



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

Report



**Queensland  
Law Reform Commission**

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

**Report**

Report No 78  
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To: The Honourable Yvette D'Ath MP  
Attorney-General and Minister for Justice  
Leader of the House

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its Report, *Review of consent laws and the excuse of mistake of fact*.

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Chairperson

His Honour Judge Brian Devereaux SC  
Member

The Honourable Margaret Wilson QC  
Member

Ms Penelope White  
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Previous Queensland Law Reform Commission publication in this reference:

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<sup>1</sup> 2 March 2020–3 July 2020.

<sup>2</sup> The role of research officer was successively filled by Mr Sam Harvey (14 November 2019–20 January 2020); Ms Rose Leonforte (20 January 2020–28 February 2020); Ms Ruby Chester (23 February 2020–30 June 2020).

## Abbreviations and Glossary

<b>ALRC</b>	Australian Law Reform Commission
<b>ALRC and NSWLRC Joint Report on Family Violence</b>	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)
<b>ANROWS</b>	Australia's National Research Organisation for Women's Safety
<b>balance of probabilities</b>	The standard of proof where the trier of fact must be satisfied that a particular matter 'is more probable than not'
<b>beyond reasonable doubt</b>	The standard, in a criminal trial, to which the trier of fact must be satisfied to find a defendant guilty of the offence. For indictable offences, including rape and sexual assault, the prosecution bears the burden (or onus) of proof of the offence. The 'beyond reasonable doubt' standard is a higher and different standard of proof to the 'balance of probabilities' standard.
<b>burden or onus of proof</b>	The responsibility to prove a particular charge or defence or excuse
<b>Criminal Code</b>	<i>Criminal Code Act 1899</i> (Qld) sch 1
<b>criminal responsibility</b>	Liability to punishment as for an offence <sup>3</sup>
<b>element</b>	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.
<b>evidence</b>	The oral testimony of witnesses and any exhibits admitted at the trial, such as documents, photographs or recordings. Examples of exhibits include recorded interviews by police with a defendant, and recordings of 'pretext conversations' between a complainant or witness and the alleged offender.
<b>evidentiary burden</b>	An obligation to raise a particular matter in or on the evidence
<b>jury direction</b>	An instruction about the law, the evidence or the trial process, given by the trial judge to a jury to help them to decide whether a person is guilty or not guilty of an offence
<b>MCC</b>	Model Criminal Code: MCCOC, <i>Chapter 5: Sexual Offences Against the Person</i> , Report (May 1999)
<b>MCCOC</b>	Model Criminal Code Officers Committee
<b>NSWLRC</b>	New South Wales Law Reform Commission
<b>NSWLRC draft proposals</b>	New South Wales Law Reform Commission, <i>Consent in relation to sexual offences—Draft proposals</i> (October 2019)



<b>QLRC Consultation Paper No 78 (2019)</b>	Queensland Law Reform Commission, <i>Review of consent laws and the excuse of mistake of fact</i> , Consultation Paper, WP No 78 (December 2019)
<b><i>Queensland's Framework to address Sexual Violence (2019)</i></b>	Department of Child Safety, Youth and Women (Qld), <i>Prevent. Support. Believe. Queensland's Framework to address Sexual Violence</i> (2019)
<b>standard of proof</b>	The level a party must reach to prove a particular charge or factor, that is, beyond reasonable doubt or on the balance of probabilities
<b>summing-up</b>	The instructions given by the judge to the jury before the jury retires to consider its verdict. The summing-up includes instructions on the law that applies to the case including the elements of the charge and any required directions about the use that may (or may not) be made of parts of the evidence ('jury directions').
<b>Taskforce Discussion Paper</b>	Queensland Taskforce on Women and the Criminal Code, <i>Discussion Paper of the Taskforce on Women and the Criminal Code</i> (September 1999)
<b>Taskforce Report</b>	Queensland Taskforce on Women and the Criminal Code, <i>Report of the Taskforce on Women and the Criminal Code</i> (2000)
<b>the draft Bill</b>	Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020, contained in Appendix G.
<b>VLRC</b>	Victorian Law Reform Commission

\* *Except where otherwise indicated, references to legislation in this Report are references to Queensland legislation*



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# Executive Summary

## CURRENT LAW IN QUEENSLAND

[1] Sections 349 and 352 of the Criminal Code provide for offences of rape and sexual assault respectively. These offences are found in Chapter 32 of the Criminal Code.<sup>4</sup>

[2] A key element that must be proved for an offence of rape or sexual assault is that the act constituting the offence was done by the defendant without the complainant's consent. This is expressly required by the text of section 349 for an offence of rape. The text of section 352(1)(a) does not expressly do so, but an assault within the meaning of that section is defined in section 245 in a way that requires absence of consent. However, section 245 is not in Chapter 32.<sup>5</sup>

### The definition of 'consent'—section 348

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

#### **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.

### The excuse of mistake of fact—section 24

[4] For an offence of rape or sexual assault, a defendant may be excused from criminal responsibility for the offence if the act otherwise constituting the offence was

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<sup>4</sup> Chapter 32 of the Criminal Code (Qld) also contains the offences of 'Attempt to commit rape' and 'Assault with intent to commit rape': ss 350, 351.

<sup>5</sup> Section 245 is contained in ch 26 of the Criminal Code (Qld), which deals with assaults and violence to the person generally.

done under an honest and reasonable, but mistaken, belief that the complainant gave consent. 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.

[5] Section 24 applies to all persons charged with any criminal offence against the statute law of Queensland.<sup>6</sup> It may, therefore, apply to an offence of rape or sexual assault.

## TERMS OF REFERENCE

[6] The terms of reference required the Commission to conduct a review of the operation and practical application of the definition of consent in section 348 and the operation of the excuse of mistake of fact under section 24 as it applies to rape and sexual assaults in Chapter 32 of the Criminal Code, and to recommend whether there is a need for reform of those and any other matters the Commission considers relevant.

[7] The terms of reference required consultation with a range of classes of stakeholders and the public generally.

## CONSULTATION

[8] To assist with the preparation of its Consultation Paper, the Commission invited preliminary submissions on the issues raised in the review from the judiciary, legal stakeholders, academics and organisations representing the interests of victims and survivors.<sup>7</sup> Some members of the public also provided the Commission with their preliminary views.<sup>8</sup>

[9] The Commission then released a detailed Consultation Paper outlining the key issues raised in the review and called for submissions on a number of specific questions.<sup>9</sup>

[10] The Commission received 87 submissions from respondents including legal professional bodies, community legal centres, academics, individuals who had

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<sup>6</sup> Criminal Code (Qld) s 36.

<sup>7</sup> See the list of preliminary respondents in Appendix B.

<sup>8</sup> At the Commission's request, the Attorney-General also provided the Commission with consultation undertaken by the Government with legal stakeholders in respect of Queensland's consent laws. In relation to the Government's consultation, see terms of reference, 'Background' in Appendix A.

<sup>9</sup> QLRC Consultation Paper No 78 (December 2019).

experienced sexual violence, organisations that support and represent victims and survivors of sexual violence, and members of the public.<sup>10</sup>

[11] In addition, the Commission held a consultation workshop with representatives from organisations that support and represent victims and survivors of sexual violence, as well as victims and survivors who wished to attend.

[12] The submissions to the review raised many issues and reflected a wide range of views. Some of the matters raised were outside the scope of the Commission's terms of reference.

## ANALYSIS OF TRIAL TRANSCRIPTS AND APPEAL DECISIONS

[13] The Commission examined a large number of rape and sexual assault trials and appeals in Queensland for the purpose of achieving an evidence-based analysis of how the laws to be reviewed are operating in practice.

[14] First, the Commission undertook a detailed quantitative and qualitative analysis of transcripts of all criminal trials of rape or sexual assault completed in the 2018 calendar year (excluding trials that involved a complainant under 12 years of age)<sup>11</sup>—a total of 135 trials (the '2018 Trials'). This examination of transcripts involved the collection of information about the conduct of the trials (including lines of defence and whether mistake of fact was left to the jury) as well as matters given in evidence and trial outcomes. The findings have provided valuable information about the operation of the definition of consent and the excuse of mistake of fact as it applies to rape and sexual assault in Queensland. They are detailed in Chapter 3.<sup>12</sup>

[15] Second, the Commission undertook a qualitative analysis of relevant Queensland Court of Appeal decisions in rape and sexual assault matters principally between 2000 and 2019. Those appeal decisions have informed the Commission's consideration of the issues in the review.<sup>13</sup>

[16] Third, the Commission also undertook a qualitative review of the transcripts of a further 76 trials (in which consent or mistake of fact was raised) which were referred to the Commission, at its invitation, by the judiciary, the Office of the Director of Public Prosecutions, Legal Aid Queensland and the Bar Association of Queensland. That examination sought to identify, but did not reveal, any significant issues with the operation of the law which were not highlighted by the analysis of the 2018 Trials.

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<sup>10</sup> See the list of respondents and consultees in Appendix B.

<sup>11</sup> Consent was not in issue in any of those 28 trials because s 349(3) of the Criminal Code (Qld) provides that a child under 12 years of age is incapable of giving consent for s 349. In the review of trial transcripts, outlined in Chapter 3 below, the Commission generally separates trials involving complainants over 16 ('Adult complainants') and trials involving complainants aged 12 to 15 (who, for the purpose of Chapter 3, are referred to as 'Child complainants').

<sup>12</sup> See also the research questions in Appendix E.

<sup>13</sup> See Appendix F.

## Principles underpinning the review

[17] A primary purpose of the criminal law in the present context is to punish serious breaches of sexual autonomy.

[18] The Commission's starting point for the review was that the criminal law regarding consent should support the objective of protecting sexual autonomy. It is desirable that the law reflect a contemporary standard of what is required in relation to consent.

[19] However, there are limits to what the criminal law is practically and properly able to achieve in terms of changing social practices. Sexual offences occur within a broad social context and raise complex issues that go beyond the criminal law on consent. Legislative amendment is only one means of addressing these issues.

[20] The Commission is mindful of the importance of the fundamental principles of a fair trial, including the presumption of innocence. It is necessary to balance those principles with the protection of complainants' rights. Any changes to the legislation should be careful to avoid unnecessary or unjustified erosion of those principles.

[21] The law regarding consent needs to be clear, for judges and juries as well as for the wider community.

[22] Reforms should, where possible, be informed by available empirical evidence.

## APPROACHES IN OTHER JURISDICTIONS

[23] Other jurisdictions make provision for offences equivalent to the offences of rape and sexual assault in Queensland, although there are some differences. A comparative table summarising the legislative provisions in Queensland and other jurisdictions, and the provisions of the Commission's proposed draft Criminal Code (Consent and Mistake of fact) Amendment Bill 2020, is set out in Appendix C.<sup>14</sup>

[24] The Commission has considered the approaches and relevant law reform reports of other jurisdictions, both within Australia and internationally, in informing itself about appropriate reforms. These are listed in Appendix D.

## COMMISSION'S CONCLUSIONS AND RECOMMENDATIONS

[25] Overall, the Commission does not recommend extensive changes to the existing law regarding consent for the offences of rape or sexual assault or the excuse of mistake of fact in relation to those offences. Its detailed review of the operation of the existing law did not support the conclusion that there should be extensive changes.

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<sup>14</sup> There are some significant differences in the way rape and sexual assault offences, and the defence or excuse of mistake of fact, are structured and operate between the code and common law jurisdictions.

[26] However, in the Commission's view there should be some amendments that will clarify, reinforce and update the current operation of the law. It has made five recommendations for amendments to the Criminal Code.<sup>15</sup>

## DEFINITION OF CONSENT

[27] The Commission considered a number of issues relevant to consent, as set in Chapter 5 and summarised below.

### Affirmative consent model

[28] Some respondents to the consultation process have suggested that the law should adopt an 'affirmative consent' model. Definitions and descriptions of an 'affirmative consent' model vary.

[29] In the Commission's view, two significant aspects of the existing law reflect an affirmative consent model, namely:

- (a) consent is a state of mind, but must also be 'given' (that is, communicated); and
- (b) mere failure to manifest an absence of consent by words or actions is not sufficient for consent to be given.

[30] The Commission recognises, however, that these aspects may not be widely understood in the community. This may be due to their presence in case law rather than in the express terms of the Criminal Code.

[31] The Commission recommends that a new subsection be inserted in section 348 of the Criminal Code to provide that a person is not taken to give consent to an act only because, at or before the time of the relevant act, the person does not say or do anything to communicate that they do not consent to that act.<sup>16</sup>

[32] Otherwise, the Commission does not consider that section 348 should be amended to give effect to an 'affirmative consent' model.

### Consent and sexual assault

[33] The offences of rape, assault with intent to commit rape and sexual assault are contained in Chapter 32 of the Criminal Code, in sections 347, 351(1) and 352(1) respectively. By section 347, consent in Chapter 32 has the meaning given to it by section 348. However, the term 'consent' is not used in section 351 or section 352(1)(a).<sup>17</sup> Absence of consent is, however, an element of each offence. This is because assault is an element of each offence. For the purposes of the

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<sup>15</sup> See the List of Recommendations below.

<sup>16</sup> See Rec 5-1, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 5, inserting new s 348(3).

<sup>17</sup> See s 352(1)(b) of the Criminal Code (Qld), which contains a form of the offence dealing with the procurement of another person without that person's consent. But 'consent' does not appear in the main offence creating provision, which is s 352(1)(a).

Criminal Code, 'assault' is defined in section 245 as occurring where a person applies force to another, directly or indirectly, without the consent of that other person.<sup>18</sup>

[34] The Commission recommends that section 347 of the Criminal Code be amended to apply the definition of 'consent' in section 348 to the offences provided for under sections 351(1) (assault with intent to commit rape) and 352(1)(a) (sexual assault).<sup>19</sup> This will ensure consistency in the meaning of consent for all offences of rape and sexual assault under Chapter 32.

### **Withdrawal of consent**

[35] In the Commission's view, the existing law operates so that a person who initially consents to an act but subsequently withdraws consent and communicates the withdrawal, before or during the act, does not consent. An offence of rape or sexual assault can arise from the point at which consent is withdrawn and that withdrawal is communicated.

[36] However, no express provision is made in section 348 that if an act is done after consent to the act is withdrawn the act is done without consent.

[37] The Commission therefore recommends that section 348 of the Criminal Code be amended to provide that, if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent. The withdrawal of consent must be communicated in some positive way, 'by words or conduct', so that once the other person is made aware that consent, initially given, is withdrawn, they have the opportunity to respond to that withdrawal by ceasing to engage in the relevant act.

### **CIRCUMSTANCES WHEN CONSENT IS NOT FREE AND VOLUNTARY**

[38] The effect of section 348(1) is that for an offence of rape or sexual assault 'consent' is only given if it is given 'freely and voluntarily'. Without limiting the operation of those words, section 348(2) provides expressly for circumstances where consent is not freely and voluntarily given. The Commission considered whether there was any need to amend section 348(2), as set out in Chapter 6 and summarised below.

#### **Existing circumstances under section 348(2) in which consent is taken not to have been freely and voluntarily given**

[39] The existing list of circumstances in section 348(2) is non-exhaustive and expressed in broad terms. Broad terms can be applied in accordance with community standards or expectations. They avoid the inflexibility that the application of more specifically defined circumstances can bring. In the Commission's view, changes to section 348(2) are unnecessary. A more extensive and specific list might produce unanticipated and unsatisfactory outcomes.

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<sup>18</sup> See s 246(1) of the Criminal Code (Qld), which provides that an assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.

<sup>19</sup> See Rec 5-2, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cll 3, 4, inserting new definition of 'assault' for ch 32.



**Consent obtained in circumstances where the complainant is asleep, unconscious or affected by alcohol or another drug**

[40] For an offence of rape, section 348(1) requires that 'consent' be given 'by a person *with the cognitive capacity* to give the consent'.<sup>20</sup> A complainant who is asleep or otherwise unconscious does not have, and a person affected by alcohol or drugs may not have, the cognitive capacity to give consent.<sup>21</sup>

[41] The Commission has recommended that section 347 of the Criminal Code be amended to apply the definition of 'consent' in section 348 to offences of sexual assault. Assuming that recommendation is adopted, it is unnecessary to amend section 348(2) or make any other amendment to deal more specifically with circumstances that go to cognitive capacity for offences of rape or sexual assault.

**Consent obtained by a mistaken belief, induced by the defendant, that there will be monetary exchange for the sexual act**

[42] For an offence of rape, where consent is given in exchange for a promise of payment or some other reward a question may arise under section 348(1) whether consent was not freely and voluntarily given. Only if the promise can be characterised as a false and fraudulent representation about the 'nature or purpose of the act' should section 348(2) deem the consent not freely and voluntarily given.

[43] Further, section 218 provides that a person who by a false pretence procures another person to engage in a sexual act commits an offence. Section 408C provides that a person who dishonestly induces another person to do any act which that person is lawfully entitled to abstain from doing commits an offence of fraud. However, neither of those offences is contained in Chapter 32 of the Criminal Code.

[44] This issue raises broader policy questions about the regulation and protection of sex workers, and their experiences within the criminal justice system, that are outside the scope of the Commission's review. Accordingly, it does not recommend any amendment to section 348(2) of the Criminal Code to deal specifically with this circumstance.

**Consent obtained but the defendant fails to use a condom as agreed or sabotages the condom**

[45] The Commission shares the view expressed in the submissions that the sabotage or removal of a condom without the other party's consent is a concerning practice. It is aware of at least one instance where such an act has been prosecuted as rape in Queensland.

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<sup>20</sup> Criminal Code (Qld) s 348(1) (emphasis added).

<sup>21</sup> The term 'cognitive capacity' is not defined in the Criminal Code (Qld). The Macquarie Dictionary defines the term 'cognition' as 'the act or process of knowing' and 'the product of such a process'. The term 'capacity' is defined as the 'power of receiving impressions [or] knowledge' and the 'power, ability or possibility of doing something': *Macquarie Dictionary* (online at 24 June 2020) 'Cognition', 'Capacity'.

[46] There may well be merit in making this practice an offence in its own right. However, the Commission does not recommend an amendment to section 348(2) of the Criminal Code to deal with such circumstances.

### **Consent obtained by a mistaken belief, induced by the defendant, that the defendant does not suffer from a serious disease**

[47] Present public health and criminal laws indirectly deal with circumstances where a complainant consents to a sexual act under a mistaken belief, induced by the defendant, that the defendant does not suffer from a serious disease.

[48] Section 143 of the *Public Health Act 2005* provides that a person must not recklessly put someone else at risk of contracting a controlled notifiable condition. Those conditions include HIV and some other sexually transmitted diseases. Section 317 of the Criminal Code provides that any person who, with intent to transmit a serious disease, transmits a serious disease to another person commits an offence.<sup>22</sup> Neither of these sections is within Chapter 32. The offences they provide for are not directed to sexual activity as such, either with or absent consent, but either offence can apply to such conduct.

[49] The Commission considers that the existing laws achieve a reasonable balance between public health measures and criminal law interventions for transmission of a serious disease. Section 348(2) of the Criminal Code should not be amended to include consent obtained under a mistaken belief, induced by the defendant, that the defendant does not have a serious disease as consent not freely and voluntarily given.

### **Consent obtained in circumstances of domestic and other violence**

[50] Offences of rape or sexual assault commonly occur in a context of domestic violence.

[51] Section 348(2)(a)–(c) of the Criminal Code provide that a person's consent to an act is not freely and voluntarily given if it is obtained by force, threat or intimidation, or fear of bodily harm. These provisions are raised when an offence of rape or sexual assault occurs in a context of domestic violence.

[52] Further, the existing law permits reception of evidence of domestic violence in a relationship where it is relevant; for example, where there is conduct which might go to whether consent was given freely or voluntarily or which might be capable of explaining aspects of the complainant's evidence which the jury might otherwise have considered unlikely.

[53] In the Commission's view, the existing laws in Chapter 32 do not require amendment to address the concerns raised about rape and sexual assault in the context of domestic violence.

## EXCUSE OF MISTAKE OF FACT

[54] For an offence of rape or sexual assault, the excuse of mistake of fact under section 24 of the Criminal Code applies where the defendant does an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act.

[55] The Commission considered a number of issues relevant to the excuse of mistake of fact for an offence of rape or sexual assault, as set out in Chapter 7 and summarised below.

### Application of the excuse of mistake of fact to Chapter 32 offences

[56] Section 24 is a provision that has general application to all criminal offences.

[57] In the Commission's view, there is no justification to exclude Chapter 32 offences from the potential operation of the excuse of mistake of fact. To do so would discriminate against defendants charged with those offences, as against defendants charged with other serious offences.

### Onus of proof and the excuse of mistake of fact

[58] A fundamental principle is that the onus of proof in criminal proceedings rests with the prosecution. For an offence of rape or sexual assault, the prosecution must prove every element of the offence, beyond reasonable doubt. Further, if mistake of fact as to consent is raised on the evidence, the prosecution must prove, beyond reasonable doubt, that the defendant did not honestly believe that the complainant gave consent or that any such belief was not reasonably held.

[59] The Commission has carefully considered the arguments for and against reversing the onus of proof for the excuse of mistake of fact onto a defendant charged with an offence under Chapter 32 of the Criminal Code. It has concluded that there is no adequate justification for reversing the onus of proof. The interests of justice are best served by maintaining the status quo, which in the Commission's view strikes the right balance between the rights of the individual and the wider interests of the community.

### Reasonableness of a defendant's belief

[60] To constitute an excuse, the defendant's mistaken belief as to consent must be both honest and reasonable. Under the existing law, in considering what is reasonable, fairness demands that a person be judged not by what would be reasonable for a hypothetical ordinary person but by a standard that asks what was reasonable for the defendant in their actual circumstances. Features such as intellectual disability,<sup>23</sup> mental illness<sup>24</sup> and language difficulties<sup>25</sup> are examples of disadvantages of a defendant that would be excluded from consideration by a jury if

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<sup>23</sup> *R v Mrzljak* [2005] 1 Qd R 308.

<sup>24</sup> *R v Dunrobin* [2008] QCA 116.

<sup>25</sup> *R v Mrzljak* [2005] 1 Qd R 308.

a hypothetical reasonable person test was adopted without reference to a defendant's actual circumstances.

[61] In the Commission's view, the existing law strikes the right balance between the competing considerations of the requirement of reasonableness as a limit on the availability of mistake as to consent as an excuse and fairness that a defendant should be judged having regard to their actual circumstances.

### **Consideration of what if any 'steps' or 'reasonable steps' the defendant took to ascertain consent**

[62] The excuse of mistake of fact in section 24 of the Criminal Code does not expressly require consideration of the steps, or reasonable steps, taken by a defendant to ascertain that the complainant gave consent. However, when the excuse of mistake of fact is raised, a jury is able to consider any steps that were taken (or that no steps were taken, depending on the facts of the case), in considering whether the defendant honestly and reasonably believed the complainant consented.

[63] The introduction of a steps, or reasonable steps *requirement*, to qualify the operation of section 24, before the excuse of mistake of fact can be relied upon, could operate unfairly. Not all situations where a defendant may honestly and reasonably believe that a complainant is giving consent will alert a defendant to the need to take steps to ascertain the fact of consent.

[64] The Commission recommends that a new provision be introduced into Chapter 32 of the Criminal Code that, for an offence under that Chapter, in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, the circumstances that may be taken into account include what, if anything, the defendant said or did to ascertain whether the complainant gave consent.<sup>26</sup>

### **The way a defendant's voluntary intoxication affects the assessment of excuse of mistake of fact as to consent**

[65] Commonly, an alleged offence of rape or sexual assault is prosecuted in circumstances where the defendant was intoxicated by alcohol or a drug at the time of the alleged offence.

[66] The Criminal Code does not expressly provide that either intoxication or voluntary intoxication is relevant to whether a defendant's mistaken belief that the complainant gave consent was honest and reasonable. However, under the existing law, voluntary intoxication is not relevant in determining whether a defendant's mistaken belief as to consent was reasonable.

[67] Although the case law to this effect is clear, the Commission's review of the 2018 Trials involving Chapter 32 offences suggests that position is not always made clear to the jury.

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<sup>26</sup>

See Rec 7-1, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 6, inserting new s 348A(1)–(2).

[68] The Commission recommends that a new provision be introduced into Chapter 32 of the Criminal Code to the effect that, for an offence under that Chapter, in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance.<sup>27</sup>

### **Concept of ‘recklessness’ as to a defendant’s belief in consent**

[69] In a number of Australian jurisdictions, it is an element of an offence of rape or sexual assault that the defendant knew the complainant was not consenting to the relevant sexual act, or was reckless as to the absence of consent. In Queensland an offence of rape or sexual assault does not contain that element. The only elements are that the relevant sexual act took place and that the act was done without consent.

[70] The existing law in Queensland does not expressly refer to the relevance of ‘recklessness’ on the part of a defendant. However, where the excuse of mistake of fact as to consent is raised on the evidence, the concept of ‘recklessness’ is accommodated within the question of whether the defendant acted under an honest and reasonable, but mistaken, belief that the complainant gave consent.

[71] The introduction of the concept of recklessness as an additional express consideration to be taken into account in assessing whether a defendant acted under an honest and reasonable, but mistaken, belief would not serve to clarify the existing law, is unnecessary and could cause complications.

[72] In the Commission’s view, since mistake of fact is an excuse under section 24 only where the defendant acts under an honest and reasonable, but mistaken, belief as to consent, the Criminal Code should not be amended to refer expressly to ‘recklessness’ as to the complainant’s consent for the offences of rape and sexual assault.

## **OTHER MATTERS**

[73] The Commission considered a range of other relevant matters, as set out in Chapter 8 and summarised below.

### **Preconceptions about rape and sexual assault**

[74] Recent research does not strongly support the concern that jurors commonly harbour false preconceptions or ‘rape myths’, or that any such preconceptions affect jury deliberation or verdicts. This research includes the recent 2017 National Community Attitudes towards Violence against Women Survey (‘NCAS’) and its report<sup>28</sup> and recent research conducted over 2017–2019 in different regions of England, Wales and Northern Ireland which surveyed jurors from 63

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<sup>27</sup> See Rec 7-2, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 6, inserting new s 348A(1), (3).

<sup>28</sup> K Webster et al, *Australians’ attitudes to violence against women and gender equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (ANROWS, Research Report No 03/2018).

criminal juries after trial.<sup>29</sup> This research suggests that the influence of some of the suggested 'rape myths' may be overstated.

[75] Accordingly, the Commission does not recommend any change to the existing law to deal with perceptions that jurors might harbour false preconceptions or that those false preconceptions might affect jury deliberations or verdicts.

### **Expert evidence**

[76] Expert evidence about the nature and effects of sexual assault, of the kind envisaged by section 388 of the *Criminal Procedure Act 2009* (Vic), is unlikely to be admissible under current laws in Queensland in a rape or sexual assault trial.

[77] The Commission is not persuaded, given recent research of jurors' views, that juries are influenced in their decision-making by false preconceptions about rape or sexual assault or that where there is a need for jury guidance this is best achieved by making expert evidence admissible as provided by section 388 or some similar provision. There may be some practical difficulties with use of expert evidence of this kind. They include the availability of appropriate experts, the increase in the length of trials where there is an expert evidence issue and the associated impacts upon complainants and defendants.

[78] The Commission does not recommend that a provision authorising the receipt of expert evidence that does not meet the requirements for admissibility at common law should be introduced.

### **Statement of objectives and guiding principles**

[79] In some jurisdictions, statements of objectives and guiding principles have been the subject of law reform commission recommendations or adopted in legislation. The objective of these statements is to counter the influence of false preconceptions said to influence the decision-making process at all levels of a prosecution for rape or sexual assault.

[80] The Commission is not persuaded that general legislative statements of objectives or guiding principles helpfully assist juries, who are the triers of fact in criminal trials, to evaluate factual issues in specific cases. Nor is it persuaded that such statements or objectives are needed, or would inform judges about the law to be applied by the jury in reaching its verdict or the admissibility of evidence.

### **Education and awareness**

[81] The Commission recognises the importance of education about the law of consent and mistake of fact for both practitioners in the criminal justice system and the broader community. Changes to the law are sometimes complemented by educational and training material. However, the form and scope of any education program is a matter for the government and individual organisations. Accordingly, the Commission does not make any recommendations in relation to education or

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<sup>29</sup> C Thomas, 'Juries, rape myths and stereotypes' (2020) *Criminal Law Review* (forthcoming). This research was undertaken by Professor Cheryl Thomas QC at the request of Sir Brian Leveson, President of the Queen's Bench Division, specifically to obtain the views of jurors. This research has not yet been published or peer reviewed, but has been provided to the Queensland Law Reform Commission to assist with its review.

training programs about the law of consent and mistake of fact in respect of Chapter 32 offences.

## **OVERVIEW OF THE CRIMINAL CODE (CONSENT AND MISTAKE OF FACT) AMENDMENT BILL 2020**

[82] The Commission's draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 (the 'draft Bill') implements the Commission's recommendations.

[83] The key features of the draft Bill are to amend the Criminal Code by:

- Inserting a new subsection in section 348 to provide that a person is not to be taken to give consent to an act only because at or before the time of the act the person does not say or do anything to communicate that the person does not consent to the act.<sup>30</sup>
- Applying the definition of 'consent' in section 348 to the offences provided for under sections 351(1) (assault with intent to commit rape) and 352(1)(a) (sexual assault).<sup>31</sup>
- Inserting a new subsection in section 348 to provide that, if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.<sup>32</sup>
- Inserting a new subsection in section 348 to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act.<sup>33</sup>
- Inserting a new subsection in section 348 to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance.<sup>34</sup>

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<sup>30</sup> See Rec 5-1, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 5, inserting new s 348(3).

<sup>31</sup> See Rec 5-2, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 3, 4, inserting new definition of 'assault' for ch 32.

<sup>32</sup> See Rec 5-3, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 5, inserting new s 348(4).

<sup>33</sup> See Rec 7-1, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 6, inserting new s 348A(1)–(2).

<sup>34</sup> See Rec 7-2, and draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 cl 6, inserting new s 348A(1), (3).





# List of Recommendations

## CHAPTER 5: CONSENT AND AFFIRMATIVE CONSENT

### Not saying or doing anything to communicate consent

- 5-1 Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that a person is not taken to give consent to an act only because, at or before the time of the relevant act, the person does not say or do anything to communicate that they do not consent to that act.

*[See Draft Bill cl 5, inserting new s 348(3)]*

### The definition of consent and sexual assault

- 5-2 Chapter 32 of the Criminal Code should be amended to apply the definition of 'consent' in section 348 to the offences provided for under sections 351(1) (assault with intent to commit rape) and 352(1)(a) (sexual assault).

*[See Draft Bill cll 3, 4, inserting new definition of 'assault' for ch 32]*

### Withdrawal of consent

- 5-3 Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that, if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.

*[See Draft Bill cl 5, inserting new s 348(4)]*

## CHAPTER 7: THE EXCUSE OF MISTAKE OF FACT

### Steps taken by a defendant to ascertain consent

- 7-1 The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act.

*[See Draft Bill cl 6, inserting new s 348A(1)–(2)]*

**Intoxication of the defendant**

- 7-2**    The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance.

*[See Draft Bill cl 6, inserting new s 348A(1), (3)]*

# Chapter 1

## Introduction

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### BACKGROUND

1.1 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 that any potential changes to the law ‘should be based on evidence after expert advice’.<sup>1</sup>

1.2 In October 2019, the Government released its *Framework to address Sexual Violence*.<sup>2</sup> The framework identifies a range of measures relating to prevention, support, accountability and justice. Among other things, it notes the referral ‘of the issue of consent in sexual assault and rape cases’ to the Commission.<sup>3</sup>

### THE TERMS OF REFERENCE

1.3 On 2 September 2019, the Attorney-General and Minister for Justice and Leader of the House referred to the Commission for review and investigation:<sup>4</sup>

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.

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<sup>1</sup> 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>>.

<sup>2</sup> See generally Department of Child Safety, Youth and Women (Qld), *Sexual Violence Prevention Framework* (26 April 2020) <<https://www.csyw.qld.gov.au/violence-prevention/sexual-violence-prevention/sexual-violence-prevention-framework>>.

<sup>3</sup> *Queensland’s Framework to address Sexual Violence* (2019) 4, 21.

<sup>4</sup> Terms of reference, para 1. The terms of reference are set out in full in Appendix A.

1.4 The terms of reference required the Commission to examine the operation and practical application of those provisions and to make recommendations on:<sup>5</sup>

- (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.

1.5 In making its recommendations, the Commission was to have regard to:<sup>6</sup>

- (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.

1.6 The terms of reference asked the Commission to prepare, if relevant, draft legislation based on its recommendations.<sup>7</sup>

1.7 The Commission was required to report on the outcomes of the review to the Attorney-General by 30 June 2020.<sup>8</sup>

## METHODOLOGY

### Preliminary consultation

1.8 To assist with the preparation of its Consultation Paper, the Commission invited preliminary submissions on the issues raised in the review from the judiciary, legal stakeholders, academics and organisations representing the interests of victims

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<sup>5</sup> Ibid para 3.

<sup>6</sup> Ibid para 5.

<sup>7</sup> Ibid para 4.

<sup>8</sup> On 30 March 2020, the Attorney-General amended the terms of reference, at the Commission's request, to extend the reporting date from 17 April 2020 to 30 June 2020: Letter from the Attorney-General and Minister for Justice, Leader of the House, the Hon Yvette D'Ath MP, to the Chair of the Queensland Law Reform Commission, the Hon Justice David Jackson, dated 30 March 2020.

and survivors. Some members of the public also provided the Commission with their preliminary views.

1.9 At the Commission's request, the Attorney-General also provided the Commission with consultation undertaken by the Government with legal stakeholders in respect of Queensland's consent laws.<sup>9</sup>

1.10 A list of preliminary respondents is in Appendix B.

## The Consultation Paper

1.11 In December 2019, the Commission released a Consultation Paper outlining the key issues raised in the review and calling for submissions on a number of specific questions.<sup>10</sup>

1.12 Following the release of the Consultation Paper, the Commission invited submissions from more than 140 organisations and individuals, including members of the judiciary, key professional bodies (including the Queensland Law Society, Bar Association of Queensland, Office of the Director of Public Prosecutions, and Legal Aid Queensland), community legal centres, academics, Government Departments, and organisations that represent and support victims and survivors of sexual violence.

1.13 A media statement to publicise the release of the Consultation Paper and call for submissions was issued to the print and electronic media on 23 December 2019.

1.14 An advertisement calling for submissions in response to the Consultation Paper was placed in *The Weekend Australian* and *The Courier Mail* newspapers and in 12 Queensland regional newspapers on Saturday 21 December 2019.<sup>11</sup>

1.15 In December 2019, notices calling for submissions were also placed on the Commission's website and on the Queensland Government 'Get Involved' website.<sup>12</sup>

1.16 The closing date for submissions was 31 January 2020. The Commission provided numerous extensions of time to various organisations which had sought more time to make a submission, for varying periods up to late February 2020.

## Submissions and consultation

1.17 The Commission received 87 submissions from respondents to the Consultation Paper, including legal professional bodies, community legal centres, academics, individuals who had experienced sexual violence, organisations that

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<sup>9</sup> In relation to the Government's consultation, see terms of reference, 'Background' in Appendix A.

<sup>10</sup> QLRC Consultation Paper No 78 (December 2019) <[https://www.qlrc.qld.gov.au/data/assets/pdf\\_file/0011/636554/qlrc-wp78.pdf](https://www.qlrc.qld.gov.au/data/assets/pdf_file/0011/636554/qlrc-wp78.pdf)>.

<sup>11</sup> The *Bundaberg News Mail*, *Cairns Post*, *Central Queensland News*, *Daily Mercury*, *Fraser Coast Chronicle*, *Gold Coast Bulletin*, *Gympie Times*, *Morning Bulletin*, *Queensland Times*, *Sunshine Coast Daily*, *Toowoomba Chronicle*, and *Townsville Bulletin*. The notice was placed in the *Central Queensland News* on Friday 20 December 2019.

<sup>12</sup> See <<https://www.getinvolved.qld.gov.au/>>.

support and represent victims and survivors of sexual violence, and members of the public.<sup>13</sup> Some respondents referred the Commission to their preliminary submissions.<sup>14</sup>

1.18 In addition, the Commission held a consultation workshop on 26 February 2020 with representatives from organisations that support and represent victims and survivors of sexual violence, as well as victims and survivors who wished to attend and have input into the review. The four-hour workshop was attended by 39 participants, including 11 victims and survivors.<sup>15</sup>

1.19 A list of respondents and consultees is in Appendix B.

1.20 The Commission thanks all those organisations and individuals who participated in the review or provided information to the Commission for their contribution to this Report, including Professor Cheryl Thomas QC who provided unpublished research findings relating to jury trials of rape offences in England and Wales.<sup>16</sup>

## **Review of trial transcripts and appeal decisions**

1.21 The Commission examined a number of rape and sexual assault trials and appeals in Queensland, for the purpose of achieving an evidence-based analysis of how the laws to be reviewed are operating in practice.

1.22 The scope of the examination was limited by the availability of trial transcripts and the timeframe for the review. Three target groups of cases were considered.

### ***Recent trials***

1.23 The first group involved a detailed quantitative and qualitative analysis of recent cases. It comprised transcripts of all criminal trials of rape or sexual assault completed in the 2018 calendar year, excluding matters that involved a complainant under 12 years of age—a total of 135 trials (the ‘2018 Trials’). This examination of transcripts involved the collection of information about the conduct of the trials (including lines of defence and whether mistake of fact was left to the jury) as well as matters given in evidence and trial outcomes. The findings have provided valuable information about the operation of the definition of consent and the excuse of mistake of fact as it applies to rape and sexual assault in Queensland. They are detailed in Chapter 3 below.<sup>17</sup>

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<sup>13</sup> See the list of respondents and consultees in Appendix B.

<sup>14</sup> See [1.8] above.

<sup>15</sup> See the list of respondents and consultees in Appendix B.

<sup>16</sup> Correspondence from Prof C Thomas QC, University College London Faculty of Laws, 10 June 2020.

<sup>17</sup> See also the research questions in Appendix E.

## ***Appeal decisions***

1.24 The second group comprised relevant Queensland Court of Appeal decisions in rape and sexual assault matters principally between 2000 and 2019, which some academic commentators have argued demonstrate a need for reform.

1.25 Media discussion of cases may focus on limited aspects of a case, including the outcome of any appeal. In an appeal, the court is limited to the issue or issues raised in the appeal, and is focused on the question of whether there was an error of law or other defect in the trial that resulted in a miscarriage of justice. The verdict in a criminal trial is reached by the jury, as the trier of fact, after hearing and considering all of the evidence given in the trial. It is for the jury to determine what parts of the evidence it accepts, and to apply the trial judge's directions on the law to that evidence. It is not possible to know with certainty what view a jury took of the evidence or how it arrived at its verdict. The full context of a criminal trial may not be apparent from an appeal decision.

1.26 Appeal decisions in rape and sexual assault matters can be examined, however, to identify the principles of law that apply in relation to the definition of consent and the excuse of mistake of fact. Collectively, such decisions can also provide valuable information about the arguments that might be made in different scenarios in which those matters are in issue.

1.27 The Commission accordingly undertook a qualitative analysis of those appeal decisions to inform its consideration of the issues in the review. A list of the cases is included in Appendix F.

## ***Selected cases***

1.28 The third group comprised a selection of cases identified by key legal stakeholders in which consent or mistake of fact was raised. The Commission requested the names of potentially relevant cases from the judiciary, the Office of the Director of Public Prosecutions, Legal Aid Queensland and the Bar Association of Queensland. A total of 76 trials were identified from this process.

1.29 Review of those trials necessarily required an analysis of the transcripts. Trial transcripts are the best available means to consider the evidence given and the issues raised in a trial, but they do not include exhibits.

1.30 The question of whether a particular issue was raised in a trial (such as mistake of fact) will usually be apparent from the judge's summing-up and in counsel's legal arguments, rather than from the transcripts of evidence. For this reason, the review of transcripts focused primarily on the summing-up.<sup>18</sup>

1.31 The Commission received and reviewed the summing-up transcripts for each of the 76 identified trials.<sup>19</sup> The reviewed trials ranged across the years 2008

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<sup>18</sup> A similar approach was taken for the review of the 2018 Trials. The length of transcripts also meant that it would not have been practicable to review transcripts in full for each trial.

<sup>19</sup> The summing-up is not transcribed as a matter of course for Queensland trials, and transcripts had to be ordered from and prepared by Auscript Australasia, which is the recording and transcription service provider for Queensland Courts. Some additional time constraints resulted from the impacts of COVID-19 restrictions.

and 2019 and did not represent a random sample or a representative snapshot in time. For this reason, a quantitative analysis was not possible, and the findings could not be amalgamated with the results of the Commission's examination of the 2018 Trials. The trials were accordingly examined in a qualitative way to inform the Commission's consideration of the issues in the review. That examination sought to identify, but did not reveal, any significant issues with the operation of the law which were not highlighted by the analysis of the 2018 Trials.

1.32 The Commission thanks all those organisations and individuals who assisted in either identifying relevant cases or preparing and providing trial transcripts, including the Chief Judge of the District Court, the Courts Performance and Reporting Unit within the Department of Justice and Attorney-General ('DJAG'), the DJAG Transcripts Coordination Team, and Auscript Australasia. The Commission also thanks Professor Anna Stewart, School of Criminology and Criminal Justice at Griffith University, for her assistance in reviewing the quantitative analysis of the 2018 Trials.

### **Assistance provided by experienced criminal law practitioners and research staff**

1.33 The Commission has been greatly assisted in undertaking this review by several experienced criminal law practitioners. His Honour Judge Brian Deveraux SC was appointed, from the District Court bench, to serve as a part-time member of the Commission for the duration of the review. His Honour was the Public Defender at Legal Aid Queensland between 1999–2009.

1.34 Two experienced criminal law practitioners were seconded to the Commission—a Principal Crown Prosecutor from the Office of the Director of Public Prosecutions, and a senior trial lawyer from Legal Aid Queensland who was formerly a Senior Crown Prosecutor.

1.35 The Commission has also been supported by a senior researcher and three former District Court Judge's Associates (who have successively filled a role assisting with the review of the trial transcripts).

### **MATTERS OUTSIDE THE SCOPE OF THE REVIEW**

1.36 The submissions to the review raised many issues and reflected a wide range of views. Some of the matters raised were outside the scope of the Commission's terms of reference.

1.37 For example, some respondents raised matters relating to procedure and support,<sup>20</sup> including suggestions for improved procedural responses in investigating and prosecuting sexual offences, 'trauma training' of relevant professionals, the use of specialised courts for rape and sexual assault trials, access to restorative justice and mediation, and improved access to victim support services.

1.38 Some respondents suggested consideration of particular changes to the law, including changes to the provisions dealing with the non-publication of the

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<sup>20</sup> Eg, Submissions 37, 41, 46, 52, 54, 71 75, 79.



identity of sexual offence complainants and defendants to more readily allow such publication;<sup>21</sup> and amendments to offences relating to sexual activity with ‘a person with an impairment of the mind’ to recognise a person’s capacity to consent to sexual activity.<sup>22</sup>

1.39 It was also suggested that the language used in Chapter 32 of the Criminal Code should be modernised by removing the term ‘carnal knowledge’.<sup>23</sup> The Commission considers that the term ‘carnal knowledge’, which is used in the definition of the offence of rape in section 349, is outdated. Section 349 would be improved by the adoption of more modern language such as that found, for example, in the Criminal Code (WA) (which uses the term ‘sexually penetrates’).<sup>24</sup> However, a change to remove the term ‘carnal knowledge’ may require, or suggest, more than a simple substitution of terms having regard to the drafting of section 349 as a whole. Significantly, the term ‘carnal knowledge’ is also used in a number of other offences, outside Chapter 32 of the Criminal Code.<sup>25</sup> Any change to remove the term ‘carnal knowledge’ should be considered in the context of all of those offences.

## STRUCTURE OF THIS REPORT

1.40 The first two chapters of the Report contain background information and research. Chapter 2 provides an overview of the current law in Queensland and the approaches in other jurisdictions. Chapter 3 contains the findings of the Commission’s analysis of transcripts of rape and sexual assault trials conducted in 2018.<sup>26</sup>

1.41 The Commission’s general approach to the question of reform is outlined in Chapter 4. That chapter sets out the key principles and concepts that have informed the Commission’s approach in the review.

1.42 The remaining chapters consider the specific issues raised in the review.

1.43 Questions concerning the fact of consent (including how consent is defined, and whether the complainant consented to the sexual activity) are legally and conceptually distinct from questions concerning the defendant’s belief as to consent. Accordingly, while there is some interaction and overlap between these issues, they are considered separately in the Report.

1.44 Chapter 5 considers issues relating to the definition of consent in section 348, including affirmative consent, withdrawal of consent, and the application of the legislative definition of consent to the offence of sexual assault. Chapter 6 examines circumstances in which consent is not ‘freely and voluntarily’ given.

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21 Submission 76. See *Criminal Law (Sexual Offences) Act 1978* (Qld) ss 6, 7.

22 Eg, Submission 57. Criminal Code (Qld) s 216. See also s 229L. Those sections are in chs 22 and 22A of the Code, respectively.

23 Eg, Submissions 24, 39.

24 See Criminal Code (WA) ss 319 (definition of ‘to sexually penetrate’), 325.

25 See Criminal Code (Qld) ss 211, 215, 216, 217, 221, 222 (in ch 22).

26 The research questions for that analysis are set out in Appendix E.

1.45 Chapter 7 considers the excuse of mistake of fact in rape and sexual assault trials. It examines issues relating to the scope of the excuse as it applies to rape and sexual assault, the onus of proving the excuse, what is required for a ‘reasonable’ belief, the role of steps taken by a defendant to ascertain consent, the relevance of a defendant’s voluntary intoxication, and ‘recklessness’ as to belief in consent.

1.46 The final chapter, Chapter 8, examines other matters raised in the review, including the use of expert evidence, and education and awareness.

1.47 The Report also contains supplementary information in the following Appendices:

- Appendix C is a comparative table of the legislative provisions in other jurisdictions.
- Appendix D contains a list of law reform reviews and other inquiries considered in this review.
- Appendix F contains a list of the main Court of Appeal decisions considered in this review.

1.48 The draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 (the ‘draft Bill’), which gives effect to the Commission’s recommendations, is set out in Appendix G.

## TERMINOLOGY

1.49 A list of Abbreviations and Glossary of terms commonly used in this Report is set out at the beginning of the Report.

1.50 For clarity and consistency, the Report refers to the ‘complainant’ and ‘defendant’ throughout.<sup>27</sup> Not all scenarios will involve a formal complaint within the criminal justice system. However, the use of these terms avoids potential confusion.

1.51 Where relevant, the Report refers to ‘victims and survivors’ of sexual violence, consistently with the terms of reference.

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<sup>27</sup>

Except where quoting from legislation or another source, or where context otherwise requires.

# Chapter 2

## Overview of the current law

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### THE CURRENT LAW IN QUEENSLAND

#### The offences in Chapter 32

2.1       Sections 349 and 352 of the Criminal Code deal with the offences of rape and sexual assault respectively.<sup>1</sup> These offences are found in Chapter 32 of the Criminal Code.

#### **Rape**

2.2       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.

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<sup>1</sup>

For an overview of trial procedure for such offences, see QLRC Consultation Paper No 78 (2019) [31]–[38].

- (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.<sup>2</sup>
- (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)

2.3 In order to prove the offence of rape, the prosecution must prove beyond reasonable doubt<sup>3</sup> that the defendant:

- had ‘carnal knowledge’ 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.

2.4 Both men and women may commit rape or be victims of rape. Penetration to any extent is sufficient.<sup>4</sup> Section 347 provides that ‘penetration’ does not include penetration for the purposes of a proper medical, hygienic or law enforcement purpose.

2.5 The term ‘carnal knowledge’, which is used in section 349(2)(a), refers to penetration by a penis.<sup>5</sup> It is qualified by the definition in section 6 of the Criminal Code, which provides that:

- (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.

<sup>2</sup> The *Penalties and Sentences Act 1992* (Qld) s 161Q relates to the meaning of ‘serious organised crime circumstance of aggravation’.

<sup>3</sup> As to ‘beyond reasonable doubt’ see the Glossary; and QLRC Consultation Paper No 78 (2019) [36].

<sup>4</sup> See LexisNexis Australia, *Carter’s Criminal Law of Queensland* [s 347.1] (July 2012), citing *R v L* [1997] QCA 436.

<sup>5</sup> See LexisNexis Australia, *Carter’s Criminal Law of Queensland* [s 6.10] (November 2019); E Colvin, J McKechnie and J O’Leary, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (8th ed, 2018) [6.3].

2.6 That definition makes it clear that ‘penetration to any extent’ is sufficient, and that ‘carnal knowledge’ includes anal penetration. In addition, judicial decisions have interpreted ‘carnal knowledge’ to mean that:<sup>6</sup>

- 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); and
- there is no need to prove ejaculation.

2.7 ‘Penis’ is defined in section 1 of the Criminal Code to include ‘a surgically constructed penis, whether provided for a male or female’. ‘Vagina’ is similarly defined in that section to include ‘a surgically constructed vagina, whether provided for a male or female’.<sup>7</sup>

### **Sexual assault**

2.8 Section 352 of the Criminal Code contains 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 any part of the genitalia or the anus of a person with any part of the mouth of a person.<sup>8</sup>
- (3) Further, the offender is liable to a maximum penalty of life imprisonment if—

<sup>6</sup> See LexisNexis Australia, *Carter’s Criminal Law of Queensland* [215.15] (November 2019), citing, eg, *R v Lines* (1844) 1 Carr & K 393; 174 ER 861; *R v Randall* (1991) 53 A Crim R 380; *R v Marsden* [1891] 2 QB 149. In *Holland v The Queen* (1993) 68 A Crim R 176, the High Court held (at 180) that the word ‘vagina’, in the context of the offence of ‘sexual intercourse’ in the *Crimes Act 1900* (NSW) s 61A, must be understood to mean:

the female organ consisting of the membranous passage or channel leading from the uterus to the vulva.

<sup>7</sup> ‘Vulva’ is similarly defined in Criminal Code (Qld) s 1 to include ‘a surgically constructed vulva, whether provided for a male or female’.

<sup>8</sup> ‘Genitalia’ is defined in Criminal Code (Qld) s 1 to include ‘surgically constructed genitalia’.

- (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.<sup>9</sup>
- (4) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.<sup>10</sup>
  - (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. (notes added)

2.9 Broadly, in order to prove 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 the complainant to commit or witness an act of gross indecency; and
  - did so without the complainant's consent.

2.10 The term 'indecent' is not defined in the Criminal Code. Courts have held that it is to be given its ordinary meaning, as that which offends against currently accepted standards of decency.<sup>11</sup> It is not so wide, however, as to include conduct that is 'merely unbecoming'.<sup>12</sup> It is a matter for the jury to determine in each case.

<sup>9</sup> As to the terms 'penetration', 'vagina' and 'penis', see [2.4]–[2.7] above.

<sup>10</sup> The *Penalties and Sentences Act 1992* (Qld) s 161Q relates to the meaning of 'serious organised crime circumstance of aggravation'.

<sup>11</sup> See generally LexisNexis Australia, *Carter's Criminal Law of Queensland* [s 352.20] (September 2013) and [s 210.20] (October 2017), citing generally *R v Dunn* [1973] 2 NZLR 481; *A-G v Huber* (1971) 2 SASR 142; *Harkin v The Queen* (1989) 38 A Crim R 296. See also, eg, *R v BAS* [2005] QCA 97, [15]–[17], [50] (Fryberg J; McPherson and Davies JJA agreeing); and *R v Jones* (2011) 209 A Crim R 379 as to the element of 'indecent' in the Criminal Code (Qld) ss 210(1)(a) and 352(1)(a).

As to 'gross' indecency, which is also a matter for the jury to determine, see LexisNexis Australia, *Carter's Criminal Law of Queensland* [s 352.30] (September 2013), citing *R v Whitehouse* [1955] QWN 76 in which it was held that the term 'gross' is to be given its ordinary meaning of 'plain, evident, obvious'.

<sup>12</sup> See *R v Bryant* [1984] 2 Qd R 545; *R v McBride* [2008] QCA 412.

2.11 The term ‘assault’ is defined in the Criminal Code:<sup>13</sup>

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, or with the other person’s consent if the consent is obtained by fraud, ... is said to assault that other person, and the act is called an **assault**. (emphasis added)

2.12 An assault is ‘unlawful’ unless it is authorised, justified or excused by law.<sup>14</sup>

### Other offences

2.13 Chapter 32 of the Criminal Code also contains the following offences:

- attempt to commit rape;<sup>15</sup> and
- assault with intent to commit rape.<sup>16</sup>

### ‘Without consent’

2.14 A key element that must be proved for an offence of rape or sexual assault is that the act constituting the offence was done by the defendant without the complainant’s consent. The text of section 349 for an offence of rape expressly requires that. The text of section 352(1)(a) does not expressly do so, but an assault within the meaning of that section is defined in section 245 in a way that requires absence of consent.<sup>17</sup> However, section 245 is not in Chapter 32 of the Criminal Code.<sup>18</sup>

### The definition of ‘consent’

2.15 Consent is relevant to a number of offences in the Criminal Code, but is defined only in respect of particular provisions.<sup>19</sup> For the purposes of Chapter 32 of the Criminal Code, ‘consent’ is defined in section 348. It provides:

**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.

<sup>13</sup> Criminal Code (Qld) s 245.

<sup>14</sup> Criminal Code (Qld) s 246(1).

<sup>15</sup> ‘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). As to what constitutes an ‘attempt’, see s 4; and LexisNexis Australia, *Carter’s Criminal Law of Queensland* [s 4.15] (February 2019), citing *R v Barbeler* [1977] Qd R 80.

<sup>16</sup> ‘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). As to ‘assault’, see [2.11]–[2.12] above. See generally LexisNexis Australia, *Carter’s Criminal Law of Queensland* [s 351.10]–[s 351.15] (November 2012).

<sup>17</sup> See generally Colvin, McKechnie and O’Leary, above n 5, [6.12]. As to the definition of ‘assault’, see [2.11] above.

<sup>18</sup> Section 245 is in ch 26 of the Criminal Code (Qld), which deals with assaults and violence to the person generally.

<sup>19</sup> 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.

- (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.

2.16 Section 348(1) provides a definition of consent. Section 348(2) sets out a list of circumstances in which a person's consent is 'not freely and voluntarily given'.

2.17 The definition applies to the use of the word 'consent' in every offence contained in Chapter 32 of the Criminal Code, including rape.

2.18 The definition does not apply to the offence of sexual assault in section 352(1)(a) as that offence provision does not use the word 'consent'.<sup>20</sup>

### The excuse of mistake of fact

2.19 Proof of the absence of consent is central to rape and sexual assault. There is, however, an excuse which may be available to a defendant, even if consent was not given.

2.20 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.

2.21 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.<sup>21</sup> It applies to all persons charged with any criminal offence against the statute law of Queensland.<sup>22</sup> It is not, therefore, specific or limited to rape and sexual assault offences.

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<sup>20</sup> *R v BAS* [2005] QCA 97, [51] (Fryberg J).

<sup>21</sup> See Criminal Code (Qld) pt 1 ch 5.

<sup>22</sup> Criminal Code (Qld) s 36.



2.22 In the context of a charge of rape or sexual assault, a defendant who honestly and reasonably, but mistakenly, believed that the complainant gave consent is not criminally responsible.

## REFORMS IN QUEENSLAND

### Definition of consent for rape and sexual assault

2.23 Prior to amendments made in 2000, the Criminal Code did not contain a specific definition of consent for the purpose of rape or sexual assault. The offence of rape applied where the act occurred without the complainant's consent, or with the complainant's consent if it was obtained by specified means,<sup>23</sup> including by 'false and fraudulent representations as to the nature of the act'.<sup>24</sup> The current definition was inserted by the *Criminal Law Amendment Act 2000*, following recommendations made by the Taskforce on Women and the Criminal Code (the 'Taskforce').<sup>25</sup>

2.24 The Taskforce was established in 1998 by the then Minister for Justice and Attorney-General and the Minister for Women's Policy. It was asked to report on the operation of the Criminal Code and its impacts on women. It examined a wide range of issues, including the offences of rape and sexual assault and, as part of that, the concept of 'consent'.<sup>26</sup>

2.25 The Taskforce considered what constitutes consent and how consent, or the absence of consent, can be demonstrated.<sup>27</sup> Taking into account the position in other jurisdictions, it recommended that consent 'be defined in the Criminal Code in a way that focuses on the need for a free and voluntary agreement'.<sup>28</sup>

2.26 The Taskforce also recommended that the vitiating circumstances listed in the legislation be retained and extended to include: a false and fraudulent representation as to the *purpose* of the act; and a mistaken belief by the complainant that the defendant was the complainant's sexual partner.<sup>29</sup>

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<sup>23</sup> Often referred to as 'vitiating circumstances': see, eg, Taskforce Report 227, 241.

<sup>24</sup> See Criminal Code (Qld) s 347(1) (reprint 3A dated 14 July 2000) which was in the following terms:

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'.

See also Criminal Code (Qld) s 337(1)(b) (reprint 3A dated 14 July 2000) in relation to the former offence of sexual assault.

<sup>25</sup> See n 30 below.

<sup>26</sup> See generally Taskforce Discussion Paper 3 and ch 2; and Taskforce Report i–ii and ch 7.

<sup>27</sup> See Taskforce Report 225–36, 237–8, 239–41.

<sup>28</sup> Ibid Rec 64-1.

<sup>29</sup> Ibid Rec 64.2.

2.27 The *Criminal Law Amendment Act 2000* replaced the former provisions and gave effect to the Taskforce recommendations on consent by:<sup>30</sup>

- inserting the current definition of consent in section 348(1); and
- introducing the non-exhaustive list of circumstances in section 348(2) in which consent is not freely and voluntarily given.

2.28 The Explanatory Notes to the Bill stated that:<sup>31</sup>

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.

### **Excuse of mistake of fact as it applies to rape and sexual assault**

2.29 The Taskforce also considered the excuse of mistake of fact as it applies to rape and sexual assault.<sup>32</sup> It recommended that, where the excuse of mistake of fact is relied on, the jury should 'be directed to look at what steps the accused took to ensure that the complainant consented'.<sup>33</sup> In its view, this would focus 'the jury's deliberations not only on what the complainant did or said, or what was her state of mind, but also on what steps the accused took to ensure there was consent, and that what occurred was mutually agreed to'.<sup>34</sup>

2.30 This recommendation has not been given legislative effect. There has been no legislative change to the excuse of mistake of fact in section 24 as it applies to rape and sexual assault.

### **Other reforms relevant to sexual offence complainants**

2.31 There have been several other legislative reforms made in Queensland relevant to sexual offences. In particular, reforms have introduced protective measures for complainants when giving evidence, placed qualifications on the admission into evidence of a complainant's past sexual encounters, and introduced

<sup>30</sup> See Explanatory Notes, Criminal Law Amendment Bill 2000 (Qld) 8–9; *Criminal Law Amendment Act 2000* (Qld) s 24. Also ss 20–23, 26. Significantly, the amending Act also broadened the types of sexual contact that 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.

<sup>31</sup> Explanatory Notes, Criminal Law Amendment Bill 2000 (Qld) 9. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 3101 (M Foley, Attorney-General and Minister for Justice) in which it was stated that the definition of 'consent' was taken from the (lapsed) Criminal Code [1995] (Qld).

<sup>32</sup> Taskforce Report 236–8, 241.

<sup>33</sup> Ibid Rec 64.3.

<sup>34</sup> Ibid 236.

provisions regarding the treatment of victims and complainants within the criminal justice system. Some of these reforms apply specifically to sexual offence complainants, and others apply more generally.

### ***Special witness provisions***

2.32 Under the *Criminal Law (Sexual Offences) Act 1978*, the court is to be closed when a sexual offence complainant gives evidence.<sup>35</sup>

2.33 In addition, the *Evidence Act 1977* empowers the court to make various orders or directions to support vulnerable witnesses ('special witnesses') when giving evidence. This includes directions and orders for:<sup>36</sup>

- excluding the defendant from the courtroom, or obstructing the defendant from the view of the witness;
- giving evidence from another location;
- the presence of a support person; or
- the pre-recording of evidence.

2.34 A special witness includes a child under 16 and a person who, in the court's opinion 'would be likely to suffer severe emotional trauma' or 'to be so intimidated as to be disadvantaged as a witness'. Amendments made in 2017 extended the definition of 'special witness' so that victims of a sexual offence<sup>37</sup> are automatically recognised as special witnesses.<sup>38</sup>

Automatic recognition as a special witness will mean that a victim of a sexual assault does not need to satisfy the court that they fall under another element of the definition (for example that they would be likely to suffer severe emotional trauma if required to give evidence in the usual manner) and thereby minimises the impact of the criminal justice process on these vulnerable persons.

### ***Limits on cross-examination***

2.35 Amendments made to the *Evidence Act 1977* in 2000 introduced special provisions dealing with the cross-examination of 'protected witnesses'.<sup>39</sup> Relevantly, an unrepresented defendant cannot cross-examine a protected witness in person

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<sup>35</sup> See *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5.

<sup>36</sup> See *Evidence Act 1977* (Qld) s 21A.

<sup>37</sup> Specifically, this refers to a person against whom a sexual offence has been, or is alleged to have been, committed by another person who is to give evidence about the commission of the offence: *Evidence Act 1977* (Qld) s 21A(1)(e), inserted by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 8. A 'sexual offence' is defined as an offence of a sexual nature, including an offence under the Criminal Code (Qld) ch 32: *Evidence Act 1977* (Qld) s 21A(1).

<sup>38</sup> Explanatory Notes, Victims of Crime Assistance and Other Legislation Amendment Bill 2016 (Qld) 3.

<sup>39</sup> *Evidence Act 1977* (Qld) pt 2 div 6, inserted by the *Criminal Law Amendment Act 2000* (Qld) s 47.

(but may do so only through legal counsel).<sup>40</sup> A protected witness includes the complainant in a rape or sexual assault trial.<sup>41</sup>

2.36 In addition, the *Criminal Law (Sexual Offences) Act 1978* limits the circumstances in which a sexual offence complainant can be cross-examined as to their sexual history. In general, it provides that a complainant is not to be cross-examined as to their sexual activities with any person without leave of the court, such leave being given only when the court is satisfied of certain matters.<sup>42</sup>

2.37 The provisions were introduced to limit the 'public revelation' of the complainant's private sexual history and to make it easier for judges 'to confine within its proper limits the cross-examination of a complainant' as to such matters.<sup>43</sup>

2.38 Amendments made to that Act in 2000 extended the provisions to complainants relating to any offence of a sexual nature, where they were previously limited to prescribed sexual offences only. The amendments also extended the prohibition on the use of sexual history evidence to the complainant's sexual activities with the defendant, where this previously applied only to sexual interactions with others.<sup>44</sup>

### ***Sexual assault counselling privilege***

2.39 Amendments made in 2017 to the *Evidence Act 1977* and the Criminal Code introduced a sexual assault counselling privilege for victims' communications with a counsellor.<sup>45</sup>

2.40 The privilege applies to oral and written communications made in confidence between the counselled person and the counsellor, as well as certain other counselling communications. Such communications cannot be compelled or produced to a court, or otherwise used or disclosed, in committal or bail proceedings or, except with leave of the court, in trial or sentencing proceedings.<sup>46</sup> The court must not grant leave unless satisfied, among other things, that the public interest in admitting the communication into evidence substantially outweighs the public interest

<sup>40</sup> *Evidence Act 1977* (Qld) s 21N. A grant of legal aid may be given to allow cross-examination of the witness by counsel: s 21O.

<sup>41</sup> A 'protected witness' includes an alleged victim of an offence defined in the Criminal Code (Qld) ch 32: see *Evidence Act 1977* (Qld) s 21M(1)(c), (3) (definitions of 'alleged victim' and 'prescribed special offence').

<sup>42</sup> See *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4. The provisions in s 4 qualify the circumstances in which such evidence may be considered by the court as having substantial relevance to the facts in issue or as a proper matter for cross-examination as to credit.

<sup>43</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 24 May 1978, 1190 (WD Lickiss, Minister for Justice and Attorney-General), in relation to the Criminal Law (Sexual Offences) Bill 1978 (Qld).

<sup>44</sup> See *Criminal Law Amendment Act 2000* (Qld) ss 37(2), 38; Explanatory Notes, Criminal Law Amendment Bill 2000 (Qld) 11.

<sup>45</sup> See *Evidence Act 1977* (Qld) pt 2 div 2A; Criminal Code (Qld) s 590APA. Those provisions were inserted by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) ss 4, 7.

<sup>46</sup> See *Evidence Act 1977* (Qld) ss 14A–14F.

in preserving the confidentiality of the communication and protecting the counselled person from harm.<sup>47</sup>

2.41 The sexual assault counselling privilege aims ‘to recognise the public interest in encouraging people who have been sexually assaulted to seek therapy to assist in their recovery and may also encourage them to report the crime to police’.<sup>48</sup>

### **Charter of Victims’ Rights**

2.42 The *Victims of Crime Assistance Act 2009* provides a scheme for financial assistance for victims of crime, including victims of domestic and family violence.<sup>49</sup> It also includes a Charter of Victims’ Rights setting out certain rights that are to be observed by prescribed persons in dealing with victims of crime, including police and prosecutors. This includes the general right to be treated with ‘courtesy, compassion, respect and dignity’ as well as specific rights:<sup>50</sup>

- to be informed about the progress of the investigation of the crime, major decisions made about the prosecution of the defendant, details of relevant court processes, outcomes of criminal proceedings, and the victim’s role as a witness;
- to be protected during proceedings from unnecessary contact with, or violence or intimidation by, the defendant or defence witnesses; and
- to make a victim impact statement for consideration by the court on sentencing.

### **Domestic and family violence protection scheme**

2.43 The *Domestic and Family Violence Protection Act 2012* provides for the making of domestic violence orders and police protection notices to protect people within relevant relationships from ongoing violence. Relevantly, that Act defines domestic and family violence to include behaviour that is ‘sexually abusive’ and behaviour ‘coercing a person to engage in sexual activity or attempting to do so’.<sup>51</sup>

<sup>47</sup> See *Evidence Act 1977* (Qld) s 14H(1). The court must consider a range of factors specified in s 14H(2).

<sup>48</sup> Explanatory Notes, *Victims of Crime Assistance and Other Legislation Amendment Bill 2016* (Qld) 2.

<sup>49</sup> See *Victims of Crime Assistance Act 2009* (Qld) ss 5–6, ch 3. The Act was amended by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) to extend the scope of its provisions to victims of all forms of domestic and family violence.

<sup>50</sup> See *Victims of Crime Assistance Act 2009* (Qld) ch 2, sch 1AA. The rights in the Charter are not legally enforceable, but a victim may make a complaint to the relevant entity about a prescribed person who has acted in a way that is inconsistent with the provisions of the Charter. The *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) renamed and redrafted the statement of principles of justice for victims as the Charter of Victims’ Rights, and extended its application to non-government organisations that provide relevant victim support services.

<sup>51</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1)(a), (2)(b).

## THE APPROACHES IN OTHER JURISDICTIONS

### The criminal law framework in Australia

2.44 The criminal law in Australia originated in the common law inherited from England. The Parliaments in all the Australian states and territories have enacted legislation dealing with the criminal law.<sup>52</sup> A distinction is drawn between the ‘common law jurisdictions’ and the ‘code jurisdictions’.

2.45 In the common law jurisdictions—namely, the Australian Capital Territory,<sup>53</sup> New South Wales, South Australia and Victoria—the common law has been modified by legislation. The legislation deals with most criminal offences but contains gaps that are to be filled by common law rules and principles.<sup>54</sup>

2.46 In contrast, the other Australian jurisdictions, which are referred to as the ‘code jurisdictions’—namely, Queensland, Western Australia, the Northern Territory and Tasmania—have enacted criminal ‘codes’ that are intended to ‘provide a comprehensive statement of the criminal law and to supplant the common law’.<sup>55</sup> The courts apply and interpret the provisions of the code with reference to the ordinary meaning of the code, not (usually) the traditional common law.<sup>56</sup>

2.47 One of the significant differences between the common law and code jurisdictions is the way in which criminal responsibility for serious offences is structured.

2.48 At common law, criminal responsibility has been based on the presence of both physical and mental elements, as reflected in the Latin maxim ‘*actus non facit reum, nisi mens sit rea*’, loosely translated as ‘an act does not make a person guilty of a crime unless that person’s mind be also guilty’.<sup>57</sup> There is a presumption at common law ‘that all crimes ... involve some form of subjective fault element’.<sup>58</sup> In the common law jurisdictions, each offence typically includes its own specified mental element.

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<sup>52</sup> The Commonwealth has also enacted criminal legislation: see, eg, the *Crimes Act 1914* (Cth).

<sup>53</sup> The Australian Capital Territory has been progressively moving toward the adoption of a criminal code based on the model criminal code of the MCCOC: see Explanatory Memorandum, Criminal Code 2002 (ACT). The Criminal Code 2002 (ACT) presently operates in relation to particular offences only. The offences of rape and sexual assault continue to be governed by the *Crimes Act 1900* (ACT) and the common law. Accordingly, for the purpose of this Report, the Australian Capital Territory is treated as a common law jurisdiction. (As to the MCCOC, see [2.51] below.)

<sup>54</sup> See generally E Colvin, S Linden and L Bunney, *Criminal Law in Queensland and Western Australia* (Butterworths, 2nd ed, 1998) [1.8]–[1.10].

<sup>55</sup> Ibid [1.8]. The criminal codes in Queensland and Western Australia (both based on the Griffith Code) are similar; but those in the Northern Territory and Tasmania differ.

<sup>56</sup> In Queensland, see, *R v Knutsen* [1963] Qd R 157, 170–71 (Stanley J), approved in *R v Kusu* [1981] Qd R 136, 138 (Campbell J). The common law may aid in interpretation in some circumstances, for example, where there is ambiguity. See generally Westlaw AU, *The Laws of Australia*, ‘Interpretation of Criminal Codes’ [9.1.1750]–[9.1.1790] (1 September 2016); and, eg, *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

<sup>57</sup> S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010) 170, quoting *Haughton v Smith* (1975) AC 476; (1974) 58 Cr App R 198, 206–7 (Lord Hailsham).

<sup>58</sup> Bronitt and McSherry, above n 57, [3.235], citing *Sherras v De Rutzen* [1895] 1 QB 918.

2.49 Under the criminal codes, however, the common law presumption does not apply.<sup>59</sup> In Queensland, the Criminal Code provides that an act or omission which renders the person doing the act or making the omission liable to punishment is an offence.<sup>60</sup> It includes other provisions stating the circumstances in which a person is not criminally responsible for an offence.<sup>61</sup> One such provision is where a person acts under a mistake of fact.

2.50 There are also substantive differences within both common law and code jurisdictions as to the scope of various offences and defences. Harmonisation of the criminal law within Australia has not been achieved.<sup>62</sup>

2.51 In the early 1990s, the then Standing Committee of Attorneys-General established the Model Criminal Code Officers Committee (the 'MCCOC'), initially with a different name, to develop a national model criminal code for the Australian jurisdictions. The MCCOC released several reports with draft provisions for different parts of a model criminal code, including its May 1999 report on *Chapter 5: Sexual Offences Against the Person* (the 'MCC'). However, the provisions of the model criminal code have not been adopted uniformly or consistently by the States and Territories.

2.52 There are some significant differences in the way rape and sexual assault offences, and the defence or excuse of mistake of fact, are structured and operate between the code and common law jurisdictions.

2.53 The following outline of the relevant provisions in other jurisdictions is supplemented by the jurisdictional comparative table in Appendix C.

### ***Rape and sexual assault offences***

2.54 Every Australian jurisdiction has a criminal offence relating to sexual penetration without consent—referred to in Queensland (and in this Report) as rape. The offence is described as 'rape' in Tasmania, Victoria and South Australia, 'sexual intercourse without consent' in the Australian Capital Territory and Northern Territory, 'sexual penetration without consent' in Western Australia, and 'sexual assault' in New South Wales.<sup>63</sup> These offences are not gender-specific but generally include penetration of the genitalia by a penis or other body part or an object, and penetration of the mouth with a penis.

2.55 Each of the Australian jurisdictions also has an offence for non-consensual sexual contact that does not involve penetration—referred to in Queensland (and in this Report) as sexual assault. The offence is described as 'sexual assault' in Victoria, 'sexual touching' in New South Wales, 'indecent assault' in South Australia,

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<sup>59</sup> Ibid citing generally, eg, *Vallance v The Queen* (1961) 108 CLR 56.

<sup>60</sup> Criminal Code (Qld) s 2.

<sup>61</sup> See Criminal Code (Qld) pt 1 ch 5 ('Criminal responsibility').

<sup>62</sup> See generally Bronitt and McSherry, above n 57, [2.20].

<sup>63</sup> See *Crimes Act 1900* (ACT) s 54; *Crimes Act 1900* (NSW) s 61; Criminal Code (NT) s 192(3); *Criminal Law Consolidation Act 1935* (SA) s 48; Criminal Code (Tas) s 185; *Crimes Act 1958* (Vic) s 38; Criminal Code (WA) s 325.

Tasmania and Western Australia, an 'act of indecency without consent' in the Australian Capital Territory and an 'act of gross indecency' in the Northern Territory.<sup>64</sup>

### **Consent**

2.56 In some respects, the formulation of rape and sexual assault offences varies between jurisdictions. Common to each of them, however, is the requirement that the sexual penetration or touching has taken place without consent.

2.57 Each Australian jurisdiction, except the Australian Capital Territory, has a statutory definition of 'consent' for this purpose. The definitions are generally similar, referring to free agreement, free and voluntary agreement, or consent freely and voluntarily given.<sup>65</sup>

2.58 Each of the Australian jurisdictions also has a statutory list of circumstances in which consent is taken not to have been given.<sup>66</sup> In general terms there are many circumstances in common across the jurisdictions, but there are some differences.

### **The defendant's knowledge or belief as to consent**

2.59 In all jurisdictions, the elements of the offence of rape require the prosecution to prove that penetration occurred and that it occurred without consent. In some jurisdictions, an additional element must also be proved:

- that the defendant knew the complainant was not consenting or was reckless as to whether the complainant was consenting (in most of the common law jurisdictions and in the Northern Territory);<sup>67</sup> or
- that the defendant did not reasonably believe that the complainant was consenting (in Victoria).<sup>68</sup>

2.60 In contrast, in the code jurisdictions of Western Australia and Tasmania, knowledge or belief of the defendant that the complainant was not consenting is not an element of the offence. The defendant's state of mind arises in those jurisdictions only if the excuse of mistake of fact as to consent is raised. (This is the position in Queensland.)

2.61 A defence or excuse of mistake of fact operates in each Australian jurisdiction, but its availability and scope vary. Under the common law, the excuse required only that the mistaken belief as to consent was honest. This applied in the

<sup>64</sup> See *Crimes Act 1900* (ACT) s 60; *Crimes Act 1900* (NSW) s 61KC; Criminal Code (NT) s 192(4); *Criminal Law Consolidation Act 1935* (SA) s 56; Criminal Code (Tas) s 127; *Crimes Act 1958* (Vic) s 40; Criminal Code (WA) s 323. In some jurisdictions, other offences are also relevant: see Criminal Code (NT) s 188(2)(k) ('common assault'); *Crimes Act 1958* (Vic) s 41 ('sexual assault by compelling sexual touching').

<sup>65</sup> See *Crimes Act 1900* (NSW) s 61HE(2); Criminal Code (NT) s 192(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2); Criminal Code (Tas) s 2A(1); *Crimes Act 1958* (Vic) s 36(1); Criminal Code (WA) s 319(2).

<sup>66</sup> See *Crimes Act 1900* (ACT) s 67(1); *Crimes Act 1900* (NSW) s 61HE(5)–(8); Criminal Code (NT) s 192(2); *Criminal Law Consolidation Act 1935* (SA) s 46(3); Criminal Code (Tas) s 2A(2)–(3); *Crimes Act 1958* (Vic) s 36(2); Criminal Code (WA) s 319(2)(a).

<sup>67</sup> See *Crimes Act 1900* (ACT) ss 54(1), (3), 60(1), (3); *Crimes Act 1900* (NSW) ss 61I, 61HE(3); Criminal Code (NT) ss 192(3)–(4A), 43AK; *Criminal Law Consolidation Act 1935* (SA) ss 47–28.

<sup>68</sup> See *Crimes Act 1958* (Vic) s 38(1)(c).



Australian Capital Territory, New South Wales, South Australia and Victoria, but its operation is altered by the inclusion of recklessness or reasonableness as set out above.<sup>69</sup>

2.62 In the code jurisdictions, the excuse is contained in the legislation and requires that the mistaken belief as to consent was both honest *and* reasonable.<sup>70</sup> This is the position in Queensland.

## Law reform and other reviews

2.63 Sexual offence laws in Australia, and in other parts of the world, have undergone reform since the latter part of last century. Some reforms have focused on the definition and scope of the offences (for example, removing the requirement for force and defining rape in gender-neutral terms). Other reforms have focused on the concept of consent. In addition to the legislation in Australia, the Commission has had regard to the position in overseas jurisdictions.

2.64 Whether in the context of proving knowledge of the absence of consent or considering mistake of fact, reforms have commonly introduced into legislation notions of reasonableness of a defendant's belief as to consent.

2.65 The Commission has also had regard to law reform reports and inquiries in Australia and some overseas jurisdictions. (These are listed in Appendix D). While there are differences in approach (some of which reflect jurisdictional differences in the law), many of these reviews have expressed support for a positive standard of consent,<sup>71</sup> and some form of reasonableness requirement in relation to a defendant's belief as to consent.

2.66 Most recently,<sup>72</sup> 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, including:<sup>73</sup>

- the meaning of consent in relation to particular sexual activity;
- the circumstances in which a person is taken not to have consented;

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<sup>69</sup> See [2.59] above.

<sup>70</sup> See Criminal Code (NT) ss 43AW, 32; Criminal Code (Tas) s 14; Criminal Code (WA) s 24.

<sup>71</sup> As to a 'positive' consent standard, see [4.52] in Chapter 4 and [5.10] ff in Chapter 5 below.

<sup>72</sup> In April 2020, the Victorian Law Reform Commission (the 'VLRC') was given terms of reference to 'review and report on Victoria's laws relating to rape, sexual assault and associated adult and child sexual offences'. The terms of reference require the VLRC to examine a broad range of matters and to 'identify opportunities to embed and build upon previous reforms, identify the barriers to reporting and resolving sexual offences, and make recommendations to improve the justice system's response'. The VLRC is required to report by 31 August 2021. To date, the VLRC has not published any consultation papers or proposals in the review. See VLRC, *Improving the Response of the Justice System to Sexual Offences* (3 April 2020) <<https://www.lawreform.vic.gov.au/all-projects/improving-response-justice-system-sexual-offences>>.

<sup>73</sup> See NSWLRC draft proposals, published in October 2019.

- the law on knowledge of consent, including what the jury must and must not consider; and
- jury directions on consent.

2.67 Considering the approaches of other jurisdictions, both within Australia and internationally, provides guidance in relation to possible reforms.

# Chapter 3

## Review of transcripts of rape and sexual assault trials conducted in 2018: observations

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### SCOPE OF THE REVIEW

3.1 The Commission reviewed the transcripts of all 2018 rape and sexual assault trials (135 trials).<sup>1</sup> The aims were to contribute to the understanding of rape and sexual assault trials in Queensland and to provide a quantitative and qualitative evidence-base to inform the Commission's recommendations.

### METHOD

#### Data sources

3.2 The Commission requested the availability of transcripts of all rape and sexual assault charges that were committed after 27 October 2000<sup>2</sup> to the present

<sup>1</sup> The Commission excluded an additional 28 trials involving a complainant under 12 years of age as these trials were not within scope as s 349(3) of the Criminal Code (Qld) provides that a child under 12 years is incapable of giving consent for s 349. In this chapter, the Commission generally separates trials involving complainants over 16 years ('Adult complainants') and trials involving complainants aged 12 to 15 years (who, for the purpose of this chapter, are referred to as 'Child complainants').

<sup>2</sup> This date was chosen as s 348 in its current form was inserted into the Criminal Code (Qld) by the *Criminal Law Amendment Act 2000* (Qld) which commenced on 27 October 2000.

and that proceeded to trial and verdict. The Courts Performance and Reporting Unit within the Department of Justice and Attorney-General (the 'Courts Performance and Reporting Unit') provided a list of 1965 individual court files for matters determined between 1 October 2003 and 27 June 2019.

3.3 It was decided to examine trials that occurred in the 2018 calendar year because that was the most recent available complete year. In addition, any appeals for trials for that year were likely to have been heard and finalised. The Commission considers the 2018 dataset is likely to be representative of rape and sexual assault trials.

3.4 The dataset of 135 trials was made up of 134 trials identified by the Courts Performance and Reporting Unit,<sup>3</sup> and one further trial identified from review of Court of Appeal judgments<sup>4</sup> (the '2018 Trials').

3.5 Information from the data set out below summarises the conduct and outcomes of the 2018 Trials. It has not been adjusted to account for any acquittals entered on appeal.<sup>5</sup> The analysis focused on the transcript of legal argument and the summing-up of the trial judge.

## Design

3.6 At each trial there could be multiple charges of rape or sexual assault. Some cases involved multiple complainants or multiple defendants. Using the trial as the unit of analysis avoided overweighting matters involving multiple counts, complainants or defendants. If a defendant was tried more than once for different offences, each trial transcript was included as a separate unit. Where a trial involved multiple complainants or multiple defendants, it was included as a single unit. Five trials involved multiple complainants and five trials involved multiple defendants.

## Transcript coding

3.7 Four researchers from the Commission Secretariat coded various data about each trial.

### ***The data collected***

3.8 The data collected included:

- the outcome of the trial (coded Convicted or Discharged);<sup>6</sup>
- whether the defendant gave evidence (see below for codes);
- whether a recorded interview with police was played (coded yes or no);

<sup>3</sup> The trial transcripts of trials that were out of scope were excluded from further review.

<sup>4</sup> *R v BDJ* [2020] QCA 27.

<sup>5</sup> See [3.59] below.

<sup>6</sup> Throughout this chapter, the term 'Convicted' or 'Conviction' means on a charge or charges of rape or sexual assault in a 2018 Trial, the jury returned a verdict of guilty, and the term 'Discharged' or 'Discharge' means on all charges of rape or sexual assault in a 2018 Trial, either the jury returned a verdict of not guilty or the defendant was otherwise discharged.

- whether a pre-text call was made by police<sup>7</sup> (coded yes or no);
- whether mistake of fact was left to the jury (coded yes or no); and
- the line(s) of defence and the defence version of events.<sup>8</sup>

3.9 The Commission had access to some verdict data (Convicted or Discharged) but not for all relevant offences. The result is that the Commission was not able to determine in respect of trials that resulted in a conviction whether a defendant was convicted of all charged relevant offences.<sup>9</sup>

3.10 The lines of defence were coded as either:<sup>10</sup>

- a denial of sexual contact or penetration (yes or no); and
- an admission of sexual contact or penetration but denial of absence of consent (yes or no).

***Trial transcript examples—Denial of sexual contact or penetration***

1. The complainant gave evidence that she was in a nightclub and an unknown male touched her beneath her dress without her consent. The defendant denied that he was the person who did the physical acts.<sup>11</sup>

2. The complainant gave evidence that she was asleep on her bed and awoke to the defendant, a friend of her husband's, having sexual intercourse with her. The defence case at trial was that the defendant was performing an act of simulated intercourse on the sleeping complainant, and in the absence of corroborating evidence, the jury could not be satisfied that there was actual penetration.<sup>12</sup>

***Trial transcript examples—Admission of sexual contact or penetration but denial of absence of consent***

3. The complainant gave evidence that she was asleep in her bed and awoke to the defendant, her cousin, having sexual intercourse with her. Defence counsel put to the complainant in cross-examination that the complainant had been upset when her male friend had declined to come over and that she had substituted in the defendant by inviting him to her bedroom, but that the amount of alcohol she consumed affected her recollection of these events.<sup>13</sup>

<sup>7</sup> A pre-text call typically takes place between a complainant or witness and an alleged offender to gather evidence of the alleged offence or obtain corroboration of the complainant's or witness's version of events: see generally Westlaw AU, *Ross on Crime* [20.510] (March 2020).

<sup>8</sup> See [3.10]–[3.11] below.

<sup>9</sup> See n 6 above.

<sup>10</sup> See Tables 1, 2, 3 and 4 below.

<sup>11</sup> Case Ref: 230.

<sup>12</sup> Case Ref: 209.

<sup>13</sup> Case Ref: 25.

4. The complainant gave evidence of attending a party at the defendant's house. They both consumed alcohol. The defendant was already in his bed when the complainant got into bed and went to sleep without any interaction with the defendant. She woke up in pain and felt the defendant digitally penetrating her. The defendant participated in a recorded interview with police and said that once the complainant got into bed, they cuddled and he asked her if she wanted sex. She was moaning in response to his touches. Mistake of fact was left on the basis that there could have been a mistake as to the nature of the complainant's verbal response and a belief that the complainant was still awake at the time of penetration. It was open to the jury to acquit if it accepted that the Crown had not excluded either that the complainant gave consent or that the defendant was honestly and reasonably mistaken as to consent having been given.<sup>14</sup>

### 3.11 Defence versions of events were coded as:

- *same or similar version*: where the defendant gave the same or a similar version of events to the complainant and asserted that they believed the complainant gave consent;
- *different version*: where the defendant gave a different version of events to the complainant and asserted that they believed the complainant gave consent;
- *intermediate view of the facts*: where the defendant relied on a different line of defence, but the court accepted that mistake of fact arose on an intermediate view of the facts; and
- *mistake of fact arose on the Crown case*: where the defendant relied on a different line of defence, but the court accepted that mistake of fact arose on the Crown case.

3.12 Where a defendant relied on multiple lines of defence, each line of defence was recorded. For example, in a majority of trials where mistake of fact was left to the jury, the defendant also claimed that consent was given.

3.13 In trials involving multiple alleged offences, defendants or complainants, there were frequently multiple lines of defence and multiple versions of events.

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<sup>14</sup> Case Ref: 177.

***Trial transcript example—multiple lines of defence***

5. Three defendants were each charged with three counts of rape and one count of sexual assault in respect of one complainant. The basis for criminal responsibility for each defendant on each count was that they either did the act that constituted the offence or that they aided in the commission of the offence. In respect of the allegations of sexual assault and of oral rape, the defendant accused of doing the acts denied that such conduct ever occurred. In respect of one count of penile rape, the defendant accused of doing the act asserted that he had not been present at the time. In respect of the other count of penile rape, the defendant accused of doing the act asserted that the complainant had consented, and that if she had not given consent, he had an honest and reasonable, but mistaken, belief that consent had been given.<sup>15</sup>

3.14 In some trials involving only one defendant and one count, there were multiple lines of defence.

***Trial transcript example—multiple lines of defence***

6. The complainant gave evidence that the defendant, an Uber driver, had grabbed her upper thigh and her breast while she was intoxicated and in the Uber, but that she had not reacted until he attempted to kiss her when she turned her head away. The defendant denied that any of this contact occurred. The defendant also relied on mistake of fact as to consent, on the following evidence: during the eight minute drive, she answered his personal questions (for example, whether she had a boyfriend); when she had a coughing fit and he patted her on the back, she did not say 'Please do not touch me again'; she did not say anything that would suggest that he was to desist from touching her sexually; and, she did not push him away.

This reflects that the excuse of mistake of fact may arise on any part of the evidence, even if the defence case is, or is primarily, denial of sexual contact.<sup>16</sup>

***Relationship between the complainant and the defendant***

3.15 Information about the relationship between the complainant and the defendant was coded into four categories:

- *Stranger*: no prior contact between the complainant and defendant;
- *Acquaintance*: some prior contact between the complainant and defendant, including by digital communication or a shared social circle;
- *Domestic*: a familial or intimate relationship, including a person who fulfils a domestic role (for example, a step-father figure); and
- *Professional*: where the defendant held a medical or educational position (in relation to the complainant).

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<sup>15</sup> Case Ref: 2.

<sup>16</sup> Case Ref: 82.

***Injury to the complainant***

3.16 Evidence of any injury to the complainant was coded into three categories:

- *Minor*: bruising or abrasions;
- *Moderate*: significant bruising, significant abrasions, shallow lacerations, facial injuries or neck injuries; and
- *Major*: deep lacerations, bone fractures or brain injury.

***Condition of the complainant and the defendant***

3.17 Details about the condition of the complainant and the defendant were coded into five categories:

- *Disability or impairment*: includes physical disability, cognitive impairment, learning disability or diagnosed psychiatric condition;
- *Intoxication or consuming alcohol and/or drugs*: includes self-reported intoxication or consumption of alcohol or drugs and medical evidence of the consumption of alcohol or drugs;
- *Unconscious*: includes where the complainant has given evidence of passing out, blacking out or having no memory;
- *Asleep*: includes where the complainant has given evidence of being asleep for all or any part of the events; and
- *Language barrier*: includes where English is not their first language, whether or not an interpreter was required.

***Complainant's behaviour***

3.18 The complainant's behaviour was coded into five categories:

- *Freezing*: includes feeling unable to move or speak either throughout or at some point during the sexual contact;
- *Placating*: includes attempting to calm or appease the defendant;
- *Objecting*: includes negative verbal responses to the defendant's conduct;
- *Resisting*: includes negative physical responses to the defendant's conduct; and
- *No resistance*: includes where the complainant has given evidence that they did not resist or object to the sexual contact.

***Relationship evidence given at trial***

3.19 The review also collected information as to whether relationship evidence was given in the trial (coded as yes or no).



3.20 Relationship evidence is evidence to provide context and make the charged events more intelligible to a jury which, if accepted by the jury, could be used to assist in its determination of the ultimate issues. Such evidence included evidence of previous violence by the defendant upon the complainant that may explain why the complainant did not express absence of consent or resist or complain, or evidence of previous sexual contact that may explain why the defendant believed the complainant was giving consent.

## RESULTS

### What were the outcomes for rape and sexual assault trials in 2018?

3.21 Of the 135 trials, 87 (64%) resulted in Discharge and 48 (36%) resulted in a Conviction.<sup>17</sup>

3.22 Table 1 below summarises how frequently the coded lines of defence were relied on. These numbers add to greater than the total because of the overlap between the categories, in that a defendant may pursue more than one line of defence. For example, in a majority of trials where mistake of fact was left to the jury, the defendant also claimed that consent was given. For this reason, the resulting tables may total more than 100%.

Line of defence	Number of trials	% of trials
Denial of sexual contact or penetration	91	67%
Admission of sexual contact or penetration but denial of absence of consent	55	41%

**Table 1: Lines of Defence taken in the 2018 Trials (n = 135 trials)<sup>18</sup>**

3.23 Denial of sexual contact or penetration was the most frequent line of defence.

3.24 More than one line of defence was pursued in 32 (24%) trials, of which:

- 18 trials involved one complainant and one defendant and multiple charges;
- nine trials involved one defendant and one complainant and one charge;
- one trial involved multiple complainants; and
- four trials involved multiple defendants.

<sup>17</sup> These figures do not reflect matters that resolved by way of a plea of guilty. The Office of the Director of Public Prosecutions has provided information that during the 2018 calendar year, 546 matters involving rape and sexual assault charges were finalised. Of these, 308 are recorded as resulting in conviction whether by way of plea of guilty or conviction after trial and 238 resulted in a discharge. This reflects a conviction rate of 56% and a discharge rate of 44%.

<sup>18</sup> These numbers add to greater than the total because of the overlap between the categories.

3.25 Table 2 summarises the trial outcomes based on the lines of defence taken. The percentages in the Discharged and Convicted columns are percentages of each data point and not of the 2018 Trial dataset as a whole.<sup>19</sup>

3.26 The total number of trials in the table exceeds 135 because of the overlap between categories.<sup>20</sup>

Line of defence	Number of trials	Discharged	Convicted
Denial of sexual contact or penetration	91	54 (59%)	37 (41%)
Admission of sexual contact or penetration but denial of absence of consent	55	39 (71%)	16 (29%)

**Table 2: Outcomes by the lines of defence in the 2018 Trials (n = 135 trials)<sup>21</sup>**

3.27 When the line of defence was denial of sexual contact or penetration the rate of Conviction was higher (41% or 37 of 91 trials) than when the defendant admitted sexual contact but denied absence of consent (29% or 16 of 55 trials).

### **What differences occurred as between Adult complainants and Child complainants?**

3.28 Table 3 and Table 4 below separate trials involving complainants over 16 (Adult complainants) and trials involving complainants aged 12 to 15 (Child complainants).<sup>22</sup>

3.29 There were 96 trials involving Adult complainants, of which 65 (68%) resulted in Discharge and 31 (32%) resulted in Conviction.

3.30 Table 3 summarises the lines of defence relied on in trials involving Adult complainants, and the trial outcome. The number of trials totals more than 96 because of the overlap between the categories.<sup>23</sup>

3.31 The percentages in the % of Adult complainant trials column are percentages of the 96 trials involving Adult complainants. The percentages in the Discharged and Convicted columns are percentages of the number of trials in that row.

<sup>19</sup> It is not possible to conduct statistical analyses for these data because the lines of defence are not independent.

<sup>20</sup> For example, in some trials, a defendant may deny penetration but admit sexual contact, or a trial may involve more than one count, in respect of which penetration is admitted for one but not the other.

<sup>21</sup> See n 18 above.

<sup>22</sup> If the age of the complainant spanned both categories because of the period of the alleged offending, then the matter is counted as a trial in respect of a Child complainant.

<sup>23</sup> See n 20 above.

Line of defence	Number of trials	% of Adult complainant trials	Discharged	Convicted
Denial of sexual contact or penetration	54	56%	34 (63%)	20 (37%)
Admission of sexual contact or penetration but denial of absence of consent	51	53%	36 (71%)	15 (29%)

**Table 3: Outcome by lines of defences in 2018 Trials with Adult complainants  
(n = 96 trials)**

3.32 For Adult complainants, the distribution of trials between the categories of denial of sexual contact or penetration, and the admission of sexual contact or penetration but denial of absence of consent was near equal (54 and 51 trials, respectively). The outcomes as between Discharge and Conviction between those categories were not greatly different (34:20 trials and 36:15 trials, respectively). The total Conviction rate in respect of Adult complainants (32%) was slightly lower than the rate in respect of all 2018 Trials (36%).<sup>24</sup>

### ***Trials in respect of Child complainants***

3.33 There were 39 trials in respect of Child complainants, of which 22 (56%) resulted in Discharge and 17 (44%) resulted in Conviction.

3.34 Table 4 summarises the lines of defence relied on in trials in respect of Child complainants, and the trial outcome. The number of trials totals more than 39 because of the overlap between the categories.<sup>25</sup>

3.35 The percentages in the % of Child complainant trials column are percentages of the 39 trials involving Child complainants. The percentages in the Discharged and Convicted columns are percentages of the number of trials in that row.

<sup>24</sup> See [3.21] and [3.29] above.

<sup>25</sup> See n 20 above.

Line of defence	Number of trials	% of Child complainant trials	Discharged	Convicted
Denial of sexual contact or penetration	37	95%	20 (54%)	17 (46%)
Admission of sexual contact or penetration but denial of absence of consent	4	10%	3 (75%)	1 (25%)

**Table 4: Outcome by lines of defence in 2018 Trials with Child complainants (n = 39)<sup>26</sup>**

3.36 For Child complainants, the line of defence of denial of sexual contact or penetration represented a greater proportion of trials (95%) compared to that line of defence in all trials (67%),<sup>27</sup> and the line of defence of admission of sexual contact or penetration represented a lesser proportion (10%) compared to that line of defence in all trials (41%).<sup>28</sup> The Conviction rate for Child complainants (44%) was higher than the Conviction rate in all 2018 Trials (36%).<sup>29</sup>

3.37 A majority of defendants in trials in respect of Child complainants contended that the allegation of sexual contact or penetration was a fabrication. In trials in respect of Adult complainants, defendants more frequently admitted the sexual contact or penetration. This difference may reflect other considerations relevant to a trial in respect of a Child complainant, for example possible criminal responsibility for an offence of unlawful carnal knowledge for a complainant under 16 years of age, irrespective of consent.<sup>30</sup>

### **How often was the excuse of mistake of fact left to a jury in trials for rape and sexual assault?**

3.38 Table 5 summarises the circumstances in which mistake of fact was left to a jury in 2018 Trials. These circumstances include:

- *Defendant believed complainant consented (and gave the same or similar version of events):* where the defendant gave the same or a similar version of events and asserted that they believed the complainant consented;
- *Defendant believed complainant consented (but gave a different version of events):* where the defendant gave a different version of events and asserted that they believed the complainant gave consent;
- *Mistake of fact arose on an intermediate view of the facts:* where mistake of fact arose on an intermediate view of the facts; and

<sup>26</sup> These numbers add to greater than the total because of the overlap between the categories.

<sup>27</sup> See Table 1 above.

<sup>28</sup> Ibid.

<sup>29</sup> See [3.21] above.

<sup>30</sup> Criminal Code (Qld) s 215.

- *Mistake of fact arose on the Crown case*: where the defendant relied on a different line of defence, but the court accepted that mistake of fact arose on the Crown case.

3.39 Mistaken belief as to consent was left for the jury to decide in 48 (of 135) trials. In nine of those trials the jury was informed that it might come to an intermediate view of the facts that would raise the possible excuse. For example, the jury may accept the complainant's evidence that they did not consent but reject their evidence that they verbalised an absence of consent. In seven trials, the possible excuse arose on the Crown case.

	Mistake of fact left to the jury		
	No. of trials per category	Discharged	Convicted
Defendant believed complainant consented (and gave the same or similar version of events)	15	10 (67%)	5 (33%)
Defendant believed complainant consented (but gave a different version of events)	17	10 (59%)	7 (41%)
Mistake of fact arose on an intermediate view of the facts	9	8 (89%)	1 (11%)
Mistake of fact arose on the Crown case	7	3 (43%)	4 (57%)
<b>TOTAL</b>	<b>48</b>	<b>31 (65%)</b>	<b>17 (35%)</b>

**Table 5: Outcome of 2018 Trials and the basis on which mistake of fact was left to the jury (n = 48)**

3.40 Table 5 demonstrates that the Conviction rate in all trials where the excuse of mistake of fact was left to the jury (35% or in 17 of 48 trials) is comparable to the Conviction rate in respect of all 2018 Trials (36%).<sup>31</sup>

3.41 By comparison, the Conviction rate in trials where the excuse of mistake of fact was left to the jury because of a view that it arose on an intermediate version of the facts that a jury might accept (11%) is substantially lower than the Conviction rate in respect of all 2018 Trials (36%).<sup>32</sup>

3.42 Table 5 also demonstrates that in trials where the defendant expressly relied on mistake of fact, there was a broadly even split between trials where the defendant relied on a different version of events and trials where the defendant relied on the same or a similar version of events to the complainant.

<sup>31</sup> See [3.21] above.

<sup>32</sup> Ibid.

***Trial transcript example—Defendant believed complainant consented (and gave the same or similar version of events)***

7. The complainant gave evidence that she and the defendant drove to and parked in a rural area. They were talking, and the defendant asked her if she wanted to have sex, to which she responded 'no'. He repeated the question a few times and each time she said 'no'. She did not resist or say anything when he lay her seat down and digitally penetrated her. She did not say anything when he commenced sexual intercourse. In cross-examination, the complainant conceded that she had had sexual intercourse with the defendant earlier in the day and that she had not said anything to him at that time. The defendant had participated in a recorded interview with police where he denied all sexual contact, but his defence counsel conducted the trial on the basis that that had been a lie and that the complainant's version of events was not challenged. Defence counsel submitted to the jury that it could not exclude that the sex was consensual, or at least it could not exclude that the defendant had an honest and reasonable, but mistaken, belief.<sup>33</sup>

***Trial transcript example—Defendant believed complainant consented (but gave a different version of events)***

8. The complainant gave evidence that she was asleep in her bed and awoke to the defendant, who had earlier been present at a house party, having sexual intercourse with her. On that version, the complainant could not have consented as she was asleep at the time of penetration. The defendant gave evidence that he had fallen asleep on a couch and woken up feeling cold. He went into the complainant's room and asked her if he could lie down, to which she made a sound that he interpreted as signalling agreement. They started touching and kissing each other in a way that he interpreted as indicating consent and they had consensual intercourse. Mistake of fact was left to the jury on the basis that, if it accepted the defendant's version of events but nevertheless also accepted that the complainant had been asleep at the time, the defendant may have had an honest and reasonable, but mistaken, belief about her being awake and being responsive to his touches.<sup>34</sup>

3.43 Table 6 identifies how frequently mistake of fact was left to the jury where the defendant denied sexual contact or penetration and how frequently it was left to the jury where the defendant admitted to sexual contact or penetration but denied the absence of consent, and the outcomes. The number of trials totals more than 135 because of overlap between the categories.<sup>35</sup>

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33 Case Ref: 47.

34 Case Ref: 135.

35 For example, in some trials, a defendant may deny penetration but admit sexual contact, or a trial may involve more than one count, in respect of which penetration is admitted for one but not the other.

	Mistake of fact left to jury			Mistake of fact not left to jury		
	No. of trials per category	Discharged	Convicted	No. of trials per category	Discharged	Convicted
Denial of sexual contact or penetration	19	10 (53%)	9 (47%)	72	44 (61%)	28 (39%)
Admission of sexual contact or penetration but denial of absence of consent	37	24 (65%)	13 (35%)	18	15 (83%)	3 (17%)

**Table 6: Comparison of outcomes when mistake of fact is left to the jury and when mistake of fact is not left to the jury (n = 135)**

3.44 Table 6 demonstrates that the rates of Conviction were higher in trials where mistake of fact was left to the jury than in cases where it was not left to the jury, regardless of whether the line of defence was one of denial of sexual contact or penetration or admission of sexual contact or penetration but denial of the absence of consent. These rates of Conviction may also be compared to the rate of Conviction in respect of all 2018 Trials (36%).<sup>36</sup>

### **Does the giving or calling of evidence by a defendant at trial have an impact on trial outcomes when mistake of fact is left to a jury?**

3.45 Table 7 summarises how frequently a defendant gave evidence, called evidence, called character evidence,<sup>37</sup> or neither gave nor called evidence, as well as how frequently a record of police interview or pre-text call was led on the Crown case and the trial outcomes.<sup>38</sup>

<sup>36</sup> See [3.21] above.

<sup>37</sup> Character evidence refers to evidence called by the defence to establish that the defendant is a person of good character: see generally LexisNexis Australia, *Cross on Evidence* [19105] ff (June 2019).

<sup>38</sup> These numbers add to greater than the total because of the overlap between the categories. For example, in some trials, a defendant who gave evidence may also call evidence and/or call character evidence.

	Total No. of trials per category	Discharged	Convicted
Gave evidence	42	26 (62%)	16 (38%)
Called evidence	15	8 (53%)	7 (47%)
Called character evidence	12	6 (50%)	6 (50%)
Neither gave nor called evidence	88	58 (66%)	30 (34%)
Pre-text call	14	5 (36%)	9 (64%)
Record of police interview	34	20 (59%)	14 (41%)

**Table 7: Frequency the defendant gave evidence, called evidence etc in 2018 trials<sup>39</sup>**

3.46 Table 8 below summarises how frequently mistake of fact was left to the jury (and the outcomes), in trials where the defendant gave evidence, called evidence, called character evidence, or a recorded police interview or pre-text phone call was played.

	Mistake of fact left to jury			Mistake of fact not left to jury		
	Total No. of trials	Discharged	Convicted	Total No. of trials	Discharged	Convicted
Gave evidence	21	11 (52%)	10 (48%)	21	15 (71%)	6 (29%)
Called evidence	7	3 (43%)	4 (57%)	8	5 (62.5%)	3 (37.5%)
Called character evidence	8	3 (37.5%)	5 (62.5%)	4	3 (75%)	1 (25%)
Neither gave nor called evidence	25	19 (76%)	6 (24%)	63	39 (62%)	24 (38%)
Pre-text call	8	4 (50%)	4 (50%)	6	1 (17%)	5 (83%)
Record of police interview	18	12 (67%)	6 (33%)	16	8 (50%)	8 (50%)

**Table 8: Frequency mistake of fact was left to the jury (and the outcome), in trials where the defendant gave evidence, called evidence, etc**



3.47 Table 8 shows the following:

- Where the defendant gave evidence and mistake of fact was left to the jury, the Conviction rate (48%) and Discharge rate (52%) were almost equal. In comparison, where the defendant gave evidence and mistake of fact was not left to the jury, the Conviction rate (29%) was lower than the Discharge rate (71%).
- Where the defendant called evidence and mistake of fact was left to the jury, the Conviction rate (57%) was higher than the Discharge rate (43%).
- Whether or not mistake of fact was left to the jury, where the defendant neither gave nor called evidence, the Conviction rate (24% and 38% respectively) was lower than the Discharge rate (76% and 62% respectively).
- Across all categories (except where evidence of a pre-text call was led) where mistake of fact was not left to the jury, the Conviction rate was lower than the Discharge rate.

### **What was the relationship between the complainant and defendant in rape and sexual assault trials?**

3.48 Table 9 summarises the category of relationship that existed between the complainant and the defendant at the time of the alleged offending.

Relationship	Number of trials	% of trials
Domestic	55	41%
Acquaintance	47	35%
Stranger	27	20%
Professional	6	4%

**Table 9: Categories of relationship between the complainant and defendant**

3.49 Of the 55 trials in the Domestic relationship category, Relationship evidence<sup>40</sup> was led in 23 trials. In a further two trials, the jury was directed to ignore evidence about the relationship that had come out during the trial.

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See the explanation of Relationship evidence at [3.20] above.

### Does evidence of injury to the complainant impact on trial outcomes for rape and sexual assault?

3.50 Table 10 summarises how frequently evidence of injury was led and the trial outcomes.

Type of injury	Discharged	Convicted
Minor injury	16 (80%)	4 (20%)
Moderate injury	9 (60%)	6 (40%)
Major injury	2 (100%)	0 (0%)

**Table 10: Frequency of evidence of injury led and the trial outcome**

3.51 Table 10 shows that evidence of injury to the complainant did not have a clear relationship to the trial outcome.

### What factors are in evidence when the excuse of mistake of fact is left to a jury?

3.52 Table 11 below shows the frequency of certain conditions of the complainant, certain conditions of the defendant and behaviours of the complainant and whether mistake of fact was left to the jury.

3.53 It was not possible to gather objectively comparable evidence from every 2018 Trial transcript.

3.54 The below factors, for the most part, have been drawn from the evidence given by the complainant in evidence-in-chief, and so do not necessarily reflect any challenges or concessions made in cross-examination, nor whether a conflicting account was given by the defendant. For example, it cannot be said that mistake of fact was left to the jury in eight trials in circumstances where the jury accepted that the complainant was unconscious or asleep, as the evidence of the complainant's condition may have been qualified or disputed in other evidence.

3.55 In some trials, the evidentiary basis for leaving mistake of fact to the jury did not arise on the evidence of the complainant but arose on either the evidence of the defendant or on some other view of the facts, depending on what evidence the jury accepted or rejected.

	Mistake of Fact left to jury	Mistake of Fact not left to jury	Total cases for each category
<b>Complainant's condition</b>			
Disability or Impairment	6 (43%)	8 (57%)	14
Intoxication or consuming alcohol and/or drugs	29 (50%)	29 (50%)	58
Unconscious	1 (25%)	3 (75%)	4
Asleep	7 (25%)	21 (75%)	28
Language barrier	2 (50%)	2 (50%)	4
<b>Complainant's behaviour</b>			
Freezing	12 (55%)	10 (45%)	22
Placating	4 (57%)	3 (43%)	7
Objecting	27 (40%)	40 (60%)	67
Resisting	20 (40%)	30 (60%)	50
No resistance	4 (13%)	27 (87%)	31
<b>Defendant's condition</b>			
Disability or Impairment	0 (0%)	0 (0%)	0
Intoxication or consuming alcohol and/or drugs	28 (88%)	4 (13%)	32
Language barrier	5 (56%)	4 (44%)	9

**Table 11: Frequency of certain conditions of the complainant, certain conditions of the defendant and behaviours of the complainant and whether mistake of fact was left to a jury**

3.56 While the categories have been separately listed, a combination of two or more categories of evidence was frequently present in a single trial. For this reason, corresponding rates of Discharge or Conviction have not been calculated to avoid suggesting a relationship between evidence of certain behaviours or conditions and an outcome that is not valid.

3.57 Taking into account the caveats outlined above, Table 11 supports a conclusion that there is a relationship between certain conditions or behaviours of a complainant or defendant and whether mistake of fact was left to a jury. For example:

- Mistake of fact was left to the jury more often where the complainant gave evidence of freezing (55% or in 12 of 22 trials) or placating (57% or in 4 of 7 trials) than where the complainant gave evidence of objecting (40% or in 27 of 67 trials) or resisting (40% or in 20 of 50 trials);

- Mistake of fact was not left to the jury where there was evidence of no resistance by the complainant in 87% of trials (27 of 31 trials, noting that 23 of these 27 trials correlated to a domestic relationship); and
- Mistake of fact was left to the jury where the defendant was intoxicated or had consumed alcohol or drugs in 88% of trials (28 of 32 trials) and in 50% of trials (29 of 58 trials) where there was evidence that the complainant was intoxicated or had consumed alcohol.

#### ***Trial transcript examples***

9. The complainant gave evidence of vigorously resisting the defendant, but conceded in cross-examination that she had subsequently sent text messages to the defendant suggesting she was asleep during the event. The jury was directed that its view of whether the Crown had excluded that a mistaken belief was honest and reasonable depended on their assessment of what happened that night because of the competing evidence.<sup>41</sup>

10. The complainant gave evidence that she and the defendant had met on the night at a party. There was evidence that they were both intoxicated. She said that she did not object or resist and had gone to pains to conceal her emotions. Her evidence was that the defendant had physically picked her up and, without further discussion, had carried her to a bedroom and put her on the bed.

The defendant gave evidence that the complainant had given consent. Mistake of fact was left to the jury, but the jury was directed that, if it accepted the complainant's version in full then it could exclude that the defendant had an honest and reasonable mistaken belief.<sup>42</sup>

### **How often is mistake of fact raised as a ground of appeal?**

3.58 The outcome of appeals from 2018 Trials provides some further insight into the operation of the definition of consent and the excuse of mistake of fact. However, appeals are only brought from a conviction. They cannot provide insight into the operation of the definition of consent or the excuse of mistake of fact in trials that resulted in an acquittal, which are not subject to a right of appeal.<sup>43</sup>

3.59 Of the 48 trials that resulted in Convictions on charges of rape or sexual assault, 30 defendants (63%) filed a notice of appeal against conviction. Of those 30, four were not finalised at the time of data extraction. Of the 26 finalised appeals, the outcomes were as follows:

- five were abandoned;
- 18 were dismissed;

<sup>41</sup> Case Ref: 129.

<sup>42</sup> Case Ref: 125.

<sup>43</sup> Criminal Code (Qld) s 668D.

- of the 18 dismissed appeals, it was a ground of appeal that mistake of fact ought to have been left to the jury in two appeals;<sup>44</sup> and
- three appeals were successful. They were allowed on the ground of:
  - a misdirection about whether the defendant's words amounted to an admission;<sup>45</sup>
  - inconsistent verdicts as between the offences charged;<sup>46</sup> and
  - the conduct of the defendant's solicitor-advocate at trial.<sup>47</sup>

3.60 Of the four appeals that are not finalised, mistake of fact was left to the jury in only one of the trials. In that matter, the defendant had participated in a recorded interview with police and denied the sexual contact. Mistake of fact was left to the jury as it arose on the Crown case.

3.61 Of the three successful appeals, mistake of fact was raised on the appeal in only one matter.<sup>48</sup>

***Appeal example—R v Lennox; R v Lennox; Ex parte Attorney-General (Qld) [2018] QCA 311***

11. The defendant was charged with two counts of rape and three counts of sexual assault. The complainant gave evidence that she had recently met the defendant and had one date with him. She agreed to go for a drive with him and to talk. He drove the car to a public park and parked. They talked, and after a time, he began to touch her breasts (counts 1 and 2) and digitally penetrated her (count 3). He had penetrative intercourse with her (count 4), after which he procured her to masturbate him (count 5).

Her evidence was that throughout this course of conduct, she cried, said 'stop' and 'do not want'.

The defendant gave evidence, admitting the physical acts in relation to counts 1 to 4, denying that count 5 occurred and alleging that the complainant had willingly participated in the conduct.

Mistake of fact was left to the jury as it arose on the defendant's evidence. It did not arise on the complainant's evidence. The defendant was acquitted of three counts of sexual assault and of one count of rape and was convicted of one count of rape.

<sup>44</sup> *R v De Silva* [2018] QCA 274; *R v Kau* [2019] QCA 73.

<sup>45</sup> *R v BDJ* [2020] QCA 27.

<sup>46</sup> *R v Lennox; R v Lennox; Ex parte Attorney-General (Qld)* [2018] QCA 311.

<sup>47</sup> *R v Mansoori* [2019] QCA 250.

<sup>48</sup> *R v Lennox; R v Lennox; Ex parte Attorney-General (Qld)* [2018] QCA 311.

His appeal from conviction included that the verdict of guilty was inconsistent with the verdicts of not guilty. The majority of the Court of Appeal accepted that, to have reached verdicts of not guilty, the jury must have accepted that the prosecution had failed to exclude that either consent was given, or the defendant was honestly and reasonably mistaken about consent. Either finding must have involved a rejection of the credibility or reliability of the complainant, as neither case arose on the complainant's evidence. The acquittals did not (and could not, in relation to count 5) necessarily reflect that the jury relied on mistake of fact. As there was no difference in the quality of the complainant's evidence or other explanation for why different verdicts were reached, the finding of guilt on count 4 was inconsistent and set aside.

## DISCUSSION

3.62 The review of the 2018 Trials assisted the Commission in assessing how the definition of consent and the excuse of mistake of fact are operating in practice.

3.63 In general, the Conviction rate was higher in trials where the defendant denied the sexual contact or penetration (41%)<sup>49</sup> than in trials where the defendant admitted the charged sexual contact but denied absence of consent (29%).<sup>50</sup> However, where sexual contact or penetration was admitted, the Conviction rate was higher where mistake of fact was left to the jury (35%),<sup>51</sup> than where mistake of fact was not left (17%).<sup>52</sup> Accordingly, the mistake of fact excuse did not appear to have a disproportionate impact on Conviction rates.

3.64 The data also showed that the Conviction rate was generally about the same where mistake of fact was left to the jury (35%),<sup>53</sup> compared to the total Conviction rate of 2018 Trials (36%).<sup>54</sup>

3.65 The review of the 2018 Trials has informed the Commission's consideration of submissions which argue that mistake of fact is a loophole that allows factors to be considered by the jury that were said not to be otherwise relevant to the question of consent, such as consumption of alcohol or drugs (by a complainant or defendant), that the complainant was unconscious or asleep, or gave evidence of 'freezing'. Broadly, mistake of fact was left to the jury more frequently when those factors were present.<sup>55</sup>

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49 See Table 2 above.

50 See Table 2 above.

51 See Table 6 above.

52 See Table 6 above.

53 See Table 5 above.

54 See [3.21] above.

55 See Table 11 above.

***Trial transcript example—Freeze evidence and mistake of fact not left***

12. The complainant gave evidence of exchanging contact details with the defendant and meeting with him several times over the following days. During that time, she physically resisted his touches and rebuffed his sexual advances. In the lead up to the alleged offending, she physically and verbally rejected his advances, but had frozen by the time of the sexual intercourse. The defendant gave evidence that no penetration occurred. The issue of mistake of fact was raised in legal argument but it was not left to the jury as it did not arise on the evidence of either the complainant or defendant.<sup>56</sup>

3.66 In some trials where mistake of fact was left to the jury, there were conflicting versions of events on the evidence about the presence or consequence of these factors. Mistake of fact may have been logically open to the jury on one version but not on another.

***Trial transcript example—Mistake of fact arose on defendant's version***

13. The complainant gave evidence of being asleep or unconscious and waking up when the defendant was already penetrating her. She was confused and did not object or resist. The defendant gave evidence of asking the complainant whether he could get into bed, of receiving a verbal positive response and that mutual sexual touching and consensual intercourse followed. Mistake of fact was left to the jury as it arose on the defendant's account, though it did not arise on the complainant's account.<sup>57</sup>

3.67 The review of 2018 Trials suggests a strong relationship between evidence of the defendant's intoxication or consumption of alcohol or drugs and mistake of fact being left to the jury (88%).<sup>58</sup> In eight trials where mistake of fact was left to the jury, they were not directed that evidence of the defendant's intoxication was not relevant to the reasonableness of the belief.<sup>59</sup> This question is considered further in Chapter 7 below.

3.68 The review of the 2018 Trials also informed the Commission in its consideration of submissions that the current law permits a court to draw the jury's attention to whether the defendant did or said anything to ascertain whether the complainant was giving consent. No direction about that question was given in any of the 2018 Trials. This question is further discussed in Chapter 5 below.

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<sup>56</sup> Case Ref: 231.

<sup>57</sup> Case Ref: 135.

<sup>58</sup> See Table 11 above.

<sup>59</sup> It has been held that intoxication of a defendant is not relevant to the question of whether belief was 'reasonable' but may be relevant to the question as to whether the belief was 'honest'.





## Chapter 4

# The question of reform: key principles and informing concepts

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## INTRODUCTION

4.1 The terms of reference specifically required the Commission to consider 'whether there is a need for reform' of the Criminal Code to change the definition of consent in section 348, or the excuse of mistake of fact in section 24, as it applies to rape and sexual assault.<sup>1</sup>

4.2 In considering whether there is a need for reform, the Commission was required to have regard to a number of matters, including 'the experiences of sexual assault victims and survivors in the criminal justice system', existing legal principles relating to criminal responsibility, and 'the need for Queensland's criminal law to ensure just outcomes by balancing the interests of victims and accused persons'.<sup>2</sup>

4.3 This chapter outlines the Commission's general approach to the question of reform, including the key principles and concepts that have informed its approach.

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<sup>1</sup> See terms of reference, para 3(a).

<sup>2</sup> See terms of reference, para 5(b)–(d).

## KEY PRINCIPLES AND INFORMING CONCEPTS

### The incidence and reporting of rape and sexual assault

4.4 Available data<sup>3</sup> show that there is a high incidence of sexual violence nationally and in Queensland, and that the number of incidents reported to police has increased from previous years.<sup>4</sup>

4.5 Increased reporting may, in part, be a consequence of increased awareness about sexual violence.<sup>5</sup> Nevertheless, it is widely accepted that sexual violence is significantly under-reported.<sup>6</sup> Barriers to reporting include fear of discrimination or of not being believed, distrust of authorities, fear of the perpetrator, language and cultural issues, and not regarding the incident as a serious crime.<sup>7</sup>

4.6 Any person, whether male or female, can be the victim of sexual violence. However, sexual violence is often referred to as a 'gendered issue'. Most reported sexual offences are committed against females by males.<sup>8</sup> Sexual offences are, accordingly, often considered as part of discussions on gender-based discrimination and the violation of women's human rights.

4.7 Available data also indicate that:

- The majority of reported sexual offences occur in residential dwellings.<sup>9</sup>

<sup>3</sup> The categories of data referred to in this section are limited by what has been reported in the cited sources. For a summary of key statistics, see also *Queensland's Framework to address Sexual Violence* (2019) 5–6, 8–10.

<sup>4</sup> In Queensland, the number of sexual offences reported to police increased from 6163 in 2016–17 (including 1929 rape or attempted rape offences) to 6300 in 2017–18 (including 2099 rape or attempted rape offences): Queensland Government Statistician's Office, *Crime Report, Queensland, 2017–18*, Table 1. 'Sexual offences' include 'rape and attempted rape' and 'other sexual offences', including indecent treatment of children, incest, indecent assault, bestiality, and wilful obscene exposure: at Table 18 note (a). Over the ten years from 2008–09 to 2017–18, sexual offences accounted for between 14.6% and 17.3% of all reported victims: at 87.

Nationally, the number of reported victims of sexual assault (including rape and indecent assault) increased from 25 837 in 2017 to 26 312 in 2018: Australian Bureau of Statistics, *Recorded Crime-Victims, Australia* (Catalogue No 4510.0, 2018), Table 1.

<sup>5</sup> *Queensland's Framework to address Sexual Violence* (2019) 5: 'as awareness of sexual violence increases and more people start to report their experiences, rates of reported sexual assaults are likely to increase'.

<sup>6</sup> Ibid 5–6, 9. See also Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia: Continuing the national story' (2019) 17.

<sup>7</sup> *Queensland's Framework to address Sexual Violence* (2019) 9; Australian Institute of Family Studies and Victoria Police, 'Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners' (2017) 3.

<sup>8</sup> In Queensland in 2017–18, 84% of victims of reported sexual offences were female, with female victims outnumbering male victims in all age groups; and 95% of offenders for reported sexual offences identified as male, with male offenders outnumbering female offenders in all age groups: Queensland Government Statistician's Office, *Crime Report, Queensland, 2017–18*, 83, 86, 89, Tables 47, 57, 58, Fig 57.

<sup>9</sup> In Queensland, 4180 (66%) reported sexual offences in 2017–18 occurred in a residential dwelling, compared with 1186 (19%) in a community location such as a school or university, street or footpath, open space, or car park: ibid Table 44 and Glossary ('Crime location'). Nationally, see Australian Bureau of Statistics, *Recorded Crime-Victims, Australia* (Catalogue No 4510.0, 2018), Table 3.

- In most reported cases, the offender is a person known to the victim and, in many of those cases, the offender is a family member of the victim.<sup>10</sup>
- Most reported sexual offences do not involve the use of a weapon.<sup>11</sup>
- Vulnerable populations tend to experience a higher incidence of sexual violence, including Aboriginal and Torres Strait Islander people, women with disability, and sex workers.<sup>12</sup>

4.8 Not all reported sexual offences result in prosecution or conviction.<sup>13</sup> This is partly attributed to the nature of such offences which mainly occur in private locations, often with few witnesses and little physical evidence.<sup>14</sup> It has also been suggested that false preconceptions about the nature of sexual violence may influence the decisions of police, prosecutors and juries.<sup>15</sup>

## The experience of victims

4.9 Sexual violence has a range of significant and potentially enduring consequences for those affected. Victims of sexual violence may experience both immediate and long term effects on their physical and mental health and wellbeing, as well as effects on their relationships with others. These impacts may be compounded in the context of domestic or family violence, or because of other intersecting disadvantage or discrimination.<sup>16</sup>

4.10 Research documenting the effects of sexual assault on the physical and mental health of victims has been summarised as follows:<sup>17</sup>

psychological and emotional effects [include]: intense fear of death and disassociation during the assault; anxiety and ongoing fears; feelings of low self-

<sup>10</sup> See Queensland Government Statistician's Office, *Crime Report, Queensland, 2017–18*, 92, Fig 59. Forty-four percent of Indigenous female victims, 34% of non-Indigenous female victims, 44% of Indigenous male victims and 30% of non-Indigenous male victims were in a family or domestic relationship with the offender.

<sup>11</sup> Nationally, see Australian Bureau of Statistics, *Recorded Crime-Victims, Australia* (Catalogue No 4510.0, 2018), Table 4. Data on the use of weapons in sexual offences is not reported in the Queensland Government Statistician's Office, *Crime Report, Queensland, 2017–18*.

<sup>12</sup> See *Queensland's Framework to address Sexual Violence* (2019) 6, and the references cited there. It has also been observed that a significant number of women in the custodial system have previously been the victim of sexual abuse: D Kilroy, 'Women in Prison in Australia' (Panel presentation at the Current Issues in Sentencing Conference, Canberra, 6–7 February 2016) 1.

<sup>13</sup> It has been reported that, in Queensland in 2017–18, police proceeded against 2660 offenders in respect of sexual offences: Queensland Government Statistician's Office, *Crime Report, Queensland, 2017–18*, Table 56. Police action against an offender includes arrest, summons, warrant or caution: Glossary ('police action type').

<sup>14</sup> Australian Institute of Family Studies and Victoria Police, 'Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners' (2017) 3.

<sup>15</sup> See further Chapter 8 below.

<sup>16</sup> See generally Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia: Continuing the national story' (2019) chs 4, 6. Some, but not all, sexual violence may result in immediate physical injury and more than half of victims experience anxiety or fear in the 12 months following the incident: at 17. Women who have experienced rape or sexual assault have also been found to have increased rates of depression and anxiety: Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia' (2018) 71.

<sup>17</sup> Z Morrison, A Quadara and C Boyd, "'Ripple effects" of sexual assault' (Issues No 7, Australian Centre for the Study of Sexual Assault, 2007) 1–2.

esteem, self-blame, and guilt; shock, confusion, and denial; self-harm, suicidal ideation and attempted suicide; and post-traumatic stress disorder (PTSD). Physical effects of sexual assault include: chronic diseases, headaches, eating disorders, gynaecological symptoms, irritable bowel syndrome, and damage to the urethra, vagina or anus. (notes omitted)

4.11 Victims may also face shame, stigma, and victim-blaming or other false preconceptions about sexual violence, which may present barriers to reporting and recovery.<sup>18</sup>

4.12 Additionally, ‘victims can suffer “secondary victimisation” through their experience of the response of the criminal justice system and health service providers’.<sup>19</sup> The criminal justice system is a complaints-based and adversarial system. It has been noted that the victim’s role as a key witness who is subject to questioning including, at trial, cross-examination can ‘re-trigger ... emotions and augment victim trauma’:<sup>20</sup>

We know that following a sexual assault, victims often feel scared, anxious, sad, angry, shameful, responsible and unconfident, and may experience ... Post Traumatic Stress Disorder (PTSD). ... there is an enormous potential for re-traumatisation of sexual assault victims through their involvement with the criminal justice system and its processes. Of particular concern is when victims testify and are cross-examined.

Studies outside of Australia have shown that, as a result of their contact with [the] legal system, survivors felt bad about themselves ..., depressed ..., violated ..., distrustful of others ..., and reluctant to seek further help. (notes omitted)

## Human rights: The protection of bodily integrity and sexual autonomy

4.13 International human rights law and commentary recognise sexual violence as a form of gender-based discrimination that interferes with the enjoyment of several human rights.<sup>21</sup>

4.14 Those rights variously include:<sup>22</sup>

(a) The right to life;

<sup>18</sup> See, eg, *Queensland’s Framework to address Sexual Violence* (2019) 13.

<sup>19</sup> Morrison, Quadara and Boyd, above n 17, 2.

<sup>20</sup> J Kennedy and P Easteal, ‘The Rights (Boxing) Ring: Australian Rape Trials’ in H Gavin and J Bent (eds), *Sex, Drugs and Rock & Roll: Psychological, Legal and Cultural Examination of Sex and Sexuality* (2010) 131–45, citing R Campbell, ‘What really happened? A validation study of rape survivors’ help-seeking experiences with the legal and medical systems’ (2005) 20 *Violence & Victims* 55, 61.

<sup>21</sup> Because sexual offences disproportionately affect females, they are often discussed in the context of the human rights of women. The same principles of non-discrimination nevertheless apply more broadly to all individuals: see, eg, Human Dignity Trust, ‘Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth’ (Equality & Justice Alliance, November 2019) [7.10].

<sup>22</sup> Committee on the Elimination of Discrimination against Women, *General recommendation No 19: Violence against women*, UN Doc A/47/38 (1993) [7].

These rights are principally contained in the ICCPR: see *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 16 December 1966, arts 6(1), 7, 9, 11, 16, 26. They are also reflected in the *Convention on the Rights of the Child*, GA Res 44/25, 20 November 1989, arts 2, 6, 37; and the *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 24 January 2007, arts 10, 12, 14, 15.

- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;

...

- (d) The right to liberty and security of person; [and]

- (e) The right to equal protection under the law [including equal and effective protection against discrimination];

...

4.15 Underlying those rights are the core principles of substantive equality and respect for the inherent dignity of every individual.<sup>23</sup> In the present context, sexual violence is typically characterised as an infringement of the individual's bodily integrity and sexual autonomy. These are complex concepts, but some general principles can be identified.

4.16 Bodily integrity refers to an individual's freedom from physical interference; that is, 'the right not to have your body touched or your body interfered with without your consent'.<sup>24</sup> It has been taken to include 'freedom of movement, respect for bodily boundaries, and opportunities for sexual satisfaction and reproductive choice'. It may also refer to 'the person's imaginings and understandings of her or his body, its limits and characteristics'.<sup>25</sup>

4.17 Sexual autonomy is a related but distinct concept. It is concerned with the exercise of free choice, and is said to have two components.<sup>26</sup> The first is the freedom to decide what sexual acts one engages in, and with whom. It concerns the freedom to pursue the sexual life of one's own choosing. The second is the freedom *not* to engage in sexual activity, that is, to refuse to engage in sexual activity with any person at any time, with or without a reason. It concerns the freedom *not* to be subjected to others' sexual acts.<sup>27</sup>

4.18 Relevantly, the second component of sexual autonomy has been explained in this way:<sup>28</sup>

The importance of ... sexual autonomy stems from the fact that sexuality involves the body: to exercise autonomy over what happens to one's body is considered particularly important. ...

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<sup>23</sup> See, eg, Human Dignity Trust, above n 21, [6.6]. See generally *Universal Declaration of Human Rights*, GA Res 217A (III), 10 December 1948.

<sup>24</sup> J Herring and J Wall, 'The nature and significance of the right to bodily integrity' (2017) 76(3) *Cambridge Law Journal* 566, 568.

<sup>25</sup> M Patosalmi, 'Bodily Integrity and Conceptions of Subjectivity' (2009) 24(2) *Hypatia* 125, 125–6, referring to the philosophies of M Nussbaum and D Cornell, respectively.

<sup>26</sup> K Grewal, 'The Protection of Sexual Autonomy under International Criminal Law' (2012) 10 *Journal of International Criminal Justice* 373, 386.

<sup>27</sup> See *ibid* 386; T Hörnle, 'Rape as non-consensual sex' in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (2018) 235, 236; and S Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26 *New Zealand Universities Law Review* 614, 621.

<sup>28</sup> Hörnle, above n 27, 236–7.

[However] ... another aspect needs to be emphasized: disregard of a person's sexual autonomy is also disregard for this person's human dignity. ... Performing a sexual act using a non-consenting person's body or forcing a person to act in a sexual way means to humiliate this person in a substantial way ...

4.19 Some writers have criticised the concept of sexual autonomy. It has been argued, for example, that, if narrowly understood, it is 'overly individualistic and removed from social context'. Instead, a 'relational and embodied' notion of 'sexual integrity' which takes account of the whole person is preferred.<sup>29</sup> As the passage quoted in the paragraph above makes clear, sexual autonomy involves more than just bodily integrity.

4.20 Consistently with this, the United Nations Committee on the Elimination of Discrimination Against Women observes that State parties should:<sup>30</sup>

Ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes ... is based on the lack of freely given consent and takes into account coercive circumstances.

4.21 That Committee also observes that the implementation of such measures should be 'centred around the victim/survivor, acknowledging women as rights holders and promoting their agency and autonomy'.<sup>31</sup>

4.22 The *Handbook for Legislation on Violence Against Women*, from the United Nations' organisation for gender equality, similarly advises that:<sup>32</sup>

Legislation should ... [d]efine sexual assault as a violation of bodily integrity and sexual autonomy; [and should] minimize secondary victimization of the complainant/survivor ...

4.23 Commentators have also identified, as 'core principles for a good practice sexual offences law' based on human rights, that:<sup>33</sup>

[S]exual offences laws must be non-discriminatory, must protect an individual from harm, and must respect their personal agency and bodily integrity.

<sup>29</sup> Croskery-Hewitt, above n 27, 621, citing, eg, N Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 113, 118, 120; and S Cowan, 'Choosing Freely: Theoretically Reframing the Concept of Consent' in R Hunter and S Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, 2007) 91, 97. See also S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010) [11.65].

<sup>30</sup> Committee on the Elimination of Discrimination against Women, *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, UN Doc CEDAW/C/GC/35 (14 July 2017) [29](e).

<sup>31</sup> Ibid [28].

<sup>32</sup> UN Women, *Handbook for Legislation on Violence Against Women* (2012) [3.4.3.1]. The Handbook is intended to provide detailed guidance for the adoption and implementation of legislation 'which prevents violence against women, punishes perpetrators, and ensures the rights of survivors': at 1.

See also, eg, Human Dignity Trust, above n 21, Fig 4 [3](a): rape and sexual assault 'should be categorised as a crime of power and violence against the physical and mental integrity, and sexual autonomy, of the victim'.

<sup>33</sup> Human Dignity Trust, above n 21, [6.7].

4.24 In Queensland, the *Human Rights Act 2019* relevantly gives statutory expression to the following rights:<sup>34</sup>

- the right to enjoyment of human rights without discrimination, and to equal protection of the law without discrimination;
- the right to equal and effective protection against discrimination;
- the right to life;
- freedom from torture and cruel, inhuman or degrading treatment; and
- the right to liberty and security.

4.25 That Act aims to protect and promote human rights by stating the human rights Parliament specifically seeks to protect and promote, requiring public entities to act and make decisions in a way that is compatible with human rights, and requiring human rights to be considered as part of the passage of legislation through Parliament and in the judicial interpretation of legislation.<sup>35</sup>

4.26 Consistently with international human rights law, the Act recognises that human rights are not absolute. They may be ‘subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.<sup>36</sup> The factors that may be relevant in deciding whether a limit is reasonable as justified are:<sup>37</sup>

- (a) the nature of the human right;
- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- (e) the importance of the purpose of the limitation;
- (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- (g) the balance between the matters mentioned in paragraphs (e) and (f).

<sup>34</sup> *Human Rights Act 2019* (Qld) ss 15(2)–(4), 16, 17, 29(1). These are drawn from the ICCPR: see Explanatory Notes, *Human Rights Bill 2018* (Qld) 3–4.

<sup>35</sup> See *Human Rights Act 2019* (Qld) ss 3(a), 4(b)–(h). The Act also provides a mechanism for dealing with human rights complaints: s 4(i)–(j). The other main objects of the Act are to help build a culture in the Queensland public sector that respects and promotes human rights and to help promote a dialogue about the nature, meaning and scope of human rights: s 3(b)–(c).

<sup>36</sup> *Human Rights Act 2019* (Qld) s 13(1).

<sup>37</sup> *Human Rights Act 2019* (Qld) s 13(2).

## Human rights: The criminal justice process

4.27 Many important principles underpin the criminal justice process. They form the basis for safeguards against arbitrary punishment and wrongful or unsafe conviction. They are given expression in certain rights of defendants which are recognised under international human rights law, as well as throughout the common law and in relevant statutes.

4.28 Those rights relevantly include:<sup>38</sup>

- the right to liberty and security of person, including the right:
  - not to be deprived of liberty except on grounds and in accordance with procedures established by law; and
  - if arrested or detained on a criminal charge, to be brought to trial without unreasonable delay;
- the right to a fair and public hearing by a competent, independent and impartial tribunal established by law;
- the right to be presumed innocent until proved guilty according to law;
- the entitlement to certain minimum guarantees, including:
  - to examine, or have examined, witnesses against the person;
  - to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution; and
  - not to be compelled to testify against oneself or to confess guilt; and
- the right, if convicted of a criminal offence, to have the conviction and any sentence imposed reviewed by a higher court in accordance with law.

4.29 Those rights are also given statutory expression in Queensland's *Human Rights Act 2019*.<sup>39</sup>

4.30 Many of these matters are reflected in long-standing rules of law and practice that have developed under the common law to regulate the course of criminal proceedings. Primary among these is the defendant's right to a fair trial.<sup>40</sup>

<sup>38</sup> See *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 16 December 1966, arts 9, 14. They are also reflected in the *Convention on the Rights of the Child*, GA Res 44/25, 20 November 1989, arts 37(b), 40; and the *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 24 January 2007, arts 14(1)(b), (2).

<sup>39</sup> See *Human Rights Act 2019* (Qld) ss 29, 31, 32; Explanatory Notes, Human Rights Bill 2018 (Qld) 4. As to the purpose and general operation of that Act, see [4.25]–[4.26] above.  
See also, in more general terms, the fundamental legislative principles in the *Legislative Standards Act 1992* (Qld) s 4(3).

<sup>40</sup> See, eg, *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541–2 (Isaacs J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 56 (Deane J), 29 (Mason CJ).



**Fair trial**

4.31 The High Court has explained that it is not possible to define the attributes of a fair trial in a comprehensive way, and that what is required will depend on the circumstances of each case. In *Dietrich v The Queen*, Mason CJ and McHugh J explained the nature of the common law right in this way:<sup>41</sup>

*Right to a fair trial*

The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.<sup>42</sup> [At common law] the accused's right to a fair trial is more accurately expressed ... as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial ...<sup>43</sup> The right is manifested in rules of law and of practice designed to regulate the course of the trial. ...

There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice. However, various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial [including] Article 14 of the International Covenant on Civil and Political Rights ('the ICCPR'), to which instrument Australia is a party ... (notes omitted; notes added)

4.32 In the same case, Brennan J observed that fairness is measured against legal rules, not general community standards:<sup>44</sup>

the rhetoric that a trial must be fair before a conviction can properly be recorded is true only to the extent that unfairness leads to a miscarriage of justice. The legal question then is not whether a trial has been unfair according to community values but whether it is unfair in the sense that it has not taken place according to law. A miscarriage of justice may consist in a failure to adopt a lawful procedure which would have ensured fairness to an accused person or would have eliminated unfairness to him ...

<sup>41</sup> (1992) 177 CLR 292, 299–300.

<sup>42</sup> Citing *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 Gaudron J).

<sup>43</sup> Citing *Jago v District Court (NSW)* (1989) 168 CLR 23, 56–7 (Deane J). The High Court's statement preceded the enactment of the human rights statutes in the ACT, Victoria and Queensland which include the right to a fair trial. In *R v Griffin* [2007] ACTCA 6, the Court observed (at [4]) that:

It should be noted that s 21 *Human Rights Act 2004* (ACT) (HR Act) now is the source, under Territory law, of the right to a fair trial. The difference may be one of emphasis rather than of substance. It does, however, mean that there is now a positive right to a fair trial rather than the right not to be tried unfairly as the common law provides. It may be that would make a difference in some cases, though in this case it seems to us to lead to the same result.

See also, eg, *DPP v Mokbel (Orbital and Quills Ruling No 1)* [2010] VSC 331, [162] (Whelan J). In *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, Bell J (at 682) stated of the right to a fair trial that:

human rights and the common law are mutually reinforcing and the obligations arising under each are almost always co-extensive.

<sup>44</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 325.

### ***Presumption of innocence and onus of proof***

4.33 Related to a fair trial is the presumption of innocence and the prosecution's onus of proof. In *Momcilovic v The Queen*, French CJ described the presumption of innocence in these terms:<sup>45</sup>

The concept of the presumption of innocence is part of the common law of Australia, subject to its statutory qualification or displacement in particular cases. ... Its content, so far as it is relevant to this case, was concisely stated in *Howe v The Queen*:

The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption.

Its meaning and operation were described by Sir James Fitzjames Stephen, in words still relevant, as 'an emphatic caution against haste in coming to a conclusion adverse to a prisoner'. (notes omitted)

4.34 As an incident of the presumption of innocence, the prosecution bears the onus (or burden) of proof. For indictable offences, including rape and sexual assault, the prosecution must prove, beyond reasonable doubt, all the elements of the offence. Further, the prosecution must ordinarily disprove (or 'negative') any defence or excuse raised by the defendant or on the evidence.<sup>46</sup>

### ***Right to silence***

4.35 The prosecution's burden of proof forms part of the accusatorial character of criminal proceedings. That character is also closely related to the 'right to silence' and the common law privilege against self-incrimination.<sup>47</sup> As a majority of the High Court explained in *X7 v Australian Crime Commission*:<sup>48</sup>

It is accusatorial in the sense that an accused person is not called on to make any answer to an allegation of wrong-doing, or to any charge that is laid, until the prosecuting authorities have made available to the accused particulars of the evidence on which it is proposed to rely in proof of the accusation that is made. And even after that information has been provided, the accused person need say or do nothing more than enter a plea of guilty or not guilty to the charge. If the accused person chooses to plead not guilty at trial, he or she is entitled to put the prosecution to proof of the charge and, as part of that process, to test the strength of the evidence which the prosecution adduces at trial.

...

<sup>45</sup> (2011) 245 CLR 1, 51, citing *Howe v The Queen* (1980) 55 ALJR 5, 7; and JF Stephen, *A General View of the Criminal Law of England* (Macmillan, 2nd ed, 1890) 183. See also the often-cited statement of the principle in *Woolmington v Director of Public Prosecutions (UK)* [1935] AC 462, 481–2 (Viscount Sankey LC).

<sup>46</sup> The onus of proof is discussed further in Chapter 7 below.

<sup>47</sup> As to the privilege against self-incrimination, which may be limited by statute, see *Sorby v The Commonwealth* (1983) 152 CLR 281, 288 (Gibbs CJ); *Reid v Howard* (1995) 184 CLR 1, 11 (Toohey, Gaudron, McHugh and Gummow JJ).

<sup>48</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92, 136 (Hayne and Bell JJ; Kiefel J agreeing).

These features of the accusatorial system of criminal justice can be described as an accused having a 'right to silence'.

### ***Trial by jury***

4.36 Most trials for rape and sexual assault proceed before a jury.<sup>49</sup>

4.37 Within the tradition of the common law, the institution of trial by jury for serious offences is recognised as an important means by which to ensure a fair trial.<sup>50</sup>

Justice requires a fair trial according to law. Trial by jury is a time-honoured means of fulfilling that purpose. It has the inestimable advantage of involving the wider community in the judicial process.

4.38 Trial by jury is valued as a safeguard against the arbitrary exercise of authority, helping to ensure both the substance and appearance of an impartial hearing. As Deane J explained in *Brown v The Queen*:<sup>51</sup>

regardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community, at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment. That essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached. ...

4.39 Trial by jury has benefits both for defendants and the general public. Significantly, it is said to provide 'a measure of democratic participation in the administration of criminal law'.<sup>52</sup>

4.40 Jury verdicts are not infallible. However, the jury system allows verdicts to reflect the conscience of the community while guarding against 'uninhibited popular reaction':<sup>53</sup>

The jury is the means by which the people play a direct part in the application of the law. It is a contributory part. The interrelation between judge and jury, slowly and carefully worked out over several hundred years, secures that the verdict will not be demagogic; it will not be the simple uninhibited popular reaction. But it also secures that the law will not be applied in a way that affronts the conscience of the common man.

4.41 The jury is tasked with delivering a verdict in accordance with the law and on the basis only of the evidence led at the trial. Its role is to consider the evidence

<sup>49</sup> In relation to applications for trial by judge alone, see Criminal Code (Qld) pt 8 ch 62 div 9A.

<sup>50</sup> *Alqudsi v The Queen* (2016) 258 CLR 203, 208 (French CJ). See also, eg, *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J), 201–202 (Deane J); *Kingswell v The Queen* (1985) 159 CLR 264, 299–302 (Deane J). For indictable offences against federal laws, the right to trial by jury is guaranteed by s 80 of the *Australian Constitution*.

<sup>51</sup> (1986) 160 CLR 171, 202. Jurors are randomly selected: see especially *Jury Act 1995* (Qld) ss 25, 41.

<sup>52</sup> *Alqudsi v The Queen* (2016) 258 CLR 203, 256 (French CJ); and at 255.

<sup>53</sup> P Devlin, *The Judge* (Oxford University Press, 1979) 127, quoted in *Alqudsi v The Queen* (2016) 258 CLR 203, 255 (French CJ); and M Findlay et al, *Jury Management in New South Wales* (1994) 1. See also *Kingswell v The Queen* (1985) 159 CLR 264, 301–2 (Deane J).

dispassionately, apply the directions on the law given by the trial judge and return a verdict of guilty or not guilty.<sup>54</sup> Jury deliberations are confidential.<sup>55</sup>

4.42 Relevantly, the judge is to explain the law the jury is to apply and the issues it is to consider. Much of this is done in the judge's 'summing-up' to the jury<sup>56</sup> and is one of the ways in which a trial judge is to ensure a fair trial.

### **Balancing a fair trial with the interests of complainants and the community**

4.43 There has been some judicial recognition that the defendant's right to a fair trial should be balanced with the needs and interests of complainants and the community.

4.44 In general terms, the Victorian Supreme Court has noted that this arises from the criminal law's purpose in protecting society:<sup>57</sup>

the right to a fair trial is one aspect of the administration of criminal justice, whose principal objective is the protection of society. As was said by Lord Steyn in the House of Lords in *Attorney General's Reference (No 3 of 1999)*:

The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. (note omitted)

4.45 The Supreme Court of the Australian Capital Territory has also referred to the need to consider fairness to the community and the complainant, observing that:<sup>58</sup>

While the fairness to the community is important as is that to the complainant, obviously the fairness to the accused is of more significance because the accused is at greater risk and ultimately bears the burden [of conviction] at the end of the day.

... It is not a zero-sum game, it is not the position whereby fairness to the complainant reduces fairness to the accused—both can sit comfortably together.

<sup>54</sup> See generally *Jury Act 1995* (Qld) s 50; *Criminal Practice Rules 1999* (Qld) r 48. The jury must try to return a unanimous verdict; as to majority verdicts, see *Jury Act 1995* (Qld) s 59A.

<sup>55</sup> See *Jury Act 1995* (Qld) s 70.

<sup>56</sup> See *Criminal Code* (Qld) s 620(1); *Jury Act 1995* (Qld) s 51.

<sup>57</sup> *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300, 319 (Bell J), quoting *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118 (Lord Steyn).

<sup>58</sup> *R v WR* [2009] ACTSC 93, [32]–[33] (Refshauge J). That case concerned an application for adjournment of a pre-trial proceeding for pre-recording of the complainant's evidence and cross-examination by the defence under provisions introduced by the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT).

4.46 Lord Bingham noted the importance of minimising the ‘trauma’ of witnesses.<sup>59</sup>

The trial judge is, however, obliged to have regard not only to the need to ensure a fair trial for the defendant but also to the reasonable interests of other parties to the court process, in particular witnesses, and among witnesses particularly those who are obliged to relive by describing in the witness box an ordeal to which they say they have been subject. It is the clear duty of the trial judge to do everything he can, *consistently with giving the defendant a fair trial*, to minimise the trauma suffered by other participants. (emphasis added)

4.47 The interconnection between the rights of the community and the defendant is also recognised in the guidelines issued to prosecutors by the Director of Public Prosecutions in Queensland:<sup>60</sup>

The Director of Public Prosecutions represents the community. The community’s interest is that the guilty be brought to justice and that the innocent not be wrongly convicted.

### The criminalisation of rape and sexual assault

4.48 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.<sup>61</sup>

4.49 Rape and sexual assault are recognised as serious criminal offences. The wrongdoing that forms the basis of these offences is the violation of sexual autonomy, as indicated by absence of consent.<sup>62</sup> As the Home Office in the United Kingdom explained:<sup>63</sup>

The common feature of all these offences [is] that they are acts of sexual violation (whether or not they include any physical violence or force) which take place without the consent of the victim. Consent is the crucial issue for these offences because the lack of consent is the essence of the criminal behaviour. It is one individual forcing another to undergo an experience against their will. It is a violation of the victim’s autonomy and freedom to decide how and with whom she (or he) would want to share any kind of sexual experience.

4.50 In many offences, the criminal law prohibits behaviour on the basis that it harms another person. In the case of rape and sexual assault, physical injury may or may not be present, but the harm is not confined to physical harm. It is the

<sup>59</sup> *R v Brown* [1998] 2 Cr App R 364, 371, cited in *Lindsay v Health Care Complaints Commission* [2010] NSWCA 194, [175] (Sackville AJA; Giles and Young JJA agreeing); *R v Cumming* [2006] 2 NZLR 597, 612–13. Lord Bingham CJ’s observation was made in the context of the cross-examination of a witness by a self-represented defendant. See also Kennedy and Eastale, above n 20.

<sup>60</sup> Office of the Director of Public Prosecutions, *Director’s Guidelines* (30 June 2016) 1, made under *Director of Public Prosecutions Act 1984* (Qld) s 11(1)(a)(i).

<sup>61</sup> Bronitt and McSherry, above n 29, [3.05].

<sup>62</sup> See generally J Vidler, ‘Ostensible Consent and the Limits of Sexual Autonomy’ (2017) 17 *Macquarie Law Journal* 103, 110. See also the sources cited in nn 63 and 64 below.

<sup>63</sup> Home Office (United Kingdom), ‘Setting the Boundaries: Reforming the law on sex offences’ (Report, July 2000, vol 1) [2.1.1]. See also, eg, Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report No 209 (December 2007) [1.25]; ALRC and NSWLRC Joint Report on Family Violence, vol 1, 68: ‘protecting the sexual autonomy and freedom of choice of adults’ is a primary objective of sexual offences law.

non-consensual nature of the behaviour and the violation of sexual autonomy that motivate the intervention of the criminal law.<sup>64</sup>

4.51 Absence of consent is accordingly a central feature of rape and sexual assault offences in many jurisdictions, including in Australia. This contrasts with other legal definitions of rape and sexual assault which focus on force and coercion.

4.52 A positive standard of consent—where consent is not assumed but must be actively given—is reflected to varying degrees in the rape offences of many jurisdictions, including Canada, England, New Zealand and Australia.<sup>65</sup> This is also referred to, with differing degrees of emphasis, as an ‘affirmative’ or ‘communicative’ model of consent.<sup>66</sup> It has been contrasted with a ‘negative’ consent standard, where consent is assumed to exist, unless or until it is ‘taken away’.<sup>67</sup> The adoption of a positive consent standard has been described as:<sup>68</sup>

a positive evolution away from violence, physical resistance, force or ‘clear-verbal-no’ elements of consent (in the sense that, by not relying on these factors, it more precisely circumscribes the core wrong or harm of *sexual* assault ... (emphasis in original)

4.53 There is a vast amount of academic literature on the philosophy and theory of consent. It is a concept which plays a significant role across many domains of social life, including in sexual activity.

4.54 In many contexts, consent acts as ‘a criterion of legitimacy’, transforming an act or practice that might otherwise be impermissible into one that is permitted or authorised.<sup>69</sup> 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.<sup>70</sup>

4.55 Three main views about what constitutes consent are distinguished in the literature:<sup>71</sup>

- consent as a person’s subjective state of mind;

<sup>64</sup> See, eg, Hörnle, above n 27, 235–6, referring to the ‘harm principle’ of John Stuart Mill.

<sup>65</sup> See, eg, Criminal Code, RSC, 1985, c C-46 s 273.1; *Sexual Offences Act 2003* (UK) s 74; *Crimes Act 1961* (NZ) s 128; and see the jurisdictional comparative table in Appendix C below.

<sup>66</sup> See, eg, R Burgin, ‘Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform’ (2019) 59 *British Journal of Criminology* 296, 296, 302; Croskery-Hewitt, above n 27, 631.

<sup>67</sup> See, eg, Burgin, above n 66, 300–2.

<sup>68</sup> Vidler, above n 62, 110. See also Hörnle, above n 27, 237: ‘lack of coercion does not indicate that sexual acts are consensual’.

<sup>69</sup> 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 Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2010) 3, 4.

<sup>70</sup> Schnüriger, above n 69, 21–2.

<sup>71</sup> Ibid 21. See also Archard, above n 69, 176.

- consent as an objective and manifest act by the person, where there is no consent unless it is communicated in some way, whether verbally or non-verbally; and
- consent as both the subjective state of mind and the objective manifest act.

4.56 Some acts of consent are not recognised as being legally valid. Three conditions for valid consent are widely recognised:<sup>72</sup>

- the consenting person must be ‘competent’ to consent (that is, they must have the requisite capacity to consent);
- the consenting person must be ‘informed’ as to the nature of the matter to which they are consenting (that is, consent must not, for example, be obtained by fraud); and
- the consent must be free and voluntary (that is, it must not, for example, be coerced).

4.57 In practical terms, the criminal law recognises that consent to sexual activity is not always verbalised according to ‘set formalities’ but may be indicated by ‘conduct and implication’. This reflects the reality that consensual sexual activity concerns ‘conduct usually so intimate, individual and private’.<sup>73</sup>

4.58 In addition to asking whether consent has been given, and what constitutes consent, the criminal law also asks what the defendant *believed* about consent. The starting point is that the absence of consent makes the sexual act a criminal wrong. However, it does not necessarily follow that a person should be criminally responsible if they believed consent had been given.<sup>74</sup>

4.59 This is reflected in the availability in many jurisdictions of the excuse of mistake of fact. Such an excuse—which applies to other offences as well—reflects the general principle that ‘only a person who is considered “blameworthy” should be convicted of a crime’.<sup>75</sup> It harks back to the idea at common law that criminal responsibility depends on the person having had a guilty mind, or knowledge of the wrongfulness of the act.<sup>76</sup>

<sup>72</sup> See generally Schnüriger, above n 69, 22. See also Kleinig, above n 69, 5 ff.

<sup>73</sup> *DPP (NT) v WJI* (2004) 219 CLR 43, 75 (Kirby J), in relation to the Criminal Code (NT) ss 31, 32, 192(3). See also, eg, *R v Makary* [2019] 2 Qd R 528, 543 (Sofronoff P), quoted at [5.4] in Chapter 5 below.

<sup>74</sup> See generally Archard, above n 69, 178–9, in which it is observed that ‘[t]o insist that any false belief in consent is culpable would mean seeing rape as a strict liability offense’.

<sup>75</sup> Bronitt and McSherry, above n 29, [3.05]. Also at [3.270].

<sup>76</sup> See generally JC Smith and B Hogan, *Criminal Law* (Butterworths, 2nd ed, 1969) 129–31, 293–4. Code jurisdictions such as Queensland do not refer to ‘mens rea’ (guilty mind): see the discussion at [2.44] ff in Chapter 2 above.

## The purposes and limits of the criminal law

4.60 The criminal law has a long history of development, with many purposes. It has been said that its ultimate objective is the ‘protection of the community’ from criminal wrongs.<sup>77</sup>

4.61 The focus on wrongdoing that is harmful to the public is reflected in the investigation and prosecution of criminal offences by the State, rather than by individual complainants.

4.62 The purposes of the criminal law are often discussed in the context of sentencing convicted persons. In Queensland, sentencing purposes are set out in the *Penalties and Sentences Act 1992*, but developed initially under the common law.<sup>78</sup>

### 9 Sentencing guidelines

- (1) The only purposes for which sentences may be imposed on an offender are—
  - (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
  - (b) to provide conditions in the court’s order that the court considers will help the offender to be rehabilitated; or
  - (c) to deter the offender or other persons from committing the same or a similar offence; or
  - (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
  - (e) to protect the Queensland community from the offender; or
  - (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

...

4.63 The prominence given to these factors has tended to fluctuate over time, and will vary case by case, but each remains important.<sup>79</sup>

4.64 In *Ryan v The Queen*, McHugh J observed that:<sup>80</sup>

The established principles, recognising that punishment for crime serves a number of purposes, reflect competing factors and policies. They include the

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<sup>77</sup> LexisNexis Australia, *Halsbury’s Laws of Australia* [130-17000] (13 August 2018). This can include the violation of others’ rights: see T Hörnle, ‘Theories of Criminalization’ (2016) 10 *Criminal Law and Philosophy* 301.

<sup>78</sup> *Penalties and Sentences Act 1992* (Qld) s 9(1).

<sup>79</sup> See generally Westlaw AU, *The Laws of Australia* [12.1.10] (14 November 2014).

<sup>80</sup> (2001) 206 CLR 267, 282, citing *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476.



need to punish the offender, to protect society, to deter others and to rehabilitate and reform the offender.

4.65 In the same case, Kirby J highlighted the purpose of the criminal law in publicly denouncing and condemning wrongful conduct:<sup>81</sup>

A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'. (note omitted)

4.66 A central concern of the criminal law is therefore the punishment of wrongdoers and the deterrence of those who are tempted to commit such wrongs in the future.<sup>82</sup> It has been said, for example, that the criminal law is 'society's strongest form of official censure and punishment'.<sup>83</sup> This public censure is embodied in the conviction itself as well as the sentence, if any, that is imposed.<sup>84</sup>

4.67 It is good practice in drafting criminal legislation to 'label' and 'subdivide' offences so that they fairly represent distinctions between different kinds and degrees of criminal wrongdoing:<sup>85</sup>

one of the basic aims of the criminal law is to ensure a proportionate response to law-breaking, thereby assisting the law's educative or declaratory function in sustaining and reinforcing social standards. Fairness demands that offenders be labelled and punished in proportion to their wrongdoing; the label is important both for public communication and, within the criminal justice system, for deciding on appropriate maximum penalties, for evaluating previous convictions, for classification in prison, and so on. 'In fairness both to offenders and to others with a relevant interest, there is a need for offence labels to convey sufficient information ... to enable them to make fair and sensible decisions'. (note omitted)

4.68 There is some debate whether a proper purpose of the criminal law is not merely to reflect society's condemnation of wrongs and deter criminal conduct, but to change community behaviours and attitudes.

4.69 Human rights commentators have argued that good practice sexual offence laws have a role in changing social and cultural attitudes and behaviour:<sup>86</sup>

[L]aws, if they are non-discriminatory and enforced consistently and fairly, can play a vital role in protecting people equally, deterring people from committing

<sup>81</sup> Ibid 302, citing *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ).

<sup>82</sup> As to deterrence being the 'chief purpose' of the criminal law, see *Walden v Hensler* (1987) 163 CLR 561, 569 (Brennan J); *He Kaw Teh v The Queen* (1985) 157 CLR 523, 567, 588 (Brennan J).

<sup>83</sup> A Ashworth and J Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 17. Also at 31–4 as to the minimalist approach to the criminal law which recognises, among other things, that as the law's most coercive technique criminalisation should be a last resort.

<sup>84</sup> Ibid 18.

<sup>85</sup> Ibid 77, quoting J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217, 234. Also at 78–9.

<sup>86</sup> Human Dignity Trust, above n 21, [1.8].

offences, providing redress for those affected by violations, and eliminating stigma and abuse of vulnerable or marginalised groups. *They can also protect and guarantee fundamental human rights, and encourage shifts in attitude and behaviour at a societal and cultural level.* On the other hand, if laws are discriminatory or unfair, either on paper or in their application, they can cause harm to individuals, communities and whole societies, as well as to the rule of law itself. For example, a discriminatory rape law will deter victims/survivors from coming forward and reporting the crime. Discriminatory rules of evidence can re-traumatise victims/survivors and deny them access to justice while the perpetrator is not held to account. (emphasis added)

4.70 The ALRC and NSWLRC explained this in terms of a ‘process of feedback’ between the legal response and that of the community:<sup>87</sup>

On the one hand, community attitudes inform the legal system’s responses to sexual assault; on the other, the law—how it defines and responds to sexual assault—plays a key symbolic role in forming community perceptions of sexual violence. As such, the law is a critical mechanism through which understandings of appropriate sexual relationships—based on notions of autonomy and freedom of choice—can be fostered.

4.71 This is important not only for the community at large, but also for prospective defendants who are to be held accountable for breaches of the standards enshrined in criminal legislation.<sup>88</sup>

4.72 In relation to the definition of consent for sexual offences, those Commissions cautioned that ‘legislation alone is too blunt a tool to effectively inform community understandings, attitudes and beliefs about appropriate sexual interactions’, and that legislative reform should be ‘supported by community education’.<sup>89</sup>

4.73 The criminal law is not the only means for society to seek to reduce the incidence, and respond to the consequences, of sexual violence.<sup>90</sup> It has been observed that:<sup>91</sup>

A range of legal and non-legal measures is required in order to substantially reduce sexual violence. This need is particularly clear given the very small number of cases that come to the attention of the criminal justice system. The VLRC recognised this reality, noting that:

An adequate response to the harm of sexual assault must go beyond the criminal justice process and include other mechanisms for assisting people who have been sexually assaulted such as access to information, provision of counselling and support services ... and compensation. (note omitted)

<sup>87</sup> ALRC and NSWLRC Joint Report on Family Violence, vol 1, [24.95]. As to the ‘symbolic’ dimension of criminal law see also Bronitt and McSherry, above n 29, [11.85], [11.250].

<sup>88</sup> See further [4.77] below.

<sup>89</sup> ALRC and NSWLRC Joint Report on Family Violence, vol 1, [25.88].

<sup>90</sup> See, eg, Ashworth and Horder, above n 83, 16 [1.5].

<sup>91</sup> ALRC and NSWLRC Joint Report on Family Violence, vol 1, [24.94], citing VLRC, *Sexual Offences: Final Report* (2004) [1.53]. See also, eg, Bronitt and McSherry, above n 29, [11.85] in which it observed that ‘[t]here is an increasing awareness that an integrated or holistic approach to reform is required’.

4.74 Rape and sexual assault, as criminal offences, sit within a broader context of inter-related matters. As well as other laws<sup>92</sup> and the various aspects of the formal criminal justice system itself, this includes health services, other support services, and social, cultural and individual attitudes and practices regarding sexual activities. A change to the law in any one aspect can go only so far in addressing wider systemic issues and is only one of several measures that may be needed to effect change in society.<sup>93</sup>

4.75 For example, the Queensland Government's *Framework to address Sexual Violence* identifies a range of measures relating to prevention, support, accountability and justice, including school-based education and sexual health support strategies, health service strategies to support clients whose sexual safety may be at risk, targeted early intervention programs for youth in detention centres or on detention orders, perpetrator intervention programs for sexual offenders in prison, support services for victims and multi-agency service responses to sexual assault.<sup>94</sup>

### Clarity of the law

4.76 As a general principle, legislation should be 'unambiguous and drafted in a sufficiently clear and precise way'.<sup>95</sup> It has been noted in this regard that the community is 'the ultimate user of a law', and that effective communication of legislative rights and obligations is a key component of access to justice.<sup>96</sup>

4.77 In particular, the significant consequences of a conviction require clarity in provisions that impose criminal responsibility.<sup>97</sup> This applies no less in respect of sexual offences. As the Scottish Law Commission observed:<sup>98</sup>

Persons contemplating engaging in a particular form of sexual conduct should be able to know, or find out without difficulty, whether what they are intending to do is, or is not, legal.

4.78 It nevertheless remains a challenge for the criminal law to set clear ground rules about consent that address, in specific terms, the wide range of circumstances and scenarios, real and hypothetical, that potentially fall within the scope of rape and sexual assault. Given the plurality of views in the community about sexual interactions, and the inherently personal and intimate nature of such activities, the need for clarity also requires flexibility.

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<sup>92</sup> See, eg, the *Domestic and Family Violence Protection Act 2012* (Qld) at [2.43] in Chapter 2 above.

<sup>93</sup> See, eg, Human Dignity Trust, above n 21, [3.4]: 'laws, no matter how "good" they may be from a legal and human rights perspective, will not be effective without implementation and a range of complementary and interdependent legislative and non-legislative measures'.

<sup>94</sup> *Queensland's Framework to address Sexual Violence* (2019) 17, 19, 21.

<sup>95</sup> *Legislative Standards Act 1992* (Qld) s 4(3)(k).

<sup>96</sup> Office of Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook* (2008) [1.16.1].

<sup>97</sup> See, eg, *ibid* [2.16.6].

<sup>98</sup> Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, Discussion Paper No 131 (January 2006) [2.2]. See generally Home Office (United Kingdom), 'Setting the Boundaries: Reforming the law on sex offences' (Report, July 2000, vol 1) [0.8].

## CONCERNS RAISED

4.79 The Consultation Paper<sup>99</sup> noted concerns expressed by some members of the community that the definition of consent in section 348 and the excuse of mistake of fact in section 24 are outdated,<sup>100</sup> are out-of-step with reforms in other Australian jurisdictions, do not ‘reflect modern understandings and attitudes, especially towards women’,<sup>101</sup> and may give rise to ‘serious injustices’.<sup>102</sup>

4.80 Concern has been raised that giving evidence is ‘confronting’ and places the complainant in a position where they have to defend their own ‘credibility and behaviour’.<sup>103</sup>

4.81 It has also been suggested that the application of the excuse of mistake of fact in sexual assault cases may allow some defendants to rely on erroneous assumptions about sexual behaviour and the behaviour of women.<sup>104</sup>

4.82 More generally, it has been observed, in the context of the Government’s consultation on its *Framework to Address Sexual Violence*, that:<sup>105</sup>

for many people who had experienced sexual violence, the process of seeking justice was lengthy and traumatic ...

... Many victims and survivors highlighted that knowing the perpetrator had been held to account was important for their own healing, and [highlighted] the significant negative impact on their wellbeing and recovery when they did not feel justice had been achieved.

...

A range of concerns about the legislative framework under which sexual violence operates were raised, including around Queensland’s definition of consent, the use of the ‘mistake of fact’ excuse, issues relating to the burden of proof in cases, [and] penalties and sentencing for perpetrators ...

## SUBMISSIONS

4.83 In the Consultation Paper, the Commission sought submissions about the particular concerns or practical problems, if any, with the current definition of consent and excuse of mistake of fact in the context of rape and sexual assault. It also sought

<sup>99</sup> See QLRC Consultation Paper No 78 (2020) [67]–[73].

<sup>100</sup> Women’s Legal Service Qld, *Qld Rape Law Review Now* (10 July 2019) <<https://wlsq.org.au/qld.rape-law-review-now/>>.

<sup>101</sup> Women’s Legal Service Qld, Submission to the Legal Affairs and Community Safety Committee, Legislative Assembly, *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018* (2018) 7.

<sup>102</sup> J Crowe and B Lee, *Consent law in Queensland* <[www.consentlawqld.com](http://www.consentlawqld.com)>.

<sup>103</sup> Department of Child Safety, Youth and Women, ‘Sexual Violence Prevention: Consultation Summary’ (2019) 8.

<sup>104</sup> 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) *University of New South Wales Law Journal* 462, 471.

<sup>105</sup> Department of Child Safety, Youth and Women, ‘Sexual Violence Prevention: Consultation Summary’ (2019) 8.

submissions on the considerations and principles that should be taken into account in determining whether the definition or the excuse should be changed.<sup>106</sup>

### Concerns with the current provisions

4.84 Respondents were divided in their views as to whether the current provisions are problematic and in need of reform. The main points raised are summarised here.

#### *Factors relevant to consent and the excuse of mistake of fact*

4.85 Many respondents submitted that Queensland has a comprehensive and ‘progressive’ definition of consent ‘by world standards’.<sup>107</sup> They expressed the view, however, that this is ‘undermine[d] and contradict[ed]’ by the operation of the excuse of mistake of fact.<sup>108</sup> In a joint submission, an academic and an advocate submitted that:<sup>109</sup>

The efforts of the Queensland courts to appropriately define the notion of consent by excluding prejudicial or irrelevant social or contextual factors ... are undermined by the defendant’s ability to cite those factors as inducing or rationalising his mistaken belief as to consent.

4.86 Other respondents similarly expressed the view that the excuse of mistake of fact facilitates false preconceptions about rape and sexual assault by allowing consideration of factors relating to the complainant’s behaviour or condition, such as intoxication or absence of physical injury or resistance.<sup>110</sup>

4.87 Many respondents drew attention to the ‘freeze response’ that may be experienced by a victim of rape or sexual assault, submitting that the excuse of mistake of fact ‘makes it extremely difficult to secure convictions’ in such cases.<sup>111</sup> The Cairns Sexual Assault Service explained that the freeze response is a ‘well studied and documented trauma reaction of “shutting down” or “freezing” [that] is a biological mechanism known as “traumatic dissociation”’.

4.88 On the other hand, some respondents submitted that there are no difficulties with the operation of the existing provisions.<sup>112</sup> In their view, the ‘broad framework’ of section 348 and the requirement under section 24 for a defendant’s mistaken belief as to consent to be ‘reasonable’, means that the excuse of mistake of fact operates in a limited number of cases.<sup>113</sup>

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<sup>106</sup> QLRC Consultation Paper No 78 (2020) Q-1, Q-2.

<sup>107</sup> Eg, Submissions 5, 6, 7, 15, 17, 20, 24, 56.

<sup>108</sup> Eg, Submissions 5, 6, 7, 15, 17, 20, 56. Also, eg, Submission 23, 54, 70.

<sup>109</sup> Submission 23.

<sup>110</sup> Eg, Submissions 23, 25, 54, 70, 77, 79.

<sup>111</sup> Eg, Submissions 5, 6, 7, 15, 17, 20, 56. Also, eg, Submissions 23, 29.

<sup>112</sup> Eg, Submissions 69, 72.

<sup>113</sup> Submission 69. Also, eg, Submission 72.

4.89 Some respondents also observed that, in each case, it is a matter for the jury to decide.<sup>114</sup> In relation to cases that have been discussed in the media and in public debate, an academic submitted that:<sup>115</sup>

[W]e need to remember that ... properly instructed juries were not convinced beyond a reasonable doubt that there was not a mistake of fact in the matters before them. This is a corner stone of our justice system that must remain. ... The issue of sufficiency of evidence with which to rely on the defence is in reality what the legal system is designed to test. ... the jury are the ones who heard the totality of [the] evidence ...

4.90 Another respondent submitted that the existing law allows the jury in each case to take a 'proper consideration' of the facts and a 'common sense, flexible approach'.<sup>116</sup>

### ***Focus on the complainant's or defendant's conduct***

4.91 Some respondents submitted that the 'traditional focus of inquiry' in prosecutions of rape and sexual assault 'has placed too great an emphasis on the conduct of the complainant without considering the conduct of the defendant'.<sup>117</sup> It was submitted that the current law 'falls short of effectively and fairly distributing the responsibility' to ascertain consent.<sup>118</sup> Legal Aid Queensland, Family Services Division explained the concern that:

[T]he definition of consent in section 348 and mistake of fact excuse in section 24, as these sections are worded and interpreted, focus questioning and evidence on the conduct and behaviour of the complainant rather than the conduct and behaviour of the defendant. There has been an acknowledgement in legislative reforms to family law, domestic violence and child protection law that there should be a shift away from a survivor/victim approach to a perpetrator focus.

Trauma evidence from sexual assault complainants indicates that one of the reasons why sexual assault offences are unreported is a lack of confidence [in] the criminal justice system to provide redress. A shift in the legislation from [a] survivor/victim approach to a perpetrator approach may go some way towards addressing this perception.

### ***Protection of complainants' interests***

4.92 Some respondents submitted that the operation of the current laws on consent and mistake of fact have 'significant negative impacts' on the reporting and prosecution of rape and sexual assault.<sup>119</sup> Other respondents referred to the experience of victims noting, for example, that many victims withdraw their reports to police 'because the system places the onus ... on them and they are made to feel

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<sup>114</sup> Eg, Submissions 53, 69.

<sup>115</sup> Submission 53.

<sup>116</sup> Submission 69.

<sup>117</sup> Submission 57. Also, eg, Submissions 43, 49, 70.

<sup>118</sup> Submission 43. Also, eg, Submission 63.

<sup>119</sup> Eg, Submissions 25, 31, 47, 60, 74, 77, 79, 85.

they are the victimisers rather than victims'.<sup>120</sup> One respondent, a medical practitioner who works with male victims of rape and sexual assault, submitted that:<sup>121</sup>

Many people tell me that they feel as traumatized by the adversarial justice system as they did by the sexual assault. Individuals often don't feel heard or believed. They can't get to tell their story, they only get to answer questions and they certainly are vulnerable to attaching their value or sense of worth to the outcome [and] the penalty ...

4.93 Some respondents submitted in general terms that the current laws 'are not effective in advocating for victims of sexual assault or protecting the community from perpetrators'.<sup>122</sup>

4.94 The Bar Association of Queensland observed, in this regard, that many 'important safeguards' for the protection and assistance of complainants are in place in Queensland, including provisions 'to prohibit or significantly limit cross-examination' on certain matters. It also noted that an acquittal is not necessarily 'a verdict on the truthfulness of a complainant'.

### ***Reflection of community standards***

4.95 Several respondents submitted that the laws on consent should be changed to 'better reflect the modern understanding of the circumstances and facts surrounding sexual assault and rape', and to accord with community standards and values.<sup>123</sup> A youth violence prevention program submitted that the definition of consent:<sup>124</sup>

[D]oes not currently provide an affirmative definition of consent that is in line with community standards. ... Additionally, the use of the mistake of fact defence ... undermines community values of sexual respect, and voids perpetrator's responsibility [for] violent actions which traumatise victims.

4.96 On the other hand, some respondents expressed the view that the framing of the current law, and its case by case application, already accommodate community standards.<sup>125</sup> Legal Aid Queensland, Criminal Law Practice submitted, for example, that:

Where it is operative, the current provisions allow a jury to determine the facts and context of the actions having regard to all the circumstances in each case. [The wording of the current definition] ensures the trier of fact can apply the definition in section 348 in a flexible and meaningful way. They are not limited by prescriptive lists attempting to anticipate every concerning issue that may breach community standards. ... the current provisions provide a suitable framework

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<sup>120</sup> Submission 49. Also, eg, Submissions 12, 16, 46, 62.

<sup>121</sup> Submission 71.

<sup>122</sup> Submissions 46, 67, 74, 75. Also, eg, Submission 77.

<sup>123</sup> Submissions 47, 60, 74, 77. Also, eg, Submissions 29, 56, 63, 79, 84.

<sup>124</sup> Submission 63.

<sup>125</sup> Eg, Submissions 69, 72. Also, eg, Submission 86.

within which actions can be appropriately measured against community standards on a case by case basis.

4.97 Similarly, the Queensland Law Society expressed the view that:

[I]n practice, the wording of section 24 is flexible. It allows for the evolution of the application of the defence along *with* changing community expectations that is, circumstances in which a mistaken belief may have been considered reasonable by a previous generation of jurors, may no longer be considered to be reasonable. (emphasis in original)

### ***Education and promotion of social change***

4.98 Some respondents urged that the current provisions should be changed to educate the community and promote social change.<sup>126</sup> An academic submitted in this regard that the law should be ‘harnessed as a leverage point’ to ‘encourage shifts in attitude and behaviour at a societal and cultural level’.<sup>127</sup> Another respondent submitted that:<sup>128</sup>

Clear definitions of consent remove ambiguity of the issue and go towards establishing clear societal expectations ... of how sexual activities should be negotiated ...

4.99 On the other hand, it was submitted that legislative amendments ‘are not the appropriate vehicle to bring such change’, but that this is instead a matter for ‘broad public awareness and education campaign[s]’.<sup>129</sup> It was observed that legislation is:<sup>130</sup>

an important factor, though one among many in a constellation of intersecting legal, social, cultural, and other factors that inform how we understand sexual offences and consent.

Clearly, it is beyond the role of the Commission to address certain aspects of the systems that underpin the law and practices related to sexual offences ...

### ***Clarity in the law***

4.100 Some respondents submitted that the law should be amended to provide ‘a clearer definition of what consent is, and isn’t’.<sup>131</sup> An academic expressed the view that there is confusion about consent and reasonable belief as to consent:<sup>132</sup>

One particular theme that seems to make itself present in the public debate is the confusion over what is consent, and the extent to which someone can reasonably believe that they have [been given] consent, despite having no positive verbal agreement or an exceedingly clear or obvious non-verbal

<sup>126</sup> Eg, Submissions 49, 65A. Also, eg, Submissions 30, 70.

<sup>127</sup> Submission 65A, quoting Human Dignity Trust, above n 21, [1.8], set out at [4.69] above.

<sup>128</sup> Submission 70.

<sup>129</sup> Submission 69.

<sup>130</sup> Submission 65A. Also, eg, Submission 85.

<sup>131</sup> Submission 44. Also, eg, Submissions 25, 27, 39, 65A, 70.

<sup>132</sup> Submission 53. Also, eg, Submission 23 in relation to the excuse of mistake of fact.



indication of agreement. Here lies the crux of the matter. The issue of consent is blurry and opaque, in reality it should be clear and easily discernible.

4.101 Another respondent cautioned, however, that any changes to the law should 'not introduce more intricacies that could leave the state of the law more unclear and harder for juries to apply'.<sup>133</sup>

## Relevant considerations and principles

4.102 In addition to the matters mentioned above, respondents identified various principles and considerations that, in their view, should guide consideration of any amendments to the legislation.

## *Incidence and reporting of sexual violence*

4.103 Several submissions drew attention to the high incidence<sup>134</sup> and under-reporting (or barriers to reporting) of sexual violence.<sup>135</sup> Some respondents also referred to information published in the media about the numbers of sexual assaults reported to police that do not result in an arrest, summons, formal caution or other legal action.<sup>136</sup>

## *Other jurisdictions*

4.104 Some respondents made positive references to the approaches taken in other jurisdictions (either as to aspects of the definition of consent or the excuse of mistake of fact), including the Australian Capital Territory, Tasmania, Victoria and Canada.<sup>137</sup> In the context of mistake of fact, some respondents considered, for example, that the requirement in the Canadian legislation for the defendant to take 'reasonable steps' to ascertain consent should be followed in Queensland.<sup>138</sup>

4.105 Other respondents observed that there are significant differences between jurisdictions, particularly between the code and common law jurisdictions.<sup>139</sup> The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd submitted in this regard that:

<sup>133</sup> Submission 38.

<sup>134</sup> Eg, Submissions 34, 74.

<sup>135</sup> Eg, Submissions 16, 39, 70, 71, 74, 75, 85.

<sup>136</sup> Eg, Submission 49, referring to I Ting, N Scott and A Palmer, 'Rough Justice: How police are failing survivors of sexual assault cases' (ABC News, online, 3 February 2020) <<https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>>. That article presented information on investigations of sexual assaults reported to police in each Australian State and Territory. The data was collected from requests made to State crime statistics agencies and was then grouped by the reporters into five categories ('legal action', 'withdrawn', 'unsolved', 'unfounded' and 'no legal action'). Using those categories, the article reported, inter alia, that of the sexual assaults reported to police in Queensland in 2018, 42% were dealt with by 'legal action', 27% were 'withdrawn', 17% were 'unsolved' (including those where investigations could not be progressed) and 13% were 'unfounded'.

<sup>137</sup> Eg, Submissions 5, 14, 25, 32, 37, 43, 46.

<sup>138</sup> Eg, Submission 55.

<sup>139</sup> Eg, Submissions 38, 55, 69. See [2.44] ff in Chapter 2 above.

It is important that any reform remains consistent with the structure and logic of the Criminal Code as it operates in Queensland. ... Whether concepts from common law jurisdictions could or should be grafted onto our Code law also raises structural questions.

### ***Rights of women and the protection of sexual autonomy***

4.106 Several submissions referred to the rights of women as a central concern. The Queensland Human Rights Commission observed that particular rights of relevance in this context include the right to liberty and security of the person, the right to life and the right to equality, 'noting that victims of sexual assault are predominantly women'.

4.107 Respondents variously discussed or referred to the importance of sexual autonomy or freedom,<sup>140</sup> self-determination and sexual agency,<sup>141</sup> bodily autonomy or integrity,<sup>142</sup> and human dignity and personhood.<sup>143</sup>

4.108 One respondent submitted, for example, that '[t]he principles that should inform the law in this area include self-determination and sexual agency'.<sup>144</sup> Another respondent submitted that:<sup>145</sup>

The conception of rape as a deeply felt wrong against personhood, and an infringement of rights, provides a robust platform to consider human rights as the touchstone of analysis for law reform in this area.

4.109 The Queensland Human Rights Commission expressed support for 'the important purpose of rape and sexual assault laws to protect the individual rights of bodily integrity and human dignity', and observed that the focus of the legal concept of consent on free and voluntary agreement 'remains paramount'.

4.110 Another respondent submitted that the responsibility for the protection of women's sexual autonomy should be shared by all parties:<sup>146</sup>

Women should not be solely tasked with protecting or defending their autonomy. Rather, parties to sexual activity have a responsibility to ascertain one another's desires and ensure they are not acting in a way that ignores the other person's autonomy.

4.111 In their view, the 'moral blameworthiness of rape is best conceived ... as a failure to respect another person's autonomy', and that the 'normative aim' of consent

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<sup>140</sup> Eg, Submissions 37, 55.

<sup>141</sup> Eg, Submissions 54, 56.

<sup>142</sup> Eg, Submissions 57, 84.

<sup>143</sup> Eg, Submissions 43, 57, 65A.

<sup>144</sup> Submission 56.

<sup>145</sup> Submission 65A.

<sup>146</sup> Submission 43. A similar view was expressed in, eg, Submission 37.

laws should be to 'fairly distribute responsibility between sexual partners to communicate and ascertain consent':<sup>147</sup>

This means ensuring that the law does not place an undue burden on women to manifest clearly and unequivocally their lack of consent through 'verbal resistance', lest an indirect or hedged rejection provide a foundation for a 'reasonable belief in consent'. This approach recognises that all women are autonomous subjects and entitled to respect for that autonomy.

4.112 A member of the public similarly submitted that:<sup>148</sup>

The primary considerations and principles should be ... the fact that community standards no longer support the previously held views (both within society broadly and the judicial system) that the complainants somehow have responsibility for the sexual violence perpetrated against them ...

### ***Rights of the defendant and consistency with principles of the criminal law***

4.113 Other respondents referred to the importance of the rights of the defendant to a fair trial and other principles of the criminal justice system.<sup>149</sup> An academic submitted, for example, that:<sup>150</sup>

The principle of fairness in the rule of law is key. ... Principles of fairness in criminal justice include, for example, the right to silence, the presumption of innocence, the right to a fair trial and the right to a trial by jury for indictable offences.

4.114 The Queensland Law Society referred, in particular, to the presumption of innocence and the prosecution's onus of proof:

[The law] must not create criminals of people freely engaging in consensual sexual activity. A fundamental principle of our criminal justice system is that a conviction requires proof of guilt beyond reasonable doubt. It follows that people who might be innocent must not be convicted. This is a central tenet of our justice system. ...

The alternative ... would be to accept convictions of people who might be innocent. That would undermine public confidence in convictions, and therefore undermine public confidence in the criminal justice system as a whole.

4.115 Another respondent referred to the 'fundamental principle of our criminal law that a person cannot be made liable on the basis of a mistaken belief':<sup>151</sup>

As the Scottish Law Commission has noted, '... a person who makes a genuine mistake about the central feature of a crime cannot be said to have the necessary guilty mind for that crime'.

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<sup>147</sup> Submission 43.

<sup>148</sup> Submission 59.

<sup>149</sup> Eg, Submissions 38, 42, 57, 69, 72, 86.

<sup>150</sup> Submission 42.

<sup>151</sup> Submission 55, citing the Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report No 209 (December 2007) [3.71].

4.116 In their view, the question is whether that principle is adequately accommodated along with ‘the need to protect and promote female sexual freedom’.<sup>152</sup> Some other respondents expressed similar views.<sup>153</sup> The Women’s Legal Service Qld referred to:

Principles of access to justice for all—not just the defendant—including the operation of justice to include justice being available to victims, witnesses, the defendant and the community.

## THE COMMISSION’S APPROACH

4.117 The Commission’s starting point on the question of reform in this review is the protection of sexual autonomy.

4.118 The criminal law on consent should support this objective. It is desirable for the law to reflect a contemporary standard of what is required in relation to consent.

4.119 However, there are limits to what the criminal law is practically and properly able to achieve in terms of changing social practices. Sexual offences occur within a broad social context and raise complex issues that go beyond the criminal law on consent. Legislative amendment is only one means of addressing these issues.

4.120 A primary purpose of the criminal law in the present context is to punish serious breaches of sexual autonomy.

4.121 The Commission is mindful of the importance of the fundamental principles of a fair trial, including the presumption of innocence. A criminal conviction carries significant and serious consequences for the convicted person. It is necessary to balance those principles with the protection of complainants’ rights. Any changes to the legislation should be careful to avoid unnecessary or unjustified erosion of those principles.

4.122 The fundamental element in rape and sexual assault offences is the absence of consent of the complainant. In some circumstances, the defendant may have an honest and reasonable, albeit mistaken, belief that the complainant gave consent. A defendant in a rape and sexual assault case should, in principle, be afforded the excuse of mistake of fact.

4.123 Detailed examination of the existing law in this area does not generally reveal significant issues for reform to the definition of consent or the excuse of mistake of fact, as it applies to rape and sexual assault. The Commission does not recommend wholesale changes to those provisions. There is a risk that unnecessary amendments to the legislation might have unforeseen consequences for defendants, complainants or both.

4.124 One of the key strengths of the criminal law in Queensland is its combined certainty and flexibility. The Criminal Code sets out the general rules and the core elements of each offence and any excuses or defences. Their interpretation is permitted to develop on a case by case basis, having regard to the factual

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<sup>152</sup> Submission 55.

<sup>153</sup> Eg, Submissions 65A, 85.

circumstances of each case and prevailing community attitudes and standards. The jury system is also a significant part of this process.

4.125 This inherent flexibility allows the law to continue to develop over time, while retaining the core meaning contained in the terms of the Criminal Code.

4.126 The law regarding consent needs to be clear, for judges and juries as well as for the wider community. As a general aim, it is also desirable for the laws in Queensland to be reasonably consistent with those in other jurisdictions, taking into account fundamental differences between the common law and code jurisdictions (as well as non-substantive differences in language and drafting style).

4.127 Reforms should also, where possible, be informed by available empirical evidence.

4.128 Given the concerns raised in submissions about ambiguity in the current provisions and having regard to approaches in other jurisdictions, the Commission sees merit in amendments that aid in providing clarity to the existing provisions.

4.129 The Commission considers that the case law in Queensland has reached a settled position on a number of points raised in the submissions to this review, and that it is appropriate in some cases for this to be reflected in the words of the statute. This will add visibility and continuity to the current law. Accordingly, the amendments the Commission recommends in this Report are mainly declaratory of the existing law.

4.130 The following chapters consider specific issues relating to the definition of consent, the circumstances in which consent is deemed not to be given freely and voluntarily, the operation of the excuse of mistake of fact as to consent, and other related issues.



# Chapter 5

## Consent and affirmative consent

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## INTRODUCTION

5.1 This chapter considers issues relating to the definition of consent in section 348 of the Criminal Code, including affirmative consent, the application of the legislative definition of consent to the offence of sexual assault, and withdrawal of consent.

5.2 Chapter 6 below examines circumstances in which consent is not ‘freely and voluntarily’ given.

## THE CURRENT LAW OF CONSENT IN QUEENSLAND

5.3 For the purposes of Chapter 32 of the Criminal Code, section 348(1) defines ‘consent’ as ‘consent freely and voluntarily given by a person with the cognitive capacity to give the consent’. The section goes on to set out a non-exhaustive list of circumstances when ‘consent to an act is not freely and voluntarily given’.<sup>1</sup>

5.4 That definition of consent was discussed extensively by the President of the Queensland Court of Appeal in *R v Makary*.<sup>2</sup> The Court held that consent, as defined in section 348 of the Criminal Code for the purposes of the offence of rape in section 349, requires two elements:<sup>3</sup>

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)

5.5 In order to determine whether ‘consent’ as a state of mind existed, it is proper for the prosecutor to ask the complainant whether the complainant consented to the sexual intercourse on the occasion in question.<sup>4</sup> The same is true of sexual assault cases.<sup>5</sup>

5.6 As consent must be ‘given’:<sup>6</sup>

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<sup>1</sup> Criminal Code (Qld) s 348(2). Section 348 is set out in full at [2.15] in Chapter 2 above.

<sup>2</sup> [2019] 2 Qd R 528.

<sup>3</sup> *R v Makary* [2019] 2 Qd R 528, [49]–[50] (Sofronoff P; Bond J agreeing).

<sup>4</sup> *R v Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).

<sup>5</sup> *R v Sutton* [2008] QCA 249, [38] (Keane JA).

<sup>6</sup> *R v Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).



a complainant who at or before the time of sexual penetration fails by word or action to manifest [their] dissent is not in law thereby taken to have consented to it.

5.7 Accordingly, under the current law in Queensland, a person who does not say or do anything to communicate absence of consent to a sexual act is not, by reason only of that fact, to be taken to have consented to that act. This is qualified by the recognition that 'consent might be given in the most subtle ways ... evaluated against a pattern of past behaviour'.<sup>7</sup> Therefore, much will depend on the circumstances of the case. The current effect of section 348 is that 'an absence of objection is not the same as giving consent'.<sup>8</sup>

5.8 Whether consent was given is a question of fact in each case, depending on all the circumstances.

5.9 To the extent that the law in Queensland requires the 'giving' of consent and confirms that an absence of objection is not consent, the current definition of consent in section 348(1) has attributes of an 'affirmative consent model'.

## AFFIRMATIVE CONSENT

5.10 Some commentators have suggested that the law should adopt an 'affirmative consent' model. Definitions and descriptions of an 'affirmative consent' model vary. It is also sometimes referred to as a 'communicative' or 'positive' consent model.<sup>9</sup>

5.11 The concept of affirmative consent has been described in various ways and encompasses a number of features. Its underlying concern is the sexual autonomy of the parties, and their free and voluntary agreement to sexual activity.

5.12 In general terms, affirmative consent focuses on actively or positively communicated consent, in contrast to consent that is presumed. It acknowledges that consent can be given by words or actions, as long as those words or actions amount to a clear representation of a willingness to engage in the sexual activity. Some writers have described it, in simple terms, as a clear and unequivocal 'yes'.

5.13 Affirmative consent is also said to require a mutual decision or agreement by the parties involved in the sexual activity, rather than the idea of a complainant as a passive recipient of the defendant's sexual advances. Additional features are also highlighted:

- that each person involved in the sexual activity is responsible to ensure the consent of the other, by obtaining clear, expressed indications of consent;<sup>10</sup>

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<sup>7</sup> *R v Makary* [2019] 2 Qd R 528, [50] (Sofronoff P; Bond J agreeing).

<sup>8</sup> *Ibid* [70] (Sofronoff P; Bond J agreeing).

<sup>9</sup> See [4.52] in Chapter 4 above. There is some variation in the use, and meaning attributed to, those terms.

<sup>10</sup> J Monaghan and G Mason, 'Communicative Consent in New South Wales: Considering *Lazarus v R*' (2018) 43(2) *Alternative Law Journal* 96, 97; see also T Goldsworthy, 'Yes means yes: moving to a different model of consent for sexual interactions', *The Conversation* (online, 30 January 2018) <<https://theconversation.com/yes-means-yes-moving-to-a-different-model-of-consent-for-sexual-interactions-90630>>.

- that communication of consent is ongoing and is maintained or reaffirmed at each stage of the activity;<sup>11</sup> and
- that there is a shift in focus away from questions about whether a complainant physically resisted the sexual activity.<sup>12</sup>

5.14 One commentator has summarised the features of an affirmative consent model as follows:<sup>13</sup>

In contrast to the 'no means no' approach to sexual consent, an affirmative standard redefines consent in positive terms; consent is something one actively gives to another. Affirmative consent requires that a person demonstrates willingness to engage in a sexual act either verbally or through their actions. The onus is on the initiator of sex to take steps to ensure that the other party(ies) is consenting. Consent is ongoing and performative; indications of consent must be actively given before and during the sexual act. In this way, submission to the act without active, participatory agreement is not sufficient to demonstrate that consent was given. To ascertain consent, the individual seeking to engage in sexual acts with another must obtain clear, expressed indications of consent before engaging in the act(s). Failure to do so, may suggest that the sexual act(s) was not consensual. (notes omitted)

5.15 It has been argued, however, that 'moral and legal assessments are not identical'. There is a difference between 'virtue ethics and moral duties' which focus on ideal standards of behaviour, and the standards set by the criminal law which determine criminal responsibility.<sup>14</sup>

5.16 The practical dynamics of a consideration of affirmative consent and sexual assault were discussed by Justice L'Heureux-Dubé of the Supreme Court of Canada in *R v Park*.<sup>15</sup>

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 RD Wiener has observed ... :

[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.

<sup>11</sup> Monaghan and Mason, above n 10, 97; R Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59 *British Journal of Criminology* 296, 296.

<sup>12</sup> Burgin, above n 11, 302.

<sup>13</sup> Ibid, citing L Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217, S Schulhofer, 'The Feminist Challenge in Criminal Law' (1995) 143(6) *University of Pennsylvania Law Review* 2151, A Flynn and N Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167 and S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook, 3rd ed, 2010).

<sup>14</sup> T Hörnle, 'Rape as non-consensual sex' in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (2018) 235, 239.

<sup>15</sup> [1995] 2 SCR 836, 864–5, 869, quoting RD Wiener, 'Shifting the Communication Burden: A Meaningful Consent Standard in Rape' (1983) 6 *Harvard Women's Law Journal* 143, 147–9.

...

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 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 ...

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)

## Other jurisdictions

5.17 The definition of consent in Western Australia is in similar terms to that in Queensland.<sup>16</sup> Most other jurisdictions define consent using various combinations of the words 'free' and/or 'voluntary' and 'agreement' or 'agrees'.<sup>17</sup>

5.18 The Canadian legislation similarly defines consent using the term 'voluntary agreement'.<sup>18</sup> The legislation in the United Kingdom defines consent as arising when the complainant 'agrees by choice, and has the freedom and capacity to make that choice'.<sup>19</sup> It has been said of the United Kingdom definition that it 'is not a model of tight drafting', but:<sup>20</sup>

<sup>16</sup> Criminal Code (WA) s 319(2)(a).

<sup>17</sup> *Crimes Act 1900* (NSW) s 61HE(2) and *Criminal Law Consolidation Act 1935* (SA) s 46(2) each provide that a person consents to a sexual activity if the person 'freely and voluntarily agrees'; Criminal Code (NT) s 192(1) defines consent to mean 'free and voluntary agreement'; Criminal Code (Tas) s 2A(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.

<sup>18</sup> Criminal Code, RSC 1985, c C-46, s 273.1(1).

<sup>19</sup> *Sexual Offences Act 2003* (UK) s 74.

<sup>20</sup> A Cossins, 'Why Her Behaviour is Still on Trial: The Absences of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(4) *University of New South Wales Law Journal* 462, 468, quoting P Rook and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (Sweet & Maxwell, 5th ed, 2016) 4, 79.

was premised on the understanding that 'free agreement would assist in making it clear that absence of protest, resistance or injury does not necessarily mean the complainant consented'.

5.19 The legislation in Tasmania and Victoria requires also a positive representation of consent. In Victoria, the legislation defines consent as meaning 'free agreement'<sup>21</sup> and sets out a non-exhaustive list of circumstances in which a person does not consent:<sup>22</sup>

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

...

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

5.20 Tasmania includes a provision in similar terms.<sup>23</sup>

- (2) Without limiting the meaning of 'free agreement', and without limiting what may constitute 'free agreement' or 'not free agreement', a person does not freely agree to an act if the person—
  - (a) does not say or do anything to communicate consent; ...

5.21 Another aspect of the affirmative consent model is that steps ought to be taken by a defendant to ensure the complainant is consenting to the sexual act.

5.22 As discussed in Chapter 7 below, in the common law jurisdictions the question of whether a defendant took steps to ascertain the consent of the complainant is a matter relevant to an element of rape and sexual assault, which each require knowledge of absence of consent on the part of the defendant. In Queensland and the other code jurisdictions, where knowledge of absence of consent is not an element of the offences, the steps taken by a defendant to ascertain the consent of the complainant are relevant to whether the defendant acted under an honest and reasonable, but mistaken, belief that the complainant was consenting.<sup>24</sup>

## ISSUES FOR CONSIDERATION

5.23 In the Consultation Paper, the Commission sought submissions in relation to a number of matters concerning the definition of consent in section 348 of the Criminal Code including whether it accords with community expectations and standards about the meaning of consent. Specifically, the Commission sought

<sup>21</sup> *Crimes Act 1958* (Vic) s 36(1).

<sup>22</sup> *Crimes Act 1958* (Vic) s 36(2).

<sup>23</sup> Criminal Code (Tas) s 2A(2)(a).

<sup>24</sup> See further the discussion of the operation of the excuse of mistake of fact in Chapter 7 below. See also the discussion of the criminal framework in Australia at [2.44] ff in Chapter 2 above.

submissions on whether the definition of consent in section 348 of the Criminal Code should be amended, for example, to expressly require affirmative consent.<sup>25</sup>

## SUBMISSIONS

5.24 There were divergent views among respondents about whether the definition of consent should be changed to reflect, or better reflect, an affirmative model of consent.

### Submissions—support

5.25 A number of respondents submitted that, while the current definition of consent has aspects of being a communicative model it is undermined by the operation of the excuse of mistake of fact. In their view, the excuse of mistake of fact allows defendants to rely on false preconceptions to found an argument for a mistaken belief as to consent.<sup>26</sup> Some legal and academic respondents cited *R v Rope* as an example of acknowledgement by the court that factors that the Queensland law declines to treat as establishing consent, such as the absence of overt objection or resistance, are nevertheless relevant to the mistake of fact excuse. In that decision it was said:<sup>27</sup>

In particular the absence of objection, verbal or physical; the proximate potential assistance of a male friend who was not called on; and the lack of actual or threatened violence against the complainant which might have explained subjection on her part make it possible that the appellant did believe there was consent.

5.26 Some respondents submitted that the current operation of the law leads to practical unfairness as it places all responsibility on the complainant to communicate absence of consent. They submitted that it should be the responsibility of all parties involved in sexual activity to confirm that consent is present.<sup>28</sup>

5.27 Those respondents, and a number of other respondents, were therefore supportive of legislative amendment that creates a model of affirmative consent within the Criminal Code.<sup>29</sup>

5.28 While respondents referred to different legislative measures that could be adopted, they submitted that an affirmative consent model creates a level of shared responsibility in giving and ascertaining consent. One submitted that this would result in a shift in responsibility from the ‘woman’ thinking that she needs to ‘scream and

<sup>25</sup> QLRC Consultation Paper No 78 (2019) Q-3, Q-4. The Commission also sought submissions on how the definition should be amended, for example by expressly: including the word ‘agreement’; or providing that a person does not consent if the person does not say or do anything to indicate consent to the sexual act: QLRC Consultation Paper No 78 (2019) Q-5(a), Q-5(b).

<sup>26</sup> Eg, Submissions 5, 6, 7, 15, 17, 20, 23. Also, eg, Submissions 25, 54, 74, 79.

<sup>27</sup> Submission 23, citing *R v Rope* [2010] QCA 194, [57] (Chesterman CJ; de Jersey CJ and Fraser J agreeing). These respondents also referred to *R v Phillips* [2009] 2 Qd R 263, as an example where the availability of mistake of fact turned substantially on the question of whether the complainant struggled; and *R v Dunrobin* [2008] QCA 116 as a further illustration of the potential for passive compliance by the complainant following initial resistance to provide a basis for arguing the applicability of mistake of fact.

<sup>28</sup> Eg, Submissions 41, 43, 70.

<sup>29</sup> Eg, Submissions 9, 12, 14, 16, 18, 25, 29, 32, 37, 39, 41, 46, 47, 49, 50, 52, 53, 54, 56, 59, 60, 61, 63, 65A, 67, 70, 74, 75, 77, 78, 79, 84, 85.

shout' to 'men' understanding that they need to have informed consent and that they need to ask their sexual partner if they want to have sex.<sup>30</sup> Others submitted that, in the context of rape and sexual assault trials, this would shift the focus away from the behaviour of the complainant onto the behaviour of the defendant.<sup>31</sup> Some submitted that this would create greater clarity and equality in consent legislation and create a level of mutual respect.<sup>32</sup>

5.29 Several respondents submitted that sexual interactions occur in situations of power imbalance and therefore more must be done to protect complainants. An affirmative consent model, they submitted, would achieve this.<sup>33</sup>

5.30 The Women's Legal Service Qld supported the adoption of an affirmative consent model as it:

Would move away from normative understandings of sexual relationships predicated on male assertiveness and female acquiescence and the constraints of binary and traditional roles.

5.31 That respondent further submitted that:

[Change in the law will] result in a change in approach throughout the legal system and broader community. It will influence ... charging [of] defendants and will change the way that victims relate and believe in the legal system. It will also affect community understandings of their own behaviour, and people's legal obligations and rights.

## Submissions—opposition

5.32 Several legal and academic respondents submitted that the current definition presents no issues to warrant reform.<sup>34</sup> As expressed by Legal Aid Queensland, Criminal Law Practice:

Where it is operative, the current provisions allow a jury to determine the facts and context of the actions having regard to all the circumstances in each case. The use of the general phrase 'freely and voluntarily given' in conjunction with the non-exhaustive, broad list of circumstances ensures the trier of fact can apply the definition in section 348 in a flexible and meaningful way ... the current provisions provide a suitable framework within which actions can be appropriately measured against community standards on a case by case basis.

5.33 That respondent additionally submitted that the 'more appropriate way to bring about social change is through targeted community education'.

5.34 A number of respondents did not support the adoption of an affirmative consent model.<sup>35</sup> The Bar Association of Queensland and the Queensland Law

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<sup>30</sup> Submission 41.

<sup>31</sup> Eg, Submissions 41, 43, 70, 75.

<sup>32</sup> Eg, Submissions 25, 52, 53.

<sup>33</sup> Eg, Submissions 12, 16, 18, 29, 46, 56, 84.

<sup>34</sup> Eg, Submissions 69, 72, 73, 86.

<sup>35</sup> Eg, Submissions 22, 55, 69, 72, 73, 86.

Society made similar submissions as a basis for their respective opposition. As expressed by the Queensland Law Society:

The many and varied expressions of human sexuality, and the many and varied contexts in which sexual interactions take place, mean that assessments of whether consent was given are best made on a case by case basis on the evidence in each case. Prescriptive rules of general application are apt to lead to injustice.

5.35 The Queensland Council for Civil Liberties similarly noted that a legislative model that requires affirmative consent fails 'to adequately recognise the deep subjectivity and diversity of human sexual experience'.

5.36 That respondent submitted that creating an affirmative consent model would involve a practical reversal of the onus of proof. This, it was submitted, would particularly be the case if legislation were introduced requiring the person seeking to engage in sexual activity to take steps to ascertain consent.

5.37 Other respondents submitted that the law in Queensland already reflects, to a degree, an affirmative consent standard through interpretations adopted in case law and as a result there is no need to amend the Criminal Code.<sup>36</sup>

## THE COMMISSION'S VIEW

5.38 In the Commission's view, two significant aspects of the current law relating to the definition of consent reflect what has been variously described as an affirmative, communicative or positive consent model, namely:

- consent is a state of mind, but it must also be 'given' (that is, communicated); and
- mere failure to manifest an absence of consent by words or actions is not sufficient to prove that consent was given.

5.39 The current law requires consent to be communicated by the complainant. Mere silence and passivity at or before the time of a sexual act do not communicate consent. On a practical level, this may encourage the party initiating sexual contact to make positive efforts to ascertain consent.

5.40 Communication of consent may not, however, require direct words or actions. Attention has been drawn in this regard to Sofronoff P's statement in *R v Makary* that:<sup>37</sup>

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. (note omitted)

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<sup>36</sup> Eg, Submissions 69, 72.

<sup>37</sup> [2019] 2 Qd R 528, [50] (Sofronoff P; Bond J agreeing).

5.41 That statement might be seen to contradict communicative consent by construing silence as a positive statement of consent. However, it should be noted that Sofronoff P went on to qualify that statement, by adding that:<sup>38</sup>

[p]articularly 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.

5.42 This suggests that, in *R v Makary*, the President was doing nothing more than highlighting that, in the matrix of human interactions, communication is not always conducted in absolute terms but may nonetheless be clear. Social experience shows that a 'yes' or a 'no' can be delivered in many ways and understood. For example, as was the case in *R v Makary*, a refusal or a 'no' can take the form of delivering excuses accompanied by hesitation or pause. Although the complainant in that case did not manifest her dissent by saying 'no', her statements were regardless held to be express rejections of the sexual advances.<sup>39</sup>

5.43 The Commission recognises, however, that the existing aspects of an affirmative consent model may not be widely understood in the community. This is, in the Commission's view, partly a consequence of some of those matters being found in case law rather than in the express terms of the Criminal Code.

5.44 There is a perception that the current law has the following practical effect at a trial for rape or sexual assault—that the recipient of a sexual advance has a responsibility to manifest consent or absence of consent to the sexual act that is greater than the responsibility of the person making the advance to ascertain the recipient's consent.

5.45 The Commission's approach is premised on a person's sexual autonomy being a right or freedom that should be protected. Some complainants, in the circumstances that confront them, are less able than others to exercise their sexual autonomy. For example, they may be afraid that struggle or resistance will lead to injury or death, or they may be affected by paralysing effects of fear which inhibit the ability to shout, move or flee.<sup>40</sup>

5.46 A number of specific issues are considered below in relation to the amendment of the definition of consent in section 348 of the Criminal Code to give effect, or give better effect, to an affirmative consent model.

## CLEAR AND UNEQUIVOCAL 'YES'

5.47 This option would require consent to be communicated by a clear and unequivocal 'yes'.

5.48 A reform of this nature would be unique both in Australia and in other jurisdictions that have similar sexual assault provisions.

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<sup>38</sup> Ibid.

<sup>39</sup> [2019] 2 Qd R 528, [66].

<sup>40</sup> J Temkin, JM Gray and J Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13 *Feminist Criminology* 205, 211.



5.49 The NSWLRC has not proposed that the definition of consent be amended to require a clear and unequivocal 'yes'. The NSWLRC observed that the current definition in section 61HE(2) of the *Crimes Act 1961* (NSW), which provides that a person consents to a sexual activity if the person freely and voluntarily agrees to it, 'is generally well regarded and understood' and proposed that it be retained.<sup>41</sup>

## Submissions

5.50 Respondents who expressed support for this approach submitted that such a requirement would remove all ambiguity as to whether consent is given, with little effort required on the part of either party.<sup>42</sup>

5.51 Other respondents opposed to this approach submitted that it would have the effect of criminalising what would be regarded by many to be consenting sexual conduct and be an attempt to 'create ideal or perfect human beings'.<sup>43</sup>

5.52 Furthermore, some respondents suggested that an expectation of unequivocal communication, such as an outright 'no' or emphatic action of dissent, does not reflect how refusals are normally offered 'by way of palliatives and excuses accompanied by subtle signals, such as hesitations or pauses, that indicate a negative response'.<sup>44</sup>

## The Commission's view

5.53 The Commission does not consider it desirable, either as a matter of principle or from a practical standpoint, to amend section 348 of the Criminal Code to change the meaning of 'consent' to require a clear and unequivocal 'yes'. This formulation of an affirmative consent model departs from the traditional model of consent in the criminal law and is not part of the criminal law in any jurisdiction.

5.54 A requirement of unequivocal and express language or actions before there is consent in law presents difficulty. Such a model would reduce the means by which consent is given for the purposes of the law. It takes no account of variations in the dynamics of relationships.

5.55 A reform of this nature would be unlikely to produce any positive outcome in terms of shifting the focus at trial from the words or actions of the complainant to those of the defendant; it would still be necessary to consider whether and in what way the complainant gave an unequivocal and express 'yes'.

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<sup>41</sup> However, the NSWLRC did propose one amendment to state that consent must be present at the time of the sexual activity, which it noted is consistent with the common law: NSWLRC draft proposals [5.1]–[5.2], Proposal 5.1.

<sup>42</sup> Eg, Submission 53.

<sup>43</sup> Submission 55.

<sup>44</sup> Submission 43, citing S Hansen, R O'Byrne and M Rapley, 'Young Heterosexual Men's Use of the Miscommunication Model in explaining Acquaintance Rape' (2010) 7 *Sexuality Research and Social Policy* 46.

## ‘AGREEMENT’

### Introduction

5.56 Another option for reform aimed at giving effect to an affirmative consent model is to reword the definition of consent to include the words ‘agreement’ or ‘agrees’.

5.57 It has been suggested that a definition that uses the term ‘free and voluntary agreement’ reinforces ‘both positive and communicative understandings of consent’,<sup>45</sup> which are factors that underpin an affirmative consent model.

5.58 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 communicated. 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 state of willingness to engage in the sexual act for ‘consent’ and the ‘giving’ of the consent by representation through words or actions.<sup>46</sup> To this extent, the current definition of consent might be said to embody 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.

5.59 Further, it has been argued by some commentators that a change to legal definitions of consent to focus on ‘agreement’ may have a limited ability in practice to ‘bring about a desired cultural change in relation to community standards’,<sup>47</sup> or to remove considerations in rape trials of a complainant’s resistance or a defendant’s use of force.<sup>48</sup> The question of consent will continue to be a question of fact which requires consideration of all the circumstances, including the complainant’s actions.<sup>49</sup>

### Queensland

5.60 The current definition of consent in section 348(1) the Criminal Code does not include the word ‘agreement’. It defines consent as consent that is ‘freely and voluntarily given’.

### Other jurisdictions

5.61 The definition of consent in Western Australia is in similar terms to that in Queensland.<sup>50</sup> In contrast, most other Australian jurisdictions define consent using

<sup>45</sup> ALRC and NSWLRC Joint Report on Family Violence 1150.

<sup>46</sup> *R v Makary* [2019] 2 Qd R 528, [50] (Sofronoff P).

<sup>47</sup> Cossins, above n 20, 494, with reference to the position in New South Wales. Also at 470–71.

<sup>48</sup> Burgin, above n 11, 302 ff, with reference to the position in Victoria.

<sup>49</sup> See generally MCC Commentary 29, citing N Naffin, *An Inquiry into the Substantive Law of Rape* (Department of the Premier and Cabinet, South Australia, 1984) 26: ‘Court-room tactics, and therefore the experience of the victim, are unlikely to vary with semantic changes to the law’.

<sup>50</sup> Criminal Code (WA) s 319(2)(a).

various combinations of the words ‘free’ and/or ‘voluntary’ and ‘agreement’ or ‘agrees’.<sup>51</sup>

5.62 Some international jurisdictions, including Canada and the United Kingdom, also define consent as ‘voluntary agreement’,<sup>52</sup> or as arising when a person ‘agrees by choice, and has the freedom and capacity to make that choice’.<sup>53</sup>

5.63 Use of the word ‘agreement’ in defining consent was favoured by the MCCOC. In their view, this ‘emphasises ... that consent should be seen as a positive state of mind’.<sup>54</sup> They considered that defining consent in positive terms ‘properly reflects two objectives of sexual offences law; the protection of sexual autonomy and freedom of choice of adults’.<sup>55</sup>

5.64 The Taskforce on Women and the Criminal Code recommended that consent be defined in the Criminal Code ‘in a way that focuses on the need for a free and voluntary agreement’.<sup>56</sup>

### Submissions—support

5.65 A number of respondents expressed support for the use of the words ‘agreement’ or ‘agrees’ in legislation.<sup>57</sup>

5.66 Respondents variously submitted that the use of words such as ‘voluntary agreement’, ‘free agreement’ or ‘free and voluntary agreement’ would be consistent with an affirmative consent model.<sup>58</sup> Several respondents submitted that this would ‘clarify that consent requires positive communication for consent to be present’.<sup>59</sup> In this way, it was submitted, consent would be seen as something arrived at mutually between the parties involved in the sexual activity, as opposed to something that is given.<sup>60</sup> Another respondent submitted that the use of the term ‘agreement’:<sup>61</sup>

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51 See n 17 above.

52 Criminal Code, RSC 1985, c C-46, s 273.1(1).

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

54 MCC Commentary 43.

55 Ibid.

56 Taskforce Report 241, Rec 64.1. See also, eg, Human Dignity Trust, ‘Good Practice in Human Rights Complaint Sexual Offences Laws in the Commonwealth’ (Equity & Justice Alliance, November 2019) Fig 4 [4](b); and UN Women, *Handbook for Legislation on Violence Against Women* (2012) [3.4.3.1].

57 Eg, Submissions 32, 39, 60, 74, 75, 77, 79, 84, 85.

58 Eg, Submissions 25, 47, 67, 75, 77, 79, 84, 85.

59 Eg, Submissions 32, 74, 84, 85. Similarly, one respondent submitted that ‘the term agreement connotes that consent is a communicative act between parties, who agree to sexual conduct having both the freedom and autonomy to engage in that conduct’: Submission 78. Another respondent submitted that this would redefine consent as ‘a communication of permission rather than merely an internal state of mind’: Submission 37.

60 Eg, Submissions 39, 78, 84.

61 Submission 50.

implies specificity in relation to the type of act, who will participate in that act and when the act will take place. Thus, both or all parties are involved in creating the parameters of the sexual act.

## Submissions—opposition

5.67 Several respondents opposed the use of the term ‘agreement’, or similar variations of that term.

5.68 Legal Aid Queensland, Criminal Law Practice submitted that the addition of the word ‘agreement’ would ‘unnecessarily complicate the definition but effect limited change’. This respondent raised questions relating to the uncertainty of what the term ‘agreement’ means and how it would otherwise be defined. It also questioned how any definition would sit with defendants and/or complainants who have impairments.

5.69 Another respondent submitted that the concept of ‘free agreement’, which is used in the Tasmanian provision, is ambiguous and open to differing interpretations.<sup>62</sup> This respondent expressed concern that this ambiguity:

could potentially broaden the application of the criminal law to sexual activity in circumstances where a person is no longer entitled to infer that the other party was in fact consenting to the sexual activity. For example, where sexual activity between two adults proceeds without action or communication, but where consent is expressed after the fact, this post-fact consent would not overcome the ‘free agreement’ provisions due to the absence of action or communication during the time of the act.

5.70 Some respondents submitted that use of the word ‘agreement’ would add nothing to the present state of the law.<sup>63</sup> One respondent, an academic, submitted that:<sup>64</sup>

Nothing would be gained by substituting the words ‘freely and voluntarily agreed to’ for the words ‘freely and voluntarily given’ in s 348(1) ... in *R v Makary*, the [Queensland Court of Appeal] held that, because of the word ‘given’ in that sub-section ... consent will be valid only if it is communicated in some way by the complainant to the accused. There is therefore no point in substituting for that word (‘given’) language that would reinforce ‘both positive and communicative understandings of consent.’ Such understandings are already being reinforced.

5.71 Another respondent submitted that:<sup>65</sup>

[the] current provisions and interpretation allow for greater flexibility in the many and varied circumstances in which sexual conduct between individuals occur.

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<sup>62</sup> Submission 22.

<sup>63</sup> Eg, Submissions 73, 86.

<sup>64</sup> Submission 73, citing *R v Makary* [2019] 2 Qd R 528, [49]–[50] (Sofronoff P; Bond J agreeing).

<sup>65</sup> Submission 69. This respondent also submitted that the appropriate vehicle to bring about a clearer understanding in the community as to what amounts to consent is through a public awareness and education campaign.

## **The Commission's view**

5.72 The Commission does not recommend any amendment to the definition of consent in section 348(1) of the Criminal Code to incorporate the term 'agreement', or some variant of it.

5.73 One of the perceived benefits of such an amendment is that the terms 'agreement' or 'agrees' (in conjunction with other concepts such as free, voluntary and/or unequivocal) denote an exchange or communication, thus going some way towards implementing an affirmative consent model. Such a position is said to clarify that consent requires positive communication by both parties to any sexual activity. In this way, such a definition of consent would reflect mutuality and cause it to be an act of two-way communication and not simply a state of mind of the complainant.

5.74 Another significant benefit ascribed to an amendment to incorporate the terms 'agreement' or 'agrees' is that, by giving effect to an affirmative consent model, it would shift the focus of enquiry away from the complainant and their actions and onto the defendant and their actions.

5.75 However, the current definition of consent already reflects a communicative model in that the definition requires consent (as a state of mind) to be 'given' (that is, communicated) to the other person. The current position in this regard is clear and settled. The introduction of a new term like 'agreement' would not substantially change the operation of the law and may create uncertainty in interpretation.

5.76 In cases of rape and sexual assault, if the defendant does not deny penetration or the action constituting the assault, the primary issue will be whether the complainant gave consent. Absence of consent is proved by asking the complainant whether the complainant consented to the sexual act on the occasion in question.<sup>66</sup> This focus on the complainant's state of mind is the means by which control over sexual autonomy is respected. Any approach that shifts the focus away from the complainant's state of mind is undesirable.

5.77 On balance, the Commission is of the view that an amendment introducing the word 'agreement' or 'agrees' into the definition of consent in section 348 should not be made. Reform of this nature may introduce uncertainty as to the meaning of the definition. It remains the case that it is the complainant's consent that is relevant.

## **NOT SAYING OR DOING ANYTHING TO COMMUNICATE CONSENT OR ABSENCE OF CONSENT**

5.78 Another option for reform aimed at giving effect to an affirmative consent model is for the Criminal Code to stipulate that consent is not freely and voluntarily given if a person does not say or do anything to communicate consent.

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See [5.5] above.

## Queensland

5.79 Currently, the law in Queensland is that consent must be communicated by the making of some representation. This goes some way towards implementing an affirmative consent model.

5.80 The suggested reform, however, would take this a step further. If it were accepted by the trier of fact that the person did not say or do anything to communicate consent, the law would deem that there was no consent at or before the relevant time. This would mean that consent requires an act of positive and active communication, rather than allowing that, depending on the circumstances, consent might be communicated in more subtle or nuanced ways.<sup>67</sup>

## Other jurisdictions

5.81 A reform of this nature would be consistent with provisions in some other Australian and international jurisdictions.<sup>68</sup>

5.82 Both Tasmania and Victoria include provisions expressly stating that a complainant who does not say or do anything to indicate or communicate consent does not consent.<sup>69</sup>

5.83 The NSWLRC has proposed that the *Crimes Act 1900* (NSW) should be amended to provide that a person does not consent to a sexual activity if ‘the person does not do or say anything to communicate consent’.<sup>70</sup> It noted that this is consistent with the law in Tasmania and Victoria and ‘reflects the communicative model of consent’.<sup>71</sup> It also noted that this ‘would recognise, for example, that a person who “freezes” out of fear and is unable to communicate does not consent’.<sup>72</sup>

## Submissions—support

5.84 A number of respondents expressed support for an affirmative consent model that includes a provision that a person does not consent to a sexual activity if the person does not say or do anything to communicate consent.<sup>73</sup>

5.85 Respondents submitted that this approach provides clarity and strengthens affirmative consent by requiring that consensual sexual contact should only take

<sup>67</sup> See *R v Makary* [2019] 2 Qd R 528, [50] (Sofronoff P; Bond J agreeing), set out at [5.4] above.

<sup>68</sup> See also, eg, Human Dignity Trust, ‘Good Practice in Human Rights Complaint Sexual Offences Laws in the Commonwealth’ (Equality & Justice Alliance, November 2019) Fig 4 [4](c)–(d), in which it is observed that the ‘law should make clear that passivity or submission by the victim/survivor does not equal consent’, and the lack of physical resistance or physical injury is not, by reason only of that fact, to be regarded as indicating consent.

<sup>69</sup> Criminal Code (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l).

<sup>70</sup> NSWLRC draft proposals [2.5], Proposal 6.1.

<sup>71</sup> Ibid [6.8] and [6.9], noting that ‘consent is not just an internal state of mind, but a communicated state of mind. Consent must be given by one person to another’.

<sup>72</sup> Ibid [6.10].

<sup>73</sup> Eg, Submissions 16, 25, 37, 60, 61, 74, 75, 77, 84, 85.

place where there is communication and agreement between the parties rather than a mere absence of communicated disagreement. This is particularly so given that:<sup>74</sup>

There is consistent research that shows traumatic events, particularly instances of sexual assault and rape, can illicit an involuntary ‘freeze’ or immobility response to fear which prevents the victim from physically or verbally resisting the attacker. Studies dating back to 1993 show a consistent reporting of a ‘freeze’ response in at least 37 percent of sexual assault and rape survivors who were surveyed.

5.86 Another respondent submitted that this approach recognises that, in the face of rape or sexual assault, some complainants may not be able to assert their absence of consent for a multitude of reasons (emotional, psychological and economic), in particular where their physiological response is to freeze. In other words, it affords them protection when they are unable to protect themselves.<sup>75</sup>

5.87 It was submitted that the inclusion of a provision that a person does not consent to a sexual activity if the person does not say or do anything to communicate consent ‘would move away from normative understandings of sexual relationships predicated on male assertiveness and female acquiescence’.<sup>76</sup> It was also submitted that this would:<sup>77</sup>

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

## Submissions—opposition

5.88 Respondents who opposed an amendment of this kind submitted that it is unnecessary as it is already the law in Queensland that a person who does not say or do anything to communicate consent to a sexual act is not, by reason only of that fact, to be taken to have consented to that act,<sup>78</sup> and that ‘the jury will be directed accordingly’.<sup>79</sup> One respondent submitted that ‘silence will mean different things in different contexts’ and that the current broad provisions allow jurors to consider and interpret silence having regard to ‘all the circumstances of a particular case’.<sup>80</sup> Another respondent submitted that ‘silence may be a communication of consent, or

<sup>74</sup> Eg, Submissions 25, 74, 85, referring to J Heidt, B Marx and J Forsyth, ‘Tonic immobility and childhood sexual abuse: a preliminary report evaluating the sequela of rape-induced paralysis’ (2005) 43(9) *Behaviour Research and Therapy* 1157; G Galliano et al, ‘Victim reactions during rape/sexual assault: a preliminary study of immobility response and its correlates’ (1993) 8(1) *Journal of Interpersonal Violence* 109; A Moor et al, ‘Rape: A Trauma of Paralyzing Dehumanisation’ (2013) 22(10) *Journal of Aggression, Maltreatment and Trauma* 1051.

<sup>75</sup> Submission 65A.

<sup>76</sup> Submission 85.

<sup>77</sup> Submission 61.

<sup>78</sup> Eg, Submissions 69, 72, referring to *R v Makary* [2019] 2 Qd R 528 and *R v Shaw* [1996] 1 Qd R 641. See further [5.6]–[5.7], [5.79] above.

<sup>79</sup> Submission 69.

<sup>80</sup> Ibid. This respondent also submitted, more generally, that the current provisions operate in a way that ‘avoids unintended consequences that may come with attempting to overregulate and second guess human behaviour that is familiar to members of a jury’.

may not be, depending on the context', and that the law must not create criminals of people freely engaging in consensual sexual activity.<sup>81</sup>

5.89 One respondent submitted that the introduction of such an amendment would introduce confusion and ambiguity in that members of the community would not be entitled to infer, from the circumstances in which they found themselves, whether the other party to a consensual encounter was in fact consenting to the sexual act. In their view, this would in turn lead to a heightened risk of extensive cross-examination of the complainant in relation to how consent was communicated. This would likely increase focus on the complainant's conduct in order to assess whether the conduct amounted to communication of consent and, as a result, would undermine the objective of placing greater emphasis on the defendant's conduct.<sup>82</sup>

### **The Commission's view**

5.90 The law should not criminalise consensual sexual activity. Amending Chapter 32 of the Criminal Code to such an extent that it expressly provides that a person's consent is not freely and voluntarily given if 'a person does not say or do anything' to communicate consent may create unintended consequences. Relevant circumstances like the nature and duration of the relationship between the parties involved in the sexual activity and how that relationship might impact on the ways in which those parties might communicate may be given less weight by the trier of fact.

5.91 It is already the law that a complainant is not to be taken to give consent to a sexual act merely because of their failure to manifest an absence of consent by words or actions at or before the time of the act. The Commission recognises that this may not be clear to many legal stakeholders or the wider community. Stating this explicitly in the law would serve the valuable purpose of providing this clarity. In the present context, an amendment of this kind would assist judges to direct the jury as to what is the current law. Where the application of the Criminal Code, through the case law, has evolved, it is sometimes appropriate to amend the Criminal Code to reflect that position.

5.92 The Commission considers that a new subsection should be inserted in section 348 of the Criminal Code to provide that a person is not taken to give consent to an act only because, at or before the time of the relevant act, the person does not say or do anything to communicate that they do not consent to that act.

## **CONSENT AND SEXUAL ASSAULT**

### **The meaning of consent in the Criminal Code**

5.93 The offences of rape, assault with intent to commit rape and sexual assault are contained in Chapter 32 of the Criminal Code, in sections 349, 351(1) and 352(1) respectively. By section 347, consent in Chapter 32 has the meaning given to it in

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<sup>81</sup> Submission 72, noting that, for example, 'the couple in a long-established intimate relationship may trust each other to communicate when sexual conduct is unwanted' and referring to the statement in *R v Makary* [2019] 2 Qd R 528, [50] (Sofronoff P) that 'a representation [of consent] 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 of ways, or by nuance, evaluated against a pattern of past behaviour'.

<sup>82</sup> Submission 22.



section 348. However, the term ‘consent’ is not used in section 351 or section 352(1)(a).<sup>83</sup> Absence of consent is, however, an element of each of these offences. This is because assault is an element of each offence. For the purpose of the Criminal Code, ‘assault’ is defined in section 245 as occurring where a person applies force to another, directly or indirectly, without the consent of that other person.<sup>84</sup>

5.94 The Criminal Code does not contain a general definition of consent.<sup>85</sup>

5.95 The term ‘consent’ is used in Chapter 26 of the Criminal Code, which deals with ‘assaults and violence to the person generally’. Section 245 defines ‘assault’ for the purpose of the Criminal Code.<sup>86</sup> The relevant actions will constitute an assault if done by a defendant to a complainant without the complainant’s consent or with consent obtained by fraud. Consent as it applies in the definition of assault in section 245 is not further defined.

5.96 The term ‘consent’ is used in Chapter 22 of the Criminal Code, which provides for ‘offences against morality’.<sup>87</sup> Some offences in that chapter, such as the crime of incest, use the term consent without defining it.<sup>88</sup> Other offences in that chapter, such as the offence of distributing intimate images, use the term ‘consent’ and define it for the purpose of the offence.<sup>89</sup> The definitions used in those provisions are in the same terms as section 348(1), namely, ‘*consent* means consent freely and voluntarily given by a person with the cognitive capacity to give consent’. They do not contain exclusionary factors equivalent to those provided in section 348(2).

5.97 As a result of these different provisions in the Criminal Code and, in particular, the opening words of section 348(1)—‘[i]n this chapter’—the definition of consent in section 348 does not apply to a sexual assault under section 352(1)(a) or to an assault with intent to commit rape under section 351.

## How consent applies to sections 351 and 352

5.98 Section 352(1) provides two bases upon which the offence of sexual assault can be committed—either section 352(1)(a) (sexual assault) or section 352(1)(b) (procuring an act of gross indecency without the complainant’s consent).<sup>90</sup> The

<sup>83</sup> ‘Consent’ does not appear in s 352(1)(a) of the Criminal Code (Qld), under which a person who ‘unlawfully and indecently assaults another person’ is guilty of the crime of sexual assault. But see s 352(1)(b), which contains a form of the offence dealing with the procurement of another person without that person’s consent.

<sup>84</sup> See Criminal Code (Qld) s 246(1) which provides that an assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.

<sup>85</sup> Criminal Code (Qld) s 1 includes the following definition: ‘*consent*, for chapter 32, see section 348’.

<sup>86</sup> Section 245 is set out at [2.11] in Chapter 2 above.

<sup>87</sup> Criminal Code (Qld) s 207A defines various terms used in ch 22. It does not include a definition of consent.

<sup>88</sup> See Criminal Code (Qld) s 222. See also, eg, s 210(1)(a), (6) (Indecent treatment of children under 16).

<sup>89</sup> See Criminal Code (Qld) s 223. Consent is defined for that section in s 223(5). Section 223(2) further provides that, for s 223(1)(a), a child under the age of 16 years is incapable of giving consent. See also ss 227A(3) (Observations or recordings in breach of privacy), 227B(2) (Distributing prohibited visual recordings), 229A(5) (Threats to distribute intimate image or prohibited visual recording).

<sup>90</sup> Section 352 is set out at [2.8] in Chapter 2 above.

absence of a complainant's consent is relevant for both offences, but only one offence provision uses the term 'consent'.

5.99 As to section 352(1)(a), in *R v BAS*, it was said:<sup>91</sup>

Until the question was raised in the course of argument in this appeal, it seems to have been assumed that issues of consent and fraud in relation to the offence created by s 352(1)(a) arose under s 347 and s 348. In my judgment that assumption was incorrect. Section 352(1)(a) applies to any person who unlawfully and indecently assaults another person. The provision does not use the words 'consent' or 'fraud'. Its requirements are satisfied by the commission of an unlawful and indecent assault on another person. Section 348 provides an exclusive definition of the word 'consent', but the defined meaning is for 'consent' 'in this chapter'. The section does not purport to provide a definition for 'consent' when that word is used in other Chapters of the Code. It cannot be used to import concepts of consent and fraud into s 352(1)(a).

That conclusion is consistent with the structure of the Code. Chapter 26 defines assault, makes it unlawful unless authorised, justified or excused by law and sets out the circumstances of justification and excuse. It does so for the purposes of the Code generally and applies to a number of offences, scattered throughout the Code, of which assault is an element. The definition of assault (s 245) deals with the question of consent: consent (or more precisely, absence of consent) is an element of the definition. Of course, assault is not an element of rape; that offence has always had its own explication of the relevance of consent. Until the 2000 amendments came into force, the same was true of the offence of procuring a person to commit or witness an act of gross indecency. From its introduction into the Code in 1989 until 2000 that offence was co-located with indecent assault in s 337, originally under the heading 'Indecent assaults' and from 1997 under the heading 'Sexual assaults'. When both offences were relocated to Chapter 32 (s 352) that explication was deleted in favour of the definition provided for in that chapter (s 348). The ambit of the new definition was carefully limited. For example, it did not and does not extend to s 210(6) or s 216(5), notwithstanding the obvious similarities of subject matter. (notes omitted)

5.100 Accordingly—because the definition of consent in section 348 applies to the word 'consent' in Chapter 32, but section 352(1)(a) does not use that term—the definition in section 348 does not apply to that offence.

5.101 By the same reasoning, the definition in section 348 would not apply to the offence of assault with intent to commit rape in section 351(1).<sup>92</sup>

5.102 As to section 352(1)(b), in contrast, an element of the offence as stated in that section is that the relevant conduct occurred 'without the [complainant's] consent'. Accordingly, the definition of consent in section 348 applies to a sexual assault under that section.

<sup>91</sup> [2005] QCA 97 [51]–[52] (Fryberg J; Davies and McPherson JJA agreeing).

<sup>92</sup> Section 351(1) is set out at [2.13], n 16 in Chapter 2 above.

## Other jurisdictions

5.103 The other Australian jurisdictions' treatment of the issue of consent in their offence provisions for the equivalent of sexual assault may be divided into three categories:

- In the Australian Capital Territory,<sup>93</sup> New South Wales<sup>94</sup> and Victoria,<sup>95</sup> the sexual assault or indecent assault provisions expressly require that the actions are done without consent. Consent is defined and the definition applies to the offences.
- In South Australia<sup>96</sup>, Tasmania<sup>97</sup> and Western Australia,<sup>98</sup> the sexual assault or indecent assault provisions do not expressly provide that the assault occurs without consent. However, the definition of assault includes that the relevant action is done without consent.
- In the Northern Territory there are two offence provisions:
  - common assault with a circumstance of aggravation, which does not expressly provide that the assault must be without consent, but where the definition of assault provides for 'application of force to a person without his consent';<sup>99</sup> and
  - gross indecency without consent, which requires that the relevant action occurs without the consent of the complainant and for which consent is defined (including circumstances where a person does not consent).<sup>100</sup>

<sup>93</sup> See *Crimes Act 1900* (ACT) s 60 (Act of indecency without consent). The definition of consent for that provision (and the equivalent of rape in s 54) is found in s 67, which sets out a list of circumstances in which consent is negated but does not otherwise define consent.

<sup>94</sup> See *Crimes Act 1900* (NSW) ss 61KC (Sexual touching), 61J (Aggravated sexual assault). The definition of consent for those provisions (and the equivalent of rape in s 61I) is found in s 61HE, which includes a definition of consent and circumstances in which consent is negated.

<sup>95</sup> See *Crimes Act 1958* (Vic) ss 40 (Sexual assault), 41 (Sexual assault by compelling sexual touching), 42 (Assault with intent to commit a sexual offence). The definition of consent for those provisions (and the equivalent of rape in s 38) is found in s 36, which includes a definition of consent and circumstances in which a person does not consent. The definition of assault in s 31 does not refer to consent.

<sup>96</sup> See *Criminal Law Consolidation Act 1935* (SA) ss 20 (Assault), 56 (Indecent assault). Consent is not defined for those provisions. The definition of consent (and its vitiating factors) in s 46 applies to the offence of rape in s 48.

<sup>97</sup> See *Criminal Code* (Tas) ss 182 (Definition of assault), 127(1) (Indecent assault). Section 127 provides that consent may in some circumstances be a defence to a charge under that section (but not where the consenting person is under 17 years). The definition of consent (and circumstances in which a person does not freely agree) in s 2A applies to the Code unless a contrary intention appears.

<sup>98</sup> See *Criminal Code* (WA) ss 222 (Term used: assault), 323 (Indecent assault), 324 (Aggravated indecent assault). The definition of consent (and circumstances in which consent is not freely and voluntarily given) in s 319 applies to ch 31 (Sexual offences).

<sup>99</sup> See *Criminal Code* (NT) ss 187 (definition of 'assault'), 188(2)(k) (Common assault with a circumstance of aggravation).

<sup>100</sup> See *Criminal Code* (NT) s 192(4) (Gross indecency without consent). The definition of consent (and circumstances where a person does not consent) for that provision is found in s 192(1)–(2), which also applies to the equivalent of rape in s 192(3).

## Issue for consideration

5.104 In the Consultation Paper, the Commission did not ask a question specifically in relation to the application of the definition of consent in section 348 to section 351 and 352(1)(a), but sought submissions about what amendments, if any, should be made to the definition of consent in section 348.<sup>101</sup> In relation to the definition of consent in section 348 and section 352(1)(a), it was noted that:<sup>102</sup>

Strictly, [the definition] does not apply to the offence of sexual assault in section 352(1)(a) as that offence provision does not use the word 'consent'. However, the courts continue to recognise the useful formulation of the list of circumstances in section 348(2) which may be relevant when directing juries in relation to the phrase 'without the other person's consent' for the purposes of the sexual assault offence. (notes omitted)

## Submissions

5.105 A number of respondents submitted that the Criminal Code should expressly provide that the definition of consent in section 348 applies to the offence of sexual assault under section 352.<sup>103</sup>

5.106 The Queensland Law Society supported an amendment to apply the definition to sexual assault, 'to overcome the problem of statutory construction identified in *R v BAS*'.<sup>104</sup>

5.107 One respondent, an academic, submitted that:<sup>105</sup>

The definition of consent under s 348 of the Queensland Criminal Code should apply to s 352(1)(a) as well as s 349. There is no reason in principle for the meaning of consent to differ, depending on the precise nature and severity of sexual offending. This is currently the situation in Queensland, regarding consent to rape on the one hand, and consent to sexual assault on the other. The definition in s 348 is more complete and helpful than the definition of consent currently relevant under s 352(1)(a) (ie the meaning of consent as an element of assault under s 245 of the Queensland Criminal Code). This fact is acknowledged in the current trial directions relating to sexual assault in the Supreme and District Courts Criminal Directions Benchbook, which reference the definition of consent in s 348.

## The Commission's view

5.108 In the Commission's view, the definition of consent in section 348 of the Criminal Code should apply to an offence of sexual assault under section 352(1)(a).

<sup>101</sup> QLRC Consultation Paper No 78 (2019) Q-1, Q-5(d).

<sup>102</sup> QLRC Consultation Paper No 78 (2019) [27]. See generally *Criminal Law Amendment Act 2000* (Qld), discussed at [2.23] ff in Chapter 2 above. Among other things, that Act relocated the offences of sexual assault and assault with intent to commit rape into ch 32 of the Criminal Code (Qld).

<sup>103</sup> Eg, Submissions 24, 32, 47, 60, 74, 77, 79, 84.

<sup>104</sup> Submission 72, referring to *R v BAS* [2005] QCA 97.

<sup>105</sup> Submission 14. See Queensland Court, *Supreme and District Courts Criminal Directions Benchbook* [145] 'Indecent assault s 352'.

5.109 Equally, it should apply to an offence of assault with intent to commit rape under section 351(1).

5.110 This will remove any potential uncertainty and ensure consistency in the meaning of consent for Chapter 32 offences.

## WITHDRAWAL OF CONSENT

5.111 Offences of rape and sexual assault include, as a key element, that relevant conduct is done without consent. The protection of sexual autonomy requires that consent, once given, can be withdrawn.<sup>106</sup>

5.112 In Queensland, unlike some other Australian jurisdictions, section 348 of the Criminal Code does not include an express provision dealing with the withdrawal of consent. However, the offence of rape can arise from a point in time after any consent, initially given, has been withdrawn and the withdrawal has been communicated by the complainant. The same reasoning applies to offences of sexual assault.<sup>107</sup>

5.113 An example of an offence of rape arising from withdrawal of consent can be found in the decision of *R v OU*. There, the complainant gave evidence that she had consented to sexual intercourse with the defendant, but subsequently withdrew her consent by telling the defendant to stop because she was experiencing pain. The defendant persisted with sexual intercourse for some time after her withdrawal. He was convicted of the offence of rape.<sup>108</sup>

5.114 Another example can be found in the decision of *R v Johnson*, where the case advanced was also that the complainant and defendant were engaged in sexual intercourse when the complainant withdrew her consent. The complainant gave evidence that she put her arms around the defendant's neck and told him to stop and that he was hurting her, but that he did not react and appeared to be 'in a zone'. The complainant then pushed and kicked the defendant and he fell onto the floor, at which point the sexual intercourse ended. The issues at trial included whether the complainant had withdrawn her consent, and at what point that occurred. The defendant was ultimately convicted of the offence of rape.<sup>109</sup>

<sup>106</sup> See [4.13] ff in Chapter 4 above as to relevant principles, including the protection of sexual autonomy. See further, as to consent, [5.13] above, which explains that affirmative consent requires that a decision be maintained or reaffirmed at every stage of the activity. See generally D Ross, 'Consent in Criminal Law' (2009) 32 *Australian Bar Review* 62, 62, citing D Beyleveld and R Brownsword, *Consent in the Law* (Hart Publishing, 2007) 23. Ross explains that 'where consent is necessary, as in a sexual act, it can be given, then withdrawn'.

<sup>107</sup> See [5.93] ff above as to the offence of sexual assault and consent.

<sup>108</sup> *R v OU* [2017] QCA 266, [12] (McMurdo JA).

<sup>109</sup> *R v Johnson* [2015] QCA 270, [22], [30], [56]–[58] (Morrison JA). The question of whether rape can arise in circumstances where consent has been given but subsequently withdrawn was also raised in *R v McLennan* [1999] 2 Qd R 297. In that matter, the decision reached on other grounds made it unnecessary to consider the question of withdrawal, but it was noted that there were earlier conflicting authorities: 306 (White J). Several of these authorities were from other jurisdictions, and one from Queensland was decided in 1973 so predates the existing law.

5.115 In *R v Makary*, the court highlighted that ‘the material time to consider whether consent has been given was the time at which penetration occurred’.<sup>110</sup>

## Other jurisdictions

5.116 Most Australian jurisdictions, including the Australian Capital Territory, New South Wales, South Australia, Tasmania, Victoria and Western Australia, define sexual intercourse’ to include ‘the continuation of sexual intercourse’.<sup>111</sup> This would encompass continuation after a person has withdrawn consent.<sup>112</sup>

5.117 In addition, although addressed in different ways, the legislation in South Australia and Victoria includes specific provisions about the withdrawal of consent.

5.118 In South Australia, the withdrawal of consent is expressly included in the elements of the offence of rape. A person is guilty of rape if that person ‘engages, or continues to engage, in sexual intercourse with another person who ... has withdrawn consent to the sexual intercourse’.<sup>113</sup>

5.119 In Victoria, the legislation defines ‘consent’ and details the circumstances in which a person does not consent to an act. Those circumstances include where ‘having given consent to the act, the person later withdraws consent to the act taking place or continuing’.<sup>114</sup>

5.120 The NSWLRC recently recommended that the definition of consent (which refers to ‘free and voluntary agreement’) should not be changed, but that the law should be amended to explicitly provide that:<sup>115</sup>

A person may, by words or conduct, withdraw consent to a sexual activity at any time before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.

<sup>110</sup> *R v Makary* [2019] 2 Qd R 528, 546 [68] (Sofronoff P; Bond J agreeing).

<sup>111</sup> *Crimes Act 1900* (ACT) s 50(1)(f); *Crimes Act 1900* (NSW) s 61HA(d); *Criminal Law Consolidation Act 1935* (SA) s 5(1) (definition of ‘sexual intercourse’); *Criminal Code* (Tas) s 2B(1)(d); *Crimes Act 1958* (Vic) s 35A (definition of ‘sexual penetration’); *Criminal Code* (WA) s 319(1) (definition of ‘to sexually penetrate’, (e)). In Victoria, the defined term is ‘sexual penetration’, which is framed in terms of person A introducing a body part or object into person B and includes where person A ‘continues to keep it there’: s 35A(1)(d)–(f), (2)(c)–(d). In Tasmania, the legislation refers to ‘the continuation of an act of penetration’.

The NSWLRC has recently recommended that a similar approach regarding continuation should also be taken in relation to the terms ‘sexual touching’ and ‘sexual act’: NSWLRC draft proposals [9.6]–[9.7], Proposal 9.3.

In the Northern Territory, the definition of ‘sexual intercourse’ states that sexual intercourse continues until the relevant body part or object is withdrawn, or until the relevant activity is ceased: *Criminal Code* (NT) s 1 (definition of ‘sexual intercourse’).

<sup>112</sup> See also South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1472 (MJ Atkinson, Attorney-General and Minister for Justice, Minister for Multicultural Affairs). There, it was stated that reference to the non-consensual continuation of sexual intercourse emphasised that the conduct is criminal.

<sup>113</sup> *Criminal Law Consolidation Act 1935* (SA) s 48(1)(b). See also ss 48(2) and 48A(1), which also apply in circumstances where a person has withdrawn consent to a sexual act.

<sup>114</sup> *Crimes Act 1958* (Vic) s 36(2)(m). Those circumstances also include where a person ‘is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act’: s 36(2)(f). See also, eg, Human Dignity Trust, ‘Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth’ (Equality & Justice Alliance, November 2019) Fig 4 [4](f) which suggests a similar approach.

<sup>115</sup> NSWLRC draft proposals [2.4], [2.13], [5.3]–[5.4], Proposal 5.2. See also NSWLRC, *Consent in Relation to Sexual Offences*, Consultation Paper No 21 (October 2018) [3.79] ff, [4.80] ff.

5.121 It was explained that this approach reflects the common law,<sup>116</sup> and is consistent with the reference to ‘continuation’ in the definition of the term ‘sexual intercourse’.<sup>117</sup>

5.122 The NSWLRC also explained that this section would ‘recognise that the withdrawal of consent must be communicated’. However, it stated that the ‘reference to withdrawal of consent “by words or conduct” would not require any specific form of words or actions’, and that a ‘person may, for example, indicate withdrawal of consent with body language even if consent was previously given verbally’.<sup>118</sup>

5.123 In Canada, legislation states that the circumstances in which ‘no consent is obtained’ include where ‘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’.<sup>119</sup>

5.124 In Scotland, legislation states that ‘consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct’, and that if conduct takes place or continues after that withdrawal of consent, then that conduct is taking place or continuing without consent.<sup>120</sup> The Scottish Law Commission recommended this legislation, stating that ‘the exercise of sexual autonomy involves the right to withdraw, at any time, consent previously given’.<sup>121</sup>

## Issue for consideration

5.125 In the Consultation Paper, the Commission sought submissions on whether section 348 of the Criminal Code should be amended to include an express provision

<sup>116</sup> NSWLRC draft proposals [5.3], citing *R v Aiken* (2005) 63 NSWLR 719, [12] (Studdert J), quoting *Question of Law Reserved on Acquittal (No 1 of 1993)* (1993) 59 SASR 214, 220 (King CJ).

<sup>117</sup> Ibid.

<sup>118</sup> Ibid [5.4].

<sup>119</sup> Criminal Code, RSC 1985, c C-46, s 273.1(2)(e).

<sup>120</sup> *Sexual Offences (Scotland) Act 2009* (Scot) s 15(3)–(4); see also s 38(7)–(8). Under that Act, penetration is a continuing act from entry until withdrawal, and where penetration is initially consented to but consent is withdrawn, ‘a continuing act from entry’ means a continuing act from the point of withdrawal: ss 1(2)–(3), 2(2)–(3), 3(3)–(4), 38(2).

<sup>121</sup> Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, December 2007) [2.85]. The Scottish Law Commission also observed that consent cannot be withdrawn after the act is complete, because in that scenario the other party cannot adapt their behaviour to the withdrawal of consent.

The Law Reform Commission of Hong Kong recently recommended that Hong Kong should adopt Scotland’s approach, except that the provisions should refer to ‘sexual conduct’. It stated:

We share the view that consent to sexual activity may be qualified or restricted and may be withdrawn at any time. The right to qualify, restrict or withdraw consent to sexual activity is a manifestation of the principle of sexual autonomy. Hence, there is a need for the legislation to provide for the scope and withdrawal of consent.

The Law Reform Commission of Hong Kong also recommended that penetration should be dealt with as in the Scottish legislation: The Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences*, Report (December 2019) [2.41]–[2.44], Rec 6 and [2.69]–[2.72], Rec 10.

Legislation in Ireland provides that ‘consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place’: *Criminal Law (Rape) (Amendment) Act 1990* (Irl) s 9(4), as amended by *Criminal Law (Sexual Offences) Act 2017* (Irl) s 48.

that a sexual act which continues after the withdrawal of consent is a sexual act that takes place without consent.<sup>122</sup>

### Submissions—support

5.126 Generally, respondents noted the importance of withdrawal of consent. The Women's Legal Service Qld observed:

If a participant cannot freely withdraw consent—and expect that the sexual activity will stop—then how can their consent be a free, voluntary agreement?

5.127 Other respondents stated that the consent must be ongoing or continuing throughout any sexual activity.<sup>123</sup>

5.128 A number of respondents submitted that consent to a sexual act can be withdrawn at any time and that this should be reflected in the Criminal Code. Several of those respondents submitted that withdrawal of consent should be 'accurately and specifically reflected' in legislation.<sup>124</sup>

5.129 Some respondents submitted more specifically that section 348 of the Criminal Code should include 'an express provision providing that consent can be withdrawn at any time',<sup>125</sup> or should be amended to expressly provide that a sexual act which continues after the withdrawal of consent is a sexual act that takes place without consent.<sup>126</sup> It was submitted that this approach is consistent with the current law in Queensland, but that an explicit statement of the position would make the law clear to juries and the public.<sup>127</sup>

5.130 Several other respondents submitted that section 348(2)—which presently provides a non-exhaustive list of circumstances in which a person's consent is not free and voluntary—should be expanded to include the circumstance where a person has withdrawn their consent to a sexual act.<sup>128</sup> One respondent submitted that it should be made clear, by amendment to section 348(2), 'that consent is not demonstrated by past behaviour', and must 'be continuing'.<sup>129</sup>

5.131 A few respondents addressed the communication of withdrawal of consent, suggesting that it could be verbal or non-verbal and could include non-participation

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<sup>122</sup> QLRC Consultation Paper No 78 (2019) Q-7.

<sup>123</sup> Eg, Submissions 37, 39, 65A.

<sup>124</sup> Eg, Submissions 12, 16, 18, 29, 31, 32, 39, 44, 46, 48A, 56, 62, 65A, 85. Also, eg, Submissions 3, 37, 41, 54, 55, 75.

<sup>125</sup> Eg, Submissions 25, 47, 60, 74, 77, 79, 84. It was observed that this approach would not be unique to Queensland, as it is included in the legislation in South Australia.

<sup>126</sup> Eg, Submissions 54, 73, 75, 85. Also, eg, Submission 61.

<sup>127</sup> Eg, Submissions 25, 85. Also, eg, Submission 73.

<sup>128</sup> Eg, Submissions 37, 65A.

<sup>129</sup> Submission 65A. Separately, one respondent submitted that if the law were amended to require a defendant to show the steps taken to ascertain consent to a sexual act, this would address circumstances involving withdrawal of consent: Submission 70.



in a sexual act.<sup>130</sup> One respondent submitted that the legislation should specify that consent can be withdrawn through words or actions, ‘to clarify that in some circumstances, a complainant may withdraw consent through body language alone, and this may be effective even where they had previously given verbal consent’.<sup>131</sup>

5.132 An academic, although supportive of an express provision to the effect that there is no consent where a sexual act continues after consent is withdrawn, considered the communication of withdrawal. This respondent referred to the decision of *R v Makary* and stated that ‘if consent is not just an internal state of mind, but a communicated state of mind, it seems logically to follow that withdrawal of consent, too, must be communicated before it is effective’. However, this notion is called into question by some scenarios; for example, where a complainant freezes and cannot communicate their unwillingness to continue a sexual act.<sup>132</sup>

### Submissions—opposition

5.133 The Queensland Law Society, the Bar Association of Queensland, and Legal Aid Queensland, Criminal Law Practice submitted that it is unnecessary for the law to expressly provide for the withdrawal of consent. They submitted that the law already imposes criminal responsibility in situations where consent is withdrawn, and that amending the law in the way suggested would not alter its current effect.<sup>133</sup>

5.134 One respondent submitted that under an affirmative consent model, consent is ongoing and must be continually sought and given, meaning that there is no need to withdraw consent. Further, a requirement for withdrawal could cause complications, such as a lack of clarity about when a person should express their withdrawal. However, this respondent also stated that ‘it is important to capture instances where sexual assault or rape occurs after other consensual acts’ and suggested that this could be achieved via a specific provision relevant to those circumstances.<sup>134</sup>

### The Commission’s view

5.135 Although there is no express provision dealing with the withdrawal of consent in Chapter 32 of the Criminal Code, the application of the law extends to circumstances where a person consents to a sexual act and then subsequently withdraws their consent. Where that occurs, the offence of rape or sexual assault can arise from the point at which consent is withdrawn. On that basis, it might be concluded that there is no need to amend the Criminal Code to make express provision for the withdrawal of consent.

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<sup>130</sup> Eg, Submissions 37, 48A, 75. Also, eg, Submission 29.

<sup>131</sup> Submission 37.

<sup>132</sup> Submission 73, referring to *R v Shaw* [1996] 1 Qd R 641. This respondent also referred to the NSWLRC draft proposals in relation to the withdrawal of consent: see [5.120]–[5.122] above.

<sup>133</sup> Cf Submission 73. This respondent submitted that s 348 of the Criminal Code (Qld) should expressly provide that there is no consent where a sexual act continues after a person withdraws consent, even though this is already the law in Queensland.

<sup>134</sup> Submission 50.

5.136 On the other hand, it is desirable that the provisions in Chapter 32 of the Criminal Code dealing with consent are clear and unambiguous. On balance, the Commission considers that the Criminal Code should be amended to expressly provide that if a sexual act is done or continues after consent is withdrawn, it occurs without consent.

### ***The express provision***

5.137 The Commission considers that the withdrawal of consent should be addressed expressly in a separate declaratory provision. This approach will most directly state the law about withdrawal of consent and will therefore best achieve the aim of providing clarity in the law.

5.138 Specifically, section 348 of the Criminal Code should be amended to include an additional subsection about withdrawal of consent, to the effect that, if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.

5.139 This proposed provision contemplates that a person can withdraw their consent to an act at any time before the act takes place or, if an act has begun and is continuing, during the act. The provision makes it express that where an act takes place or continues after the person withdraws consent, then the act takes place or continues without consent.

5.140 The ordinary meaning of the term ‘continue’ includes ‘to go forwards or onwards in any course or action’.<sup>135</sup> It is unnecessary to define the term ‘continue’ for the purposes of this provision.<sup>136</sup>

5.141 The proposed provision does not contemplate withdrawal of consent after an act has ended. That approach would be inconsistent with the position that consent must exist at the time of the relevant act and would place the other person in the position of being unable to respond to the withdrawal.

### ***Communication or expression of withdrawal***

5.142 As explained above, ‘consent’ is a state of mind, but must also be given, that is, by a representation through words or conduct.<sup>137</sup>

5.143 This understanding of consent has developed through case law. In particular, the Criminal Code does not include legislative requirements about how a person ‘gives’ their consent or how a representation is made. The Commission has not recommended including such requirements.

5.144 However, the Commission considers that the position regarding withdrawal of consent is different. For an offence to arise in these circumstances, consent must have initially been given to the other person. As a matter of fairness, it is necessary

<sup>135</sup> *Macquarie Dictionary* (online at 29 April 2020) ‘continue’.

<sup>136</sup> This is consistent with the principles of plain English drafting: see, eg, Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs*, ‘Clear meaning’ (14 February 2014) [6] ff.

<sup>137</sup> See, for more detail as to consent and the giving of consent, [5.4] ff above; *R v Makary* [2019] 2 Qd R 528, [49]–[50] (Sofronoff P; Bond J agreeing).

that the other person is made aware that consent is withdrawn and given the opportunity to respond to that withdrawal by ceasing to engage in the relevant act.

5.145 Further, for an offence prosecuted in these circumstances, it is necessary to be able to identify the point at which the complainant withdrew their consent and communicated that withdrawal and to prove that the defendant did not cease the relevant act.

5.146 For these reasons, the Commission considers that the provision about the withdrawal of consent should recognise that withdrawal must be communicated in some positive way. Accordingly, the Commission recommends that the provision should include withdrawal of consent ‘by words or conduct’.

5.147 The Commission recognises that if a person has ‘frozen’ partway through a consensual act they may be unable to communicate their withdrawal of consent. However, on balance and taking into account the previous considerations, the Commission has concluded that in the circumstances particular to a withdrawal of consent, communication of that withdrawal through words or conduct is necessary.

5.148 The Commission does not recommend that there be any requirements about the particular words or conduct a person uses to communicate a withdrawal of consent. A person may communicate a withdrawal of consent in the same way as they initially gave consent, or in some other way.<sup>138</sup> In each case, whether a person has given or withdrawn their consent will be a question of fact, having regard to all of the relevant circumstances.

## RECOMMENDATIONS

### **Not saying or doing anything to communicate consent**

**5-1 Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that a person is not taken to give consent to an act only because, at or before the time of the relevant act, the person does not say or do anything to communicate that they do not consent to that act.**

*[See Draft Bill cl 5, inserting new s 348(3)]*

### **The definition of consent and sexual assault**

**5-2 Chapter 32 of the Criminal Code should be amended to apply the definition of ‘consent’ in section 348 to the offences provided for under sections 351(1) (assault with intent to commit rape) and 352(1)(a) (sexual assault).**

*[See Draft Bill cl 3, 4, inserting new definition of ‘assault’ for ch 32]*

<sup>138</sup>

See also similar conclusions reached by the NSWLRC at [5.122] above.

**Withdrawal of consent**

- 5-3**     **Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that, if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.**

*[See Draft Bill cl 5, inserting new s 348(4)]*

## Chapter 6

# Circumstances when consent is not free and voluntary

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## INTRODUCTION

6.1 This chapter examines the circumstances in which consent is, under the current law, taken not to have been freely and voluntarily given by the complainant. It also considers whether any additional circumstances should be added to the existing provision in section 348(2) of the Criminal Code.

## THE CURRENT LAW

### Queensland

6.2 Consent is defined in section 348(1) of the Criminal Code to mean ‘consent freely and voluntarily given by a person with the cognitive capacity to give the consent’.<sup>1</sup> Without limiting that definition, section 348(2) sets out the following list of circumstances in which the complainant’s consent is not freely and voluntarily given:<sup>2</sup>

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.

6.3 The circumstances in section 348(2) relate to situations in which the complainant consented under a mistaken belief induced by the defendant or because of some deception or other wrongdoing in obtaining consent. They are expressed in wide and general terms and, as such, are capable of capturing a range of scenarios.

### Other jurisdictions

6.4 A list of circumstances ‘in which consent is irrebuttably defined to be absent’<sup>3</sup> is included in the MCC in the following terms:<sup>4</sup>

<sup>1</sup> Section 348 is set out in full at [2.15] in Chapter 2 above.

<sup>2</sup> The present form of s 348 was introduced by the *Criminal Law Amendment Act 2000* (Qld) in response to the recommendations in the Taskforce Report: see [2.23] ff in Chapter 2 above.

<sup>3</sup> MCC Commentary 51. See also, eg, Human Dignity Trust, ‘Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth’ (Equality & Justice Alliance, November 2019) Fig 4 [4](f), in which it is observed that the law should provide an inclusive list of broad circumstances in which consent cannot be given.

<sup>4</sup> MCC s 5.2.3(2). Section 5.2.3 includes the following note: ‘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’.

### 5.2.3 Consent

...

- (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).

6.5 The legislation in each of the Australian jurisdictions also includes a non-exhaustive list of circumstances in which consent is taken not to have been freely and/or voluntarily given or agreed<sup>5</sup> or is negated.<sup>6</sup> These are sometimes described as vitiating or negating factors.

6.6 In some jurisdictions, like Queensland, the circumstances are expressed in broad terms. In others, they are expressed in narrower terms, often to address specific factual scenarios that have arisen under the case law.<sup>7</sup>

6.7 The circumstances included in the legislation in other Australian jurisdictions differ as to both their degree of specificity and their language. In summary, they relate to the following:

- the application of force towards the complainant or another person;<sup>8</sup>
- fear of harm to the complainant or to another person or an animal;<sup>9</sup>
- the threat of harm to, or harassment or degradation of, the complainant or another person;<sup>10</sup>

<sup>5</sup> See *Crimes Act 1900* (NSW) s 61HE (5)–(7); *Criminal Code* (NT) s 192(2); *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Criminal Code* (Tas) s 2A(2); *Crimes Act 1958* (Vic) s 36(2); *Criminal Code* (WA) s 319(2)(a).

<sup>6</sup> *Crimes Act 1900* (ACT) s 67.

<sup>7</sup> J Crowe, 'Fraud and consent in Australian rape law' (2014) 38 *Criminal Law Journal* 236, 238.

<sup>8</sup> See *Crimes Act 1900* (ACT) s 67(1)(a); *Criminal Code* (NT) s 192(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Criminal Code* (Tas) s 2A(2)(b); *Crimes Act 1958* (Vic) s 36(2)(a); *Criminal Code* (WA) s 319(2)(a). See also *Criminal Code* (Qld) s 348(2)(a).

<sup>9</sup> *Crimes Act 1958* (Vic) s 36(2)(b).

<sup>10</sup> See *Crimes Act 1900* (ACT) s 67(1)(b), (c), (d); *Crimes Act 1900* (NSW) s 61HE(5)(c), (8)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(ii); *Criminal Code* (Tas) s 2A(2)(c); *Criminal Code* (WA) s 319(2)(a). See also *Criminal Code* (Qld) s 348(2)(b).

- the complainant being overborne by the authority or position of trust held by the defendant;<sup>11</sup>
- fraud or a false representation by the defendant;<sup>12</sup>
- a complainant's mistaken belief:
  - induced by the defendant, about the nature or purpose of the act;<sup>13</sup>
  - induced by the defendant, about the identity of the defendant;<sup>14</sup>
  - that the complainant is married to the defendant;<sup>15</sup> or
  - that the act is for medical or hygienic purposes;<sup>16</sup>
- the unlawful detention of the complainant or another person;<sup>17</sup>
- a complainant being unable to understand the nature of the act;<sup>18</sup>
- a complainant being affected by a condition or impairment rendering them incapable of consenting;<sup>19</sup> and
- a complainant being asleep, unconscious or so affected by alcohol or another drug as to be unable to consent.<sup>20</sup>

6.8 Many of those circumstances are dealt with in section 348(2) of the Criminal Code.

<sup>11</sup> See *Crimes Act 1900* (ACT) s 67(1)(h); *Crimes Act 1900* (NSW) s 61HE(8)(c); Criminal Code (Tas) s 2A(2)(e). See also Criminal Code (Qld) s 348(2)(d).

<sup>12</sup> See *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1900* (NSW) s 61HE(6)(d); Criminal Code (NT) s 192(2)(g); Criminal Code (Tas) s 2A(2)(f); Criminal Code (WA) s 319(2)(a). See also Criminal Code (Qld) s 348(2)(e).

<sup>13</sup> See Criminal Code (NT) s 192(2)(e); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h); Criminal Code (Tas) s 2A(2)(g). See also Criminal Code (Qld) s 348(2)(e).

<sup>14</sup> See *Crimes Act 1900* (ACT) s 67(1)(f); *Crimes Act 1900* (NSW) s 61HE(6)(a); Criminal Code (NT) s 192(2)(e); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g); Criminal Code (Tas) s 2A(2)(g); *Crimes Act 1958* (Vic) s 36(2)(i). See also Criminal Code (Qld) s 348(2)(f).

<sup>15</sup> *Crimes Act 1900* (NSW) s 61HE(6)(b). See also Criminal Code (Qld) s 348(2)(f).

<sup>16</sup> See *Crimes Act 1900* (NSW) s 61HE(6)(c); Criminal Code (NT) s 192(2)(f); *Crimes Act 1958* (Vic) s 36(2)(j). See also Criminal Code (Qld) s 348(2)(e).

<sup>17</sup> See *Crimes Act 1900* (ACT) s 67(1)(j); *Crimes Act 1900* (NSW) s 61HE(5)(d); Criminal Code (NT) s 192(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b); Criminal Code (Tas) s 2A(2)(d); *Crimes Act 1958* (Vic) s 36(2)(c).

<sup>18</sup> See *Crimes Act 1900* (NSW) s 61HE(6)(d); Criminal Code (NT) s 192(2)(d); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(f); Criminal Code (Tas) s 2A(2)(i); *Crimes Act 1958* (Vic) s 36(2)(g), (h).

<sup>19</sup> 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).

<sup>20</sup> See *Crimes Act 1900* (ACT) s 67(1)(e); *Crimes Act 1900* (NSW) s 61HE(5)(b), (8)(a); Criminal Code (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c), (d); Criminal Code (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(d)–(f).



6.9 Other potentially relevant circumstances, not expressly included in the Australian provisions, have also been identified<sup>21</sup> (and are considered later in this chapter).<sup>22</sup>

### The scope of the current provisions

6.10 In Queensland, a court considering whether a complainant did not give consent to an act will start with section 348(1) of the Criminal Code, which provides that consent means 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent'.<sup>23</sup>

6.11 With some variation, the legislation in most other Australian jurisdictions also incorporates the concept of free and voluntary consent (or agreement).<sup>24</sup>

6.12 Unlike Queensland, the meaning of consent in other jurisdictions does not incorporate the concept of cognitive capacity. However, legislation in some jurisdictions includes incapacity as a vitiating factor, in general terms providing that consent is not free and voluntary (or is negated) in circumstances where the complainant is affected by a condition or impairment that renders them incapable of consenting, or where the complainant is unable to understand the nature of the act.<sup>25</sup>

6.13 In addition, legislation in Queensland and other Australian jurisdictions sets out other specific circumstances in which a person's consent is taken not to have been freely or voluntarily given or is negated.

### Consent obtained by force

6.14 In Queensland, consent to an act is not freely and voluntarily given if it is obtained 'by force'.<sup>26</sup> This provision does not specify the nature of the force or the persons to whom it is directed; it is sufficiently broad to encompass varying degrees of force, as well as force directed at persons other than the complainant.

6.15 All Australian jurisdictions include a circumstance relating to the involvement or application of violence or force.<sup>27</sup> The provisions variously allow for such force to be exerted against the complainant, a third party who is present or nearby, or another person.

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<sup>21</sup> See, eg, Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005) 40–2; NSWLRC draft proposals 18–19.

<sup>22</sup> See [6.32] ff below.

<sup>23</sup> Criminal Code (Qld) s 348(1). See further [5.3] ff in Chapter 5 above.

<sup>24</sup> See further [5.17] ff and n 17 in Chapter 5 above. Legislation in the Australian Capital Territory does not define consent or refer to free and voluntary consent. Rather, it includes a non-exhaustive list of grounds on which consent is 'negated': *Crimes Act 1900* (ACT) s 67.

<sup>25</sup> *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).

<sup>26</sup> Criminal Code (Qld) s 348(2)(a).

<sup>27</sup> See n 8 above. The terms used in other jurisdictions include 'violence', 'force' and 'threats of force'.

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

6.16 In Queensland, consent to an act is not freely and voluntarily given if it is obtained 'by threat or intimidation'<sup>28</sup> or 'by fear of bodily harm'.<sup>29</sup> The general nature of the terms used are apt to encompass varying levels of threat, intimidation or fear of bodily harm, as well as threats or intimidation directed at persons other than the complainant.

6.17 Similarly, the legislation in Tasmania and Western Australia refers to 'threats' in a broad sense.<sup>30</sup> The legislation in the Australian Capital Territory, New South Wales and South Australia is narrower, by addressing specific types of threats towards the complainant or another person, for example, threats to inflict violence, threats of force or threats to degrade, humiliate, disgrace or harass.<sup>31</sup> The Victorian legislation includes circumstances involving 'fear of harm' of any type, whether to the complainant or someone else or an animal, but not specifically, threats.<sup>32</sup>

6.18 If a complainant is unlawfully detained or deprived of their liberty, that may be a circumstance in which a complainant's consent is not freely and voluntarily given, including because that detention could amount to force, threats or intimidation.<sup>33</sup> In most Australian jurisdictions (not including Queensland), legislation provides that consent is not freely and voluntarily given where the complainant submits to the conduct due to the unlawful detention of the complainant or another.<sup>34</sup>

### ***Consent obtained by exercise of authority***

6.19 In Queensland, a complainant's consent to an act is not freely and voluntarily given if it is obtained by 'exercise of authority'.<sup>35</sup> In other jurisdictions,<sup>36</sup> this circumstance is addressed variously, by reference to the complainant being overborne by the nature or position of the defendant, or by the abuse of a position of authority or trust. The purpose of such provisions is to protect the sexual autonomy of a complainant in a relationship of trust with, or subject to the authority of, the defendant which affects the complainant's ability to refuse to consent to sexual conduct. The Queensland provision specifically refers to 'exercise of authority'. However, section 348(2) is not an exhaustive list, and situations involving a breach of a position of trust may be covered by the broader provision of section 348(1).

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

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

30 See n 10 above.

31 Ibid.

32 See n 9 above.

33 In Queensland, s 355 of the Criminal Code (Qld) also provides for a separate offence of deprivation of liberty:

Any person who unlawfully confines or detains another in any place against the other person's will, or otherwise unlawfully deprives another of the other person's personal liberty, is guilty of a misdemeanour, and is liable to imprisonment for three years.

34 See n 17 above.

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

36 See n 11 above.

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

6.20 In Queensland, 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'.<sup>37</sup> Other jurisdictions also provide, to varying degrees, for vitiating circumstances related to fraud, or a complainant's mistaken belief about the nature or purpose of the act.<sup>38</sup>

- In some jurisdictions, the relevant circumstance is that the complainant agrees or submits as a result of fraud or false representation.<sup>39</sup> Those provisions do not include the additional qualifying words used in Queensland that the representation is 'about the nature or purpose of the act'.
- In other jurisdictions, the relevant circumstance is that the complainant has a mistaken belief about the nature (or sexual nature) or purpose of the Act. In some of those jurisdictions the legislation requires that the complainant's mistake is caused or induced by the defendant. Some jurisdictions include a further specific circumstance that the complainant mistakenly believes that the act is for medical or hygienic purposes; it is not necessary that the mistaken belief is induced by the defendant.<sup>40</sup>

6.21 It might be argued that section 348(2)(e) of the Criminal Code is more restrictive than those provisions. However, despite its narrower wording, the Queensland provision captures many instances of fraud and false representation. For example, it would apply to a situation where the complainant is induced, by a false and fraudulent representation by the defendant, to mistakenly believe that the act is for a medical purpose.<sup>41</sup>

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

6.22 In Queensland, consent to an act is not freely and voluntarily given if it is 'obtained by a mistaken belief induced by the accused person that the accused person was the person's sexual partner'.<sup>42</sup> Other jurisdictions frame such provisions more widely, as a circumstance in which the complainant is caused to be mistaken

<sup>37</sup> Criminal Code (Qld) s 348(2)(e). This circumstance was extended to refer to the nature 'and purpose' of the act by amendments made in 2000 following recommendation of the Taskforce Report: see [2.26], [2.28] in Chapter 2 above. See also QLRC Consultation Paper No 78 (2019) [156] ff.

<sup>38</sup> See nn 12–16 above.

<sup>39</sup> See n 12 above.

<sup>40</sup> See nn 13, 16 above.

<sup>41</sup> In recommending that the circumstance be extended to refer to the nature 'and purpose' of the act, the Taskforce expressed the view that this 'would ensure that the fact situation in *Mobilio* was covered': Taskforce Report, 240. In *R v Mobilio* [1991] 1 VR 339, the defendant, 'a radiographer, introduced an ultrasound transducer into the vaginas of eight women, representing that it was for the purpose of medical diagnoses when it was in fact for his own sexual gratification': at 229.

<sup>42</sup> Criminal Code (Qld) s 348(2)(f). This circumstance was added by amendments made in 2000 following recommendations of the Taskforce Report: see [2.26], [2.28] in Chapter 2 above.

about the identity of the defendant,<sup>43</sup> or has a mistaken belief that they are married to the defendant.<sup>44</sup> (One jurisdiction is silent as to such a mistake.)

## ISSUES FOR CONSIDERATION

6.23 In the Consultation Paper, the Commission sought submissions about whether section 348(2) of the Criminal Code should be amended, including whether there is a need to include additional circumstances to address specific scenarios.<sup>45</sup>

## SUBMISSIONS

6.24 A number of respondents supported extending the circumstances in which consent is not freely and voluntarily given.<sup>46</sup> In broad terms, reasons respondents gave for extending these circumstances included:

- to achieve clarity—or to relieve ambiguity—about the concept of consent;<sup>47</sup>
- to establish a comprehensive definition of consent;<sup>48</sup>
- to reflect contemporary community standards;<sup>49</sup>
- to ‘provide statutory guidance to jurors and encourage them to focus their attention on the importance of examining the accused’s conduct’;<sup>50</sup>
- as an educative function to the community and professionals in the criminal justice system;<sup>51</sup> and
- to ‘validate and encourage victims to come forward to report’—in particular, it was submitted that such amendment:<sup>52</sup>

would support QPS charging defendants for behaviour that currently is not seen as ‘falling clearly within the legal definitions of sexual offences’, and encourage more utilisation of the justice system, an increase in prosecutions and successful court outcomes.

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<sup>43</sup> See n 14 above.

<sup>44</sup> See n 15 above.

<sup>45</sup> QLRC Consultation Paper No 78 (2019) Q-8 to Q-11.

<sup>46</sup> Eg, Submissions 16, 24, 25, 32, 37, 38, 47, 48A, 55, 56, 60, 61, 65A, 67, 73, 74, 75, 77, 79, 84, 85.

<sup>47</sup> Eg, Submissions 24, 47, 60, 74, 75, 79, 85.

<sup>48</sup> Eg, Submissions 25, 32, 47, 60, 67, 74, 77, 79.

<sup>49</sup> Eg, Submissions 56.

<sup>50</sup> Eg, Submission 61.

<sup>51</sup> Eg, Submissions 47, 60, 61, 67, 74, 77, 79, 85.

<sup>52</sup> Submission 85.

6.25 In broad terms, the amendments suggested or proposed by respondents included:<sup>53</sup>

- creating a non-exhaustive list of more specific scenarios or circumstances, or examples of scenarios or circumstances, in which consent is not free and voluntary;<sup>54</sup>
- extending the current wording of the provisions relating to force, threats and intimidation, including by adding specific categories or examples of threats<sup>55</sup> or referring to other persons or animals;<sup>56</sup>
- adding to the current wording of the provision relating to exercise of authority;<sup>57</sup> and
- recognising additional circumstances, including circumstances relating to—
  - a complainant’s unlawful detention;<sup>58</sup>
  - a complainant’s incorrect beliefs in particular circumstances;<sup>59</sup>
  - grievous bodily harm;<sup>60</sup>
  - a complainant being asleep or unconscious,<sup>61</sup> or so affected by alcohol or drugs as to lack cognitive capacity to consent;<sup>62</sup>
  - a defendant’s failure to wear a condom as agreed or sabotage of a condom;<sup>63</sup>
  - a complainant’s mistaken belief that there will be a monetary exchange in relation to the act;<sup>64</sup>

<sup>53</sup> In their submissions, respondents have suggested various ways of amending the legislation to reflect or recognise circumstances in which a person does not freely and voluntarily consent to a sexual act. Generally, respondents suggested amending the legislation to include examples of scenarios or circumstances where consent is not free and voluntary, expanding upon some of the circumstances that are already included in the legislation, or adding additional circumstances to the existing legislation. These approaches are discussed collectively in this chapter.

<sup>54</sup> Eg, Submissions 24, 25, 47, 55, 60, 67, 74, 75, 77, 79, 84, 85. These examples relate to similar matters as are included in the additional circumstances listed later in this paragraph.

<sup>55</sup> Eg, Submissions 32, 38.

<sup>56</sup> Eg, Submissions 24, 32, 37, 39, 60, 74, 75, 84, 85.

<sup>57</sup> Eg, Submissions 24, 60, 65A, 74, 75, 84, 85.

<sup>58</sup> Eg, Submissions 24, 47, 60, 74, 75, 84, 85.

<sup>59</sup> Eg, Submissions 24.

<sup>60</sup> Eg, Submissions 32. Also, eg, Submissions 25, 47, 60, 74, 77, 79, 84, 85.

<sup>61</sup> Eg, Submissions 24, 25, 37, 39, 47, 48A, 60, 61, 65A, 74, 75, 84, 85.

<sup>62</sup> Eg, Submissions 24, 25, 37, 39, 47, 48A, 60, 61, 65A, 74, 75, 84, 85.

<sup>63</sup> Eg, Submissions 24, 25, 32, 39, 47, 48A, 56, 61, 65A, 73, 74, 84.

<sup>64</sup> Eg, Submissions 24, 25, 32, 37, 39, 47, 48A, 56, 61, 65A, 73, 74, 84.

- a complainant’s mistaken belief that the defendant does not suffer from a serious disease;<sup>65</sup> or
- sexual violence within the context of domestic or family violence.<sup>66</sup>

6.26 Respondents who opposed amendment to section 348(2), including the Bar Association of Queensland and the Queensland Law Society, submitted that:<sup>67</sup>

- such change is unnecessary<sup>68</sup> and is ‘addressed through case law interpreting this section’;<sup>69</sup> and
- ‘[t]he list as it stands is not exhaustive which leaves open the potential for further circumstances which would amount to consent not being freely given’.<sup>70</sup>

6.27 One of those respondents submitted, for example, that:<sup>71</sup>

The current provision encompasses a broad set of scenarios to be included in the [section on] what is not ‘freely and voluntarily’ [given]. ... Creating more prescriptive and non-traditional categories of rape could lead to unintended consequences in which the sexual history of a complainant becomes an issue of substantial relevance and therefore warranting cross examination. It also runs the risk of creating separate classes of rape and therefore reducing the seriousness of the offence.

## THE COMMISSION’S VIEW

6.28 Consistently with its approach in Chapter 4 above, the Commission considers that one of the core strengths of the criminal law in Queensland is the combination of certainty and flexibility that comes from the relationship between the Criminal Code and the significant body of case law that applies and interprets its provisions.

6.29 Section 348(2) of the Criminal Code acts, as it states, not to limit section 348(1), which provides that consent means ‘consent freely and voluntarily given by a person with the cognitive capacity to give the consent’. Section 348(2) lists certain circumstances in which consent, while apparently given, was ineffective.<sup>72</sup> In each case, the primary question is whether (or not) consent was freely and voluntarily given.

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<sup>65</sup> Eg, Submissions 25, 47, 48A, 61, 65A, 73, 74, 84. One respondent submitted, more broadly, that the circumstances in which consent is not free and voluntary should include where a person is not informed by the other person of any fact that is relevant to their consent because it may impact on their health and well-being.

<sup>66</sup> Eg, Submissions 37, 39. Also, eg, Submissions 16, 25, 32, 47, 60, 67, 74, 77, 84, 85.

<sup>67</sup> Submissions 69, 70, 72, 86.

<sup>68</sup> Submissions 69, 70.

<sup>69</sup> Submission 70.

<sup>70</sup> Submission 86.

<sup>71</sup> Submission 69.

<sup>72</sup> *R v Pryor* (2001) 124 A Crim R 22, 39 [71] (Dutney J).

6.30 Section 348(2) has the advantage of flexibility. The list of circumstances is non-exhaustive and is expressed in broad terms. In this way, it is capable of covering many circumstances, including those which may not have been contemplated at the time of drafting. It can also adapt to relevant changes in community standards or expectations. It avoids the inflexibility (and potential unfairness) of narrowly drafted circumstances addressed to specific issues that may arise through case law from time to time. A more extensive and specific list might produce unsatisfactory outcomes. A court's attention might be diverted from the essential issue—whether the complainant did not freely and voluntarily give consent—to:

- an argument about, for example, whether a particular situation amounted (in law and fact) to deprivation of liberty, bodily harm or grievous bodily harm;
- the erroneous view that the prosecution is required to prove that the facts of the case fell within a particular listed vitiating circumstance.

6.31 The Commission's view is that changes to section 348(2) are unnecessary. The remaining part of the chapter discusses some specific issues for consideration.

## **CONSENT OBTAINED IN CIRCUMSTANCES WHERE THE COMPLAINANT IS ASLEEP, UNCONSCIOUS OR AFFECTED BY ALCOHOL OR ANOTHER DRUG**

### **Queensland**

6.32 In Queensland, 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'.<sup>73</sup> In *R v Singh*,<sup>74</sup> 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.<sup>75</sup> The conviction was upheld by the Court of Appeal.

6.33 Considerations as to the level of consciousness or intoxication of a complainant are matters of fact for the jury and may be relevant to whether the prosecution has proved the complainant did not have the cognitive capacity<sup>76</sup> to consent to the sexual act.

6.34 Intoxication of a complainant may be relevant to the jury's assessment of whether the complainant was able to consent, whether the complainant was in fact consenting and the defendant's belief as to the complainant's consent.<sup>77</sup>

<sup>73</sup> Criminal Code (Qld) s 348(1).

<sup>74</sup> *R v Singh* [2012] QCA 130.

<sup>75</sup> Ibid [20] (Lyons J; McMurdo P and Muir JA agreeing).

<sup>76</sup> The term 'cognitive capacity' is not defined in the Criminal Code (Qld). The Macquarie Dictionary defines the term 'cognition' as 'the act or process of knowing' and 'the product of such a process'. The term 'capacity' is defined as the 'power of receiving impressions [or] knowledge' and the 'power, ability or possibility of doing something': *Macquarie Dictionary* (online at 24 June 2020) 'Cognition', 'Capacity'.

<sup>77</sup> QLRC Consultation Paper No 78 (2019) [125] ff.

6.35 An example of the connection between the level of intoxication of the complainant, the issue of consent and the availability of the excuse of mistake of fact was explained by Jerrard JA in *R v SAX*:<sup>78</sup>

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.

6.36 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:<sup>79</sup>

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'.

## Other jurisdictions

6.37 In a number of other Australian jurisdictions, the list of circumstances in which consent is not free and voluntary specifically includes where the complainant was asleep, unconscious or intoxicated.<sup>80</sup> 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

<sup>78</sup> [2006] QCA 397, [1]–[2].

<sup>79</sup> Ibid [20] (Jones J agreeing), citing *R v Blayney* (2003) 140 A Crim R 249, 254 [17]; *R v Francis* [1993] 2 Qd R 301, 305. *R v Francis* was decided in relation to former s 347 of the Criminal Code (Qld), which provided for the offence of rape prior to the legislative changes in 2000.

<sup>80</sup> See n 20 above.



matter for which consent is required'.<sup>81</sup> Some jurisdictions split these aspects into separate circumstances; others include only one of these aspects. Intoxicating substances include alcohol and drugs.

## Issue for consideration

6.38 The Consultation Paper noted the suggestion that the current provisions are deficient in the way they address this issue, in particular, by not referring to circumstances in which the complainant is asleep, unconscious or intoxicated in the list in section 348(2) of the Criminal Code.<sup>82</sup>

6.39 The Commission sought submissions in the Consultation Paper about whether section 348(2) should be amended to add one or more specific circumstances in which consent is negated on the basis that the complainant:<sup>83</sup>

- is asleep or unconscious when any part of the sexual act occurs; or
- is so affected by alcohol or another drug as to be incapable of consenting to the sexual act.

## Submissions

### *Submissions—support*

6.40 As identified at paragraphs [6.24] and [6.25] above, a number of respondents expressed support for amending the circumstances in which consent is not freely and voluntarily given for various reasons, including that amendments would make for a more comprehensive definition of consent, increase clarity in the law, and reflect contemporary community standards. This reasoning also applied to respondents' support for the introduction of circumstances relating to situations where the complainant is intoxicated, asleep or unconscious.<sup>84</sup>

6.41 Those respondents submitted that such changes are necessary to reflect an affirmative consent model<sup>85</sup> or 'to reflect widespread, contemporary problems with specific acts of non-consent',<sup>86</sup> and 'may assist in clarifying that consent is not freely and voluntarily given if the complainant is intoxicated such that they are incapable of consenting'.<sup>87</sup>

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<sup>81</sup> Criminal Code (Tas) s 2A(2)(h).

<sup>82</sup> QLRC Consultation Paper No 78 (2019) [131].

<sup>83</sup> Ibid Q-9(a)(i)–(ii).

<sup>84</sup> Eg, Submissions 24, 25, 31, 37, 39, 47, 54, 55, 60, 61, 65A, 67, 74, 75, 77, 79, 84, 85. There were multiple proposals for how this provision could be worded. Also, eg, Submissions 12, 18, 46, 56, 62.

<sup>85</sup> Submission 37.

<sup>86</sup> Submission 39.

<sup>87</sup> Submission 68.

6.42 One respondent, who was related to a victim, submitted that there should be a provision to the effect that the consumption of alcohol or drugs, to any extent, effectively negates consent.<sup>88</sup>

### ***Submissions—opposition***

6.43 As referred to in [6.26] above, some respondents were opposed to any changes to section 348(2) of the Criminal Code.<sup>89</sup> In relation to the specific circumstance(s) relating to a complainant being asleep, unconscious or affected by alcohol or drugs, some respondents submitted that no amendments should be made because these circumstances are already covered by section 348 of the Criminal Code.<sup>90</sup>

6.44 For example, the Queensland Law Society submitted that:

The present state of the law in Queensland is that a person who is asleep or unconscious does not have the cognitive capacity to consent. There is no need to include express words in the Criminal Code to that effect. Adding such words would not change the law. It can be noted that the strict application of this rule makes criminal some conduct which might be considered inoffensive. (note omitted)

6.45 In relation to intoxication, that respondent submitted that:

The present state of the law is that consent cannot be given by a person who lacks the cognitive capacity to consent, including where the lack of cognitive capacity is caused by intoxication. There is no need to include express words in the Criminal Code to that effect. Adding such words would not change the law. (note omitted)

6.46 An academic similarly submitted that an amendment to section 348(2) in relation to this topic is unnecessary because:<sup>91</sup>

[s]ection 348(1) already makes it clear that a person who lacks the 'cognitive capacity' to give consent is not consenting. As the Commission suggests, people who are asleep, unconscious or so affected by alcohol or drugs as to be incapable of consenting, clearly lack such cognitive capacity. (note omitted)

### ***Submission—general***

6.47 Two academic respondents provided an analysis of the issues in this area with reference to their research.<sup>92</sup>

6.48 Those respondents noted that triers of fact are often required to rely upon their common knowledge of intoxication in considering the matters before them:

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88 Submission 48A.

89 Submissions 69, 70, 72, 86.

90 Submissions 69, 72, 73.

91 Submission 73.

92 Submission 40.

In an earlier study of Australian criminal laws that attached significance to 'intoxication' we found that in the majority of instances of laws governing offences and powers, decision-makers are given inadequate guidance on what intoxication means or how to assess it. In our study of rape trials we found that evidence of a complainant's intoxication frequently took the form of self-assessment by the complainant, using (understandably) imprecise and colloquial language about how they felt, recollections of how much they had consumed, or answers to a question that asked them to rate their intoxication on a 1–10 scale (noting that, although well-established for pain self-assessment, the use of numerical rating scales for intoxication self-assessment is more contentious). Blood alcohol concentration (BAC) readings form part of the evidence in only a small number of cases, and the admission of pharmacological or other scientific evidence about the effects of alcohol (or other drugs) was the exception rather than the rule.

...

A consequence of limited statutory guidance about intoxication and the 'lay' nature of the evidence that is commonly relied on in rape trials to establish the complainant's intoxication is that tribunals of fact (whether juries, or judges in judge-alone trials) face a formidable exercise in translation. It is often the case that jurors are given little guidance in deciding how to take evidence from the complainant about their level of intoxication ... (notes omitted)

6.49 They queried the utility of including intoxication of the complainant as a vitiating factor, observing that, among other things, there remains the difficulty of 'imprecision' with the meaning of intoxication:

These findings [of our earlier studies] suggest that even where legislation identifies complainant intoxication as a factor that may vitiate consent, such provisions may not be entirely effective in achieving their goal: to transform the ways in which complainant intoxication evidence operates in rape trials. In our view it is doubtful whether the suggested wording of a statutory amendment to the Criminal Code (Qld)—'the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual act'—is, on its own, likely to break the nexus between complainant intoxication and assumed consent. The proposal does not address the problems we have identified in our research: imprecision around what intoxication means and the evidence required to establish it, and a tendency to treat relevant intoxication as synonymous with being asleep or unconscious (or very nearly so). Centring the inquiry on incapacity may serve only to consolidate the problematic practice of equating relevant intoxication with being asleep or unconscious.

Unfortunately, our research to date suggests that alternative statutory formulations may be no more effective. ...

6.50 In relation to statutory reform, those respondents submitted that:

It is important to recognise the limitations of statutory reform. The objective is not about 'perfecting' statutory language, but creating the circumstances under which rape trials can be conducted in such a way as to maximise the opportunity for justice for victims of sexual violence, while respecting and protecting the rights of the accused.

6.51 In their view, increased use of expert evidence would better address the issues identified.<sup>93</sup>

### The Commission's view

6.52 The current provision in section 348 of the Criminal Code, which defines consent to mean 'consent freely and voluntarily given by a person *with the cognitive capacity* to give the consent',<sup>94</sup> allows evidence that the complainant was asleep, unconscious or affected by alcohol or drugs to be taken into account by a trier of fact when considering whether a complainant had the cognitive capacity to give consent.

6.53 The requirement that the complainant has the cognitive capacity to consent is a necessary element in the consideration of whether consent was given.

6.54 The Commission's view is that the current law operates to address such situations and an additional circumstance in section 348(2) is unnecessary. Such an amendment could introduce confusion and ambiguity into an already settled area of law.

### CONSENT OBTAINED BY A MISTAKEN BELIEF, INDUCED BY THE DEFENDANT, THAT THERE WILL BE MONETARY EXCHANGE FOR THE SEXUAL ACT

6.55 The Commission has considered whether provision should be made in section 348(2) of the Criminal Code for the circumstance where, despite an agreement to pay for a sexual act, the defendant does not pay. In that circumstance, the complainant's consent may be said to be based on the mistaken belief, induced by the defendant, that there would be payment for the act.

6.56 There is no legislative provision in sexual assault legislation in the other Australian jurisdictions dealing with such a specific circumstance. Some jurisdictions criminalise this conduct as rape by providing that the complainant's consent is negated by a false or fraudulent representation, others by a separately defined offence.<sup>95</sup>

### Queensland

6.57 Depending on the facts of a particular case, a court might be satisfied that the complainant who gave consent to an act in the expectation of monetary payment did not freely and voluntarily give consent. The possibility was raised in *R v Winchester*, as discussed below. It is less clear that section 348(2)(e) of the Criminal Code—which provides that 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—would apply to make the giving of consent ineffective.<sup>96</sup>

<sup>93</sup> See the discussion of expert evidence in Chapter 8 below.

<sup>94</sup> Criminal Code (Qld) s 348(1) (emphasis added).

<sup>95</sup> *Crimes Act 1900* (ACT) ss 54, 67(1)(g); *Crimes Act 1958* (Vic) ss 36, 38. See also [6.72] ff below.

<sup>96</sup> Criminal Code (Qld) s 348(2)(e).

6.58 The relationship between the requirement that consent be freely and voluntarily given and the list of vitiating circumstances was examined in *R v Pryor*. The Court of Appeal considered the operation of section 347 of the Criminal Code in the following form:<sup>97</sup>

Any person who has carnal knowledge of a female without her consent<sup>98</sup> or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, 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 woman, by personating her husband,<sup>99</sup> is guilty of a crime, which is called rape.

In the preceding paragraph 'married woman' includes a woman living with a man as his wife though not lawfully married to him and 'husband' has a corresponding meaning. (emphasis added) (notes added)

6.59 In considering the operation of that section, Dutney J said:<sup>100</sup>

In relation to s 347(1) I am satisfied that the legislative purpose of the second limb of the subsection was not to limit the scope of the first limb but among other things to overcome what in relation to the married woman qualification was then a real question in the common law as to whether or not 'consent' encompassed not just penetration but penetration by the man accused. Insofar as it impacts on the first limb, the purpose of the second limb is thus clarification rather than limitation of the general scope of the first limb. The second limb has the dual purpose where consent is in fact given of identifying circumstances in which that consent will be ineffective. It follows that the limitation in the second limb qualification in relation to a married woman even with the extension by the definition of 'married female' (sic) in subs (2) does not limit the operation of the first limb nor create a lacuna of the type of which the appellant seeks to avail himself here. The second limb is not concerned with whether or not there is consent but with whether that consent is ineffective. (emphasis added)

6.60 It is apparent from the analysis of the majority judges in *R v Pryor* that the first limb of former section 347 was not limited by the second limb and was capable of capturing additional circumstances surrounding the giving of consent.<sup>101</sup>

6.61 The later decision in *R v Winchester* concerned the operation of section 348 in its present form. The offending involved a range of sexual offences against a child, who was aged between approximately 12 and 14 years at the time, including charges of rape. The evidence included an allegation that the defendant offered the complainant child the gift of a racehorse, which he did not own, if she had sexual intercourse with him.<sup>102</sup>

<sup>97</sup> *R v Pryor* (2001) 124 A Crim R 22, 22 [1] (Williams JA). Section 347 of the Criminal Code (Qld) provided for the offence of rape prior to the legislative changes in 2000.

<sup>98</sup> Described as 'limb one' by the Court: *ibid* 23 [4], 28 [19] (Williams JA), 37 [58], 39 [71] (Dutney J).

<sup>99</sup> Described as 'limb two' by the Court: *ibid*.

<sup>100</sup> *Ibid* 39 [71] (Dutney J).

<sup>101</sup> See also Crowe, above n 7, 240.

<sup>102</sup> *R v Winchester* [2014] 1 Qd R 44.

6.62 In considering the application of section 348 and the inter-relationship between subsections (1) and (2), Muir JA noted that:<sup>103</sup>

None of paras (a) to (f), in which the Legislature has specified the more obvious matters which may interfere impermissibly with the giving of a consent, applies to the point under discussion, but subs (2), which expressly provides that it does not limit subs (1), does not purport to define exhaustively the circumstances in which a consent will be deemed not [to] be free and voluntary.

6.63 In this regard Muir JA also accepted that whether consent was freely and voluntarily given was a consideration for the jury.<sup>104</sup>

6.64 When considering the meaning of 'freely and voluntarily given', Muir JA noted that:<sup>105</sup>

Whether the consent of a promisee entering into sexual relations after a promise or offer of the kind referred to in para [82] above can be considered not to be 'freely and voluntarily given' will depend on whether, having regard to the circumstances in which the promise or offer is made and characteristics of the offeree such as her intellect, maturity, psychological and/or emotional state, the offeree is to be regarded as not having exercised her free choice.

6.65 The vitiating factor in section 348(2)(e) requires the false and fraudulent representation to be about the nature or purpose of the act. The Court in *R v BAS* considered that the 'purpose' referred to in the legislation related to the purpose held by the defendant.<sup>106</sup> The Court cited, with approval, a passage from *R v Harkin* in which the Court referred to the 'purpose or motive of the [defendant]'.<sup>107</sup> However, the Court in *R v BAS* also noted that '[i]t is not clear whether under s 348(2)(e) an act may have a purpose distinct from the purpose of the actor; but in the present case that problem does not arise. The purposes of the appellant's acts must have been his purposes in performing them'.<sup>108</sup>

6.66 In relation to proving 'purpose', McPherson JA said:<sup>109</sup>

Proof of purpose entails inquiry into the state of mind of the person alleged to have it, in order to determine that person's true or 'genuine' state of mind at the time. Coupled with the requirement that the representations about purpose be 'false and fraudulent', it means that in this case the prosecution undertook the burden of proving to the satisfaction beyond reasonable doubt of the jury that the appellant had dishonestly misrepresented his purpose, or his true state of mind, to the complainants whom he persuaded to consent to the acts which he carried out.

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103 Ibid 65 [75] (Muir JA).

104 Ibid 65 [76].

105 Ibid 68 [85]; See also 80 [135]–[136] (Fryberg J).

106 *R v BAS* [2005] QCA 97.

107 Ibid [16] (Fryberg J; Davies JA agreeing).

108 Ibid [87] (notes omitted).

109 Ibid [4].

6.67 The issue in *R v BAS* was whether the prosecution had proven that the appellant had dishonestly represented that his acts were for therapeutic purposes, when his real purpose was his own sexual gratification. The reasoning in *R v BAS* does not easily lead to the conclusion that a defendant's false representation, 'I intend to pay', would amount to a misrepresentation about the nature or purpose of the act.

6.68 The Criminal Code contains a separate offence of 'procuring sexual acts by coercion etc':<sup>110</sup>

(1) A person who—

- (a) by threats or intimidation of any kind, procures a person to engage in a sexual act, either in Queensland or elsewhere; or
- (b) by a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere; or
- (c) administers to a person, or causes a person to take, a drug or other thing with intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person;

commits a crime.

Maximum penalty—imprisonment for 14 years.

(2) For subsection (1), a person engages in a sexual act if the person—

- (a) allows a sexual act to be done to the person's body; or
- (b) does a sexual act to the person's own body or the body of another person; or
- (c) otherwise engages in an act of an indecent nature with another person.

(3) Subsection (2) is not limited to sexual intercourse or acts involving physical contact.

...

(4) In this section—

**procure** means knowingly entice or recruit for the purposes of sexual exploitation.

6.69 Section 218, in its present form, was introduced by the *Prostitution Laws Amendment Act 1992* (Qld).<sup>111</sup> Previously, this offence did not protect a woman or girl who was 'a common prostitute or of known immoral character' from procurement by false pretences.<sup>112</sup> However, the offence was redrafted 'in a gender neutral

<sup>110</sup> Criminal Code (Qld) s 218.

<sup>111</sup> *Prostitution Laws Amendment Act 1992* (Qld) s 9. Further subsequent amendments included, among other things, increasing the penalty from 7 years imprisonment to 14 years imprisonment and inserting the definition of 'procure': *Criminal Law Amendment Act 1997* (Qld) s 29.

<sup>112</sup> Butterworths, *Carter's Criminal Law of Queensland* [s 218] (8th ed, 1992).

manner which will apply regardless of a person's moral character or previous employment as a prostitute'.<sup>113</sup> On its face, any person, including a sex worker, may make a complaint under this section.

6.70 Offences relating to fraud<sup>114</sup> or stealing<sup>115</sup> could also apply in these circumstances, although the question may remain whether such a charge adequately covers the total criminality of the offending.

6.71 In a recent Queensland case, a defendant was charged with two counts of fraud involving separate complainants. The offending involved the defendant making arrangements with a sex worker to have sexual intercourse for a set fee. As arranged, the act of sexual intercourse took place and then the defendant did not pay the fee. The defendant was ordered to pay restitution of \$350 to each complainant and was fined \$750 for each offence.<sup>116</sup>

## Other jurisdictions

6.72 In the Australian Capital Territory, sections 54(1) and 67(1)(g) of the *Crimes Act 1900* (ACT) provide:

113 Explanatory Note, Prostitution Laws Amendment Bill 1992 (Qld) cl 9.

114 Criminal Code (Qld) s 408C:

- (1) A person who dishonestly—
  - (a) applies to his or her own use or to the use of any person—
    - (i) property belonging to another; or
    - (ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
  - (b) obtains property from any person; or
  - (c) induces any person to deliver property to any person; or
  - (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
  - (e) causes a detriment, pecuniary or otherwise, to any person; or
  - (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
  - (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
  - (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;
 commits the crime of fraud.  
 Maximum penalty—5 years imprisonment.

- (2) ...

115 Criminal Code (Qld) ss 390–398 relate to stealing. The definition of 'stealing' in s 391(1) includes:

A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person's own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

116 M McGowan and C Knaus, 'It absolutely should be seen as rape: when sex workers are conned', *The Guardian*, (online), 13 October 2018; J Lill, 'Man taken to court after defrauding Brisbane sex workers', *The Courier Mail* (online) 12 October 2018.



**54 Sexual intercourse without consent**

- (1) A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

...

**67 Consent**

- (1) For sections 54, 55(3)(b), 60 and 61(3)(b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—

...

- (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person;

...

6.73 Those provisions, in combination, founded a prosecution that resulted in a conviction for rape in the Supreme Court of the Australian Capital Territory in 2015 for conduct that involved the non-payment of a sex worker by a client where sexual intercourse was engaged in on the basis of an agreed fee.<sup>117</sup>

6.74 The defendant appealed the sentence to the Court of Appeal.<sup>118</sup> The Court set out the relevant facts of the offending:<sup>119</sup>

At the time of the offence, the complainant worked as a sex worker from her home in a Canberra suburb. In October 2010, the appellant made an appointment to spend an hour with her. The agreed fee was \$250. When he attended, he gave her \$200, claiming to have been mistaken about how much he thought she was charging him. He promised to pay her the remaining \$50 by leaving it in her letter box.

Several days later, not having received the money due to her, the complainant sent him a text saying, 'Hi, Peter. Hope you haven't forgotten the \$50' and then three crosses. He replied saying, 'No. When can I meet you again?' Soon after, he made an appointment to spend four hours with her on 21 October 2010. When he made the appointment, she told him the cost would be \$800 and that he must pay her the \$50 he still owed. He agreed to her terms.

On 21 October he arrived at the complainant's home. He accompanied her to her bedroom. He placed a sealed white envelope on the top of the bedroom dresser. He told her it contained the money. The complainant went to check, but he said,

<sup>117</sup> *R v Livas* [2015] ACTSC 50; see also *R v Miller* [2019] ACTSC 18. In *R v Livas*, the defendant was charged with, and pleaded guilty to, rape and was sentenced to 25 months imprisonment with the sentence to be suspended after he had served eight months full-time custody. He was also required to enter into a two year good behaviour order.

<sup>118</sup> *Livas v The Queen* [2015] ACTCA 54.

<sup>119</sup> *Ibid* [7]–[13] (Murrell CJ, Perry J and Walmsley AJ).

'no, no, no, don't open it now, it's—you have to trust me on this, it's part of my fantasy that it's all about the romance, and I need you to trust me'. So the complainant did not open the envelope.

A little later, she again went to open the envelope, but the appellant said, 'No, no, no, you have to trust me on this... I wouldn't rip you off because it's really important we know each other for a long time'. So again she resisted from checking. The complainant then had intercourse with the appellant. She continued to worry about whether the money was in fact in the envelope. She eventually managed to open it and found it did not contain any money but contained a piece of folded paper to make the envelope appear to be bulky.

She picked up the telephone to call help, but the appellant grabbed the telephone from her. She then left the bed. She had begun to shake and weep. She accused the appellant of betraying her trust. He said to her, 'I'm sorry. I always intended to pay you. I was going to get the money out of the bank. The money goes in at 1 pm today. The complainant then told him security would be coming. He then left.

The complainant then called a security guard. When he arrived at her home, the security guard observed her to be in a state of distress. She telephoned the sex workers outreach program and told a staff member what had occurred. The appellant had taken some written material with him to the complainant's home and when she realised she had been deceived, she managed to hide the material from the appellant. By reference to that material, she then learned his name.

The next day she reported the offence to police. The police arrested the appellant several days later. When spoken to, he admitted having had sexual intercourse with the complainant. He also admitted he had put a folded paper bag in the sealed envelope to make it appear that it contained money. He told police that he had had no money at the time, but had intended to pay her. He said he did not know whether she would have consented to intercourse had she known the envelope contained no money.

**6.75** In the decision at first instance, Penfold J made the following observations about the conduct of the defendant:<sup>120</sup>

... it must be clearly understood that something that looks like a consent to sexual intercourse, if obtained by fraudulent activity as this one clearly was, is not a consent. The offence of having sexual intercourse with a person, without her consent, is clearly made out.

The impact on the complainant in this case was eloquently explained by her in her Victim Impact Statement, as follows.

My retrospective regret focused mainly upon my naivety. ... The care and affection that I showed Mr Livas during what I thought to be an honest service was completely devalued when I realised that I had been deceived. The tenderness of the act of lovemaking was shared by the man who called himself 'Peter', and was incongruent with the violation that was really happening. My desire to give clients a service that I think they deserve was used to goad me into not checking the payment. Nevertheless, I made several attempts to check the payment, but was physically blocked by Mr Livas as he used his body to herd me into the shower and onto the bed. He was not aggressive per se in these manoeuvres, but I did have a sense of powerlessness after being thwarted in my attempts. In the days following the incident, I was unable to think clearly, eat or

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*R v Livas* [2015] ACTSC 50, [21]–[22].

sleep properly and I felt continuously tired. I was confused and hurt in a deeply emotional way, feeling shamed about my gullibility.

6.76 Later in the decision, Penfold J noted:<sup>121</sup>

Sex workers clearly fall into the category of vulnerable workers in general and may be particularly vulnerable to abuse of this kind. Certainly, no one should doubt that fraudulently achieving sexual intercourse by this kind of activity constitutes rape, rather than a dishonesty offence, although of course dishonesty is a major element of this fact situation.

6.77 The appeal was on the grounds that the sentencing judge had erred on a number of bases in relation to the way in which the sentence should be served and also that the 'sentencing judge had not treated the fact that consent was fraudulently obtained as reducing the objective seriousness of the offence'. The appeal was dismissed.<sup>122</sup> In this regard, the Court of Appeal noted that:<sup>123</sup>

When her Honour's remarks, which we have quoted above, are seen in context, it is clear that she took account of all objective and subjective matters and in particular, when dealing with objective gravity, the gradations of this serious offence, paying special attention to the way the appellant had fraudulently acted to obtain consent. Her Honour was correct to describe the offence as a serious one.

6.78 In Victoria, the law in relation to rape and consent is governed by sections 36 and 38 of the *Crimes Act 1958* (Vic). Section 36 dictates the circumstances in which a person does not consent. These provisions differ from those in many other Australian jurisdictions in that they do not refer to circumstances in which consent is obtained by fraud or false representation. However, Victoria has a discrete offence provision to address such a scenario, 'procuring sexual act by fraud':<sup>124</sup>

- (1) A person (A) commits an offence if—
  - (a) A makes a false or misleading representation; and
  - (b) A knows that—
    - (i) the representation is false or misleading; or
    - (ii) the representation is probably false or misleading; and
  - (c) as a result of A's representation, another person (B) takes part (whether at the time the representation is made or at a later time) in a sexual act with A or another person; and
  - (d) A intends that, as a result of A's representation, an outcome mentioned in paragraph (c) will occur.

...

<sup>121</sup> Ibid [34].

<sup>122</sup> *Livas v The Queen* [2015] ACTCA 54, [5], [27]–[28] (Murrell CJ, Perry J and Walmsley AJ).

<sup>123</sup> Ibid [24]–[25].

<sup>124</sup> *Crimes Act 1958* (Vic) s 45. 'A false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit': s 45(3).

6.79 The Victorian Court of Appeal decision of *R v Rajakaruna* shows the contrast between the provisions in relation to rape and the offence of procuring a sexual act by fraud.<sup>125</sup> In that matter, the defendant embarked on a course of conduct involving four complainants who were sex workers. He was convicted after trial of four counts of rape, two counts of assault, one count of procuring sexual penetration by fraudulent means and one count of attempting to procure sexual penetration by fraudulent means.

6.80 The Court summarised the broader facts in this way:<sup>126</sup>

The applicant's offending conduct in respect of the four complainants had a number of common features .... For present purposes, it is sufficient to note only their essential aspects. At the time of the offending each complainant was, as I have mentioned, a prostitute, who worked on streets in a particular area of St Kilda. In each case, the applicant drove up to the complainant, in the afternoon, in his Lexcen car, and negotiated with her a price for various sexual services that he sought, after which he drove the complainant to a location of his choice, being a garage beneath a block of flats in the St Kilda area. In two cases the complainant had suggested that the applicant come to a room that she had available, but he declined the invitation and instead took her to a garage of his choosing. On each occasion the complainant asked that she be paid before she gave her sexual services, but the applicant refused, giving various excuses for not paying in advance. As a result, an argument ensued and in the case of all but one of the complainants, the applicant persisted in having sex with her, either by force or by fraud, but not paying for it as he had agreed to do.

6.81 The charges involving sexual intercourse achieved by fraud and accompanied by some level of force, violence or assault led to convictions of rape. The charges involving fraud to occasion sexual intercourse, absent any acts of force, violence or assault, led to convictions of procuring sexual penetration by fraudulent means and attempting to procure sexual penetration by fraudulent means.

6.82 A further example of the operation of the provision in relation to procuring sexual act by fraud is found in the Victorian Court of Appeal decision of *Onnis v The Queen*.<sup>127</sup> The offending involved six offences of procuring sexual penetration by fraud and one offence of attempted procuring sexual penetration by fraud.

6.83 In broad compass, the facts involved seven complainants who were the subject of a fraudulent scheme conducted by the defendant so that he could obtain free sexual acts from them. The general approach of the defendant was to contact the complainants on the internet while pretending to be a female recruiting for a business that provided sexual services for money. To assess the complainant's suitability for employment, the defendant would ask them to perform sexual acts over webcam. Once he 'approved' of them using this method he would arrange for them to meet with a 'scout' from the business who would participate in sexual acts with them to confirm whether or not they were suitable for the role or on the basis that they would be paid at that time for their sexual acts. The defendant met with a number

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<sup>125</sup> *R v Rajakaruna* (2004) 8 VR 340.

<sup>126</sup> Ibid 343 [3] (Chernov JA).

<sup>127</sup> [2013] VSCA 271.

of the complainants and had sexual intercourse with them on the basis that he would pay them or that he was the ‘scout’ for the business.

6.84 The defendant pleaded guilty, but subsequently successfully appealed against his sentence. In the course of the appeal, the Court said this about the nature of the offending:<sup>128</sup>

Compared say, to a doctor or other healthcare professional who abuses his position of trust and confidence in order to deceive a patient to subject herself to an act of sexual penetration, we consider that individual offences of the kind committed in this case tend to rank lower in the scale. Arguably, too, they are less serious than the offence of a man who procures sexual penetration by making a fraudulent promise to marry a woman or even by pretending that he is single and unattached. No doubt, a prostitute has just as much right to be protected against fraud as a woman to whom the idea of selling herself is anathema. But there is a substantive difference. If a prostitute is fraudulently induced to forego her fee, her complaint is that she has not been paid what is owing. And she can be compensated by payment of what is due. It is otherwise, however, and generally speaking likely to be more serious, where a woman is deceived in respects which go beyond the measure of money.

In this case, each of the complainants except RJ was induced to subject herself to acts of sexual penetration on the faith of a fraudulent misrepresentation that she could thereby qualify to be retained to provide sexual services for reward. Had she been so retained and rewarded, she would have had little cause for complaint. Thus, despite the despicable nature of that kind of offending, we do not think that, of itself, it ranks as especially grave.

...

All things considered, the offending was relatively serious and the applicant’s moral culpability was high.

## Issue for consideration

6.85 In the Consultation Paper, the Commission sought submissions about whether section 348(2) of the Criminal Code should be amended to include a specific circumstance to address the situation where the complainant consents to a sexual act under a mistaken belief induced by the defendant that there will be a monetary exchange in relation to the sexual act.<sup>129</sup>

## Submissions

### *Submissions—support*

6.86 One respondent suggested a ‘non-exhaustive list of consent negating circumstances’ where one such circumstance would be that the person ‘submitted’ because they held an incorrect belief (induced by a person involved in the act) regarding ‘facts about gifts or payment promised in relation to the act’.<sup>130</sup> Another

<sup>128</sup> Ibid [27]–[29] (Nettle and Coghlan JJA). The defendant was initially sentenced to eight years imprisonment with a non-parole period of five years in relation to the offences. On appeal, his sentence was reduced to six years and two months imprisonment with a non-parole period of three years and six months.

<sup>129</sup> QLRC Consultation Paper No 78 (2019) Q-9(d).

<sup>130</sup> Submission 24.

respondent submitted that section 348 should be ‘amended to establish a comprehensive definition of consent that includes all of the current exceptions and be extended to include ... scenarios where consent cannot be a free and voluntary agreement’ where one scenario would be ‘transaction not upheld’. That respondent noted that ‘payments may include a monetary exchange, provision of food and/or accommodation in relation to the sexual act’.<sup>131</sup>

6.87 Other respondents submitted that there should be an additional circumstance or example negating consent where the person ‘consented 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’.<sup>132</sup>

6.88 Similarly, another respondent suggested inserting ‘an additional circumstance of fraudulent misrepresentation where a person submits under “a mistaken belief that the sexual activity is for the purposes of monetary exchange”’.<sup>133</sup>

6.89 An academic supported the inclusion in section 348(2) of a mistaken belief that the other person will pay on the basis that, in their view, the current provision does not cover this circumstance. Further, that respondent submitted that the circumstance should be framed in terms of ‘a mistaken belief about payment of any sort’.<sup>134</sup>

6.90 Respondents identified a number of reasons to specifically recognise such a circumstance in Queensland, including:

- to ‘communicate the standards of respect we expect people to show each other’;<sup>135</sup>
- ‘that there is a lack of clarity as to whether non-payment of sex workers amounts to rape under the current law and that this affects the attitudes of police officers and their approaches to survivors’;<sup>136</sup> and
- that sex workers can experience barriers to reporting acts of sexual violence and the addition of such a circumstance would give ‘in principle support to sex workers having the same right to free and voluntary sexual consent as all other Queenslanders’.<sup>137</sup>

### **Submissions—opposition**

6.91 As noted at [6.26] above, a number of other respondents opposed amendments to the list of circumstances in section 348(2) in which a person’s

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<sup>131</sup> Submission 32.

<sup>132</sup> Eg, Submissions 25, 29, 39, 47, 48A, 54, 56, 60, 61, 65A, 67, 74, 77, 79, 84, 85. Also, eg, Submissions 51, 62.

<sup>133</sup> Submission 37.

<sup>134</sup> Submission 73. See also A Dyer, ‘Mistakes That Negate Apparent Consent’ (2019) 43(3) *Criminal Law Journal* 159.

<sup>135</sup> Submission 56. Also, eg, Submissions 12, 62.

<sup>136</sup> Submission 24.

<sup>137</sup> Submission 39.

consent to a sexual act is not freely and voluntarily given on a number of bases, including that:<sup>138</sup>

- ‘such change is unnecessary’;
- scenarios are addressed through case law; and
- the non-exhaustive nature of the list allows for further circumstances to be captured.

6.92 With specific reference to monetary exchange, a legal stakeholder respondent was of the view that:<sup>139</sup>

The offence of rape carrying a maximum penalty of life imprisonment should not be aligned with circumstances relating to the recovery of money. This is fraud, not rape. Including this type of circumstance into the non-exhaustive list under section 348(2) could have the impact of creating separate categories of rape. Work needs to be done regarding education in relation to the circumstances already covered but misunderstood, rather than introducing new categories that traditionally would not be understood by most members of the community as rape. A better way to protect sex workers would be to reform the law of that industry, particularly where at present a sex worker who has someone assisting with protection and recovery of money is breaking the law.

6.93 Another legal stakeholder respondent was of the view that ‘a distinct offence is not necessary as such conduct is already captured by the broad definition of fraud in section 408C of the Criminal Code’.<sup>140</sup>

## The Commission’s view

6.94 Sex work is legal in Queensland provided certain conditions, provisions and licensing rules are complied with by those who operate in the industry.<sup>141</sup>

6.95 Sex workers are, however, vulnerable to increased risks of sexual violence.<sup>142</sup>

6.96 The Commission has considered whether statutory amendments are therefore required in relation to the issue of monetary exchange in the context of consent for the purposes of section 348 of the Criminal Code.

<sup>138</sup> Eg, Submissions 69, 70, 72, 86.

<sup>139</sup> Submission 69.

<sup>140</sup> Submission 72.

<sup>141</sup> The Criminal Code (Qld) ch 22A, the *Prostitution Act 1999* (Qld) and the *Prostitution Regulation 2014* (Qld) are the relevant pieces of legislation that regulate sex work (prostitution) in Queensland and mandate specific offences. The Prostitution Licensing Authority assists in the monitoring and management of prostitution and brothels in Queensland, including by granting brothel licences: Queensland Government, *Prostitution Licensing Authority* (27 April 2020) <<http://www.pla.qld.gov.au>>.

<sup>142</sup> See generally A Quadara, ‘Sex workers and sexual assault in Australia: Prevalence, risk and safety’ (Issues No 8, Australian Centre for the Study of Sexual Assault, 2008) 8 ff; RL Latimer et al, ‘Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia’ (2018) 13(12) *Plos One* <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779>>; P Cox, ‘Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper’ (Landscapes Issue 13, ANROWS, October 2015) 43.

6.97 There are few express provisions addressing this issue in other Australian jurisdictions. The question of whether such conduct will be found to amount to a sexual offence therefore typically depends on the particular facts of the case and the interpretation of the relevant provisions.

6.98 There are offence creating provisions in both Victoria and Queensland, which provide for a separate offence of procuring a sexual act by fraud or false pretences.

6.99 In contrast, the Australian Capital Territory addresses the issue of monetary exchange within the ambit of the vitiating factor of fraudulent misrepresentation in relation to consent. Unlike section 348(2)(e) of the Criminal Code, however, the provision in the Australian Capital Territory does not require the fraudulent misrepresentation to be about the nature or purpose of the act.

6.100 The Commission's view is that, in accordance with the court's approach in *R v Winchester*, whether the consent of a complainant given after a promise of payment or some other reward was consent not freely and voluntarily given, ought to depend on the material facts of a particular case. Only if a defendant's promise to pay the complainant amounted to a false and fraudulent representation about the nature or purpose of the act would section 348(2)(e) deem the consent not freely and voluntarily given.

6.101 The current position leaves it open for the trier of fact to determine, on a case by case basis, whether consent was not freely and voluntarily given. This has the advantage of flexibility and allows the application of the law to evolve in light of changing community values.

6.102 Depending on the facts of any alleged offence and the nature of any criminal conduct involved, there are also other offences in the Criminal Code which could provide protection against false or fraudulent representations about payment, for instance, procuring sexual acts by coercion pursuant to section 218 or fraud pursuant to section 408C.

6.103 This issue potentially raises broader policy issues relating to the regulation and protection of sex workers, in addition to issues surrounding their perceived treatment within the criminal justice system, which are outside the scope of this review.

6.104 Accordingly, the Commission does not recommend any amendment to section 348(2) to deal specifically with this circumstance.

## **CONSENT OBTAINED BUT THE DEFENDANT FAILS TO USE A CONDOM AS AGREED OR SABOTAGES THE CONDOM**

6.105 A recent survey of more than 2000 people who visited the Melbourne Sexual Health Centre over three months found that one in three women and almost one in five men had been the victim of non-consensual condom removal.<sup>143</sup>

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Latimer et al, above n 142.



6.106 This reflects a concerning practice emerging in the community, wherein a complainant consents to a sexual act on the basis that the defendant will use a condom, but the defendant either does not use a condom or removes the condom partway through the sexual act without the complainant's consent, colloquially known as 'stealthing'.<sup>144</sup> Another practice involves the defendant sabotaging or tampering with the condom.

6.107 There are concerns that confusion exists in relation to non-consensual condom removal, because it is not specifically covered under existing legislative provisions and there is little legal precedent.<sup>145</sup>

## Queensland

6.108 In Queensland, section 348 of the Criminal Code does not expressly address these circumstances. Such conduct could be caught by section 348(2)(e), where the person's consent is not freely and voluntarily given because it is obtained 'by false and fraudulent representations about the nature or purpose of the act'.

6.109 It seems clear that a complainant who gives consent to a sexual act using a condom is not to be taken to give consent to that sexual act taking place without the use of a condom. In *R v Rad* the appellant was convicted of one count of rape.<sup>146</sup> The circumstances were that the defendant and the complainant were commencing sexual intimacy and the complainant told the defendant to put on a condom. The defendant refused to do so and then had sexual intercourse with the complainant. At trial, the Crown case proceeded on the basis that sexual intercourse had occurred without the complainant's 'free and voluntary consent'.<sup>147</sup> The learned trial judge described the Crown case in this way: '... the complainant was willing to have sexual activity with the accused, there was [no] consent to no—to sexual activity without a condom'.<sup>148</sup>

6.110 In 2019 in the District Court a defendant was prosecuted in relation to a charge of rape, where it was alleged that he removed a condom during sexual intercourse without the complainant's consent. Prior to commencing sexual intercourse, the complainant had agreed to the act on the basis that the defendant wore a condom. She watched him put on a condom but during sexual intercourse realised that he was no longer wearing one. The defendant was found not guilty.<sup>149</sup> It is not possible, however, to discern the basis of the jury's verdict. A jury is not

<sup>144</sup> Ibid; H Klein, 'Generationing, Stealthing, and Gift Giving: The Intentional Transmission of HIV by HIV-Positive Men to their HIV-Negative Sex Partners' (2014) 2:1582 *Health Psychology Research* 54. See also A Brodsky, '“Rape-Adjacent”: Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal of Gender and Law* 183; B Chessser and A Zahra, 'Stealthing: a criminal offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, which refers to 'scattered media coverage [which] has revealed the widespread occurrence in Australia of stealthing': 217–18.

<sup>145</sup> Chessser and Zahra, above n 144, 219.

<sup>146</sup> *R v Rad* [2018] QCA 103.

<sup>147</sup> Ibid [20] (Davis J; Gotterson and Morrison JJA agreeing).

<sup>148</sup> Ibid [31].

<sup>149</sup> S Barnham, 'Gladstone man fights rape allegation after removing condom', *The Observer* (online), 25 July 2019; S Barnham, 'NOT GUILTY: Man accused of “stealthing” rape is acquitted', *The Observer*, (online) 25 July 2019.

required to give reasons for its decision and, from the limited information available about the trial, it is unknown whether other issues were also raised.

## Other jurisdictions

6.111 To date, the other Australian jurisdictions have not legislated to address these circumstances.

6.112 The NSWLRC has proposed the inclusion of a provision to address such a circumstance:<sup>150</sup>

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.

6.113 The NSWLRC explained that:<sup>151</sup>

Sometimes a person will agree to participate in a sexual activity to be performed in a particular way. In that case, sexual activity performed in a different way is outside the scope of the consent. To address this, we propose that the law provide that it should not be assumed, in this situation, that the person consents to the activity being performed in a different way.

A note [...] includes an example of when this issue may arise. A person might consent to a sexual activity to be performed with the use of a device to prevent a sexually transmitted infection. Sexual activity *without* the use of the device would be outside the scope of the consent.

We included this note in our draft because there are concerns that the law may not cover this scenario currently. (emphasis in original)

6.114 It appears there have been few prosecutions based on non-consensual removal of a condom or similar iterations of that type of conduct in other Australian jurisdictions, although popular media would suggest that there are recent prosecutions in this area.<sup>152</sup>

6.115 In Victoria, a defendant pleaded guilty to a charge of ‘procuring sexual act by fraud’,<sup>153</sup> on the basis that he removed a condom during sexual intercourse without the consent of the complainant. The complainant had agreed to sexual

<sup>150</sup> NSWLRC draft proposals, Proposal 5.6.

<sup>151</sup> Ibid [5.11]–[5.13].

<sup>152</sup> See, eg, S McVeigh ‘Could this be Australia’s first stealthing court case?’, *ABC News* (online, 19 May 2017) <<https://www.abc.net.au/triplej/programs/hack/could-this-be-australias-first-stealthing-court-case/8534190>>; “‘Is this rape?’ The legal grey-area around prosecuting “stealthing” in Australia’, *ABC News* (online, 2 May 2017, updated 18 May 2017) <<https://www.abc.net.au/triplej/programs/hack/stealthing-and-the-law/8489348>>. See also B Chesser, ‘Case in Victoria could set new legal precedent for stealthing, or removing condom during sex’, *The Conversation* (online, 16 August 2019) <<https://theconversation.com/case-in-victoria-could-set-new-legal-precedent-for-stealthing-or-removing-condom-during-sex-118343>>.

<sup>153</sup> *Crimes Act 1958* (Vic) s 45, quoted at [6.78] above.

intercourse on the condition that the defendant would wear a condom. The trial judge noted that:<sup>154</sup>

The charge of procuring sexual activity by fraud clearly involves a deception or false representation, in this case particularised as you representing that you would wear a condom during sexual penetration and you did not. You effectively changed the rules for your own gratification without any consideration for the complainant or her wishes. In my view your offending involved a conscious decision by you and therefore is serious.

6.116 Internationally, research suggests that non-consensual condom removal and related conduct has generally been prosecuted under the auspices of rape (or its equivalent charge) and the vitiating factors for consent.<sup>155</sup> This type of conduct appears to be an emerging area in the criminal law in overseas jurisdictions with the possibility of prosecutions on this basis being recognised.<sup>156</sup>

6.117 In Canada, offences involving the non-consensual removal of, or tampering with, a condom have been prosecuted as sexual assaults.<sup>157</sup>

6.118 In *R v Hutchinson*,<sup>158</sup> the defendant was convicted of sexual assault where the complainant agreed to have sexual intercourse with him and insisted that he wear a condom to prevent conception. Unbeknown to the complainant, the defendant had pierced holes in the condom and the complainant became pregnant. The appellate court proceeded on the basis that the Crown had not established that the complainant's pregnancy was due to the damaged condom but the defendant exposed the complainant 'to an increased risk of becoming pregnant by using a faulty condom'.<sup>159</sup> The conviction for sexual assault was upheld in multiple appeals, but the higher court decisions in this matter disclose a divergence in the reasoning of those

<sup>154</sup> *R v Dinen* [2020] VCC 61, [19] (Wright J). The defendant was sentenced to a two-year community correction order with the additional conditions that he perform 150 hours of community service and that he undertake treatment and rehabilitation programs.

<sup>155</sup> In 2017, in the Federal Supreme Court in Lausanne, Switzerland, a man was convicted of rape after removing a condom during sex without the complainant's consent. The appeals court in Lausanne ruled that the sentence was appropriate, while changing the crime involved from rape to defilement: S Turnbull, 'Swiss court upholds sentence in "stealthing" condom case', *ABC News* (online, 10 May 2017) <<https://www.abc.net.au/news/2017-05-10/swiss-court-upholds-sentence-in-stealthing-condom-case/8512326>>.

In 2018 in Germany, a police officer was convicted of sexual assault for the non-consensual removal of a condom during sexual intercourse. The Court found that the act of removing the condom was non-consensual but that the sexual intercourse itself was consensual, thus he was convicted of sexual assault rather than rape or its equivalent: M Robinson, 'Police officer found guilty of condom "stealthing" in landmark trial' *CNN* (online, 20 December 2018) <<https://edition.cnn.com/2018/12/20/health/stealthing-germany-sexual-assault-scli-intl/index.html>>.

<sup>156</sup> See, eg, *Sexual Offences Act 2003* (UK) ss 74, 76; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R(F) v DPP* [2013] EWHC 945 (Admin); *R ('Monica') v Director of Public Prosecutions* [2018] EWHC 3508 (Admin). See also, eg, Crown Prosecution Service (UK), *Rape and Sexual Offences CPS Policy statement*, chs 1 to 3 <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences>>. See further A Clough, 'Conditional Consent and Purposeful Deception' (2018) 82(2) *Journal of Criminal Law* 178; C Lowbridge, 'Sex, lies and legal consent: Can deceit turn sex into rape?', *BBC News* (online, 26 September 2019) <<https://www.bbc.com/news/uk-england-49127545>>.

<sup>157</sup> See, eg, *R v Hutchinson* [2014] 1 SCR 346; *R v Lupi* [2019] ONSC 3713; P Young (ed), 'Recent cases—Where to draw the line: Fraudulent consent or no consent at all?' (2015) 89 *Australian Law Journal* 151; M Mullin, "'Stealthing' could be considered assault say experts about secret removal of condom during sex' *CBC News* (online, 4 May 2017) <<https://www.cbc.ca/news/health/stealthing-condoms-legal-concerns-1.4088491>>.

<sup>158</sup> *R v Hutchinson* [2014] 1 SCR 346.

<sup>159</sup> Ibid 377 [73] (McLachlin CJ and Cromwell J for McLachlin CJ, Cromwell, Rothstein and Wagner JJ).

courts as to the operation of the law relating to consent and the vitiating factor of fraud or deception.

6.119 The majority in the Supreme Court of Canada<sup>160</sup> ruled that the complainant had consented (that is, voluntarily agreed) to the act of sexual intercourse—it was irrelevant to this enquiry whether sexual intercourse was with or without the use of a condom despite the agreement between the parties that one would be used. The majority found that, once consent had been given, consideration then moved to whether that consent had been vitiated and it was at this stage that consideration was to be given to the ‘qualities of the physical act’.<sup>161</sup> The majority found that the defendant had committed a fraud upon the complainant by piercing the condom thus causing her consent to be vitiated, that is, the complainant had been ‘deceived as to the condition of the condom’.<sup>162</sup> For the vitiating circumstance of fraud to be established there must be, in addition to lies or dishonesty, a ‘significant risk of serious bodily harm as a result of the sexual touching’.<sup>163</sup> The Court considered that the notion of harm included ‘the sorts of profound changes in a woman’s body—changes that may be welcomed or changes that a woman may choose not to accept—resulting from pregnancy’.<sup>164</sup> The majority found that ‘[d]epriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a “significant risk of serious bodily harm” ... and therefore suffices to establish fraud vitiating consent ...’.<sup>165</sup>

6.120 While also dismissing the appeal, the minority in that Court reasoned that, ‘[w]hen a woman agrees to have sexual intercourse with a condom, she is consenting to a particular sexual activity. It is a different sexual activity than sexual intercourse *without* a condom’.<sup>166</sup> The minority noted that the ‘deliberate and undisclosed thwarting of her agreement as to how the intercourse is to take place turns the sexual activity into a non-consensual act, regardless of its consequences’.<sup>167</sup> Thus, the minority reasoning did not require consideration as to whether consent had been vitiated as it was not given in the first instance. The minority said:<sup>168</sup>

Since the protection of personal integrity underlies the requirement for consent in s 273.1(1), consent to the ‘sexual activity in question’ necessarily means the complainant’s voluntary agreement both to engage in touching of a sexual nature and to the manner in which that touching is carried out. In other words, without voluntary agreement as to the ‘how’—the manner in which the sexual activity in question occurred—there is no consent within the meaning of s 273.1(1).

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<sup>160</sup> Ibid 352 [1] ff.

<sup>161</sup> Ibid 372 [55].

<sup>162</sup> Ibid 354 [6].

<sup>163</sup> Ibid 363 [34].

<sup>164</sup> Ibid 376 [70].

<sup>165</sup> Ibid.

<sup>166</sup> Ibid 377 [76] (Abella and Moldaver JJ for Abella, Moldaver and Karakatsanis JJ) (emphasis in original).

<sup>167</sup> Ibid.

<sup>168</sup> Ibid 381 [85], 383 [88].

...

A person consents to *how* she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reason she wishes. The fact that some of the consequences of her motives are more serious than others, such as pregnancy, does not in the slightest undermine her right to decide the manner of the sexual activity she wants to engage in. (emphasis in original)

6.121 In their judgment, the minority expressed concern about the reasoning of the majority:<sup>169</sup>

With respect, it does not follow that because a condom is a form of birth control, it is not also part of the sexual activity. Removing the use of a condom from the ambit of what is consented to in the sexual activity because in some cases it may be used for contraceptive purposes, means that an individual is precluded from requiring a condom during intercourse where pregnancy is *not* an issue. That is, individuals who engage in sexual activity that has no risk of pregnancy, either because of age, fertility, or gender, for example, would have no legal right to insist upon the use of a condom.

...

With respect, even aside from the problematic analogy between pregnancy and bodily harm, this result does not reflect the fact that everyone has a right to insist on a condom as part of the sexual activity—for whatever reason. All individuals must have an equal right to determine how they are touched, regardless of gender, sexual orientation, reproductive capacity, or the type of sexual activity they choose to engage in. We fail to see how condoms can be seen as anything but an aspect of how sexual touching occurs. When individuals agree to sexual activity with a condom, they are not merely agreeing to sexual activity, they are agreeing to how it should take place. That is what s 273.1(1) was intended to protect. (emphasis in original)

6.122 In a later decision of *R v Lupi*, the Superior Court of Justice of Ontario upheld a conviction of sexual assault where the defendant and complainant agreed to have sexual intercourse and the complainant had insisted that the defendant use a condom.<sup>170</sup> The only factual issue in dispute in the trial was whether the act of penetration had occurred without the use of a condom. Applying the reasoning of the majority in *R v Hutchinson*, the Court upheld the conviction of the lower Court.

6.123 Singapore has legislated a separate offence to address such conduct. Section 376H of the Singapore *Penal Code* criminalises non-consensual condom removal:<sup>171</sup>

<sup>169</sup> Ibid 387 [98].

<sup>170</sup> *R v Lupi* [2019] ONSC 3713.

<sup>171</sup> This offence was introduced by the *Criminal Law Reform Act 2019* (Singapore) s 119 and came into operation on 1 January 2020: *Criminal Law Reform Act 2019 (Commencement) Notification 2019*. For this offence, 'a person makes a false representation if it is untrue or misleading, and that person knows that it is, or might be, untrue or misleading'. A representation may be express or implied: s 376H(3)(a)–(b). Section 376H also applies to a defendant who fraudulently obtains the consent of the complainant by deception or false representation that the defendant is not 'suffering from or is a carrier of a sexually transmitted disease': see further [6.157] below.

### 376H Procurement of sexual activity by deception or false representation

- (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;
  - (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) ...
  - (e) A knows or has reason to believe that the consent was given in consequence of such deception or false representation.
- ...
- (3) (c) a 'sexually protective measure' means—
  - (i) where B is female, a device, drug or medical procedure to prevent pregnancy or sexually transmitted diseases as a result of sexual intercourse; or
  - (ii) where B is male, a device, drug or medical procedure to prevent sexually transmitted diseases as a result of sexual intercourse.

6.124 Unlike most other jurisdictions, Singapore's *Penal Code* does not provide a definition of consent.<sup>172</sup> It is argued that the absence of a definition of consent has led to the need for the introduction of this type of scenario specific legislation.<sup>173</sup>

## Discussion

6.125 Judicial and academic discussion of this issue across multiple jurisdictions centres around whether such conduct involves, either:

- the absence of free and/or voluntary consent given by the complainant; or
- the vitiation of consent, initially given, by a circumstance such as a fraudulent representation.

<sup>172</sup> See, eg, *Penal Code* (Singapore) ss 90 (Consent given under fear or misconception, by person of unsound mind, etc., and by child) 375 (Rape), 376 (Sexual assault involving penetration) and s 376H (Procurement of sexual activity by deception or false representation).

<sup>173</sup> A Yean, 'Drawing the Line: Deception and the Law on Sexual Consent' (2019) 1(2) *Journal of International and Public Affairs* <<https://www.jipasg.org/posts/2019/4/30/drawing-the-line-deception-and-the-law-on-sexual-consent>>.

6.126 At the heart of the argument in support of the criminalisation of such conduct is the notion that non-consensual removal of a condom or sabotage of a condom is a deliberate breach of a complainant's sexual autonomy by a defendant.<sup>174</sup>

6.127 With respect to the role of consent in this regard, one academic has noted:<sup>175</sup>

If a matter is not only essential to someone giving consent, but may also have repercussions as to physical health, this must be taken seriously. It is not regrettable consent after it is revealed the victim did not partake in protected sex. It is sex that would not have taken place at all had the victim known the circumstances, in order to protect their physical health.

In addition to this, unprotected sex adds an additional amount of intimacy and skin-to-skin contact that the victim is unaware of.

6.128 Another academic has formulated two approaches to the consideration that non-consensual removal of a condom vitiates consent—the 'literal approach' and the 'risk inherent approach':<sup>176</sup>

There are two primary ways to argue that the nonconsensual removal of a condom vitiates consent to the sex itself. The first, which I will argue is preferable, is a literal approach: the victim consented to touch by a condom, not touch by the skin of a penis. The law is clear that one may consent to one form of sexual contact without providing blanket future consent to all sexual contact. For example, that one has given consent to a partner to penetrate digitally does not mean the partner may, without more, legally penetrate by a penis. The leap is not far, then, to say that consent to touch by a condom covering a penis is distinct from consent to touch by the penis itself.

...

The second rationale for viewing 'stealthing' as a consent violation centers on the different risks inherent to sex with a condom and sex without a condom. The logic would go like this: Someone who consents to a certain sexual act does so after balancing the benefits and risks of that behaviour. Sex without a condom carries higher risks of pregnancy and STI transmission than sex with a condom. Because of the increased risk, the removal of the condom transforms the sexual act into a different act, such that consent to one is not carried over to consent to the other. (notes omitted)

6.129 In terms of the psychology behind, or explanation for, committing acts of non-consensual removal of a condom, it has been said that:<sup>177</sup>

Assailants' narratives underscore the ties between so-called 'stealthing' and other forms of sexual and gender-based violence like rape. Internet forums provide not only accounts from victims but encouragement from perpetrators.

<sup>174</sup> *R v Hutchinson* [2014] 1 SCR 346 357–58 [17]–[19] (McLachlin CJ and Cromwell J for McLachlin CJ, Cromwell, Rothstein and Wagner JJ), 380 [82]–[83], 387 [98] (Abella and Moldaver JJ for Abella, Moldaver and Karakatsanis JJ). See also Brodsky, above n 144, 184, 186, 205; Chesser and Zahra, above n 144; Clough, above n 156, 178, 182, 187, 188.

<sup>175</sup> Clough, above n 156, 190.

<sup>176</sup> Brodsky, above n 144, 190–92. See also Chesser and Zahra, above n 144, 220.

<sup>177</sup> Brodsky, above n 144, 188.

Promoters provide advice, along with explicit descriptions, for how to successfully trick a partner and remove a condom during sex. ‘Stealthing is controversial’, writes Mark Bentson, who runs a website dedicated to teaching others how to trick their sexual partners into condom-less sex. ‘But it’s also a reality. If you want to do it, you need to know how.’

Online writers who practice or promote nonconsensual condom removal root their actions in misogyny and investment in male sexual supremacy. While one can imagine a range of motivations for ‘stealthers’—increased physical pleasure, a thrill from degradation—online discussions suggest offenders and their defenders justify their actions as a natural male instinct—and natural male right. (notes omitted)

### Issue for consideration

6.130 In the Consultation Paper, the Commission sought submissions about whether the list of circumstances in section 348(2) of the Criminal Code should be amended to include a specific circumstance where the defendant fails to use a condom as agreed or sabotages the condom.<sup>178</sup>

### Submissions

#### *Submissions—support*

6.131 A number of respondents expressed support for the inclusion of a circumstance or example addressing consent in the context of stealthing, and other related acts.<sup>179</sup> There was some divergence in the proposed mechanism to achieve this outcome and the reasoning respondents gave in support of the inclusion.

6.132 Multiple respondents were of the view that ‘[s]tealthing ... should be explicitly legislated to communicate the standards of respect we expect people to show each other during sexual activity’.<sup>180</sup>

6.133 Another respondent submitted, in relation to her experience of non-consensual condom removal:<sup>181</sup>

Clarity in legislation is vital. It’s vital so that survivors of this can have language to name what’s happened to us and to understand why it’s having such an ongoing impact on us and consequently those around us.

It shows the seriousness to those who did it, who might do it thinking it is not a big deal. It IS a big deal. (emphasis in original)

6.134 A joint submission by a group of academic respondents stated:<sup>182</sup>

It is conceivable that surreptitious removal of a condom would be captured under the broader heading of fraudulent representations, but the recent research ...

<sup>178</sup> QLRC Consultation Paper No 78 (2019) Q-9(b).

<sup>179</sup> Eg, Submissions 12, 16, 24, 25, 29, 31, 32, 37, 38, 39, 46, 47, 48A, 54, 56, 60, 61, 65A, 67, 73, 74, 75, 77, 79, 84, 85. Also, eg, Submissions 44, 52, 62.

<sup>180</sup> Eg, Submission 56. Also, eg, Submissions 12, 46, 62.

<sup>181</sup> Submission 87.

<sup>182</sup> Submission 24.



cited by the QLRC Consultation Paper at [135] indicates that this offending is extraordinarily common and therefore that community attitudes do not adequately reflect the severity of the harm done by such actions. It should not be left to one individual case—with one complainant and one defendant—to ‘test the waters’ on this issue and establish a precedent. It is not unreasonable to suggest that lack of legislative clarity in this area has a negative effect on policing and prosecutorial attitudes.

**6.135 Rape & Domestic Violence Services Australia submitted that:**

Our organisation would assert that the non-consensual removal of a condom (also colloquially known as ‘stealthing’) should be included as a circumstance where a person does not consent.

Although, we do assert that stealthing could be captured, with some minor amendments to the legislation, by either of the current provisions in section 348(2) of: ‘by false and fraudulent representations about the nature or purpose of the act’, or ‘by a mistaken belief’.

Stealthing could be adequately covered in an amended section 348(2) to include that a person does not consent ‘where they are under a mistaken belief as to the nature of the activity’. This would emphasise that the core wrong involved in stealthing is the fraudulent misrepresentation, rather than the removal of the condom itself.

However, Rape & Domestic Violence Services Australia do recommend a cautious approach here as to inserting any additional circumstance to target fraudulent misrepresentation about the use of contraception generally. This is because such a provision may then unintentionally capture behaviour that, while unethical, is not deserving of criminal sanction—for example, improper use of the contraceptive pill.

**6.136 ANROWS submitted that:**

Research highlights that intimate partner violence interferes with reproductive and sexual autonomy through pregnancy promotion, contraceptive sabotage and pregnancy outcome control. While contraceptive sabotage and pregnancy outcome control are self-explanatory, pregnancy promotion refers to the ignoring or disregard by a sexual partner for reproductive preferences through behaviours that prevent effective contraceptive use, including the removal or sabotage of contraceptive devices (ie vaginal rings and intrauterine devices). Research suggests that domestic and family violence does not facilitate safe negotiation of contraception or sexual activity; reproductive coercion often co-occurs with other violent controlling behaviours; and women may consent to sexual activity to prevent the escalation of physical violence.

...

To this end, ANROWS is supportive of the inclusion of Q-9(b), particularly if widened to include circumstances where a person fails to use a condom as agreed, refuses to use a condom, removes the condom (an act commonly referred to as ‘stealthing’) or sabotages the condom/contraceptive device. (notes omitted)

**6.137 One legal service respondent expressed support for amendment to section 348 and recommended the inclusion of a provision similar to that in Singapore, which specifically requires that ‘A [a person] knows or has reason to believe that the**

consent was given in consequence of such deception or false representation', to avoid any potential ambiguities.<sup>183</sup>

6.138 One respondent supported amendment, but only 'where the person sabotages or removes a condom without consent'. This respondent did not support the inclusion of 'fails to use a condom'. They expressed concern that any provision should not 'be used to criminalise consensual activity'. This respondent highlighted the importance of accurately capturing criminality, particularly to protect sex workers, noting that '[c]onsent, if based on prophylactic use, should not be considered open-ended consent to sexual activity without a prophylactic'.<sup>184</sup>

### ***Submissions—opposition***

6.139 As referred to in [6.26] above, some respondents were opposed to any changes to section 348(2) of the Criminal Code.<sup>185</sup> A number of respondents were specifically opposed to amendment to section 348(2) to address non-consensual condom removal.<sup>186</sup>

6.140 One respondent submitted that '[i]n fairness the introduction of this type of change could broaden the basis upon which leave would be granted to cross-examine a complainant on previous sexual history'.<sup>187</sup>

6.141 Another respondent submitted that, in their view, 'such circumstances would constitute a conceptually different offence to rape and sexual assault and should therefore properly form a separate and distinct offence'.<sup>188</sup>

### **The Commission's view**

6.142 The Commission acknowledges and shares the view expressed in the submissions that the sabotage or removal of a condom without the other party's consent is a concerning practice. It is aware of at least one instance where such an act has been prosecuted as rape in Queensland.

6.143 There may well be merit in considering whether this practice should be specifically dealt with as an offence in its own right. The Commission does not recommend an amendment to section 348(2) of the Criminal Code to include specific circumstances where the defendant sabotages or removes a condom without consent.

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<sup>183</sup> Submission 38.

<sup>184</sup> Submission 54.

<sup>185</sup> Submissions 69, 70, 72, 86.

<sup>186</sup> Eg, Submissions 69, 72.

<sup>187</sup> Submission 69 (note omitted).

<sup>188</sup> Submission 72.

## CONSENT OBTAINED BY A MISTAKEN BELIEF, INDUCED BY THE DEFENDANT, THAT THE DEFENDANT DOES NOT SUFFER FROM A SERIOUS DISEASE

6.144 In considering this circumstance, the Commission has focussed on sexually transmissible diseases that amount to a ‘serious disease’.<sup>189</sup> Generally, a ‘sexually transmitted disease’ is any disease that is transmitted by sexual contact between persons.<sup>190</sup>

### Queensland

6.145 The Criminal Code contains specific offences (outside Chapter 32) for conduct involving the transmission of serious diseases.

6.146 It is an offence under section 317(1) of the Criminal Code for a person to unlawfully wound, do grievous bodily harm, or transmit a serious disease to another person, with the intent of doing some grievous bodily harm or transmitting a serious disease.<sup>191</sup> The relevant intention for this offence is the actual subjective intention to achieve that result, as distinct from an awareness of the probable consequence of the defendant’s actions.<sup>192</sup>

6.147 ‘Serious disease’ is defined in the Criminal Code to mean:<sup>193</sup>

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.

<sup>189</sup> ‘Serious disease’ is a defined term in the Criminal Code (Qld) s 1: see [6.147] below.

<sup>190</sup> *Macquarie Dictionary* (online at 29 April 2020) ‘Sexually transmitted disease’, ‘STD’. The Macquarie Dictionary gives, as examples, diseases such as syphilis, AIDS and some forms of hepatitis.

<sup>191</sup> Criminal Code (Qld) s 317(1)(b), (e). Such conduct is a crime, with a maximum penalty of life imprisonment. See also s 313(2): ‘Any person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to, or transmits a serious disease to, the child before its birth, commits a crime’ (maximum penalty of life imprisonment).

<sup>192</sup> *Zaburoni v The Queen* (2016) 256 CLR 482, 501 [55] (Gageler J) citing *R v Willmot (No 2)* [1985] 2 Qd R 413, 418; *R v Reid* [2007] 1 Qd R 64, 96–7.

<sup>193</sup> Criminal Code (Qld) s 1 (definition of ‘serious disease’). That definition applies throughout the Code. The term ‘serious disease’ is used, however, only in ss 317(1) and 313(2).

6.148 'Grievous bodily harm' is defined in similar terms<sup>194</sup> and is also a crime.<sup>195</sup>

6.149 Generally, recent prosecutions involving a serious disease have related to human immunodeficiency virus ('HIV') or hepatitis.<sup>196</sup>

6.150 For rape and sexual assault, section 348(2) of the Criminal Code does not include, as a circumstance in which consent is not freely and voluntarily given, consent obtained by a mistaken belief that a person does not have a serious disease.

## Other jurisdictions

6.151 No other Australian jurisdiction specifically includes this scenario in its list of circumstances in which consent is not freely or voluntarily given.

6.152 The NSWLRC has not proposed an amendment to the legislation in that jurisdiction to include a person's 'failure to disclose their HIV/AIDS positive status' as a specific vitiating circumstance. It observed that such a scenario is a 'subcategory of fraudulent misrepresentation', and noted that an amendment to include this as a specific circumstance in which consent is vitiated raises questions about:<sup>197</sup>

whether such a law would discourage people from undertaking appropriate health checks and talking openly about HIV, and whether it would apply if someone were unaware of their HIV/AIDS positive status.

6.153 The NSWLRC also noted the existing provisions in the *Crimes Act 1900* (NSW) and the *Public Health Act 2010* (NSW) that are specifically addressed to the transmission of serious diseases.<sup>198</sup>

6.154 Internationally, various approaches have been taken to this issue.

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<sup>194</sup> The Criminal Code (Qld) s 1 defines 'grievous bodily harm' to mean:

- (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.

<sup>195</sup> See Criminal Code (Qld) s 320(1): 'Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years'.

<sup>196</sup> See, eg, *R v Reid* [2006] QCA 202; *R v Zaburoni* [2014] QCA 77; *Zaburoni v The Queen* (2016) 256 CLR 482; and see also *R v Leighton* [2014] QCA 169.

The facts of *Zaburoni* were that the complainant and defendant engaged in unprotected sexual intercourse after the complainant asked the defendant about his HIV status and the defendant untruthfully advised that he was not HIV-positive. This proceeded as an offence of transmitting a serious disease to another person (and not as an offence of rape or another sexual offence). See also, in similar circumstances, *R v Reid* [2006] QCA 202.

<sup>197</sup> NSWLRC, *Consent in relation to sexual offences*, Consultation Paper No 21 (October 2018) [4.65]–[4.67]. See also Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005) 41, in which the majority expressed concern that such an approach 'may have unwanted and inadvertent health ramifications' by discouraging health checks and curbing open communication.

<sup>198</sup> See *Crimes Act 1900* (NSW) ss 4(c) (definition of 'grievous bodily harm'), 33(1)(b), under which it is an offence to 'cause a person to contract a grievous bodily disease'; and *Public Health Act 2010* (NSW) s 79(1), which relates to a person's obligation to take reasonable precautions against spreading a sexually transmissible disease or condition.

6.155 The legislation in Canada includes a vitiating factor, that applies to sexual assault, ‘where the complainant submits or does not resist by reason of fraud’.<sup>199</sup> A series of cases relating to circumstances in which a defendant was HIV positive have concluded that where a defendant is deliberately deceitful about, or fails to disclose that they have, a condition which poses ‘a significant risk of serious bodily harm’ to the complainant, that action ‘is a type of fraud which may vitiate consent to sexual intercourse’.<sup>200</sup> In summary, the effect of the decisions, taken together, is that:<sup>201</sup>

Failure to disclose one’s HIV positive status amounts to fraud vitiating consent where the complainant would not have consented had he or she known the accused was HIV positive, and where sexual contact poses a realistic risk of transmission or causes actual harm in the form of transmission of HIV. There is no realistic risk of transmission where the infected party has a low viral load, and a condom is used.

6.156 In England and Wales, the *Sexual Offences Act 2003* (UK) provides that, if it is proved that the defendant did the relevant sexual act and ‘intentionally deceived the complainant as to the nature or purpose’ of that act, it is to be ‘conclusively presumed’ that the complainant did not consent.<sup>202</sup> Under the current case law on this provision, it may be open to find that the complainant’s consent was vitiated where there was active deception by the defendant as to a transmissible disease (for example, if the complainant had been positively, but falsely, assured that the defendant was not HIV-positive).<sup>203</sup> It appears that more is required, however, than a mere failure to disclose.<sup>204</sup>

6.157 As explained at [6.124] above, the *Penal Code* in Singapore does not contain a definition of consent for the purpose of sexual offences. Section 376H of the *Penal Code* creates an offence of ‘procurement of sexual activity by deception or false representation’. It specifically includes deception or false representation related to whether the defendant is suffering from or is a carrier of a sexually transmitted disease.<sup>205</sup>

6.158 In a number of those jurisdictions, it has been argued that the transmission of serious diseases, through sexual activity, should not ordinarily be dealt with by prosecution for rape or sexual assault. In particular, it is argued that such a response

<sup>199</sup> Criminal Code, RSC 1985, c C-46, s 265(1)(a), (2), (3)(c). See also ss 273(1) and 273.1(1), (2) as to the offence of aggravated sexual assault (where a defendant, in committing the sexual assault, endangers the life of the complainant) and further circumstances in which a person does not consent.

<sup>200</sup> See, in particular, *R v Cuerrier* [1998] 2 SCR 371. This decision followed an amendment to the law which removed the requirement to consider whether the fraud was related to ‘the nature and quality of the act’: [3]–[16] (L’Heureux-Dube J), [97]–[108] (Cory J for Cory, Major, Bastarache and Binnie JJ).

<sup>201</sup> *R v Gauthier* [2020] BCSC 146, [84] (Devlin J). This passage neatly summaries the key decisions of *R v Cuerrier* [1998] 2 SCR 371 and *R v Mabior* [2012] 2 SCR 584. See also, relevantly, *R v DC* [2012] SCR 626 and *R v Goodchild* [2017] ONSC 6379.

<sup>202</sup> See *Sexual Offences Act 2003* (UK) s 76(1)(a), (2)(a). See also ss 74–5, 77–8. See also *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin), [72] (Lord Burnett CJ and Jay J).

<sup>203</sup> See, together, *R v McNally (Justine)* [2014] QB 593, 600 [24] (Leveson LJ for the Court); and *R v B* [2007] 1 WLR 1567, 1571 [17] (Latham LJ for the Court).

<sup>204</sup> See *R v B* [2001] 1 WLR 1567, 1571 [17] (Latham LJ for the Court).

<sup>205</sup> *Penal Code* (Singapore, cap 224, 2008 rev ed) s 376H(1). See [6.123] above.

is disproportionate, may create stigma and may undermine public health objectives.<sup>206</sup>

### Other relevant laws and policies

6.159 Issues that affect people living with a serious disease, such as HIV, are the subject of national and international programmes, initiatives and laws. There are legislative, policy and community structures in place in Queensland, and more broadly, to prevent and treat such diseases.<sup>207</sup>

6.160 Internationally, the Joint United Nations Programme on HIV/AIDS ('UNAIDS') notes that '[p]revention of HIV must be the primary objective of the policy of criminalization'.<sup>208</sup>

6.161 In Australia, the *National Guidelines for Managing HIV Transmission Risk Behaviours* relevantly note that:<sup>209</sup>

Prosecution of people for the transmission of HIV, or for risking the transmission of HIV to others, perpetuates and worsens negative stereotypes of people living with HIV. This occurs both within the criminal justice system, including within the police force, and in the general public via media reporting of the prosecution case. Such stereotypes add to HIV stigma and discrimination and reduce the effectiveness of public health programs to reduce HIV transmission by deterring people from being tested for HIV. There is extensive local and international literature which documents the greater public health harms that may be caused by criminalisation of HIV transmission.

6.162 In Queensland, the *Public Health Act 2005* mandates that certain medical conditions are categorised as a 'notifiable condition'.<sup>210</sup> This requires that in particular circumstances members of the medical profession and others must notify the Department of Health that an individual has been diagnosed with a relevant condition.<sup>211</sup> The Act creates a Notifiable Conditions Register,<sup>212</sup> maintained by the

206 See, eg, Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005) 41; Canadian HIV/AIDS Legal Network, *The Criminalisation of HIV Non-disclosure in Canada: Current Status and the Need for Change* (April 2019); J Wilson-Raybould, Attorney General of Canada, *Office of the Director of Public Prosecutions: Directive*, 30 November 2018; M Loutfy et al, 'Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law' (2014) 25(3) *Canadian Journal of Infectious Diseases and Medical Microbiology* 135; Canadian Coalition to Reform HIV Criminalisation, *End Unjust HIV Criminalization: Community Consensus Statement* (November 2017, updated March 2019); D Yang, 'Evaluating the Criminalisation of HIV/AIDS Non-Disclosure Laws in Singapore' (2018–19) 36 *Singapore Law Review* 136. See also D Yang, 'Is it Time to Decriminalise HIV Non-Disclosure in Singapore?' (2018–19) 10 *Singapore Law Review*, *Juris Illuminae*.

207 See, eg, Australian Government, Department of Health (2018) *Eighth National HIV Strategy 2018–2022*. See also, eg, a study in the United Kingdom: C Dodds and P Keogh, 'Criminal Prosecutions for HIV Transmission: People Living with HIV Respond' (2016) 17 *International Journal of STD & AIDS* 315.

208 R Elliott, 'Criminal Law, Public Health and HIV Transmission: A Policy Options Paper', UNAIDS 2002, 15.

209 Australian Government, Department of Health, *National Guidelines for Managing HIV Transmission Risk Behaviours* (2018) 13. The Guidelines were developed in consultation with a number of national bodies largely for the use of Chief Health Officers ('CHOs'), to 'ensure consistency in the way all Australian states and territories manage HIV transmission risk behaviours'. They are intended, among other things, to 'provide advice on best practice based upon the best available evidence at the time of completion': 1.

210 *Public Health Act 2005* (Qld) ss 62–66.

211 *Public Health Act 2005* (Qld) ss 69–75.

212 *Public Health Act 2005* (Qld) ss 67–68, 76–88.

Department of Health, which requires that identifying information be kept in relation to people living with particular conditions including HIV and nominated strains of Hepatitis.<sup>213</sup> In addition, a number of offence provisions are legislated in relation to the reckless spread of controlled notifiable conditions.<sup>214</sup> The Act also prescribes guiding principles in relation to this part of the legislation:<sup>215</sup>

- (1) The principles intended to guide the achievement of this chapter's purpose are the following—
  - (a) The spread of notifiable conditions should be prevented or minimised without unnecessarily infringing the liberty or privacy of individuals;
  - (b) a person at risk of contracting a notifiable condition should take all reasonable precautions to avoid contracting or being infected with the condition;
  - (c) a person who suspects he or she may have a notifiable condition should ascertain—
    - (i) whether he or she has the condition; and
    - (ii) what precautions should be taken to prevent others from contracting the condition.
- (2) For subsection (1), a person at risk of contracting, who suspects he or she may have, or who has, a notifiable condition has a right—
  - (a) to be protected from unlawful discrimination; and
  - (b) to have his or her privacy respected; and
  - (c) to make informed decisions about his or her medical treatment.
- (3) Nothing in this section limits the *Anti-Discrimination Act 1991*, section 107.<sup>216</sup>

6.163 Queensland Health's 'Guideline for the Management of People Living with HIV who Place Others at Risk of HIV' explains the relationship between such mechanisms under the *Public Health Act 2005* and the Criminal Code in this way:<sup>217</sup>

The Criminal Code also has penalties for those who recklessly transmit HIV, but the Department of Health recommends assessment for management under this Guideline, as an alternative in the first instance, which provides for management under the *Public Health Act 2005*.

This Guideline consists of a five level framework designed to facilitate behavioural change in those who have not responded to initial interventions at

<sup>213</sup> *Public Health Regulation 2018* (Qld) sch 1 Notifiable Conditions.

<sup>214</sup> *Public Health Act 2005* (Qld) s 143.

<sup>215</sup> *Public Health Act 2005* (Qld) s 66.

<sup>216</sup> *Anti-Discrimination Act 1991* (Qld) s 107: 'A person may do an act that is reasonably necessary to protect public health'.

<sup>217</sup> Queensland Government, Department of Health, *Guideline for the Management of People Living with HIV who Place Others at Risk of HIV*, Document No QH-GDL-367:2014 (6 November 2014).

the local level or are unwilling or unable to change their risk behaviours. A panel of experts [the HIV Advisory Panel] provides advice to assist in the management of these individuals.

...

#### 4.6 Levels of management

There are five levels of management:

- Level One: Management by the Clinician at the clinic level;
- Level Two: Department of Health managed and supervised counselling, education and support
- Level Three: Formal agreement on behaviour change
- Level Four: Detention
- Level Five: Referral to Police

...

##### 4.6.5 Level Five—Referral to police

Escalation to Level Five would only occur where management at lower levels had not been successful. All actions available under lower levels would be exhausted before Level Five is initiated, however, the matter can be elevated to Level Five immediately if the panel considers there is clear evidence that:

- a person is unwilling to modify their behaviour that recklessly endangers another person(s) by exposing them to HIV
- or
- would support a charge with the elements of 'intentionally causing serious harm'.

Prosecution under the *Public Health Act 2005* or the *Criminal Code Act 1899* would be considered in most circumstances.

6.164 Additionally, the Queensland HIV Action Plan 2019–2022 states:<sup>218</sup>

The Queensland Government is committed to working towards the virtual elimination of new HIV transmissions in Australia by 2022 through a comprehensive approach to prevention, testing and treatment focused on meeting the United Nations 95-95-95 targets. These are that: 95 per cent of all people with HIV will know their HIV status, 95 per cent of all people with diagnosed HIV infection will receive sustained antiretroviral treatment and 95 per cent of all people receiving antiretroviral therapy will maintain viral suppression so their immune system remains strong and minimises the risk of transmitting HIV. This commitment has been endorsed by the Australian Health Ministers in the 20th International AIDS Conference Legacy Statement.

...



In 2018, there were 180 new HIV diagnoses in Queensland, a 13 per cent decrease compared with the previous four-year average of 206.5 cases.

...

Modern antiretroviral treatment (ART) is so effective at suppressing HIV within a person's body, that people consistently using ART are unlikely to ever develop AIDS and have effectively no risk of sexually transmitting the virus to others.

6.165 In recent years, there has been a significant reduction in new HIV transmissions in Queensland.<sup>219</sup>

## Issue for consideration

6.166 In the Consultation Paper, the Commission sought submissions about whether section 348(2) of the Criminal Code should be amended to include a specific circumstance addressing the situation where the complainant agrees to a sexual act under a mistaken belief (induced by the defendant) that the defendant does not suffer from a serious disease.<sup>220</sup>

## Submissions

### *Submissions—support*

6.167 A number of respondents submitted that the legislation should include a circumstance or example about agreement to a sexual act under a mistaken belief (induced by the defendant) that the defendant does not suffer from a serious disease.<sup>221</sup>

6.168 An academic expressed the view that, in circumstances where a defendant wrongly induces a complainant to believe that the defendant does not have a serious disease, it is difficult to characterise the defendant's conduct as falling within section 348(2)(e) because there is no dishonesty about the purpose of the act, namely, 'sexual gratification'.<sup>222</sup> This respondent suggests that section 348(2) should be amended to provide that:<sup>223</sup>

a person does not freely and voluntarily consent to an act if s/he 'consented' because of a mistaken belief ... that the accused does not have a serious disease, in circumstances where there is a real risk that the person will contract the disease as a result of her/his participation in the act.

6.169 Elsewhere, this respondent has suggested that the amendment should also apply where the complainant is 'ignorant of the fact' that the defendant has a serious

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<sup>219</sup> Ibid.

<sup>220</sup> QLRC Consultation Paper No 78 (2019) Q-9(c).

<sup>221</sup> Eg, Submissions 16, 25, 48A, 60, 61, 65A, 67, 73, 74, 77, 79, 84.

<sup>222</sup> Submission 73.

<sup>223</sup> Submission 73, citing Dyer, above n 134, 173.

disease.<sup>224</sup> Further, this respondent explained that, where the risk of transmission is ‘negligible’, the complainant’s interest in sexual autonomy should ‘give way’ to the defendant’s ‘rights to autonomy and privacy’. This view takes into account the ‘potential for stigma and discrimination’, which provides ‘strong reasons’ for protecting the confidentiality of a person diagnosed with a serious disease, leading to the conclusion that a person should not be required to disclose that they have a serious disease where the ‘possibility of [transmission] is truly insignificant’.<sup>225</sup>

6.170 Finally, this respondent suggested that amending the law would be unlikely to deter people from undergoing testing for serious diseases, and that ‘speculative concerns of this nature should not obstruct a law that gives appropriate protection to sexual autonomy’.<sup>226</sup> Further, it is argued that, if the law was a deterrent, then that deterrent would already exist by way of provisions regarding grievous bodily harm and the transmission of serious diseases.<sup>227</sup>

### **Submissions—opposition<sup>228</sup>**

6.171 One submission from a number of academics submitted that this circumstance is covered by the present provision in section 348(2) regarding fraudulent representations and expressed concern that legislating in the specific way proposed ‘can have disproportionate and discriminatory impacts on LGBTQIA+ identifying individuals and other vulnerable populations’.<sup>229</sup>

6.172 One respondent recommended that the ‘current law should be maintained whereby a person’s failure to disclose their HIV/AIDS positive status is dealt with separately from the law of sexual offences’. In their view, ‘[it] is critical to ensure that people are not discouraged from undertaking appropriate health checks in relation to HIV/AIDS and other sexually transmittable conditions’.<sup>230</sup>

6.173 Another respondent submitted that the ‘issue of serious disease is more appropriately (and already) addressed in other areas of Queensland law’ such as the *Public Health Act 2005*. This respondent cautioned against criminalising HIV transmission as it ‘contradicts best practice public health messaging’. They submitted that an alternative approach might be the inclusion of a provision that:<sup>231</sup>

<sup>224</sup> Dyer, above n 134, 173. It was noted that, under this proposal, consent would be vitiated if the defendant was unaware they had a serious disease, but that the defendant would generally lack the *mens rea* to be convicted of the offence. This may be different if a defendant ‘strongly suspected’ that they had a serious disease: 175; see also A Dyer, ‘Yes! To Communication About Consent. No! To Affirmative Consent: A Reply to Anna Kerr’ (2019) 7(1) *The Griffith Journal of Law and Human Dignity* 17, 44.

<sup>225</sup> Dyer, above n 134, 176, citing S Ryan, “Active Deception” vs Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ [2019] 1 *Criminal Law Review* 1, 10–11.

<sup>226</sup> Ibid 175, referring to *R v Mabior* [2010] 2 SCR 584, 608 [59] (McLachlin CJ for the Court).

<sup>227</sup> Ibid. See also Dyer, above n 224, 44–5.

<sup>228</sup> Eg, Submissions 24, 37, 39, 45, 51, 54, 56, 58, 69, 70, 71, 72, 86.

<sup>229</sup> Submission 24 (note omitted).

<sup>230</sup> Submission 37.

<sup>231</sup> Submission 39.

any person engaging in sexual activity can indicate that their consent hinges upon the use of a condom (or other safer sex paraphernalia), irrespective of whether the intended use is to prevent the transmission of sexually transmitted infections, or for reason of reproductive control, or indeed, for any other reason.

6.174 A submission from a respondent in the criminal law sector opposed an amendment, noting that this is ‘a health issue for public awareness [or] education campaigns, not for criminal courts’.<sup>232</sup>

6.175 One respondent opposed an amendment noting:<sup>233</sup>

- When non-disclosure of HIV status is treated as fraud vitiating sexual consent, there is no requirement that the legal response be proportionate to the risk of harm posed by the sexual encounter, or the actual harm that occurs. This results in people living with HIV being convicted of aggravated sexual assault for consensual sex that did not cause or pose any risk of HIV transmission.
- People living with HIV who have sought support from their clinicians, psychologists and social workers to address barriers to the use of protective methods have been reported to police on suspicion of sexual assault.
- People living with HIV have been named and had their ‘mug shots’ included in police media releases that describe them as suspected sexual predators, inviting other ‘victims’ to come forward or seek testing.

6.176 This respondent further submitted:

There is no public health justification for changing the law of sexual offences to make non-disclosure of a serious communicable disease a fraud vitiating sexual consent.

...

The public health management process balances the consent and confidentiality of the participant with the need to protect public health and the personal safety of their current and future partners. It constitutes a positive and effective alternative to the criminal law for managing the risk of transmission and the difficulties people may face in negotiating disclosure of positive HIV status.

6.177 Respondents representing the interests of those with HIV and Hepatitis expressed significant concern about the criminalisation of people living with serious disease which may occur if such an inclusion is made to section 348(2). Collectively these respondents made the following points:<sup>234</sup>

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<sup>232</sup> Submission 69.

<sup>233</sup> Submission 45, citing A McClelland, “‘Lock this Whore Up’: Legal Violence and Flows of Information Precipitating Personal Violence Against People Criminalised for HIV-related Crimes in Canada (2019) 10(1) *European Journal of Risk Regulation* 132, and referring generally to the author’s ‘own interviews with legal advocates and community organisations working to challenge HIV criminalisation in [Canada]’.

<sup>234</sup> Eg, Submissions 51, 58, 80, 81.

- The Queensland criminal law, by way of provisions relating to grievous bodily harm, currently has a mechanism to prosecute those who intentionally or recklessly transmit a serious disease.<sup>235</sup>
- The *Public Health Act 2005* allows for the prosecution of people with HIV who fail to take reasonable precautions to prevent transmission of HIV and contains powers to make orders to protect public health.<sup>236</sup>
- The proposed inclusion in section 348(2) ‘is vague, arbitrary and does not give consideration to whether there is any risk of transmission’,<sup>237</sup> and ‘is contrary to, and would undermine, public health strategies and initiatives’.<sup>238</sup> Further, it may discourage people from being tested for a serious disease or seeking treatment.<sup>239</sup>
- Medical science advances in this area assist substantially in controlling the transmission of HIV, for example, people living with HIV taking HIV anti-retroviral therapies can ‘achieve and maintain sustained viral suppression, ... [and] have no risk of sexually transmitting the virus to a HIV-negative partner’.<sup>240</sup> In addition, HIV pre-exposure prophylaxis (‘PrEP’) involves ‘the use of HIV medications by HIV negative people and is ... highly effective in the prevention of HIV’.<sup>241</sup> Similarly, advances in medical science and knowledge in relation to the various strains of Hepatitis reflect that transmissibility via sexual intercourse for some strains is limited. Also, cures and treatments exist for different types of Hepatitis.<sup>242</sup>
- The public health laws and guidelines in Australia appropriately deal with issues surrounding the transmission of HIV and Hepatitis.<sup>243</sup>
- People living with HIV and Hepatitis are entitled to privacy in relation to their status and they should not be obligated to disclose this fact, particularly if they are taking precautions to prevent transmission. There remains a stigma attachable to those with HIV and other serious diseases—disclosure of the condition can leave people vulnerable to such a stigma and negative

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235 Eg, Submission 51. Also, eg, Submissions 80, 81.

236 Eg, Submission 51. Also, eg, Submission 80.

237 Submission 58. Also, eg, Submission 80.

238 Submission 58. Also, eg, Submissions 80, 81.

239 Eg, Submissions 80, 81.

240 Submission 58 (note omitted). Also, eg, Submissions 56, 81.

241 Submission 58. Also, eg, Submission 81.

242 Eg, Submission 80.

243 Eg, Submissions 58, 80, 81. Also, eg, Submission 56.

responses including ostracism and violence. Non-disclosure of this status is one way a person living with such a condition protects themselves.<sup>244</sup>

- ‘Moving the regulation of HIV transmission risk and disclosure from the Queensland public health law to the Criminal Code would represent a dramatic elevation of induced mistaken beliefs in relation to HIV status to among the most serious offences known to the law which attract significantly higher and, we would argue, disproportionate penalties’.<sup>245</sup>
- ‘Australia, and indeed Queensland is a world leader in HIV prevention, treatment and care.<sup>246</sup> We are well placed to be the first country in the world to virtually eliminate HIV transmission. In part this is because successive Australian governments, over many national and jurisdictional HIV Strategies, have adopted the principle of shared responsibility. This principle articulates that both HIV positive and HIV negative people are responsible for preventing HIV transmission and that each party should take responsibility for maintaining their own sexual health without assuming, or relying on representations made by other parties, as to the presence, absence or likelihood of transmission risk’.<sup>247</sup>
- Approaches taken by international jurisdictions, such as Singapore and Canada, should not be adopted in Australia. The reasons given by these respondents relate to the concerns discussed previously, including the ineffectiveness of the law and the potential for the law to operate disproportionately, stigmatisation, and negative impacts on testing for HIV or other diseases.<sup>248</sup>

### The Commission’s view

6.178 In the Commission’s view, section 348(2) of the Criminal Code should not be amended to address a circumstance in which a complainant consents to a sexual act under a mistaken belief, induced by the defendant, that the defendant does not have a serious disease.

6.179 The Criminal Code contains other specific offences for conduct involving the transmission of serious diseases or grievous bodily harm. These offences are not directed to (non-consensual) sexual activity, but can apply in appropriate circumstances to such conduct.

6.180 The Commission considers that the current law achieves the right balance between public health measures and criminal law interventions.

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<sup>244</sup> Eg, Submissions 51, 58, 80, 81. Respondents also noted that the law recognises the ‘potential for discrimination, stigmatisation and personal violence against HIV positive people who choose to disclose their status’, for example, the *Anti-Discrimination Act 1991* and the *Public Health Act 2005*: Submissions 51, 58. A similar submission was made in relation to Hepatitis: Submission 80.

<sup>245</sup> Submission 51.

<sup>246</sup> A similar submission was made in relation to Hepatitis: Submission 80.

<sup>247</sup> Submission 58. Also, eg, Submission 81.

<sup>248</sup> Eg, Submissions 45, 51. Also, eg, Submissions 58, 80.

6.181 The general approach to the prevention and treatment of serious diseases, such as HIV, on international, national and state levels, promotes a framework of public health measures followed by, as a last resort, criminal law interventions. There are presently various support systems, legislative mechanisms and offence-making provisions within the Queensland public health framework and criminal justice system that operate in tandem to follow this philosophy. The present position allows for both the prevention of new transmissions and the need to address or punish criminal behaviours. In recent years, there has been a reduction in new HIV transmissions in Queensland.<sup>249</sup>

6.182 In the Commission's view, the present frameworks within the public health and criminal law sectors adequately and appropriately deal with the transmission of serious diseases. The current dual frameworks address issues of prevention and reduction of transmission, while also allowing for diversity and flexibility in the way in which conduct is addressed by reference to the severity and criminality of the relevant conduct. Accordingly, there is no need to amend section 348(2).

## CONSENT OBTAINED IN CIRCUMSTANCES OF DOMESTIC AND OTHER VIOLENCE

6.183 In Queensland, domestic and family violence occurs where 'violence or abuse' is used by one person in a relationship to 'maintain power and control' over the other person. In Queensland, domestic and family violence:<sup>250</sup>

includes behaviour that is physically, sexually, emotionally, psychologically or economically abusive, threatening, coercive or aimed at controlling or dominating another person through fear. The violence or abuse can take many forms ranging from physical, emotional and sexual assault through to financial control, isolation from family and friends, threats of self-harm or harm to pets or loved ones, constant monitoring of whereabouts or stalking.

6.184 Of particular relevance to this review is domestic violence arising within 'intimate personal relationships', such as married and de facto spouses, people who are engaged to be married, and people who are a couple.<sup>251</sup> Within such relationships, there are intersections between sexual offences and domestic violence.

6.185 ANROWS has synthesised research about 'intimate partner sexual violence'. That research recognises that 'domestic violence and sexual assault can occur in the same incident ... when an intimate partner uses sexual violence'. Intimate partner sexual violence is described as a 'tactic of domestic violence' and is

<sup>249</sup> Queensland Health, *Queensland HIV Action Plan 2019–2022* (November 2019) 2.

<sup>250</sup> Queensland Government, *Domestic and Family Violence Prevention Strategy 2016–2026* (December 2016) 1; *Domestic and Family Violence Protection Act 2012* (Qld) s 8. See also generally, as to domestic and family violence in Queensland: Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*, Final Report (2015) vol 1; Queensland Government, *Queensland Government Response to the report of the Special Taskforce on Domestic and Family Violence, Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*, tabled in Parliament on 18 August 2015; QLRC, *Domestic Violence Disclosure Scheme* (Report No 75, June 2017) ch 3.

<sup>251</sup> Queensland Government, *Domestic and Family Violence Prevention Strategy 2016–2026* (December 2016) 1; *Domestic and Family Violence Protection Act 2012* (Qld) ss 13–18. The *Domestic and Family Violence Protection Act 2012* (Qld) also applies to family relationships and informal care relationships: ss 19–20. Sexual offences and issues of consent could also sometimes arise in those types of relationships.

generally explained as ‘the intentional perpetration of sexual acts without consent in intimate relationships’. It is ‘characterised by “deliberate intimidation or coercion” and may either be pressure to perform sexual acts that the victim is not comfortable with, or to engage in acts at a time that they do not wish to do so’. It may also include reproductive coercion or control.<sup>252</sup>

6.186 Broadly, research indicates that ‘[intimate partner sexual violence] often co-occurs with other forms of physical and emotional violence’ and that it is ‘often part of a larger pattern of coercive control in a relationship’.<sup>253</sup>

6.187 Incidents of intimate partner sexual violence are less likely to be reported than other types of domestic violence or sexual assault, with research concluding that ‘[w]omen tend to only report severe [intimate partner sexual violence] to the police ... with several studies finding a zero percent report rate for sexual coercion’.<sup>254</sup> In addition, offences arising out of intimate partner sexual violence are described as ‘difficult to prosecute’.<sup>255</sup>

This could be partly due to delays in reporting because of the barriers outlined above, and also partly due to the current lack of legal recognition of affirmative consent models in many jurisdictions. Without an affirmative model, demonstrating lack of consent is complicated because sexual violence may have been perpetrated in a context where consensual relations may have taken place before and/or after the assault, and in the context of established patterns of sexual behaviours that do not include verbalised consent. (notes omitted)

## Issue for consideration

6.188 A common general theme among respondents was that the law regarding the circumstances in which consent to an act is not freely and voluntarily given, in Chapter 32 of the Criminal Code, should be amended to address issues that relate to domestic violence.<sup>256</sup> Some of the amendments suggested by respondents raise matters that would apply exclusively in circumstances involving domestic violence. Other suggested amendments could apply either to a person experiencing domestic violence or more broadly to other persons.

6.189 Some respondents submitted, for example:

<sup>252</sup> ANROWS, ‘Intimate Partner Sexual Violence: Research Synthesis’, (Insights No 08/2019, ANROWS, 2nd ed) 1 (notes omitted); Cox, above n 142, 11 (note omitted). As to reproductive coercion, see also H Douglas and K Kerr, ‘Domestic and Family Violence, Reproductive Coercion and the Role for Law’ (2018) 26 *Journal of Law and Medicine* 341.

<sup>253</sup> Cox, above n 142, 2, 11, 28 (notes omitted); ANROWS, above n 252, 2.

<sup>254</sup> ANROWS, above n 252, 4. It was noted that the zero percent reporting rate was ‘unsurprising given that most women do not believe that sexual coercion is a crime’: 4 (notes omitted).

<sup>255</sup> Ibid 5.

<sup>256</sup> These submissions were made in response to the Commission seeking submissions about whether s 348(2) of the Criminal Code should include any other specific circumstances in which consent is not freely and voluntarily given: QLRC Consultation Paper No 78 (2019) Q-10.

- The circumstances in which there is no consent should include where a person agrees or submits to a sexual act because of force or harm, or a reasonable fear of force or harm, to an animal.<sup>257</sup>
- In order to address behaviours that are common to domestic violence, the circumstances in section 348(2) of the Criminal Code should be expanded beyond ‘fear of bodily harm’ to include ‘fear of degradation, humiliation, exposure, outing, harassment and blackmail’, and should include threats that are not imminent.<sup>258</sup>
- In a family or domestic violence situation, ‘threats of harm to children, relatives or animals can be used to coerce a partner to have non-consensual sex’.<sup>259</sup> This should be reflected by providing that a person does not consent if the person agrees or submits to a sexual act because of force or harm, or a reasonable fear of force or harm, to themselves or another person; or because they or another person are unlawfully detained.<sup>260</sup>
- Where there is a history of violence, ‘sexual coercion may be experienced as the cumulative effect of a pattern of coercive and controlling behaviours’. In those circumstances it can be difficult to prove a particular ‘threat’ or ‘intimidation’ that negates consent. Section 348(2) should extend to circumstances where the complainant ‘has sexual intercourse because of fear of harm of any type against the complainant, another person, an animal or damage to property’, with a focus on the complainant’s fear and not the defendant’s conduct. There should also be a new provision ‘to clarify that in circumstances of domestic and/or family violence, actual threats or coercive behaviour need not be immediately present for consent to be negated’.<sup>261</sup>

6.190 Respondents also made other submissions relevant to domestic violence. Some respondents, including the Women’s Legal Service Qld, submitted that ‘[a] history of domestic violence [should] be expressly required to be considered in sexual violence offences, where it is relevant’.<sup>262</sup> A respondent also suggested that section 132B of the *Evidence Act 1977* should be amended to make it applicable to offences in Chapter 32 of the Criminal Code.<sup>263</sup>

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<sup>257</sup> Eg, Submissions 25, 39, 77, 79, 84, 85.

<sup>258</sup> Submission 39.

<sup>259</sup> Submission 31. Also, eg, Submission 39.

<sup>260</sup> Submission 31. Also, eg, Submissions 25, 39, 60, 77, 79, 84, 85. Some respondents also suggested that circumstances should include a threat of any kind against themselves or another person.

<sup>261</sup> Submission 37. Also, eg, Submissions 39, 85.

<sup>262</sup> Eg, Submissions 25, 32, 47, 60, 67, 74, 77, 79, 84, 85.

<sup>263</sup> Submission 25.

A respondent also suggested that specific jury directions should be given where there is a ‘domestic violence relationship’: for example, a direction that a person may submit to a sexual act due to fear of harm in circumstances of domestic violence, and that this may apply where there was no immediate threat: Submission 85. Also, eg, Submission 39.



**Criminal law: Queensland**

6.191 Section 348(1) of the Criminal Code provides that consent to a sexual act must be ‘freely and voluntarily given’. The list of circumstances in section 348(2), when consent is not freely and voluntarily given, is not exhaustive. That is, it does not list all the circumstances in which consent is taken to be not freely and voluntarily given. Also, proof that consent was not freely and voluntarily given does not require proof that one of the listed circumstances applied.

6.192 Section 348(2) does not refer specifically to domestic violence. (Nor do the equivalent provisions in other jurisdictions.) However, many actions that are commonly associated with domestic violence would come within other circumstances that vitiate consent.

6.193 In Queensland, consent is vitiated if it is obtained by ‘force’, ‘threat or intimidation’, or ‘fear of bodily harm’.<sup>264</sup> For example, a complainant who is experiencing domestic violence, and who consents to a sexual act because she is physically abused or threatened with physical abuse, would not be freely and voluntarily giving consent.

6.194 Section 348(2) refers to consent obtained by force, threat, intimidation or fear of bodily harm, without specifying the nature of that conduct or the persons to whom it is directed. It is likely that this would extend to force, threats or fear of bodily harm that relate to other people or things.<sup>265</sup> For example, under sections 348(1) and 348(2), consent would not be freely and voluntarily given in circumstances where there is actual or threatened force toward the complainant’s animal, or actual or threatened force, or a fear of bodily harm, to a complainant’s child or relative, or to another person.

6.195 Whether one of the scenarios in [6.194] falls within a circumstance listed in 348(2) and has the effect that a complainant’s consent was not freely and voluntarily given will depend on the particular facts of a given case. But again, the list of circumstances in section 348(2) does not limit section 348(1) and is not exhaustive. Those examples, or other circumstances that might not as clearly come within the list in section 348(2), such as harassment or blackmail of a complainant, might also lead to a conclusion that consent is not freely and voluntarily given.

6.196 *R v Dighton* is an example of a case involving sexual offences where evidence of threats to harm the complainant’s family was relevant to her state of mind regarding consent:<sup>266</sup>

When asked why it was that she continued to see the appellant after the two occasions she had described as occurring before the night in question, the complainant explained that the appellant had ‘used his firm tone, and told me if I don’t do it, he’d go and hurt my family. ... He said if I didn’t let him back in or let him do stuff, he would go and hurt my family’. (notes omitted)

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<sup>264</sup> Criminal Code (Qld) s 348(2)(a)–(c).

<sup>265</sup> See also [6.14]–[6.18] above.

<sup>266</sup> *R v Dighton* [2018] QCA 354, [30] (Morrison JA; Sofranoff P and McMurdo JA agreeing).

6.197 In another decision involving sexual offences against a child, the facts of the offending included that the sexual relationship continued because of threats that if the complainant told anyone about the relationship the defendant would cease supporting the complainant's ill grandmother.<sup>267</sup>

6.198 The application of this legislation is less clear in circumstances where an absence of consent is said to arise in the context of ongoing domestic violence and as a result of the 'cumulative effect' of a violent relationship, as opposed to a particular and identifiable matter such as a specific threat or incident of violence. For example, a complainant who is in a domestically violent relationship with the defendant might state that her consent to sexual intercourse was not free and voluntary because it was given on the basis that, due to the history of domestic violence, she believed she would be physically abused if she did not consent.

6.199 Sexual offences involving these circumstances appear to have varied treatment in Queensland. In some matters, it has not been charged as an offence. For example, the decision of *R v OU*, which involved multiple offences of rape, also included the following:<sup>268</sup>

The last occasion on which there was sex between the couple was on New Year's Eve. The complainant agreed that this was consensual, although she said that she participated only because she believed he would force himself on her if she did not consent.

6.200 Similarly, in the decision of *R v Gippo*, which also involved multiple offences of rape, the judgment included the following:<sup>269</sup>

[The defendant] repeatedly asked [the complainant] to go to the bedroom as he wanted sex. She reluctantly agreed as she thought it was the only way to get him to leave. (The prosecution did not contend that this was an episode of non-consensual sexual intercourse.)

6.201 However, there have been convictions in other matters. For example, in *R v Everton*, multiple offences of rape were charged in circumstances where neither the complainant nor defendant spoke, but the defendant removed his clothing and 'gestured' for the complainant to perform sexual acts. The complainant gave evidence that she did not want to perform those acts, but did so because 'she was worried that if she "did not do those things" she would be beaten', because 'she "felt it would be better for [her] wellbeing to do as [she] was told"', because 'she was afraid that the appellant would hurt her', or 'so that the appellant would not hit her'.<sup>270</sup>

6.202 These offences occurred over approximately nine days, and in conjunction with other conduct that formed the basis for charges of torture, assault and deprivation of liberty. The defendant was convicted of some offences of rape and

<sup>267</sup> *R v HAA* [2006] QCA 55, 4 (McMurdo J; Jerrard and Williams JA agreeing). See also *R v VAB* [2014] QDC 113, [108] (Devereaux SC DCJ).

<sup>268</sup> *R v OU* [2017] QCA 266, [13] (McMurdo JA; Sofranoff P and Bowskill J agreeing).

<sup>269</sup> *R v Gippo* [2012] QCA 232, [10] (McMurdo P; Gotterson JA and Douglas J agreeing).

<sup>270</sup> *R v Everton* [2016] QCA 99, [16], [17], [22], [27] (Fraser JA; Gotterson JA and Henry J agreeing); also at [24]-[26]. *R v Everton* involved a domestic relationship, as the complainant and defendant were engaged in a sexual relationship and were engaged to be married. In this case the violence primarily occurred over a short but continuous period of time, as opposed to occurring for intermittent periods.

assault, but not others. The convictions for rape were appealed on the ground that there was insufficient evidence to prove beyond reasonable doubt that he did not honestly and reasonably believe the complainant was giving consent. Among other things, it was argued that the complainant 'did not positively convey a lack of consent' or any 'overt resistance or hesitation', and that 'the [defendant] did not threaten or engage in actual violence ... concurrently with his sexual conduct'.<sup>271</sup>

6.203 The court considered the definition of consent and the application of mistake of fact in the context of all the evidence. The appellant was found guilty of an offence of assault (described as 'count 9'), which marked an 'escalation' of his violence toward the complainant. The convictions being appealed against occurred after that escalation. It was held:<sup>272</sup>

The jury could reasonably conclude that the appellant suddenly, violently and irrationally attacked the complainant with no provocation. Upon the complainant's evidence regarding count 9, and yet more clearly when that evidence is understood in the context of her evidence of the appellant's earlier irrational and controlling behaviour, the jury could reasonably conclude that at all times after the assault in count 9 the complainant must have been terrified that the appellant might again violently attack her without warning. The evidence as a whole, allowed the jury to decide that thereafter the complainant held a well-founded fear of sudden and violent reprisals by the appellant if she did not cooperate in the appellant's sexual conduct.

...

In relation to count 11, the first alleged rape by the appellant after the assault in count 9, the complainant gave evidence to the effect that she did not consent to the appellant's sexual conduct and said nothing because of her fear of the appellant. Some of the complainant's subsequent evidence about the very similar alleged offences in other counts was given in a shorthand fashion, but in the context of her evidence on counts 9 and 11 the complainant's evidence conveyed that she did not consent to any of the appellant's sexual conduct after the assault in count 9 but acquiesced because of her fear of the appellant.

6.204 The court also made reference to the definition of consent, concluding that in the circumstances any consent by the complainant was not freely and voluntarily given. Dismissing the appeal, it was held:<sup>273</sup>

The real question in the appeal is whether the prosecution proved beyond reasonable doubt that the appellant did not have an honest and reasonable, if mistaken, belief that the complainant consented. The evidence already discussed requires an affirmative answer to that question. The appellant could not reasonably have been unaware that his unpredictable and apparently irrational violence so subdued and frightened the complainant as to ensure her acquiescence in his sexual conduct. The appellant's conduct in establishing control and domination over the complainant to the extent of making her give up her son, taking her to another State, requiring her to answer to different names, keeping her isolated from other people, barricading her in the tent, and attempting to prevent her from speaking to police, could be treated by the jury as further

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<sup>271</sup> Ibid [39]–[40].

<sup>272</sup> Ibid [44]–[47].

<sup>273</sup> Ibid [48]–[49].

evidence that the appellant knew that the complainant did not consent, or at least that it was unreasonable for him to believe that she did consent. The jury could reasonably conclude that, upon any reasonable view, any supposed consent by the complainant was obtained by the appellant's force, threat and intimidation and the complainant's fear of bodily harm such that it did not amount to 'consent freely and voluntarily given' in terms of s 348 of the Criminal Code.

6.205 The decision of *R v Motlop* involved charges of rape and other offences of violence in the context of a relationship, and the complainant gave evidence that she had submitted to acts of sexual intercourse because assaults occurring earlier the same day had caused her to be fearful.<sup>274</sup>

6.206 On appeal, the defendant submitted that the complainant's evidence of fear 'had to be viewed against the background that there was no evidence those assaults were in any way related to a request or demand by the appellant for sex' and that '[t]here was also no evidence their prior relationship involved the use of violence to dominate or overcome the complainant's exercise of free will in respect of sexual intercourse'. It was argued that a jury could not be satisfied that consent had been obtained by force or another circumstance in section 348(2) of the Criminal Code.<sup>275</sup>

6.207 In dismissing that ground of appeal, the court stated:<sup>276</sup>

A review of the complainant's evidence reveals she gave clear and unambiguous evidence she did not consent to either act of intercourse. She also clearly asserted her failure to resist was due to fear and/or survival. That evidence could only properly be seen as a reference to the sustained violence inflicted upon her by the use of various implements earlier that morning.

If the jury accepted the complainant's evidence, that evidence was sufficient to establish beyond reasonable doubt that the acts of intercourse referred to by the complainant were non-consensual acts of intercourse with any perceived consent being obtained by threat or intimidation or by fear of bodily harm. Such a consent is not freely and voluntarily given.

The appellant's submission [that] there must be a temporal connection between the infliction of acts of violence and the obtaining of consent is not supported by any authority. It is also inconsistent with the concept of consent in rape. The issue of consent is not determined by reference to the intention of the person inflicting the violence. The issue is whether consent was freely and voluntarily given by the complainant. That involves a consideration of whether the consent of the particular complainant was obtained or induced by the conduct in question.

## Criminal law: Other jurisdictions

6.208 Legislation in other jurisdictions provides that consent to an act is not given in circumstances related to the involvement or application of force, including force against the complainant or another person.<sup>277</sup>

<sup>274</sup> *R v Motlop* [2013] QCA 301, [17]–[18], [30], [40] (Boddice J; Fraser JA and Douglas J agreeing).

<sup>275</sup> Ibid [30]. The jury were directed to consider the 'lapse in time' between the physical violence and the acts of sexual intercourse: [56].

<sup>276</sup> Ibid [42]; See also, more generally, [40]–[45].

<sup>277</sup> See further [6.14] ff above.

6.209 Further, legislation in other jurisdictions also encompasses the concepts of threat, intimidation and bodily harm. Some refer broadly to ‘threats’, while others include specific types of threats; for example, threats of violence or force, or threats to degrade, humiliate, disgrace or harass. A threat can be toward a complainant or another person.<sup>278</sup> For example, in Victoria, a person does not consent in circumstances 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’.<sup>279</sup>

### The *Evidence Act 1977*

6.210 In Queensland, section 132B of the *Evidence Act 1977* provides for the admission of evidence about domestic violence in some criminal proceedings:<sup>280</sup>

#### **132B Evidence of domestic violence**

- (1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.<sup>281</sup>
- (2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding.
- (3) In this section—

***domestic relationship*** means a relevant relationship under the *Domestic and Family Violence Protection Act 2012*, section 13.

Note—

Under the *Domestic and Family Violence Protection Act 2012*, section 13, a relevant relationship means an intimate personal relationship, a family relationship or an informal care relationship, as defined under that Act.

6.211 This provision does not apply to offences in Chapter 32 of the Act, and so will not apply in criminal proceedings for rape or other sexual offences. In that respect, it has been explained that:<sup>282</sup>

Section 132B was introduced following a period of legal reform in Queensland and Australia recognising domestic violence as a prevalent and serious issue in society. Focus at this time was on ensuring women who killed or seriously injured

<sup>278</sup> See further [6.16] ff above.

<sup>279</sup> *Crimes Act 1958* (Vic) s 36(2)(b).

<sup>280</sup> *Evidence Act 1977* (Qld) s 132B. The operation of s 132B is subject to a general power in s 130 of that Act to exclude evidence that would be unfair to the defendant:

#### **130 Rejection of evidence in criminal proceedings**

Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.

See also, as to the relationship between ss 130 and 132B, *R v Roach* (2011) 242 CLR 610.

<sup>281</sup> Criminal Code (Qld) chs 28–30 relate, respectively, to ‘homicide—suicide—concealment of birth’, ‘unlawful striking causing death’, ‘offences endangering life or health’ and ‘assaults’.

<sup>282</sup> R Campbell, ‘Domestic Relationship Evidence in Queensland’ (2019) 42(2) *University of New South Wales Law Journal* 430, 449. In relation to the final sentence of the quoted passage, this article cites: Crime and Misconduct Commission, ‘Seeking Justice: An Inquiry into How Sexual Offences Are Handled by the Queensland Criminal Justice System’, Report (June 2003) 12.

their abuser after years of being the victim of domestic violence were adequately protected and provided for under the respective criminal codes and evidence legislation. For this reason, the reform centred on violence in relationships including the offences of assault, murder and manslaughter with very little said about sexual assault within domestic relationships. In fact, women's accusations of rape and sexual assault were routinely overlooked or downplayed by both the criminal justice system and society at large.

6.212 However, it has been explained in *R v PAB*<sup>283</sup> that section 132B does not place limits on the admissibility of particular evidence in proceedings for other offences that fall outside Chapters 28 to 30 of the Criminal Code.

6.213 In the context of offences involving homicide, assault or other physical injury, the Taskforce on Women and the Criminal Code noted the importance of an offence being portrayed in the context of a violent domestic relationship, stating for example that 'it is arguable that defences should not be able to be advanced in a factual vacuum'.<sup>284</sup>

### **Evidence of domestic violence—admissibility**

6.214 Evidence of domestic violence will be admissible in a trial involving rape or sexual assault charges depending on the purpose of the evidence. Such evidence will be admissible if it is relevant<sup>285</sup> to a fact in issue in the trial directly or indirectly.<sup>286</sup>

#### ***Relevant to a fact in issue***

6.215 In a rape or sexual assault trial the prosecution must prove beyond reasonable doubt that the complainant did not consent to the sexual act. The prosecution does so by evidence of the complainant's state of mind and what she did or said. Evidence of circumstances or conduct that bears upon that state of mind are also relevant to whether the complainant did not give consent. Evidence of any conduct by the defendant which tends to establish that consent was not freely and voluntarily given is also relevant. Examples include threats or violence towards the complainant at the time of or immediately prior to the offence, or previous threats or violence during the course of the relationship generally.

6.216 In *R v Motlop* the complainant and defendant were in a domestic relationship. Evidence of violence that occurred on the same day as the charged

<sup>283</sup> *R v PAB* [2008] 1 Qd R 184, 189 [28] (Keane JA; McMurdo P and Muir J agreeing) citing Forbes, *Evidence Law in Queensland*, (5th ed, 2004), [132B.2]; Harris, 'Evidence in Queensland—Recent Legislative Changes' (1998) 18 *Queensland Lawyer* 196, 198. Specifically, Keane JA stated:

It cannot be suggested, however, that section 132B impliedly excludes the admissibility of evidence of the history of the relationship in proceedings for offences defined under chapters of the Criminal Code other than Chapter 28 to Chapter 30. That is because section 132B of the *Evidence Act 1977* does not add 'anything to the common law, which recognises that evidence of a relevant and specific "relationship" between an alleged offender and a complainant is not caught by the rule against "character" or propensity evidence'.

<sup>284</sup> Taskforce Report, 128–137. See also Campbell, above n 282, 434.

<sup>285</sup> *Wilson v The Queen* (1970) 123 CLR 334, 337 (Barwick CJ): 'The fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone'.

<sup>286</sup> A full analysis of the case law pertaining to the admissibility of this evidence is beyond the scope of this review.

offence of rape was relevant to prove that the complainant did not give consent freely and voluntarily.<sup>287</sup>

6.217 In *R v Sollitt*,<sup>288</sup> the complainant and defendant were in a domestic relationship. Evidence of previous domestic violence, and violence at the time of and leading up to the charged offences, was led by the prosecution. An issue on appeal was whether the prosecutor's address in this regard was appropriate. Philippides JA said:<sup>289</sup>

I do not consider that there is cause for complaint as to the prosecutor's address concerning the 'cycle of domestic violence' and the 'ongoing domestic violence in the relationship'. As the respondent pointed out, the complainant herself gave evidence asserting that she was in a 'domestic violence cycle'. It was appropriate for the jury to have regard to the 'ongoing domestic violence in the relationship' and the complainant's continuation of the relationship in considering the issues raised by the case.

6.218 Evidence of domestic violence in a relationship may be relevant to give context to the complainant's evidence of a charged offence, or to explain what occurred in the incident. As Kiefel J said in *HML v The Queen*:<sup>290</sup>

Relationship evidence is also admissible for the more limited purpose of providing answers to questions which might naturally arise in the minds of the jury, such as questions about the complainant's reaction, or lack of it, to the offences charged, or questions about whether the offences charged were isolated events. These examples are not exhaustive. It follows that no more evidence than is necessary to answer the inquiry could be considered relevant.

6.219 The Queensland Court of Appeal in *R v R*<sup>291</sup> considered the relevance and admissibility of relationship evidence as to violence on the part of the defendant:

In *R v D* [2001] QCA 126, McPherson JA, delivering a judgment with which Davies and Williams JJA agreed, provided a description of the evidence in that matter which included evidence by the child complainant of not only sexual acts against her on other occasions, which acts had not been charged as offences, but also of uncharged acts of assault, some of considerable force or violence, perpetrated not only against her alone, but also against her brother or brothers and seemingly witnessed by her. His Honour held that, ... evidence (ie including the evidence of uncharged acts of assault and some of considerable violence) was properly admissible as tending to show the relationship between the parties or as serving to place evidence of the offence charged in a true and realistic context. (notes omitted)

<sup>287</sup> *R v Motlop* [2013] QCA 301, [42] (Boddice J; Fraser JA and Douglas J agreeing). See further [6.205]–[6.207] above.

<sup>288</sup> *R v Sollitt* [2019] QCA 44.

<sup>289</sup> *Ibid* [53] (Holmes CJ and Morrison JA agreeing).

<sup>290</sup> (2008) 235 CLR 334, 502 [513]. See also 497 [500], 498–99 [502]–[503], 502 [512].

<sup>291</sup> (2003) 139 A Crim R 371, 378 [31] (Jerrard JA; Davies and Williams JA agreeing).

6.220 In applying these principles, the Court said:<sup>292</sup>

Experiencing that violence and knowing of its propensity was directly relevant to her explanation of non-consensual submission to sexual exploitation because of fear. ... The relevance of this to the charges involving T is that, as the Crown Prosecutor submitted to the trial judge, the jury would undoubtedly be looking for an explanation as the years went by as to what the complainant did to protect herself as she grew older. What that other evidence demonstrates is that there was very little she could do, while she remained in that house and subject to the physical and mental domination of R ...

6.221 In *R v McMullen*<sup>293</sup> the complainant and defendant were in a domestic relationship. Evidence of domestic violence previously in the relationship and during the offending was relevant and admissible because it was capable of explaining aspects of the complainant's evidence which the jury otherwise may have considered unlikely in relation to the charged offences. The Court said:<sup>294</sup>

Similarly, the evidence of domestic violence was admissible so that the jury understood the nature of their relationship, both as to the sexual offences and the offences of violence. It was especially relevant on the rape charges (counts 3, 6, 7 and 8) where the complainant's lack of consent was the critical issue.

...

Admission of evidence of discreditable conduct is exceptional, even where as here it is properly led to enable the complainant to give her evidence in context and to explore her relationship with the appellant. When admitted, great care must be taken by counsel and by the trial judge to ensure the jury understands the limits of its use.

## The Commission's view

6.222 Offences of rape or sexual assault commonly occur in a context of domestic violence.

6.223 Without limiting the requirement that consent means 'consent freely and voluntarily given', section 348(2)(a)–(c) of the Criminal Code provides that 'a person's consent to an act is not freely and voluntarily given' if it is obtained by force, threat or intimidation, or fear of bodily harm. These exclusions are not limited to circumstances of domestic violence, but their operation may be affected by evidence given of a relationship of domestic violence.

6.224 In the Commission's view, amendment to section 348 of the Criminal Code to address the specific concerns raised about rape and sexual assault in the context of domestic violence is not necessary. The current law permits the reception of evidence of domestic violence in a relationship where it is relevant; for example, where there is conduct which might go to whether consent was given freely or voluntarily or which might be capable of explaining aspects of the complainant's evidence that the jury might otherwise have considered unlikely.

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<sup>292</sup> Ibid 384 [59].

<sup>293</sup> *R v McMullen* [2011] QCA 153.

<sup>294</sup> Ibid [82], [85] (McMurdo P; Cullinane and Jones JJ agreeing).



6.225 The admissibility of such evidence is determined on a case by case basis, which allows flexibility and enables the law to develop with, and take into account, community standards.

6.226 Although the question of the relevance and admissibility of evidence of domestic violence may arise in relation to offences outside Chapter 32 of the Criminal Code,<sup>295</sup> the Commission considers that any amendment in those areas is outside the terms of reference of this review.

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<sup>295</sup>

For example, sexual offences against children are located in the Criminal Code (Qld) ch 22.



# Chapter 7

## Excuse of mistake of fact

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### INTRODUCTION

7.1 This chapter examines the application of the excuse of mistake of fact to the offences in Chapter 32 of the Criminal Code, the onus of proving the excuse of mistake of fact, 'reasonable belief', the relevance of steps taken by a defendant to

ascertain whether the complainant gave consent, the relevance of the defendant's voluntary intoxication, and 'recklessness' as to belief in consent.

## THE OPERATION OF SECTION 24 (MISTAKE OF FACT) IN QUEENSLAND

7.2 As discussed in Chapter 2 above, 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.

7.3 For an 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 criminally responsible unless the prosecution proves that the defendant did not honestly hold the belief, or that any such belief was not reasonably held.

7.4 Whether the mistaken belief was 'honest' requires a subjective assessment. That is, the question is whether the defendant actually believed the complainant gave consent.<sup>1</sup>

7.5 Whether the mistaken belief was 'reasonable' requires an objective assessment.<sup>2</sup> That is, the question is whether the defendant had reasonable grounds for believing the complainant gave consent. This is because:<sup>3</sup>

The section directs attention to the actual belief of the accused; nothing in its language invites reference to the reasonable man's putative view. What must be considered ... is the reasonableness of an accused's belief based on the circumstances as he perceived them to be.

7.6 Thus, in assessing whether the belief was reasonable the test is not whether a 'theoretical ordinary, reasonable person would or should have made the mistake.'<sup>4</sup> It is the belief of the defendant which is critical rather than that of a theoretical reasonable person. It is the information available to the defendant which must determine whether the belief was reasonable.<sup>5</sup>

7.7 Personal attributes of the defendant, for example, intellectual impairment<sup>6</sup> or language difficulties,<sup>7</sup> may be relevant in so far as they determine how that belief was arrived at.<sup>8</sup> Holmes J in *R v Mrzljak* said:<sup>9</sup>

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

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<sup>1</sup> *DPP v Morgan* [1976] AC 182.

<sup>2</sup> *R v Mrzljak* [2005] 1 Qd R 308 and *R v Wilson* [2009] 1 Qd R 476.

<sup>3</sup> *R v Mrzljak* [2005] 1 Qd R 308, 327 [81] (Holmes J).

<sup>4</sup> *R v Wilson* [2009] 1 Qd R 476, 482 (McMurdo P).

<sup>5</sup> *R v Mrzljak* [2005] 1 Qd R 308, 321 [53] (Williams JA).

<sup>6</sup> *R v Mrzljak* [2005] 1 Qd R 308; *R v Wilson* [2009] 1 Qd R 476. See also, eg, *R v Donrobin* [2008] QCA 349 where the defendant suffered from a chronic paranoid schizophrenia.

<sup>7</sup> *R v Mrzljak* [2005] 1 Qd R 308.

<sup>8</sup> *Ibid*; *R v Wilson* [2009] 1 Qd R 476.

<sup>9</sup> [2005] 1 Qd R 308, 330 [90].

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.

7.8 When intoxication is voluntary, 'a mistaken belief that is induced by intoxication is not one that can be considered 'reasonable' as distinct from 'honest'.<sup>10</sup>

7.9 The Commission has identified and considered a number of issues relevant to the excuse of mistake of fact. Each of these is discussed below.

## APPLICATION OF THE EXCUSE OF MISTAKE OF FACT TO CHAPTER 32 OFFENCES

### Issue for consideration

7.10 In the Consultation Paper, the Commission sought submissions as to whether there is 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.<sup>11</sup>

### Submissions

7.11 A number of respondents submitted that the excuse of mistake of fact should be 'rendered inapplicable to the issue of consent in rape and sexual assault' cases.<sup>12</sup> It was broadly submitted that section 24 undermines the otherwise strong Queensland definition of consent by allowing a defendant to rely on facts and circumstances, that are not evidence of consent being given under the definition, to support an argument for a mistaken belief.

7.12 One respondent submitted as a key reason for removing mistake of fact from rape and sexual assault cases, that:<sup>13</sup>

a person who engages in a sexual act without consent and holds an honest but unreasonable belief in consent, should be guilty of the same offence as someone who has actual knowledge of non-consent.

7.13 That respondent also submitted that sexual offences 'have unique characteristics, which make prosecution an especially onerous task', because sexual offences commonly occur in private, without any witnesses and without force or physical injury. It was submitted that this 'dearth of evidence makes it difficult to prove' sexual offences to the necessary criminal standard.

7.14 Some other respondents, both legal and academic, submitted that there is no need to amend or qualify section 24 as, in broad terms, it ensures an appropriate

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<sup>10</sup> *R v Hopper* [1993] QCA 561, 10; *R v O'Loughlin* [2011] QCA 123, [33] (Muir JA). Intoxication may be relevant to the honesty of a belief held. This is discussed further at paragraphs [7.109] ff below.

<sup>11</sup> QLRC Consultation Paper No 78 (2019) Q-12.

<sup>12</sup> Eg, Submissions 1, 5, 6, 7, 15, 17, 20, 56. Also, eg, Submissions 28, 37, 52, 54, 65A.

<sup>13</sup> Submission 37.

balance in the administration of justice.<sup>14</sup> Others considered that section 24 should continue to apply, subject to amendment or modification.<sup>15</sup>

### The Commission's view

7.15 As detailed in Chapter 2 above, the code and common law jurisdictions differ significantly in the way criminal responsibility for serious offences is structured. In the absence of section 24<sup>16</sup> of the Criminal Code all that the prosecution would need to prove in a rape or sexual assault trial is that the relevant act took place without consent.

7.16 Section 24 is a provision that has general application to all criminal offences. To exclude Chapter 32 offences from the potential operation of the excuse of mistake of fact would discriminate against defendants charged with those offences, as against defendants charged with other serious offences, even unlawful killing.

## THE ONUS OF PROOF FOR THE EXCUSE OF MISTAKE OF FACT

### The onus of proof in Queensland

7.17 A fundamental principle of the common law is that the onus of proof in criminal proceedings rests with the prosecution.

7.18 This applies to indictable offences in Queensland including rape and sexual assault. The prosecution must prove, beyond reasonable doubt, all the elements of an offence. Further, the prosecution is required to negative or disprove any defence or excuse raised by the defendant or raised on the evidence, subject to limited exceptions.

7.19 When the excuse of mistake of fact is raised on the evidence in a trial for an offence of rape or sexual assault, the prosecution must negative the operation of the excuse. The prosecution must prove, beyond reasonable doubt, that the defendant *did not* honestly or reasonably hold a belief that the complainant gave consent to the relevant sexual act.

7.20 In *R v Singh*, the Court of Appeal noted:<sup>17</sup>

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

7.21 While in Queensland the prosecution must negative mistake, the requirement to do so arises only after the evidentiary onus has been discharged by a defendant. The 'evidentiary onus' is the 'burden of introducing evidence in support of a case'.<sup>18</sup> This means that where a matter proceeds to trial, section 24 of the

<sup>14</sup> Eg, Submissions 69, 72, 73, 86.

<sup>15</sup> Eg, Submissions 63, 70, 75.

<sup>16</sup> Section 24 is contained in the Criminal Code (Qld) ch 5 ('Criminal Responsibility').

<sup>17</sup> [2012] QCA 130, [16] (Lyons J).

<sup>18</sup> *R v Director of Public Prosecutions, Ex parte Kebilene* [2000] 2 AC 326, 378.

Criminal Code will be an issue for the jury's consideration only where there is evidence of 'facts in the case that justify consideration of the issue by a jury'.<sup>19</sup>

7.22 Relevantly, in *R v Makary*, Sofronoff P explained that:<sup>20</sup>

Before 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.

...

It 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.

7.23 This might arise from evidence called by either the defence or the prosecution:<sup>21</sup>

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)

7.24 A defendant in any criminal trial is not obliged to give or call evidence,<sup>22</sup> but may do so. A defendant's evidence that the complainant gave consent is evidence that the defendant held a belief that the complainant gave consent. If so, section 24 would be raised.

7.25 If a defendant does not give evidence, section 24 might still be raised by evidence on the prosecution case if the defendant's belief as to the giving of consent by the complainant arises by way of inference, or if the prosecution tenders evidence of statements made by the defendant to that effect.<sup>23</sup> In assessing whether section 24 is raised by the evidence, a judge must not confuse inference with speculation.<sup>24</sup>

7.26 If the trial judge determines that mistake as to consent having been given is fairly raised on the evidence, the jury must be directed to consider whether the excuse is negated. This can occur even if the defendant does not raise the excuse of mistake at the trial by giving evidence in the trial.<sup>25</sup>

<sup>19</sup> *R v Makary* [2019] 2 Qd R 528, [55] (Sofronoff P).

<sup>20</sup> *Ibid* [56] (Sofronoff P).

<sup>21</sup> *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.

<sup>22</sup> The right of silence has been recognised as a fundamental common law right. See *Glennon v The Queen* (1994) 179 CLR 1, 8. See also *Human Rights Act 2019* (Qld) s 32(2)(k).

<sup>23</sup> This could be done by playing a recorded interview between the defendant and police or playing a recorded pre-text telephone conversation between the defendant and the complainant.

<sup>24</sup> *R v Makary* [2019] 2 Qd R 528, [59] (Sofronoff P).

<sup>25</sup> *R v FAV* [2019] QCA 299, [94]–[111]; *R v HBQ* [2017] QA 134, [22]; *Pemble v The Queen* (1971) 124 CLR 107, 117–18, 133, 137; *Stevens v The Queen* (2005) 227 CLR 319, 331–2 [30]–[32], 344 [75], 347 [85], 369–71 [160]–[161].

7.27 To afford an excuse, a mistaken belief must be honestly and reasonably held. Accordingly, the prosecution has to prove one of two alternative facts; first, that the defendant did not honestly believe that the complainant gave consent; or second, that the belief was not reasonably held. These are questions of fact for the jury to decide. The same rule applies to offences other than rape and sexual assault.

7.28 The law of every other state and territory of Australia also places the onus on the prosecution to negative mistake as to consent. As discussed previously, some jurisdictions require proof that the defendant knew the complainant was not consenting as an element of the offence of rape or sexual assault. Regardless of the structure of the substantive offences in those other jurisdictions, the onus of proof rests with the prosecution.

### The presumption of innocence

7.29 Some rights, freedoms and privileges are embodied in the common law as to criminal proceedings.

7.30 It has long been identified that the right to a fair trial is one such fundamental right. It is an:<sup>26</sup>

elementary right of every accused person to a fair and impartial trial. That such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilization.

7.31 A fundamental attribute of the common law right to a fair trial is that a defendant is presumed innocent until proved guilty. This presumption has been described as the 'golden thread' running through criminal law, so that 'no attempt to whittle it down can be entertained'.<sup>27</sup> An often repeated legal aphorism is that it is 'better that ten guilty persons escape than one innocent suffer'.<sup>28</sup> Indeed, the presumption of innocence is aimed at protecting *all* individuals from wrongful conviction. It follows that it is in the public interest to maintain the presumption of innocence.<sup>29</sup>

7.32 A defendant's right to a fair trial is:

commonly 'manifested in rules of law and of practice designed to regulate the course of the trial', but the right extends to the whole course of the criminal process. The courts have long had inherent powers to ensure that court processes are not abused. Such powers exist to enable courts to ensure that their processes are not used in a manner giving rise to injustice, thereby safeguarding the administration of justice (citations omitted).<sup>30</sup>

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<sup>26</sup> *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541 (Isaacs J).

<sup>27</sup> *Woolmington v The Director of Public Prosecutions* [1935] AC 462, 481–2 (Viscount Sankey LC).

<sup>28</sup> Online Library of Liberty, 'Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, vol 2 [1753] <<https://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-2/simple>>.

<sup>29</sup> KC Ong, 'Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights' (2013) 32(2) *University of Tasmania Law Review* 247.

<sup>30</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J)



7.33 The right to a fair hearing is now legislatively recognised as a human right.<sup>31</sup> Further, and specifically in the criminal law context, ‘a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.’<sup>32</sup>

7.34 Serious consequences flow from a wrongful conviction for rape or sexual assault. The maximum penalty for rape is life imprisonment and a conviction almost always results in actual imprisonment, usually for a period of several years. The maximum penalty for sexual assault is ten years imprisonment and a conviction often results in actual imprisonment. Further, a person convicted of rape may be exposed to continuing detention or a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act 2004* which may extend the time spent in prison even beyond the length of the sentence imposed on the person.

7.35 A conviction for an offence of rape or sexual assault also brings stigma and community shame.

7.36 It flows from these rights and principles that in rape and sexual assault trials the prosecution bears the onus of proof to the standard of beyond reasonable doubt.

7.37 The High Court of Australia has noted that, ‘it has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof’.<sup>33</sup>

7.38 Isaacs J in *Williamson v Ah On* said:<sup>34</sup>

The broad primary principle guiding a Court in the administration of justice is that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognised, justice would be sometimes frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object. The usual path leading to justice, if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct the vindication of the law.

7.39 The High Court has repeatedly stated that statutory provisions are not to be construed as modifying or abrogating important common law rights and freedoms, privileges or immunities, but they can do so with the use of clear words or necessary implication to that effect.<sup>35</sup> The *Legislative Standards Act 1992* also recognises that a fundamental legislative principle underlying a parliamentary democracy based on the rule of law is that the onus of proof in criminal proceedings should not be reversed ‘without adequate justification’.<sup>36</sup>

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<sup>31</sup> *Human Rights Act 2019* (Qld) s 31.

<sup>32</sup> *Human Rights Act 2019* (Qld) s 32(1).

<sup>33</sup> *Kuczborski v Queensland* [2014] HCA 46, [240].

<sup>34</sup> (1926) 39 CLR 95, 113.

<sup>35</sup> See *Potter v Minahan* (1908) 7 CLR 277; *Coco v The Queen* (1994) 179 CLR 427; and *Attorney-General for the State of South Australia v The Corporation of the City of Adelaide* [2013] HCA 3.

<sup>36</sup> *Legislative Standards Act 1992* (Qld) s 4(3)(d).

## Issue for consideration

7.40 In the Consultation Paper, the Commission sought submissions as to whether, where the excuse of mistake of fact is raised on the evidence, there should be a change from the requirement that the prosecution prove that the defendant did not hold an honest or reasonable belief. Submissions were also sought as to what advantages or disadvantages might result from such a change.<sup>37</sup>

## Submissions

7.41 A number of respondents submitted that it is not unreasonable to expect a defendant to give or call evidence if they want to rely on the excuse of mistake of fact.<sup>38</sup> An academic respondent stated that:<sup>39</sup>

Placing the onus of proof on the prosecution raises serious concerns because the defendant is in a better position than the prosecution to provide proof of whether they had an honest and reasonable belief there was consent [and] the prosecution is often not in a good position to contest the defendant's claims because the only other 'witness' is routinely the complainant.

7.42 There was a general concurrence with that position from a number of other respondents who submitted that the onus should be on the defendant to prove the excuse.<sup>40</sup>

7.43 In their view, a reversal of the onus would lead to more clearly articulated claims of mistake which would be fairer to all concerned. Also, it was submitted, reversing the onus would enhance the capacity of the trial judge to prevent unmeritorious claims being raised which would go a long way to reducing the impact of false preconceptions and stereotypes about sexual offences.<sup>41</sup> Some respondents submitted that a reversal of the onus of proof would have the added advantage of reducing the incidence of cases where a defendant 'advances a case theory that is inconsistent' with a mistaken belief as to consent at trial,<sup>42</sup> and then 'seeks to argue on appeal' that the conviction should be set aside because the jury was not directed to consider mistake.<sup>43</sup> Finally, respondents noted that a reversal of the onus of proof would not be unique to rape and sexual assault. In particular, Chapter 22 of the Criminal Code deals with offences against morality, where a reversal of the onus of proof of some defences applies and this has not been seen as a 'significant inroad into the presumption of innocence'.<sup>44</sup>

7.44 A number of respondents, however, opposed amendments that would place the onus of proving a mistaken belief that the complainant gave consent on the

<sup>37</sup> QLRC Consultation Paper No 78 (2019) Q-13, Q-14.

<sup>38</sup> Eg, Submissions 12, 18, 29, 44, 56, 62, 75.

<sup>39</sup> Submission 25.

<sup>40</sup> Eg, Submissions 9, 23, 25, 31, 32, 47, 48A, 59, 60, 65A, 74, 75, 77, 79, 84, 85.

<sup>41</sup> Eg, Submission 31.

<sup>42</sup> For example, that the alleged sexual contact did not occur at all.

<sup>43</sup> Eg, Submission 23. See, eg, *R v Hall* [2011] QCA 26 and *R v Cook* [2012] QCA 251.

<sup>44</sup> Eg, Submission 65A.

defendant.<sup>45</sup> The Bar Association of Queensland submitted that ‘to reverse the onus is to unjustifiably derogate from the principle of the presumption of innocence’ that is a human right<sup>46</sup> and should be retained. The Queensland Law Society submitted that a shift in onus to the defendant, to prove mistake to a civil standard,<sup>47</sup> ‘would be to accept convictions of people who might be innocent’. In their view, this ‘would undermine public confidence in convictions, and therefore undermine public confidence in the criminal justice system as a whole.’ Respondents highlighted that currently the evidentiary onus falls to the defendant to establish or point to facts in the case that justify consideration of the excuse of mistake of fact by a jury. This, it was argued, ‘often requires the defendant to give evidence’ and be subjected to cross-examination which in turn ensures ‘all versions are tested before the jury’. This is said to provide an ‘initial general safeguard’.<sup>48</sup>

## Discussion

7.45 Justifications for the reversal of the onus of proof derive from the desire to achieve ‘a fair balance between the general interests of the community and personal rights of the individual’.<sup>49</sup> The terms of reference for this review required the Commission to have regard to ‘the need for Queensland’s criminal law to ensure just outcomes by balancing the interests of victims and accused persons’.<sup>50</sup>

7.46 Reversal of the onus of proof under section 24 would require the defendant to prove on the balance of probabilities that he acted under an honest and reasonable, but mistaken, belief that consent was given. In all other respects, the onus of proof would remain with the prosecution.

7.47 When the Criminal Code was first introduced, it was held that the onus of proof of an honest and reasonable mistake under section 24 was on the defendant.<sup>51</sup> However, for at least the last 60 years, the onus of proof has been on the prosecution to prove beyond reasonable doubt that the defendant did not act under an honest or reasonable, but mistaken, belief.<sup>52</sup>

7.48 Reversing the onus of proof of mistake of fact would increase the risk that a defendant might be wrongfully convicted. The onus on a defendant would increase from meeting the evidentiary onus to raise consideration of the excuse to proving on the balance of probabilities that the defendant acted under an honest and reasonable, but mistaken, belief that the complainant gave consent.<sup>53</sup>

<sup>45</sup> Eg, Submissions 55, 69, 72, 73, 86.

<sup>46</sup> See *Human Rights Act 2019* (Qld) s 32(1).

<sup>47</sup> That is, on the balance of probabilities, meaning more probable than not.

<sup>48</sup> Eg, Submission 69.

<sup>49</sup> *Brown v Stott* [2003] 1 AC 681, 704.

<sup>50</sup> See terms of reference, para 5(c).

<sup>51</sup> *Heaslop v Burton* [1902] St R Qd 259, 266 (Griffith CJ).

<sup>52</sup> *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, 267–8 and *Brimblecombe v Duncan; Ex parte Duncan* [1958] Qd R 8, 12.

<sup>53</sup> See, eg, *R v Libke* [2006] QCA 242, [96] (Mullins J) where it was said:

7.49 An increase in the risk of wrongful conviction is significant because of the seriousness of offences of rape and sexual assault in terms of the penalties and stigma that follow conviction.

7.50 It is recognised that the onus of proof of a defence or excuse has been reversed in respect of some serious offences, notwithstanding the serious consequences which would flow from a wrongful conviction. Section 304 of the Criminal Code reduces an offence of murder to manslaughter, if the act which causes the death occurred in the heat of passion caused by sudden provocation. The onus is on the defendant to prove the defence of provocation.<sup>54</sup> Even so, on conviction the offender is liable to punishment for manslaughter.

7.51 Some serious offences within Chapter 22 of the Criminal Code<sup>55</sup> also shift the onus of proof of a relevant defence to a defendant. Those offences attract maximum penalties from 10 years to life imprisonment. However, those offences differ from rape and sexual assault. First, they are offences committed against children or people with an impairment of the mind. Second, the reversal of the onus of proof is confined to a mistake about the age of the complainant or that the complainant did not suffer from an impairment of mind. Victims of these Chapter 22 offences fall into classes of special vulnerability. It is that vulnerability that justifies the shift in onus of proof of defences reflected in Chapter 22.

7.52 As some respondents submitted, proving that a defendant did not hold an honest or reasonable, but mistaken, belief may confront the prosecution with a difficult task. The absence of a belief or the nature of the belief held by a defendant is a matter that cannot always be proved by external observation or any direct evidence unless the defendant gives that evidence. Proof of those facts is almost always a matter of inference, particularly where the defendant exercises their right not to give evidence.

7.53 In other contexts, however, it is not an uncommon requirement that the prosecution must prove the state of mind of a defendant at the time of an offence. For example, for an offence of murder, the prosecution must prove the defendant intended to kill (or do grievous bodily harm to) the deceased. This is usually done by leading evidence of facts from which an inference is drawn that the defendant possessed the necessary intent at the relevant time. That sort of evidence, however, is led to prove a *positive*.

7.54 Negating the excuse of mistake of fact requires the prosecution to prove a *negative*, either that the defendant did not honestly believe that the complainant gave consent or that the belief was not reasonable. Facts that might raise a possible honest and reasonable belief are varied. They may include subtle actions, such as a

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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.

<sup>54</sup> Criminal Code (Qld) s 304(9).

<sup>55</sup> See, eg, Criminal Code (Qld) ss 210 (Indecent treatment of child under 16), 213 (Owner permitting abuse of children on premises), 215 (Carnal knowledge with or of children under 16), 216 (Abuse of persons with an impairment of the mind).

look or facial expression, a gesture, a word or sound, or past contact or conduct. Whatever basis is suggested for the belief, once section 24 is raised on the evidence, the onus of proof rests on the prosecution to prove beyond reasonable doubt that the defendant either did not act under an honest, but mistaken, belief or that belief was not reasonable.

7.55 While proof that the defendant did not hold an honest belief requires proof of the defendant's actual state of mind, proof that the belief was not reasonable involves an objective examination of the circumstances that the defendant claims provided grounds for the belief. A reasonable belief is one based on reasonable grounds. The prosecution will request the jury to examine the circumstances overall and submit they should conclude that, even if the defendant honestly held the stated belief, it was not a reasonable belief. If the jury so finds, the excuse does not apply.

7.56 It has been suggested that it is a relatively easier task for a defendant to prove that they honestly believed that the complainant gave consent and also that the belief was reasonable. However, it is recognised that, for many reasons, the giving of evidence in one's own defence in a criminal trial is not an easy task.

7.57 A related point is the suggestion that, if a defendant must prove the excuse of mistake of fact, the scope of the general issue raised by a plea of not guilty may be reduced. In *R v Makary*,<sup>56</sup> Sofronoff P emphasised that the evidentiary onus to raise section 24 in a rape case requires that there must be some evidence that raises a factual issue about the defendant's belief. Inevitably, that will require some evidence of acts or omissions by a complainant that led the defendant to believe that the complainant had given consent. This seems to be capable of going some way to ensuring that directions about honest and reasonable mistake are only given where they are truly required. It has been held also that it is an error for a trial judge to give such a direction when section 24 is not raised on the evidence,<sup>57</sup> accepting that if a trial judge is in doubt as to whether there is sufficient material to raise the issue, in general the prudent course is for it to be left to the jury.<sup>58</sup>

### The Commission's view

7.58 The Commission has carefully considered the arguments for and against reversing the onus of proof for the excuse of mistake of fact onto a defendant charged with an offence under Chapter 32 of the Criminal Code.

7.59 A reversal of the onus, requiring a defendant to prove a mistaken belief, has not been enacted in any other Australian jurisdiction, or in Canada or in the United Kingdom. Justification for the reversal of such a fundamental and long-standing common law principle would need to be significant.

7.60 The Commission has concluded that there is no adequate justification for reversing the onus of proof. The interests of justice are best served by maintaining

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<sup>56</sup> [2019] 2 Qd R 528, 544–45 [54]–[58].

<sup>57</sup> *R v HBQ* [2017] QCA 134, [27].

<sup>58</sup> *Ibid* [22].

the status quo, which in the Commission's view strikes the right balance between the rights of the individual and the wider interests of the community.

7.61 If mistake of fact as to the giving of consent is raised on the evidence, the onus should remain on the prosecution to prove beyond reasonable doubt that the defendant did not honestly believe that the complainant gave consent or that such a belief was not reasonably held.

## REASONABLE BELIEF: AN OBJECTIVE STANDARD

### Issue for consideration

7.62 As noted above, to constitute an excuse for an offence of rape or sexual assault a defendant's mistaken belief that the complainant gave consent must be both honest and reasonable.

7.63 In the Consultation Paper, the Commission sought submissions as to what aspects of the excuse of mistake of fact in section 24 of the Criminal Code give rise to concern. In this context, one of the questions raised was whether, in assessing the *reasonableness* of a belief, the test should be purely objective, meaning what would have been the belief of the hypothetical reasonable person, not was the belief of the defendant, given their particular circumstances, held on reasonable grounds.<sup>59</sup>

### Other jurisdictions

7.64 The requirement in section 24(1) of the Criminal Code that a mistaken belief must be 'reasonable' appears in similar terms in the Western Australian<sup>60</sup> and Tasmanian<sup>61</sup> Criminal Codes.

7.65 The Western Australian Court of Appeal<sup>62</sup> and the Full Court of the Supreme Court of Tasmania<sup>63</sup> have reached the same conclusion as the Queensland Court of Appeal. In each of those States, when assessing the reasonableness of a belief the test is not a reasonable person test, it is a reasonable grounds test. The jury must ask itself whether it was reasonable for the defendant, in their particular circumstances, to hold the belief.<sup>64</sup>

### Submissions

7.66 In relatively consistent terms, a number of respondents submitted that the test for determining whether a belief was reasonably held should be a 'purely objective' assessment in the sense of what a hypothetical reasonable person would

<sup>59</sup> QLRC Consultation Paper No 78 (2019) Q-2, and see generally [210] ff.

<sup>60</sup> Criminal Code (WA) s 24.

<sup>61</sup> Criminal Code (Tas) s 14.

<sup>62</sup> *Aubertin v Western Australia* (2006) 33 WAR 87, 91–8 [21]–[48].

<sup>63</sup> *Hindrum v Lane* (2014) 24 Tas R 290, [26]–[27].

<sup>64</sup> See further *Higgins v Western Australia* (2016) 263 A Crim R 474, [24], [26]; *Narkle v Western Australia* [2011] WASCA 160, [2].

have believed.<sup>65</sup> It was submitted by some respondents that section 24, by its terms, appears to have ‘a more objective measure’ for the assessment of a mistaken belief, but in practice ‘there is no such objective component’ leaving the prosecution to disprove a ‘wholly subjective’ belief.<sup>66</sup>

7.67 Those respondents submitted that the current interpretation of the ‘reasonableness’ of a belief may enable unjust outcomes for rape and sexual assault complainants and contribute to stereotypes and false preconceptions about rape and sexual assault.<sup>67</sup> However, many of the same respondents acknowledged that a purely objective test might have unintended consequences for particularly vulnerable classes of defendant such as those with intellectual impairments.

7.68 Some other respondents, however, submitted that section 24 is balanced and fair in that it requires both subjective honesty and objective reasonableness of a defendant’s belief.<sup>68</sup>

### The Commission’s view

7.69 In the Commission’s view, it is fair that mistake of fact is engaged as an excuse if an honest, but mistaken, belief as to the giving of consent is reasonable for the defendant in their particular circumstances. Features such as intellectual disability,<sup>69</sup> mental illness<sup>70</sup> and language difficulties<sup>71</sup> are examples of disadvantages of a defendant that would be excluded from consideration by a jury if a hypothetical reasonable person test was adopted without reference to a defendant’s particular circumstances.

7.70 As is recognised in the submissions, assessing the question of the reasonableness of a defendant’s belief by reference to a purely objective reasonable person standard has the capacity to cause injustice, most particularly for defendants who fall into the vulnerable categories identified in *R v Mrzljak*<sup>72</sup> and other cases. No person should be convicted of an offence as serious as either rape or sexual assault because of a failure to reach a standard of reasonableness that a defendant with these disadvantages would not otherwise be expected to achieve in relation to criminal responsibility for other serious offences.

7.71 The law as it has been interpreted in Queensland and other code jurisdictions is in accordance with the fundamental principles of criminal responsibility. It strikes an appropriate balance between the degree of social harm

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<sup>65</sup> Eg, Submissions 25, 47, 60, 65A, 74, 75, 77, 79, 84.

<sup>66</sup> Eg, Submission 65A.

<sup>67</sup> Eg, Submissions 25, 47, 60, 74, 75, 77, 79.

<sup>68</sup> Eg, Submissions 38, 42, 69.

<sup>69</sup> *R v Mrzljak* [2005] 1 Qd R 308.

<sup>70</sup> *R v Dunrobin* [2008] QCA 116.

<sup>71</sup> *R v Mrzljak* [2005] 1 Qd R 308.

<sup>72</sup> *Ibid.*

incurred by acts of non-consensual sexual activity and matters of fairness to a defendant at trial.

## STEPS TAKEN BY A DEFENDANT TO ASCERTAIN CONSENT

7.72 Other jurisdictions have introduced requirements that any ‘steps’ or ‘reasonable steps’ the defendant took to ascertain the complainant’s consent be taken into account in assessing the defendant’s belief as to consent.

7.73 The requirement is framed in different ways in different jurisdictions, including that some refer to ‘steps’<sup>73</sup> taken by the defendant, while others use the term ‘reasonable steps’.<sup>74</sup>

7.74 In New South Wales, Victoria and the United Kingdom, the requirement is included as part of the consideration of the element of the defendant’s knowledge of the absence of consent.<sup>75</sup> Knowledge of absence of consent is taken to be established if the defendant has no reasonable grounds for believing that the complainant was consenting. The existence of steps or reasonable steps is a matter that must or may be taken into account in assessing whether a belief as to consent was honest and reasonable.

7.75 In Tasmania and Canada, if the defendant has not taken steps, or reasonable steps to ascertain the consent of the complainant, the defendant’s mistaken belief that the complainant was consenting is taken not to be honest and reasonable.

7.76 In South Australia, a slightly different approach is taken which focuses on the defendant’s reckless indifference.<sup>76</sup>

## Queensland

7.77 In Queensland, the Criminal Code does not expressly provide for consideration of the steps or reasonable steps taken by a defendant to ascertain whether the complainant gave consent to the act alleged to constitute rape or sexual assault. Nevertheless, when the excuse of mistake of fact in section 24 is raised, any steps taken by the defendant would be relevant circumstances in considering whether the defendant’s belief was honest and reasonable.

<sup>73</sup> *Crimes Act 1900* (NSW) s 61HE(4); *Crimes Act 1958* (Vic) s 36A(2); *Sexual Offences Act 2003* (UK) ss 1(2), 3(2). See also, eg, UN Women, *Handbook for Legislation on Violence Against Women* (2012) [3.4.3.1] in which it is suggested that the definition of sexual assault should require proof by the defendant of steps taken to ascertain whether the complainant was consenting; and Taskforce Report Rec 64-3 at [2.29] in Chapter 2 above.

<sup>74</sup> *Criminal Law Consolidation Act 1935* (SA) s 47(b); Criminal Code (Tas) sch 1 s 14A(1)(c); Criminal Code, RSC 1985, c C-46, s 273.2. See also, eg, Human Dignity Trust, ‘Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth’ (Equality & Justice Alliance, November 2019) Fig 4 [4](e) in which it was observed that the defendant ‘must take reasonable steps’ to ascertain consent.

<sup>75</sup> *Crimes Act 1900* (NSW) s 61HE; *Crimes Act 1958* (Vic) s 36A; *Sexual Offences Act 2003* (UK) ss 1(2), 3(2).

<sup>76</sup> *Criminal Law Consolidation Act 1935* (SA) ss 47, 48.



## Other jurisdictions

7.78 In New South Wales, section 61HE(3) of the *Crimes Act 1900* (NSW) provides in effect that a defendant who has no reasonable grounds for believing a complainant consents to sexual activity knows that the complainant does not consent. Section 61HE(4) provides:<sup>77</sup>

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.

7.79 The NSWLRC proposes that the requirement in section 61HE(4)(a), to consider ‘any steps’ taken by the defendant to ascertain consent, be changed to require the trier of fact to instead consider:<sup>78</sup>

whether the accused person said or did anything to ascertain if the complainant consented, and if so, what the accused person said or did. (emphasis added)

7.80 In Victoria, absence of reasonable belief that the complainant was consenting is an element of the offence of rape.<sup>79</sup> In determining whether the defendant held a reasonable belief in consent, the steps taken to find out whether the complainant was consenting are relevant circumstances. Section 36A of the *Crimes Act 1958* (Vic) provides:<sup>80</sup>

### 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.

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<sup>77</sup> *Crimes Act 1900* (NSW).

<sup>78</sup> NSWLRC draft proposals (October 2019) 5, 22. The NSWLRC noted that the NSW Court of Criminal Appeal has given the word ‘step’ a broad interpretation and held that a ‘step’ can include the defendant’s internal thought processes, such as the defendant’s reasoning in response to what they hear, observe or perceive: see, eg, *R v Lazarus* [2017] NSWCCA 279 [146]–[147] (Bellew J). The NSWLRC concluded that the Court’s interpretation does not reflect the need for active steps or ‘external’ or ‘physical or verbal’ steps to be taken to ascertain consent. Submissions said that ‘fact finders should consider the “external” or “physical or verbal” steps taken by the accused person’: 22.

<sup>79</sup> *Crimes Act 1958* (Vic) s 38(1)(c).

<sup>80</sup> *Crimes Act 1958* (Vic) s 36A.

7.81 The United Kingdom provisions are similar to those in Victoria:<sup>81</sup>

- (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.

7.82 In South Australia, it is an element of the offence of rape that the 'offender knows, or is recklessly indifferent to, the fact that the other person does not so consent'.<sup>82</sup> The requirement to consider whether the defendant took reasonable steps forms part of what constitutes reckless indifference. A defendant is recklessly indifferent if they are aware of the possibility that the complainant does not consent or has withdrawn consent, but do not take reasonable steps to ascertain whether there is consent. Being recklessly indifferent is defined in the following way:<sup>83</sup>

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

...

7.83 In Tasmania, mistake of fact is an excuse from criminal responsibility, generally in a way similar to that in Queensland. However, operation of the excuse in the context of offences of rape and sexual assault is confined. Section 14A of the Tasmanian Criminal Code states:

**14A Mistake as to consent in certain sexual offences**

- (1) 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 and 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.

7.84 A similar approach is adopted in Canada where section 273.2 of the Canadian Criminal Code states:<sup>84</sup>

<sup>81</sup> *Sexual Offences Act 2003* (UK) s 1(2) ('rape'). See also ss 2(2) and 3(2), in relation to 'assault by penetration' and 'sexual assault', which are drafted in similar terms.

<sup>82</sup> *Criminal Law Consolidation Act 1935* (SA) s 48(1).

<sup>83</sup> *Criminal Law Consolidation Act 1935* (SA) s 47.

<sup>84</sup> Criminal Code, RSC 1985, c C-46, s 273.2(c).

### 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

...

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

...

7.85 The general effect of the legislation in Tasmania and Canada is that if reasonable steps are not taken to ascertain that the complainant was consenting, mistake of fact will not apply.

7.86 The effect of the Canadian provisions has been explained as follows:<sup>85</sup>

[Section 273.2(b)] relocates the culpability in sexual assault. *It explicitly shifts the focus, in a limited number of cases, away from the self-conscious wrongdoing of the accused.* The new focus is on the culpability inherent in the accused's failure to take reasonable steps to determine if the act he is about to engage in is in fact mutual and consensual. *The provision creates a form of objective liability in that the accused is held up to a standard of reasonable conduct which is assessed on the basis of the circumstances known to the accused at the time of the assault.* The provision does not require that the belief in consent itself be reasonable, but rather that the accused make a reasonable effort to ascertain if consent in fact exists. (emphasis in original)

7.87 The Courts of Appeal of New South Wales and Victoria, where the legislation refers to 'steps', appear to have differently analysed what constitutes a 'step'.

7.88 The New South Wales Court of Criminal Appeal in *R v Lazarus* held that:<sup>86</sup>

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.

<sup>85</sup> *R v Malcolm* [2000] MBCA 77, [14] (Helper JA), quoting R Way, 'Bill C-49 and the Politics of Constitutionalized Fault' (1993) 42 *University of New Brunswick Law Journal* 325, 329–30.

<sup>86</sup> [2017] NSWCCA 279 [146]–[147].

7.89 The Victorian Court of Appeal in *Bakshi v The Queen*<sup>87</sup> was less explicit in construing ‘steps’. However, the reasoning of the court was that the defendant was required to take some positive step to ascertain consent, in the face of statements by a complainant that she wanted to go home, and thereby was not giving consent.<sup>88</sup>

7.90 It seems then that there may be some uncertainty about what can amount to a ‘step’ to ascertain consent.

### Issues for consideration

7.91 In the Consultation Paper<sup>89</sup> the Commission sought submissions on whether there is a need to amend or qualify the operation of the excuse of mistake of fact or otherwise amend the Criminal Code to require a person to take ‘steps’ or ‘reasonable steps’ to ascertain if the other person gave consent to the sexual act. If there was support to amend or qualify the operation of mistake of fact in this way, submissions were sought as to why and how this could be achieved.

7.92 Further, in the Consultation Paper the Commission sought submissions on whether such a requirement should be framed in either of two alternative ways. The first is as a threshold test, to the effect that the excuse of mistake of fact 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 gave consent. The second is as a matter to be taken into account by the trier of fact when assessing whether the defendant’s honest, but mistaken, belief was reasonable.

7.93 If a ‘steps’ or ‘reasonable steps’ requirement were to be introduced, the Consultation Paper also sought submissions on whether the Criminal Code should specify what steps or reasonable steps should be considered and what steps should be taken.

7.94 Finally, the Consultation Paper asked what difference, if any, amendments of this nature would make to the operation of the current law in Queensland and what advantages or disadvantages might result from such changes.

### Submissions

7.95 A large number of respondents expressed support for a legislative model that includes specific provision to require or direct attention to the steps, or reasonable steps, taken by the defendant to ascertain the consent of the complainant.<sup>90</sup> Some respondents submitted that this is a corollary of the affirmative consent model’s requirement for positive communication.<sup>91</sup> It was acknowledged that, in many situations, a person’s communication in relation to consent might be ambiguous. However, where ambiguity arises, the social burden should rest on the

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<sup>87</sup> [2018] VSCA 83.

<sup>88</sup> Ibid [72].

<sup>89</sup> See QLRC Consultation Paper No 78 (2019) Q-18 to Q-21.

<sup>90</sup> Eg, Submissions 9, 14, 16, 23, 25, 29, 32, 37, 39, 43, 48A, 49, 54, 55, 59, 60, 63, 67, 70, 73, 75, 77, 78.

<sup>91</sup> Eg, Submissions 14, 23, 37.

person initiating sexual activity to ‘take steps’ to resolve any ambiguity in communication ‘to ensure there has, in fact, been a positive communication of consent’.<sup>92</sup>

7.96 It was submitted that such an amendment would place focus on the behaviour of the defendant which is a positive step towards combatting ‘discriminatory stereotypes of female sexuality in the law, as well as in the wider community’.<sup>93</sup> Some respondents observed that this approach has been taken in some other jurisdictions.<sup>94</sup>

7.97 Respondents highlighted that a steps or reasonable steps requirement could be framed as a threshold requirement (before consideration can be given to whether a defendant’s mistaken belief was honest and reasonable), or as a matter for consideration in determining the same. Some respondents submitted that, if the provision were not structured as a threshold test, such an amendment would fail the objectives of an affirmative consent model that requires a clear giving and receiving of consent.<sup>95</sup> Others submitted that a threshold test would go too far in limiting the availability of the excuse.<sup>96</sup>

7.98 Other respondents highlighted that it is possible that a set of circumstances may occur where a defendant ‘does not take clear positive steps’ through words or actions to confirm consent, ‘but their belief as to consent may be reasonable’. They considered that, in these circumstances, the mistake of fact excuse should be left open for the jury to determine whether the defendant’s mistaken belief was reasonable.<sup>97</sup>

7.99 A number of other respondents opposed amendments of this nature.<sup>98</sup> They submitted that there is no need for such changes in that ‘a jury may already take into account any steps taken by the defendant as part of the circumstances surrounding whether the belief of the defendant was reasonable’.<sup>99</sup> It was also submitted that, ‘given the very wide variety of factual circumstances under which the law is meant to operate and be applied to sexual relations, there is strength and logic and flexibility in this approach’.<sup>100</sup>

7.100 Legal Aid Queensland, Criminal Law Practice submitted that inclusion of a steps requirement may have the effect of ‘imposing a structure’ onto human relationships, in particular onto ‘all lawful sexual conduct’. It could ‘also apply unfairly

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92 Submission 37.

93 Submission 78, citing S Bronitt and B McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 700. Also, eg, Submission 39.

94 Eg, Submissions 5, 6, 7, 23, 25, 43, 63, 78.

95 Eg, Submissions 43, 63.

96 Eg, Submission 73.

97 Eg, Submission 14.

98 Eg, Submissions 38, 61, 69, 72.

99 Another respondent submitted that the Criminal Code should be amended to reflect this current practice: Submission 55.

100 Submission 38. Also, eg, Submission 72.

to people who are immature, impaired or unsophisticated who may not be in a position to understand this level of regulation'. In their view, it would be prescriptive and would risk criminalising consensual sexual activity.<sup>101</sup> It was further submitted that such an approach would do more than simply shift the focus of inquiry to the defendant's actions, it would shift 'the evidentiary onus to the defendant to show that they made reasonable efforts to ascertain consent'. This would, it was submitted, be a significant change, which would not necessarily improve the experiences of victims.<sup>102</sup>

### **The Commission's view**

7.101 While section 24 of the Criminal Code does not expressly require consideration of the steps, or reasonable steps, taken by a defendant to ascertain that the complainant gave consent, it does not preclude consideration of any steps that were taken (or that no steps were taken, depending on the facts of the case). When the excuse of mistake of fact is raised, the jury can take account of the steps, if any, the defendant took to ascertain consent in considering whether the defendant honestly and reasonably believed the complainant gave consented.

7.102 In the Commission's view, legislation that requires the taking of steps or reasonable steps before the excuse of mistake of fact can be relied upon can operate unfairly. Not all situations where a defendant may mistakenly but honestly and reasonably believe that a complainant is giving consent will alert a defendant to the need to take steps to ascertain the fact of consent. Conversely, if steps or reasonable steps are taken, the occasions where consent is not in fact given but a defendant acts under an honest and reasonable, but mistaken, belief in consent would be rare.

7.103 In the Commission's view there is merit in retaining flexibility in the application of the mistake of fact excuse so as to accommodate individual circumstances. Consideration of the steps taken by a defendant to ascertain that consent has been given, is and should continue to be relevant to the question of whether a belief that the complainant gave consent was honestly and reasonably held in appropriate cases. Of course, a jury must consider the evidence as a whole when considering whether the defendant acted under an honest and reasonable, but mistaken, belief that consent was given.

7.104 If a 'steps' provision were introduced, the judge would direct the jury to consider what steps, if any, the defendant took to ascertain that consent was given in assessing whether the defendant had an honest and reasonable belief. The course of evidence at trial may be affected. The prosecution and defence would seek to elicit evidence, respectively, of the absence or existence of steps that the defendant took.

7.105 However, if provisions like those in New South Wales were introduced, and Queensland courts construed 'steps' as the New South Wales Court of Appeal did, to include the defendant's consideration of, or reasoning in response to, things or

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<sup>101</sup> Also, eg, Submission 72.

<sup>102</sup> Submission 72.

events which he or she hears observes or perceives, no physical act may need to be taken as a step.<sup>103</sup>

7.106 Clarity as to what constitutes a ‘step’ might be improved by a qualification that the step must be ‘reasonable’ or ‘positive’ or even ‘physical’. However, it may be preferable to go further. The NSWLRC proposes that the requirement in section 61HE(4)(a) of the *Crimes Act 1900* (NSW), to consider ‘any steps’ taken by the defendant to ascertain consent, should be changed so that the triers of fact (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’.<sup>104</sup>

7.107 The intention of the NSWLRC appears to be to move the consideration away from ‘a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives’.<sup>105</sup> A provision that requires a jury to consider what, if anything, a defendant said or did to ascertain if the complainant consented achieves this in clear and simple language.

7.108 Taking all these matters into account, the Commission recommends that the Criminal Code should be amended to include a provision to the general effect that, for offences in Chapter 32, in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may be had to what, if anything, the defendant said or did to ascertain whether the complainant gave consent. The Commission does not consider that such an amendment would change the current law, but it would give clear expression to the law as it presently stands.

## INTOXICATION OF A DEFENDANT

7.109 Commonly, an alleged offence of rape or sexual assault is prosecuted in circumstances where the defendant was intoxicated by alcohol or a drug at the time of the alleged offence. Legislation in a number of Australian jurisdictions and Canada addresses the application of the excuse of mistake of fact when the intoxication of the defendant is voluntary.

7.110 In Queensland, the Criminal Code does not expressly provide for voluntary intoxication in relation to the application of section 24 to an offence of rape or sexual assault under Chapter 32. The question has, however, been the subject of judicial consideration.

### Queensland

7.111 Voluntary intoxication does not generally relieve a defendant of criminal responsibility for committing an offence. However, the defendant’s intoxication may be relevant to criminal responsibility in some circumstances.

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<sup>103</sup> *R v Lazarus* [2017] NSWCCA 279, [147].

<sup>104</sup> NSWLRC draft proposals 5.

<sup>105</sup> *R v Lazarus* [2017] NSWCCA 279, [147].

7.112 Section 28(3) of the Criminal Code generally restricts consideration of intoxication<sup>106</sup> by a defendant to offences of 'specific intent'. It provides that:

**28 Intoxication**

...

- (3) When an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

7.113 Specific intent is an element of many offences.<sup>107</sup> For such offences, the prosecution must prove beyond reasonable doubt that the defendant had in fact formed the requisite specific intent. Evidence that the defendant was intoxicated when the incident occurred is relevant to whether the specific intent existed.<sup>108</sup>

7.114 Neither rape nor sexual assault is an offence where a specific intent is an element.

7.115 However, a defendant's intoxication may in limited circumstances be relevant to the application of mistake of fact to those offences. Section 28(3) does not apply to them.

7.116 The Criminal Code does not expressly provide that either intoxication or voluntary intoxication is relevant to whether a defendant's mistaken belief as to the complainant's giving of consent is honest and reasonable. However, according to case law, courts have held that voluntary intoxication negates the availability of the excuse of mistake of fact under section 24 because a mistaken belief induced by voluntary intoxication is not reasonable.

7.117 The Queensland Court of Appeal considered the question in *R v Hopper*. In that case, the court held:<sup>109</sup>

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.

7.118 Accordingly, although a jury must have regard to the personal circumstances of the defendant, in deciding whether the defendant acted under an

<sup>106</sup> The term 'intoxication' is not defined in the Criminal Code (Qld).

<sup>107</sup> For example, an element of the offence of murder under s 302(1)(a) of the Criminal Code (Qld) is intent to cause the death or grievous bodily harm to another person.

<sup>108</sup> In *R v Middleton* [2003] QCA 432, [29] the Queensland Court of Appeal noted that the purpose of s 28(3) is 'better served by focusing only on the question of whether the defendant did in fact form the intention rather than directing attention to whether the defendant had the capacity to form the intention, any concern about "capacity" being subsumed in that inquiry'.

<sup>109</sup> [1993] QCA 561, 10.



honest and reasonable, but mistaken, belief about the giving of consent,<sup>110</sup> voluntary intoxication is not regarded as one of those personal circumstances that are relevant in deciding whether the belief was reasonable.

7.119 This position is confirmed by recent decisions.<sup>111</sup>

## Other jurisdictions

7.120 In New South Wales and Victoria there are express provisions about the defendant's intoxication in the context of the defendant's belief as to consent.

7.121 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) provides 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.<sup>112</sup>

- (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.

7.122 In Victoria, an element of the offence of rape is that the defendant does not 'reasonably believe' that the complainant consents to the penetration.<sup>113</sup> What amounts to reasonable belief in consent is defined by section 36A of the *Crimes Act 1958* (Vic).

7.123 The effect of intoxication on whether a defendant has a 'reasonable belief as' to consent 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

<sup>110</sup> *R v Mrzljak* [2005] 1 Qd R 308; *R v Wilson* [2009] 1 Qd R 476. See further [7.5] ff above.

<sup>111</sup> *R v Duckworth* [2016] QCA 30, [25] (Philippides JA), [106] (Burns J). See also *R v O'Loughlin* [2011] QCA 123, [33] (Muir JA).

<sup>112</sup> *Crimes Act 1900* (NSW) s 61HE(4).

<sup>113</sup> *Crimes Act 1958* (Vic) s 38(1)(c).

- (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
  - (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.

7.124 The legislation in Tasmania and Canada excludes mistake of fact where a defendant charged with a sexual offence is intoxicated.

7.125 In Tasmania, section 14A of the Criminal Code (Tas) provides:

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

...

7.126 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,

...

## Issues for consideration

7.127 In the Consultation Paper the Commission sought submissions on whether there is a need to amend or qualify the operation of the excuse of mistake of fact, or otherwise amend the Criminal Code, to specify in what way a defendant's intoxication should affect the assessment of mistake of fact as to the giving of consent. If there was support to amend or qualify the operation of mistake of fact, submissions were

sought as to why and how this could be achieved and what difference, if any, such amendments would make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes.<sup>114</sup>

## Submissions

7.128 A number of respondents submitted that a defendant should not be able to rely upon voluntary intoxication to claim that this led them to mistakenly believe that a complainant gave consent to a sexual activity.<sup>115</sup> Many of these respondents submitted that legislation similar to section 14A of the Criminal Code (Tas) should be introduced in Queensland. It was submitted that an express provision of this nature would achieve ‘clarity and simplification’<sup>116</sup> with some respondents stating that, the ‘fact that juries are asking questions to judges about when they can and cannot use a defendant’s intoxication demonstrates that this area of the law is unclear’.<sup>117</sup>

7.129 It was submitted that an express provision to this effect may have the advantage of making a complainant more inclined to report the crime and feel more respected in the justice system. It was further submitted that legislation of this nature would send a positive message about ‘healthy relationships, respect and ... a cultural change’ resulting in a safer society.<sup>118</sup>

7.130 One respondent submitted directly that intoxication should not be a relevant consideration in an assessment of even the honesty of a defendant’s belief. In this respondent’s view the ‘fact that in a drunken state an individual could honestly believe they had permission to commit rape is more reason to see them convicted and incarcerated for the greater safety of the community’.<sup>119</sup> Another respondent submitted that the law should ‘impose a blanket exclusion’ of evidence from a trial relating to intoxication of a defendant. Noting that rape is not a crime of specific intent, this respondent submitted, consistently with section 28 of the Criminal Code, intoxication should be relevant only where a specific intent is an element of the offence.<sup>120</sup>

7.131 A number of other respondents, however, submitted that amendment or qualification of the excuse of mistake of fact as it relates to voluntary intoxication of the defendant is unnecessary. These respondents highlighted that in Queensland intoxication is relevant to the existence of an honest belief but entirely irrelevant to the reasonableness of a belief.<sup>121</sup> It was observed that adopting the wording of the Tasmanian provision ‘would make no substantive change to the law’ in

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<sup>114</sup> QLRC Consultation Paper No 78 (2019) Q-22 to Q-24.

<sup>115</sup> Eg, Submissions 9, 12, 14, 16, 18, 23, 25, 31, 37, 39, 40, 52, 54, 56, 61, 62, 67, 73, 75, 77.

<sup>116</sup> Eg, Submissions 65A. Also, eg, Submission 73.

<sup>117</sup> Eg, Submissions 12, 56, 62.

<sup>118</sup> Eg, Submission 16.

<sup>119</sup> Eg, Submission 61.

<sup>120</sup> Eg, Submission 40, citing *Crimes Act 1900* (NSW) s 61HE(4)(b).

<sup>121</sup> Eg, Submissions 38, 69, 72, 86.

Queensland.<sup>122</sup> Even some supporters of an amendment of this type doubted its necessity.<sup>123</sup>

### The Commission's view

7.132 In Queensland the law relating to an intoxicated defendant's mistaken belief as to the complainant having given consent is well established. Voluntary intoxication of a defendant is not relevant in determining whether a defendant's mistaken belief that the complainant gave consent was reasonable.

7.133 Although the case law to this effect is clear, the Commission's review of the 2018 Trials involving Chapter 32 offences suggests that position is not always made clear to the jury. In 28 of the 2018 Trials, mistake of fact was left to the jury to consider where there was evidence of voluntary intoxication by the defendant. In eight of those trials the jury was not directed that the evidence of the defendant's voluntary intoxication was irrelevant to the reasonableness of the defendant's belief.<sup>124</sup> Two cases in the Court of Appeal also raised inadequate directions by a trial judge as to the relevance of voluntary intoxication to the assessments of the honesty and reasonableness of a defendant's belief as to the giving of consent.<sup>125</sup>

7.134 For offences under Chapter 32 of the Criminal Code, an express provision that voluntary intoxication of a defendant is not relevant in considering whether a defendant's belief as to the giving of consent is reasonable should result in a direction to that effect being given in relevant cases.

7.135 The Tasmanian Criminal Code provides that a mistake as to the existence of consent is not honest and reasonable if a defendant was in a state of self-induced intoxication and the mistake was not one which the defendant would have made if not intoxicated. A provision in that form directs attention and focus to the hypothetical question of what the defendant would have believed if sober. In the Commission's view, the better approach is that voluntary intoxication is not relevant in assessing whether a belief as to the giving of consent was reasonable, without posing a hypothetical question as to what would have been believed by the defendant if sober.

7.136 The Commission considers therefore that the Criminal Code should be amended to include a provision to the general effect that, for offences in Chapter 32, in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may not be had to the voluntary intoxication of the defendant in deciding whether a belief was reasonable.

### RECKLESSNESS

7.137 A number of Australian jurisdictions require, as an element of the offences of rape and sexual assault that, the defendant knew that the complainant was not consenting to the relevant sexual act or was *reckless* as to the absence of consent.

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<sup>122</sup> Eg, Submission 72.

<sup>123</sup> Eg, Submission 73.

<sup>124</sup> See [3.67] in Chapter 3 above.

<sup>125</sup> See *R v O'Loughlin* [2011] QCA 123; *R v Duckworth* [2017] 1 Qd R 297.

Another approach is taken in Tasmania and Canada, where the excuse or defence of mistake of fact is expressly excluded if the defendant was reckless.

7.138 As stated in Chapter 2 above, in Queensland the offences of rape and sexual assault require proof only that the sexual act took place without consent. Recklessness as to the absence of consent is relevant only to the application of the excuse of mistake of fact under section 24 of the Criminal Code.

7.139 The Criminal Code does not expressly refer to the relevance of 'recklessness' on the part of a defendant in mistakenly believing that the complainant gave consent for an offence of rape or sexual assault. The question under section 24 is not whether the defendant's belief was reckless, but whether it was an honest and reasonable belief.

## Other jurisdictions

### *Where knowledge is an element of the offence*

7.140 In the Northern Territory and South Australia, the offences of rape and sexual assault require the defendant's actual knowledge of the absence of consent or their recklessness as to consent.

7.141 Sections 192(3) and 192(4) of the Criminal Code (NT) state that a defendant is guilty of an offence if an act of sexual intercourse or an act of gross indecency, respectively, is engaged in (a) without the complainant's consent and (b) 'knowing about or being reckless as to the lack of consent'. By section 192(4A) 'recklessness includes not giving any thought to whether or not the complainant 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 (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:
  - (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.<sup>126</sup> (note added)

7.142 Section 48 of the *Criminal Law Consolidation Act 1935* (SA) is similar. The offence of rape is committed if, without consent, the defendant 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.

7.143 By section 61I of the *Crimes Act 1900* (NSW) an offence occurs where (a) a defendant has sexual intercourse with a complainant, (b) without the consent of the complainant, and (c) knowing that the complainant 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. It provides:<sup>127</sup>

**Section 61I**

...

**(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 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

<sup>126</sup> The relevant ‘circumstance’ for the purposes of the offences detailed in s 192(3), (4) is that the other person does not consent: see Criminal Code (NT) s 43AK(2).

<sup>127</sup> *Crimes Act 1900* (NSW) s 61HE(3).

- (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.

7.144 Section 54 of the *Crimes Act 1900* (ACT) requires, as an element of the offence of rape (not involving violence or force), that the act took place without the consent of the complainant and that the defendant was reckless as to whether the complainant consented. Section 54(3) provides 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’.

7.145 The Victorian legislation also requires knowledge of absence of consent as an element of the offence. However, it makes no reference to ‘recklessness’.

### ***Where knowledge is relevant to mistake of fact***

7.146 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 the giving of 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.<sup>128</sup>

7.147 Unlike Queensland and Western Australia, the legislation in Tasmania qualifies the operation of mistake of fact for some offences, including rape and sexual assault in a way that expressly addresses recklessness. In proceedings for those offences:<sup>129</sup>

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

- (a) ...; 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.

<sup>128</sup> In Tasmania, the mistaken belief is in the existence of ‘any state of facts’: Criminal Code (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 (WA) s 24.

<sup>129</sup> Criminal Code (Tas) s 14A.

7.148 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 is relevant to the defence of excuse of mistake of fact.

7.149 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 the jury's consideration only if the judge is satisfied that there is sufficient evidence of a mistaken belief.<sup>130</sup> 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) ...,
  - (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;<sup>131</sup>
- (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)

**Definition of recklessness**

7.150 Reckless behaviour can be advertent or inadvertent. A defendant who realises that there is a risk that the complainant is not consenting to a sexual act but proceeds anyway can be said to be reckless (advertent recklessness). A defendant who gives no thought to whether the complainant is consenting can also be said to be reckless (inadvertent recklessness).

7.151 In the context of the New South Wales legislation, in *Banditt v The Queen*, the High Court held that either failing to give any thought to whether consent was given or actual forethought of the risk of absence of consent, may amount 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'.<sup>132</sup>

<sup>130</sup> Criminal Code, RSC 1985, c C-46, s 265(4).

<sup>131</sup> Criminal Code, RSC 1985, c C-46, ss 265(3), 273.1(2) detail circumstances when consent is not obtained.

<sup>132</sup> (2005) 224 CLR 262, 275, [36] (Gummow, Hayne and Haydon JJ).



7.152 Kirby P commented on the moral culpability of both advertent and inadvertent recklessness in *R v Kitchener*.<sup>133</sup>

To criminalise conscious advertence to the possibility of non-consent, but to excuse reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable ... Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women.

### Issues for consideration

7.153 In the Consultation Paper,<sup>134</sup> the Commission sought submissions on whether there is a need to amend or qualify the operation of the excuse of mistake of fact or otherwise amend the Criminal Code to introduce the concept of 'recklessness' with respect to the question of consent in rape and sexual assault. If so, submissions were sought as to why and how this could be achieved.

7.154 The Commission also sought submissions on whether the excuse of mistake of fact should be excluded if the defendant was reckless as to whether or not the complainant gave consent and if so, whether and how 'recklessness' might be defined.

7.155 Finally, in the Consultation Paper the Commission sought submissions on what difference, if any, such amendments would make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes.

### Submissions

7.156 Several respondents submitted that the application of the excuse of mistake of fact should be qualified so that it does not apply if the defendant was reckless as to whether or not the complainant gave consent.<sup>135</sup> Some of these respondents suggested a provision based on section 14A of the Criminal Code (Tas). It was submitted that qualifications to the excuse of mistake of fact that include 'recklessness' would 'narrow the application' of the excuse and 'address concerns' that mistake of fact 'undermines' the definition of consent<sup>136</sup> and highlight that 'moral culpability and criminal responsibility' should attach to a defendant who is 'recklessly indifferent' as to whether a complainant gave consent to sexual activity.<sup>137</sup> Express reference to 'recklessness' to qualify the excuse of mistake of fact in rape and sexual assault cases, it was submitted, could also contribute to shifting the focus at trial away from the conduct of the complainant and onto the conduct of the defendant.<sup>138</sup>

<sup>133</sup> (1993) 29 NSWLR 696, 697.

<sup>134</sup> See QLRC Consultation Paper No 78 (2019) Q-15 to Q-17.

<sup>135</sup> Eg, Submissions 9, 14, 23, 25, 32, 39, 47, 48A, 50, 60, 63, 65A, 67, 70, 74, 75, 77, 78, 79, 84, 85.

<sup>136</sup> Submission 70. Also, eg, Submission 23.

<sup>137</sup> Submission 14.

<sup>138</sup> Eg, Submissions 65A, 85.

7.157 In aid of an amendment of this nature some respondents further supported the inclusion of a definition of ‘recklessness’ in the Criminal Code consistent with the terms of section 47 of the *Criminal Law Consolidation Act 1935* (SA).<sup>139</sup> That definition captures both advertent and inadvertent forms of recklessness.

7.158 Other respondents, however, submitted that ‘there is no purpose to be served’ by express legislative declaration that a belief is not honest or reasonable if the defendant was reckless as to whether or not the complainant gave consent.<sup>140</sup> It was submitted that section 24 in its current form is broad enough that a reckless defendant ‘could not possibly hope to raise mistake of fact successfully’. It was submitted that this is because a defendant who is reckless either holds no belief at all or their belief is that the complainant might not be consenting.<sup>141</sup>

7.159 Another respondent highlighted that the concept of recklessness is relatively unknown to the criminal law of Queensland. The introduction of the concept of recklessness would unnecessarily complicate matters for a jury and make the exercise of directing a jury even more fraught with the likely outcome of an increase in the number of retrials.<sup>142</sup>

### The Commission’s view

7.160 The Criminal Code does not expressly require consideration of the defendant’s recklessness as to the complainant’s consent.

7.161 At present, where the mistake of fact as to consent is raised on the evidence, the concept of ‘recklessness’ is accommodated within the question, under section 24 of the Criminal Code, of whether the defendant acted under an honest and reasonable, but mistaken, belief that the complainant gave consent.

7.162 In considering that question, the prosecution must prove that the defendant did not have an honest belief or that any such belief that they held was not reasonable. Evidence suggesting recklessness is relevant to either part of the question.

7.163 Introduction of the concept of recklessness as an additional express consideration to be taken into account in assessing whether a defendant acted under an honest and reasonable, but mistaken, belief would not clarify the existing law. Such a provision is unnecessary and could cause complications.

7.164 In crafting any provision about recklessness as to the complainant’s consent, there could be a complexity in relation to advertent recklessness. Where the defendant realises that there is a risk that the complainant does not consent, what level of risk-taking must occur for the defendant to be criminally responsible?

7.165 In the context of offences of a sexual nature, South Australia deals with this issue by specifically defining ‘reckless indifference’ as arising where the defendant

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<sup>139</sup> Eg, Submissions 25, 65A. Also, eg, Submission 78.

<sup>140</sup> Submission 72. Also, eg, Submissions 38, 54, 69, 73, 86.

<sup>141</sup> Submission 73. Also, eg, Submissions 69, 86.

<sup>142</sup> Submission 86.

is aware of the possibility (as distinct from a probability) that the complainant might not be consenting to the sexual act.<sup>143</sup> A lesser level of appreciation of risk is therefore required before criminal responsibility attaches. The question of the level of risk-taking that must be present before criminal responsibility should attach by reason of recklessness does not need to be considered by a Queensland jury under section 24.

7.166 In the Commission's view, since mistake of fact is an excuse under section 24 only where the defendant acts under an honest and reasonable, but mistaken, belief that the complainant gave consent, the Criminal Code should not be amended to refer expressly to recklessness as to the complainant's consent in the offences of rape and sexual assault.

## RECOMMENDATIONS

### **Steps taken by a defendant to ascertain consent**

- 7-1 The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act.**

*[See Draft Bill cl 6, inserting new s 348A(1)–(2)]*

### **Intoxication of the defendant**

- 7-2 The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance.**

*[See Draft Bill cl 6, inserting new s 348A(1), (3)]*

<sup>143</sup>

*Criminal Law Consolidation Act 1935 (SA) s 47.*



# Chapter 8

## Other matters

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### INTRODUCTION

8.1 This chapter deals with juror preconceptions and expert evidence in rape and sexual assault trials, statements of objectives and guiding principles in legislation and education and awareness.

8.2 Some of these matters have been raised by other law reform bodies and inquiries, in part as a way to address concerns about the potential impact of false preconceptions about rape and sexual assault on the trial process.

### PRECONCEPTIONS ABOUT RAPE AND SEXUAL ASSAULT

8.3 Some commentators contend that false preconceptions, sometimes called 'rape myths', influence jury decision-making and the verdicts of sexual assault trials including that:<sup>1</sup>

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<sup>1</sup> See, eg, the synthesis of over 40 years of research evidence in Australian Institute of Family Studies and Victoria Police, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017).

- a rape or sexual assault will result in the complainant suffering physical injuries;
- a genuine complainant will resist and fight off a violent offender;
- a complainant who does not report a rape or sexual assault immediately is likely to be lying;
- sexual offences are committed by strangers;
- complainants report sexual assaults because they regret having consensual sexual intercourse; and
- complainants report sexual assaults to 'get back' at men.

8.4 In fact, available statistics indicate that the majority of rapes are committed by someone known to the complainant, and that a large proportion of sexual assault complainants report that they did not offer any resistance.<sup>2</sup>

### **Research about Australian community attitudes and understanding of sexual violence**

8.5 To date, the National Community Attitudes towards Violence against Women Survey ('NCAS') has been conducted on four occasions. To a limited degree, these survey results lend support to the existence of some false preconceptions in the community; in other respects, they suggest the proportion of people who have false preconceptions is low and is in decline. The most recent NCAS was led by ANROWS in 2017.<sup>3</sup>

8.6 The findings included that:<sup>4</sup>

- 6% agreed that rape is unlikely to have occurred if there are no obvious signs of physical force;
- 7% agreed that if 'a woman doesn't physically resist—even if protesting verbally—then it isn't really rape';<sup>5</sup>
- 11% agreed that it is likely that a woman who waited weeks or months to report sexual assault was lying;

<sup>2</sup> See also [4.7] in Chapter 4 above. Statistics also indicate that false allegations are rare (and in fact rape and sexual assault is under-reported) and that there are many reasons why a complainant may delay reporting: K Webster et al, *Australians' attitudes to violence against women and gender equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (ANROWS, Research Report No 03/2018) 50, 84.

<sup>3</sup> The NCAS was initially developed on behalf of the Australian Government in 1995, drawing on an earlier 1987 survey. It is implemented every four years and the last two national waves were led by VicHealth in 2009 and 2013.

<sup>4</sup> Webster et al, above n 2, 48, 84, 86.

<sup>5</sup> The proportion agreeing with this statement has dropped 3% since 2013. A further 4% said they did not know if it is rape only when physical resistance is involved.

- 16% agreed that many allegations of sexual assault made by women are false and a further 9% did not know;
- 31% agreed that 'a lot of the time women who say they were raped had led the man on and then had regrets';<sup>6</sup>
- 42% agreed that it is 'common for sexual assault accusations to be used as a way of getting back at men'; and
- 64% agreed that women are more likely to be raped by someone they know than by a stranger and 16% did not know.

### Impact of false preconceptions upon jurors

8.7 Offences of rape and sexual assault tend to be committed behind closed doors. Prosecutions of those offences often involve the word of the complainant against the word of the defendant.

8.8 False preconceptions are said to influence jurors' views about the question of whether the complainant did not consent and whether the complainant may have caused a mistaken belief by the defendant that consent was given.<sup>7</sup> Some researchers suggest that jurors' judgments may be more likely to be based on a juror's personal beliefs than on what a witness says.<sup>8</sup> However, others acknowledge that:<sup>9</sup>

A large majority of the empirical research relating to both rape myth acceptance and gender role conformity has been conducted within the 1980's and early 1990's and there is, therefore, a lack of contemporary research focusing on the impact of these factors on rape blame attribution. This is an area which would benefit from current academic investigation to explore whether the impact of these factors is still valid within our society today.

8.9 Recent research conducted of jurors in England, Wales and Northern Ireland refutes the claim that many jurors hold false preconceptions which would influence their decision-making. The findings of this research are set out at paragraphs [8.17]–[8.19] below.

<sup>6</sup> The proportion of those agreeing with this statement has declined 7% between 2013 and 2017.

<sup>7</sup> See N Taylor, *Juror attitudes and biases in sexual assault cases* (Trends & Issues in crime and criminal justice No 344, Australian Institute of Criminology, August 2007); A Cossins, 'Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England' (2013) 17 *International Journal of Evidence and Proof* 74; 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) *University of New South Wales Law Journal* 462. See also A Grubb and E Turner, 'Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' (2012) 17(5) *Aggression and Violent Behaviour* 443 (online, ResearchGate).

<sup>8</sup> S Dinos et al, 'A systematic review of juries' assessment of rape victims: Do preconceptions impact on jury decision-making?' (2015) 43 *International Journal of Law, Crime and Justice* 36, 39.

<sup>9</sup> Grubb and Turner, above n 7, 31–2. There has been some debate about the research into rape myths: see, eg, H Reece, 'Rape Myth: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445; J Conaghan and Y Russell, 'Rape Myths, Law, and Feminist Research: "Myths About Myths"?' (2014) 22(1) *Feminist Legal Studies* 25; and B Krahe, 'Myths about Rape Myths? Let the Evidence Speak. A Comment on Reece' (2013) <[https://www.uni-potsdam.de/fileadmin/projects/sozialpsychologie/images/pdf/Comment\\_Reece\\_Paper.pdf](https://www.uni-potsdam.de/fileadmin/projects/sozialpsychologie/images/pdf/Comment_Reece_Paper.pdf)>.

### The research

8.10 Some of the research into the impacts of preconceptions upon jury decision-making is founded in research about how people generally use their life experience and understanding to make decisions, relying on ‘schemas’, stereotypes, and heuristics.<sup>10</sup> The processes by which jurors make decisions suggests that jurors actively interpret what they see and hear based on their knowledge, experience, attitudes, biases and expectations.<sup>11</sup> However, the strength of the evidence should be, and mostly will be, the greatest influence upon the jury.<sup>12</sup>

8.11 Generally the research (across law, sociology and psychology), into the possible influence of preconceptions upon decision-making has had to rely upon surveys of public attitudes.<sup>13</sup> It has been inferred that as a jury is composed of representatives from the community they will bring the same beliefs to bear on the jury decision-making process as are held in the community generally. Whether, and how, the attitudes of jurors impact upon their decision-making requires some regard to be had to the unique circumstances in which jurors are required to come to a decision.

8.12 Due to difficulties in collecting data from jurors, ‘empirical’ studies have for the most part been confined to examining findings from the creation of mock juries in mock trials.<sup>14</sup> This research method has limitations.<sup>15</sup>

8.13 The experimental designs of most mock juror studies have required participants to come to their individual decisions without engaging in a process of deliberation with other participants.<sup>16</sup>

8.14 The limitations of attitudinal surveys and mock jury experiments are highlighted by more recent research with access to jurors.

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<sup>10</sup> See I Freckelton et al, *Expert Evidence and Criminal Jury Trials* (Oxford University Press, 2016) [5.05]–[5.17]; G Bohner et al, ‘Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator’ in M Horvath and J Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan, 2009) 17, 23–7; J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart, 2008) 119–22.

<sup>11</sup> See Taylor, above n 7; Temkin and Krahe, above n 10, 53–71.

<sup>12</sup> Freckelton et al, above n 10, [5.090].

<sup>13</sup> See, eg, PA Newcombe et al, ‘Attributions of Responsibility for Rape: Differences across Familiarity of Situation, Gender, and Acceptance of Rape Myths’ (2008) 38 *Journal of Applied Social Psychology* 1736; E Suarez and TM Gadalla, ‘Stop Blaming the Victim: A Meta-Analysis on Rape Myths’ (2010) 25(11) *Journal of Interpersonal Violence* 2010.

<sup>14</sup> See, eg, L Ellison and V Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49(2) *British Journal of Criminology* 202.

<sup>15</sup> See W Young, ‘Summing-up to Juries in Criminal Cases—What Jury Research says about Current Rules and Practice’ (2003) *Criminal Law Review* 665; Dinos et al, above n 8, 46, noting that there is reliance on university students as participants and limitations with the way the material was presented and how participants were asked to come to judgment.

<sup>16</sup> Dinos et al, above n 8. Those authors conducted a systematic review of the literature to determine whether juror decision-making is influenced by preconceptions. Screening of 2780 articles against criteria (non-empirical, lack of rape myth measure, lack of verdict, and exclusion of studies that did not use a mock juror framework) reduced their pool to nine studies.



8.15 A recent Australian multi-jury, multi-jurisdictional study included interviews of legal professional and jurors about their perceptions of expert evidence presented in a sample of 55 Australian criminal jury trials. The authors acknowledged that whether or not jurors are unduly influenced by false preconceptions is unknown.<sup>17</sup>

8.16 In one of the sexual assault trials in the sample the authors did not identify juror preconceptions 'as the major reason for their verdict'.<sup>18</sup>

8.17 Research conducted over 2017–2019 in different regions of England, Wales and Northern Ireland surveyed 63 criminal juries after trial and included questions as to individual jurors' beliefs.<sup>19</sup> The research has not been published, however the researcher agreed to make some of the results available to the Commission for this Report. It does not support the view that false preconceptions have a significant impact on jury decision-making.<sup>20</sup> The findings included that, of the jurors interviewed:

- 3% agreed that a rape probably did not happen if the victim had no bruises or marks;
- 3% agreed that it was not rape if a person did not physically fight back;
- 7% agreed that it is difficult to believe a rape allegation that is not reported immediately;
- 4% agreed that a woman who wears provocative clothing puts herself in a position to be raped; and
- 4% agreed that a woman who goes out alone at night puts herself in a position to be raped.

8.18 The findings also included that:

- 80% agreed that there are good reasons why a person who has been raped would be reluctant to tell anyone, or report it to the police;
- 77% agreed that rape can occur in relationships over long periods before any complaint is made; and
- 77% agreed that it was a hard thing to give evidence about a rape in court.

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<sup>17</sup> J Horan and J Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *University of New South Wales Law Journal* (Advance) 5.

<sup>18</sup> Ibid 31. The jury acquitted the defendant of five charges in relation to the alleged rape and sexual assault of an adolescent complainant. Immediately following the verdict, the jurors were invited to complete a written post-trial questionnaire and to participate in an anonymous interview. Five of the eleven jurors completed the survey (45% response rate), and four of those jurors participated in one on one interviews: at 9–10.

<sup>19</sup> There were 746 jurors in total.

<sup>20</sup> C Thomas, 'Juries, rape myths and stereotypes' (2020) *Criminal Law Review* (forthcoming). This research was undertaken by Professor Cheryl Thomas QC at the request of Sir Brian Leveson, President of the Queen's Bench Division, specifically to obtain the views of jurors. This research has not yet been published or peer reviewed but has been provided to the Queensland Law Reform Commission to assist with its review.

8.19 For some matters, the findings indicated that some jurors were uncertain, including that:

- 31% were not sure that most people who are raped are likely to be raped by someone they know and not a stranger; and
- 35% were not sure, and 43% agreed, that they would expect a person who was raped to be very emotional when giving evidence in court.

8.20 The difference between the findings of surveys conducted with jurors and the findings of opinion polls and surveys of mock jurors is attributed to the reliance on volunteers in conducting opinion polls and surveys of mock jurors. Jurors are not volunteers.<sup>21</sup>

8.21 At commencement of a trial, the judge directs the selected jurors that it is important that all members of the jury must be impartial and be seen to be impartial. The judge asks the jurors that they tell the judge if there is any reason why they feel they could not be completely impartial. Sometimes the judge specifically mentions that a juror might feel they cannot be impartial in the trial because the trial relates to alleged sexual offences. Jurors can be excused from participating in the trial if they feel they cannot be impartial.

8.22 Other directions given in a trial are that jurors:

- must follow the judge's directions on matters of law;
- must come to their verdict on the basis of the evidence given in the trial; and
- are to act with complete impartiality and without allowing matters of sympathy, prejudice, sentiment or emotion to play any part.<sup>22</sup>

8.23 Further, the process of jury deliberations and the requirement that, except in limited circumstances, all 12 jurors must agree, will significantly reduce the likelihood of the false preconceptions of any single juror impacting on the verdict of the jury as a whole.

8.24 Although the context did not concern rape myths, the High Court in *Murphy v The Queen* recognised that it is not feasible for jurors to come to a trial completely free of preconception or opinion, but that this does not mean that they will be 'partial' in coming to a decision as it is 'fundamental that ... the jury should reach [a] verdict by reference only to the evidence admitted at trial'.<sup>23</sup>

<sup>21</sup> Jurors often would prefer not to be summoned for jury service. However, in the English, Welsh and Northern Ireland survey, 81% indicated that if summoned again they would be happy to serve on a jury.

<sup>22</sup> See generally *Jury Act 1995* (Qld) s 51(b); Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* [4A] 'Judge's opening remarks'. See also [4.41] in Chapter 4 above.

<sup>23</sup> *Murphy v The Queen* (1989) 167 CLR 94, 98 (Mason CJ and Toohey J).

## Submissions

8.25 A number of respondents submitted that Queensland's current laws, and more broadly the criminal justice system, facilitate the belief in false preconceptions.<sup>24</sup> One respondent submitted that:<sup>25</sup>

our current laws and criminal justice system can be seen as actively supporting the myths of sexual violence in placing the responsibility on victims and does little to hold perpetrators accountable, which in turn, does nothing to reduce the rates of sexual violence in Queensland.

8.26 A number of respondents submitted that the excuse of mistake of fact enables defendants to benefit from false preconceptions to found an argument for a mistaken belief as to consent.<sup>26</sup>

8.27 The Bar Association of Queensland submitted that 'juries are not required to give reasons for their verdicts, and identifying the basis for an acquittal is a fraught exercise'. This respondent stated that:

Sexual offences are, by their very nature, difficult offences both to prosecute, and to defend. Often the case will rest solely on an allegation and a denial—either through a not guilty plea or through the evidence of the accused. This presents a jury with a difficult task and requires them to make a careful assessment of the plausibility of the complaint and the credibility or reliability of the complainant. It is a crucial tenet of our justice system that criminal offences must be proved, by the Crown, beyond reasonable doubt. This is a very high standard, as it must be. A conviction for rape for an adult offender invariably results in a lengthy custodial sentence.

...

It is important to bear in mind that, in our current system, particularly when the defence of mistake of fact is raised, an acquittal is not a verdict on the truthfulness of the complainant. A jury may believe that a complainant was not consenting and still acquit if unable to exclude a defence of honest and reasonable mistake beyond reasonable doubt. This is a normal incident of the criminal standard of proof and the presumption of innocence.

## The Commission's view

8.28 It is very difficult to determine whether false preconceptions have an effect upon jury verdicts. This has been an evolving area of research and understanding, but both the 2017 NCAS and recent research with jurors suggest that the influence of some of the 'rape myths' may be overstated.

8.29 A strength of the jury system is that the jurors are chosen randomly from different backgrounds in society, in terms of their ethnicity, culture, age, gender, occupation, and socio-economic status, which helps ensure diversity. Usually, all 12 jurors must agree on a verdict and the deliberations on the evidence enable any false preconceptions held by a juror or jurors to be tempered by the collective

<sup>24</sup> Eg, Submissions 23, 25, 32, 37, 39, 47, 54, 60, 65A, 67, 74, 75, 77, 79, 84, 85.

<sup>25</sup> Submission 67.

<sup>26</sup> See further [5.25] in Chapter 5 above.

decision-making process. Jurors are directed by the trial judge to put any preconceptions they might have to one side, to act impartially and to act only on the evidence before them. For example, the following is a standard form of direction:<sup>27</sup>

When you sit as jurors in these trials, you are not just individuals anymore. You represent the community. You represent its sense of justice. The privilege which you have of sitting in judgment upon some of your fellow men is one which has corresponding duties and obligations. It is your duty to act with complete impartiality, complete detachment and without letting matters of sympathy, prejudice, sentiment or emotion play any part.

8.30 The Commission does not consider that the existence of false preconceptions or ‘rape myths’ being commonly held by jurors, or the conclusion that any such false preconceptions affect jury deliberation or verdicts, is strongly supported by the currently available research.

8.31 The Commission does not recommend any change to the existing law to deal with perceptions that jurors might harbour false preconceptions or that those false preconceptions might affect jury deliberations or verdicts.

## EXPERT EVIDENCE

8.32 Cross-examination of a complainant may challenge the reliability of the evidence the complainant gave during evidence-in-chief and may also challenge the honesty of the complainant. Inconsistencies, omissions, errors, delay in reporting or other behaviour of the complainant before, during or after the alleged offence, may be used to call into question the credibility of the complainant. One view is that this approach can feed into any false preconceptions that a juror or jurors might have about the way a complainant should behave.

8.33 It has been suggested that the calling of expert evidence in a trial on general matters relating to rape or sexual assault may counter any false preconceptions, thereby ‘ensuring that jury decision-making is based on accurate information’.<sup>28</sup>

8.34 At common law, expert opinion evidence is admissible if it is the opinion of a witness possessing expertise in a recognised field 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.<sup>29</sup>

### Expert evidence—Queensland rules for admissibility

8.35 In Queensland, the admission of expert evidence is governed by the common law. Neither the Criminal Code nor the *Evidence Act 1977* alters that law in relation to the admissibility of expert evidence at a rape or sexual assault trial.

8.36 Expert opinion that is relevant to the proof of a fact in issue is admissible as evidence, as an exception to the general rule at common law that evidence of

<sup>27</sup> *Murphy v The Queen* (1989) 167 CLR 94, 100 (Mason CJ and Toohey J), quoting the direction provided to the jury during the trial by Maxwell J.

<sup>28</sup> VLRC, *Sexual Offences*, Final Report (2004) [7.184].

<sup>29</sup> *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).

opinions or beliefs is inadmissible. To be admissible, the expert opinion must satisfy the requirements that:

- matters that would generally be regarded as common knowledge should not be the subject of expert evidence (the common knowledge rule);<sup>30</sup>
- there must be a recognised and credible field of expertise (the area of expertise rule);<sup>31</sup>
- the expert must have knowledge and experience that allows them to be regarded as an expert in the field (the expertise rule);<sup>32</sup>
- the opinion must be based upon matters that the expert has observed directly or assumed facts that are independently proved (the basis rule);<sup>33</sup> and
- the evidence must not have the effect of supplanting the functions of the judge or jury to decide the ultimate issue before the court (the ultimate issue rule).<sup>34</sup>

8.37 These rules of admissibility reflect the concern that, if these tests are not met, expert evidence may be misleading or be given undue weight, which in turn may unfairly impact on the jury's verdicts. Freckelton suggests that 'the possibility that jurors may be misled by expert evidence with a scientifically untested basis is very real'.<sup>35</sup>

### Admission of evidence—credibility

8.38 The assessment of the credibility of a witness is a function of the jury. An expert expressing an opinion which 'goes only to bolster the credit of another witness called in the case of the party calling the evidence' is objectionable.<sup>36</sup> However, in *Farrell v The Queen*, Kirby J accepted that 'while expert evidence on the ultimate

<sup>30</sup> *Murphy v The Queen* (1989) 167 CLR 94. The common rationale for this exclusion is that it usurps the province of the jury. See, eg, *R v Ashcroft* [1965] Qd R 81, 85 (Gibbs J) and *R v Tonkin and Montgomery* [1975] Qd R 1, 39 (Dunn J). In *R v CAU* [2010] QCA 46, [102] (McMurdo P; Fraser and Douglas JJA agreeing), evidence of a clinical psychologist was found to be inadmissible as the evidence regarding the complainant's ability to remember was regarded by the Queensland Court of Appeal as 'a common sense observation and not outside the ordinary experience and knowledge of jurors'. In contrast, in *R v BDI* [2020] QCA 22, the Court of Appeal has found that psychiatric evidence of a complainant's mental state and the nature of drug-induced psychosis and its symptoms and effects was likely to be outside the experience and knowledge of a judge and jury.

<sup>31</sup> *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ). In *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111, 119 it was observed in respect of evidence regarding characteristics, behaviour and responses of any special category of person that 'it must be shown that is a subject of special study or knowledge and that only the opinions of persons qualified by special training or experience may be received'.

<sup>32</sup> The admissibility of an 'expert's' evidence often 'devolves to the sufficiency and relevance of his or her specialised skills, rather than to any strict questions of definition': I Freckelton and H Selby, *Expert Evidence* (Lawbook, 5th ed, 2013) [2.5.70]. Qualifications or a 'course of study' are not the only determining factor in establishing whether a witness has the requisite expertise. A person may be recognised as an expert by way of experience in a particular field gained over the course of time: *Weal v Bottom* (1966) 40 ALJR 436, 439 (Barwick CJ); *R v Lam* (2002) 121 A Crim R 272; *R v Robb* (1991) 93 Cr App R 161.

<sup>33</sup> An expert may give evidence of an opinion based on assumed facts, provided the facts are proved by other evidence. Some allowance is given for them to get around the hearsay rule in recognition that there will always be some reliance on expertise acquired by others: *R v Noll* [1999] 3 VR 704.

<sup>34</sup> *R v Hally* [1962] Qd R 214, 229 (Gibbs J).

<sup>35</sup> Freckelton et al, above n 10, [2.93].

<sup>36</sup> *R v SBV* [2011] QCA 330, [23] applying *Palmer v The Queen* (1998) 193 CLR 1.

credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility, is admissible'. Nevertheless, the evidence must still comply with the common law principles that the evidence be outside the common knowledge of the jury, be within the expert's own knowledge and emanate from a recognised and credible area of expertise. It would also need to be made clear to a jury that the evidence does not supplant the function of the jury to determine matters of credibility.<sup>37</sup>

### Expert evidence in rape trials

8.39 In some jurisdictions, expert evidence has been admitted in two areas: counter-intuitive expert evidence (otherwise known as myth dispelling or educative evidence) and complainant specific expert evidence.

8.40 Counter-intuitive expert evidence comprises evidence of findings and conclusions from scientific literature about the reactions of adults or children who have been sexually assaulted. It has been argued that it is against the background of such expert evidence that a jury is best informed in their decision-making duty.<sup>38</sup> It does not extend to an opinion as to whether the particular complainant was sexually assaulted, or whether the complainant's behaviour was typical of someone who had been sexually assaulted.<sup>39</sup>

8.41 Complainant specific expert evidence comprises opinion evidence about whether the complainant is suffering 'rape trauma syndrome' based on the witness's psychological knowledge or expertise about sexual assault and reactions to sexual assault. The opinion of the expert would be arrived at by interview, observation or treatment of the complainant.<sup>40</sup>

### Other jurisdictions

8.42 The legislation in a number of Australian jurisdictions specifically provides for the admission of expert evidence on the subject of child behaviour and development in cases where a child has been the victim of a sexual offence.<sup>41</sup>

8.43 Victoria is the only jurisdiction to legislate for the admissibility of expert evidence to address the responses of an adult complainant to a sexual offence. Section 388 of the *Criminal Procedure Act 2009* (Vic) provides:

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<sup>37</sup> *Farrell v The Queen* (1998) 194 CLR 286, 300.

<sup>38</sup> See, eg, A Cossins, 'Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England' (2013) 17 *International Journal of Evidence and Proof* 74.

<sup>39</sup> New Zealand Law Commission, *Evidence Code and Commentary*, Report No 55 (1999) vol 2, 67.

<sup>40</sup> Rape trauma syndrome evidence was the first type of expert evidence used in rape trials in the United States. Criticism of its use has seen it categorised as post-traumatic stress disorder: Temkin and Krahe, above n 10, 58. Given that United States law regarding the admissibility of this type of evidence is very different to the common law, it is not discussed in this Report.

<sup>41</sup> *Evidence Act 2011* (ACT) s 79; *Evidence Act 1995* (NSW) s 79; *Evidence Act 2001* (Tas) s 79; *Evidence Act 1906* (WA) s 36BE.

### 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.

8.44 This provision was introduced by the *Sexual Offences Act 2006* (Vic) to recognise that expert evidence on the dynamics of sexual assault is rarely led in the prosecution of sexual offences in Victoria.<sup>42</sup> It was intended to allow for expert evidence on the nature and effects of sexual assault to be heard by the court more readily.<sup>43</sup>

8.45 In *Jacobs v The Queen*, the Victorian Court of Appeal recently considered whether the admission of expert evidence of this kind led to a substantial miscarriage of justice.<sup>44</sup> The issues at the trial were the complainant's consent to sexual intercourse and the defendant's belief as to the complainant's consent. A forensic psychiatrist gave evidence in general terms explaining the response of some complainants to unwanted sexual conduct and delay by some complainants in reporting such conduct. The expert stated that the basis of his evidence was his reading of academic literature and his experience in a clinical setting. The Court of Appeal summarised the salient aspects of the evidence as follows:<sup>45</sup>

- (1) The two main factors, that influence a person's response to rape or other unwarranted sexual activity, are, first, the circumstances of the unwanted assault, and, secondly, the personal characteristics of the person who alleges the unwanted sexual activity, including that person's age, gender, sexual experience, cultural or religious background, and the degree of support that was available to that person.
- (2) According to professional literature, a minority of alleged rapes are reported to the police, and many of those reports are made some time later. In the majority of cases reports to police are delayed.
- (3) Research produced by the Australian Institute of Family Studies states that there are a range of reasons why people do not report sexual assaults, including uncertainty about what constitutes an assault, a concern about the repercussions of the report (shame), and a range of

<sup>42</sup> Initially the provision, in identical terms, was inserted into the *Evidence Act 1958* (Vic) as s 37E. That was later repealed by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic), which reinserted the provision into the *Criminal Procedure Act 2009* (Vic).

<sup>43</sup> See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2185 (Mr Hulls, Attorney-General).

<sup>44</sup> [2019] VSCA 285. Note that the applicant was subject to separate trials in four proceedings and that the discussion concerns the first trial ('the first proceeding') involving complainant 'AR'.

<sup>45</sup> Ibid [32].

different factors. Some women may feel that they have brought it upon themselves, or feel inhibited about reporting a sexual assault, because they come from a cultural, social or religious background which says that premarital sex is forbidden.

- (4) There are differences in cultural responses to unwanted sexual activity. One example [is] women of particular cultural or social backgrounds in which they are not expected to affiliate with men outside their immediate family.
- (5) The cultural background of the person is an important consideration. It is a 'very critical and differing aspect' of the way in which people react with doctors, police or hospitals. In many cases, culture defines a particular role in the community for a gender. In some cultures, physically active and assertive males are privileged, and in others quiet and dedicated males are privileged.
- (6) A number of persons, who have been the subject of unwanted sexual activity, continue to have further contact with the protagonist. In clinical practice, numbers of patients have reported having returned to a relationship or seeing the person who perpetrated the assault. In one study, thirty per cent of women said they had sex again with the person after they believed they had been sexually assaulted.
- (7) A woman's immediate response to the commencement of unwanted sexual activity may depend on the circumstances, including if the protagonist is very violent and aggressive, it might be feared that resistance would lead to increased violence. Victims report a range of different responses, depending on their personality or their cultural, social or religious background.

8.46 The Court of Appeal noted that the rationale relied on by the prosecution for seeking to lead the evidence was the re-establishment of the credibility of the complainant, in light of the complainant's delay in making the complaint and the fact that the complainant and defendant interacted after the offence. However, the defence did not suggest that the complainant's conduct was inconsistent with her account that she did not consent. The defence focused on challenging the complainant's account that the defendant continued penetration after she withdrew consent and that she did not consent at all to the second act of intercourse. Accordingly, there was no ambiguity or equivocality in the complainant's account that she consented or that could have given a false impression that she consented and therefore nothing 'by reason of cultural or other factors' that would have been misconstrued by a jury as evidence of her consent.<sup>46</sup> The Court of Appeal found that the expert evidence was irrelevant and inadmissible noting:<sup>47</sup>

it is trite, but of particular importance, to observe the principle that evidence is only admissible in a criminal ... proceeding, if it is relevant to a fact in issue.

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<sup>46</sup> Ibid [66].

<sup>47</sup> Ibid [71].



8.47 It was found that there was no aspect of the conduct of the complainant, either during the incident or before police spoke to her, which:<sup>48</sup>

the jury could have regarded as being counterintuitive conduct, or from which the jury could have drawn a conclusion (albeit erroneously) that might have been precluded by the evidence of [the expert].

8.48 It is notable that the Court of Appeal considered that if there had been a possibility that the jury could have drawn an erroneous conclusion based on the complainant's evidence that this could have been effectively addressed by the Judge giving the appropriate direction under the *Jury Directions Act 2015* (Vic) observing that:<sup>49</sup>

It is almost a matter of routine, in criminal trials in this State, for judges to give cautionary directions to juries, in order to ensure that they do not misuse evidence that is put before them, or use such evidence for an impermissible purpose. Most often, such directions are given in order to preclude a jury from engaging in a line of reasoning that might be impermissible and unfair to an accused person. However, equally, it is appropriate for a judge to give such a direction, where necessary, in order to ensure that a jury does not engage in impermissible reasoning that might be to the disadvantage of the prosecution. It is for that precise reason that the legislature has specified the particular direction prescribed by s 52 of the *Jury Directions Act*.

8.49 The Court of Appeal did not consider the type of evidence given by the expert to be inadmissible and irrelevant in all cases of sexual assault. The Court referred to its previous decision in *MA v The Queen*, where expert evidence that bore on the child complainant's credibility was considered. In that case, it was held that expert evidence that was directed at 'establishing that that behaviour of the complainant was neither necessarily inconsistent with the allegations she made, nor an abnormal response to offending of the type that she described' was admissible by reason of section 108C(1) of the *Evidence Act 2008* (Vic) which provides an exception to the credibility rule where a person has specialised knowledge based on the person's training, study or experience. In reaching that conclusion, it was observed that 'ordinarily the decision as to admissibility is likely to be the same' whether the issue of admissibility arose under section 108C or section 388.<sup>50</sup>

8.50 The Court of Appeal in *Jacobs v The Queen* referred to the following principles that were drawn from the New Zealand Court of Appeal decision in *M v The Queen*, where the Court was concerned with the admissibility of 'counterintuitive evidence' as to the behaviour of children who have been sexually abused:<sup>51</sup>

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48 Ibid [73].

49 Ibid.

50 *Jacobs v The Queen* [2019] VSCA 285, [53]–[57], discussing *MA v The Queen* (2013) 40 VR 564.

51 Ibid [60], quoting *M v The Queen* [2011] NZCA 191, [32] and referring to *DH v The Queen* [2015] 1 NZLR 625, 636–7 [30].

To summarise, then:

- (a) In many contested cases involving allegations of sexual abuse against children, the jury's verdict will depend critically on their assessment of the complainant's credibility.
- (b) Research indicates that there is a substantial risk that a jury's assessment of a complainant's credibility will be influenced by behavioural assumptions that are unjustified.
- (c) Section 127 is a partial recognition of this, in that it allows a judge to instruct the jury on the question of delay in reporting abuse.
- (d) In cases where such unjustified behavioural assumptions may influence the jury's assessment, expert evidence as to those assumptions may be led (assuming the requirements of s 25 [of the *Evidence Act 2006* (NZ)] are met).
- (e) Where that is done, however, the judge must take care to instruct the jury as to the purpose for which the expert evidence has been led and that the evidence says nothing about the credibility of the *particular* complainant. This is because there may be a tendency for the jury to reason that:
  - delayed reporting (for example) is common where children have been sexually abused;
  - this is a case where there was delayed reporting by a child alleging sexual abuse;
  - given that there was delayed reporting, the child must have been sexually abused.

To use the language of [the expert], the risk is that what is descriptive or observational information (some sexually abused children act in this way) is used as a predictive or diagnostic tool (a child who acts in this way must have been sexually abused).

- (f) Where the Crown wishes to lead this type of expert evidence, the matter should be addressed pre-trial so that the parties and the trial judge know in advance precisely what the position is. (emphasis in original)

#### 8.51 The Victorian Court of Appeal observed that:<sup>52</sup>

In accordance with those principles in an appropriate case in which it is alleged that an accused person has engaged in non-consensual sexual conduct in respect of a complainant, evidence of the kind given by [the expert], in the first proceeding, may be relevant for two possible purposes. First, it may explain conduct or reactions by the complainant at the time of the alleged offending, which, in the absence of such an explanation, might be considered to contradict or be inconsistent with the evidence of the complainant that the sexual conduct, complained of, was not consensual. Secondly, such evidence might be relevant to explain conduct by a complainant, during the period between the date of the offence and the time at which it is reported to the police, which, if not explained, might seem to contradict or be inconsistent with the evidence of the complainant that the sexual conduct, complained of, was not consensual. In either or both of

<sup>52</sup>

Ibid [61].

such cases, the evidence would be relevant to explain counterintuitive conduct by a complainant which, if not properly understood, might lead a jury to erroneously conclude that the conduct, alleged against the accused, might have been consensual. In that way, the evidence would be directed to dispel misconceptions or 'myths' held as to the manner in which it might be expected that a victim of a sexual offence might react either at the time of the offending or in the period that followed it.

### **New Zealand**

8.52 Counter-intuitive evidence is now 'frequently adduced' in sexual assault trials in New Zealand under statutory authority.<sup>53</sup> The New Zealand Court of Appeal in *M v The Queen*<sup>54</sup> accepted that where a complainant's credibility may be influenced by 'unjustified behavioural assumptions' about sexual offending and complainants' responses, psychologists' expert evidence relevant to the case may meet the 'substantial helpfulness' threshold set out in section 25 of the *Evidence Act 2006* (NZ). That section provides that, for the evidence to be admissible, a jury must be 'likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding'.

8.53 The New Zealand Court of Appeal in *T v The Queen* explained the primary purpose of the expert evidence in the following terms:<sup>55</sup>

[T]o educate the jury regarding behaviour that might, intuitively, be regarded as inconsistent with having been sexually abused and neutralise the effect of unjustified assumptions about how victims of sexual abuse are likely to behave. This kind of evidence is permitted on the basis that such matters are not necessarily within the ordinary competence of jurors and the evidence may be substantially helpful for the purposes of s 25 of the *Evidence Act 2006*.

### **Issue for consideration**

8.54 In the Consultation Paper, the Commission sought submissions on whether there is a need for legislation specifically to 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. The Commission also sought submissions about what difference, if any, such amendments would make to the operation of the current law in Queensland, and what advantages or disadvantages might result from those changes.<sup>56</sup>

### **Submissions**

8.55 Some respondents submitted that there should be amendments to the *Evidence Act 1977* specifically to allow for the admission of expert evidence in criminal proceedings that relate (wholly or partly) to a charge of a sexual offence.<sup>57</sup>

<sup>53</sup> *K v The Queen* [2013] NZCA 430, [34].

<sup>54</sup> [2011] NZCA 191.

<sup>55</sup> *T v The Queen* [2013] NZCA 298, [7].

<sup>56</sup> QLRC Consultation Paper No 78 (2019) Q-27, Q-29.

<sup>57</sup> Eg, Submissions 39, 48B, 79. Also, eg, Submission 37.

One respondent submitted that ‘express provision in the law for the introduction of expert evidence would give weight to the importance of addressing rape myths’.<sup>58</sup>

8.56 A number of respondents supported the greater utilisation of expert witnesses by prosecutors. Some respondents submitted that there is a need to inform members of the jury about the dynamics of sexual violence and the impacts of trauma. In their view, this would improve juror decision-making and dispel false preconceptions.<sup>59</sup> Several respondents submitted that there is a need for jurors to be given reliable information about ‘freeze’ responses and the reasons victims might delay making complaints.<sup>60</sup> Another respondent submitted that an expert witness could ‘provide evidence about trauma responses to explain why a survivor may behave in a certain way’.<sup>61</sup>

8.57 One respondent saw a greater use of expert evidence as one of two ‘main reform options designed to enhance information available to jurors’ the other being judicial direction. This respondent cited research supporting that ‘jury misconceptions about child sexual abuse were “substantially reduced” by both expert evidence and judicial direction’.<sup>62</sup>

8.58 ANROWS supported the use of expert evidence that might improve juries’ understanding of the freeze response, the impact of trauma on memory, the reasons victims may not report (or immediately report) an assault, and how common it is for victims not to report (or immediately report) an assault. ANROWS also submitted that expert evidence about domestic violence and social entrapment theory would be informative for juries.

8.59 Two academics submitted that there is ‘potential for improving the quality of courtroom knowledge about the effects of alcohol and other drugs’. Having conducted a study of complainant intoxication evidence in rape trials they submitted that they had seen:<sup>63</sup>

some encouraging signs of growing judicial awareness of the relationship between intoxication and memory/recall, including that intoxicated rape victims can often accurately recall key events, even if their recollection of peripheral details is imperfect.

8.60 Some respondents submitted that experts with relevant areas of expertise could include specialist sexual assault counsellors or social workers, specialist trauma psychologists and psychiatrists with experience in treating victims of sexual assault.<sup>64</sup> In the context of the sexual assault of sex workers or of members of the

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58 Submission 39.

59 Eg, Submissions 32, 37.

60 Eg, Submissions 12, 18, 31, 35, 41, 56, 62.

61 Submission 32. Also, eg, Submission 44.

62 Submission 37, referring to J Goodman-Delahunty, A Cossins and K O’Brien, ‘Enhancing the credibility of complainants in child sexual assault trials: The effect of expert evidence and judicial directions’ (2010) 28(6) *Behavioural Sciences and the Law* 769, 780, cited in Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X* (2017) 154.

63 Submission 40.

64 Eg, Submissions 32, 85.

LGBTIQ communities, some respondents submitted that there is a need for peer-based expertise drawn from those communities to ensure an understanding of the 'lived experiences' of victims.<sup>65</sup>

8.61 A number of respondents suggested that there is no need for an amendment of this kind.

8.62 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd submitted that:

As new fields of expert evidence develop or become discredited, the common law is flexible enough to address their admission into evidence in appropriate cases. (note omitted)

8.63 That respondent also expressed concern that:

a statutory formula would permit otherwise impermissible forms of expert evidence such as reliance on attitudinal surveys to be automatically adduced into evidence.

8.64 Legal Aid Queensland, Criminal Law Practice submitted that expert opinion evidence should be admitted only if it meets 'the current tests' of admissibility and that the category of experts should not be 'treated any differently' from any other opinion evidence sought to be admitted in Queensland courts. This respondent considered that this type of evidence is 'within the contemplation of an ordinary jury':

Ordinary people can understand the dynamics involved with sexual interaction and domestic relationships. Many of the issues raised ...should therefore be a matter for a jury properly informed of the case through evidence, addresses and directions. There is already provision within a criminal trial to address any recognised preconceptions.

8.65 The Queensland Law Society questioned the utility of such expert evidence given that 'the real focus of most criminal trials is on the particular circumstances of the allegation' and that for the most part this type of evidence will be concerned with generalities about the diversity of human behaviour. It submitted that the type of expert evidence utilised to counteract false preconceptions about complainant behaviour leading up to, during or after a sexual assault has been 'rendered largely moot' by the development of judicial directions, giving the following example:<sup>66</sup>

[T]here's no rule in relation to how people behave when they're being abused, sexually. There's no rule in relation to how victims respond, and if you haven't been a victim of a crime, particularly of a sexual crime, you shouldn't presume that you've got any way of assessing how a victim should behave. Obviously, that goes for sexual crimes, but it probably also goes for normal assaults. You know, some people react aggressively; some people react passively. It depends very much on the personality and situation.

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<sup>65</sup> Eg, Submissions 54, 56.

<sup>66</sup> Quoting an extract from a summing-up of Richards DCJ in the Brisbane District Court on 13 December 2019 indictment 403/19.

## Discussion

8.66 The 2018 Trials did not reveal any instances in which either the Director of Public Prosecutions or the defence had sought to utilise counter-intuitive expert evidence.<sup>67</sup> Such evidence could be challenged in Queensland on the basis that it:

- is within the common knowledge of the jury (depending on what behaviour it concerns);<sup>68</sup>
- may concern subject matter about behaviour that is not a recognised area of expertise;
- will not be evidence derived from direct observations of the complainant;
- is inadmissible as it goes to the credibility of the complainant; or
- would have a prejudicial effect which would outweigh its probative value.

8.67 The problematic features of the evidence given in *F v The Queen* as identified by the New South Wales Court of Criminal Appeal,<sup>69</sup> could suggest that counter-intuitive evidence would be inadmissible in Queensland in that it would not:

- be evidence of observations by the expert of the behaviour and condition of the complainant; and could apply to ‘all manner of people in a wide variety of circumstances’ and for this reason would be ‘a matter of common experience ... of which jurors are expected to be aware’;
- directly relate to the complainant or the facts of the case leaving it unclear as to what utility it would have for the trier of fact; or
- be helpful in assisting the jury to evaluate the reliability or otherwise of the complainant as it would be non-diagnostic.

8.68 The value to juries of expert evidence concerning technical and medical issues is easily recognised—as in the case, for example, of medical evidence concerning the cause of a person’s death or DNA evidence that shows sexual penetration by the defendant<sup>70</sup>—but some would argue it is much harder to recognise the types of psychological knowledge that might fall outside a jury’s ‘common’ understanding. It is argued that it is not beyond a jury to appreciate that how a person will react during or after a rape is dependent upon the personal circumstances of the complainant and for this reason the reactions may be many and varied, and that these behaviours do not call for expert evidence. It is a matter of assessing the

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<sup>67</sup> See the review of the 2018 Trials in Chapter 3 above.

<sup>68</sup> ALRC, NSWLRC and VLRC, *Uniform Evidence Law Report*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (December 2005) 316, [9.144].

<sup>69</sup> *F v The Queen* (1995) 83 A Crim R 502. The question was the admissibility of expert evidence regarding ‘The Accommodation Syndrome’ where a specialist paediatrician gave evidence about what the literature said about complaints by children of sexual abuse and whether children delay in complaining. The Court of Appeal considered that evidence given as to reporting and ‘the pattern of any human being in a powerless stressful situation’ was a matter of common experience of which jurors are expected to be aware.

<sup>70</sup> Some research suggests that juries may in fact have a preference for hard or scientific evidence known as the ‘tech effect’: see Horan and Goodman-Delahanty, above n 17, 23.

complainant during their evidence, which the jury can do without the help of 'experts'.<sup>71</sup>

8.69 It is also argued that prosecutors can effectively address any potential false preconceptions by seeking an explanation from the complainant as to the reasons behind their behaviour and reminding the jury of the dangers of subconsciously being influenced by such preconceptions in their opening or closing addresses. A judge might in turn consider it appropriate to instruct the jury to avoid assessing evidence on the basis of potentially erroneous beliefs or assumptions about how a complainant would respond to a sexual assault.

8.70 The 'basis rule' may cause some considerable difficulty for the admissibility of survey evidence which may form the basis for social sciences evidence. Survey evidence is evidence derived by the assembly of data from answers to questions posed to a sample group. Early authority pronounced such evidence to be inadmissible. Australian authorities that have taken a more relaxed approach to survey evidence have generally been confined to civil cases.<sup>72</sup> Not extending the admissibility of evidence to criminal trials is assumed to be because of the care that must be taken to prevent expert evidence without a clear factual foundation being presented to a jury.

8.71 While the admission of counter-intuitive expert evidence may be seen as valuable in dispelling false preconceptions about complainant behaviour during and after a sexual assault, it is uncertain whether this can outweigh the concerns that jurors will give undue deference, and accordingly weight, to the evidence of an expert in determining the complainant's credibility, thus prejudicing the defendant's right to a fair trial.<sup>73</sup> The concerns were explained by Dawson J in *Murphy v The Queen*:<sup>74</sup>

The admission of such evidence carries with it the implication that the jury are not equipped to decide the relevant issue without the aid of expert opinion and thus, if it is wrongly admitted, it is likely to divert them from their proper task which is to decide the matter for themselves using their own common sense. And even though most juries are not prone to pay undue deference to expert opinion, there is at least a danger that the manner of its presentation may, if it is wrongly admitted, give to it an authority which is not warranted.

## The Commission's view

8.72 The Commission considers that expert evidence of the nature envisaged by section 388 of the *Criminal Procedure Act 2009* (Vic) is unlikely to be admissible under current laws in Queensland in a rape or sexual assault trial.

8.73 The Commission is not persuaded, given recent research of jurors' views, that juries are influenced in their decision-making by false preconceptions about rape or sexual assault or that where there is a need for jury guidance this is best achieved

<sup>71</sup> Ibid 32, noting that jurors may perceive expert counter-intuitive evidence as 'a waste of their time' if it is not directly 'relevant to the facts of the case at hand'.

<sup>72</sup> See *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 360–61.

<sup>73</sup> H Hill, 'Rape Myths and the Use of Expert Psychological Evidence' (2014) 45(3) *Victoria University of Wellington Law Review* 471, 478, 485.

<sup>74</sup> (1989) 167 CLR 94, 131.

by making expert evidence admissible as provided by section 388 or some similar provision.

8.74 The Commission considers that although the counter-intuitive evidence that is admissible in other jurisdictions may have an educative purpose, it is general in nature and does not answer the questions that a jury may have to consider in a particular case. A jury may derive little additional benefit in terms of enhancement of their understanding and weighing of the specific evidence before them.

8.75 The Commission appreciates that a judge will ordinarily give directions to the jury not to act on any preconceptions and that some judges already give such directions about factors that may affect a complainant's behaviour.

8.76 The Commission also considers that there may be some practical difficulties with the use of expert evidence of the proposed kind. Practical difficulties include the availability of appropriate experts, the increase in the length of trials where there is an expert evidence issue and the associated impacts upon complainants and defendants.

8.77 In the result, the Commission does not recommend that a provision authorising the receipt of expert evidence that does not meet the requirements for admissibility at common law should be introduced.

## STATEMENT OF OBJECTIVES AND GUIDING PRINCIPLES

8.78 In some jurisdictions statements of objectives and guiding principles have been the subject of law reform commission recommendation or adopted in legislation. The objective of these statements is to counter the influence of false preconceptions said to influence the decision-making process at all levels of a prosecution for rape or sexual assault.<sup>75</sup>

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

8.80 In 2010, the ALRC and the NSWLRC, in their joint report on family violence, recommended that:<sup>76</sup>

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

<sup>75</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2185 (Mr Hulls, Attorney-General).

<sup>76</sup> ALRC and NSWLRC Joint Report on Family Violence Rec 25-9.



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.

8.81 The NSWLRC has proposed the inclusion of 'interpretive principles' in the *Crimes Act 1900* (NSW) stating that, in interpreting and applying the proposed new subdivision covering rape and sexual assault offences, regard must be had to the following principles:<sup>77</sup>

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

8.82 Victoria is the only Australian jurisdiction to have enacted objectives and guiding principles. The objectives are set out in section 37A of the *Crimes Act 1958* (Vic):

**37A Objectives of Subdivisions 8A to 8G**

The objectives of Subdivisions (8A)<sup>78</sup> 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)

8.83 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

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<sup>77</sup> NSWLRC draft proposals 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.

<sup>78</sup> The offences of rape and sexual assault are detailed in the *Crimes Act 1958* (Vic) subdiv 8A.

- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

### Issue for consideration

8.84 In the Consultation Paper, the Commission sought submissions on whether there is 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 sexual assault offences. The Commission also sought submissions about what difference, if any, those amendments would make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes.<sup>79</sup>

### Submissions

8.85 A number of respondents supported the inclusion of provisions setting out objectives and guiding principles for Chapter 32 of the Criminal Code.<sup>80</sup> Those respondents variously submitted that such provisions would:

- assist in the interpretation of the legislation;
- provide clear guidance on the circumstances in which rape and sexual assault occurs;
- serve as a ‘building block for broad community education’,<sup>81</sup> provide a ‘firm foundation’ for community initiatives around consent,<sup>82</sup> and provide direction to society as well as to those involved in the criminal justice process about what is, and is not, acceptable conduct;<sup>83</sup>
- address common false preconceptions about sexual violence;
- place sexual violence in its context; and
- create a culture of respect.<sup>84</sup>

8.86 Several respondents were supportive of the approach adopted in sections 37A and 37B of the *Crimes Act 1958* (Vic) or as recommended by the ALRC and NSWLRC,<sup>85</sup> with some suggesting additions to those provisions.<sup>86</sup> One respondent suggested the inclusion of two more guiding principles, namely:

- sexual offences most frequently occur in residential locations;

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<sup>79</sup> QLRC Consultation Paper No 78 (2019) Q-25, Q-26.

<sup>80</sup> Eg, Submissions 24, 25, 32, 37, 39, 47, 48B, 54, 59, 60, 65A, 67, 70, 74, 75, 77, 79, 84, 85.

<sup>81</sup> Submission 37.

<sup>82</sup> Submission 65A.

<sup>83</sup> Submission 24.

<sup>84</sup> Submission 70.

<sup>85</sup> Eg, Submissions 25, 32, 75, 84, 85. The Victorian provisions are set out at [8.82]–[8.83] above.

<sup>86</sup> Eg, Submission 50.

- there are legitimate reasons why victims of sexual violence may not:
  - physically resist an assault, including, but not limited to, physiological responses to aggression and fear of escalating or prolonging the attack; and
  - immediately report an assault to police or another person and a failure to make an immediate report, on its own, does not discredit an allegation.

8.87 Some respondents were supportive of the inclusion of objectives or guiding principles in similar terms to the interpretive principles recently proposed by the NSWLRC.<sup>87</sup>

8.88 One of those respondents submitted that the guiding principles could be ‘enhanced further with the inclusion of “intimate partner” terminology’.<sup>88</sup>

8.89 Several respondents from the legal profession firmly opposed the inclusion of a statement of objectives or guiding principles in the terms set out Victorian legislation or as recommended by the ALRC and NSWLRC on the basis that these would be ‘highly prejudicial to defence’, and are ‘reflective of a bias in favour of the prosecution case’.<sup>89</sup> Another submitted that ‘the enactment of motherhood statements or platitudes is only likely to result in confusion, and provoke more appeals against conviction’.<sup>90</sup>

8.90 One respondent submitted that their inclusion could risk inconsistent interpretation and application of the law with different persons applying ‘varying weight and meaning to the objectives and guiding principles’.<sup>91</sup>

8.91 Several respondents submitted that a statement of objectives or guiding principles is not needed or would not assist in statutory interpretation.<sup>92</sup> The Queensland Law Society submitted that:

The two objectives in the Victorian legislation would not aid in the interpretation of the Code’s provisions. Of the five ‘guiding principles’, none are of any assistance to statutory interpretation, and only the final two have any relevance to the determination of guilt in any particular case.

The Society agrees with the Victorian Law Reform Commission that the criminal law has both a regulatory and educative function. The educative function, in the Society’s submission, is achieved by identifying clearly for the public the conduct that will attract the sanctions and opprobrium of the criminal law. The criminal statute book is not well suited to pronouncing aspirational slogans, nor to effecting changes in cultural mores or ethics.

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<sup>87</sup> Eg, Submissions 37, 39, 61. The interpretive principles proposed by the NSWLRC are set out at [8.81] above.

<sup>88</sup> Submission 39.

<sup>89</sup> Submission 69.

<sup>90</sup> Submission 86.

<sup>91</sup> Submission 68.

<sup>92</sup> Eg, Submissions 72, 73, 86.

## Discussion

8.92 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, arose out of recommendations made by the VLRC.<sup>93</sup>

8.93 When proposing the inclusion of ‘objectives’ and ‘guiding principles’, the ALRC and NSWLRC identified the intention to provide a contextual framework for the legislative response to sexual assault, rather than any exhaustive list of issues to which judges and juries should have regard.<sup>94</sup>

8.94 When making recommendations to include such provisions the VLRC concluded that these reforms should assist, and not complicate, the interpretation of relevant legislative provisions.<sup>95</sup> It outlined the arguments for this approach as follows:<sup>96</sup>

- 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 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.

8.95 It is instructive to consider how such provisions have been considered to aid interpretation of relevant sexual assault provisions in Victoria.

8.96 In *Clarkson v The Queen*, the Victorian Court of Appeal had reason to consider sections 37A and 37B of the *Crimes Act 1958* (Vic) in relation to child sexual offences.<sup>97</sup> The Court considered whether consent could be a mitigating factor, and said that it is ‘axiomatic that ... provisions must be interpreted in context’.<sup>98</sup> Citing

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<sup>93</sup> VLRC, *Sexual offences*, Final Report (2004) Recs 193, 194.

<sup>94</sup> Ibid 1181.

<sup>95</sup> VLRC, *Sexual offences*, Interim Report (2003) [8.89].

<sup>96</sup> Ibid [8.88].

<sup>97</sup> *Clarkson v The Queen* (2011) 32 VR 361. In this case, the two appellants argued that their sentences were manifestly excessive and sought to rely on the consent of the complainant as a mitigating factor.

<sup>98</sup> Ibid [18], referring to *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408, in which it was stated that:

section 37A, it said that the intention of Parliament was clear in that children are vulnerable and must be protected from sexual exploitation. The Court noted that those offences are 'governed by s 37A and the interpretive principles in s 37B' of the Act, the relevant objective being 'to protect children ... from sexual exploitation'.<sup>99</sup>

8.97 That reasoning reflects two fundamental features of the modern law of statutory interpretation. The first is that it is for the court to determine the meaning of a statutory provision as a matter of law. In a jury trial, it is for the judge to direct the jury as to that meaning as a matter of law and for the jury to apply the law as directed by the judge to the facts as they find them on the evidence. It must follow that, so far as the jury is concerned, an objectives provision such as section 37A is not within the jury's province and the only possible role for a guiding principles provision such as section 37B is in applying the law as directed to the facts. It is not at all clear how a jury could or would do so.

### The Commission's view

8.98 If provisions similar to those in Victoria were to 'govern' the interpretation of offence provisions in Chapter 32 of the Criminal Code, it is unclear how they could or would operate without potentially creating interpretive difficulties and introducing irrelevant considerations into the jury's function to decide the guilt of a defendant and to return a verdict on the evidence. They might create ambiguity rather than resolve it.

8.99 A clearly expressed offence provision identifies the elements that comprise the conduct for which a defendant is criminally responsible and subject to punishment. A properly directed jury is tasked with the duty to consider and weigh the evidence in proof of those elements and should not be distracted by 'principles' that do not bear on the evidence in that case.

8.100 The High Court relevantly observed that:<sup>100</sup>

A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement. History would indicate that the codifier will never achieve the clarity and completeness which would obviate any need for subsequent interpretation or commentary ... The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty.

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the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous.

<sup>99</sup> Ibid, noting that the relevant objective in this case is s 37A(b), namely 'to protect children ... from sexual exploitation'.

<sup>100</sup> *Boughey v The Queen* (1986) 161 CLR 10, 21 (Mason, Wilson and Deane JJ).

8.101 This cautionary note was sounded as to the courts' directions and decisions, but it could be extended to drafting objectives and principles to support the interpretation of offence provisions. General contextual information or aims may be unhelpful in illuminating the 'expression of the elements of an offence'.<sup>101</sup>

8.102 The Commission is not persuaded that general legislative statements of objectives or guiding principles helpfully assist juries, who are the triers of fact in criminal trials, to evaluate factual issues in specific cases. Nor is the Commission persuaded that such statements or objectives are needed, or that they would inform judges about the law to be applied by the jury in reaching its verdict or about the admissibility of evidence.

## EDUCATION AND AWARENESS

8.103 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:<sup>102</sup>

- address misunderstanding and a lack of understanding about the application of the criminal law to sexual offences and legal processes including trial procedure;<sup>103</sup>
- counter false preconceptions and 'victim blaming';
- improve understanding about the need for consent and to promote respectful relationships;<sup>104</sup>
- 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;<sup>105</sup>
- improve the rates of reporting of sexual offences and criminal justice outcomes; and
- encourage actions to avoid, recognise and report sexual offences.

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<sup>101</sup> Ibid, quoted at [8.100] above.

<sup>102</sup> Taskforce Report 81–96.

<sup>103</sup> J Horan, 'Communicating with Jurors in the Twenty-First Century' (2007) 29 *Australian Bar Review* 101, 102.

<sup>104</sup> Department of Child Safety, Youth and Women (Qld), *Sexual Violence Prevention: Having the conversation*, Background Paper (May 2019) 7–8.

<sup>105</sup> Temkin and Krahe, above n 10, 188–94.

## Issue for consideration

8.104 In the Consultation Paper, the Commission sought submissions on whether there should be public education programs to educate the community about issues of consent and mistake of fact.<sup>106</sup>

## Submissions

8.105 Several respondents were supportive of public education programs to educate the community about issues of consent and mistake of fact and to inform the community of any changes to the law.<sup>107</sup>

8.106 A number of respondents submitted that any statutory reforms need to be complemented by educational initiatives about consent,<sup>108</sup> for example, to promote an understanding of ‘what is and is not acceptable behaviour’ and steps that should be taken to ensure consent.<sup>109</sup> Women’s Legal Service Qld observed that:

Law reform is but one platform in the complex multifaceted platform of substantive reform to the entire system. Sexual violence is a systemic and cultural problem where implementing positive law reform is only part of what is required to bring about significant change in the experience of sexual violence complainants’ interaction with the system.

8.107 Respondents submitted that there should be a broad community education program to ‘address the prevalence of myths about sexual violence and consent’, to promote ‘healthy’ and ‘respectful relationships’, and to ‘enhance understanding of trauma’ and ‘assist better responses’.<sup>110</sup> One respondent noted that this is in line with the National Plan to Reduce Violence Against Women and their Children.<sup>111</sup>

8.108 A number of respondents emphasised the need for education targeting young people, and some noted that there needs to be a particular focus on educating young men.<sup>112</sup> Several respondents noted the importance of educational material about equality, bodily autonomy and respectful relationships being ‘embedded’ within the school curriculum.<sup>113</sup> Some respondents noted education about respectful relationships that is already being undertaken in some schools.<sup>114</sup>

<sup>106</sup> QLRC Consultation Paper No 78 (2019) Q-30.

<sup>107</sup> Eg, Submissions 25, 32, 39, 47, 60, 74, 77, 79, 84.

<sup>108</sup> Eg, Submissions 57, 65A, 72, 75, 85.

<sup>109</sup> Submission 57, quoting ACT Human Rights Commission, Submission to ACT Greens Exposure Draft Crimes Consent Amendment Bill 2018 (26 March 2018).

<sup>110</sup> Eg, Submissions 3, 25, 32, 47, 70, 74, 77, 84.

<sup>111</sup> Submission 39, referring to the *National Plan to Reduce Violence against Women*, National Outcome 2: Relationships are Respectful <<https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>>. Another respondent similarly referred to *Queensland’s Framework to address Sexual Violence* (2019): Submission 72.

<sup>112</sup> Eg, Submissions 63, 69, 71, 72, 75, 84.

<sup>113</sup> Eg, Submissions 75, 84.

<sup>114</sup> Eg, Submissions 72, 75.

8.109 Another respondent noted the findings of several recent surveys of young people that showed a ‘disregard for the need to gain consent in sexual matters’ and highlighted the need to educate those most ‘at risk as to what levels and forms of consent they should seek and are entitled to expect’.<sup>115</sup>

8.110 Some respondents submitted that community education may increase reporting rates.<sup>116</sup> One respondent submitted that this is because ‘community perceptions of the criminal justice response to sexual violence may influence victims’ decisions about whether to report sexual assaults to police or access support services’.<sup>117</sup>

8.111 Some respondents observed that there is a need for better community education about the operation of the current law of consent and the justice system.<sup>118</sup> One respondent submitted that some of the criticisms of the law arise from ‘misconceptions of how the current laws operate’ and that these should be addressed by ‘an extensive government public awareness campaign to educate members of the public regarding the law as it currently operates in relation to consent’.<sup>119</sup>

8.112 Several respondents submitted that there should be targeted education for police and other professionals involved in criminal justice processes to improve understanding of trauma and support ‘better responses’.<sup>120</sup> Some of those respondents referred in this regard to existing specialised training programs and initiatives.<sup>121</sup>

8.113 Some respondents submitted that there should be education for judges involved in rape and sexual assault cases.<sup>122</sup>

### The Commission’s view

8.114 The Commission recognises the importance of education about issues of consent and mistake of fact. Changes to the law are sometimes complemented by educational and training material. However, the form and scope of any education program is a matter for the government and individual organisations. Accordingly, the Commission does not make any recommendations in relation to education or training programs.

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<sup>115</sup> Submission 53, referring to ANROWS, ‘Young Australians confused about consent and control in the age of Tinder and Snapchat’ (Media Release, 22 May 2019); and YouGov, *Public’s attitudes to sexual consent* (1 December 2018) <<https://yougov.co.uk/topics/resources/articles-reports/2018/12/01/publics-attitudes-sexual-consent>>; K Jozkowski and Z Peterson, ‘College Students and Sexual Consent: Unique Insights’ (2013) 50(6) *Journal Of Sex Research* 517.

<sup>116</sup> Eg, Submissions 37, 39, 68.

<sup>117</sup> Submission 37.

<sup>118</sup> Eg, Submissions 69, 86.

<sup>119</sup> Submission 69.

<sup>120</sup> Eg, Submissions 32, 47, 52, 67, 72, 74, 77, 79. Also, eg, Submissions 52, 72.

<sup>121</sup> Eg, Submissions 72, 79. Submission 72 referred, for example, to programs identified in *Queensland’s Framework to address Sexual Violence* (2019).

<sup>122</sup> Eg, Submissions 77, 79, 84.



8.115 The Commission notes that there are some broader education programs being implemented as part of the Queensland Government's *Framework to address Sexual Violence*.<sup>123</sup>

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<sup>123</sup> See further *Queensland's Framework to address Sexual Violence* (2019) 3–4, 17, which provides for a range of measures, including in relation to respectful relationships education. See also, eg, Department of Education (Qld), 'Respectful relationships education program' (22 April 2020) <<https://education.qld.gov.au/curriculum/stages-of-schooling/respectful-relationships>>.



# 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~~ **30 June 2020**.<sup>1</sup>

Dated the 2nd day of September 2019

**YVETTE D'ATH MP**

Attorney-General and Minister for Justice  
Leader of the House

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<sup>1</sup>

This amendment to the terms of reference was made, at the request of the Commission, by a letter from the Attorney-General and Minister for Justice, Leader of the House, the Hon Yvette D'Ath MP, to the Chair of the Queensland Law Reform Commission, the Hon Justice David Jackson, dated 30 March 2020.



# Appendix B

## List of respondents and consultees

### Preliminary respondents

Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd	Dyer, Andrew
Australian Lawyers Alliance	Flynn, Associate Professor Asher
Bar Association of Queensland	Lee, Bri
Berkman, Michael MP	Legal Aid Queensland
Bravehearts	Queensland Advocacy Incorporated
Centre Against Sexual Violence Inc.	Queensland Council for Civil Liberties
Chief Judge of the District Court	Queensland Law Society
Crowe, Professor Jonathan	Rape & Domestic Violence Services Australia
Director of Public Prosecutions (Qld)	Sisters Inside Inc.
Douglas, Professor Heather	Tait, Bill (Jnr) Esq.
	Women's Legal Service Qld

### Respondents and consultees

Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd	Burgin, Dr Rachael
Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine	Cairns Sexual Assault Service
Australia's National Research Organisation for Women's Safety Ltd (ANROWS)	Calvert, Fay
Australia's Right to Know coalition of media companies	Care Leavers Australasia Network
Australian Lawyers Alliance	Centre Against Sexual Violence Inc.
Bachand, Taylor	CQUniversity Justice Precinct and Centre for Domestic and Family Violence
Bar Association of Queensland	Crowe, Professor Jonathan
Berkman, Michael MP	Currie, Emma-Kate
Blain, Amy	Dempster, Fiona
Bravehearts	District Court of Queensland
Brisbane Rape and Incest Survivors Support Centre	Douglas, Professor Heather
Bronitt, Professor Simon	Duffy, James
	Dyer, Andrew
	Elizabeth, Letticia

Feminist Legal Clinic Inc.	Queensland Centre for Domestic and Family Violence Research, CQUniversity Australia
Field, Dr Rachael	
Filet, Monique	Queensland Council for Civil Liberties
Fitzgerald, Nicole	Queensland Council for LGBTI Health (formerly Queensland AIDS Council)
Flynn, Associate Professor Asher	Queensland Human Rights Commission
Fry, Emily	Queensland Law Society
Gold Coast Centre Against Sexual Violence Inc.	Queensland Police Service
Goldsworthy, Terry	Queensland Positive People
Hearl, Leigh	Queensland Sexual Assault Network
Heeb, Elodie	Quilter, Dr Julia
Hepatitis Queensland	R4Respect, YFS Ltd
HIV/AIDS Legal Centre Inc. (NSW)	Rape & Domestic Violence Services Australia
Hunter, Tammy	Rape & Sexual Assault Research & Advocacy Initiative
James Cook University	Reeders, Daniel
Jane, Laura	Respect Inc
Laurel Place Inc.	Rosevear, Dr Wendell
Lee, Bri	Sadlier, Derek
Lee, Ellie	Selin, Cassie
Legal Aid Queensland, Criminal Law Practice	Sisters Inside Inc.
Legal Aid Queensland, Family Services Division	Soroptimist International of South Queensland
MacDonald, Laura	Taylor, Lyle
McCabe, Heather	The Centre for Women & Co.
McCarthy, Tegan	The University of Queensland
McMiilan, Angelique	Walters, Jeni
McNamara, Luke	Ward, Kit
Myers, Melanie A	Williams, Robynn
Micah Projects	Williams, Ruby
Mills, Robyn	Wilson, Chantel
Mullins, Saxon	Witter, Elise
National Association of People with HIV Australia	Women's Legal Service Qld
Pechey, Gillian	Zig Zag Young Women's Resource Centre Inc.

The Commission also received eight confidential or anonymous submissions, including one submission with 429 signatories



## Consultation Workshop attendees

Brisbane, 26 February 2020

Attendees included 11 individuals who identified as victims or survivors, three legal academics or authors, and representatives of the following organisations (some individuals attended as members of more than one organisation):

Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine

Brisbane Rape and Incest Survivors Support Centre

Centre Against Sexual Violence

Children by Choice

Ending Violence Against Women Queensland

HIV/AIDS Legal Centre Inc. (NSW)

Men Affected by Rape and Sexual Abuse

Queensland Council for LGBTI Health

Queenslanders with Disability Network

Queensland Indigenous Family Violence Legal Service

Queensland Jewish Community Services Inc.

Queensland Positive People

R4Respect, YFS Ltd

Rape & Sexual Assault Research & Advocacy Initiative

Sisters Inside Inc.

Stonewall Medical

Women's Legal Service Qld

WWILD Sexual Violence Prevention Association

Zig Zag Young Women's Resource Centre Inc.



## **Appendix C**

### **Comparative table of legislative provisions in other jurisdictions**

The following table provides a brief comparative guide to the legislative provisions in other jurisdictions and the provisions the Commission recommends in this Report, which are reflected in the draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020.

The table refers to legislative provisions<sup>1</sup> but does not reflect how the provisions are interpreted and applied by the courts.

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<sup>1</sup>

Except where otherwise stated in the table, the references to legislation are to the *Crimes Act 1900* (ACT); *Crimes Act 1900* (NSW); *Criminal Code* (NT); *Criminal Code* (Qld); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code* (Tas); *Crimes Act 1958* (Vic); *Criminal Code* (WA); *Criminal Code*, RSC 1985, c C-46; *Sexual Offences Act 2003* (UK).

	QLD	QLRC's Draft Bill	ACT	NSW	NT
<b>Rape or equivalent</b>	Rape s 349		Sexual intercourse without consent s 54	Sexual assault s 61I	Sexual intercourse without consent s 192
<b>Sexual assault or equivalent</b>	Sexual assaults s 352		Act of indecency without consent s 60	Sexual touching s 61KC	Act of gross indecency s 192 Common assault s 188(2)(k)
<b>Consent defined in legislation</b>	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
<b>Examples of 'affirmative consent'</b>		cl 5(3)—a person is not taken to give consent to an act only because the person does, before or at the time the act is done, not say or do anything to communicate they do not consent  cl 6(2)—in deciding whether a belief that consent was given is honest and reasonable regard may be had to anything a person said or did to ascertain whether the other person was giving consent			
<b>Circumstances or factors which invalidate, negate or vitiate consent</b>	Yes s 348(2)		Yes s 67(1)	Yes s 61HE(5), (6), (7), (8)	Yes s 192(2)
<b>Intoxication of the complainant invalidates, negates or vitiates consent</b>	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 s 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
<b>Failure to use a condom as agreed or sabotage of a condom</b>	No		No	No	No

SA	TAS	VIC	WA	Canada	UK
Rape s 48	Rape s 185	Rape s 38	Sexual penetration without consent s 325	Rape (with gender-neutral sexual assault offences) s 271	Rape s 1
Indecent assault s 56	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 46(2)–free and voluntary agreement	Yes s 2A(1)–free agreement	Yes s 36(1)–free agreement	Yes s 319(2)(a)–consent freely and voluntarily given	Yes s 273.1(1)–voluntary agreement 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  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  s 36A(2)–steps are to be taken by the person seeking to engage in sexual activity to ascertain consent of the other person		s 273.2–mistaken belief as to consent, does not apply where: <ul style="list-style-type: none"> <li>s 273.2(c)–no evidence the complainant's voluntary agreement was affirmatively expressed by words or actively expressed by conduct; or</li> <li>s 273.2(b)–defendant did not take reasonable steps to ascertain the complainant's consent</li> </ul>	
Yes s 46(3)	Yes s 2A(2)	Yes s 36(2)	Yes s 319(2)(a)	Yes s 273.1(2)	Yes ss 75–76
Yes s 46(3)(d)–taken not to freely agree if intoxicated to the point of being incapable of freely and voluntarily agreeing	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)(b)–no consent if incapable of consenting for any reason other than unconsciousness	No
No	No	No	No	No	No

	QLD	QLRC's Draft Bill	ACT	NSW	NT
<b>Absence of physical or verbal resistance</b>	No	Yes cl 5(3)—a person is not taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate they do not consent	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(a) (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
<b>Legislation specifically covers consent, initially given, then withdrawn</b>	No	Yes cl 5(4)—if an act is done or continues after consent to the act is withdrawn by words or conduct then the act is done or continues without consent	No	No	No
<b>Mental state of the defendant as an element of the offence</b>	No		ss 54(1),(3), 60(1), (3)—knows or is reckless as to whether that other person consents	ss 61I & 61HE(3)—knows or is reckless as to whether the other person consents, or has no reasonable grounds for believing the other person consents	ss 192(3), (4), (4A), 43AK—knows or is reckless as to the absence of consent
<b>Mistake of fact (about consent) is provided for in the legislation</b>	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 s 61HE(3)—'reasonableness' is required as part of the defendant's knowledge about consent—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 rape and sexual assault)—mistaken belief must be reasonable in the circumstances Yes s 32 (common assault, indecent)—mistaken belief must be honest and reasonable

SA	TAS	VIC	WA	Canada	UK
Yes s 34N <i>Evidence Act 1929</i> (as a required jury direction)—a 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 or physically resist	Yes s 2A(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 s 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
Yes s 48(1)(b)—as an element of rape offence	No	Yes s 36(2)(m)—does not amount to consent	No	Yes s 273.1(2)(e)—does not amount to consent	No
ss 47–48 (rape only)—knows, or is recklessly indifferent to, the fact that the other person does not consent	No	s 38(1)(c)—does not reasonably believe the other person consents s 36A—determining whether a person reasonably believes includes steps taken to ascertain consent	No	No	s 1(1)(c)—does not reasonably believe the other person consents s 1(2)—determining whether a person reasonably believes includes steps taken to ascertain consent
No common law—mistaken belief need only be honest But ss 47–48—'reckless indifference' as to consent is an element of the offence of rape; 'reckless indifference' includes failing to take reasonable steps to ascertain consent	Yes s 14—mistaken belief must be honest and reasonable s 14A—mistaken belief as to the existence of consent is not honest and reasonable in circumstances involving a defendant in a state of self-induced intoxication, being reckless or not taking reasonable steps to ascertain consent	No common law—mistaken belief need only be honest But ss 38(1)(c) & 40(1)(d)—'reasonable belief' is an element of the offences—the defendant does not 'reasonably believe' the other person consents s 36A—'Reasonable belief' depends on the circumstances including any steps the defendant has taken to find out whether the other person consents See also s 36B—effect of intoxication on reasonable belief	Yes s 24—mistaken belief must be honest and reasonable	No common law—mistaken belief need only be honest But ss 265(4) & 273.2—reasonable grounds are required 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	No common law—mistaken belief need only be honest But ss 1(1)(c) & 3(1)(d)—'reasonable belief' is an element of the offences ss 1(2) & 3(2)—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

	QLD	QLRC's Draft Bill	ACT	NSW	NT
<b>Recklessness of the defendant relevant to an element of the offence or to mistake of fact</b>	No		Yes ss 54(1) & 60(1)–reckless as to whether the other person consents as an element of the offence	Yes s 61HE(3)(b)–relevant to proof of knowledge about consent as an element of the offence	Yes ss 192(3), (4), (4A) & 43AK–reckless as to absence of consent as an element of the offence
<b>Taking of 'reasonable steps' or 'steps' by the defendant to confirm consent relevant to an element of the offence or to mistake of fact</b>	No	Yes cl 6(2)–in deciding whether a belief that consent was given is honest and reasonable regard may be had to anything a person said or did to ascertain whether the other person was giving consent	No	Yes s 61HE(4)(a)–relevant to proof of knowledge about consent as an element of the offence	No
<b>Intoxication of the defendant relevant to an element of the offence or to mistake of fact</b>	No	Yes cl 6(3)–in deciding whether a belief that consent was given was reasonable no regard can be had to voluntary intoxication	No	Yes s 61HE(4)(b)–relevant to proof of knowledge about consent as an element of the offence	Yes s 43AU–relevant to the application of mistake of fact
<b>Statement of objectives or guiding principles</b>	No		No	No	No
<b>Specific provision for admission of expert evidence in trials for sexual offences</b>	No		No	No	No



SA	TAS	VIC	WA	Canada	UK
Yes (rape only) s 48(1)—reckless indifference to consent as an element to the offence	Yes s 14A(1)(b)—relevant to the application of mistake of fact	No	No	Yes s 273.2(a)(ii)—relevant to the application of mistake of fact	No
Yes (rape only) s 47(b)—as a consideration to the element of reckless indifference to consent	Yes s 14A(1)(c)—relevant to the application of mistake of fact	Yes s 36A(2)—relevant to proof of reasonable belief of consent as an element of the offence	No	Yes s 273.2(b)—relevant to the application of mistake of fact	Yes s 1(2) (rape) s 3(2)—as a consideration to the reasonable belief element of the offence of sexual assault
No	Yes s 14A(1)(a)—relevant to the application of mistake of fact	Yes s 36B—relevant to proof of reasonable belief as an element of consent	No	Yes s 273.2(a)(i)—relevant to the application of mistake of fact	No
No	No	Yes s 37A and s 37B	No	No	No
No	No	Yes <i>Criminal Procedure Act 2009</i> s 388—evidence based on a 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 of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence	No	No	No



# Appendix D

## Law reform reviews and other inquiries on sexual offences

In its consideration of recent developments, legislative reform and research in other jurisdictions, the Commission has had regard to various law reform reviews and other inquiries on sexual offence laws both within Australia and in some overseas jurisdictions, including those listed below.

### AUSTRALIA

<b>MCCOC</b>	Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, <i>Model Criminal Code: Chapter 5 Sexual Offences Against the Person</i> , Report (May 1990)
<b>ALRC &amp; NSWLRC</b>	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)—see especially Part G ('Sexual Assault') < <a href="https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/">https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/</a> >
<b>ACT LRC</b>	ACT Law Reform Commission, <i>Report on the Laws Relating to Sexual Assault</i> , Report No 18 (April 2001) < <a href="http://www.austlii.edu.au/au/other/actlrc/reports/18.html">http://www.austlii.edu.au/au/other/actlrc/reports/18.html</a> >
<b>NSW Taskforce</b>	Criminal Justice Sexual Offences Taskforce, 'Responding to Sexual Assault: The Way Forward' (Report, Attorney-General's Department of New South Wales, 2005) < <a href="https://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot_report.pdf">https://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot_report.pdf</a> >
<b>NSW DAGJ</b>	Department of Attorney-General and Justice (NSW), 'Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900' (Report, October 2013) < <a href="https://www.justice.nsw.gov.au/justicepolicy/Documents/consent_review.pdf">https://www.justice.nsw.gov.au/justicepolicy/Documents/consent_review.pdf</a> >
<b>NSWLRC</b>	New South Wales Law Reform Commission, <i>Consent in relation to sexual offences</i> —see Consultation Paper No 21 (October 2018); and <i>Draft proposals</i> (October 2019) < <a href="https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Consent.aspx">https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Consent.aspx</a> >
<b>NTLRC</b>	Northern Territory Law Reform Committee, <i>Report on the Laws Relating to the Investigation and Prosecution of Sexual Assault in the Northern Territory</i> , Report (1999) < <a href="https://justice.nt.gov.au/_data/assets/pdf_file/0016/270034/ntlrc-sexual-assault-investigation-report.pdf">https://justice.nt.gov.au/_data/assets/pdf_file/0016/270034/ntlrc-sexual-assault-investigation-report.pdf</a> >

<b>Tasmanian Taskforce</b>	'Report of the Task Force on Sexual Assault and Rape in Tasmania' (1998)
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<b>VLRC</b>	Victorian Law Reform Commission, <i>Sexual Offences: Final Report</i> , Report (January 2004)—see especially Chapter 8 ('The Mental Element of Rape') < <a href="https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Sexual_Offences_Final_Report.pdf">https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Sexual_Offences_Final_Report.pdf</a> >
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## INTERNATIONAL

<b>Government of Northern Ireland</b>	Sir John Gillen, 'Report into the law and procedures in serious sexual offences in Northern Ireland' (Government of Northern Ireland, 2019)—see Chapter 11 ('Consent') < <a href="https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf">https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf</a> >
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<b>LRC Hong Kong</b>	Law Reform Commission of Hong Kong, <i>Review of Substantive Sexual Offences</i> , Report (December 2019)—see especially Chapter 2 ('Rape and Other Non-Consensual Sexual Offences') < <a href="https://www.hkreform.gov.hk/en/publications/rsubstantive_sexual_offences.htm">https://www.hkreform.gov.hk/en/publications/rsubstantive_sexual_offences.htm</a> >
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<b>LRC Ireland</b>	Law Reform Commission of Ireland, <i>Knowledge or Belief Concerning Consent in Rape Law</i> , Report No 122 (2019) < <a href="https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/51231">https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/51231</a> >
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<b>NZ Taskforce</b>	Taskforce for Action on Sexual Violence, 'Report of the Taskforce for Action on Sexual Violence' (New Zealand Ministry of Justice, July 2009)—see Chapter 4 ('Action Area: Reforming Criminal Justice') < <a href="https://ndhadeliver.natlib.govt.nz/delivery/DeliveryManagerServlet?dps_pid=IE1332120&amp;dps_custom_att_1=ilsdb">https://ndhadeliver.natlib.govt.nz/delivery/DeliveryManagerServlet?dps_pid=IE1332120&amp;dps_custom_att_1=ilsdb</a> >
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<b>Scottish LC</b>	Scottish Law Commission, <i>Report on Rape and Other Sexual Offences</i> , Report No 209 (December 2007)—see especially Part 2 ('Consent') < <a href="https://www.scotlawcom.gov.uk/download_file/view/311/">https://www.scotlawcom.gov.uk/download_file/view/311/</a> >
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<b>UK Home Office</b>	Home Office, United Kingdom, 'Setting the Boundaries: Reforming the Law on Sex Offences' (Report, July 2000) vol 1—see Chapter 2 ('Rape and Sexual Assault')
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<b>UN Women</b>	United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), <i>Handbook for Legislation on Violence Against Women</i> (2012)—see especially [3.4.3] ('Defining sexual violence') < <a href="https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women">https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women</a> >
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## **Appendix E**

### **List of research questions informing the review of the 2018 Trials**

The Commission considered the following research questions in Chapter 3 of this Report:

#### **Research Question 1: What were the outcomes for rape and sexual assault trials in 2018?**

- 1.1 For all rape and sexual assault trials what was the conviction rate?
- 1.2 What were the lines of defence raised in rape and sexual assault trials?
- 1.3 What were the outcomes with each line of defence?

#### **Research Question 2: What differences occurred as between adult complainants and child complainants?**

- 2.1 For all rape and sexual assault trials how many trials involved adult complainants?
- 2.2 What were the lines of defence raised in trials involving adult complainants?
- 2.3 What was the outcome when mistake of fact was relied upon at a trial involving an adult complainant?
- 2.4 For all rape and sexual assault trials how many trials involved child complainants?
- 2.5 What were the lines of defence raised in trials involving child complainants?
- 2.6 What was the outcome when mistake of fact was relied upon at a trial involving a child complainant?

#### **Research Question 3: How often was the excuse of mistake of fact left to a jury in trials for rape and sexual assault?**

- 3.1 In what circumstances was mistake of fact left to the jury?
- 3.2 Where mistake of fact was left to the jury, what was the outcome?
- 3.3 How often was mistake of fact left to the jury when it was not raised by the defence?

#### **Research Question 4: Does the giving or calling of evidence by a defendant at trial have an impact on trial outcomes when mistake of fact is left to a jury?**

- 4.1 How often did a defendant give or call evidence in rape and sexual assault trials?
- 4.2 What was the outcome when a defendant gave or called evidence?

4.3 How often was mistake of fact left to a jury when a defendant gave or called evidence etc?

4.4 What was the outcome when the defendant gave or called evidence etc and mistake of fact was left to a jury?

**Research Question 5: What was the relationship between the complainant and defendant in rape and sexual assault trials?**

**Research Question 6: Does evidence of injury to the complainant impact on trial outcomes for rape and sexual assault?**

6.1 What is the relationship between evidence of injury to the complainant and use of the excuse of mistake of fact and trial outcomes?

**Research Question 7: What factors are in evidence when the excuse of mistake of fact is left to a jury?**

7.1 What factors arising from the condition or behaviour of the complainant were present in trials where mistake of fact was left to a jury?

7.2 When each of these factors were present how often was mistake of fact left to a jury?

7.3 What factors arising from the condition or behaviour of the defendant were present in trials where mistake of fact was left to a jury?

7.4 When each of these factors were present how often was mistake of fact left to a jury?

7.5 Does the existence of any factor, relied upon to ground the excuse of mistake of fact, more significantly lead to conviction or acquittal?

**Research Question 8: How often is mistake of fact raised as a ground of appeal?**

8.1 How many of the 2018 trials were appealed?

8.2 How many of those appeals were successful / what were the outcomes of those appeals?

8.3 In how many of those appeals was mistake of fact a ground of appeal in some way?

8.4 What was the issue about mistake of fact that formed the basis of the ground of appeal?

8.5 What was the outcome of appeals where mistake of fact was in issue?

These questions are answered throughout Chapter 3 of this Report.

# Appendix F

## List of Queensland Court of Appeal decisions

The Commission has considered a number of Queensland Court of Appeal decisions in rape and sexual assault matters principally between 2000 and 2019 to inform its consideration of the issues in this review, including the following:

*R v Ali* [2017] QCA 300

*R v Awang* [2004] QCA 152; [2004] 2 Qd R 672

*R v Butterworth* [2019] QCA 94

*R v Cannell* [2009] QCA 94

*R v Chardon* [2015] QCA 186

*R v Cook* [2012] QCA 251

*R v CU* [2004] QCA 363

*R v Cutts* [2005] QCA 306

*R v CV* [2004] QCA 411

*R v Duckworth* [2016] QCA 30

*R v Dunrobin* [2008] QCA 116

*R v Elomari* [2012] QCA 27

*R v Everton* [2016] QCA 99

*R v FAV* [2019] QCA 299

*R v GBF* [2019] QCA 4

*R v Hall* [2011] QCA 26

*R v HBQ* [2017] QCA 134

*R v Hopper* [1993] QCA 561

*R v KAU* [2019] QCA 73

*R v Koranteng* [2016] QCA 299

*R v Kovacs* [2007] QCA 143

*R v Lennox; R v Lennox; Ex parte Attorney-General (Qld)* [2018] QCA 311

*R v Libke* [2006] QCA 242  
*R v Lu* [2018] QCA 193  
*R v Makary* [2018] QCA 258; [2019] 2 Qd R 528  
*R v Motlop* [2013] QCA 301  
*R v Mrzljak* [2004] QCA 420; [2009] 1 Qd R 308  
*R v Murdock & Williams* [2005] QCA 168  
*R v O'Loughlin* [2011] QCA 123  
*R v Pegg* [2017] QCA 93  
*R v Phillips* [2009] QCA 57; [2009] 2 Qd R 263  
*R v Rad* [2018] QCA 103  
*R v Rope* [2010] QCA 194  
*R v SAX* [2006] QCA 397  
*R v Singh* [2012] QCA 130  
*R v Sollitt* [2019] QCA 44  
*R v Soloman* [2006] QCA 244  
*R v Vecchio & Tredrea* [2016] QCA 71  
*R v Watt* [2006] QCA 539  
*R v Williams* [2008] QCA 411

Queensland Court of Appeal (QCA) decisions are available from the Supreme Court Library Queensland, *Court of Appeal* <<https://www.sclqld.org.au/caselaw/QCA>>



## **Appendix G**

### **Draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020**

The draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020 gives effect to the recommendations made in this Report.





Queensland

# **Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020**

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4	Amendment of s 347 (Definitions for ch 32) .....	4
5	Amendment of s 348 (Meaning of consent) .....	4
6	Insertion of new s 348A .....	5
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**DRAFT**



**2020**

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**A Bill**

for

**An Act to amend the Criminal Code for particular purposes**

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**DRAFT**

**The Parliament of Queensland enacts—**

**1 Short title**

This Act may be cited as the *Criminal Code (Consent and Mistake of Fact) Amendment Act 2020*.

**2 Code amended**

This Act amends the Criminal Code.

**3 Amendment of s 1 (Definitions)**

Section 1—

*insert—*

*assault—*

- (a) generally—see section 245; or
- (b) for chapter 32—see section 347.

**4 Amendment of s 347 (Definitions for ch 32)**

Section 347—

*insert—*

*assault* has the meaning given by section 245 as if a reference in section 245 to consent were a reference to consent within the meaning given by section 348.

**5 Amendment of s 348 (Meaning of *consent*)**

Section 348—

*insert—*

- (3) A person is not to be taken to give consent to an act only because the person does not, before or at

the time the act is done, say or do anything to communicate that the person does not consent to the act.

- (4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.

## 6 Insertion of new s 348A

After section 348—

*insert—*

### **348A Mistake of fact in relation to consent**

- (1) This section applies for deciding whether, for section 24, a person charged with an offence under this chapter did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.
- (2) In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.
- (3) In deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.

DRAFT