consent standard, as well as defining what constitutes ‘active agreement’ to limit any confusion as to what this might look like.

An affirmative consent standard requires that a person demonstrates an ongoing willingness to engage in a sexual act, either verbally or through their actions.¹⁷ Affirmative consent diverges from ‘traditional’ understandings of consent, which require a victim to express non-consent or actively resist a sexual act. It instead places the onus on each party to take active steps to ensure the other party is consenting before and during the sexual encounter.¹⁸ In other words, the focus is on the *communication* between the parties. This approach better reflects the realities of sexual violence victimisation, where it is a common and understandable response for victims to freeze, shut down and/or stay silent during their assault.¹⁹

Under an affirmative consent standard, consent cannot be implied from the victim’s (perceived) behaviour in the hours or days prior to the act, nor can it be inferred, for example, from previous consensual sexual encounters.²⁰ This provides a clear message that consent must be present at the time of the sexual act and must continue while the act itself continues. It addresses concerns around sexist discourses and outdated rape myths which imply if the victim had acted differently, ‘the perpetrator would not have thought she “wanted sex” and would therefore not have raped her’.²¹ By reducing the opportunities for these ‘implied consent narratives’ to function at trial,²² the Bill directly challenges victim-blaming attitudes.

An affirmative consent standard also recognises that if one party to a sexual act departs from the agreed sexual conduct – for example, if consent was premised on the person wearing a condom, which they later remove – there is no requirement on the victim to revoke consent or express non-consent. Each party must continue to ensure the other person consents throughout the entire sexual encounter.

This approach, in which sexual consent is based on ongoing active agreement by all parties, is achieved in this Bill by stating that ‘consent means free and active agreement to an act by a person with the cognitive capacity to give consent’. It is further reflected in provisions stating that:

- active agreement requires consent to have been expressed immediately before and during the sexual encounter;
- active agreement to a sexual act cannot be expressed hours, days or weeks prior to the sexual act occurring;

- active agreement cannot be implied. It must be clearly and positively expressed;
- each person engaging in sexual penetration or sexual touching must take steps to find out whether the other person consents to each sexual act, and to ensure that they continue to consent throughout the sexual encounter.

This Bill makes a substantive change to the law by providing these clear definitions of active agreement, seeking to counteract a system that allows victims to be blamed for their rape or sexual assault.

The Bill also provides a clear, but non-exhaustive, list of consent-negating circumstances that can be used by the courts to better understand the circumstances in which consent *cannot* be present, regardless of the perpetrator's claims the victim was consenting. This includes circumstances such as submitting due to force, fear, threats, intimidation or perceived or actual authority,²³ as well as circumstances such as where the victim is substantially affected by alcohol or another drug, or asleep or unconscious when any part of the sexual act occurs.

The Bill also includes a non-exhaustive list of circumstances in which the victim is unable to understand the nature of the sexual act, or where the victim submits because they are misled about a material fact, in the absence of which they would not have submitted.²⁴ This includes, for example, being misled about:

- the sexual nature of the act;
- the identity of any other person involved in the act;
- the purpose of the act (including medical, hygienic, veterinary, agricultural or scientific purposes);
- gifts or payment promised in relation to the act; or
- condom use by any other person involved in the act.²⁵

In cases where any of these consent-negating circumstances can be established, the perpetrator should be found guilty of rape.

The current definition of rape in Queensland makes use of the common law term 'carnal knowledge',²⁶ an obscure and gendered term which has been replaced in other Australian jurisdictions.²⁷ This definition reflects the traditional understanding of rape as confined to penetration of the vagina by the penis, but has long been expanded to include other forms of sexual penetration. Because the offence of rape is now gender-neutral, this outdated and confusing terminology should not be retained.

Mistake of Fact Excuse

The Bill will eliminate the mistake of fact excuse²⁸ for the issue of consent in cases of rape and sexual assault. This excuse undermines the free and active agreement definition of consent now enshrined in the law. It also

perpetuates harmful and false rape myths, allowing these myths to wrongfully become the focus of the trial.²⁹

Under the mistake of fact excuse, a perpetrator can argue that even if the victim did not consent to the sexual act, they honestly and reasonably, but mistakenly, believed that they did and therefore should be found not guilty.³⁰ As recent research into the Queensland case law shows, this excuse has a number of undesirable consequences.³¹ The main concern is that it undermines the way Queensland law construes the notion of free and active consent, by allowing factors such as the victim's social behaviour, relationship to the perpetrator or lack of overt resistance to be raised by the perpetrator in order to avoid liability.

There are several reasons why a victim may not resist or express lack of consent to a sexual act, even though they are unwilling to engage in it. First, they may be afraid due to the express or implicit threat of physical violence. Second, they may be affected by the 'freezing response' that is a common psychological reaction to aggression or trauma.³² Third, they may be inclined to pacify the aggressor, rather than confronting them directly.³³ And fourth, they may rationally judge that it is safer not to 'fight back', rather than risk escalating or prolonging the encounter.

Many cases feature a combination of these factors, each of which indicates a lack of consent. It is important the law clearly acknowledges this, especially since recent Queensland case law shows that a perpetrator is more likely to be able to rely on the mistake of fact excuse if the victim did not clearly resist their advances.³⁴ Even if the victim *did* resist, other factors (such as subsequent passivity or the exchange of money) can support the excuse. This troubling reasoning has been approved by the Court of Appeal, even where there is a clear power imbalance between the parties.³⁵

These cases show how rape myths and social expectations around sexual behaviour influence the mistake of fact excuse, even though they do not establish consent. Victims who go along with the perpetrator's advances under duress, who express affection after an assault has commenced in an attempt to placate a perpetrator, who experience a freezing response or do not vigorously resist or who have an ongoing financial, employment or other relationship with the perpetrator may find that these factors are considered relevant when the mistake of fact excuse is raised.

The excuse has also led to problematic results when applied to cases involving impaired capacity – such as intoxication, cognitive impairment or linguistic incapacity – by either the perpetrator or the victim. The effect of intoxication on the mistake of fact excuse effectively means the perpetrator can say, 'I was so drunk I thought they were consenting'. Intoxication of the victim also lowers the bar for the excuse – meaning that, effectively, the perpetrator can say, 'They were so drunk I thought they were consenting'. This argument can succeed even where the victim was, in fact, so intoxicated that they were incapable of giving consent.³⁶

The cumulative effect of these interpretations is that where the perpetrator and victim are both intoxicated, the bar for establishing the excuse may be very low. The criminal law does not generally accept intoxication as an excuse for, or a mitigation of, bad behaviour. Driving is a good example of people having criminal liability for their actions, despite being voluntarily drunk or affected by drugs.

A further factor that can lower the bar for the mistake of fact excuse is the cognitive impairment of the perpetrator or victim (or both). As with intoxication, cognitive impairment on the part of either party tends to favour the perpetrator where the mistake of fact excuse is concerned. The perpetrator's cognitive impairment can lower the bar for the excuse by making their mistake more likely to be honest and, to a limited extent, reasonable. However, the victim's cognitive impairment also lowers the bar by enabling the perpetrator to contend that they misunderstood the victim's resistance. Again, as with intoxication, this argument can succeed even where the victim's incapacity casts doubt on their ability to have consented in the first place.

Our legal system contains special provisions to prevent perpetrators who do not have the cognitive capacity of an adult from being tried like other adults.³⁷ Judges also have a large discretion when sentencing someone with a different mental capacity, so they are not punished excessively given their difference.³⁸ Given these allowances, the mistake of fact excuse is not the best way to accommodate cognitive differences when doing justice.

Cases involving a perpetrator who is not proficient in the same language as the victim (regardless of whether that language is English) may also present an opportunity for a mistake of fact excuse, as counsel are able to paint a picture of 'grey areas' and 'miscommunications' that might otherwise seem unrealistic or unlikely. Linguistic incapacity being used to bolster mistake of fact arguments is at odds with the law not requiring a victim to 'fight back' to establish a lack of consent, placing extra pressure on victims to fight back harder if the perpetrator doesn't speak their language. In many cases, there is also a clear power imbalance between the victim and perpetrator which is exacerbated by the language difference. Indeed, several recent Queensland cases suggest that vulnerable victims who do not speak the same language as the perpetrator may be deliberately targeted for rape.³⁹

The Bill responds to these problems by specifically and clearly removing the mistake of fact excuse in rape and sexual assault cases. The language used is based on similar wording elsewhere in the *Criminal Code*.⁴⁰

Conclusion

In conclusion, this Bill introduces an affirmative model of consent for sexual relations, thereby addressing confusion around what constitutes consent. Further, the Bill seeks to rectify the damage caused by the mistake of fact excuse in rape and sexual assault cases, which undermines an affirmative

consent model by shifting responsibility for the rape on to the victim and their behaviour.

There are several key benefits of the Bill, including increased clarity on the definition of consent and directly challenging outdated rape myths that have continued to infiltrate the law and the criminal justice process. The Bill will improve justice experiences for rape and sexual assault victims, as well as providing a vehicle to change problematic social attitudes that perpetuate victim-blaming. It does this by placing the onus on each party to a sexual act to seek *ongoing* agreement from anyone with whom they wish to engage in sexual penetration or touching.

Ultimately, this Bill makes significant improvements to Queensland's sexual offence laws.

We commend the Bill to the House.

Queensland

Criminal Code Amendment (Sexual Offences) Bill 2024

A Bill

for

An Act to amend the *Criminal Code Act 1899* (Qld)⁴¹

The Parliament of Queensland enacts –

1 Insertion of new sections 347A and 347B

Before section 348

insert –

Section 347A – Objectives of this chapter

The objectives of this chapter are –

- (a) to uphold the fundamental right of every person to make decisions about their sexual behaviour and to choose not to engage in sexual activity;
- (b) to protect the following persons from sexual exploitation –
 - (i) children;
 - (ii) persons with an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
 - (iii) other vulnerable persons.

Section 347B – Guiding principles

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

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

- (g) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred; and
- (h) there are legitimate reasons why victims of sexual violence may not immediately report an assault to police or another person, and a failure to make an immediate report does not on its own discredit an allegation.

2 Section 348 (Meaning of *consent*)

Section 348(1)–(4) – *omit, insert* –

- (1) In this chapter –
 - (a) **Consent** means free and active agreement to an act by a person with the cognitive capacity to give consent.
 - (i) Consent to one act does not constitute consent to a different act, even where the acts are part of the same sequence of acts.
 - (b) **Active agreement** means that each person involved in an act takes steps to find out whether each other person involved consents to the act, and to ensure that they continue to consent for the duration of the act.
 - (i) Active agreement cannot be inferred from the circumstances of an act. It must be clearly and positively expressed.
 - (ii) Active agreement must be present immediately before and during an act. It cannot be inferred from words or actions made hours, days or weeks prior to the act occurring.
- (2) There are circumstances in which a person does not consent to an act. These include, but are not limited to, the following –
 - (a) the person submits to the act due to force or the fear of force or harm of any kind, whether to that person or someone else or an animal;
 - (b) the person submits to the act due to threats or intimidation, whether physical, verbal or through control of the physical environment;
 - (c) the person submits to the act because they are unlawfully detained;
 - (d) the person submits to the act due to the exercise of actual or apparent authority;
 - (e) the person is asleep or unconscious when any part of the act occurs;
 - (f) the person is so affected by alcohol or another drug as to lack the cognitive capacity to consent to the act;
 - (g) the person lacks the cognitive capacity to understand the sexual nature of the act;
 - (h) the person submits to the act due to an incorrect belief, induced by or with the knowledge of any other person involved in the act, as

to any fact but for which the person would not have submitted to the act, including, but not limited to:

- (i) facts about the sexual nature of the act;
 - (ii) facts about the identity of any other person involved in the act;
 - (iii) facts about the purpose of the act (including medical, hygienic, veterinary, agricultural or scientific purposes); or
 - (iv) facts about gifts or payment promised in relation to the act.
- (i) the person submits to the act in the belief, induced by or with the knowledge of any other person involved in the act, that the other person will use a condom, and the other person does not do so or ceases to do so at any time during the act.

3 Section 348A (Mistake of fact in relation to consent)

Section 348A –

Omit.

4 Section 349 (Rape)

Section 349(2) –

omit, insert –

- (2) A person rapes another person if –
- (a) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body without the other person’s consent; or
 - (b) the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.

After section 349(5) –

insert –

- (6) Section 24 does not apply in relation to a belief of the person who performs an act referred to in subsection (2)(a) or (b) that the person on whom that act is performed is consenting to it.

5 Section 350 (Attempt to commit rape)

After section 350(3) –

insert –

- (4) Section 24 does not apply in relation to a belief of the person who attempts to perform an act referred to in section 349(2)(a) or (b) that the person on whom that act is attempted is consenting to it.

6 Section 351 (Assault with intent to commit rape)

After section 351(3) –

insert –

- (4) Section 24 does not apply in relation to a belief of the person who assaults another with intent to perform an act referred to in section

349(2)(a) or (b) that the person on whom that act is intended to be performed is consenting to it.

7 Section 352 (Sexual assaults)

After section 352(5) –

insert –

- (6) Section 24 does not apply in relation to a belief of the person who performs an act referred to in subsection (1)(a) or (b) that the person on whom that act is performed is consenting to it.

Notes

- 1 Australian Bureau of Statistics, *Personal Safety Survey 2005 (Reissue)* (Catalogue number 4906.0, 21 August 2006).
- 2 Australian Bureau of Statistics, *Recorded Crime Victims Australia 2018–19* (Catalogue number 4510.0, 9 August 2020); K Daly, ‘Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases’ (2006) 46(2) *British Journal of Criminology* 334; A Flynn, ‘Sexual Violence and Innovative Responses to Justice: Interrupting the Recognisable Narratives’ in A Powell et al (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, 2015); Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003* (Report, 2004); Australian Institute of Criminology, ‘Women’s Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)’, *Research and Public Policy Series, No 56* (Report, 1 January 2004), <https://aic.gov.au/publications/rpp/rpp56>.
- 3 Daly (n 2); Flynn (n 2).
- 4 See generally A Powell et al (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, 2015).
- 5 Flynn (n 2). See also N Christie, ‘The Ideal Victim’ in E Fattah (ed) *From Crime Policy to Victim Policy* (Oxford University Press, 1988); S Estrich, *Real Rape* (Harvard University Press, 1988); L Pineau ‘Date Rape: A Feminist Analysis’ (1989) 8 *Law and Philosophy* 217.
- 6 For discussion, see A Powell et al, ‘Meanings of “Sex” and “Consent”: The Persistence of Rape Myths in Victorian Rape Law’ (2013) 22 *Griffith Law Review* 456.
- 7 Australian Bureau of Statistics, *Personal Safety Survey* (Catalogue No 4906.0, 2016); A Moran, ‘Patterns of Rape: A Preliminary Queensland Perspective’ in P Eastal (ed) *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology, 1993) 39–40, <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/20-moran.pdf>.
- 8 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) 42.
- 9 United Nations, ‘Facts and Figures: Ending Violence Against Women’, *UN Women* (United Nations, 2019), <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.
- 10 Australian Bureau of Statistics (n 1).
- 11 Australian Bureau of Statistics (n 2).
- 12 S E Baumgartner et al, ‘Unwanted Online Sexual Solicitation and Risky Sexual Online Behavior Across the Lifespace’ (2010) 31(6) *Journal of Applied Developmental Psychology* 439; N Henry et al, *Responding to ‘Revenge*

- Pornography: Prevalence, Nature and Impacts* (Australian Institute of Criminology, 2019), <http://crg.aic.gov.au/reports/1819/08-1516-FinalReport.pdf>; A Powell et al, 'Image-Based Sexual Abuse' in W DeKeseredy and M Dragiewicz (eds) *Handbook of Critical Criminology* (Routledge, 2018).
- 13 M B Hossain et al, 'Are Female College Students who are Diagnosed with Depression at Greater Risk of Experiencing Sexual Violence on College Campus?' (2014) 25 *Journal of Health Care for the Poor and Underserved* 1341; I Khemka and L Hickson, 'Decision-Making by Adults with Mental Retardation in Simulated Situations of Abuse' (2000) 38 *Mental Retardation* 15; J A Snyder, 'The Link between ADHD and the Risk of Sexual Victimization Among College Women: Expanding the Lifestyles/Routine Activities Framework' (2015) 21 *Violence Against Women* 1364.
 - 14 Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* 2017 (Report, August 2017), https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_2017_ChangeTheCourse_UniversityReport.pdf; A Flynn and N Henry, 'Image-Based Sexual Abuse: An Australian Reflection' (2021) 31 *Women and Criminal Justice* 313; P R Sterzing et al, 'Social Ecological Correlates of Polyvictimisation Among a National Sample of Transgender, Genderqueer, and Cisgender Sexual Minority Adolescents' (2017) 67 *Child Abuse and Neglect* 1.
 - 15 F Al-Yaman et al, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (Australian Institute of Health and Welfare, 2006); B Carlson, 'Indigenous Social, Cultural and Political Engagements on Social Media', paper presented at the QUT Creative Industries Indigenous Seminar Series, 2 June 2017, <https://nowalls.qut.edu.au/wp-content/uploads/2017/05/Bronwyn-Carlson-Indigenous-Seminar-Presentation.pdf>; H Douglas et al, 'Technology-Facilitated Domestic and Family Violence: Women's Experiences' (2019) 59 *British Journal of Criminology* 551; Office of the eSafety Commissioner, *eSafety for Women from Culturally and Linguistically Diverse Backgrounds: Summary Report* (Office of the eSafety Commissioner, 2019), <https://www.esafety.gov.au/about-the-office/research-library/technology-facilitated-abuse>.
 - 16 *Criminal Code* 1899 (Qld) ss 349, 352.
 - 17 R Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59 *British Journal of Criminology* 296.
 - 18 A Flynn and N Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167.
 - 19 J Crowe and B Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and a Proposal for Reform' (2020) 39 *University of Queensland Law Journal* 1.
 - 20 R Burgin and A Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21 *Criminology and Criminal Justice* 334.
 - 21 Ibid. See also E Craig, 'Ten Years after Ewanchuk: The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defense' (2009) 13(3) *Canadian Criminal Law Review* 247.
 - 22 Burgin and Flynn (n 20).
 - 23 J Crowe and L Sveinsson, 'Intimidation, Consent and the Role of Holistic Judgments in Australian Rape Law' (2017) 42 *University of Western Australia Law Review* 136.
 - 24 This mirrors the current law in Western Australia, Tasmania and the Australian Capital Territory. See J Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38 *Criminal Law Journal* 236, 239.
 - 25 In a 'recent joint study between the Melbourne Sexual Health Centre and Monash University, one in three women and nearly one in five men' reported experiencing

- non-consensual removal of a condom during sex. See B Chesser, 'Case in Victoria Could Set New Legal Precedent for Stealthing, or Removing Condom During Sex', *The Conversation* (16 August 2019), <https://theconversation.com/case-in-victoria-could-set-new-legal-precedent-for-stealthing-or-removing-condom-during-sex-118343>.
- 26 *Criminal Code 1899* (Qld) s 349.
- 27 See, for example, *Criminal Law Consolidation Act Amendment Act 1976* (SA); *Crimes (Amendment) Ordinance (No 5) 1985* (ACT); *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas); *Law Reform (Decriminalization of Sodomy) Act 1989* (WA); *Criminal Code Amendment Act (No 3) 1994* (NT).
- 28 *Criminal Code 1899* (Qld) s 24.
- 29 Burgin (n 17); Crowe and Lee (n 19); J Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21; J Crowe et al, 'Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law' (2023) 50 *University of Western Australia Law Review* 284.
- 30 It is the prosecution's responsibility to negate the excuse if it arises on the facts. This creates the possibility of the mistake of fact excuse being raised on appeal, even if it was not argued at trial (or, indeed, directly contradicts the perpetrator's version of events). See, for example, *R v Elomari* [2012] QCA 27; *R v Soloman* [2006] QCA 244; *R v Cook* [2012] QCA 251. For detailed discussion of these cases, see Crowe and Lee (n 19).
- 31 Crowe and Lee (n 19).
- 32 See, for example, S D Suarez and G G Gallup, 'Tonic Immobility as a Response to Rape in Humans: A Theoretical Note' (1979) 29 *Psychological Record* 315; G C Mezey and P J Taylor, 'Psychological Reactions of Women Who Have Been Raped: A Descriptive and Comparative Study' (1988) 152 *British Journal of Psychiatry* 330; G Galliano et al, 'Victim Reactions during Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates' (1993) 8 *Journal of Interpersonal Violence* 109.
- 33 See, for example, S E Taylor et al, 'Biobehavioral Responses to Stress in Females: Tend-and-Befriend, Not Fight-or-Flight' (2000) 107 *Psychological Review* 411; S E Taylor et al, 'Sex Differences in Biobehavioral Responses to Threat: Reply to Geary and Flinn' (2002) 109 *Psychological Review* 751.
- 34 QLRC (n 8) 41.
- 35 See, for example, *R v Dunrobin* [2008] QCA 116; *R v Kovacs* [2007] QCA 143. For detailed discussion of these cases, see Crowe and Lee (n 19).
- 36 See, for example, *R v CU* [2004] QCA 363, 5 (Jerrard JA); *R v SAX* [2006] QCA 397, [20] (Keane JA). For detailed discussion of these cases, see Crowe and Lee (n 19).
- 37 *Criminal Code 1899* (Qld) s 27.
- 38 *Penalties and Sentencing Act 1992* (Qld) s 18(a).
- 39 See, for example, *R v Kovacs* [2007] QCA 143; *R v Lennox* [2018] QCA 311.
- 40 *Criminal Code 1899* (Qld) s 365B. See also *Criminal Code of Canada* s 273.2.
- 41 *Criminal Code Act 1899* (Qld). The proposed amendments are based on the Act incorporating amendments as at 21 September 2022. <https://www.legislation.qld.gov.au/view/html/inforce/2022-09-12/act-1899-009>.