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Attn: Mr David Groth

Friday 31 January 2019

Submission for Consent and Mistake of Fact Review

Feminist Legal Clinic Inc. is a community legal service that works to advance the human rights of women and girls through a combination of targeted casework, community legal education and law reform submissions.

Please find following our responses to the questions raised in the Consultation Paper. Please note that we intentionally make use of male pronouns for defendants and female pronouns to refer to victims to reflect the sex-based reality of most sexual crimes.

CHAPTER 2: BACKGROUND AND OVERVIEW

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? What is the basis of these concerns or problems?

Men are too often escaping conviction for rape and sexual assault by claiming mistake of fact or otherwise disputing that consent was absent.

For example, defendants are currently able to argue they believed the victim was consenting because they did not clearly resist advances. This problem has been addressed in states such as Tasmania where section 2A(2)(a) of the Schedule of the *Criminal Code* 1924 (Tas) provides: “a person does not freely agree to an act if the person –

(a) does not say or do anything to communicate consent”¹

¹ Criminal Code 1924 (Tas) Schedule 1, section 2A(2)(a) states: Without limiting the meaning of ‘free agreement’, and without limiting what may constitute ‘free agreement’ or ‘not free agreement’, a person does not freely agree to an act if the person (a) does not say or do anything to communicate 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?

Consideration should be given to the unfairness of men routinely escaping liability for rape and sexual assault and the principles of justice should be put into operation. It should not be possible for a man to escape conviction by simply claiming that he misconstrued a victim's silence or failure to resist as consent.

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?

The definition is missing key elements. One element is that consent needs to have been positively communicated. This is in line with community expectations that men should not assume consent when it has not been clearly communicated.

By analogy, in a medical context, a doctor could not rely upon consent that was not positively communicated. A patient's failure to resist a doctor should not be taken to indicate consent if there has been no explicit communication in advance in relation to the procedure being undertaken.

Another absent element is the need for consent to be informed. Again, in a medical context the need to provide relevant information relating to risks and consequences in advance of a procedure is standard practice. There is no good reason why a lesser standard should apply to sexual encounters which also carry a significant risk of harm to the individual.

For example, if an individual is aware that they have a contagious venereal disease, or perhaps is breaching an agreement in relation to fidelity or has removed a contraceptive, it should be incumbent on them to share these pertinent facts at the time of securing consent for it to be valid. A failure to disclose such influential information should be regarded as negating consent, as it would in a medical context.

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?

It is in the public interest to strengthen the requirement for affirmative consent to reduce the scope for misunderstanding in sexual encounters and stop sexual perpetrators wrongfully escaping conviction. Such an amendment would also play an educative role in generally promoting clearer communication between individuals contemplating intimate relations. It would also be cautionary to itemise what does not constitute consent. For example, in Victoria, section 36 (2) (1) of the *Crimes Act 1958* (Vic) sets out various circumstances in which a person does *not* consent to an act, and

explicitly includes where: “the person does not say or do anything to indicate consent to the act”.

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)?(d)in some other way (and if so, how)?

We have indicated below in red some simple amendments to the existing legislation which we suggest would achieve the purpose in a concise manner.

- (1) In this chapter, "consent" means **informed** consent freely, voluntarily and **explicitly communicated** by a person with the cognitive capacity to give the consent.
- (2) Without limiting subsection (1), a person’s consent to an act is not freely and voluntarily given if it is obtained—
 - (a) by force; or
 - (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, **or**
 - (g) by a failure by the accused person to honestly inform a sexual partner of any fact that is relevant to their decision whether to engage in the sexual behaviour due to its potential impact upon their health and well-being.**

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

Such changes would perform an educational role in encouraging individuals to be both more honest and more circumspect in relation to sexual encounters and ensure that consent is explicitly obtained with proper consideration given to the interests of the person’s sexual partner and the potential consequences of the encounter for their health and well-being.

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?

An express provision is required because of the apparent tendency by male perpetrators of sexual violence to be obtuse. It must be made clear that a sexual act that continues after withdrawal of consent at any stage is sexual assault.

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?

Yes. This list would play an educative role in encouraging greater consideration and sensitivity to the circumstances of the sexual partner. It would also provide statutory guidance to jurors and encourage them to focus their attention on the importance of examining the accused’s conduct, including coercive behaviour and any power imbalance in the relationship.

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? (b) where the person fails to use a condom as agreed or sabotage the condom? (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? (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, all of those should be included.

Q-10 Should other specific circumstances be included in section 348(2) of the Criminal Code? If so, what should they be?

Yes, as suggested above a general provision should be included to capture circumstances in which consent has been obtained:

g) by a failure by the accused person to honestly inform a sexual partner of any fact that is relevant to their decision whether to engage in the sexual behaviour due to its potential impact upon their health and well-being.

Q-11 If yes to Q-8 to Q10, what differences and what advantages or disadvantages might result from any changes?

Such changes might discourage some spontaneity in sexual encounters. On the other hand, the advantage is that it is likely to reduce the spread of disease, unwanted pregnancies and sexual assault allegations – all of which is in the community’s best interests.

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? Why or why not?

If the other suggested changes are made there is less scope for the defence to argue that the accused made a mistake of fact. The dispute would more narrowly centre on

whether the complainant had positively communicated consent and therefore is less likely to involve offensive speculation about the complainant's sexual proclivities in general.

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?

Once the complainant gives evidence that she did not communicate consent, she will have discharged the onus of proof on the prosecution in respect to this element of the offence. A defendant can still counter with his own evidence rebutting this. However, if on his own version explicit consent was not given, his mistaken belief is not relevant. There should be no scope for him to argue that his mistaken belief was honest and reasonable where he concedes there was no explicit communication of consent. It would not be reasonable for a car thief to argue he had an honest and reasonable belief that the owner would be happy for him to take his car based only on the car owner's general proclivities to lend his car to others. It is generally accepted that individuals should seek permission to use someone's car. Surely, we should respect at least equal boundaries when it involves a woman's body.

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

The onus of proof should still rest with the prosecution. However, once the complainant has given evidence that she did not explicitly communicate consent, the onus is discharged as the prosecution case is made out regarding this element. It is a matter for the defence to rebut this evidence and there should be no scope for them to split hairs over what subtleties may be mistaken for consent.

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? Why or why not?

The argument for introducing a lesser offence invoking "recklessness" or "negligent rape", would be to provide an easier means of securing a conviction in cases where it is her word against his. This could offer a back-up charge that may be more likely to attract a plea, particularly in cases where the defendant claims to have been intoxicated. Of course, a requirement that there has been explicit communication of consent already negates the need for this to some extent. If the defendant cannot rebut her evidence that she did not give consent, the fact that he believed or assumed for nebulous reasons that she was consenting is irrelevant. If he had sex with her without explicit communication of her consent he is committing a crime, regardless of whether he intended to rape her or was just recklessly indifferent to her feelings. Although it may be a relevant consideration in sentencing.

Q-16 If yes to Q-15, how should this be achieved? For example: (a) Should the excuse of mistake of fact be excluded if the defendant was reckless as to whether or not the complainant was consenting? (b) Should 'recklessness' be defined in the Criminal Code and, if so, how?

Section 349 needs to be redrafted in its entirety. The use of the term "carnal knowledge" is antiquated and the section is drafted in a confusing manner. It is also problematic that the section states: *For this section, a child under the age of 12 years is incapable of giving consent* giving the false impression that those over 12 years will be considered capable of consenting. Although section 215 makes clear that carnal knowledge of a child under 16 years is also unlawful, section 349 should be capable of standing alone. The whole section should be redrafted making intentionally or recklessly having sex without explicit communication of consent a crime. We are happy to provide detailed suggestions for redrafting if called upon.

Q-17 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?

It is important that the legislation is clear in its intention and unambiguous as any uncertainty in relation to interpretation creates loopholes that may provide opportunities for perpetrators to escape conviction. The proposed amendments would have the advantage of keeping laws in line with community expectations in relation to rape and sexual assault. In so doing, Queensland will be moving forward like other states such as Victoria and Tasmania.

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? Why or why not?

It should be enough that consent must have been explicitly communicated. In view of the considerable difficulty in this area, it might be best to provide direction by including a section that specifies that silence, acquiescence or a lack of resistance does not constitute consent. However, adding a requirement of reasonable steps is likely to just further complicate considerations for a judge or jury without any additional benefit.

Introducing a threshold test would unnecessarily complicate proceedings and put greater emphasis on the whole question of consent. If the victim has provided evidence that she did not consent this establishes a prima facie case in respect to that element of the crime. To rebut this a defendant would have to provide unequivocal evidence that consent was explicitly communicated to him.

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?

This requirement should not be added for the reasons stated above.

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?

Such a requirement unnecessarily complicates the proceedings. It places too much emphasis on the consent element of the crime. Regardless of the steps taken by a man, reasonable or not, a woman may choose to withhold consent or withdraw consent at any time.

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

These amendments would place increased focus on the element of consent and would therefore be counterproductive. If the woman gives evidence that she did not consent, that should be accepted unless the defendant gives evidence that she is lying, in which case the respective credibility of the parties will need to be weighed.

A reasonable steps requirement is counter-productive. Even if a defendant could show that he took reasonable steps, that in no way necessarily establishes that the woman was consenting if she claims she was not. It would be an unnecessary and confusing waste of court time.

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?

If an individual takes someone's car without their consent while drunk, it does not cease to be a crime. Similarly, being drunk is not an excuse for sexual assault. It may feature as a mitigating factor in sentencing but it does not alter whether the crime was committed.

Q-23 If yes to Q-22, how should intoxication of a defendant operate in respect of the question of honesty and/or reasonableness of a defendant's belief as to consent?

Being drunk should not in itself provide a basis for defending rape or any other crime. If intoxication were regarded as automatically negating mens rea, this would provide an individual with carte blanche to commit crimes while under the influence of drugs or alcohol. The fact that in a drunken state an individual could honestly believe they

had permission to commit rape is more reason to see them convicted and incarcerated for the greater safety of the community. This belief cannot be characterised as reasonable in any event, since this level of intoxication is not reasonable.

Q-24 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?

Enabling intoxication to be used as a basis for claiming reasonable mistake would just provide a carte blanche for rapists.

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? See also Q-13 and Q-14 above when interpreting provisions relating to rape and the sexual offences in Chapter 32 of the Criminal Code? Why or why not?

It should be obvious that the Criminal Code is about bringing people to justice for committing crimes for the protection of the community. This should not exclude holding drunk men accountable for raping women.

However, for abundant clarity new interpretive principles could include that "every person has a fundamental right to choose whether or not to participate in a sexual activity"; "a person's consent to a sexual activity should not be presumed"; and "sexual activity should involve ongoing and mutual communication".

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?

It seems amendments are required to provide clarity for men who otherwise believe they should be able to sexually assault women with impunity, particularly when they or the woman is intoxicated. It is hard to know whether the proposed amendments will succeed in changing these attitudes, but hopefully they should play an educative role if broadly publicised.

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?

This is surely implicit by operation of the common law.

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

It will depend on the facts of each case.

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?

It can only be hoped that any amendments will operate to improve the delivery of justice by increasing the rate of conviction for rape and sexual assault.

Education and awareness

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

Public education programs are essential but should focus on the importance of obtaining explicit consent in sexual encounters rather than the possibility of claiming you made a mistake as a potential defence.

Thank you for the opportunity to make this submission. We are happy to expand on any element of it if required.

Yours faithfully



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