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| Review of consent laws and the excuse of mistake of fact |
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| **Submission**  **to**  **Queensland Law Reform Commission** |

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| 31 January 2020 |

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# Introduction

1. Thank you for the opportunity to provide a submission to the Queensland Law Reform Commission’s (QLRC) review of consent laws and the excuse of mistake of fact. This inquiry arises from a referral from the Attorney General to consider, in summary, whether there is a need for reform of:
   1. The definition of consent in section 348 of the *Criminal Code*;
   2. 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
   3. Any other matters the Commission consider relevant.
2. In making its recommendations, the QLRC is to have regard to a range of matters including community standards and the need to balance the interests of complainant and accused persons.
3. This submission considers the application of the Queensland *Human Rights Act 2019* (HRA) to the issues raised in the consultation paper. The HRA provides a framework to balance the rights of all Queenslanders. The criminal law limits and promotes several rights, most particularly of a complainant and an accused, as well as the broader community’s right to be safe.
4. As the consultation paper notes, other jurisdictions have approached these issues differently and while they provide guidance, direct adoption of any specific provision or mechanism into Queensland law is problematic. With this in mind, the Queensland Human Rights Commission (QHRC) provides this submission to outline the general human rights issues that may arise from any reform. We would welcome the opportunity to provide further submissions once a clearer picture emerges of the legislative reform that may be recommended by the Inquiry (or arise through the Government’s response).
5. The Victorian Law Reform Commission’s 2016 Report on the Role of Victims of Crime in the Criminal Trial Process discussed the principles of a fair trial in some detail. It noted that the state’s control of all elements of the criminal process has resulted in a focus on how to address the power imbalance and ‘equality of arms’ with the accused. This focus has eclipsed the recognition of the victim’s inherent interest in the response by the criminal justice to the crime. The report notes that the Victorian Charter, substantially similar to the HRA, reinforces several rights of the accused relevant to receiving a fair trial. This however does not prevent the interests of the victim being considered.

The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community. The legitimate rights of victims, properly understood, do not undermine those of the accused or of the community. The true interrelationship of the three is complementary. There is a public interest in ensuring that trials are fair. This interest can be served not only by safeguarding the rights of the accused and the objectivity of the prosecution but also by acknowledging the victim’s interest.[[1]](#footnote-1)

1. The Commission appreciates that this referral is concerned with achieving similar aims. While any limitation on rights must be specifically justified, the QHRC broadly supports a statutory definition of consent, which requires examination of whether consent was free and voluntary taking into account all the relevant circumstances, including steps taken by the accused to ascertain the presence of consent. This will help advance women’s right to equal protection of the law without discrimination, given that sexual assault is predominantly a gendered crime.
2. The QHRC also takes this opportunity to raise a related issue not specifically dealt with in the terms of reference but relevant to this review. This concerns the automatic negation of consent for a person who is ‘impaired’, which limits the right to equality of people with disability.

# About the QHRC and the HRA

1. The QHRC has functions under the *Anti-Discrimination Act 1991* (ADA) and the HRA to promote an understanding and discussion of human rights in Queensland, and to provide information and educative services about human rights.
2. The HRA draws upon rights in the *International Covenant on Civil and Political Rights* (ICCPR). The three main requirements for limitations on ICCPR rights are: legality, necessity, and proportionality. The substantive requirements of necessity and proportionality are interrelated, which is reflected in the provision for the limitation of human rights in the HRA.[[2]](#footnote-2)
3. Section 13(2) of the HRA sets out factors for deciding whether a limit on a right is reasonable and justified including:
4. the nature of the human right;
5. the nature and purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
6. the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
7. whether there are any less restrictive and reasonably available ways to achieve the purpose;
8. the importance of the purpose of the limitation;
9. the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
10. the balance between the matters mentioned in paragraphs (e)   
    and (f).
11. The QHRC supports the important purpose of rape and sexual assault laws to protect the individual rights of bodily integrity and human dignity. The recommendations of the ‘Taskforce on Women and the Criminal Code*’* (the Taskforce) that the legal concept of consent be focused on ‘free and voluntary agreement’ remains paramount. The increasing reports of sexual assault and community concerns about perpetrators of sexual violence being rarely held to account are also relevant. These factors all go to potentially justifying further law reform.
12. Based on international law and the experiences of other jurisdictions, whether any law reform in Queensland is a reasonable limitation on rights will turn on whether the likely limitation on rights is specifically and demonstrably justified as the least restrictive way of achieving these purposes.
13. The consultation paper raises a number of rights enshrined in the HRA relevant to an accused person including the presumption of innocence,[[3]](#footnote-3) not to be compelled to testify,[[4]](#footnote-4) and the right to have every element of a criminal charges proved by the prosecution beyond a reasonable doubt.[[5]](#footnote-5)
14. Complainants’ rights must also be considered in this review. Article two of the ICCPR obliges state parties to respect the rights of all individuals, and where not already provided for by existing legislation, take steps to amend laws to recognise rights. The United Nations Human Rights Committee has commented that this obligation includes ensuring individuals are protected not only by the State, but against violations of their rights by private persons. This includes taking appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[[6]](#footnote-6)
15. Relevant rights that must be fulfilled by the state for complainants in this context include the right to liberty and security of the person,[[7]](#footnote-7) right to life,[[8]](#footnote-8) and the right to equality,[[9]](#footnote-9) noting that victims of sexual assault are predominantly women.

# Definition of Consent

1. Based on the important purposes of rape and sexual assault laws, the QHRC is supportive in principle of reforms that are based on ensuring that consent is freely and voluntarily given. The QHRC also appreciates that the traditional focus of inquiry in criminal prosecutions has placed too great an emphasis on the conduct of the complainant without considering the conduct of the defendant.
2. However, the HRA requires that such reforms must limit rights to the least extent necessary, and this will include considering how such changes alter burdens of proof between the prosecution and defence. A fundamental element of any rape or sexual assault charge is whether the complainant did (or did not) consent to the sexual act.
3. Canada, the ACT and Victoria have human rights legislation analogous to the HRA and so provide some guidance as to how a human rights compatible approach made be made to these issues. In these jurisdictions reform has centred on statutory definitions of consent and the ‘reasonable belief’ of the defendant.
4. The ACT Human Rights Commission has noted, in providing advice on a private member’s bill proposing changes to the definition of consent, that it is preferable for concepts of consent and reasonable belief to be separated out, rather than combined in a single provision.[[10]](#footnote-10) The ACT Commission was concerned that conflating these two discrete issues (consent by one person compared to the responsibility of the other person to take steps to ascertain consent) was likely to result in ambiguity and uncertainty.
5. The ACT Commission nonetheless suggested that a fault element including reasonable grounds for belief in consent would be a human rights compatible approach:

The requirement that a person must have reasonable grounds for believing that the agreement was freely and voluntarily given sends a clear message that a person must be certain of consent. This is a step that necessarily involves communication with the other person.[[11]](#footnote-11)

1. The ACT Commission favoured a model closer in construction to Canadian and Victorian legislation. Section 273.2 of the *Criminal Code* (Canada) provides that belief in consent is not a defence where:

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

1. As the consultation paper notes, Victorian legislation takes a similar approach to the Canadian legislation, including a definition of consent that includes an element of ‘affirmative consent’. Section 36 of the *Crimes Act 1958* (Vic) defines consent as meaning ‘free agreement’ and sets out a non-exhaustive list of circumstances which negate consent including that ‘the person does not say or do anything to indicate consent to the act’. Victorian offences of rape and sexual assault include a fault element that the accused does not reasonably believe that the other person consented to the act. This fault element includes an objective standard as to whether the accused’s belief was reasonable. The Victorian law further requires that in determining if a person held a reasonable belief in consent, consideration must be had to whether any steps were taken by that person to find out whether the other person consents.
2. The accompanying human rights compatibility statement to these changes outlined the rights engaged, particularly the presumption of innocence, and noted that the non-exhaustive list negating consent:

…does not deem an element of the relevant offence to have been proved without evidence. The prosecution must still prove beyond reasonable doubt that the consent-negating circumstance existed.[[12]](#footnote-12)

1. The Victorian Parliamentary Scrutiny of Acts and Regulations Committee raised no human rights issues with these changes.[[13]](#footnote-13)
2. The approach in other human rights jurisdictions suggests that statutory definitions of consent and reasonable belief can be compatible with human rights, based on how they are framed, generally requiring that the prosecution must prove beyond reasonable doubt any consent-negating circumstance existed.
3. The construction of these offences is clearly relevant also to the existing mistake of fact excuse, as also flagged in the consultation paper.

# Mistake of Fact Excuse

1. The terms of reference for this review include considering removing the mistake of fact excuse for rape and other sexual offences. Section 24 of the *Criminal Code* provides for the excuse of mistake of fact. It states that a defendant 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’.
2. The burden of raising the excuse is an evidential one. That is, once the mistake of fact is reasonable on the evidence, it is for the prosecution to establish beyond reasonable doubt that the defendant did not have a mistaken belief or that if the defendant did, the belief was not honest or reasonable (as questions of fact for the jury to determine).
3. The consultation paper notes that there is a common law principle that presumes a guilty mind, or knowledge of the wrongfulness of an act, is an essential ingredient in every offence. The Australian Joint Parliamentary Committee on Human Rights has further suggested, in the context of strict and absolute liability offences, that the right to be presumed innocent is limited when offences allow ‘for the imposition of criminal liability without the need to prove fault’.[[14]](#footnote-14)
4. The key difference between absolute and strict liability offences is that absolute liability offences do not provide for a mistake of fact excuse or defence. The Committee observes that:

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.[[15]](#footnote-15)

1. While the consultation paper does not necessarily discuss specific strict or absolute liability offences, these concepts are relevant to considering removing the mistake of fact excuse as it does illustrate such a change must be demonstrated to be a reasonable limitation on the presumption of innocence.
2. In relation to the presumption of innocence, it is also relevant that the current mistake of fact excuse places an evidential (not legal) burden on the defendant. The consultation paper questions if this burden should be changed to a legal one – that is, the defendant would have to prove on the balance of probabilities that the defence is proved. This is on the basis that the defendant is best placed to provide proof of their belief as to consent.
3. The consultation paper notes that ‘a reversal of the onus may be seen as a significant inroad into the presumption of innocence’. This reflects a risk that in placing a legal burden on a defendant they will be convicted, not because they committed the criminal act, but because they were unable to overcome such a burden. The Commonwealth Parliamentary Joint Committee on Human Rights has observed:

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective’. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.[[16]](#footnote-16)

1. The consultation paper further questions if the *Criminal Code* should introduce the concept or recklessness with respect to the question of consent in rape and sexual assault including excluding the mistake of fact excuse if the defendant was reckless as to whether complainant was consenting. A number of submissions to the ACT Parliamentary Standing Committee on Justice and Community Safety’s Inquiry into the Crimes (Consent) Amendment Bill 2018 addressed this issue. Most specifically, submissions raised concerns about the interaction between statutory definitions of consent and reasonable belief with the existing fault element of recklessness which applies in the ACT.[[17]](#footnote-17) Some, like the ACT Director of Public Prosecutions, argued that the existing concept of recklessness already required a consideration of what steps the defendant took to consider the complainant’s consent:

For sexual offences, recklessness covers advertent recklessness (that is, a state of mind on the part of the accused that "the other person might not be consenting, but I will engage in sexual intercourse anyway") and inadvertent recklessness (that is, a state of mind on the part of the accused whereby the accused does not even consider whether the other person is consenting, but engages in sexual intercourse). In order to preserve this expansive common law concept of recklessness, which has developed to mirror changing societal attitudes towards the issue of consent, the second aspect of consent should be defined to incorporate this concept of recklessness as to consent.[[18]](#footnote-18)

1. The Standing Committee concluded:

It was clear to the Committee that ‘recklessness’ remains a crucial element in determining consent in sexual offending, but that it cannot be conflated with the first and distinctive element of whether or not the victim actually consented.[[19]](#footnote-19)

1. Several submissions to this Inquiry also raised concerns about how the existing defence of honest and reasonable mistake of fact would interact with an objective test of reasonable belief in consent. For example, the ACT Law Society stated:

The objective test will render the defence meaningless or it will create two conflicting legal concepts of consent to be determined by a jury in one trial. The defence would serve no purpose as it would be irrelevant whether an accused honestly believed that the other person had in fact consented.[[20]](#footnote-20)

1. The Standing Committee ultimately recommended that ‘legal advice be sought on the potential impacts of legislatively removing the current common law defence of “honest mistake”’. The Committee also recommended that ‘any legislative changes retain the fundamental presumption of innocence until proven guilty in that the burden of proof beyond reasonable doubt must remain with the prosecution’.[[21]](#footnote-21)
2. The difficulty faced by the ACT Standing Committee perhaps demonstrates that the addition of ‘recklessness’ to the existing offences of rape and other sexual offences in Queensland, coupled with other reform such as including a fault element as to reasonable belief, would need to be carefully framed so as not to create greater ambiguity. Certainty of law is necessary to demonstrate that a limitation on rights is reasonable.[[22]](#footnote-22) As the consultation paper notes, the Victorian legislation does not include recklessness as a concept, but arguably achieves the same goal by requiring satisfaction of an element of knowledge as to the absence of consent in proof of the sexual offence.

# Non-legislative Reform

1. The consultation paper notes that the Taskforce recommended that mistake of fact be retained as a defence in relation to rape and sexual offences, but that jury directions be changed. Victoria has also adopted new jury directions regarding how consent and reasonable belief was to be explained including that:

* people react differently and there is no typical response to non‐consensual sexual acts
* people can be involved in consensual sexual activity on other occasions but not consent to a particular act with a particular person; and
* a stereotypical belief in consent based solely on a general assumption about the circumstances in which people consent to sex is not reasonable.[[23]](#footnote-23)

1. Arguably, jury directions do not shift the burden of proof but indicate the relevant and strength of particular evidence. As such, they provide a less restrictive way of limiting rights than shifting burdens.[[24]](#footnote-24)
2. The consultation paper notes that education, training and information provision are other potential ways of changing community attitudes and reducing the incidence of sexual violence. The ACT Human Rights Commission has also advocated that any statutory reforms be ‘accompanied by education initiatives about what is and is not acceptable behaviour, and that a person should take steps to ensure the other person is consenting of that behaviour’.[[25]](#footnote-25) This was also a recommendation of the ACT Standing Committee Inquiry.[[26]](#footnote-26)
3. The consultation paper also canvasses the possibility of introducing a statement of objectives and/or guiding principles to assist when interpreting provisions relating to rape and sexual offences.
4. The Commission also supports the consideration of any non-legislative options that will achieve the purpose of preventing sexual assault.
5. In summary, in considering the various options for reform, the requirements of compatibility under the HRA are critical. The starting point for any discussion regarding changes to the law should be the purpose or objective of the change. The various options canvassed in the consultation paper whether they be removal of defence, shifting the legal burden of proof, exclusion of the defence in the face of defendant recklessness or non-legislative options, the preferred model must be the one that achieves the objectives of reform in the least restrictive of human rights (and is otherwise demonstrably justified).

# Negation of consent for People with a Disability

1. Under s 216 of the Queensland Criminal Code, it is an offence for a person to have unlawful carnal knowledge with a person with impairment of the mind. The provision does not explicitly include consideration of the will and preferences of the person with that impairment, nor on its face does it require that the specific impairment was relevant to their ability to consent to the sexual act.
2. Section 229L further creates an offence for a person to knowingly cause or permit a person with an impairment of the mind to be at a place used for the purposes of prostitution. This provision is likely to prevent a person with a certain disabilities who also relies on support (including for transport) being able to access otherwise legal sex work services.
3. The definition of a person with an impairment is defined to include a person with a disability that:
   1. is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
   2. results in—
      1. a substantial reduction of the person’s capacity for communication, social interaction or learning; and
      2. the person needing support.
4. Queensland Advocacy Inc (QAI) has observed that this is a broad definition that would encompass episodic impairment, such as mental illness, and other disabilities that would not necessarily be relevant to a person’s ability to consent to a sexual act.[[27]](#footnote-27)
5. There are two defences provided in s 216, which appear to place a legal burden on the defendant. One is that the defendant reasonably believed the other person did not have an impairment of the mind, which is discussed in the consultation paper as way of example. The other is that the defendant must prove that the behaviour did not constitute sexual exploitation of the person with the impairment. There is no defence to s 229L.
6. These offences risk that a person in Queensland with a disability, who may have capacity to consent to a sexual act, is precluded from exercising this capacity including being supported to visit a brothel. It further renders anyone who engages in a sexual act with them guilty of a crime, unless that person can overcome the legal burden of showing the act was not sexual exploitation or that they reasonably believed the person did not have an impairment.
7. In regulating the sexual conduct of people with disability this provision limits rights to equality before the law and the right to privacy.[[28]](#footnote-28) The legal burden placed on a defendant under s 216 further limits the presumption of innocence.
8. The consultation paper suggests three conditions for valid consent are widely recognised:

* The consenting person must be ‘competent’ to do so (that is, they must have the requisite capacity to consent)
* The consenting person must be ‘informed’ as to the nature of the matter to which they are consenting.
* The consent must be free and voluntary (that is, it must not, for example be coerced).

1. Step one of this criteria refers to the requisite capacity to consent, an area of international law that has particularly focussed on the rights of people with disability in recent years. Section 48(3) of the HRA provides that international law may be considered in interpreting rights.
2. Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) deals with state party obligations to ensure equal recognition before the law. This includes an obligation to ensure measures are in place to respect the person’s capacity including their will and preferences, tailored to their circumstances. In General Comment 1, the Committee on the Rights of Persons with Disabilities stated that article 12 required ‘respect for the inherent dignity, individual autonomy – including the freedom to make one’s own choices’.[[29]](#footnote-29) The Committee further observed:

Article 12 of the Convention affirms that all persons with disabilities have full legal capacity...The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty..[[30]](#footnote-30)

1. In General Comment 3 on the rights of women and girls with disabilities, the Committee further elaborated on the need to protect the sexual rights of people with disability. In discussing articles 23 (respect for home and the family) and 25 (health) the Committee noted that wrongful stereotyping ‘is a form of discrimination that has a particularly serious impact on the enjoyment of sexual’ health.[[31]](#footnote-31)

All women with disabilities must be able to exercise their legal capacity by taking their own decisions, with support when desired…including by taking their own decisions on retaining their fertility and reproductive autonomy, exercising their right to choose the number and spacing of children, consenting and accepting a statement of fatherhood and exercising their right to establish relationships.[[32]](#footnote-32)

1. In this sense, it appears that sections 216 and 229L are not consistent with the CPRD, nor the assertion in the consultation paper that the concept of consent is free, voluntary consent based on the person’s competence. As such, their compatibility with the HRA is in question.
2. The Commission appreciates these are complex issues, particularly as human rights obligations such as rights to equality, privacy and protection from inhuman treatment also require the state to protect people with disability.[[33]](#footnote-33) Nonetheless, other jurisdictions have taken a different approach to this issue.
3. For example, similar provisions introduced in Victoria in 2016 are limited to circumstances where the defendant provides treatment or support services to the person with a disability.[[34]](#footnote-34)
4. The QHRC acknowledges that the use of the term ‘unlawful’ in s 216 may be intended to criminalise only sexual acts where the other person could not consent because their actual intellectual impairment, but that is not necessarily clear. In noting this potential reading of s 216, Queensland Advocacy Inc stated in 2006 that s 216 was having a chilling effect on people with disability in Queensland participating in sexual relationships:

…put it this way, the people who assist people with intellectual disability in particular, and also people with brain injuries, with support services in the often share-house environment, and that sort of place, they know about this legislation, and they're pretty sensibly I think, cautious about how to apply it and they're getting very little guidance at the moment from the peak bodies for disability in the state.[[35]](#footnote-35)

1. The QHRC suggests that despite the important purpose of ss 216 and 229L to protect people with disability from exploitation, on their face these provisions do not represent a reasonable limitation on rights, particularly as defences place a legal burden on the defendant. Undermining their purpose, these provisions include no express consideration of the will and preferences of that person with disability or a clear obligation on the prosecution to show they lacked capacity to consent to the particular sexual act in question.
2. The QHRC accepts however that they may be drafted to address risks that victims of sexual assault who have a disability are either unlikely to report such crimes, or may be seen as unreliable witnesses.
3. If so, practical support options such as witness intermediaries and interview friends, as well as training for all participants in the criminal justice system might better address these issues in a way that better upholds the rights of people with disability.[[36]](#footnote-36) Family Planning Queensland has previously advocated for a non-legal approach to these issues.

The law's a very blunt instrument to use in this case. If we really are committed to the protection of people with an intellectual disability from exploitation and both QAI and Family Planning Queensland would be of one mind on this, the appropriate way to protect them is to provide them with adequate sexuality education, sufficient support in their decision-making processes. People with intellectual disabilities can learn, you know, there's no blanket rule that they can't learn these things. What we're seeing is a culture that denies them the right to access sexuality education; we've got a system that doesn't provide adequate support and services of sexuality education, and backing that all up, we've got a law that unfairly discriminates against them.[[37]](#footnote-37)

1. If specific offences are needed to protect people with disability from sexual exploitation, then a preferable approach would be to reframe these to make the will and preferences of the person with impairment a primary consideration. These offences should also likely include a fault element requiring the prosecution to prove beyond reasonable doubt that the person lacked the capacity to consent (and otherwise the offence of rape and other general sexual offences would apply).
2. A further option would be to consider the Victorian approach of limiting these offences to where the defendant is providing the person with disability support services for their impairment.
3. At a minimum, the QHRC recommends the QLRC seek the views of people with disability about current s 216 and s 229L and potential changes to improve their compatibility with human rights.

# Conclusion

1. This submission has provided a broad overview of the potential human rights implications of law reform in the area of rape, sexual assault and mistake of fact defences, and recommends the Queensland Law Reform Commission include in its consideration of sexual offences specific to people with disability.
2. The QHRC would welcome the opportunity consider further any proposals for legislative change that may emerge from this review. Thank you again for opportunity to provide a submission to this inquiry.

1. Victorian Law Reform Commission, *Victims’ Rights in the Criminal Trial Process: Report,* August 2016, 29. [↑](#footnote-ref-1)
2. *Human Rights Act 2019*, section 13. [↑](#footnote-ref-2)
3. HRA s 32(1) [↑](#footnote-ref-3)
4. HRA s 32(2)(k) [↑](#footnote-ref-4)
5. Included in the presumption of innocence as interpreted by the UN Human Rights Committee, *General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial,* 19th session, UN Doc CCPR/C/GC/32 (23 August 2007) [30]. See also *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34 [52]-[55] (French CJ) [↑](#footnote-ref-5)
6. United Nations Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 80th session,CCPR/C/21/Rev.1/Add. 1326 May 2004(29 March 2004). [↑](#footnote-ref-6)
7. HRA s 29 [↑](#footnote-ref-7)
8. HRA s 16 [↑](#footnote-ref-8)
9. HRA s 15 [↑](#footnote-ref-9)
10. ACT Human Rights Commission, *Submission to ACT Greens Exposure Draft Crimes Consent Amendment Bill 2018,* 26 March 2018. [↑](#footnote-ref-10)
11. Ibid, 4. [↑](#footnote-ref-11)
12. Victoria, *Parliamentary Debates,* Legislative Assembly21 August 2014, 2932 [↑](#footnote-ref-12)
13. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* No. 11of 2014. [↑](#footnote-ref-13)
14. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights,* (December 2014), 2. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights,* (December 2014), 2. [↑](#footnote-ref-16)
17. See for example the submissions of the ACT Director of Public Prosecutions, Legal Aid Commission (ACT) and ACT Law Society to Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Crimes (Consent) Amendment Bill 2018* (October 2018). [↑](#footnote-ref-17)
18. ACT Director of Public Prosecutions, Submission to Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Crimes (Consent) Amendment Bill 2018,* 4 September 2018, 4. [↑](#footnote-ref-18)
19. Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Crimes (Consent) Amendment Bill 2018,* Report(October 2018), 41. [↑](#footnote-ref-19)
20. ACT Law Society, Submission to Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Crimes (Consent) Amendment Bill 2018,* 25 September 2018, 3. [↑](#footnote-ref-20)
21. Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Crimes (Consent) Amendment Bill 2018,* Report(October 2018), xi. [↑](#footnote-ref-21)
22. Section 13(1) requires that human rights may be subject to reasonable limits ‘under law’. To fulfil this requirement generally includes ensuring laws are predictable and sufficiently clear to give citizens an adequate indication in which they will apply. See for example *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307. [↑](#footnote-ref-22)
23. *Crimes Amendment (Sexual Offences) Act 2016* amending *Jury Directions Act 2015.*  [↑](#footnote-ref-23)
24. See for example discussion in Statement of Compatibility for the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 – Victoria, *Parliamentary Debates,* Legislative Assembly,21 August 2014, 2933. [↑](#footnote-ref-24)
25. ACT Human Rights Commission, *Submission to ACT Greens Exposure Draft Crimes Consent Amendment Bill 2018,* 26 March 2018. [↑](#footnote-ref-25)
26. Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Crimes (Consent) Amendment Bill 2018,* Report(October 2018), xi. [↑](#footnote-ref-26)
27. Nick Collyer, ‘Let’s Nix 216’ on *Queensland Advocacy Incorporated* (3 April 2018)<<https://www.qai.org.au/lets-nix-216/>> and ABC Radio National, ‘Sex and disability in the sunshine state’, *The Law Report,* 26 September 2006, (Damien Carrick) <https://www.abc.net.au/radionational/programs/lawreport/sex-and-disability-in-the-sunshine-state/3347602>. [↑](#footnote-ref-27)
28. Protected in sections 15 and 25 of the HRA. In *Toonen v Australia* (Communication No 488/1992) the UN Human Rights Committee found a law criminalising sexual activity between adults violated the right to privacy under the ICCPR. [↑](#footnote-ref-28)
29. UN Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law,* 11th session,CRPD/C/GC/1 19 May 2014(31 March – 11 April 2014). [↑](#footnote-ref-29)
30. Ibid, 2. [↑](#footnote-ref-30)
31. UN Committee on the Rights of Persons with Disabilities, *General Comment No 3: General comment no. 3 (2016) on women and girls with disabilities,* CRPD/C/GC/3 25 November 2016, [38]. Protection of home life is encompassed in the right to privacy under the HRA. The right to health is also protected in s 37. [↑](#footnote-ref-31)
32. UN Committee on the Rights of Persons with Disabilities, *General Comment No 3: General comment no. 3 (2016) on women and girls with disabilities,* CRPD/C/GC/3 25 November 2016, [44] [↑](#footnote-ref-32)
33. See for example discussion in General Comment 3 from the UNCRPD regarding the need to protect women and girls from sexual exploitation and violence. [↑](#footnote-ref-33)
34. Although even these changes were commented upon by the Parliamentary Scrutiny of Acts and Regulations Committee as perhaps being further improved by restricting them to circumstances where the services provided relate directly to the impairment – see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 9 of 2016*. [↑](#footnote-ref-34)
35. Julian Porter as quoted in ABC Radio National, ‘Sex and disability in the sunshine state’, *The Law Report,* 26 September 2006, (Damien Carrick) <https://www.abc.net.au/radionational/programs/lawreport/sex-and-disability-in-the-sunshine-state/3347602>. [↑](#footnote-ref-35)
36. Witness intermediaries have been introduced in the United Kingdom, Victoria, NSW and the ACT to assist children and people with disability give evidence. ‘Intermediaries are skilled communication specialists who assist vulnerable witnesses to give their best evidence’ – Justice and Community Safety Department, Government of Victoria, *Victorian intermediaries pilot program,* <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program> [↑](#footnote-ref-36)
37. Anthony Walsh then Director of Education Services with Family Planning Queensland and a Disability Worker quoted in ABC Radio National, ‘Sex and disability in the sunshine state’, *The Law Report,* 26 September 2006, (Damien Carrick) <https://www.abc.net.au/radionational/programs/lawreport/sex-and-disability-in-the-sunshine-state/3347602>. [↑](#footnote-ref-37)