



**Review of consent laws and the
excuse of mistake of fact**

Consultation Paper

Queensland
Law Reform Commission

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excuse of mistake of fact**

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SUBMISSIONS

You are invited to make a written submission on the issues raised in this Consultation Paper. Submissions should be sent to:

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Abbreviations and Glossary

accused or accused person or defendant	A person who is charged with a criminal offence and/or being prosecuted in a criminal proceeding
ALRC	Australian Law Reform Commission
ALRC and NSWLRC Joint Report on Family Violence	Australian Law Reform Commission and New South Wales Law Reform Commission, <i>Family Violence—A National Legal Response</i> , ALRC Report No 114, NSWLRC Report No 128 (October 2010)
balance of probabilities	The standard of proof where the finder of fact or jury must be satisfied that 'it is more probable than not' of a particular matter
Queensland Benchbook	Queensland Courts, <i>Supreme and District Courts Criminal Directions Benchbook</i> < https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook >
beyond reasonable doubt	The standard that the prosecution must reach for a jury to find a defendant guilty of an offence in a criminal proceeding
burden or onus of proof	The responsibility to prove a particular charge or defence or excuse
Criminal Code	<i>Criminal Code Act 1899</i> (Qld)
criminal responsibility	Liability to punishment as for an offence ¹
element	An offence consists of elements. An element of an offence is a matter that the prosecution must prove beyond reasonable doubt if the defendant is to be found to have committed that offence.
evidential burden	An obligation to raise a particular matter in or on the evidence
jury direction	An instruction about the law given by the trial judge to a jury to help them to decide whether a person is guilty or not guilty of an offence
MCC	Model Criminal Code: Chapter 5: Sexual Offences Against the Person, Report (May 1999)
MCCOC	Model Criminal Code Officers Committee (1999)
NSWLRC	New South Wales Law Reform Commission
NSWLRC draft proposals	New South Wales Law Reform Commission, <i>Consent in relation to sexual offences—Draft proposals</i> (October 2019)

¹ Criminal Code (Qld) s 1.

standard of proof	The level a party must reach to prove a particular charge or factor, that is, beyond reasonable doubt or on the balance of probabilities
Taskforce Discussion Paper	Queensland Taskforce on Women and the Criminal Code, <i>Discussion Paper of the Taskforce on Women and the Criminal Code</i> (September 1999)
Taskforce Report	Queensland Taskforce on Women and the Criminal Code, <i>Report of the Taskforce on Women and the Criminal Code</i> (2000)
VLRC	Victorian Law Reform Commission

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Consultation questions

The Commission seeks your views on the following questions:

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?
- 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?

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

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?

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?

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 sabotages 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?

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

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

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?

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?

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

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?

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?

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?

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?

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?

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?

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?²

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

- (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?

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?

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?

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?

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

²

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?

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?

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?

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

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?

Education and awareness

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

Chapter 1

Introduction

[1] The operation of consent laws in rape and sexual assault cases has attracted significant recent attention in Queensland and elsewhere.³

[2] In July 2019, the Government announced that it would refer the matter of consent in rape and sexual assault cases to the Queensland Law Reform Commission ('the Commission'), noting the importance of evidence-based reform.⁴

THE TERMS OF REFERENCE

[3] On 2 September 2019, the Attorney-General and Minister for Justice and Leader of the House referred to the Commission for review and investigation 'the definition of consent in section 348 (Meaning of consent) in Chapter 32 (Rape and sexual assaults) of the Criminal Code and the operation of the excuse of mistake of fact under section 24 as it applies to Chapter 32'.

[4] The terms of reference⁵ require the Commission to examine the operation and practical application of those provisions and to make recommendations on:

- (a) whether there is a need for reform of:
 - (i) the definition of consent in section 348;
 - (ii) the excuse of mistake of fact in section 24 as it applies to rape and sexual assaults in Chapter 32 of the Criminal Code; and
- (b) any other matters the Commission considers relevant having regard to the issues relating to the referral.

[5] In making its recommendations, the Commission is to have regard to:

- (a) the need to ensure Queensland's criminal law reflects contemporary community standards;
- (b) existing legal principles in relation to criminal responsibility;
- (c) the need for Queensland's criminal law to ensure just outcomes by balancing the interests of victims and accused persons;
- (d) the experiences of sexual assault victims and survivors in the criminal justice system;

³ See, eg, NSWLRC, *Consent in relation to sexual offences*, Consultation Paper 21 (23 October 2018).

⁴ Attorney-General and Minister for Justice, The Hon Yvette D'Ath, Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence, The Hon Di Farmer, 'Palaszczuk government to refer consent laws to Queensland Law Reform Commission' (Ministerial Media Statement, 9 July 2019) <<http://statements.qld.gov.au/Statement/2019/7/9/palaszczuk-government-to-refer-consent-laws-to-queensland-law-reform-commission>>.

⁵ See Appendix A.

- (e) the views and research of relevant experts;
- (f) recent developments, legislative reform, and research in other Australian and international jurisdictions; and
- (g) any other matters that the Commission considers relevant having regard to the issues relating to the referral.

[6] The terms of reference ask the Commission to prepare, if relevant, draft legislation based on its recommendations.

[7] The Commission is required to provide its final report by 17 April 2020.

THE CONSULTATION PAPER

[8] Chapter 2 provides an overview of the current law in Queensland, reforms in other jurisdictions, and the key issues raised by the terms of reference including the threshold question of whether there is a need for reform.

[9] Chapters 3 and 4 address specific issues raised in relation to the definition of consent and the excuse of mistake of fact as it relates to the relevant offences in Chapter 32 of the Criminal Code.

[10] Chapter 5 deals with a number of other matters raised in the review.

[11] At the request of the Commission, the Attorney-General, Minister for Justice and Leader of the House provided the Commission with consultation undertaken by the Government with legal stakeholders in respect of Queensland's consent laws. Further, the Commission invited preliminary submissions from the judiciary, legal stakeholders, academics and groups representing the interests of victims and survivors. Some members of the public have also provided the Commission with their preliminary views. The list of preliminary respondents is in Appendix B.

[12] Relevant extracts from the Criminal Code and the Queensland Courts Benchbook are contained in Appendices C and D, respectively.

[13] Appendix E includes a comparative table of the relevant provisions in other jurisdictions.

[14] The questions posed throughout the paper are set out in full at pages v-ix above. You are encouraged to read the chapters which give relevant background to the questions.

MAKING A SUBMISSION

[15] The Commission invites written submissions in response to the questions by **31 January 2020**.

[16] Information about how to make a submission is set out at the beginning of the paper.

Chapter 2

Background and overview

THE CURRENT LAW

The offences in Chapter 32

[17] Sections 349 and 352 of the Criminal Code deal with the offences of rape and sexual assault respectively. These offences are found in Chapter 32 of the Criminal Code. Section 349 provides:

349 Rape

- (1) Any person who rapes another person is guilty of a crime.
Maximum penalty—life imprisonment.
- (2) A person rapes another person if—
 - (a) the person has carnal knowledge with or of the other person without the other person's consent; or
 - (b) 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 that is not a penis without the other person's consent; or
 - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (3) For this section, a child under the age of 12 years is incapable of giving consent.
- (4) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.⁶
- (5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer. (note added)

[18] In order to establish the offence of rape, the prosecution must prove beyond reasonable doubt that the defendant:

⁶ The *Penalties and Sentences Act 1992* (Qld) s 161Q relates to the meaning of 'serious organised crime circumstance of aggravation'.

- had carnal knowledge⁷ of or with the complainant; and
 - did so without the consent of the complainant;
- or
- penetrated the vulva, vagina or anus of the complainant with a thing or part of the defendant's body that is not a penis; and
 - did so without the consent of the complainant;
- or
- penetrated the mouth of the complainant with a penis; and
 - did so without the consent of the complainant.

[19] Penetration to any extent is sufficient. Both men and women may commit rape or be victims of rape. Penetration for the purposes of a proper medical, hygienic or law enforcement purpose is excluded.⁸

[20] Section 352 of the Criminal Code deals with the offence of sexual assault. It provides:

352 Sexual assaults

(1) Any person who—

(a) unlawfully and indecently assaults another person; or

(b) procures another person, without the person's consent—

(i) to commit an act of gross indecency; or

(ii) to witness an act of gross indecency by the person or any other person;

is guilty of a crime.

Maximum penalty—10 years imprisonment.

(2) However, the offender is liable to a maximum penalty of 14 years imprisonment for an offence defined in subsection (1)(a) or (1)(b)(i) if the indecent assault or act of gross indecency includes bringing into contact

⁷ As to 'carnal knowledge' see Criminal Code (Qld) s 6, which provides: (1) If carnal knowledge is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent. (2) Carnal knowledge includes anal intercourse; See also LexisNexis, *Carter's Criminal Law of Queensland* [215.15]: The Criminal Code (Qld) does not define the nature of the penetration required for there to be 'carnal knowledge'. It is necessary to refer to the common law for a better understanding of the term. Penetration by the penis is required. In the case of vaginal intercourse, any degree of penetration is sufficient. There need not be penetration of the actual vagina or rupture of the hymen: *R v Lines* (1844) 1 Carr & K 393; 174 ER 861; *R v Randell* (1991) 53 A Crim R 389; *Holland v R* (1993) 117 ALR 193. There is no need to prove ejaculation: *R v Marsden* [1891] 2 QB 149.

⁸ Criminal Code (Qld) s 347.

any part of the genitalia or the anus of a person with any part of the mouth of a person.

- (3) Further, the offender is liable to a maximum penalty of life imprisonment if—
- (a) immediately before, during, or immediately after, the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with any other person; or
 - (b) for an offence defined in subsection (1)(a), the indecent assault includes the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis; or
 - (c) for an offence defined in subsection (1)(b)(i), the act of gross indecency includes the person who is procured by the offender penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the body of the person who is procured that is not a penis.
- (4) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.
- (5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

[21] Broadly, in order to establish the offence of sexual assault, the prosecution must prove beyond reasonable doubt that the defendant:

- unlawfully assaulted the complainant; and
- the assault was indecent;

or

- procured another person to commit or witness an act of gross indecency; and
- did so without that person's consent.

[22] The term 'indecent' is not defined in the Criminal Code. What constitutes indecency is to be judged by prevailing community standards.⁹

[23] The term 'assault' is defined in the Criminal Code:¹⁰

A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, *without the other person's consent* ... is said to assault that other person. (emphasis added)

⁹ See generally LexisNexis, *Carter's Criminal Law of Queensland* [210.20], and the cases cited therein. As to 'gross' indecency, which is also a matter for the jury to determine, see [s 352.30], citing *R v Whitehouse* [1955] QWN 76.

¹⁰ Criminal Code (Qld) s 245.

[24] Chapter 32 of the Criminal Code also contains other offences, namely, attempt to commit rape (in section 350)¹¹ and assault with intent to commit rape (in section 351).¹²

[25] A key element that must be proved by the prosecution beyond reasonable doubt in order to establish the offences of rape and sexual assault is, therefore, that the conduct took place without consent.

Consent

[26] Consent is relevant to a number of offences in the Criminal Code, but is defined only in respect of particular provisions.¹³ For the purposes of Chapter 32 of the Criminal Code, 'consent' is defined in section 348:

348 Meaning of consent

- (1) In this chapter, consent means consent freely and voluntarily given 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.

[27] Section 348(1) provides a definition of consent. Section 348(2) sets out a list of circumstances in which a person does not give consent freely and voluntarily. The definition applies to the use of the word 'consent' in every offence contained in Chapter 32 of the Criminal Code, including rape. Strictly, it does not apply to the offence of sexual assault in section 352(1)(a) as that offence provision does not use the word 'consent'.¹⁴ However, the courts continue to recognise the useful formulation of the list of circumstances in section 348(2) which may be relevant when

¹¹ Any person who attempts to commit the crime of rape is guilty of a crime, and is liable to imprisonment for 14 years: Criminal Code (Qld) s 350(1).

¹² Any person who assaults another with intent to commit rape is guilty of a crime, and is liable to imprisonment for 14 years: Criminal Code (Qld) s 351(1).

¹³ See, eg, Criminal Code (Qld) s 223 (distributing intimate images). The Criminal Code (Qld) does not include a general definition of consent that applies throughout that legislation.

¹⁴ *R v BAS* [2005] QCA 97, [51] (Fryberg J).

directing juries in relation to the phrase 'without the other person's consent' for the purposes of the sexual assault offence.¹⁵

The excuse of mistake of fact

[28] Proof beyond reasonable doubt as to absence of consent is central to proof of the offences of rape and sexual assault. There is, however, an excuse which may be available to a defendant at trial. Section 24 of the Criminal Code provides:

24 Mistake of fact

- (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
- (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

[29] Section 24 is one of a number of general provisions in the Criminal Code dealing with the circumstances in which a person will not be criminally responsible for an offence.¹⁶ It applies to all persons charged with any criminal offence against the statute law of Queensland.¹⁷ It is not, therefore, specific or limited to rape and sexual assault offences.

[30] In the context of a trial of a charge of rape or sexual assault, a defendant who honestly and reasonably, but mistakenly, believed that the complainant was consenting is not criminally responsible.

Criminal law practice and procedure

[31] Upon the making of a complaint to a police officer, a decision to prosecute the alleged offender must be made. In deciding whether or not to prosecute, a police officer must be satisfied that there is sufficient evidence and that the public interest requires a prosecution. In practice, it will rarely be the case that it is not in the public interest to prosecute an allegation of rape or sexual assault, so the primary test for the decision to prosecute is the sufficiency of evidence. A police officer must consider all aspects of the evidence to be presented, including admissibility and reliability of evidence and possible defences or excuses. These same issues will be considered

¹⁵ Queensland Benchbook, Indecent (Sexual) Assault—352, No 145.1
<https://www.courts.qld.gov.au/_data/assets/pdf_file/0006/86154/sd-bb-145-indecent-sexual-assault-s352.pdf>.

¹⁶ See Criminal Code (Qld) pt 1 ch 5.

¹⁷ Criminal Code (Qld) s 36.

by the Police Prosecution Corps or the Office of the Director of Public Prosecutions before a decision is made to continue a prosecution.¹⁸

[32] In Queensland, trials for offences of rape and sexual assault will usually involve a judge and jury.¹⁹ Relevantly, the role of the judge is to ensure the trial is conducted according to law. The role of the jury is to consider the evidence, apply the directions on the law given by the trial judge and return a verdict of guilty or not guilty.

[33] The verdict of the jury is to be reached only on the evidence heard during the course of the trial. Evidence consists of the oral testimony from witnesses and any exhibits received during the trial. In relation to the oral testimony of a witness, the jury can accept or reject all or part of a witness's testimony. Generally, exhibits are documents, photographs, recordings and other materials relevant to the trial.

[34] The process of a trial commences with the prosecution addressing the jury in relation to the evidence expected to be heard from prosecution witnesses during the trial. Those witnesses are then called to give evidence. This process involves the prosecutor taking evidence-in-chief from the witness followed by defence counsel testing that evidence through cross-examination, for example, by identifying inconsistencies in a witness's story and raising questions about their credibility. If necessary, the prosecutor is able to re-examine the witness for the purpose of clarifying the witness's evidence. The same process is followed for each witness.

[35] Once the prosecution has presented its case, the defendant has the opportunity to give or call evidence. A defendant is under no obligation to give or call evidence. It is central to the criminal justice system that the prosecution must satisfy the jury that a defendant is guilty of a charge and guilt must be proven beyond reasonable doubt. The defendant is presumed to be innocent unless it is proven otherwise, and is therefore under no obligation to produce evidence at any stage of the trial process. If the defendant chooses to give or call evidence, the process will be the same as for prosecution witnesses.

[36] The term 'beyond reasonable doubt' is the standard to which a jury must be satisfied in relation to each element of an offence before they can convict a defendant of that offence. The concept of beyond reasonable doubt is a matter for a jury to determine. The Supreme and District Courts Criminal Directions Benchbook (the 'Queensland Benchbook') gives this guidance:²⁰

Proof beyond reasonable doubt is the highest standard of proof known to the law. It can be contrasted with the lower standard of proof that is required in a civil case

¹⁸ See Queensland Police Service, *Operational Procedures Manual*, 3.4. See also Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2016), made under the *Director of Public Prosecutions Act 1984* (Qld) s 11(1)(a)(i) and available at <https://www.justice.qld.gov.au/_data/assets/pdf_file/0015/16701/directors-guidelines.pdf>. The Director's Guidelines are not directions but guidelines 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice'. These considerations apply to the prosecution of all criminal charges.

¹⁹ See Criminal Code (Qld) part 8 ch 62 div 9A, in relation to the ability for the parties to a criminal trial to apply for a trial by judge alone.

²⁰ Queensland Benchbook, 'Reasonable Doubt', No 60.1 <https://www.courts.qld.gov.au/_data/assets/pdf_file/0020/86060/sd-bb-60-Reasonable-Doubt.pdf>.

where matters need only be proved on what is called the “balance of probabilities.” That is, the case must be proved to be more likely than not.

In a criminal trial, the standard of satisfaction is much higher; the prosecution must prove the guilt of the defendant beyond reasonable doubt.

It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences. If you are left with a reasonable doubt about guilt, your duty is to acquit: that is, to find the defendant not guilty. If you are not left with any such doubt, your duty is to convict: that is, to find the defendant guilty.

[37] Once all witnesses have been called, the prosecution and defence will address the jury and present arguments about the evidence given. The judge will then ‘sum up’ to the jury.²¹ This involves explaining to the jury the law they are to apply to their deliberations and the issues that they are to consider.

[38] The jury is to return a verdict of guilty (convicted) or not guilty (acquitted) in relation to each charge. The jury must try to return a unanimous verdict.²²

Jury directions

[39] Queensland does not have legislation prescribing specific directions to be given by judges to juries in relation to particular matters.

[40] However, the Queensland Benchbook, which is prepared and updated regularly by the Courts, compiles model directions intended to assist judges in their summings up.²³ The Queensland Benchbook is intended to provide guidance to a court and it is not to be an inflexible or mandatory regime:²⁴

[The Queensland Benchbook] assist[s] the Judge to devise at trial a summing up appropriate to the particular case, while reminding of the necessary framework and matters which must be covered. Referring to the Benchbook should not only lessen the prospect of error, but also streamline summings up, better informing juries and generally promoting the interests of justice.

21 See Criminal Code (Qld) s 620.

22 See *Jury Act 1995* (Qld) s 59A as to majority verdicts.

23 See Queensland Benchbook, March 2019 Amendments, <https://www.courts.qld.gov.au/data/assets/pdf_file/0011/607277/sd-bb-update-notes-mar-2019.pdf>.

24 Foreword to the Queensland Benchbook, The Hon CE Holmes, Chief Justice and Chief Judge KJ O'Brien <https://www.courts.qld.gov.au/data/assets/pdf_file/0011/85997/sd-bb-0-foreword-by-chief-justice-and-chief-judge.pdf>.

[41] Directions 167²⁵ and 168²⁶ in the Queensland Benchbook provide guidance in directing juries on charges of rape. The definition of consent in section 348 is reproduced in the footnotes to those directions.

[42] The charge of sexual assault as provided for in section 352 is set out in Direction 145 of the Queensland Benchbook under the heading 'Indecent (Sexual) Assault'.²⁷ That direction addresses consent in this way:

'Consent' means consent freely and voluntarily given by a person with the ability to know and understand what s/he is doing in giving consent. (Refer to any of the circumstances in s 348(2) which may be relevant as negating consent.) (Section 245 (Assault) does not provide an explanation of the meaning of 'without the other person's consent'. Although the definition in s 348 does not strictly apply to s 352, it provides a useful formulation of circumstances which may be relevant as negating consent). (note omitted)

[43] Direction 79 provides guidance as to 'Mistake of fact' as it applies generally,²⁸ and Direction 80 relates to 'Mistake of fact in sexual offences'.²⁹

THE CONCEPT OF CONSENT IN THE DEVELOPMENT OF SEXUAL OFFENCES

[44] Consent plays a significant role in contemporary society across many domains of social life and, as a consequence, in many areas of the law. Relevantly, this includes the criminal law relating to sexual offences.

[45] Historically, rape offences were 'aligned with women's civil and legal status as the property of the dominant male family member',³⁰ and the 'violent appropriation of women belonging to others'.³¹ In modern liberal society, rape and sexual assault offences are more often defined by the absence of consent within a broader context

²⁵ Queensland Benchbook, Direction 167, 'Rape s 347 (now repealed) (For offences occurring prior to 27 October 2000)' <https://www.courts.qld.gov.au/_data/assets/pdf_file/0003/86178/sd-bb-167-rape-s347-now-repealed-for-offences-occurring-prior-to-27-october-2000.pdf>.

²⁶ Ibid Direction 168, 'Rape s 349 (Offences occurring after 27 October 2000)' <https://www.courts.qld.gov.au/_data/assets/pdf_file/0004/86179/sd-bb-168-rape-s349-offences-occurring-after-27-october-2000.pdf>; see Appendix D.

²⁷ Ibid Direction 145, 'Indecent (Sexual) Assault—s 352'. <https://www.courts.qld.gov.au/_data/assets/pdf_file/0006/86154/sd-bb-145-indecent-sexual-assault-s352.pdf>; see Appendix D.

²⁸ Ibid Direction 79, 'Mistake of fact, s 24'. <https://www.courts.qld.gov.au/_data/assets/pdf_file/0009/86085/sd-bb-79-mistake-of-fact-s24.pdf>. See Appendix D.

²⁹ Ibid Direction 80, 'Mistake of fact in Sexual Offences'. <https://www.courts.qld.gov.au/_data/assets/pdf_file/0010/86086/sd-bb-80-mistake-of-fact-in-sexual-offences.pdf>. See Appendix D.

³⁰ R Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59 *British Journal of Criminology* 296, 298.

³¹ T Hörnle, 'Rape as non-consensual sex' in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (2018) 235, 235. See also, eg, S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010) [11.65]. In England in the 1700s, the capital felony of rape was defined as sexual penetration of a woman 'forcibly and against her will': W Blackstone, *Commentaries on the Laws of England* (1769) vol iv, 210.

of recognition of individual rights of bodily integrity and human dignity.³² This recognises that '[t]he essence of the wrong done is the violation of sexual autonomy rights', namely, a person's freedom from unwanted sexual interferences.³³

[46] There is a vast amount of academic literature on the philosophy and theory of consent. There is general consensus about the importance and role of consent, but the nuances and complexities of what consent may require in different situations is the subject of debate.

[47] Consent acts as 'a criterion of legitimacy', transforming an act or practice that might otherwise be impermissible into one that is sanctioned (at least so far as the consent aspect is concerned).³⁴

[48] Consent is also understood as 'a transaction between two agents', where one person's consent releases the other person from a duty either to refrain from or to perform some action.³⁵

[49] Three main views about what constitutes consent are distinguished in the literature:³⁶

- Consent as a mental state where consent is a particular mental state or mental action of the consenting person (the mental view). Consent is distinguished from its communication.
- Consent as a manifest act, that is, performing a positive act of consent, (the performative action view)—where there is no consent unless it is communicated in some way, whether verbal or non-verbal.
- Consent as both a mental state and a manifest act (the hybrid view).

[50] To be effective, consent must be valid. Three conditions for valid consent are widely recognised:³⁷

- The consenting person must be 'competent' to do so (that is, they must have the requisite capacity to consent).

³² T Hörnle, above n 31, 235–37.

³³ Ibid 235–37.

³⁴ H Schnüriger, 'What is consent?' in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (2018) 21, 21–2. Consent may remove a wrongdoing, but there may be other features of the act in question that render it wrongful on some other ground: 22.

See also, as to the transformative role of consent, D Archard, 'Sexual consent' in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (2018) 174, 175; J Kleinig, 'The Nature of Consent' in FG Miller and A Wetheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2010) 3, 4.

³⁵ H Schnüriger, above n 34, 21–2.

³⁶ Ibid 21. See also D Archard, 'Sexual consent' in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (2018) 174, 176.

³⁷ H Schnüriger, above n 34, 22. See also J Kleinig, 'The Nature of Consent' in FG Miller and A Wetheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2010) 3, 1 ff.

- 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).

Criminal responsibility where there is a lack of consent

[51] In the context of sexual offences, the giving of consent has not, for understandable reasons, been reduced to a formula and is often not indicated verbally or overtly, but rather by 'conduct and implication'.³⁸ The complexity surrounding what should and should not be regarded as consent, and the need to ensure greater clarity over time, has been the subject of ongoing discussion.

[52] An important principle of criminal law is that criminal responsibility for an offence will ordinarily arise only if the defendant has acted in a wrongful or blameworthy way.³⁹

[53] Sexual intercourse without the other person's consent is widely recognised as a criminal offence across many jurisdictions. However, it does not necessarily follow that a person who has sexual intercourse, honestly believing that the other person is consenting when they are not, should be liable to conviction for an offence. This is recognised in the availability of the excuse of mistake of fact under both the common law and in jurisdictions like Queensland where the criminal law has been codified.

REFORMS IN QUEENSLAND

[54] The concept of consent in relation to rape and sexual assault was not defined in the Criminal Code until 2000.⁴⁰ The Taskforce on Women and the Criminal Code (the 'Taskforce') established in 1998 considered the notion of consent in terms of what consent entails and how consent, or an absence of consent, could be demonstrated. Taking into account how the position in other jurisdictions differs from that in Queensland, the Taskforce made a number of recommendations.⁴¹

[55] It recommended that consent be defined in the Criminal Code 'in a way that focuses on the need for a free and voluntary agreement', and that the factors where consent is not free and voluntary be extended to include: false and fraudulent representations as to the purpose of the act; and a mistaken belief that the defendant was the complainant's sexual partner.⁴²

³⁸ *DPP (NT) v WJI* (2004) 219 CLR 43 at 75 (Kirby J).

³⁹ S Bronitt et al, above n 31, 170.

⁴⁰ See the *Criminal Code [1995]* (Qld) included a definition of consent as meaning 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent', but the Act lapsed when it was not proclaimed into force.

⁴¹ Taskforce Report, 226–241.

⁴² *Ibid* Recs 64.1 and 64.2, 241.

[56] The Taskforce recommended that, where the excuse of mistake of fact is raised, the jury should 'be directed to look at what steps the accused took to ensure that the complainant consented'.⁴³ It considered that this would ensure that the jury's focus was not only on what the complainant did or said, or the complainant's state of mind, but also on what steps the defendant took to ensure the complainant was consenting, and that what occurred was 'mutually agreed to'.⁴⁴ It also considered that a defendant should not be able to use a lack of resistance by a complainant as the basis for a claimed belief that the complainant consented.

[57] The *Criminal Code Amendment Act 2000* (Qld) implemented the Taskforce recommendations regarding the definition of and factors relevant to consent by:

- inserting the current definition of consent in section 348(1); and
- introducing a non-exhaustive list of circumstances in which consent is not freely and voluntarily given.⁴⁵

[58] The Explanatory Notes to the Bill state that:⁴⁶

Consent is defined as 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent'. The term 'cognitive capacity' recognises that a person must have the ability to understand the nature and effect of giving consent, but it does not equate to 'legal' capacity. It will bring in the existing case law about an incapacity to consent, for example, due to youth, intellectual impairment or intoxication.

The existing circumstances that vitiate consent have been retained, with the addition of a false and fraudulent representation about the purpose of the act, and a mistaken belief, induced by the accused, that the defendant was the complainant's sexual partner.

[59] However, the Taskforce's recommendation about directing the jury as to what steps the defendant took to ensure that the complainant consented was not implemented by the 2000 amendments. There has been no change to the operation of the excuse of mistake of fact in section 24 as it relates to rape and sexual assault.

[60] There have, however, been a number of other reforms made in Queensland to the content and operation of the law as it relates to sexual offences. These reforms have introduced protective measures for complainants when giving evidence,⁴⁷ placed qualifications on the admission into evidence of a complainant's past sexual

43 Ibid Rec 64.3; 241.

44 Ibid 236.

45 This list of circumstances was more limited in the previous section relating to rape. One of the most significant changes was to broaden the types of sexual contact which are capable of constituting rape. The current s 349 extends not only to 'carnal knowledge', as previously defined, but to penetration of the vulva, vagina or anus by any object or body part and to penetration of the mouth by the penis.

46 See Explanatory Notes, *Criminal Code Amendment Bill 2000* (Qld) 9. See also Queensland, Parliamentary Debates, Legislative Assembly, 7 September 2000, 3101 (M Foley MP, Attorney-General and Minister for Justice), during which the then Attorney-General, Matt Foley MP, stated that this definition of 'consent' was taken from the *Criminal Code [1995]* (Qld).

47 *Evidence Act 1977* (Qld) s 21A; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5.

encounters,⁴⁸ and introduced provisions regarding the treatment of victims and complainants within the criminal justice system.⁴⁹

REFORMS IN OTHER JURISDICTIONS

[61] Each jurisdiction addresses the issues of consent and mistake of fact in different ways. Most include a statutory definition of 'consent', in conjunction with circumstances in which consent is not free and voluntary (in various formulations). The clearest differences arise when examining what the defendant knew about whether consent was given or withheld by the complainant.

[62] Some jurisdictions require that the defendant knew the complainant was not consenting or was reckless as to whether the complainant was consenting. In other jurisdictions, considerations of the state of mind of the defendant arise only when considering the application of mistake of fact.

[63] Some of these differences in approach are a result of the different legal frameworks and principles in those jurisdictions that have a codified criminal law, compared with those that rely on the common law.

[64] The meaning of consent and the operation of mistake of fact, as they apply to offences of rape and sexual assault, have been the subject of consideration and reform in many Australian jurisdictions. Whether in the context of proving knowledge of consent or considering mistake of fact, reforms have commonly introduced into legislation notions of reasonableness of a defendant's belief as to consent.

[65] Most recently, the NSWLRC has been asked to review and report on consent and knowledge as to consent in relation to sexual assault offences. In October 2019, it released draft proposals covering a number of matters. Some of which relate to:⁵⁰

- the meaning of consent, including in relation to particular sexual activity;
- the circumstances in which a person is taken not to have consented;
- the law on knowledge of consent, including what the jury must and must not consider; and
- jury directions on consent.

[66] As a result of the distinctions between the jurisdictions, direct adoption of any specific provision or mechanism is problematic. The value of considering the approaches of other jurisdictions, both within Australia and internationally, is that they provide guidance in relation to possible reforms.

⁴⁸ *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4.

⁴⁹ *Victims of Crime Assistance Act 2009* (Qld).

⁵⁰ See NSWLRC draft proposals (2019).

CONCERNS RAISED

[67] According to recent statistics provided by the Australian Bureau of Statistics, the number of reported sexual assaults continues to increase. Nationally, there were 26 312 reported victims of sexual assault in 2018. The majority of these victims were female (84%) and aged between 10 and 19 years (45%). Most of these assaults occurred in residential settings by a person known to the victim.⁵¹

[68] Consistent with national data, in Queensland, the majority of victims of sexual offences were female—four out of five (84.2%). The most common age cohort for these victims was 10 to 19 years (42.8%). Female victims were more likely than male victims to be in a domestic relationship with the offender.⁵²

[69] As part of the Queensland Government’s development of a Sexual Violence Prevention Framework, it has been observed that:⁵³

There was a strong community perception that perpetrators of sexual violence are rarely held to account for their behaviours, and that there was a lack of rehabilitation and support options to help perpetrators stop re-offending. Many victims and survivors highlighted that knowing the perpetrator had been held to account was important for their own healing, and the significant negative impact on their wellbeing and recovery when they did not feel justice had been achieved.

[70] Concerns have been raised that giving evidence is ‘confronting’ and places the complainant in a position where they have to defend their own ‘credibility and behaviour’.⁵⁴

[71] It has been suggested⁵⁵ that the Queensland laws are ‘outdated’,⁵⁶ cause ‘serious injustices’,⁵⁷ are out-of-step with reforms that have occurred in other Australian jurisdictions and do not ‘reflect modern understandings and attitudes, especially towards women’.⁵⁸

51 Australian Bureau of Statistics, *Recorded Crime-Victims, Australia*, (Catalogue No 4510.0, 2018).

52 Queensland Government Statistician’s Office, *Crime Report, 2017–18*.

53 Department of Child Safety, Youth and Women, *Sexual Violence Prevention: Consultation Summary*, 8 <<https://www.csyw.qld.gov.au/violence-prevention/sexual-violence-prevention/framework>>.

54 Ibid 8.

55 See generally J Crowe and B Lee, <www.consentlawqld.com>; Women’s Legal Service Qld ‘Rape Law Review Now’, <<https://wlsq.org.au/qld.rape-law-review-now/>> and <<http://broaderlines.com/help-to-clarify-queensland%E2%80%8Bs-consent-laws/>> (Broader Lines).

56 Women’s Legal Service Qld, above n 55.

57 Crowe and Lee, above n 55.

58 Women’s Legal Service Qld, 2018 submission to the Parliamentary, Legal Affairs and Community Safety Committee, *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018* <<https://www.parliament.qld.gov.au/documents/committees/LACSC/2018/ImageSharingBill2018/submissions/007.pdf>>.

[72] There has been criticism of the application of the mistake of fact excuse to sexual assault cases on the basis that some defendants rely on erroneous assumptions held about sexual behaviour and particularly female behaviour.⁵⁹

[73] One suggestion is that the law would be improved if the mistake of fact excuse were made inapplicable to the issue of consent in rape and sexual assault cases or, alternatively, if the application of the excuse of mistake of fact were qualified. In particular, it has been suggested that the excuse should be qualified so that a defendant could not argue that they were honestly and reasonably mistaken as to consent where: the defendant was reckless, did not take reasonable steps to find out whether the complainant was consenting, or was intoxicated (where this was self-induced); or the complainant was intoxicated or incapable of consenting.⁶⁰ It has also been recognised that any reforms must not impact on the presumption of innocence and the right of a defendant to a fair trial.⁶¹

THIS REVIEW

[74] The terms of reference require the Commission to consider a number of matters, including contemporary community standards, current legal principles with respect to criminal responsibility, the need to ‘ensure just outcomes by balancing the interests of victims and accused persons’, ‘the experiences of sexual assault victims and survivors in the criminal justice system’, ‘the views and research of relevant experts’, the position and developments in other jurisdictions, and any other relevant matters.⁶²

[75] The key question for consideration in the review is whether there are issues in application and practice arising from the current definition of consent and excuse of mistake of fact as to consent in rape and sexual assault and whether there is a need for reform. Further, if a need for reform is identified, consideration is required as to the form such changes should take.

QUESTIONS

- 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?
- Q-2** What considerations and principles should be taken into account in determining whether the definition of consent in section 348 and the

⁵⁹ A Cossins, ‘Why Her Behaviour is Still on Trial: The Absence of context in the modernisation of the substantive law on consent’, (2019) 42(2) *UNSW Law Journal*, 462–499, 471.

⁶⁰ Crowe and Lee, above n 55.

⁶¹ Crowe and Lee, above n 55.

⁶² The terms of reference are set out in full in Appendix A.

excuse of mistake of fact in section 24 of the Criminal Code, as it applies to rape and sexual assault, should be changed?

[76] A number of specific issues for consideration are raised in the following chapters.

Chapter 3

The definition of consent

INTRODUCTION

[77] The meaning of consent can be a central issue in a trial of rape or sexual assault charges because it is an element of the charge that the complainant did not give consent to the sexual act.

[78] In order to determine whether a complainant gave consent to the alleged sexual act, it is necessary to consider the complainant's subjective belief at the time, as well as any actions that represented consent or the lack of it. This results in a significant focus of questioning in cross-examination on the conduct and behaviour of the complainant.

[79] With the aim of shifting the focus of inquiry away from the conduct of the complainant and onto the conduct of the defendant, the adoption of features of what is described as an 'affirmative consent model' has been suggested.⁶³ An affirmative consent model seeks to highlight the responsibility of each person involved in sexual activity to ensure that the consent of the other has been obtained. A number of Australian jurisdictions have, arguably, adopted aspects of such a model of consent.

[80] Whether a complainant has given consent to a sexual act may require consideration of whether consent has been given, but not freely and voluntarily. For example, a complainant may consent to sexual intercourse with a defendant only because the defendant threatens violence or some other harm or detriment. In such circumstances, the complainant's consent would not be given freely and voluntarily. The Criminal Code sets out a number of circumstances in which a person's consent is not freely and voluntarily given.⁶⁴

[81] This chapter addresses the definition of consent in Chapter 32 of the Criminal Code and how it is currently applied and interpreted. It raises for consideration the adoption of an affirmative consent model. It also considers the circumstance where consent initially given is later withdrawn, as well as various circumstances, in Queensland and other jurisdictions, where consent is not given freely and voluntarily.

DEFINITION OF CONSENT

Queensland

[82] For the purposes of Chapter 32 of the Criminal Code, consent is defined as 'consent freely and voluntarily given by a person with the cognitive capacity to give

⁶³ See, eg, Crowe and Lee and Women's Legal Service Qld, above n 55, <www.consentlawqld.com>; Women's Legal Service Qld, 'Rape Law Review Now' <<https://wlsq.org.au/qld-rape-law-review-now/>> and <<http://broaderlines.com/help-to-clarify-queensland%E2%80%8Bs-consent-laws/>> (Broader Lines).

⁶⁴ Criminal Code (Qld) s 348(2).

the consent'.⁶⁵ The section goes on to set out a non-exhaustive list of circumstances when 'consent to an act is not freely and voluntarily given'.⁶⁶

[83] The definition of consent was discussed extensively by the President of the Queensland Court of Appeal in *R v Makary*. Sofronoff P noted that 'consent' is defined to require two elements:⁶⁷

First, there must in fact be "consent" as a state of mind. This is also because the opening words of the definition define "consent" tautologically to mean, in the first instance, "consent". The complainant's state of mind remains elemental. Second, consent must also be "given" in the terms required by the section.

The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour. (notes omitted)

[84] In essence, consent exists only if, at the time the sexual act takes place, in the mind of the complainant, that complainant possesses a mental state of willingness to engage in the sexual act. Additionally, that mental state of willingness must be 'given' to the other person. This is achieved by a representation to the other person through words or actions, or in more nuanced ways.

[85] In order to determine whether 'consent' as a state of mind existed, it is a proper question at a trial for the offence of rape for the prosecutor to ask the complainant whether the complainant consented to the sexual intercourse on the occasion in question.⁶⁸ The same is true of sexual assault cases.⁶⁹

[86] As consent must be 'given', a complainant who, at or before the time of the sexual act, does not manifest dissent by words or actions, is not in law taken to have consented to it.⁷⁰ Therefore, under the current law in Queensland (although not stated expressly in the legislation), a person who does not say or do anything to communicate consent to a sexual act cannot be said to have consented. This is qualified by the recognition that 'consent might be given in the most subtle ways ... evaluated against a pattern of past behaviour.'⁷¹ Therefore, much will depend on the circumstances of the case.

65 Criminal Code (Qld) s 348(1).

66 Criminal Code (Qld) s 348(2).

67 *R v Makary* [2018] QCA 258, [49]–[50] (Sofronoff P).

68 *R v Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).

69 *R v Sutton* [2008] QCA 249, [38] (Keane JA).

70 *R v Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).

71 *R v Makary* [2018] QCA 258 [50] (Sofronoff P).

AFFIRMATIVE CONSENT MODEL

[87] A number of preliminary respondents to the review have suggested the adoption of what is described as an 'affirmative consent model'.⁷²

[88] Definitions of affirmative consent vary. Affirmative consent has been defined as a knowing, voluntary, and mutual decision by all participants to engage in sexual activity which is maintained or re-affirmed at every stage of the activity. It acknowledges that consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. It highlights that silence or lack of resistance, of itself, does not demonstrate consent.⁷³ In simple terms, it is a clear and unequivocal 'yes' and highlights that it is the responsibility of each person involved in the sexual activity to ensure the affirmative consent of the other to engage in the sexual activity.⁷⁴

[89] The practical dynamics of any consideration of affirmative consent and sexual assault have been summarised by Justice L'Heureux-Dubé of the Supreme Court of Canada in *Her Majesty the Queen v Darryl Gordon Park*:⁷⁵

Few would dispute that there is a clear communication gap between how most women experience consent, and how many men perceive consent. Some of this gap is attributable to genuine, often gender-based, miscommunication between the parties. Another portion of this gap, however, can be attributed to the myths and stereotypes that many men hold about consent. As R. D. Wiener has observed in "Shifting the Communication Burden: A Meaningful Consent Standard in Rape" (1983), 6 *Harv. Women's L.J.* 143, at p. 147:

[A] gender gap in sexual communications exists. Men and women frequently misinterpret the intent of various dating behaviors and erotic play engaged in by their opposite-sexed partners.

...

Because both men and women are socialized to accept coercive sexuality as the norm in sexual behavior, men often see extreme forms of this aggressive behavior as seduction, rather than rape. A great many incidents women consider rape are, in effect, considered "normal" by both male perpetrators and the male-dominated legal system.

...

The assumption that if a woman is not consenting then she will say so is only helpful if we further assume that men perceive non-consent in the same way that

⁷² Victoria is an example of an Australian jurisdiction which is said to have adopted features of an affirmative consent model. See paragraphs 97 to 101.

⁷³ See generally the State University of New York, 'Definition of Affirmative Consent' <<https://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/>> and G Barreca PhD, 'What Does "Affirmative Consent" Actually Mean?' <<https://www.psychologytoday.com/au/blog/snow-white-doesnt-live-here-anymore/201707/what-does-affirmative-consent-actually-mean>>.

⁷⁴ T Goldsworthy, 'Yes means yes: moving to a different model of consent for sexual interactions', <<https://theconversation.com/yes-means-yes-moving-to-a-different-model-of-consent-for-sexual-interactions-90630>>.

⁷⁵ [1995] 2 S.C.R. 836, 864–5 and 869.

women communicate it. The elusive and multi-faceted character of sex-speak, however, demonstrates this latter assumption to be patently incorrect:

A woman may believe she has communicated her unwillingness to have sex - and other women would agree, thus making it a "reasonable" female expression. Her male partner might still believe she is willing - and other men would agree with his interpretation, thus making it a "reasonable" male interpretation. The woman, who believes that she *has* conveyed her lack of consent, may interpret the man's persistence as an indication that he does not care if she objects and plans to have sex despite her lack of consent. She may then feel frightened by the man's persistence, and may submit against her will. [emphasis in original.] (Wiener, *supra*, at pp. 148-49.)

Acknowledging the reality of this communication gap between reasonable women and reasonable men requires us to discard the assumption that voluntariness - defined only in terms of force, fear or fraud - is a fair proxy for consent in the absence of communicated non-consent. It is not. [Emphasis in original.]

[90] Supporters of an affirmative consent model suggest that it addresses a culture of entitlement in sexual interactions, instead, creating a culture of respect. This may better reflect community expectations as to what it means to consent to sexual activity. They argue that an adoption of the affirmative consent model may shift the focus of inquiry (as distinct from the onus of proof) away from the conduct of the complainant and onto the conduct of the defendant.⁷⁶

[91] Critics of this model suggest that it does more than simply shift the focus of inquiry as it removes due process and impinges on the defendant's right to a fair trial by changing the evidentiary onus. It is also said that it reduces what is spontaneous or nuanced human behaviour into an artificial transactional analysis of the behaviour.⁷⁷

Other jurisdictions

[92] As noted above, the Criminal Code defines consent as consent that is 'freely and voluntarily given'. The definition does not refer to the concept of agreement. It has been suggested that a definition that uses the terms free and voluntary 'agreement' reinforces 'both positive and communicative understandings of consent',⁷⁸ which are factors that underpin an affirmative consent model.

[93] The definition of consent in Western Australia is in similar terms to that in Queensland.⁷⁹ In contrast, most other Australian jurisdictions define consent using

⁷⁶ Goldsworthy, above n 74; A. Kerr, 'Cups of Tea, Joyriding and Shaking Hands—The Vexed Issue of Consent' (2019) 7 *The Griffith Journal of Law & Human Dignity* 1.

⁷⁷ Ibid. See also, as to other arguments, A Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr', (2019) 7 *The Griffith Journal of Law & Human Dignity* 17.

⁷⁸ ALRC and NSWLRC Joint Report on Family Violence, 1150.

⁷⁹ *Criminal Code Act Compilation Act 1913 (WA)* s 319(2).

various combinations of the words 'free' and/or 'voluntary' and 'agreement' or 'agrees'.⁸⁰

[94] Some consent-based international jurisdictions, including Canada and the United Kingdom, also define consent as 'voluntary agreement'⁸¹ or arising when a person 'agrees by choice, and has the freedom and capacity to make that choice'.⁸²

[95] Use of the word 'agreement' in defining consent was favoured by MCCOC as it 'emphasises ... that consent should be seen as a positive state of mind'.⁸³ Defining consent in positive terms 'properly reflects two objectives of sexual offences law; the protection of sexual autonomy and freedom of choice of adults.'⁸⁴

[96] However, a definition of consent that requires 'agreement' does not itself clarify the form that such agreement must take or the way it must be manifested. The analysis of the definition of consent in *R v Makary* makes it clear that the current terms of section 348(1) of the Criminal Code already require both the mental element of consent and the 'giving' of the consent by representation through words or actions.⁸⁵ To this extent, the current definition of consent in section 348(1) might be said to have an aspect of an 'affirmative consent model' in which consent is understood not merely as an internal state of mind or attitude but also as a permission that is given by one person to another. However, an affirmative consent model may require something more, that is, some type of positive effort on the part of the defendant to ascertain that consent has been given.

[97] Tasmania and Victoria have enacted aspects of an affirmative consent model. The first aspect requires a positive representation of consent.

[98] Victoria defines consent as meaning 'free agreement'⁸⁶ and also sets out a non-exhaustive list of circumstances in which a person does not consent:⁸⁷

Circumstances in which a person does not consent to an act include, but are not limited to, the following—

...

⁸⁰ *Crimes Act 1900* (NSW) s 61HE provides 'a person consents to sexual activity if the person freely and voluntarily agrees'; *Criminal Code Act 1983* (NT) s 192(1) defines consent to mean 'free and voluntary agreement'; *Criminal Law Consolidation Act 1935* (SA) s.46(2) provides 'a person consents to sexual activity if the person freely and voluntarily agrees'; *Criminal Code Act 1924* (Tas) s.2A(1) sch 1 and *Crimes Act 1958* (Vic) s.36(1) each provide that 'consent means free agreement'. The Australian Capital Territory does not define consent, but specifies particular circumstances in which consent is not freely and voluntarily given, *Crimes Act 1900* (ACT) s 67.

⁸¹ *Criminal Code, R.S.C., 1985, c. C-46 s 273.1(1)*.

⁸² *Sexual Offences Act 2003* (UK) s 74.

⁸³ MCC, 43. In 1990, Standing Committee of Attorneys-General established the Model Criminal Code Officers Committee to advise on the development of a model criminal code for adoption on a national basis.

⁸⁴ *Ibid.*

⁸⁵ *R v Makary* [2018] QCA 258, [50] (Sofronoff P).

⁸⁶ *Crimes Act 1958* (Vic) s 36(1).

⁸⁷ *Crimes Act 1958* (Vic) s 36(2).

(l) the person does not say or do anything to indicate consent to the act;

...

[99] Tasmania includes a provision in similar terms.⁸⁸ A similar provision is also included in the Canadian legislation, except that it applies in the context of the excuse of mistake of fact, rather than as part of the definition of consent.⁸⁹

[100] The second aspect of the legislated models is to require steps, or reasonable steps to be taken by the person seeking to engage in the sexual activity to ensure the other party is, in fact, consenting to the activity.

[101] For example, in determining whether a person held a reasonable belief in consent, Victoria requires a consideration of the steps taken by a person to find out whether the other person consents.⁹⁰

Reasonable belief in consent

(1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.

(2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents or, in the case of an offence against section 42(1), would consent to the act

[102] A reasonable steps provision is included in Tasmania (and also in Canada) but the requirement in those jurisdictions is set out in the context of considerations relating to a defendant's mistaken belief as to consent.⁹¹

Queensland

[103] It is arguable that at least some aspects of an affirmative consent model—the requirements for a positive representation of consent and for the defendant to take reasonable steps to confirm the complainant's consent—are addressed by the current position in Queensland.

[104] Although the Criminal Code does not expressly state that consent does not exist if a complainant 'does not say or do anything to communicate consent',⁹² the Queensland Court of Appeal has held, and maintained, that 'a complainant who at or before the time of sexual penetration fails by word or action to manifest ... dissent is not in law thereby taken to have consented to it.'⁹³

⁸⁸ *Criminal Code Act 1924* (Tas) s 2A(2)(a).

⁸⁹ *Criminal Code, R.S.C., 1985, c. C-46* s 273.2(c).

⁹⁰ *Crimes Act 1958* (Vic) s 36A.

⁹¹ *Criminal Code Act 1924* (Tas) s 14A; *Criminal Code, R.S.C., 1985, c. C-46* s 273.2(b).

⁹² *CF Criminal Code Act 1924* (Tas) 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l).

⁹³ *R v Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA); see also *R v Makary* [2018] QCA 258, [49]– [50] (Sofronoff P)

[105] The Criminal Code does not expressly require a defendant to take reasonable steps to ascertain whether the complainant was consenting to the act.⁹⁴ It remains the case in Queensland, however, that a mistaken belief as to consent must be both honest and *reasonable*. It is therefore arguable, even without legislative reform, that a failure by a defendant to take reasonable steps to ascertain whether a complainant is consenting may suggest that a mistaken belief was not one reasonably held.

Questions

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?

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?

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)?**

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

WITHDRAWAL OF CONSENT

[106] Rape and sexual assault offences based on the absence of consent are aimed at the protection of a person’s sexual autonomy and freedom of choice. The principles of autonomy and freedom require that consent, once given, can be withdrawn.

[107] It is clear that rape can be, and is, prosecuted in Queensland when the offence is particularised as having arisen from a point in time after any consent,

⁹⁴ CF *Criminal Code Act 1924* (Tas) s 14A. This issue is discussed in greater detail in Chapter 4.

initially given, has been withdrawn. Two examples of this are *R v Johnson*⁹⁵ and *R v OU*.⁹⁶ The same reasoning applies to offences of sexual assault.

[108] The position is made clear in *R v Makary* in which the President of the Queensland Court of Appeal highlighted that ‘the material time to consider whether consent has been given was the time at which penetration occurred’.⁹⁷

[109] The Criminal Code does not, however, include an express provision that deals with withdrawal of consent. This contrasts with the approach taken in some other jurisdictions.⁹⁸

[110] Although addressed in different ways, the legislation in both South Australia and Victoria include specific provisions about the withdrawal of consent.

[111] In South Australia, the offence of rape in section 48 of the *Criminal Law Consolidation Act 1935 (SA)*, provides:

48 Rape

(1) A person (the *offender*) is guilty of the offence of rape if he or she engaged, or continued to engage, in sexual intercourse with another person who—

(a) does not consent to engaging in the sexual intercourse; or

(b) has withdrawn consent to the sexual intercourse,

and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be).

[112] The *Crimes Act 1958 (Vic)* defines ‘consent’ in section 36(1). Section 36(2) details the circumstances in which a person does not consent to an act. One of those circumstances is:⁹⁹

having given consent to the act, the person later withdraws consent to the act taking place or continuing.

[113] Canadian legislation takes a similar approach to that in Victoria. Section 273.1 of the Canadian Criminal Code defines consent, and specifies circumstances in which ‘no consent is obtained’, including where:¹⁰⁰

⁹⁵ [2015] QCA 270.

⁹⁶ [2017] QCA 266.

⁹⁷ [2018] QCA 258, [68] (Sofronoff P).

⁹⁸ See *Criminal Law Consolidation Act 1935 (SA)* s 48; *Crimes Act 1958 (Vic)* s 36(2)(m); *Criminal Code, R.S.C., 1985, c. C-46* 273.1(2)(e).

⁹⁹ *Crimes Act 1958 (Vic)* s 36(2)(m).

¹⁰⁰ *Criminal Code, R.S.C., 1985, c. C-46* s 273.1(2)(e).

the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Question

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?

CIRCUMSTANCES WHEN CONSENT IS NOT FREE AND VOLUNTARY

[114] As detailed above, the definition of ‘consent’ means consent freely and voluntarily given by a person with the cognitive capacity to give consent.¹⁰¹ Section 348(2)¹⁰² sets out a non-exhaustive list, expressed in broad terms, of circumstances in which consent is not freely and voluntarily given:¹⁰³

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.

[115] This approach is consistent with the recommendations of MCCOC that ‘[t]he Model Criminal Code should define consent as “free and voluntary agreement” and list a limited number of circumstances in which consent is irrebuttably defined to be

¹⁰¹ Criminal Code (Qld) s 348(1).

¹⁰² The present form of s 348 was introduced by the *Criminal Law Amendment Act 2000* (Qld) in response to the recommendations of the Report of the Taskforce on Women and the Criminal Code (February 2000) 239–41. Prior to these amendments, the relevant provision was in the following terms in s 347:

- (1) Any person who has carnal knowledge of another person without that person’s consent or with that person’s consent if it is obtained by force, or by means of threats or intimidation of any kind, or by exercise of authority, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married female, by personating her husband, is guilty of a crime, which is called ‘rape’.
- (2) in this section—‘married female’ includes a female living with a man as his wife though not lawfully married to him and ‘husband’ has a corresponding meaning.

The changes to the section specifically amended the provisions in relation to false and fraudulent representation about the nature or purpose of the act (now s 348(2)(e)) and a mistaken belief induced by the defendant that they were the complainant’s sexual partner (now s 348(2)(f)).

¹⁰³ Criminal Code (Qld) s 348(2).

absent'.¹⁰⁴ The provision in the Model Criminal Code relating to circumstances in which a person does not consent, is in the following terms:¹⁰⁵

- (2) Examples of circumstances in which a person does not consent to an act include the following:
- (a) the person submits to the act because of force or the fear of force to the person or to someone else;
 - (b) the person submits to the act because the person is unlawfully detained;
 - (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
 - (d) the person is incapable of understanding the essential nature of the act;
 - (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes).

Notes: Section 5.2.43 also requires that the judge direct a jury, in a relevant case, as to the factors the jury may have regard to in determining whether or not there was consent.

[116] All Australian jurisdictions include provisions detailing circumstances in which consent is not freely and/or voluntarily given or agreed,¹⁰⁶ or is 'negated'.¹⁰⁷ The list of circumstances in each jurisdiction is non-exhaustive.

[117] In Queensland, each of the circumstances in which consent is not freely and voluntarily given is predicated on some act of wrongdoing to obtain such consent: for example, by force, threat or intimidation, or by false and fraudulent representations about the nature or purpose of the act.¹⁰⁸ The legislation in Western Australia is similar.¹⁰⁹

[118] The listed circumstances in other Australian jurisdictions include circumstances that reflect a wrongful act by the person in obtaining consent (such as force or fraud), as well as those involving a mistaken belief, fragility or incapacity on the part of the person giving consent.¹¹⁰

¹⁰⁴ MCC, 51.

¹⁰⁵ Ibid 50, s 5.2.3.

¹⁰⁶ See *Crimes Act 1900* (NSW) s 61HE (5)-(7); *Criminal Code Act 1983* (NT) s 192(2); *Criminal Code* (Qld) s 348(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Criminal Code Act 1924* (Tas) s 2A(2); *Crimes Act 1958* (Vic) s 36(2); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

¹⁰⁷ *Crimes Act 1900* (ACT) s 67.

¹⁰⁸ *Criminal Code* (Qld) s 348(2).

¹⁰⁹ *The Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

¹¹⁰ See *Crimes Act 1900* (ACT) s 67(1); *Crimes Act 1900* (NSW) s 61HE (5)-(8); *Criminal Code Act 1983* (NT) s 192(2); *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Criminal Code Act 1924* (Tas) s 2A(2); *Crimes Act 1958* (Vic) s 36(2).

[119] In some jurisdictions, like Queensland, the listed circumstances are expressed in broad or general terms that capture a wide range of scenarios.

[120] In other jurisdictions, the list of circumstances is expressed in narrower terms. Commonly, these have been included in legislation to address specific factual scenarios presented in prior court cases.

[121] The various circumstances included in the legislation across the Australian jurisdictions are:

- where the person agrees to the act due to the application of force, be it towards the person or others;¹¹¹
- where the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;¹¹²
- where there is an express or implied threat of harm or to harass or degrade towards the person or others;¹¹³
- where the person is overborne by the authority of or position of trust held by the other person;¹¹⁴
- where the person agrees or submits to conduct as a result of the fraud or false misrepresentation of the other person;¹¹⁵
- where the person is caused, by the other person, to be mistaken about the nature or purpose of the act;¹¹⁶
- where the person is caused to be mistaken about the identity of the other person;¹¹⁷

¹¹¹ See *Crimes Act 1900* (ACT) s 67(1)(a); *Criminal Code Act 1983* (NT) s 192(2)(a); Criminal Code (Qld) s 348(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Criminal Code Act 1924* (Tas) s 2A(2)(b); *Crimes Act 1958* (Vic) s 36(2)(a); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

¹¹² *Crimes Act 1958* (Vic) s 36(2)(b).

¹¹³ See *Crimes Act 1900* (ACT) s 67(1)(b)(c)(d); *Crimes Act 1900* (NSW) s 61HE(5)(c),(8)(b); Criminal Code (Qld) s 348(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(ii); *Criminal Code Act 1924* (Tas) s 2A(2)(c); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

¹¹⁴ See *Crimes Act 1900* (ACT) s 67(1)(h); *Crimes Act 1900* (NSW) s 61HE(8)(c); Criminal Code (Qld) s 348(2)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(e).

¹¹⁵ See *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1900* (NSW) s 61HE(6)(d); *Criminal Code Act 1983* (NT) s 192(2)(g); Criminal Code (Qld) s 348(2)(e); *Criminal Code Act 1924* (Tas) s 2A(2)(f); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

¹¹⁶ See *Criminal Code Act 1983* (NT) s 192(2)(e); Criminal Code (Qld) s 348(2)(e); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h); *Criminal Code Act 1924* (Tas) s 2A(2)(g).

¹¹⁷ See *Crimes Act 1900* (ACT) s 67(1)(f); *Crimes Act 1900* (NSW) s 61HE(6)(a); *Criminal Code Act 1983* (NT) s 192(2)(e); Criminal Code (Qld) s 348(2)(f); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g); *Criminal Code Act 1924* (Tas) s 2A(2)(g); *Crimes Act 1958* (Vic) s 36(2)(i).

- where the person has a mistaken belief that they are married to the other person;¹¹⁸
- where the person submits to the conduct due to the unlawful detention of the person or another;¹¹⁹
- where the person is unable to understand the nature of the act;¹²⁰
- where the person mistakenly believes that the act is for medical or hygienic purposes;¹²¹
- where the person is affected by a condition or impairment rendering them incapable of consenting;¹²²and
- where the person is asleep, unconscious or so affected by alcohol or another drug so as to be unable to consent.¹²³

[122] Other specific scenarios that might impact upon whether or not a person's consent was free and voluntary, but that are not specifically listed in the existing legislation in Australian jurisdictions include the following:¹²⁴

- where the other person fails to use a condom as agreed or sabotages the condom;
- where the person agrees to a sexual act with the other person under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease or grievous bodily disease;¹²⁵
- where the person consents to the sexual act under a mistaken belief, induced by the other person, that there will be a monetary exchange in relation to the act.¹²⁶

¹¹⁸ *Crimes Act 1900* (NSW) s 61HE(6)(b); *Criminal Code* (Qld) s 348(2)(f).

¹¹⁹ See *Crimes Act 1900* (ACT) s 67(1)(j); *Crimes Act 1900* (NSW) s 61HE(5)(d); *Criminal Code Act 1983* (NT) s 92(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b); *Criminal Code Act 1924* (Tas) s 2A(2)(d); *Crimes Act 1958* (Vic) s 36(2)(c).

¹²⁰ See *Crimes Act 1900* (NSW) s 61HE(6)(d); *Criminal Code Act 1983* (NT) s 192(2)(d) *Criminal Law Consolidation Act 1935* (SA) s 46(3)(f); *Criminal Code Act 1924* (Tas) s 2A(2)(i); *Crimes Act 1958* (Vic) s 36(2)(g)(h).

¹²¹ See *Crimes Act 1900* (NSW) s 61HE(6)(c); *Criminal Code Act 1983* (NT) s 192(2)(f); *Criminal Code* (Qld) s 348(2)(e); *Crimes Act 1958* (Vic) s 36(2)(j).

¹²² See *Crimes Act 1900* (ACT) s 67(1)(i); *Crimes Act 1900* (NSW) s 61HE(5)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e).

¹²³ See *Crimes Act 1900* (ACT) s 67(1)(e); *Crimes Act 1900* (NSW) s 61HE(5)(b),(8)(a); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(d)(e)(f).

¹²⁴ See the discussion of specific circumstances in this chapter.

¹²⁵ Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to sexual assault: the way forward* (December 2005) 40–42.

¹²⁶ NSWLRC draft proposals (October 2019) 18–19.

Question

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?

Specific circumstances

[123] There are a number of circumstances that impact upon whether a person’s consent was free and voluntary that are arguably not covered in the present Queensland legislation. These are considered below.

Where the person is asleep, unconscious or so affected by alcohol or another drug so as to be unable to consent¹²⁷

[124] In Queensland, the Criminal Code does not address this in its list of circumstances. However, the definition of consent in section 348(1) requires that consent is ‘freely and voluntarily given by a person with the cognitive capacity to give the consent’.¹²⁸ For example, in *R v Singh*,¹²⁹ the prosecution case proceeded on the basis that the highly intoxicated complainant was asleep or unconscious and did not consent or, in the alternative, that she did not have the cognitive capacity to consent.¹³⁰ The conviction was upheld by the Court of Appeal.

[125] Implicit in such considerations is the need to acknowledge that each case is different, turning on its facts and the evidence before the court. Considerations as to the level of consciousness or intoxication of a complainant are matters of fact for the jury and may be relevant to a number of their considerations in reaching a verdict including whether or not the complainant had the cognitive capacity¹³¹ to consent to the sexual act.

[126] Intoxication of a complainant can impact on the issue of whether or not the complainant was able to consent, whether the complainant was in fact consenting and the defendant’s belief as to the complainant’s consent. The level of intoxication and the way in which that intoxication impacts a complainant may vary. It may range from a low level of intoxication, which would not have any substantial impact upon the complainant, to a high level of intoxication, where the impact of the intoxication is significant. The level of intoxication could also be so great that the complainant is

¹²⁷ See *Crimes Act 1900* (ACT) s 67(1)(e); *Crimes Act 1900* (NSW) s 61HE(5)(b),(8)(a); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Code* (Qld) s 348(1); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(d)(e)(f).

¹²⁸ *Criminal Code* (Qld) s 348(1).

¹²⁹ *R v Singh* [2012] QCA 130.

¹³⁰ *Ibid* [20] (Lyons J).

¹³¹ The term ‘cognitive capacity’ is not defined in the *Criminal Code* (Qld). The terms ‘cognitive capacity’ and ‘capacity’ are defined respectively in the *Oxford Dictionary* definitions as: ‘cognitive means the process by which knowledge and understanding is developed in the mind’ and ‘your capacity for something is your ability to do it.’ *Oxford English Dictionary* (3rd ed, 2015) ‘cognitive’ and ‘capacity’.

unable to consent to a sexual act. The way intoxication affects the decision-making, attitude and demeanour of a complainant may also be relevant to the mind of a defendant, particularly when considering the application of the 'honest' belief aspect of the excuse of mistake of fact.¹³²

[127] An example of the interplay between the level of intoxication of the complainant, the issue of consent and the availability of the excuse of mistake of fact is explained by Jerrard JA in *R v SAX*¹³³:

The evidence raised for the jury's consideration the issue of whether the prosecution had excluded the possibility that the complainant had acted before and during the sexual intercourse as the appellant claimed she had, but with the complainant later having no memory of those events, because she was intoxicated. If the jury thought that had happened, it could conclude that the complainant did not have the cognitive capacity to give consent at the time, because she was so affected by alcohol or drugs that she did not know what was happening, and was not able to give consent to it. That would be an available conclusion. There would also be another issue, whether or not the appellant honestly and reasonably believed that she did have cognitive capacity and was consenting; or whether the evidence showed that she was so plainly affected by alcohol as to obviously lack cognitive capacity, as the appellant then well knew.

Cases of this nature, where a considerable quantity of alcohol or another drug has been consumed, and when intercourse occurs in circumstances of which a complainant has no recollection of the intercourse or of the prior events, almost always raise for consideration whether there was obvious stupefaction from alcohol and cognitive incapacity, of which a defendant simply took advantage; or whether a defendant mistakenly but honestly and reasonably believed actual consent was given with cognitive capacity. The issue is not concluded for the prosecution because it establishes to the jury's satisfaction that a complainant did not have sufficient understanding to know what was happening and give consent to it. There remains the issue of whether that lack of cognitive capacity was either obvious or also actually known to the defendant, excluding the possibility of reasonable mistake about it.

[128] In the same case, in discussing the directions of the judge in relation to intoxication of the complainant, Keane JA endorsed and confirmed the reasoning of the South Australian Court of Appeal and the Queensland Court of Appeal in previous decisions:¹³⁴

... it was incumbent on the trial judge to make clear the distinction: 'between cases where the intoxication is so gross that the complainant is unable to consent and those cases where the complainant is not so severely intoxicated and she consents to sexual intercourse either because her inhibitions are reduced or for any other reason.'

¹³² See further Chapter 4.

¹³³ [2006] QCA 397 [1]–[2].

¹³⁴ *Ibid* [20], citing *R v Blayney* [2003] SASC 405; (2003) 140 A Crim R 249 at 254 [17]; *R v Francis* [1993] 2 Qd R 301 at 305 [*R v Francis* was decided in relation to previous Queensland provisions.]

[129] In a trial, evidence about the intoxication of a complainant may be received from the complainant, other witnesses present at the time, the defendant and/or a forensic medical officer or a doctor.¹³⁵

[130] In a number of Australian jurisdictions, the list of circumstances in which consent is not free and voluntary includes, where the person was asleep, unconscious or intoxicated. For example, in Tasmania ‘a person does not freely agree to an act if the person—is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required’.¹³⁶ Some jurisdictions split these aspects into separate circumstances; others include only one of these aspects. The reference to intoxicating substances covers intoxication by alcohol or drugs.

[131] In Queensland, concerns have been raised about circumstances in which the complainant is intoxicated or unconscious. On one view, the requirement of ‘cognitive capacity’ to consent in section 348(1) of the Criminal Code is sufficient to address this circumstance. An alternative approach is to include an express provision in section 348(2) to the effect that consent is not freely and voluntarily given if the complainant is intoxicated, to some lesser degree than where there is an absence of cognitive capacity.

Consent to a sexual act on the basis of an agreement that the other person will wear a condom but fails to do so or sabotages the condom

[132] A concerning practice emerging in the community is where a person consents to the sexual act on the basis of an agreement that the other person will use a condom, but the other person does not do so or removes the condom part way through the sexual act.¹³⁷ Another circumstance of a similar nature is where the other person sabotages or tampers with the condom in some manner. The practice of the non-consensual removal of a condom during sexual intercourse is colloquially known as ‘stealthing’.¹³⁸

¹³⁵ In these situations, the prosecution may seek to call evidence from a medical practitioner who has examined the complainant, lead evidence of blood alcohol test results or call evidence from a Forensic Medical Officer (Government Medical Officer) to give evidence of the general impact of particular levels of consumption over a specific time period.

¹³⁶ *Criminal Code Act 1924* (Tas) s 2A(2)(h).

¹³⁷ RL Latimer RL, LA Vodstrcil, CK Fairley, CJ Cornelisse, EPF Chow, TRH Read, CS Bradshaw, ‘Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia’, (28 February 2019) <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779>> See also B Chesser and A Zahra, ‘Stealthing: a criminal offence?’ (2019) Vol 31, No 2 *Current issues in Criminal Justice* 217-235, 217, which refers to ‘scattered media coverage [which] has revealed the widespread occurrence in Australia of stealthing’.

¹³⁸ H Klein, ‘Generationing, Stealthing, and Gift Giving: The Intentional Transmission of HIV by HIV-Positive Men to their HIV-Negative Sex Partners’, *Health Psychology Research*, Vol 2 1582 (2014). See also A Brodsky, ‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal’, (2017) 32.2 *Columbia Journal of Gender and Law* 82.

[133] To date, none of the Australian jurisdictions specifically address these circumstances in their legislation.¹³⁹

[134] It has been argued that despite the decades of extensive reform of the law relating to sexual offences in Australia, a significant gap and confusion exists in relation to non-consensual condom removal which is not specifically covered under existing legislative provisions.¹⁴⁰

[135] A recent Melbourne Sexual Health Centre and Monash University survey of more than 2000 people who visited the Melbourne Sexual Health Centre over three months from December 2017 found that one in three women and almost one in five men had been the victim of non-consensual condom removal.¹⁴¹

[136] On one view, the non-consensual removal of a condom and the other circumstances outlined above, are already covered by existing provisions, like the one in Queensland, to the effect that a person's consent to an act is not freely and voluntarily given if it is obtained 'by false and fraudulent representations about the nature or purpose of the act'.¹⁴²

[137] Alternatively, it might be considered, that the legislation should specifically address these practices. For example, in Singapore, the *Criminal Law Reform Act 2019* amended the Singapore *Penal Code* by introducing section 376H, which criminalises non-consensual condom removal:¹⁴³

'Procurement of sexual activity by deception or false representation',

376H.—(1) Any person (A) shall be guilty of an offence if —

- (a) A intentionally touches another person (B) or intentionally incites B to touch A or B or another person;
- (b) the touching is sexual and B consents to the touching;
- (c) A fraudulently obtains B's consent by means of deception or false representation practised or made by A for that purpose;

¹³⁹ 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>>

¹⁴⁰ B Chesser and A Zahra, 'Stealthing: a criminal offence?' (2019) Vol 31, No 2 *Current issues in Criminal Justice* 217-235, 219.

¹⁴¹ RL Latimer RL, LA Vodstrcil, CK Fairley, CJ Cornelisse, EPF Chow, TRH Read, CS Bradshaw. 'Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia', (28 February 2019) <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779>>

¹⁴² Criminal Code (Qld) s 348(2). 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>> For a discussion of the effect of stealthing on consent to sexual activity in the United Kingdom see A Clough, Conditional Consent and Purposeful Deception, (2018) 82(2) *The Journal of Criminal Law* 178.

¹⁴³ Section 376H also applies to an accused who fraudulently obtains the consent of the complainant by deception or false representation that the accused is not 'suffering from or is a carrier of a sexually transmitted disease'. The *Criminal Law Reform Act 2019* (Sg) was passed on 6 May 2019 but has not yet commenced.

- (d) the deception or false representation mentioned in paragraph (c) relates to—
 - (i) the use or manner of use of any sexually protective measure; or
 - (ii) whether A or another person whom B is incited to touch is suffering from or is a carrier of a sexually transmitted disease; and
- (e) A knows or has reason to believe that the consent was given in consequence of such deception or false representation.

[138] The NSWLRC has proposed the inclusion of a similar provision:¹⁴⁴

A person who consents to a sexual activity being performed in a particular manner is not, by reason only of that fact, to be taken to consent to the sexual activity being performed in another manner.

Note. For example, a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.

Consent to a sexual act with the other person under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease

[139] Considerations as to this circumstance arise in relation to sexually transmissible diseases of a serious kind, that is, a serious disease.¹⁴⁵

[140] None of the Australian jurisdictions specifically address such a circumstance in their legislation regarding rape and sexual assault.¹⁴⁶

[141] As noted above, in Singapore, the *Criminal Law Reform Act 2019 (Sg)* amended the Singapore *Penal Code* by introducing section 376H, to create an offence of ‘Procurement of sexual activity by deception or false representation’.¹⁴⁷ This offence covers a situation where a defendant fraudulently obtains the consent

¹⁴⁴ NSWLRC draft proposals (October 2019) 11–12.

¹⁴⁵ ‘Serious disease’ is defined in s 1 of the Criminal Code (Qld) to mean ‘a disease that would, if left untreated, be of such a nature as to—
 (a) cause or be likely to cause any loss of a distinct part or organ of the body; or
 (b) cause or be likely to cause serious disfigurement; or
 (c) endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available’.

¹⁴⁶ See NSWLRC, *Consent in relation to sexual offences*, Consultation Paper (February 2018) which refers to the failure to disclose HIV/AIDS positive status as one circumstance which may impact on whether a person’s consent was free and voluntary but the NSWLRC draft proposals (October 2019) do not include any proposal to introduce this circumstance. See also Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to sexual assault: the way forward* (December 2005) 40–42; Criminal Law Review Division Attorney General’s Department (NSW), *The Law of Consent and Sexual Assault*, Discussion Paper (May 2007) 18.

¹⁴⁷ See [137] and above n 143.

of the complainant by deception or false representation that the defendant is not 'suffering from or is a carrier of a sexually transmitted disease'.

[142] It is arguable that, in Queensland, such a situation falls within the scope of the existing circumstance regarding fraud, if there is a positive act of dishonesty on the part of the defendant.¹⁴⁸

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

[143] It has been suggested that provision should be made for the circumstance to capture a situation where, there is an agreement for money to be exchanged for a sexual act and the money is not ultimately paid by the other person, for example, an arrangement with a sex worker. The idea of such a provision is that the person would be consenting to the act due to a mistaken belief, created by the other person, about payment for the sexual act, a payment that is not ultimately made.

[144] There is no legislative provision in the Australian jurisdictions specifically protecting against such a circumstance.

[145] It is arguable that such a situation falls under the existing circumstance where false and fraudulent representations on the part of the other person negate consent.¹⁴⁹

Questions

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?**

¹⁴⁸ Criminal Code (Qld) s 348(2)(e). Additionally, the Criminal Code (Qld) addresses such conduct by way of s 317 (Acts intended to cause grievous bodily harm and other malicious acts) and s 320 (Grievous bodily harm). Section 317(1)(b) provides 'Any person who, with intent – to do some grievous bodily harm or transmit a serious disease to any person is guilty of a crime ...'. Section 320(1) provides 'Any person who unlawfully does grievous bodily harm to another is guilty of a crime ...'. 'Grievous bodily harm' is defined in the Criminal Code (Qld) in s 1 as meaning:

- (a) the loss of a distinct part or an organ of the body; or
- (b) serious disfigurement; or
- (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available'.

See also *Zaburoni v The Queen* (2016) 256 CLR 482.

¹⁴⁹ Criminal Code (Qld) s 348(2)(e).

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

Other circumstances

[146] Some additional circumstances addressed in other jurisdictions are considered below. Many of these are more specific or detailed examples of the broadly drafted Queensland provisions.

Consent obtained by force

[147] In Queensland, a person's consent to an act is not freely and voluntarily given if it is obtained 'by force'.¹⁵⁰ All Australian jurisdictions include a circumstance where consent is not free and voluntary where there is the involvement of or application of force.¹⁵¹ The terms used include 'violence', 'force' and 'threats of force'. The provisions variously allow for such force to be exhibited against the person, a third party who is present or nearby, or another person.

[148] The Queensland provision simply refers to the term 'by force' without specifying the nature of the force or the persons to whom it is directed.¹⁵² Arguably, those matters are covered by the broad and inclusive language of the provision.

Consent obtained by threat or intimidation or by fear of bodily harm

[149] In Queensland, a person's consent to an act is not freely and voluntarily given if it is obtained by threat or intimidation¹⁵³ or by fear of bodily harm.¹⁵⁴

¹⁵⁰ Criminal Code (Qld) s 348(2)(a).

¹⁵¹ See *Crimes Act 1900* (ACT) s 67(1)(a); *Criminal Code Act 1983* (NT) s 192(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Criminal Code Act 1924* (Tas) s 2A(2)(b); *Crimes Act 1958* (Vic) s 36(2)(a); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

¹⁵² Criminal Code (Qld) s 348(2)(a).

¹⁵³ Criminal Code (Qld) s 348(2)(b).

¹⁵⁴ Criminal Code (Qld) s 348(2)(c).

[150] Queensland,¹⁵⁵ Tasmania¹⁵⁶ and Western Australia¹⁵⁷ refer to ‘threats’ in a broad sense in their provisions. The Australian Capital Territory,¹⁵⁸ New South Wales¹⁵⁹ and South Australia¹⁶⁰ legislate more narrowly by addressing specific types of threats, for example, threats to inflict violence, threats of force, threats to degrade, humiliate, disgrace or harass. The threats can be towards the person or another person. The Victorian legislation includes circumstances involving ‘fear of harm’ of any type, whether to that person or someone else or an animal, but not specifically, threats.¹⁶¹

[151] On one view, the inclusion of these more specific circumstances of threats would assist in addressing the impact of domestic violence by capturing threats made to a person living in a domestic relationship, or someone closely related such as a child of the relationship.

[152] On the other view, these circumstances are sufficiently covered by the existing provision in the Queensland legislation.¹⁶²

Consent obtained by exercise of authority

[153] In Queensland, a person’s consent to an act is not freely and voluntarily given if it is obtained by ‘exercise of authority’.¹⁶³ In other jurisdictions, this circumstance is framed in terms of being overborne by the authority of or position of trust held by the other person.¹⁶⁴ This is addressed in a number of ways, for example, by reference to the person being overborne by the nature or position of the other person, or by the abuse of someone’s position of authority or trust. The idea behind extending such provisions is to cover situations in which there is a relationship of authority or trust between the person and the other person which affects the other person’s ability to refuse to consent to sexual conduct.

[154] The Queensland provision applies where the consent is obtained ‘by exercise of authority’. This covers many different relationships of authority between a defendant and a complainant.

155 Criminal Code (Qld) s 348(2)(c).

156 *Criminal Code Act 1924* (Tas) s 2A(2)(c).

157 *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

158 *Crimes Act 1900* (ACT) s 67(1)(b)(c)(d).

159 *Crimes Act 1900* (NSW) s 61HE(5)(c),(8)(b).

160 *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(ii).

161 *Crimes Act 1958* (Vic) s 36(2)(b).

162 Criminal Code (Qld) s 348(2)(b).

163 Criminal Code (Qld) s 348(2)(d).

164 *Crimes Act 1900* (ACT) s 67(1)(h); *Crimes Act 1900* (NSW) s 61HE(8)(c); *Criminal Code Act 1924* (TAS) s 2A(2)(e).

[155] The Queensland provision does not specifically refer to a position of trust. However, it is arguable that this may fall under a broader interpretation of 'exercise of authority'.

Consent obtained by false and fraudulent representations about the nature or purpose of the act

[156] In Queensland, a person's consent to an act is not freely and voluntarily given if it is obtained 'by false and fraudulent representations about the nature or purpose of the act'.¹⁶⁵ In other Australian jurisdictions, there are a number of circumstances which come within the scope of a false and fraudulent representation.

[157] First, other jurisdictions include a circumstance where the person agrees or submits as a result of the fraud or false representation of the other person.¹⁶⁶ The provisions are in differing terms with the operative feature being the inducement of consent by way of fraud and/or false representation without the Queensland qualification of 'about the nature or purpose of the act'.¹⁶⁷ There is an argument that the Queensland provision is more restrictive than other jurisdictions, because it addresses fraud and false representation in relation to the nature or purpose of the act as opposed to other jurisdictions which broadly refer to fraud or false representation. However, it can be said that, despite the narrower Queensland provision, it captures many instances of such conduct.

[158] Second, other jurisdictions include a circumstance where the person is caused, by the other person, to be mistaken about the nature or purpose of the act.¹⁶⁸ Three jurisdictions allow for a mistake on the part of the person as to, variously, the nature or sexual nature or purpose of the act. These particular circumstances do not require the mistake on the part of the person to be caused by false and fraudulent representations on the part of the other person or another (as is the case in Queensland). Tasmania requires that the person be reasonably mistaken.

[159] It could be argued that the Queensland provision narrows the scope of such a circumstance by requiring a false and fraudulent representation about the nature or purpose of the act. However, one of the benefits of such a construction may be that it ensures that the conduct on the part of the defendant has the appropriate criminality, rather than being inadvertent or accidental.

[160] Third, some jurisdictions include a circumstance where the person is unable to understand the nature of the act.¹⁶⁹ Four jurisdictions draft these circumstances in terms of when a person is unable to understand the nature of the act (or activity). In

¹⁶⁵ Criminal Code (Qld) s 348(2)(e).

¹⁶⁶ See *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1900* (NSW) s 61HE(6)dc); *Criminal Code Act 1924* (Tas) s 2A(2)(e).

¹⁶⁷ Criminal Code (Qld) s 348(2)(e).

¹⁶⁸ See *Criminal Code Act 1983* (NT) s 192(2)(e); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h); *Criminal Code Act 1924* (Tas) s 2A(2)(f).

¹⁶⁹ See *Criminal Code Act 1983* (NT) s 192(2)(d); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(f); *Criminal Code Act 1924* (Tas) s 2A(2)(i); *Crimes Act 1958* (Vic) s 36(2)(g)(h).

addition, Victoria includes a circumstance where the person is mistaken about the sexual nature of the act. An example of such a circumstance is in Tasmania:¹⁷⁰

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—is unable to understand the nature of the act.

[161] One concern that arises in relation to the broader circumstance used in other jurisdictions is that the provision does not require any conduct on the part of the defendant to induce such a lack of understanding in the complainant, as opposed to Queensland where some act of fraud or false representation is necessary. In addition, the Queensland legislation addresses a broader concern about the ability of a complainant to understand the nature of the act by way of the first limb of the definition of consent in section 348(1), that 'consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent'.¹⁷¹

[162] Fourth, other Australian jurisdictions include a circumstance where the person mistakenly believes that the act is for medical or hygienic purposes.¹⁷² It is notable that, under these provisions, it is not necessary for such a mistaken belief to be induced or caused by the defendant. As a result, there may be some concerns in adopting a circumstance drafted in these terms.

[163] The Queensland legislation does not include such a circumstance in its list of when consent is not freely and voluntarily given. However, depending on the facts, it could be addressed under the circumstance of consent obtained by false and fraudulent representations.¹⁷³

Consent obtained by a mistaken belief that the defendant was the person's sexual partner

[164] In Queensland, a person's consent to an act is not freely and voluntarily given if it is obtained 'by a mistaken belief induced by the defendant that the defendant was the person's sexual partner'.¹⁷⁴ Other jurisdictions frame such provisions more widely, as a circumstance in which the person is caused to be mistaken about the identity of the other person,¹⁷⁵ or has a mistaken belief that they are married to the other person.¹⁷⁶ (One jurisdiction is silent as to such a mistake.)

[165] There are additional circumstances dealt with in other jurisdictions that do not directly fall under the Queensland provisions. However, it is arguable that they

¹⁷⁰ *Criminal Code Act 1924* (Tas) s 2A(2)(i).

¹⁷¹ *Criminal Code* (Qld) s 348(1).

¹⁷² See *Crimes Act 1900* (NSW) s 61HE(6)(c); *Criminal Code Act 1983* (NT) s 192(2)(f); *Crimes Act 1958* (Vic) s 36(2)(j).

¹⁷³ *Criminal Code* (Qld) s 348(2)(e).

¹⁷⁴ *Criminal Code* (Qld) s 348(2)(f).

¹⁷⁵ See *Crimes Act 1900* (ACT) s 67(1)(f); *Crimes Act 1900* (NSW) s 61HE(6)(a); *Criminal Code Act 1983* (NT) s 192(2)(e); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g); *Criminal Code Act 1924* (Tas) s 2A(2)(g); *Crimes Act 1958* (Vic) s 36(2)(i).

¹⁷⁶ See *Crimes Act 1900* (NSW) s 61HE(6)(b).

relate to conduct that is potentially captured by the Queensland provisions. These are discussed below.

Where the person submits to the conduct due to the unlawful detention of the person or another¹⁷⁷

[166] The Queensland legislation does not include specific reference to unlawful detention in the list of circumstances in which consent is not given freely and voluntarily. However, it is arguable that such a situation would be covered by the broader provisions depending on how the unlawful detention is occasioned (such as where the consent is obtained by force or threat).

[167] In some jurisdictions, the relevant provision applies 'if the other person is unlawfully detained', at the relevant time. The Tasmanian provision, in contrast, applies if 'the person submits' because they, or another person, are unlawfully detained.

Where the person is affected by a condition or impairment rendering them incapable of consenting¹⁷⁸

[168] The Queensland definition of consent requires 'consent freely and voluntarily given by a person with the cognitive capacity to give consent'.¹⁷⁹ This provision addresses a situation that is legislated in other jurisdictions as a circumstance in which consent is not free and voluntary.

[169] The provision in South Australia is in the following terms:¹⁸⁰

the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing.

[170] In the Australian Capital Territory, the provision refers to consent caused 'by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given'.¹⁸¹ The New South Wales provision is 'if the person does not have the capacity to consent to the sexual activity, including because of age or cognitive incapacity'.¹⁸²

¹⁷⁷ See *Crimes Act 1900* (ACT) s 67(1)(j); *Crimes Act 1900* (NSW) s 61HE(5)(d); *Criminal Code Act 1983* (NT) s 192(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b); *Criminal Code Act 1924* (Tas) s 2A(2)(d); *Crimes Act 1958* (Vic) s 36(2)(c). Another State is silent as to this circumstance: *Criminal Code Act Compilation Act 1913* (WA) s 319.

¹⁷⁸ See *Crimes Act 1900* (ACT) s 67(1)(i); *Crimes Act 1900* (NSW) s 61HE(5)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e).

¹⁷⁹ *Criminal Code* (Qld) s 348(1).

¹⁸⁰ *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e).

¹⁸¹ *Crimes Act 1900* (ACT) s 67(1)(i).

¹⁸² *Crimes Act 1900* (NSW) s 61HE(5)(a).

Questions

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

Q-11 If yes to Q-8 to Q-10, what differences and what advantages or disadvantages might result from any changes?

Chapter 4

Excuse of mistake of fact

INTRODUCTION

[171] 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.¹⁸³ The principle is reflective of the idea that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences.¹⁸⁴

[172] In some Australian jurisdictions—the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Victoria—‘knowledge’ is an element of the offences of rape and sexual assault, that must be proved by the prosecution. In those five jurisdictions, the relevant offences require proof that:

- the sexual act took place;
- the sexual act took place without consent; and
- the defendant had the requisite degree of knowledge as to the absence of consent.

[173] In Queensland, the offences of rape and sexual assault require proof of just two elements:

- that the sexual act took place; and
- that the sexual act took place without consent.¹⁸⁵

[174] The absence of an element of knowledge makes the task of proving rape and sexual assault in Queensland less onerous. ‘Knowledge’ as to consent is relevant, but only if section 24 of the Criminal Code is raised on the evidence.

[175] 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’. For the purposes of rape and sexual assault offences, the mistake commonly relied upon is the mistaken belief that the complainant was consenting.

[176] Once mistake of fact is raised on the evidence it is for the prosecution to negative the excuse, that is, to establish beyond reasonable doubt that the defendant

¹⁸³ *Sherras v De Rutzen* [1895] 1 QB 918, 921 (Wright J).

¹⁸⁴ G Williams, *Textbook of Criminal Law* (Stevens & Sons, 2nd ed, 1983), 70.

¹⁸⁵ The same approach is adopted in Tasmania and Western Australia.

did not have a mistaken belief or that if the defendant did, the belief was not honest or not reasonable. These are questions of fact for the jury to determine.

[177] The excuse of mistake of fact, as it applies to the offences of rape and sexual assault, has been the subject of recent discussion.¹⁸⁶ One of the arguments made is that the application of the excuse to offences of a sexual nature should be qualified, making it available only if a defendant was not reckless as to consent, took reasonable steps to ascertain if the complainant was consenting and only if the mistaken belief in consent was not influenced by self-induced intoxication. Recklessness, reasonable steps and intoxication are all features of legislation which are relevant to charges of rape and sexual assault in Tasmania, Canada and Victoria. It is argued that the adoption of similar legislative provisions would narrow the application of the excuse of mistake of fact and avoid perceived injustices in Queensland. Others argue that the excuse in its present terms is sufficient for these purposes.

THE OPERATION OF SECTION 24 IN QUEENSLAND

[178] Section 24 of the Criminal Code provides for the excuse of mistake of fact, which, if raised on the evidence, must be disproved by the prosecution:¹⁸⁷

24 Mistake of fact

- (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
- (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

[179] Section 24 applies to all persons charged with any criminal offence against the statute law of Queensland.¹⁸⁸ It is not limited in its application to the offences of rape and sexual assault. Where it is raised in respect of an act that would otherwise constitute the offence of rape or sexual assault, the mistaken belief commonly relied upon is that the complainant gave consent to the act. A defendant will not be held criminally responsible unless the prosecution proves that the defendant did not hold the belief, or that it was not held honestly and reasonably.

[180] Where a matter proceeds to trial, section 24 will be an issue for the jury's consideration if evidence of a defendant's mistaken belief has arisen during the trial,

¹⁸⁶ See, eg, J Crowe, 'Evidence Proves it's Time for Change' (September 2019) *Proctor* 32; L Reece, 'Honest and Reasonable is Enough' (September 2019) *Proctor* 33; R Field, 'Applying the Principle of Fairness' (September 2019) *Proctor* 34; R Fogerty, 'The Universal Right to Plead One's Case' (September 2019) *Proctor* 35.

¹⁸⁷ For a discussion of the onus of proof, see [189]–[196] below.

¹⁸⁸ Criminal Code (Qld) s 36.

that is, where there are ‘facts in the case that justify consideration of the issue by the jury’.¹⁸⁹

[181] Relevantly, in *R v Mackary*, Sofronoff P explained that:¹⁹⁰

[b]efore section 24 can arise for a jury’s consideration in connection with the issue of consent there must be some evidence that raises a factual issue about whether the accused believed that the complainant had a particular state of mind and also believed that the complainant had freely and voluntarily given consent in some way.

...

[i]t is essential that evidence that is said to raise a requirement for a jury to consider s. 24 does indeed raise the issue, both as to the defendant’s honest belief and as to the facts that reasonably may give rise to that belief.

[182] This might arise from evidence called by either the defence or prosecution:¹⁹¹

It is clear law that a trial judge is obliged to direct the jury on any defence fairly raised on the evidence even where it is not raised on the defence case: *Pemble v The Queen*; *R v Van Den Hoek*.’ (notes omitted)

[183] A defendant in any criminal trial is not obliged to give or call evidence, but may do so. A defendant’s evidence that the complainant gave consent can also be evidence that the defendant held a belief that the complainant had given consent. Section 24 would be raised.

[184] If a defendant does not give evidence, section 24 might still be raised by evidence on the prosecution case although this can be problematic because the defendant’s belief as to consent can arise only by way of inference, unless the prosecution tenders evidence of statements made by the defendant to that effect. In assessing whether there is evidence of mistake of fact, such as to require that the judge direct the jury to consider the application of section 24, a judge must not confuse inference with speculation.¹⁹²

[185] If a judge determines that mistake of fact as to consent is fairly raised as an issue, the jury will be directed to consider whether the excuse applies or is negated. The question is whether the mistaken belief was both honestly and reasonably held—only if the jury is satisfied that the prosecution has proven that the defendant did not have the mistaken belief or did not honestly or reasonably do so, can the jury exclude the mistake of fact excuse and convict the defendant. These are questions of fact for the jury to decide.

189 *R v Makary* [2018] QCA 258, [55] (Sofronoff P).

190 *Ibid* [54], [56] (Sofronoff P).

191 *R v Cutts* [2005] QCA 306, [3] (McMurdo P), citing *Pemble v The Queen* (1971) 124 CLR 107, 117–18; *R v Van Den Hoek* (1986) 161 CLR 158.

192 *R v Makary* [2018] QCA 258, [59] (Sofronoff P).

[186] The assessment of whether the mistaken belief was ‘honest’ is a subjective one, that is, it must be a belief actually held by the defendant.¹⁹³

[187] Whether the mistaken belief was ‘reasonable’ requires an objective assessment.¹⁹⁴ In assessing whether the belief was reasonable the test is not whether a ‘theoretical ordinary, reasonable person would or should have made the mistake.’¹⁹⁵ Considerations as to whether the defendant’s belief is reasonable must have regard to the personal circumstances of the defendant, in so far as they determine how that belief was arrived at.¹⁹⁶ For example, intellectual impairment¹⁹⁷ or language difficulties¹⁹⁸ are relevant.

It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused’s opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.¹⁹⁹

[188] When intoxication is self-induced ‘a mistaken belief that is induced by intoxication is not one that can be considered ‘reasonable’ as distinct from honest.’²⁰⁰

Burden of proof—mistaken belief as to consent

[189] In a criminal case, the prosecution bears the onus of proving, beyond reasonable doubt, all the elements of the offence. In addition, the prosecution must negative, beyond reasonable doubt, all defences or excuses raised by the defendant or raised on the evidence.

[190] If mistake of fact is fairly raised on the evidence the onus falls to the prosecution to negative the existence of such a belief.²⁰¹ The court in *R v Singh* noted that:²⁰²

There is no doubt that s 24 provides an excuse as opposed to a defence and the prosecution must negative mistake of fact beyond reasonable doubt once the evidential onus has been discharged by a defendant.

193 *DPP v Morgan* [1976] AC 182.

194 *R v Mrzljak* [2004] QCA 420 and *R v Wilson* [2009] 1 Qd R 476.

195 *R v Wilson* [2009] 1 Qd R 476, 482 [20] (McMurdo P).

196 *R v Mrzljak* [2004] QCA 420; *R v Wilson* [2009] 1 Qd R 476.

197 *Ibid.* See also for example *R v Donrobin* [2008] QCA 349 where the defendant suffered from a chronic paranoid schizophrenia.

198 *R v Mrzljak* [2004] QCA 420.

199 *Ibid* [90] (Holmes J).

200 *R v Hopper* [1993] QCA 561, 10; *R v O’Loughlin* [2011] 123, [33] (Muir JA). Intoxication may be relevant to the honesty of a belief held. This is discussed further at paragraphs [251]–[262].

201 *R v Singh* [2012] QCA 130, [23] (Lyons J) referring to *Sancoff v Holford*; *Ex parte Holford* [1973] Qd R 25, 33.

202 *Ibid* [16] (Lyons J).

[191] When section 24 of the Criminal Code was introduced it was initially held that the onus of proving an honest and reasonable mistake fell to the person seeking to rely on it, that is, the defendant.²⁰³

[192] However, for over 60 years, the authorities on section 24 of the Criminal Code have consistently held that the onus is on the prosecution to disprove, beyond reasonable doubt, that the defendant had an honest and reasonable, but mistaken belief.²⁰⁴ This position is consistent with the approach of the High Court in *He Kaw Teh v The Queen*²⁰⁵ in relation to similar legislation.

[193] It has been suggested that a defendant is best placed to provide proof of their belief as to consent and therefore, it is arguable, that the burden of proving the honesty and reasonableness of their belief should shift to the defendant.

[194] In the context of offences of a sexual nature, a reversal of the onus of proof would not be unique within the Criminal Code. For example, section 216(4)(a) places the onus on the defendant, if the defence to a charge of abuse of persons with an impairment of the mind is, that the defendant believed on reasonable grounds that the person was not a person with an impairment of the mind.

[195] The standard of proof for the defendant under section 216(4)(a) is satisfaction on the balance of probabilities. In *R v Libke*, it was held that:²⁰⁶

In relation to the defence in section 216(4)(a) of the Code, the appellant had to prove on the balance of probabilities that he believed on reasonable grounds that the complainant was not an intellectually impaired person. By the end of the trial there was no real issue that the complainant was an intellectually impaired person. This defence focused on the appellant's actual belief at the time and whether he had reasonable grounds for the belief.

[196] However, a reversal of the onus may be seen as a significant inroad into the presumption of innocence and the degree of proof required for a conviction.

THE EXCUSE OF MISTAKE OF FACT IN OTHER AUSTRALIAN JURISDICTIONS

[197] Like Queensland, in the Northern Territory, Tasmania and Western Australia, the criminal law is codified.²⁰⁷ In the Australian Capital Territory, New South Wales, South Australia, and Victoria, the criminal law is not codified, but operates alongside the common law.

²⁰³ *Heaslop v Burton* [1902] St R Qd 259, 266 (Griffith CJ).

²⁰⁴ *R v Lafaele* [2018] QCA 42, [40-41] (North J) referring to *Loveday v Ayre and Ayre: Ex parte Ayre* [1955] St R Qd 264, 267-68 and *Brimblecombe v Duncan, Ex parte Duncan* [1958] Qd R 8 12.

²⁰⁵ (1985) 157 CLR 523, 534-35 (Gibbs C.J.).

²⁰⁶ [2006] QCA 242, [96] (Mullins J). This position was not disputed in the High Court: see *Libke v The Queen* (2007) 230 CLR 559, 594 [103] (Haynes J).

²⁰⁷ The provisions of the Criminal Codes are, nevertheless, to be interpreted with reference to case law.

[198] The Western Australian excuse of mistake of fact provision is largely consistent with the Queensland provision in requiring that the mistaken belief be both honest and reasonable.²⁰⁸

[199] In Tasmania, the mistake of fact provision also requires that the mistaken belief be honest and reasonable.²⁰⁹ This is further qualified, however, by section 14A of the Tasmanian Criminal Code pertaining to mistake as to consent in certain sexual offences²¹⁰ including indecent assault and rape. It provides that:²¹¹

...a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused—

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or
- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

[200] The section also provides for a situation where there is an attempt to commit the primary offence.²¹²

[201] As a result of the introduction of additional legislative provisions to the Criminal Code in the Northern Territory regarding criminal responsibility, there is a divergence in the operation of mistake of fact in relation to some offences. For the offence of common assault with a circumstance of aggravation that the assault was indecent,²¹³ the mistake of fact provision is in similar terms to Queensland and requires the mistaken belief to be both honest and reasonable.²¹⁴

[202] In contrast, for the offences of sexual intercourse without consent,²¹⁵ and gross indecency without consent,²¹⁶ a separate part relating to criminal responsibility applies under which there is no requirement for the mistaken belief to be honest, but 'the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.'²¹⁷ It is notable that the regime in which mistake of fact operates (as to sexual intercourse without consent and gross indecency without consent) does not require the mistaken belief to be honest. This is in contrast with

²⁰⁸ *Criminal Code Act Compilation Act 1913 (WA)* s 24.

²⁰⁹ *Criminal Code Act 1924 (Tas)* s 14. Like Queensland, the mistake of fact provision applies to all criminal offences.

²¹⁰ *Criminal Code Act 1924 (Tas)* s 14A.

²¹¹ *Criminal Code Act 1924 (Tas)* s 14A(1).

²¹² *Criminal Code Act 1924 (Tas)* s 14A(2).

²¹³ *Criminal Code Act 1983 (NT)* s 188(2)(k).

²¹⁴ *Criminal Code Act 1983 (NT)* s 32.

²¹⁵ *Criminal Code Act 1983 (NT)* s 192(3).

²¹⁶ *Criminal Code Act 1983 (NT)* s 192(4).

²¹⁷ *Criminal Code Act 1983 (NT)* s 43AW.

the offence of common assault with a circumstance of aggravation that the assault is indecent, where the mistaken belief must be both honest and reasonable.

[203] In the Australian Capital Territory, New South Wales, South Australia and Victoria, mistake of fact is a defence or excuse operating under common law principles (but which in most jurisdictions has been modified by statute). At common law, a mistaken belief of the defendant that was honest (a subjective test) as to the complainant's consent to engaging in sexual intercourse, operated as a defence or excuse for the offence of rape, regardless of the reasonableness of that mistaken belief.²¹⁸

[204] Most of these jurisdictions have legislated to introduce an 'objective test' to modify the common law defence by introducing a requirement of reasonableness.

[205] The existing New South Wales provision includes a 'reasonable grounds' test in the knowledge about consent limb of the section on consent in relation to sexual offences:²¹⁹

- (3) **Knowledge about consent:** A person who without consent of the other person (the alleged victim) engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if—
 - (a) the person knows that the alleged victim does not consent to the sexual activity, or
 - (b) the person is reckless as to whether the alleged victim consents to the sexual activity, or
 - (c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.
- (4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case—
 - (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
 - (b) not including any self-induced intoxication of the person.

[206] The South Australian equivalent of the offence of rape—'sexual intercourse with another person who does not consent to engaging in the sexual intercourse ... and the offender knows, or is recklessly indifferent to, the fact that the other person

²¹⁸ *DPP v Morgan* [1976] AC 182.

²¹⁹ *Crimes Act 1900* (NSW) s 61HE(3)(4).

does not consent ...'²²⁰—includes a definition of 'reckless indifference' which incorporates considerations as to reasonableness:²²¹

For the purposes of this Division, a person is recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—

- (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
- (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or
- (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

[207] The Victorian legislation has introduced the reasonableness of a defendant's belief that the complainant has consented as an element of the charges of rape and sexual assault. For example, in relation to rape:²²²

A person (A) commits an offence if—

- (a) A intentionally sexually penetrates another person (B); and
- (b) B does not consent to the penetration; and
- (c) A does not reasonably believe that B consents to the penetration.

[208] The Victorian legislation clarifies 'reasonable belief' in this way:²²³

Reasonable belief in consent

- (1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.
- (2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents ...

[209] Additionally, the Victorian legislation includes a provision setting out the effect of the defendant's intoxication on belief—which separately provides for situations where the intoxication is self-induced and where it is not self-induced.²²⁴

²²⁰ *Criminal Law Consolidation Act 1935* (SA) s 48.

²²¹ *Criminal Law Consolidation Act 1935* (SA) s 47. The offence of indecent assault does not refer to reasonableness: s 57.

²²² *Crimes Act 1958* (Vic) s 38. The provision regarding sexual assault is in similar terms: s 40.

²²³ *Crimes Act 1958* (Vic) s 36A.

²²⁴ *Crimes Act 1958* (Vic) s 36B.

Questions

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?

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?

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

HONESTY AND REASONABLENESS

Introduction

[210] Serious criminal offences usually require the prosecution to prove a physical element comprising acts or omissions and a mental element. For rape and sexual assault, the physical element is established with proof that the penetrative act or the sexual touching took place. As mentioned earlier, the state of mind held by a defendant as to the consent of the complainant (the mental element) becomes relevant in different ways in different Australian jurisdictions.

[211] New South Wales, the Northern Territory, South Australia and Victoria all require, as an element of the substantive offence, proof that the defendant knew that the complainant was not consenting or was reckless as to consent. In those jurisdictions, the common law defence or excuse of mistake of fact, as modified by statute, applies.

[212] At common law, if a defendant honestly believes that the complainant is consenting, the defendant will not be held criminally responsible for the rape or sexual assault. The issue is determined by an exploration of the subjective state of mind of the defendant. Provided the belief is honestly held, it does not matter how unreasonable the defendant's belief may be.

[213] The operation of the common law defence or excuse of mistake of fact has been modified in a number of those jurisdictions. This has been achieved by legislation that introduces a reasonableness test into the offence provision. The effect is that 'knowledge' of the defendant as to the consent of the complainant must

be reasonable before a defendant is excused from criminal responsibility. For example, the Victorian offence of rape provides:²²⁵

- (1) A person (A) commits an offence if—
 - (a) A intentionally sexually penetrates another person (B); and
 - (b) B does not consent to the penetration; and
 - (c) A does not *reasonably* believe that B consents to the penetration.
(emphasis added)

[214] In contrast, in Queensland, Tasmania and Western Australia (where the criminal law is codified), knowledge as to the absence of consent is not an element of the offences of rape or sexual assault. However, the state of mind of the defendant is relevant to the excuse of mistake of fact. A defendant is not criminally responsible for the offence of rape or sexual assault if he or she honestly and reasonably held a belief that the complainant was consenting to the physical acts that comprise the offence.

[215] It has been argued that the operation of the excuse of mistake of fact undermines the way Queensland law construes the notion of free and voluntary consent. While courts accept that consent cannot be established by a complainant's social behaviour, relationship to the defendant or lack of overt resistance, it is suggested that those same factors may be relied upon by a defendant as inducing or rationalising the defendant's mistaken belief as to consent. It is argued by some that the operation of the excuse of mistake of fact ought to be limited.

[216] Some jurisdictions have legislated guidance for a jury about these matters. It is in this context that concepts of recklessness, reasonable steps and intoxication of the defendant become relevant.

RECKLESSNESS

[217] A number of Australian jurisdictions require that, as an element of the offences of rape and sexual assault, the defendant knew that the complainant was not consenting to the relevant sexual act, or was reckless as to the lack of consent. In Tasmania and Canada (as well as Queensland and Western Australia), knowledge of, or recklessness as to, the lack of consent of the complainant are not elements of the substantive offences. Tasmania and Canada, however, expressly deny a defendant the excuse or defence of mistake of fact where the defendant has been reckless.

[218] 'Recklessness' has been defined as 'behaviour that shows a lack of care about danger and the possible results of your actions'.²²⁶ Reckless behaviour can be advertent or inadvertent. A person who realises that there is a risk that the other person is not consenting to a sexual act, but proceeds with the relevant conduct anyway can be said to be reckless (advertent recklessness). A person who gives no

²²⁵ *Crimes Act 1958* (Vic) s 38.

²²⁶ Oxford English Dictionary (3rd ed, 2015) 'recklessness'.

thought to whether the other person is consenting can also be said to be reckless (inadvertent recklessness).

[219] The High Court of Australia in *Banditt v The Queen*,²²⁷ in examining the relevant legislation of New South Wales, considered the question ‘as to what degree or extent of advertence in the state of mind of the complainant will answer the statutory criterion of recklessness’.²²⁸ The High Court held that both the failure to give any thought to whether or not the other person is consenting, and proceeding, regardless of the foresight of the risk of absence of consent, amounts to recklessness. Expressed in another way, ‘in its ordinary use, “reckless” may indicate conduct which is negligent or careless, as well as that which is rash or incautious as to consequences’.²²⁹

[220] The Criminal Code does not expressly refer to recklessness as to whether the complainant consented to sexual activity.

Other jurisdictions

Where knowledge is an element of the offence

[221] The legislation in the Northern Territory and South Australia provides that proof of the offences requires actual knowledge on the part of the defendant of the lack of consent of the complainant, or recklessness by the defendant as to the complainant’s lack of consent.

[222] Sections 192(3) and 192(4) of the *Criminal Code Act 1983* (NT) state that a person is guilty of an offence if an act of sexual intercourse or an act of gross indecency, respectively, is engaged in (a) without the other person’s consent and (b) ‘knowing about or being reckless as to the lack of consent’. Section 192(4A) states that ‘recklessness includes not giving any thought to whether or not the other person is consenting to the sexual intercourse or act of gross indecency’. Those sections are to be read in conjunction with section 43AK of the *Criminal Code Act 1983* (NT) which defines ‘recklessness’ as follows:

43AK Recklessness

- (1) A person is reckless in relation to a result if:
 - (a) the person is aware of a substantial risk that the result will happen; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (2) A person is reckless in relation to a circumstance if:

²²⁷ *Banditt v The Queen* (2005) 224 CLR 262.

²²⁸ *Ibid* 274, [31] (Gummow, Hayne and Haydon JJ). At the relevant time section 61I of the *Crimes Act 1900* (NSW) provided that a person commits a sexual assault where they know the other person is not consenting. Section 61R further provided that, for the purpose of s 61I, a person who was reckless as to consent of the other person was taken to know that the person did not consent.

²²⁹ *Ibid* 275, [36] (Gummow, Hayne and Heydon JJ).

- (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.²³⁰ (note added)

[223] Section 48 of the *Criminal Law Consolidation Act 1935* (SA) is similar. A person commits the offence of rape if, without consent, the person engages in sexual intercourse and ‘the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be)’. Section 47 of the Act defines ‘reckless indifference’ as follows:

47 Reckless indifference

For the purposes of this Division, a person is **recklessly indifferent** to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—

- (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
- (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or
- (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

[224] Section 61I of the *Crimes Act 1900* (NSW) creates an offence where (a) a person has sexual intercourse with another person, (b) without the consent of that other person, and (c) who knows that the other person does not consent to the sexual intercourse. Section 61HE(3) of the Act defines the meaning of ‘knowledge about consent’ to include being ‘reckless’ (without defining reckless) as to whether the complainant consents:²³¹

(3) Knowledge about consent

A person who without the consent of the other person (the alleged victim) engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to

²³⁰ The relevant ‘circumstance’ for the purposes of the offences detailed in ss 192(3) and 192(4) is that the other person does not consent: see *Criminal Code Act 1983* (NT) s 43AK(2).

²³¹ *Crimes Act 1900* (NSW) s 61HE(3).

engage in sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if—

- (a) the person knows that the alleged victim does not consent to the sexual activity, or
 - (b) the person is reckless as to whether the alleged victim consents to the sexual activity, or
 - (c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.
- (4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case—
- (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
 - (b) not including any self-induced intoxication of the person.

[225] Section 54 of the *Crimes Act 1900* (ACT) requires as proof of the offence of rape (not involving violence or force) the additional element that the offender was reckless as to whether the other person consented. It is made clear in section 54(3) that proof of knowledge or recklessness is sufficient to establish the element of recklessness. For the purposes of that offence, the legislation does not otherwise define ‘recklessness’.

[226] The Victorian legislation also requires satisfaction of an element of knowledge as to the absence of consent in proof of the sexual offence. However, it makes no reference to ‘recklessness’.

Where knowledge is relevant to mistake of fact

[227] In Tasmania and Western Australia (like Queensland), knowledge as to the absence of consent is not an element of the offence. However, mistaken belief as to consent (that is, the state of mind of the defendant) becomes relevant if properly raised on the evidence. Provisions relating to mistake of fact are generally similar in each of these jurisdictions.²³²

[228] The legislation in Tasmania, however, qualifies the operation of mistake of fact in relation to particular offences of a sexual nature, including rape and sexual assault. It is this qualification that addresses recklessness on the part of a defendant as to consent. In proceedings for an offence of rape or sexual assault (or for some other offences of a sexual nature):²³³

²³² In Tasmania, the mistaken belief is in the existence of ‘any state of facts’: *Criminal Code Act 1924* (Tas) s 14. The Queensland and Western Australian provisions refer to a mistaken belief in the existence of ‘any state of things’: Criminal Code (Qld) s 24; *Criminal Code Act Compilation Act 1913* (WA) s 24.

²³³ *Criminal Code Act 1924* (Tas) s 14A.

a mistaken belief by the accused as to the existence of consent is not honest and reasonable if the accused—

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or
- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

[229] The legislation in Canada adopts a similar approach. In that jurisdiction, knowledge of the absence of consent is not an element of the offence of rape, but belief as to consent becomes relevant to the defence or excuse of mistake of fact.

[230] Mistake of fact in Canada operates on common law principles as modified by statute. The issue whether the defendant held a mistaken belief will be left for a jury's consideration only if a judge is satisfied that there is sufficient evidence of a mistaken belief.²³⁴ Section 273.2 of the Canadian Criminal Code, provides that the defendant's belief that the complainant consented does not amount to a defence in some circumstances:

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) The accused's belief arose from
 - (i) the accused's self-induced intoxication,
 - (ii) the accused's recklessness or wilful blindness, or
 - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;²³⁵
- (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; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct. (note added)

[231] The legislation in Queensland and Western Australia, in relation to mistake of fact, make no specific reference to 'recklessness'.

²³⁴ *Criminal Code, R.S.C., 1985, c. C-46 s 265(4).*

²³⁵ *Criminal Code, R.S.C., 1985, c. C-46 ss 265(3) and 273.1(2) detail circumstances when consent is not obtained.*

Queensland

[232] The Criminal Code does not expressly require consideration of recklessness on the part of the defendant as to consent of the complainant.

[233] As stated above, neither knowledge by the defendant of the absence of consent, nor recklessness by a defendant as to that consent, are elements of the offences of rape or sexual assault. All that needs to be proven is that the defendant carried out the relevant sexual act and that this was done without the consent of the complainant.

[234] However, as discussed earlier, if a mistake of fact, as to consent, is raised on the evidence, the onus falls to the prosecution to negative the honesty or reasonableness of the belief. Evidence suggesting recklessness is relevant to whether the defendant had an honest and reasonable but mistaken belief that the complainant consented to the acts constituting the offence.

[235] The concept of 'recklessness' can be accommodated within the question of whether a belief is honestly and reasonably held. Advertent recklessness would be inconsistent with an honest and reasonable but mistaken belief as to consent. Inadvertent recklessness might suggest the holding of no mistaken belief. However, once there is evidence that gives rise to the existence of a mistaken belief, the question is always whether there was an honest and reasonable belief, not whether the defendant was reckless as to the belief, per se.

[236] As mistake of fact is only an excuse under section 24 where the defendant has an honest and reasonable, but mistaken, belief as to consent, express legislative reference in Queensland to 'recklessness' as a qualifier to the application of mistake of fact as it would apply to offences of a sexual nature, may, therefore, be unnecessary.

[237] Nevertheless, specific reference in the Criminal Code to 'recklessness' on the part of a defendant as to their belief in consent might clarify how assessments about the honesty of a belief can be made. Further, it may shift the focus onto the conduct or omissions of the defendant, away from a focus on the conduct of the complainant.

Questions

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?

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?

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?

REASONABLE STEPS

[238] The concept of examining any 'steps' or 'reasonable steps' taken by the defendant in considering whether consent has been given by the complainant has been legislated in other jurisdictions, both in Australia and internationally. Queensland does not have such a legislated requirement.

[239] Across the jurisdictions, such a requirement is framed in different ways with different mechanisms of consideration. Some refer to 'steps',²³⁶ whilst others use the term 'reasonable steps'.²³⁷ In three jurisdictions, this is included as part of the consideration of knowledge as to consent;²³⁸ in another jurisdiction, it is included as part of the consideration of reckless indifference;²³⁹ and in some other jurisdictions, it is included as a qualifier to mistake of fact (or its equivalent).²⁴⁰

Other jurisdictions

[240] As previously referred to, in New South Wales, section 61HE of the *Crimes Act 1900* (NSW) makes provision in relation to the defendant's knowledge about consent. This is qualified by section 61HE(4):²⁴¹

For the purpose of making any such finding [that the person knows that the alleged victim does not consent to the sexual activity], the trier of fact must have regard to all the circumstances of the case—

- (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
- (b) not including any self-induced intoxication of the person.

²³⁶ *Crimes Act 1900* (NSW) s 61HE(4); *Crimes Act 1958* (Vic) s 36A(2), *Sexual Offences Act 2003* (UK) ss 1(2), 3(2).

²³⁷ *Criminal Law Consolidation Act 1935* (SA) s 47(b); *Criminal Code Act 1924* (Tas) sch 1 s 14A(1)(c); *Criminal Code, R.S.C., 1985, c. C-46* s 273.2.

²³⁸ *Crimes Act 1900* (NSW) s 61HE; *Crimes Act 1958* (Vic) s 36A; *Sexual Offences Act 2003* (UK) ss 1(2), 3(2).

²³⁹ *Criminal Law Consolidation Act 1935* (SA) ss 47 and 48.

²⁴⁰ *Criminal Code Act 1924* (Tas) sch 1 s 14A; *Criminal Code, R.S.C., 1985, c. C-46* s 273.2.

²⁴¹ *Crimes Act 1900* (NSW).

[241] In relation to the meaning of the term ‘steps’, the New South Wales Court of Criminal Appeal in *R v Lazarus*²⁴² found that:

The word ‘steps’ is not defined in the Act but in my view there is no warrant to ascribe to it anything other than its natural and ordinary meaning. That meaning connotes doing something positive. The Collins English Dictionary defines the term ‘take steps’ as meaning:

... to undertake measures to do something with a view to the attainment of some end ...

It follows that in my view, a ‘step’ for the purposes of s 61HA(3)(d) must involve the taking of some positive act. However, for that purpose a positive act does not necessarily have to be a physical one. A positive act, and thus a ‘step’ for the purposes of the section, extends to include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.

[242] The NSWLRC proposes that the requirement in section 61HE(4)(a), to consider ‘any steps’ taken by the defendant to ascertain consent, should be changed:²⁴³

Fact finders (judges or jurors) should instead be required to consider: whether the accused person said or did anything to ascertain if the complainant consented, and if so, what the accused person said or did.

[243] In the United Kingdom, consideration of the steps taken by the defendant to ascertain whether the complainant is consenting forms part of the consideration of whether or not the belief held by the defendant was a reasonable one. An element of the offence of rape in that jurisdiction is that the defendant did not reasonably believe that the complainant was consenting. The legislation provides:²⁴⁴

- (1) A person (A) commits an offence if—
 - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

...

[244] In South Australia, a requirement to consider the defendant’s reasonable steps forms part of the knowledge or reckless indifference element of the offence of rape in that jurisdiction. The provision for rape requires that the ‘offender knows, or

²⁴² [2017] NSWCCA 279 [146]–[147].

²⁴³ NSWLRC draft proposals (October 2019) 5.

²⁴⁴ See *Sexual Offences Act 2003* (UK) ss 1, 3, in relation to sexual assault, which is drafted in similar terms.

is recklessly indifferent to, the fact that the other person does not so consent'.²⁴⁵ Reckless indifference is, relevantly, defined in the following way:²⁴⁶

For the purposes of this Division, a person is **recklessly indifferent** to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—

...

- (b) Is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or

...

[245] In Victoria, it is provided that whether a person holds a reasonable belief as to consent is dependent on the circumstances.²⁴⁷ This is to be considered in accordance with the following provision: 'Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents'.²⁴⁸

[246] In Tasmania, reference to reasonable steps is included in the provision relating to mistake of fact as to consent for particular sexual offences:²⁴⁹

In proceedings for an offence against section 124, 125B, 127 or 185, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused—

...

- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

...

[247] The legislation in Canada addresses reasonable steps in a similar way:²⁵⁰

²⁴⁵ *Criminal Law Consolidation Act 1935* (SA) s 48(1).

²⁴⁶ *Criminal Law Consolidation Act 1935* (SA) s 47. See also [224] above.

²⁴⁷ *Crimes Act 1958* (Vic) s 36A(1).

²⁴⁸ *Crimes Act 1958* (Vic) s 36A(2).

²⁴⁹ *Criminal Code Act 1924* (Tas) sch 1 s 14A(1).

²⁵⁰ *Criminal Code, R.S.C., 1985, c. C-46* s 273.2.

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, 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; or

...

Queensland

[248] In Queensland, the Criminal Code does not expressly require consideration of the steps, or reasonable steps, taken by a defendant to ascertain that the complainant was consenting. However, when the excuse of mistake of fact is raised on the evidence, the defendant must hold an honest and reasonable belief as to consent for the excuse to apply. A jury could consider any steps taken by the defendant, in considering whether the defendant's belief was reasonable, as part of the circumstances.

[249] The introduction in the Criminal Code of an express requirement to consider whether reasonable steps were taken in relation to consent, would be consistent with an affirmative consent model, and would arguably shift the focus in rape and sexual assault trials from the complainant's actions to those of the defendant.

[250] On the other hand, the introduction of such a requirement to qualify the operation of the excuse of mistake of fact may have the effect of excluding the excuse of mistake of fact. For example, an intellectually impaired defendant, such as the appellant in *R v Mrzljak*,²⁵¹ may not be able to avail themselves of the excuse if positive steps or reasonable steps are required.

Questions

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?

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

²⁵¹

[2005] 1 Qd R 308; [2004] QCA 420.

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?

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?

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?²⁵²
- (i) 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?

INTOXICATION OF THE DEFENDANT

[251] Commonly, offences of rape or sexual assault are alleged to have been committed by a defendant who was, at the relevant time, intoxicated by alcohol or a drug.²⁵³ The impact of the intoxication on criminal responsibility of a defendant charged with rape or sexual assault is a matter addressed in the legislation in a number of Australian jurisdictions and in Canada.

[252] In Queensland, the Criminal Code does not expressly provide for how intoxication of a defendant impacts on the honesty or reasonableness of a defendant's belief as to consent. The question has been the subject of judicial consideration.

Other jurisdictions

[253] The terms of the legislation in New South Wales and Victoria are illustrative of express statutory provisions as to intoxication in relation to belief as to consent.

²⁵² See also Q-13 and Q-14 above.

²⁵³ Intoxication of a complainant is discussed at [124]–[131] above.

[254] Under section 61I of the *Crimes Act 1900* (NSW), the defendant's knowledge that the other person does not consent to the sexual intercourse is an element of the offence. Section 61HE(3) of the Act specifically states that in assessing whether the defendant knew a complainant was not consenting, the trier of fact must have regard to all the circumstances of the case, but must disregard the impact of self-induced intoxication:²⁵⁴

- (4) For the purpose of making any such finding [that the person knows that the alleged victim does not consent to the sexual activity], the trier of fact must have regard to all the circumstances of the case—
 - (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
 - (b) not including any self-induced intoxication of the person.

[255] In Victoria, knowledge on the part of the defendant of the absence of consent of the complainant is also relevant in proof of the offences. The defendant is criminally responsible if the defendant does not 'reasonably believe' the complainant was consenting to the sexual act. The concept of reasonable belief in consent is defined by section 36A of the *Crimes Act 1958* (Vic).

[256] Intoxication of the defendant has an impact on whether a defendant has a 'reasonable belief' of consent. If a defendant's intoxication is self-induced then the standard is that of a reasonable person who is not intoxicated. This is specifically addressed by section 36B of the *Crimes Act 1958* (Vic):

36B Effect of intoxication on reasonable belief

- (1) In determining whether a person who is intoxicated has a reasonable belief at any time—
 - (a) If the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time; and
 - (b) If the intoxication is not self-induced, regard must be had to the standard of a reasonable person who is intoxicated to the same extent as that person and who is in the same circumstances as that person at the relevant time.
- (2) For the purposes of this section, intoxication is self-induced unless it came about—
 - (a) involuntarily; or
 - (b) because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or

²⁵⁴ *Crimes Act 1900* (NSW) s 61HE(4).

- (c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or
 - (d) from the use of a drug for which a prescription is not required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.
- (3) However, intoxication that comes about in the circumstances referred to in subsection (2)(c), (ca) or (d) is self-induced if the person using the drug knew, or had reason to believe, when taking the drug that it would significantly impair the person's judgement or control.

[257] As discussed above in relation to 'recklessness', the legislation in Tasmania and Canada addresses the issue of intoxication of the defendant by qualifying the application of mistake of fact when the excuse is relied on by a defendant charged with offences of a sexual nature.

[258] In Tasmania, intoxication is addressed in section 14A of the *Criminal Code Act 1924* (Tas) that provides:

a mistaken belief by the accused as to the existence of consent is not honest and reasonable if the accused—

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

...

[259] A similar approach is taken in section 273.2 of the Canadian Criminal Code:

It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) The accused's belief arose from
 - (i) the accused's self-induced intoxication,

...

Queensland

[260] In Queensland, the Criminal Code does not expressly state that a mistaken belief by a defendant as to the existence of consent is not honest and reasonable if the defendant held the belief as a result of self-induced intoxication. However, case law has held that section 24 operates in that way on its proper construction.

[261] The Queensland Court of Appeal considered the impact of the intoxication of a defendant on the operation of mistake of fact in *R v Hopper*. In that case, the court held:²⁵⁵

A condition of inebriation, like that which the appellant claimed to have been in at the time, may help to induce a belief that a woman is consenting to intercourse; to that extent it may tend to show the belief to be genuine or 'honest'. But it does not touch the question whether in terms of s 24 that belief is reasonable; a mistaken belief that is induced by intoxication is not one that can be considered 'reasonable' as distinct from honest.

[262] In Queensland, therefore, the intoxication of the defendant is relevant to the question of whether a mistaken belief held by a defendant is honest, but a mistaken belief induced by intoxication is not a reasonable belief and is not an excuse.²⁵⁶

Questions

- 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
- 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?
- 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?

²⁵⁵ [1993] QCA 561, 10.

²⁵⁶ The position is confirmed in the more recent decision of *R v Duckworth* [2016] QCA 30, [25] (Philippides JA) and [106] (Burns J). See also *R v O'Loughlin* [2011] QCA 123, [33] (Muir JA).

Chapter 5

Other matters

INTRODUCTION

[263] There are strongly held views that complainants in cases of rape and sexual assault are treated differently from complainants in other criminal proceedings. This is said to arise as a result of preconceptions held about the nature of such crimes, the victims and the perpetrators. This chapter examines how these beliefs are said to influence the outcomes for complainants, as well as some suggested ways of counteracting these perceived preconceptions.

PRECONCEPTIONS ABOUT SEXUAL ASSAULT OFFENDING

[264] Offences of rape and sexual assault tend to be committed behind closed doors. Prosecutions of those offences generally involve the word of the complainant against the word of the defendant. Assessment of the credibility of the complainant necessarily becomes pivotal in decisions relating to charging and prosecution of a defendant through to the jury's verdict at trial.

[265] The focus of questioning at trial is commonly whether the complainant consented and, even if the answer is 'no', whether the circumstances raise a question or support the conclusion that the defendant held a mistaken belief that the complainant was consenting. Direct evidence of an absence of consent is only of value if it is accepted by a jury.

[266] A wide range and large volume of literature and research suggests that jurors actively interpret what they see and hear based on their knowledge, experience, attitudes, biases and expectations. These preconceptions are said to influence jurors' answers to the question of whether a complainant consented and whether the conduct of a complainant may have laid the foundation for a mistaken belief held by a defendant as to consent.²⁵⁷

[267] The literature and research suggests that inaccurate and false stereotypes about what constitutes 'real' rape or sexual assault influence reporting rates and the decision-making processes at trial. These influences are sometimes referred to as 'rape myths'.²⁵⁸

[268] One preconception that jurors are said to hold is that a victim of rape or sexual assault would report the offence immediately and a person that does not, is likely to be lying. Other preconceptions are that sexual offences are committed by strangers, cannot be committed during a relationship, and that if a person consented in the past they are assumed to consent in the future. It is also said to be a

²⁵⁷ See, eg, Cossins, above n 59 and Australian Institute of Family Studies and Victoria Police, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*, 2017.

²⁵⁸ *Ibid.*

preconception that offenders typically use physical force against victims during rape and sexual assault offences, resulting in the complainant suffering physical injuries, and that complainants resist and fight off the violent offender.²⁵⁹

[269] The preconceptions detailed above are not exhaustive.

[270] Research may not support these preconceptions. The 2012 Personal Safety Survey showed that the majority of rapes were committed by someone known to the complainant. The survey revealed that approximately 16% of women had experienced sexual offences by a known person, compared to 5% by a stranger.²⁶⁰ That sexual offences are more commonly committed by a known person is also supported in international research.²⁶¹ International studies also show that less than 30% of complainants of rape or sexual assault suffer physical injury associated with the sexual act requiring medical intervention.²⁶² Most offenders have prior relationships with the complainant. Complainants who had no previous relationship with the offender were more likely to sustain a physical injury during the assault than those who knew the offender.²⁶³ A significant proportion of sexual assault complainants report that they did not offer any resistance while being sexually assaulted.²⁶⁴

[271] There have been four national surveys of community attitudes towards violence against women ('NCAS') conducted to date. The first three, in 1995, 2009 and 2013, were led by VicHealth. The most recent, in 2017, was conducted by Australia's National Research Organisation for Women's Safety ('ANROWS').²⁶⁵ It reflects relatively current community attitudes to rape and sexual assault offences. To some degree these survey results lend support to the existence of some

259 See for example the synthesis of over 40 years of research evidence reflected by Australian Institute of Family Studies and Victoria Police, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*, 2017.

260 Australian Bureau of Statistics, *Personal Safety*, Australia, 2012 (Catalogue No 4906.0, 11 December 2013).

261 Australian Institute of Family Studies and Victoria Police, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*, 2017 citing a study of 400 rape cases in the United Kingdom which revealed 70.7% were committed by someone known to the victim. See GF Waterhouse, A Reynolds and V Eagan, *Myths and legends: the reality of rape offences reported to a UK police force*. (2016) *The European Journal of Psychology Applied to Legal Context* 8(1), 1-10.

262 A study conducted in Denmark over 10 years found that of the 70% who reported vaginal or anal penetration, 27% had a genital injury and a smaller United Kingdom study of 317 subjects found only 4% experienced physical injury requiring medical intervention. See ML Larsen, M Hilden, O Lidegaard, 'Sexual assault: a descriptive study of 2500 female victims over a 10-year period' (2014) *Royal College of Obstetricians and Gynaecologists* 1, 1. *BJOG* 2014; DOI: 10.1111/1471-0528.13093, 579. See also M Carr, A Thomas, D Atwood, A Muhar, K Jarvis and S Wewerka, 'Debunking Three rape Myths' (2014) *Journal of Forensic Nursing* 217.

263 See ML Larsen et al, above n 262.

264 Ibid.

265 The sample size for the most recent ANROWS survey was 17 542. A total of 37 000 people aged 16 years and over were randomly selected from across Australia and invited to participate in a 20 minute telephone interview. 48% of those contacted completed the interview. The data was weighted to align the sample to external population benchmarks so that it mirrors the population as a whole as closely as possible. For more details see the methodology report on the ANROWS website <<https://www.anrows.org.au/NCAS/2017/home/>>.

preconceptions; in other respects, they suggest the number of people holding onto unfounded ideas is limited.

[272] Findings indicate that:²⁶⁶

- 7% agreed that if ‘a woman doesn’t physically resist—even if protesting verbally—then it isn’t really rape’. The proportion agreeing with this statement has dropped 3% since 2013.²⁶⁷ A further 4% said they did not know if it is rape only when physical resistance is involved.
- 42% agreed that it is ‘common for sexual assault accusations to be used as a way of getting back at men’.
- 16% agreed that many allegations of sexual assault made by women are false and a further 9% do not know.²⁶⁸
- 31% agreed that ‘a lot of the times women who say they were raped had led the man on and then had regrets’. The proportion of those agreeing with this statement has declined seven percentage points between 2013 and 2017.²⁶⁹
- 11% thought it likely that a woman who waited weeks or months to report sexual assault was lying.

STATEMENT OF OBJECTIVES AND GUIDING PRINCIPLES

[273] On one view, a means of addressing the influencing effect of any preconceptions about rape and sexual assault is by including in legislation ‘objectives’ and ‘guiding principles’ which outline the important factors to consider in interpreting the part of the Act dealing with rape and sexual offences.

[274] In Queensland, the Criminal Code has no provision detailing objectives or guiding principles applying to offences of rape or sexual assault.

[275] Victoria is the only Australian jurisdiction to have adopted objectives and guiding principles. The objectives are detailed in section 37A of the *Crimes Act 1958* (Vic)²⁷⁰:

266 K Webster, K Diemer, N Honey, S Mannix, J Mickle, J Morgan, A Parkes, V Politoff, A Powell, J Stubbs and A Ward, *Australians’ attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research report, 03/2018). Sydney, NSW: ANROWS.

267 Ibid 48.

268 Ibid 48-50 noting that it is difficult to determine the actual rate of false allegations of sexual assault.

269 Ibid 86.

270 The offences of rape and sexual assault are detailed in subdivision 8A.

37A Objectives of Subdivisions 8A to 8G

The objectives of Subdivisions (8A) to (8G) are—

- (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
- (b) to protect children and persons with a cognitive impairment or mental illness from sexual exploitation.(note added)

[276] The guiding principles are set out in section 37B of that Act:

37B Guiding principles

It is the intention of Parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (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; and
- (d) sexual offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

[277] The inclusion in the Victorian legislation of a statement about the objectives of, and important factors to consider in interpreting, the part of the Act dealing with rape and sexual offences, were recommendations made by the VLRC.²⁷¹

[278] The VLRC concluded that these reforms should assist, and not complicate, the interpretation of relevant legislative provisions.²⁷² It outlined the arguments for this approach as follows:²⁷³

The criminal law has both a regulatory and an educative function. It should emphasise that people have a right to make decisions about their sexual activity and to choose not to engage in sexual activity. The interpretation clause will ensure that the provisions of sexual offences laws are interpreted consistently with the goals of the legislation.

A statement of principles of interpretation will give added weight to any directions or instructions that a judge gives to the jury. The judge and jury can refer to the principles to shed light on where any ambiguity may exist in the interpretation of particular sections.

Sexual assault continues to be under-reported, and the serious social harm of sexual assault has only recently begun to be given the recognition that it

²⁷¹ VLRC, *Sexual offences Final Report* (2004) Recs 193 and 194.

²⁷² VLRC, *Sexual offences Interim Report* (2003) [8.89].

²⁷³ *Ibid* [8.88].

deserves. The unique nature and context of sexual assault should be clearly stated by the legislature, so that this underwrites the interpretation of the particular provisions in the legislation.

[279] In 2010, the ALRC and the NSWLRC, in their Joint Report on Family Violence, recommended that:²⁷⁴

State and territory legislation dealing with sexual offences, criminal procedure or evidence, should contain guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following:

- (a) sexual violence constitutes a form of family violence;
- (b) there is a high incidence of sexual violence within society;
- (c) sexual offences are significantly under-reported;
- (d) a significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Indigenous and culturally and linguistically diverse backgrounds, and persons with a cognitive impairment;
- (e) sexual offenders are commonly known to their victims; and
- (f) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

[280] The ALRC and NSWLRC considered that the use of such objectives and principles recognises the complex and unique nature of sexual assault. Those objectives and principles are intended to provide a contextual framework for the legislative response to sexual assault, rather than any exhaustive list of issues to which judicial officers and jurors should have regard.²⁷⁵

[281] The ALRC and NSWLRC noted that some stakeholders were opposed to such a reform.²⁷⁶ The Law Society of NSW was concerned about the dangers of enunciating objectives and principles in legislation in that they may be given added or undue weight in the decision-making processes of juries.²⁷⁷ Some stakeholders argued that 'education and training should instead be directed to law enforcement authorities, prosecutors, lawyers, judicial officers, and other relevant service providers'.²⁷⁸

[282] In October 2019, the NSWLRC published draft proposals as part of its review of consent in relation to sexual offences. These included a proposed set of 'interpretive principles' to govern the interpretation and application of a proposed new

²⁷⁴ ALRC and NSWLRC Joint Report on Family Violence Rec 25-9.

²⁷⁵ Ibid 1181.

²⁷⁶ Ibid [25.198].

²⁷⁷ Ibid 1180, referring to a submission from the Law Society of NSW.

²⁷⁸ Ibid 1180, referring to a submission from National Legal Aid.

subdivision in the *Crimes Act 1900* (NSW) covering rape and sexual assault type offences:²⁷⁹

- (a) every person has a fundamental right to choose whether or not to participate in a sexual activity',
- (b) a person's consent should not be presumed, and
- (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement.

[283] There is a further argument, that the very existence of legislated principles or guidelines may influence directions given by judges to a jury. It has been suggested that directions worded in a way that are consistent with stated objectives or principles might be seen as pro-complainant, and hence pro-prosecution. This may create the appearance of a judge who is not impartial, consequently impacting upon a defendant's right to a fair trial. Such directions also necessarily present views on factual matters. Making decisions on questions of fact is the role of the jury and such directions could blur the conventional distinction between judge and jury, involving the trial judge in the actual business of fact-finding.²⁸⁰

Questions

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

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?

EXPERT EVIDENCE

[284] Commonly at trial, cross-examination of a complainant aims to challenge honesty and reliability. Inconsistencies, omissions, errors, delay in reporting or other behaviour of a complainant before, during or after, the alleged sexual offence may be used to call into question the credibility of the complainant. One view is that this approach can feed into preconceptions concerning the way a complainant should behave that jurors are said to bring with them into deliberating rooms.

[285] The use of expert evidence in sexual assault trials has been considered by the VLRC, which concluded that the calling of expert evidence at trial on general

²⁷⁹ NSWLRC draft proposals (2019), 3, 7; noting that Principle (a) is adapted from the *Crimes Act 1958* (Vic) s 37A(a); and Principles (b) and (c) are based on elements of the communicative model of consent, as recognised in academic literature and in the NSWLRC proposed reforms.

²⁸⁰ J Willis and M McMahon, 'Educating Juries or Telling them What to Think? Credibility, Delay in Complaint, Judicial Directions and Role of Juries' (2017) 41 Crim LJ 27, 27.

matters relating to sexual assault would be an alternative or complementary route²⁸¹ to counter any preconceptions and correct ‘misapprehensions ... ensuring that jury decision-making is based on accurate information’.²⁸² The VLRC recommended that:²⁸³

173. The *Evidence Act 1958* should be amended to clarify that in sexual offence cases expert evidence about sexual assault is admissible. This evidence may include evidence on:

- the nature and dynamics of sexual assault;
- social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted and may result in them delaying in reporting an assault.

[286] It has been suggested that an academic, sexual assault counsellor or social worker ‘whose expertise derives from training in empirical social scientific research’ about the responses of child and adult victims to sexual assault could be an expert witness.²⁸⁴

[287] Expert evidence in this area would comprise findings and conclusions from scientific literature about the typical reactions of adults or children who have been sexually assaulted. It would not include an opinion about whether the particular complainant has been sexually assaulted, or whether the complainant’s behaviour is typical of someone who has been sexually assaulted.²⁸⁵ It is against the background of such expert evidence that a jury is said to be best informed in their decision-making duty. Clinical opinion such as ‘this person has been sexually assaulted’ would not be admissible. Such opinion is likely to have a disproportionate effect on a jury’s decision-making process and usurp the role of the jury as it goes to the ultimate issue for the jury to determine.²⁸⁶

[288] Neither the Criminal Code nor the *Evidence Act 1977* (Qld) specifically allow for the admission into evidence of expert evidence as to these matters in a rape or sexual assault trial. In Queensland, it is the common law that applies to the admission of expert evidence. Expert evidence is admissible if it is the opinion of a witness possessing peculiar skill and the subject-matter of the inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance.²⁸⁷

281 Alternate or complementary to legislated objectives and guidelines.

282 VLRC, *Sexual Offences Final Report* (2004) [7.184].

283 Ibid Rec 173.

284 See further A Cossins, ‘Expert Witness evidence in sexual assault trials: questions, answers and law reform in Australia and England’ (2013) 17 *The International Journal of Evidence & Proof* 74, 96 and the references cited therein.

285 Ibid 96.

286 Ibid 97.

287 *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ) and the cases cited therein.

[289] Victoria is the only jurisdiction to expressly allow for the admission of evidence by experts aimed at addressing the responses of adult complainants to sexual offences. Section 388 of the *Criminal Procedure Act 2009* (Vic) states that:

388 Evidence of specialised knowledge in certain cases

Despite any rule of law to the contrary, in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court may receive evidence of a person's opinion that is based on that person's specialised knowledge (acquired through training, study or experience) of—

- (a) the nature of sexual offences; and
- (b) the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that he or she has been the victim, of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence.

[290] This provision was introduced by the *Sexual Offences Act 2006* (Vic)²⁸⁸ to recognise that expert evidence on the dynamics of sexual assault is rarely led in the prosecution of sexual offences in Victoria. It was intended to allow for expert evidence on the nature and effects of sexual assault to be heard by the court more readily.²⁸⁹

[291] Arguments in favour of allowing general expert evidence in rape and sexual assault cases include the following:²⁹⁰

- Common reactions of complainants of rape are not within the understanding of the average juror.
- It is unfair to complainants that their reliability is assessed against an incomplete factual background, which can only benefit the defendant.
- If the evidence of a complainant is to be assessed detrimentally because of misconceptions that people may hold, then there would be no benefit in a complainant explaining why they reacted or acted in a certain way. It would provide further ground for cross-examination.

²⁸⁸ Section 388 was inserted in the *Criminal Procedure Act 2009* (Vic) by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic) s 50. The amending Act also repealed s 37E of the *Evidence Act 1958* (Vic), which was in identical terms to s 388: *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic) sch item 54.14.

²⁸⁹ Victoria, Second Reading of the Crimes (Sexual Offences) Bill, 9 February 2006, 142 (Hon JM Madden, Minister for Sport and Recreation).

²⁹⁰ UK Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims—Justice for Victims of Rape. A Consultation Paper* (2006) 18. See also J Temkin and B Krahe, *Sexual Assaults and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 60–63.

- ‘Educative evidence serves to provide information against which a jury can evaluate their own misconceptions and more accurately gauge the complainant’s credibility.’²⁹¹
- To give juries a balanced picture it will be necessary for expert evidence to be called rather than for prosecution advocates to attempt to address rape myths in addresses to the jury.
- General expert evidence will not be specific to any particular complainant or witness. It merely provides another explanation for fact finders to consider when assessing a person’s evidence.²⁹²

[292] Arguments against allowing general expert evidence in rape and sexual assault cases include the following:

- How a person would react after a rape is a matter that does not call for expert evidence. It is a matter of assessing the complainant during their evidence, which the trier of fact can do without the help of ‘experts’.²⁹³
- What would be a recognised field of expertise is a matter of controversy.
- Such evidence may be based on attitudinal surveys which is not admissible generally as proof of community attitudes.
- The prosecutor could effectively address any bias by seeking an explanation from the complainant as to the reasons behind their behaviour.²⁹⁴
- The prosecutor could remind the trier of fact of the dangers of subconsciously being influenced by preconceptions when they address at the opening and closing of a case.²⁹⁵
- General expert evidence is merely an attempt by the prosecution to ‘bolster the credibility’ of their witnesses²⁹⁶ and therefore impact on a defendant’s right to a fair trial.

[293] While there is no prohibition in Queensland against the admission of expert evidence of the nature envisaged by section 388 of *Criminal Procedure Act 2009* (Vic), such evidence is rarely, if ever, called in Queensland in rape and sexual assault trials.

291 A Cossins, above n 284, 97.

292 UK Office for Criminal Justice Reform, above n 290.

293 Ibid 18.

294 Ibid 19.

295 Ibid.

296 Ibid.

Questions

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

EDUCATION AND AWARENESS

Introduction

[294] Education, training and information have been suggested as mechanisms to address perceived problems in the application of the law, and to change community attitudes and beliefs about sexual relationships to mitigate the incidence of sexual violence and its effects. Education has been canvassed as suitable to:²⁹⁷

- address misunderstanding and a lack of understanding about the application of the criminal law to sexual offences and legal processes including trial procedure;²⁹⁸
- counter rape myths and ‘victim blaming’;
- improve understanding about the need for consent and to promote respectful relationships;²⁹⁹
- enhance the understanding of all professionals dealing with complainants, from first responders to legal professionals involved in the criminal law, so they are conscious of and can alleviate the trauma associated with sexual assault and its aftermath;³⁰⁰
- improve the rates of reporting of sexual offences and criminal justice outcomes; and
- encourage actions to avoid, recognise and report sexual offences.

²⁹⁷ Taskforce Report 81–96.

²⁹⁸ J Horan, ‘Communicating with jurors in the twenty-first century’ (2007) 29 *Australian Bar Review* 101–102.

²⁹⁹ Department of Child Safety, Youth and Women, *Sexual Violence Prevention: Having the conversation*, Background Paper, (May 2019) 7–8.

³⁰⁰ J Temkin and B Krahe, above n 290, 188–194.

Question

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

Appendix A

Terms of reference

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

Background

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

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

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

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

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

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

Terms of Reference

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

Scope

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

Consultation

The Commission shall consult with:

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

Timeframe

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

Dated the 2nd day of September 2019

YVETTE D'ATH MP

Attorney-General and Minister for Justice
Leader of the House

Appendix B

List of preliminary respondents

Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

Australian Lawyers Alliance

Bar Association of Queensland

Berkman, Michael MP

Bravehearts

Centre Against Sexual Violence Inc.

Chief Judge of the District Court

Crowe, Professor Jonathan

Director of Public Prosecutions (Qld)

Douglas, Professor Heather

Dyer, Andrew

Flynn, Associate Professor Asher

Lee, Bri

Legal Aid Queensland

Queensland Advocacy Inc.

Queensland Council for Civil Liberties

Queensland Law Society

Rape and Domestic Violence Services Australia

Sisters Inside Inc.

Tait, Bill (Jnr) Esq.

Women's Legal Service Qld

Appendix C

Criminal Code extracts

Chapter 5 Criminal responsibility

24 Mistake of fact

- (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
- (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Chapter 32 Rape and sexual assaults

347 Definitions for ch 32

In this chapter—

consent see section 348.

penetrate does not include penetrate for a proper medical, hygienic or law enforcement purpose only.

348 Meaning of *consent*

- (1) In this chapter, *consent* means consent freely and voluntarily given 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.

349 Rape

- (1) Any person who rapes another person is guilty of a crime.
Maximum penalty—life imprisonment.
- (2) A person rapes another person if—

- (a) the person has carnal knowledge³⁰¹ with or of the other person without the other person's consent; or
 - (b) 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 that is not a penis without the other person's consent; or
 - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (3) For this section, a child under the age of 12 years is incapable of giving consent.
 - (4) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.
 - (5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

350 Attempt to commit rape

- (1) Any person who attempts to commit the crime of rape is guilty of a crime, and is liable to imprisonment for 14 years.
- (2) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.
- (3) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

351 Assault with intent to commit rape

- (1) Any person who assaults another with intent to commit rape is guilty of a crime, and is liable to imprisonment for 14 years.
- (2) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.
- (3) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

352 Sexual assaults

- (1) Any person who—
 - (a) unlawfully and indecently assaults another person; or
 - (b) procures another person, without the person's consent—
 - (i) to commit an act of gross indecency; or

³⁰¹ 'Carnal knowledge' is defined in s. 6 of the Criminal Code (Qld) in the following terms: '(1) If carnal knowledge is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent. (2) Carnal knowledge includes anal intercourse'.

- (ii) to witness an act of gross indecency by the person or any other person;

is guilty of a crime.

Maximum penalty—10 years imprisonment.

- (2) However, the offender is liable to a maximum penalty of 14 years imprisonment for an offence defined in subsection (1)(a) or (1)(b)(i) if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.
- (3) Further, the offender is liable to a maximum penalty of life imprisonment if—
 - (a) immediately before, during, or immediately after, the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with any other person; or
 - (b) for an offence defined in subsection (1)(a), the indecent assault includes the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis; or
 - (c) for an offence defined in subsection (1)(b)(i), the act of gross indecency includes the person who is procured by the offender penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the body of the person who is procured that is not a penis.
- (4) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.
- (5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

Appendix D

Queensland Court Benchbook extracts

168.1 – Rape s 349¹ (Offences occurring after 27 October 2000)²

The prosecution must prove the defendant:

- (1) Had carnal knowledge³ of or with (the complainant).
- (2) Without her consent⁴

OR

- (1) Penetrated the vulva, vagina or anus of the other person.
- (2) To any extent
- (3) With a thing or part of the defendant's body that is not a penis
- (4) Without the consent of the other person

OR

- (1) Penetrated the mouth of the other person
- (2) To any extent
- (3) With the defendant's penis
- (4) Without the consent of the other person

¹ The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

² For offences occurring prior to 27 October 2000, see '133 Rape s 347' (now repealed).

³ See definition s 1 and s 6.

⁴ "Consent" is defined in s 348 of the *Criminal Code*: s348

(1) In this chapter, "consent" means consent freely and voluntarily given by a person with the cognitive capacity to give 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 threats 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 an accused person that the accused person was the person's sexual partner.

In *R v Mrzljak* [2005] 1 Qd R 308 it was held that a complainant's intellectual impairment will be a relevant matter for the jury to consider when determining whether or not the complainant had the necessary cognitive capacity. Intellectual impairment itself does not deprive the complainant of the cognitive capacity to give or withhold consent. See *R v Winchester* [2014] 1 Qd R 44 for a detailed examination of the subject of consent including whether consent is freely and voluntarily given where there is a promise of a gift.

An issue of mistake of fact may arise—see notes on mistake of fact.

145.1 – Indecent (Sexual) Assault – s 352

The prosecution must prove that:

1. The defendant assaulted the complainant

“A person who strikes, touches or moves or otherwise applies force of any kind to the person of another either directly or indirectly without their consent is said to assault that other person and the act is called an assault”.

“Consent” means consent freely and voluntarily given by a person with the ability to know and understand what s/he is doing in giving consent.² (Refer to any of the circumstances in s 348(2) which may be relevant as negating consent.) (Section 245 (Assault) does not provide an explanation of the meaning of “without the other person’s consent”. Although the definition in s 348 does not strictly apply to s 352, it provides a useful formulation of circumstances which may be relevant as negating consent³).
2. The assault was unlawful.

An assault is unlawful unless it is authorised, justified or excused by law.⁴
3. The assault was indecent.

The word “indecent” bears its ordinary everyday meaning.⁵ It is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.⁶
4. That the indecent assault consists of [specify acts] (refer to circumstances of aggravation)

¹ Section 352 applies to offences committed on or after 27 October 2000. For offences prior to that date: offences of sexual assault will come under s 337 (now repealed).

² Section 348. See *R v Winchester* [2011] QCA 374 for a detailed examination of the subject of consent including whether consent is freely and voluntarily given where there is a promise of a gift.

³ *R v BAS* [2005] QCA 97.

⁴ Here refer to any defence raised on the evidence.

⁵ Reference should not be made to the dictionary meaning of “indecent” as “unbecoming or offensive to common propriety”, which sets the parameters of indecency too widely: *R v McBride* [2008] QCA 412.

⁶ For a case involving therapeutic treatment, see *R v BAS* [2005] QCA 97. In *R v Jones* [2011] QCA 19 the Court of Appeal held that in a case involving an ambulance officer found guilty of indecent assault while performing an ECG the trial judge erred in directing the jury that the appellant’s motive was not relevant to whether the act was indecent. White JA said at [32] “The quality of ‘indecent’ is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision.” See also *R v Rae* [2009] 2 Qd R 463, where it was held that a direction that the acts had to be accompanied by an intention to gain sexual gratification was not required in that particular case. In *R v McCallum* [2013] QCA 254 it was held that the decision in *Jones* did not require that a direction on the motive of the accused be given in every case where indecency is an element of the offence (at [31]–[40]).

⁷ See Circumstances of Aggravation (Sexual Offences). The offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992* so a serious organised crime circumstance of aggravation is applicable.

79.2 – Mistake of fact, s 24

A person who does **[or omits to do]** an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act **[or omission]** to any greater extent than if the real state of things had been such as the person believed to exist.

So, if [the defendant] [act or omission alleged] under an honest and reasonable, but mistaken, belief that [details of state of things mistakenly believed to exist] he is not criminally responsible to any greater extent than if the real state of things had been such as he believed to exist.

If you conclude that the real state of things was **[details]**, but **[the defendant]** honestly and reasonably believed that **[detail of mistaken belief]**, **[the defendant]** will not be criminally responsible to any greater extent than if **[details of mistaken belief]**. That would mean that **[the defendant]** should be found not guilty of **[as appropriate]**. A mere mistake is not enough, the mistaken belief must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant.¹ To be reasonable, the belief must be one held by the defendant, in his particular circumstances, on reasonable grounds.²

Finally, I must emphasise that there is no burden on the defendant to prove that he made a mistake of fact. The prosecution must satisfy you beyond reasonable doubt that he did not do so. If the prosecution has failed to satisfy you that the defendant did not act under an honest and reasonable mistake of fact you should find the defendant not guilty of **[as appropriate]**.³ So if the Crown proves to your satisfaction beyond reasonable doubt that:

1. The defendant did not honestly hold the relevant mistaken belief about **[the facts]**.
- or
2. that belief was not reasonable in the defendant's circumstances, then you would find that the defence of mistake of fact did not apply.

¹ The defendant's intoxication may be relevant to whether the defendant's mistaken belief was honest: *R v O'Loughlin* [2011] QCA 123 at [34].

² Section 24(1) requires consideration of whether a defendant's belief, based on the circumstances as he or she perceived these to be was held on reasonable grounds (as opposed to whether a reasonable person would have held it): *R v Julian* (1998) 100 A Crim R 430 at 434; *R v Mrzljak* [2005] 1 Qd R 308 at 321, 326; *R v Wilson* [2009] 1 Qd R 476 at [20]; see also extensive discussion of the authorities in *R v Rope* [2010] QCA 194. Since the focus is on the defendant's belief rather than that of a theoretical reasonable person, the information available to the defendant and the defendant's circumstances (such as an intellectual impairment or language difficulty) are of relevance in considering whether a belief was reasonably held: *R v Mrzljak* at 321, 329–330.

³ This direction was approved by the Court of Appeal in *R v Keevers*; *R v Filewood* [2004] QCA 207 at [37].

80.1 – Mistake of fact in Sexual Offences

If you are satisfied beyond reasonable doubt that the complainant did not consent there is another matter you must consider.

Our law provides that a person who does 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 to any greater extent than if the real state of things had been such as the person believed to exist.

In the context of this case that means you must consider, even though the complainant wasn't consenting, did the defendant in the circumstances honestly and reasonably believe that the complainant was consenting? (It may help to describe those circumstances at this stage of the directions). A mere mistake is not enough, the mistaken belief in consent must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant.¹ To be reasonable, the belief must be one held by the defendant, in his particular circumstances, on reasonable grounds.²

The complainant says that he/she did not consent [and made that clear to the defendant]. If you accept the complainant's evidence that he/she (quote the evidence), you might think that the defendant could not have honestly and reasonably believed the complainant was consenting.

Remember however the onus of proof. It is not for the accused to prove that he/she honestly and reasonably believed the complainant was consenting but for the prosecution to prove beyond reasonable doubt that the defendant did not honestly and reasonably believe that the complainant was consenting.

Accordingly if the complainant wasn't in fact consenting, you must ask yourself "can I be satisfied beyond reasonable doubt that the defendant did not have an honest and reasonable belief that she was consenting."

If the prosecution have satisfied you beyond reasonable doubt that the defendant didn't have such a belief you must find the accused guilty.

If you are not so satisfied, even though the complainant wasn't consenting, you must find the defendant not guilty.

¹ The defendant's intoxication may be relevant to whether the defendant had an honest belief that the complainant was consenting: *R v O'Loughlin* [2011] QCA 123 at [34].

² Section 24(1) requires consideration of whether a defendant's belief, based on the circumstances as he or she perceived these to be was held on reasonable grounds (as opposed to whether a reasonable person would have held it: *R v Julian* (1998) 100 A Crim R 430 at 434; *R v Mrzljak* [2005] 1 Qd R 308 at 321, 326; *R v Wilson* [2009] 1 Qd R 476 at [20]). Since the focus is on the defendant's belief rather than that of a theoretical reasonable person, the information available to the defendant and the defendant's circumstances (such as an intellectual impairment or language difficulty) are of relevance in considering whether a belief was reasonably held: *R v Mrzljak* at 321, 329–330.

Appendix E

Jurisdictional comparative table

Note ³⁰²	QLD <i>Criminal Code Act 1899</i>	ACT <i>Crimes Act 1900</i>	NSW <i>Crimes Act 1900</i>	NT <i>Criminal Code Act 1983</i>	SA <i>Criminal Law Consolidation Act 1935</i>
Rape or equivalent	Rape [s 349]	Sexual intercourse without consent [s 54]	Sexual assault [s 61I]	Sexual intercourse without consent [s 192(3)]	Rape [s 48]
Sexual assault or equivalent	Sexual assault [s 352]	Act of indecency without consent [s 60]	Sexual touching [s 61KC]	Act of gross indecency [s 192(4)] Common assault [s 188(2)(k)]	Indecent assault [s 56]
Consent defined in legislation	Yes [s 348(1)] (consent freely and voluntarily given by a person with cognitive capacity to consent)	No	Yes [s 61HE(2)] (free and voluntary agreement)	Yes [s 192(1)] (free and voluntary agreement)	Yes [s 46(2)] (free and voluntary agreement)
Examples of 'affirmative consent'					
Presumptions or factors which invalidate, negate or vitiate consent	Yes [s 348(2)]	Yes [s 67(1)]	Yes [s 61HE(5),(6),(7),(8)]	Yes [s 192(2)]	Yes [s 46(3)]
Intoxication of the complainant invalidating, negating or vitiating consent	No (But s 348(1) - consent must be given by a person with the cognitive capacity to consent)	Yes [s 67(1)(e)] (consent is negated)	Yes [61HE(8)(a)] (a ground that may establish that a person does not consent)	Yes [s 192(2)(c)] (no consent where the person is so affected as to be incapable of freely agreeing)	Yes [s 46(3)(d)] (taken not to freely agree if intoxicated to the point of being incapable of freely and voluntarily agreeing.)
Lack of physical or verbal resistance	No	Yes [s 67(2)] (does not amount to consent by reason only of that fact) (A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting.)	Yes [s 61HE(9)] (does not amount to consent by reason only of that fact) (A person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting.)	Yes [s 192A] (as a required jury direction) (A person is not to be regarded as having consented ... only because the person did not protest or physically resist.)	Yes [s 34N <i>Evidence Act 1929</i>] (as a required jury direction) (The person is not to be regarded as having consented ... merely because the person did not say or do anything to indicate they do not freely and voluntarily agree ... or the person did not protest to or physically resist ...)
Legislation specifically covers consent, initially given, then withdrawn	No	No	No	No	Yes [s 48(1)(b)] (as an element of rape offence)
Mental state of the defendant as an element of the offence	No	knows or is reckless as to whether that other person consents [s 54(1) & (3)] [s 60(1) & (3)] Deemed to know that the other person does not consent where consent caused by means set out in s 67 (1)(a)-(j) [67(3)]	knows or is reckless as to whether the other person consents, or has no reasonable grounds for believing the other person consents [ss 61I and 61HE(3)]	knows or is reckless as to the lack of consent [s 192(3), (4), (4A) and s 43AK] Being reckless includes not giving any thought to whether or not the person is consenting (192 (4A)).	Yes (Rape) - (knows, or is recklessly indifferent to, the fact that the other person does not consent) [ss 47 - 48] No (Indecent assault)

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This table references legislative provisions but does not reflect how the provisions are interpreted and applied by the courts.

TAS <i>Criminal Code Act 1924</i>	VIC <i>Crimes Act 1958</i>	WA <i>Criminal Code Act 1913</i>	Canada <i>Criminal Code (RSC) 1958</i>	UK <i>Sexual Offences Act 2003</i>
Rape [s 185]	Rape [s 38]	Sexual penetration without consent [s 325]	'Rape' (with gender-neutral sexual assault offences) [s 271]	Rape [s 1] and Assault by Penetration [s 2]
Indecent assault [s 127]	Sexual assault [s 40] Sexual assault by compelling sexual touching [s 41]	Indecent assault [s 323]	Sexual assault [s 271]	Sexual assault [s 3]
Yes [s 2A(1)] (free agreement)	Yes [s 36(1)] (free agreement)	Yes [s 319(2)] (consent freely and voluntarily given)	Yes [s 273.1(1)] (voluntary agreement of the complainant to engage in the sexual activity in question)	Yes [s 74] (agrees by choice, and has the freedom and capacity to make that choice; but note presumptions about consent [ss 75-76])
[s 2A(2)(a)] (no consent where a person does not say or do anything to communicate consent) and [s 14A(1)(c)] (reasonable steps are to be taken by the person seeking to engage in sexual activity to ascertain consent of the other person)	[s 36(2)(l)] (no consent where a person does not say or do anything to communicate consent) and [s 36A(2)] (steps are to be taken by the person seeking to engage in sexual activity to ascertain consent of the other person)		[273.2] (a defendant's mistaken belief as to consent, does not apply where: * there is no evidence that the complainant's voluntary agreement ... was affirmatively expressed by words or actively expressed by conduct; [s 273.2(c)] or * the defendant did not take reasonable steps to ascertain the complainant's consent [s 273.2(b)])	
Yes [s 2A(2)] and if suffer GBH is evidence of lack of consent. [2A(3)]	Yes [s 36(2)]	Yes [s 319(2)(a)]	Yes [s 265 and s 273.1(2)]	Yes [ss 75-76]
Yes [s 2A(2)(h)] (no free agreement if so affected as to be unable to form a rational opinion on consent.)	Yes [s 36(2)(e)&(f)] (no consent if so affected as to be incapable of consenting or withdrawing consent to the act.)	No	No [s 273.1(2)] (no consent if incapable of consenting for any reason other than unconsciousness)	No
Yes [s 2 A(2)(a)] (as a circumstance where a person may not freely agree) (Without limiting the meaning of "free agreement", and ... what may constitute "free agreement" or "not free agreement" ... a person does not freely agree ... if the person does not say or do anything to communicate consent.)	Yes [s 36(2)(l)] (does not amount to consent) (Circumstances in which a person does not consent ... include, but are not limited to ... the person not saying or doing anything to indicate consent)	Yes [s 319(2)(b)] (does not amount to consent) (Where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent)	Yes [273.2(c)] (restricts defence of belief in consent) (It is not a defence where 'there is no evidence that the complainant's voluntary agreement ... was affirmatively expressed by words or actively expressed by conduct'.)	No
No	Yes [s 36(2)(m)] (does not amount to consent)	No	Yes [s 273.1(2)(e)] (does not amount to consent)	No
No	(does not reasonably believe the other person consents) [s 38(1)(c)] (determining whether or not a person reasonably believes includes steps taken to ascertain consent) [s 36A]	No	No	knows or does not reasonably believe the other person consents [s 1(1)(c)] (determining whether or not a person reasonably believes includes steps taken to ascertain consent) [s 1(2)]

Note ³⁰³	QLD <i>Criminal Code Act 1899</i>	ACT <i>Crimes Act 1900</i>	NSW <i>Crimes Act 1900</i>	NT <i>Criminal Code Act 1983</i>	SA <i>Criminal Law Consolidation Act 1935</i>
Is mistake of fact (about consent) provided for in legislation	Yes [s 24] (mistaken belief must be honest and reasonable)	No (common law – mistaken belief need only be honest)	No (common law - mistaken belief need only be honest but a 'reasonableness' requirement is introduced as part of the defendant's knowledge about consent [s 61HE(3)] (the defendant knows the other person does not consent, if the defendant knows, is reckless as to whether the other person consents or has no reasonable grounds for believing the other person consents)	Yes [s 43AW] (for offences of rape and sexual assault. Mistaken belief must be reasonable in the circumstances) Yes [s 32] (For the offence of common assault (indecent) the mistaken belief must be honest and reasonable)	No (common law - mistaken belief need only be honest but 'reckless indifference' as to consent is an element of the offence of rape. 'Reckless indifference' includes being aware of the possibility and proceeding regardless; being aware of possibility and failing to take reasonable steps to ascertain consent; and not giving any thought to whether consenting [ss 47-48])
Recklessness of the defendant relevant to an element of the offence or to mistake of fact	No	Yes [s 54(1) & s 60(1)] (reckless as to whether the other person consents as an element of the offence)	Yes [s 61HE(3)] (to proof of knowledge about consent as an element of the offence)	Yes [s 192(3),(4) & (4A) & s43AK] (reckless as to lack of consent as an element of the offence)	Yes (rape only) [s 48(1)] (reckless indifference to consent as an element to the offence)
Taking of 'reasonable steps' or 'steps' by the defendant to confirm consent relevant to an element of the offence or to mistake of fact	No	No	Yes [s 61HE(4)(a)] (to proof of knowledge about consent as an element of the offence)	No	Yes (rape only) [s 47(b)] (as a consideration to the element of reckless indifference to consent)
Intoxication of the defendant relevant to an element of the offence or to mistake of fact	No	No	Yes [s 61HE(3)] (to proof of knowledge about consent as an element of the offence)	Yes [s 43AU] (to the application of mistake of fact)	No
Statement of objectives or guiding principles	No	No	No	No	No
Specific provision for admission of expert evidence in trials for sexual offences	No	No	No	No	No

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This table references legislative provisions but does not reflect how the provisions are interpreted and applied by the courts.

TAS <i>Criminal Code Act 1924</i>	VIC <i>Crimes Act 1958</i>	WA <i>Criminal Code Act 1913</i>	Canada <i>Criminal Code (RSC) 1958</i>	UK <i>Sexual Offences Act 2003</i>
<p>Yes</p> <p>[s 14] (mistaken belief must be honest and reasonable)</p> <p>Mistaken belief as to the existence of consent is not honest and reasonable in circumstances involving an accused in a state of self-induced intoxication, being reckless or not taking reasonable steps to ascertain consent) [s 14A]</p>	<p>No</p> <p>(common law - mistaken belief need only be honest, but 'reasonable belief' is an element of offences in s 38(1)(c) (Rape) and s 40(1)(d) (sexual assault)); and ss 36A-36B: the defendant does not 'reasonably believe' the other person consents; 'Reasonable belief' depends on the circumstances including any steps the defendant has taken to find out whether the other person consents. See also 'Effect of intoxication on reasonable belief' [s 36B])</p>	<p>Yes</p> <p>[s 24] (mistaken belief must be honest and reasonable)</p>	<p>No</p> <p>(common law - mistaken belief need only be honest but ss 265(4) and 273.2 require reasonable grounds for the belief. No defence if belief arose from a defendant's self-induced intoxication, recklessness or wilful blindness, failure to take reasonable steps to ascertain that the complainant was consenting or where there is no evidence that the complainant's voluntary agreement ... was affirmatively expressed by words or actively expressed by conduct)</p>	<p>No</p> <p>(common law – mistaken belief need only be honest but 'reasonable belief' is an element of offences in ss 1(1)(c) and 3(1)(d). Whether a belief is reasonable is to be determined having regard to all the circumstances including any steps taken by the defendant to ascertain consent [ss 1(2) and 3(2)])</p>
<p>Yes</p> <p>[s 14A(1)(b)] (to the application of mistake of fact)</p>	<p>No</p>	<p>No</p>	<p>Yes</p> <p>Recklessness or wilful blindness [s 273.2(a)(ii)] (to the application of mistake of fact)</p>	<p>No</p>
<p>Yes</p> <p>[s 14A(1)(c)] (to the application of mistake of fact)</p>	<p>Yes</p> <p>[s 36A] (to proof of reasonable belief of consent as an element of the offence)</p>	<p>No</p>	<p>Yes</p> <p>[s 273.2(b)] (to the application of mistake of fact)</p>	<p>Yes</p> <p>[s 1(2) – rape and s 3(2)] (as a consideration to the reasonable belief element of the offence)</p>
<p>Yes</p> <p>[s 14A(1)(a)] (to the application of mistake of fact)</p>	<p>Yes</p> <p>[s 36B] (to proof of reasonable belief as an element of consent)</p>	<p>No</p>	<p>Yes</p> <p>[s 273.2(a)(i)] (to the application of mistake of fact)</p>	<p>No</p>
<p>No</p>	<p>Yes</p> <p>[s 37A] (Objective) and [s 37B] (Guiding Principles)]</p>	<p>No</p>	<p>No</p>	<p>No</p>
<p>No</p>	<p>Yes</p> <p>[Criminal Procedure Act 2009 (Vic) s 388] (evidence based on a person's specialised knowledge (acquired through training, study or experience)) of—</p> <p>(a) the nature of sexual offences; and</p> <p>(b) social, psychological and cultural factors that may affect the behaviour of a person who has been the victim ... of a sexual offence...)</p>	<p>No</p>	<p>No</p>	<p>No</p>