
ISSUES PAPER

**KNOWLEDGE OR BELIEF
CONCERNING CONSENT IN
RAPE LAW**

(LRC IP 15 - 2018)

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ISSN 1393-3140

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BACKGROUND TO THE ISSUES PAPER AND ISSUES RAISED

Introduction

1. In April 2017, the Attorney General requested the Commission:

“to examine and make recommendations on whether changes should be made to the element of knowledge or belief in the definition of rape in section 2 of the Criminal Law (Rape) Act 1981, as amended, taking into account the jurisprudence in relation to this definition, and in particular the judgment of the Supreme Court in *The People (DPP) v C O’R*.”¹
2. Section 2(1) of the *Criminal Law (Rape) Act 1981* (the 1981 Act) provides that a man commits rape if: (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it: this is the conduct or physical element of the offence (the *actus reus*); and (b) at the time of the intercourse the man knows that she does not consent or is reckless as to whether she consents: this is the fault or mental element of the offence (the *mens rea*).
3. Section 2(2) of the 1981 Act adds that if in a trial for rape the jury has to consider “whether the man believed that a woman was consenting” the jury is to have regard to “the presence or absence of reasonable grounds for such a belief” as well as any other relevant matters in considering whether the man so believed.
4. Section 2 of the 1981 Act put into statutory form the test set out by the UK House of Lords in *DPP v Morgan*² that if the accused “honestly believed” the woman was consenting, even though this was not something that a reasonable person would have believed, the fault or mental element of rape has not been proved and the accused is therefore not guilty. This test is often described as *primarily subjective*, because it is the accused’s own perception of the existence of consent that determines criminal liability. Section 2(2) of the 1981 Act allows a jury to disregard an accused’s completely unfounded or outrageous assertions of “honest belief”.
5. In *The People (DPP) v C O’R* the Supreme Court confirmed that the test to be applied under section 2 of the 1981 Act is *primarily subjective*.³ The test is “not what a reasonable man believed as to the presence of consent, but rather what the individual accused actually believed.” Therefore, an “honest, though unreasonable,

1 *The People (DPP) v C O’R* [2016] IESC 64, [2016] 3 IR 322.

2 *DPP v Morgan* [1975] UKHL 3, [1976] AC 182.

3 *The People (DPP) v C O’R* [2016] IESC 64, [2016] 3 IR 322.

mistake that the woman was consenting is a defence to rape.”⁴ The Supreme Court also added, however, that the accused’s “alleged belief in consent must be genuinely held.”⁵ The Court therefore stated that a jury, in applying section 2(2) of the 1981 Act, is under no obligation to believe “an obviously false story” from the accused; and that jurors should use “shrewdness and common sense” to judge what the accused claims as to his mistaken belief “against their view of what an ordinary or reasonable man would have realised in the circumstances.”⁶

6. The Attorney General’s request asks the Commission to examine the current law and to make recommendations as to whether any changes are required to section 2 of the 1981 Act. In approaching this request, the Commission is therefore required to assess whether the current *primarily subjective* test as to knowledge or belief should be retained or whether a different test should be put in place that would include *more objective elements*. The scope of the Attorney General’s request is restricted to the element of knowledge or belief, and this Paper does not, therefore, involve a substantive analysis of recklessness as an element of the fault or mental element (*mens rea*) in rape.
7. The Attorney General’s request arises against the immediate background of the wide-ranging reform of the law on sexual offences enacted by the Oireachtas in the *Criminal Law (Sexual Offences) Act 2017*. Of particular relevance to the Attorney General’s request, the 2017 Act made significant amendments to the general law on consent in rape and other sexual assaults. The Oireachtas debated whether to include reform of the law concerning knowledge or belief under section 2 of the 1981 Act in the 2017 Act, but it was ultimately agreed that this matter would be referred to the Commission for further analysis. Against that background, the Commission considers in this Issues Paper the effect of the reforms in the 2017 Act concerning the general law on consent in rape law.
8. This Issues Paper therefore examines the current law and seeks the views of interested parties as to whether the current law should be retained and, if not, what reforms might be appropriate. In examining the current law, the Commission notes that the fault or mental element in serious crimes such as rape is based primarily on a subjective test, but that in some instances an objective element is involved. The Commission also refers in the appendix to this Issues Paper to reforms of the law concerning knowledge or belief in rape law that have been enacted in other jurisdictions.

Views Sought on 4 Issues

9. This Issues Paper seeks views on 4 Issues concerning knowledge or belief concerning consent in rape law. The first Issue asks whether the current law should

⁴ *Ibid* at para. 51.

⁵ *The People (DPP) v C O’R* [2016] IESC 64, [2016] 3 IR 322 at para. 51.

⁶ *Ibid* at para. 57.

be retained; and, if consultees consider that the existing law should not be retained, the other Issues present possible reform options.

10. **Issue 1** seeks views as to whether the current element on knowledge or belief concerning consent in rape law should be retained. Under section 2(1) of the 1981 Act, the prosecution must prove beyond a reasonable doubt that the accused either: (a) knew of the complainant's lack of consent or (b) was reckless as to her consent. An accused will be acquitted if he establishes that he honestly believed that the complainant was consenting at the time of the sexual intercourse, and that this puts a reasonable doubt in the jury's mind as to the prosecution's case. Section 2(2) of the 1981 Act provides that a jury must have regard to the presence or absence of reasonable grounds (in conjunction with other relevant matters) when considering whether the accused genuinely believed that the complainant was consenting. As pointed by the Supreme Court in *The People (DPP) v C O'R*, section 2 of the 1981 Act does not require that the accused's belief is reasonable from an objective point of view, but at the same time a jury does not have to believe an obviously false story from the accused as to his belief; and that a jury should use common sense to judge what the accused claims as to his mistaken belief against their view of what an ordinary or reasonable man would have realised in the circumstances. Thus, section 2(2) puts on a statutory footing the common sense notion that the more unreasonable a belief was, the less likely it was genuinely held.
11. **Issue 2** examines whether an objective or "reasonable belief" element should be added to the definition of rape. Under this type of reform, an accused's belief in consent would have to be both honest (the current, primarily subjective, test) and reasonable (an objective test) in order for him to be acquitted. One possible version of this reform would be that the current mental or fault element in section 2 of the 1981 Act that the accused either (a) "knew" that the complainant was not consenting or (b) was "reckless" as to her consent would be replaced by a single provision that the accused had "no reasonable belief" that the complainant was consenting. A second possible version of this reform could be to remove the requirement in the mental element to prove that the accused either knew or was reckless as to consent and instead allow an accused to raise a defence of honest and reasonable belief in consent.
12. The test for "reasonableness" could be determined by either (i) what the "reasonable person" would have believed in the circumstances of the case (a *primarily objective* test); or (ii) whether the belief was based on reasonable grounds (a *primarily objective* test); or (iii) whether the accused's belief was reasonable in all the circumstances (a *mixed or hybrid* test of objective and subjective elements). Any of these formulations could include a further subjective element, notably to take account of certain relevant personal characteristics, such as the decision-making capacity of the accused. The addition of objective elements into the offence of rape would be in line with a number of serious offences in Irish law, such as manslaughter and sexual activity with a child, as well the definition of rape in Northern Ireland, England and Wales, Scotland, and other common law jurisdictions. The Commission therefore seeks views on whether the current law should be replaced with a more

objective test and to what extent the accused's personal characteristics would be considered in deciding whether the accused's belief in consent was reasonable.

13. **Issue 3** examines whether the law could be reformed to require that the accused, in order to rely on the mistaken belief defence, must establish that he took "reasonable steps" to ascertain whether the complainant was consenting. One way in which this possible reform could operate would be to replace the current fault or mental element of knowledge of lack of consent or recklessness as to consent with "no reasonable belief in consent", subject to the requirement that a belief in consent will not be reasonable if the accused did not take reasonable steps to ascertain consent. Another way in which this possible reform could operate would involve removing from the rape offence the fault or mental element of knowledge or recklessness, and would instead involve the accused being required to raise, as a defence, his belief in consent. This would be subject to the restriction that the defence could not be raised if there was no evidence that the accused took reasonable steps. The inclusion of a requirement of reasonable steps in the honest belief defence, would be similar to the provisions on mistaken belief in consent in Canada and Tasmania. The Commission seeks views on whether the current law should be replaced with an honest belief test that requires the accused to take reasonable steps, and if so how such a requirement might be formulated.
14. **Issue 4** asks whether consultees consider that a separate, lesser, offence might be enacted for circumstances in which a defendant honestly but unreasonably believed that there was consent: this could be described as a "gross negligence rape" offence. It is important to note that if an accused knows that the other person is not consenting or is reckless as to whether she is consenting, he is guilty of rape. Under this possible reform option, if he honestly believed that the complainant was consenting, but that belief was unreasonable, he would be guilty of this proposed lesser offence. Where the mistaken belief in consent is reasonable, he would not be guilty of either offence. A reform of this type would be similar to the position in Swedish law, which has itself been the subject of recent reform. The Commission seeks views as to whether this additional, lesser offence, should be enacted to address circumstances in which a defendant honestly but mistakenly believed that there was consent.

ISSUE 1

CURRENT LAW ON RAPE

A Introduction

1.01 Section 2 of the *Criminal Law (Rape) Act 1981* (as amended) provides:

“(1) A man commits rape if –

- (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
- (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it,

and references to rape in this Act and any other enactment shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”

1.02 At the trial of a rape offence, the prosecution bears the burden of proving both the *actus reus* (the conduct element) and the *mens rea* (the mental element). The *actus reus* has two elements:

- (1) Sexual intercourse; and
- (2) The absence of consent on the part of the complainant.

1.03 The prosecution also must prove the *mens rea* of rape beyond a reasonable doubt, which is:

- (3) Knowledge of, or recklessness as to, the woman’s lack of consent.

1.04 Thus, the defendant may rebut the prosecution’s case by arguing the converse to each element of the crime listed above, namely:

- (1) Sexual intercourse never occurred; or
- (2) The complainant consented; or
- (3) He did not know that the complainant did not consent, that is, he honestly believed in the existence of consent (the honest belief defence).

- 1.05 This is a gender specific offence; it may be committed only by a male against a female. Sexual intercourse means heterosexual vaginal intercourse; other kinds of sexual penetration are covered by rape under section 4 of the 1990 Act.⁷

B *Mens rea* of the rape offence under current Irish law

- 1.06 The mental or fault element, or *mens rea*, of rape is knowing that the complainant does not consent to the intercourse or being reckless as to whether she does or does not consent. Therefore, if the accused believed that the complainant was consenting, he will be acquitted. Unless the prosecution can convince the jury beyond a reasonable doubt that the accused knew that the complainant did not consent, or that he was reckless as to consent, the accused must be acquitted. This is summarised in Figure 1 below:

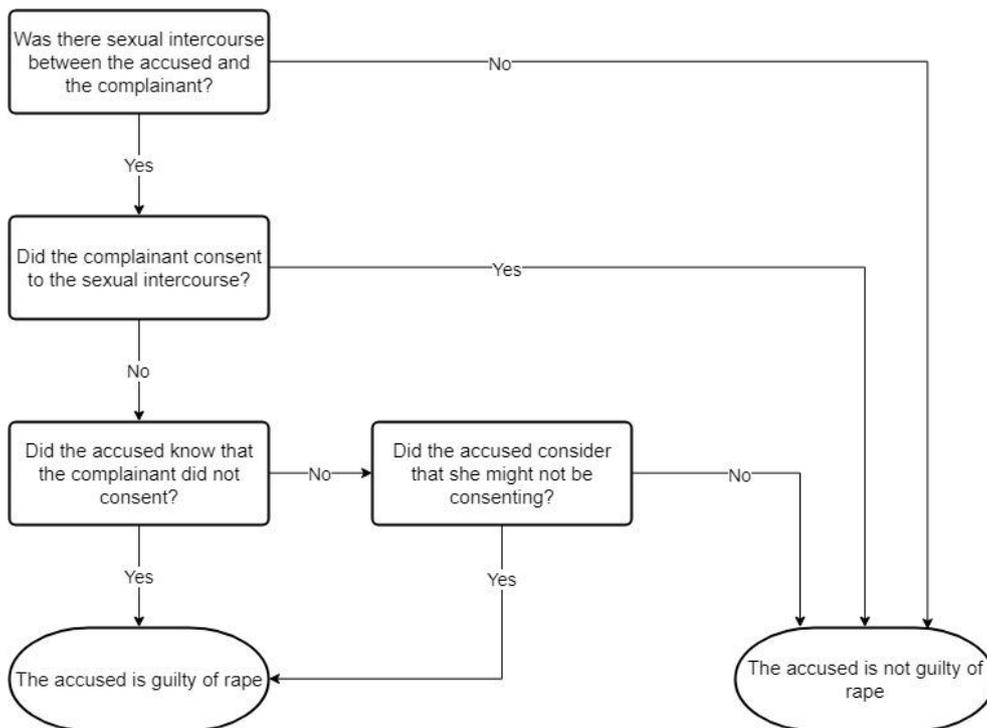


Figure 1 Prosecution proofs under the current law

⁷ Section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 provides:
 “(1) In this Act “rape under section 4” means a sexual assault that includes—
 (a) penetration (however slight) of the anus or mouth by the penis, or
 (b) penetration (however slight) of the vagina by any object held or manipulated by another person.
 (2) A person guilty of rape under section 4 shall be liable on conviction on indictment to imprisonment for life. (3) Rape under section 4 shall be a felony.”

1. Knowledge of non-consent

- 1.07 As the law currently stands, rape occurs where a man penetrates a woman, and the woman does not consent to the penetration, and where the man knows that she is not consenting or is aware that she may or may not be consenting. Charleton et al. state:
- “Rape does not occur where a man believes the woman to be consenting. The absence of such a genuine belief must be proved beyond reasonable doubt by the prosecution.”⁸
- 1.08 Section 2 of the 1981 Act therefore requires that, to convict a person of rape, the prosecution must prove that the accused knew that the complainant did not consent to sexual intercourse or that the accused was reckless as to the complainant’s lack of consent. It follows that the accused is to be acquitted if he can negate the element of “knowledge of lack of consent”, by asserting that he did not *know* that the complainant did not consent, that is, that he honestly believed in the existence of positive consent, and this puts a reasonable doubt in the jurors’ mind as to the prosecution’s case.⁹
- 1.09 Although knowledge of lack of consent is part of the mental element of the crime of rape, and thus for the prosecution to prove, the accused may argue in his defence that he had an honest belief in consent and therefore lacked the required mental or fault element. Thus, the negation of the element of knowledge of lack of consent is commonly understood as a defence of honest belief.
- 1.10 A *subjective* test of honest belief in consent means that if the jury accepts that the accused *honestly* or *genuinely* believed that the complainant was consenting, there is no criminal liability. An *objective* test of honest belief, on the other hand, adds an additional requirement of “reasonableness” to the mental element of the offence. To rely on such a defence, the accused’s honest belief in consent must also be reasonable or one that an average person would have formed.¹⁰
- 1.11 Irish law on honest belief, as set out in section 2(2) of the 1981 Act, derives from the decision of the UK House of Lords in in *DPP v Morgan*.¹¹ In that case, the UK House of Lords held that a belief in consent need not be reasonable in order to acquit a defendant on a rape charge; it need only be honest. The *Morgan* decision clarified that since the mental or fault element of rape was “knowledge of lack of consent”, an assertion of an “honest belief in consent” negated the mental element, regardless of whether that belief was reasonable or not. The UK House of Lords did, however, hold that in the jury’s determination as to whether the asserted belief was genuinely held, it should consider the presence or absence of reasonable grounds for that belief. The reasonableness of the grounds for the belief are not the determining factor for criminal liability, but merely a way for the jury to determine the honesty of the asserted belief. The *Morgan* decision therefore set out a common sense approach to

8 Charleton, McDermott and Bolger, *Criminal Law* (Bloomsbury Professional 1999) at 8.99.

9 O’Malley, *Sexual Offences* 2nd ed (Round Hall 2013) at 60.

10 Leahy and Fitzgerald O’Reilly, *Sexual Offending in Ireland* (Clarus Press 2017) at 32.

11 *DPP v Morgan* [1975] UKHL 3, [1976] AC 182.

assessing the likelihood of an asserted belief whereby the presence or absence of reasonable grounds is but one factor to be taken into consideration. The more plausible and reasonable an asserted belief is, the more likely it was genuinely held. Conversely, the more outlandish and unreasonable the accused's asserted belief was, the less likely it was genuinely held. Still, a wholly unreasonable belief in consent could acquit an accused, if the jury was convinced that it was truly held.

1.12 The *Morgan* decision was put on a statutory footing in England and Wales by section 1 of the English *Sexual Offences (Amendment) Act 1976*, in Northern Ireland by article 3 of the *Sexual Offences (Northern Ireland) Order 1978* and in Ireland by section 2 of the *Criminal Law (Rape) Act 1981*.¹²

1.13 Section 2(2) of the 1981 Act provides that:

“if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”

2. *The People (DPP) v C O'R* ¹³

1.14 In 2016, the Supreme Court discussed the mental or fault element of rape and the honest belief defence in the case of *The People (DPP) v C O'R*.¹⁴ One of the questions referred to the Supreme Court was:

“Does the mental element of rape excuse a situation where on unreasonable and irrational grounds a man genuinely believes that a woman has consented to sexual intercourse, whereas in fact she has not so consented?”

1.15 The Court answered in the affirmative and clarified that:

“[W]here the accused believed genuinely, albeit unreasonably, that the woman was consenting, on this statutory definition he must, even though she did not consent, be acquitted.”¹⁵

1.16 The Court further acknowledged the subjectivity of the *mens rea* of the offence, stating that it is:

“...not what a reasonable man believed as to the presence of consent, but rather what the individual accused actually believed. The mental element of rape requires the accused to know that the woman does not consent to intercourse or for him to be reckless as to whether she does or does not

¹² O'Malley, *Sexual Offences* 2nd ed (Round Hall 2013) at 59–60.

¹³ For discussion of other cases concerning section 2(2) of the 1981 Act, see Leahy and Fitzgerald O'Reilly, *Sexual Offending in Ireland* (Clarus Press 2017) at 33–38.

¹⁴ *The People (DPP) v C O'R* [2016] IESC 64, [2016] 3 IR 322.

¹⁵ *Ibid* at para. 57.

consent... An honest, though unreasonable, mistake that the woman was consenting is a defence to rape..."¹⁶

1.17 This constituted a clear restatement of the *Morgan* honest belief test in rape cases rather than affirming a new position.

1.18 The Court also set out an affirmative definition of consent:

"Consent is the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse."¹⁷

1.19 The Court also clarified that section 2(2) of the 1981 Act requires that:

"the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."¹⁸

1.20 Thus, the ultimate test for liability is whether the belief was genuinely held, not the reasonableness of the belief. However, as discussed above, this passage highlights that section 2(2) of the 1981 Act is a reminder to juries not to be overly credulous and to use "common sense" to assess the likelihood of the accused's asserted belief. The Court added:

"It needs also to be stated by trial judges, however, that no jury is under any obligation to believe an obviously false story. A jury is entitled to accept or reject any prosecution or defence evidence. In these cases, every jury is entrusted, using shrewdness and commonsense, to judge what the accused claims as to his mistaken belief against their view of what an ordinary or reasonable man would have realised in the circumstances."¹⁹

1.21 The Supreme Court in *The People (DPP) v C O'R* confirmed the subjective test for recklessness in the rape offence:

"In cases of rape, recklessness means that the possibility that a woman was not consenting actually occurred in the mind of the accused. Where an accused decides to proceed with or continue with intercourse in spite of advertent to that risk; that is recklessness...

Recklessness means the accused man was aware that there was a risk that the woman was not consenting but nonetheless proceeded. If it is proven that he was aware that there was a real risk that the woman was not

¹⁶ *Ibid* at para. 51.

¹⁷ *Ibid* at para. 36.

¹⁸ *Ibid* at para. 34.

¹⁹ *The People (DPP) v C O'R* [2016] IESC 64, [2016] 3 IR 322, at para. 51.

consenting but he proceeded to have, or continue, intercourse with her in spite of this, then recklessness is established.”²⁰

- 1.22 The Supreme Court decision in *The People (DPP) v C O’R* may now need to be considered in conjunction with the 2018 Court of Appeal decision in *The People (DPP) v MC*,²¹ in which the Court appeared to conclude whether there was very little difference between the primarily subjective test in the *C O’R* case and what appears to be a more objective test as to whether the defendant “could not care less” that the woman had consented. The Court stated:

“...in the context of rape and sexual offences the distinction between [couldn’t care less] and what was being contended for was a very fine one indeed. Some might go so far as to say, it was a distinction without a difference.”²²

- 1.23 The Court continued:

“it is not in fact a misdirection to say that if someone decides to have sex with another person, and couldn’t care less about whether the other person is consenting or not, or is indifferent to the wishes and feelings of the other, that person is reckless.”²³

3. The 2017 Act definition of consent and honest belief

- 1.24 Prior to 2017, it is notable that the general position concerning consent was addressed in limited terms in section 9 of the *Criminal Law (Rape) (Amendment) Act 1990* as follows:

“9. It is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission by that person to offer resistance to the act does not of itself constitute consent to the act.”

- 1.25 Section 48 of the *Criminal Law (Sexual Offences) Act 2017* substituted the following radically new, and much lengthier, section 9 into the 1990 Act:

“9. (1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.

(2) A person does not consent to a sexual act if—

- (a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,

²⁰ *The People (DPP) v C O’R* [2016] IESC 64, [2016] 3 IR 322 at para. 53.

²¹ *The People (DPP) v MC* [2018] IECA 137.

²² *Ibid* para. 29.

²³ *Ibid*.

- (b) he or she is asleep or unconscious,
 - (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,
 - (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,
 - (e) he or she is mistaken as to the nature and purpose of the act,
 - (f) he or she is mistaken as to the identity of any other person involved in the act,
 - (g) he or she is being unlawfully detained at the time at which the act takes place,
 - (h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.
- (3) This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act.
- (4) 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.
- (5) Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.
- (6) In this section—
- ‘sexual act’ means—
- (a) an act consisting of—
 - (i) sexual intercourse, or
 - (ii) buggery,
 - (b) an act described in section 3(1) or 4(1) of this [1990] Act, or
 - (c) an act which if done without consent would constitute a sexual assault;
- ‘sexual intercourse’ shall be construed in accordance with section 1(2) of the Principal [1981] Act.”

1.26 It is clear that the new definition of consent in section 9 of the 1990 Act, as substituted by the 2017 Act, contrasts markedly in a number of respects to the definition as originally enacted in 1990. First, section 9(1) of the 1990 Act, as substituted in 2017, defines consent in positive terms, stating that a person consents to a sexual act “if he or she freely and voluntarily agrees” to the act. This positive requirement derives from comparable approaches to consent enacted in other jurisdictions in recent decades; and indeed could be seen as a belated

implementation of the recommendation to that effect in the Commission's 1988 *Report on Rape and Allied Offences*.²⁴

- 1.27 It is unclear to what extent this will impact the mental element in the definition of rape. Given that section 2 of the 1981 Act currently remains unamended, it would appear that the new definition of consent in section 9 of the 1990 Act, as substituted in 2017, changes the mental element of rape as follows:
- From:** no honest belief in consent, not defined in positive terms prior to 2017.²⁵
- To:** no honest belief in consent, defined since 2017 as free and voluntary agreement.
- 1.28 This raises the question of whether and to what extent an accused could "subjectivise" a belief in free and voluntary agreement. This definition of consent may make the honest belief in consent more demanding. When consent was undefined, a defendant was somewhat free to argue that he honestly believed that there was consent according to his own understanding of consent. As consent is now statutorily defined as free and voluntary agreement, the defendant must have honestly believed that the complainant freely and voluntarily agreed to engage in the act. If the accused was to argue that he honestly believed that the complainant was consenting because she was submitting to him, then that should have no exculpatory effect because that would amount to a mistake of law.²⁶
- 1.29 Indeed, it remains to be seen how strictly "free and voluntary agreement" will be interpreted. A strict interpretation of this could require that a defendant believed that there was active communication and agreement between the parties. However, it is also conceivable that an accused could argue that he believed there to be free and voluntary agreement where the woman did not resist and "allowed" him to continue with his sexual advances.
- 1.30 Section 9(2), as amended in 2017, also contains for the first time a list of 8 specific circumstances in which a person does not consent. How the honest belief defence operates to these varying circumstances differs. It is unlikely that an honest belief in consent would be exculpatory where the accused was aware that one of the situations listed was present. For example, if an accused knew that the complainant was mistaken as to the nature and purpose of the act, or that the complainant was only consenting because of the use of force, or that the complainant was too intoxicated to consent, it is unlikely that such an accused could successfully argue honest belief in consent. Similarly, if the accused was aware that the complainant believed him to be someone else, he could not argue that he believed the complainant

²⁴ *Report on Rape and Allied Offences* (LRC 24-1988), at para. 17, cited in the Commission's *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013), at para 2.09.

²⁵ Although, so defined by the Supreme Court in *The People (DPP) v C O'R* as "the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse."

²⁶ Cockburn, *The Impact Of Introducing An Affirmative Model Of Consent And Changes To The Defence Of Mistake In Tasmanian Rape Trials* Doctoral dissertation (University of Tasmania 2012) at 31.

consented to intercourse with him.²⁷ Sections 75 and 76 of the English *Sexual Offences Act 2003* contain similar provisions, where these situations are described in terms of evidential presumptions as to lack of consent, whereas section 9 of the 1990 Act, as inserted in 2017, provides that these are situations where, quite simply, there is no consent.²⁸

- 1.31 However, an accused who had sex with a complainant but who was unaware that one of the circumstances listed in section 9(2) was present could raise a defence of honest belief in consent. He may not have been aware that the woman was mistaken as to his identity or to the nature of the act, or that she was so intoxicated that she was incapable of consenting. However, in cases where the complainant is unconscious or suffering from a physical disability that prevents her from communicating agreement, it is difficult to imagine how an accused could honestly believe that there was free agreement in any case.
- 1.32 Section 9(3) provides that the “section does not limit the circumstances in which it may be established that a person did not consent to a sexual act” thereby allowing the courts to develop the law on consent further. Section 9(4) also restates the common law position that the consent to a sexual act may be withdrawn any time, before the act begins, and during the act.²⁹ Section 9(5) restates the substantive content of the original, limited, section 9 as enacted in 1990; that is, that any failure or omission on the part of a person to offer resistance to an act does not by itself constitute consent to that act. However, it is important to note here that lack of resistance by the complainant can still be used as evidence for the defendant’s belief in consent.³⁰

C. Discussion of the honest belief defence

- 1.33 As discussed above, the mental or fault element (*mens rea*) of rape in Ireland - knowledge or recklessness - requires that the accused considered or adverted to the complainant’s lack of consent. An accused who believed that the complainant was consenting lacks the requisite mental element of the crime. Thus, if an accused asserts that he lacked the *mens rea* of the offence because he honestly believed that the complainant was consenting and never considered lack of consent, all that will be assessed is the genuineness or sincerity of that belief.
- 1.34 Because the only standard that the belief in consent is held to is its “honesty”, there are concerns that this is too low a threshold to acquit defendants who have engaged in non-consensual intercourse. As long as the accused genuinely believed that the complainant consented, the accused cannot be convicted of rape, even where it was grossly unreasonable for the accused to have held that belief. As explained by the Supreme Court in *The People (DPP) v C O’R*:

²⁷ See *The People (DPP) v C* [2001] 3 IR 345.

²⁸ The full text of sections 75 and 76 of the English 2003 Act are set out in the Table in the Appendix.

²⁹ *Kaitamaki v R* [1985] AC 147. See Leahy and Fitzgerald O’Reilly, *Sexual Offending in Ireland* (Clarus Press 2017) at 14.

³⁰ O’Malley, *Sexual Offences* 2nd ed (Round Hall 2013) at 37.

“An honest, though unreasonable, mistake that the woman was consenting is a defence to rape. Any such alleged belief in consent must be genuinely held.”³¹

- 1.35 The requirement of advertence or consideration of the complainant’s lack of consent adheres to classic subjectivist principles in criminal law; that is, the accused must *actually* advert to the relevant risk or manifest the relevant intention. Objectivist criminal law principles, on the other hand, propose that criminal liability should include those whose conduct caused harm where the reasonable person would have foreseen such a risk, regardless of whether the actual individual foresaw the risk. The objectivist construction of the honest belief test would require an accused’s belief to be reasonable in order to acquit him. Defendants who knew that the complainant did not consent or were reckless as to the lack of consent would be liable under this test, as they already are under the current law, as well as defendants who mistakenly and unreasonably believed that the complainant was consenting. If a jury deems that a reasonable man would have also believed that the complainant was consenting, then the accused will not be guilty.
- 1.36 The following section discusses the 5 identified advantages and the 7 identified disadvantages of the current subjectivist formulation of the rape definition in light of the strengths and weaknesses of subjectivity and objectivity, as applied to the law on rape. It should be noted that this is not necessarily an “either/or” choice. Irish criminal laws³² and rape laws in other jurisdictions are often comprised of different elements of subjectivity and objectivity.

1. Advantages of the current definition of rape

a. Presumption of intention, knowledge or advertent recklessness (mental element or *mens rea*)

- 1.37 There is a long-standing presumption that to convict of a person of a serious crime, he or she needs to have intended the wrongdoing, or have known that he or she was doing it, or have adverted to the risk of it happening because of his or her actions. This is sometimes referred to as the presumption of *mens rea*. The underlying principle is that people are only responsible for the consequences that they chose to bring about, and therefore, legal culpability should only apply where the person has chosen to act in a manner that merits labelling him or her a criminal.³³ According to this argument, it would be illegitimate to change the definition of rape to potentially hold criminally liable those who unreasonably believed that the complainant was consenting, because that would mean that it is possible to find an accused guilty where he did not appreciate that what he was doing was harmful. When a person is

31 *The People (DPP) v C O’R* [2016] IESC 64, [2016] 3 IR 322 at para. 57.

32 For further discussion see Prendergast, “Recent Developments in Criminal Defences and *Mens rea*: A Retreat From Subjectivism” *Criminal Law: Recent Developments and Emerging Trends*, 19 April 2018.

33 See Hall, “Negligent behaviour should be excluded from criminal liability” (1963) *Columbia Law Review* 632.

unaware of a prospective harm, the reasons for or against causing that harm cannot affect that person's assessment of his or her conduct.³⁴

b. Unfair to hold someone liable for a serious crime when they could not foresee the risk of harm

- 1.38 The subjectivist formulation of the honest belief test is also often justified on the ground of fairness. This argument holds that to add any element of "reasonableness" would be unfair because it could hold people liable for unintentional conduct when they may not have had the capacity or opportunity to realise their mistake and remedy it. Criminal liability for inadvertence is usually judged against the objective or community standard of the reasonable person. The situation could arise that an accused did not have the decision-making capacity of the hypothetical reasonable person, and thus he would be prejudiced because of this. To judge someone by objective criteria may amount to punishing them for personal incapacities.³⁵

c. Criminalising inadvertence is not an effective deterrent

- 1.39 Relatedly, some may also argue that because people are unaware of the harm caused by their inadvertent actions, it is an ineffective deterrent against harm to hold them criminally liable for their mistakes. A person who does not consider a risk will not consider altering his or her future conduct to avoid such a risk. If an important purpose of criminal law is deterrence, it is unjustified to punish people for what they did not consciously choose to do, as they could not have avoided it.

d. Criminalising inadvertence is contrary to fair labelling

- 1.40 A further argument against expanding liability to unintentional rape is that it would result in unfair labelling. A criminal conviction carries stigma, and rape is one of the most stigmatised crimes. Distinctions between degrees of wrongdoing are signalled by law, and offences are distinguished and labelled so as to fairly communicate the nature and extent of the wrongdoing.³⁶ A man who makes an honest mistake as to a woman's consent is less morally culpable than a man who intentionally or recklessly rapes her. Expanding liability for rape to include those who mistakenly believed in consent would result in a single category of guilty persons that would include both those who believed the complainant was consenting, as well as those who knowingly committed rape, all being labelled as rapists and possibly receiving a punishment of life imprisonment.³⁷

³⁴ Simester, "Can Negligence be Culpable?" in Horder (ed) *Oxford Essays in Jurisprudence 4th Series* (OUP 2000).

³⁵ See *Elliott v. C* [1983] 1 WLR 939.

³⁶ Ashworth, *Principles of Criminal Law* 5th ed (Oxford University Press 2006) at 88.

³⁷ Ashworth, *Principles of Criminal Law* 2nd ed (Oxford University Press 1993) at 341.

e. The honest belief defence rarely leads to acquittals

- 1.41 It is also worth noting here that the honest belief defence rarely leads to acquittals. The available, albeit limited, evidence suggests that it is raised on very few occasions. The Supreme Court in *C O'R* noted that rape cases typically involve a dispute as to whether the woman factually consented or not.³⁸ This was also the finding of Hanly et al. in the *Rape and Justice in Ireland Report (RAJI Report)*, a national study of survivor, prosecutor and court responses to rape published in 2009, where the authors analysed the defence strategy in rape trials and only a small percentage relied on the honest belief defence.³⁹ Jamieson argues that the honest belief defence is not used more often because defence counsels find it easier to attack the credibility of the complainant and argue that she in fact consented, rather than to concede that the complainant did not consent and then argue that the accused mistakenly believed that she was consenting.⁴⁰

2. Disadvantages with the current definition of rape

- 1.42 This section will examine 7 problems posed by requirement of knowledge of non-consent in rape.

a. Harm is caused regardless of the accused's mental state

- 1.43 The current definition of rape could be seen as ignoring the harm experienced by the complainant, in that it arguably holds that a rape has only legally occurred if the man believes so, or if he was reckless.⁴¹ It may make little difference to the complainant whether the accused knew or not that she was not consenting; the act was a violation from her point of view.⁴² Sexual offences are very serious and can cause great physical and mental injury to victims, regardless of the accused's mental state. If one of the purposes of criminal law is to prevent harm and provide retribution where harm is caused, it arguably does not follow that inadvertent or careless actions should be ignored, particularly where the harm can be easily avoided by a simple inquiry.

b. Honest belief defence is contrary to affirmative consent

- 1.44 The honest belief defence is arguably somewhat at odds with to consent understood as an agreement, which is now clearly set out both in the new definition of consent inserted as section 9(1) into the 1990 Act by section 48 of the 2017 Act, and also in

38 *The People (DPP) v C O'R* [2016] IESC 64, [2016] 3 IR 322 at para. 47.

39 Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009) at 345.

40 Jamieson, "The Social Construction of Consent Revisited" in Adkins and Merchant (eds) *Sexualizing the Social. Explorations in Sociology* (Palgrave Macmillan 1996) at 65.

41 Rafferty, "Rape: Struggling with the forces of perception – part II" (2017) 35(14) *Irish Law Times* 187–190. See also Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press 2000) at 25; Jamieson, "The Social Construction of Consent Revisited" in Adkins and Merchant (eds) *Sexualizing the Social. Explorations in Sociology* (Palgrave Macmillan 1996) at 55 – 73.

42 See Lord Simon's dissent in *DPP v Morgan* [1975] UKHL 3, [1976] AC 182 at 221.

the definition of consent set down by the Supreme Court in *The People (DPP) v C O'R*.⁴³ It could permit an accused who has not even done the bare minimum to ascertain consent to be acquitted. Leahy and Fitzgerald O'Reilly note that in cases where the complainant was frozen in fear, an accused could argue that he interpreted the complainant's silence as consent.⁴⁴ Because all that is judged is the genuineness of the belief, consent can arguably be presumed, unless the woman positively indicates that she does not want to engage in intercourse.⁴⁵ This prejudices women who do not have the capacity, for whatever reason, to actively indicate their non-consent to penetration. Moreover, it is arguable that the defence may even *encourage* men not to engage in affirmative consent. As soon as a man enquires about consent, he may no longer rely on his honest belief in consent premised on the woman's passivity.⁴⁶

c. Requirement to prove knowledge could cause procedural problems

- 1.45 Leahy and Fitzgerald O'Reilly also argue that the requirement of knowledge of non-consent can contribute to difficulties of proof in sexual offence trials. They note that it could be difficult to convince a jury that there was no way in which the accused honestly believed that the complainant had given consent.⁴⁷ While the likelihood of a completely unsubstantiated assertion being wholly accepted by jurors is low, it may still cast a reasonable doubt in their minds, which would lead to an acquittal.⁴⁸
- 1.46 Indeed, because no evidence is required to substantiate the assertion, it may be relatively easy for a defendant to lie and assert that he honestly believed that the complainant was consenting. While the Supreme Court decided in *The People (DPP) v C O'R* that a jury is not obliged to believe obviously false claims, the Law Commission of England and Wales noted that "it would be remarkable if the *Morgan* rule did not sometimes have the effect of encouraging a jury to accept a bogus defence."⁴⁹

d. Not realising that your partner is not consenting is blameworthy

- 1.47 It could also be argued that not noticing that your sexual partner is not consenting is worthy of criminal sanction. The restriction of the fault element of rape to knowledge and recklessness may be defended on the ground that culpability is only attached to a conscious decision to have non-consensual sex, and that accidental non-consensual sex is not blameworthy because it could not have been avoided by the accused. However, it could be argued that failure to realise that your sexual partner was not willing, when a reasonable person in the situation would have, *is* also

⁴³ *The People (DPP) v C O'R* [2016] IESC 64, [2016] 3 IR 322.

⁴⁴ Leahy and Fitzgerald O'Reilly, *Sexual Offending in Ireland* (Clarus Press 2017) at 39.

⁴⁵ See Victorian Law Reform Commission, *Sexual Offence: Final Report* (2004) at chapter 8.

⁴⁶ See Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press 2000) at 25.

⁴⁷ Leahy and Fitzgerald O'Reilly, *Sexual Offending in Ireland* (Clarus Press 2017) at 39.

⁴⁸ Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* at 3.

⁴⁹ The Law Commission of England and Wales, *Consultation Paper (No 139) Consent in the Criminal Law* (1995) at 92.

blameworthy.⁵⁰ A failure to notice an obvious risk can show just as strong of an insufficient concern for others as a conscious choice to disregard it.⁵¹ A failure to realise that the woman is not consenting to sexual intercourse where a reasonable person would have done so denotes a failure on the accused's part to adequately direct his mind to the woman's feelings.⁵² It is arguable that in a situation as intimate and mutual as sexual intercourse, where the whole legality of the activity is premised on consent, there is a moral obligation to take the minimal step of ensuring that it is consensual.⁵³

e. Allows accused persons to rely on unreasonable beliefs to defend themselves

- 1.48 The honest belief defence is also often criticised for allowing an accused, who relies on sexist stereotypes or grossly unreasonable beliefs about women's sexuality, to be acquitted of rape.⁵⁴ By allowing defendants to rely on their unreasonable beliefs about consent, it has also been argued that the honest belief defence perpetuates disrespect for women's sexual autonomy.⁵⁵ O'Malley states that the subjective test "places a premium on ignorance, lack of consideration, and insensitivity".⁵⁶ Cowan, meanwhile argues that, "men's unreasonable beliefs about women's sexual behaviour should not be reflected in standards that assess criminal liability".⁵⁷

f. Wholly subjective tests allow defendants who gave no thought whatsoever to consent to be acquitted

- 1.49 Another type of defendant who could be acquitted for rape under the current definition are those who had not given any thought whatsoever as to whether the complainant was consenting or not. Because the understanding of recklessness in Ireland is based on a subjective test that requires advertence, an accused who gave absolutely no thought to the issue of consent would not be guilty. Criminalising conscious advertence to the possibility of non-consent, but excusing the failure of the accused to give minimal thought to consent at all, to the extent that the woman could be said to be completely objectified, is arguably contrary to the goal of protecting the bodily autonomy of women.⁵⁸ According to Murray, the fact that the *mens rea* of rape includes recklessness reflects the concern that men should not be acquitted of rape

50 Faulkner, "Mens Rea in Rape: Morgan and the Inadequacy of Subjectivism, or Why No Should Not Mean Yes in the Eyes of the Law" (1991) 18(1) *Melbourne University Law Review* 60.

51 Stark, *Culpable Carelessness: Recklessness and Negligence in Scots and English Criminal Law* (2011) PhD Thesis, University of Edinburgh at 112 - 117. See also Stark, *Culpable Carelessness* (Cambridge University Press 2017).

52 Faulkner "Mens Rea in Rape: Morgan and the Inadequacy of Subjectivism, or Why No Should Not Mean Yes in the Eyes of the Law" (1991) 18(1) *Melbourne University Law Review* 60.

53 Simester, "Can Negligence be Culpable?" in Horder (ed), *Oxford Essays in Jurisprudence 4th Series* (OUP 2000) at 89; Chan and Simester, "Four functions of *Mens Rea*" (2011) 70(2) *The Cambridge Law Journal* at 393.

54 Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* at 1.

55 *Ibid* at 4.

56 O'Malley, *Sexual Offences* 2nd ed (Dublin: Round Hall 2013) at 61.

57 Cowan, "Freedom and capacity to make a choice" in Munro and Stychin (eds), *Sexuality and the Law: Feminist Engagements* at 60.

58 Murray, "The Mens rea of Rape in Ireland: Legal, Moral and Social Consequences" (2017) 27(1) *Irish Criminal Law Journal* at 6.

if they have been indifferent to the issue of consent.⁵⁹ Seen in this way, it is arguably apparent that the law should hold a person guilty if he did not consider the issue of consent at all.⁶⁰

g. Negative social messaging

- 1.50 Finally, it is worth considering the harm to society caused by the requirement of knowledge in the rape offence. The honest belief defence arguably legitimises and thus bolsters rape myths and sexist stereotypes that lead to victim-blaming attitudes and perceptions.⁶¹ These myths could include that dressing in a so-called provocative fashion invites violence; or if a woman did not fight back, it was not rape; or if 2 people have had sex with each other on a previous occasion there is “implied consent”. By permitting acquittals on the basis of such irrational beliefs, the law arguably encourages defendants to adhere to sexist stereotypes to defend themselves, and thereby entrenching sexist ideologies.⁶²

D. Intoxication is not a defence in rape cases

- 1.51 The available international research suggests that alcohol is consumed by one or both parties in a high proportion of rape cases.⁶³ Studies from the UK and the USA have concluded that “[t]he correlation between alcohol use and the incidence of rape has...been demonstrated beyond doubt.”⁶⁴ In 2001, the Sexual Abuse and Victimisation in Ireland Report estimated that alcohol was involved in 45.3% of sexual violence cases in Ireland.⁶⁵ The Dublin Sexual Assault Treatment Unit (SATU) noted in 2003 that 58% of its clients had consumed over 4 units of alcohol around the time of the incident.⁶⁶ The authors of the *RAJI Report* analysed 597 rape cases reported to the Director of Public Prosecutions between 2000 and 2004, and found that 88% of the defendants on trial whose alcohol consumption was known had been binge drinking at the time of the incident.⁶⁷
- 1.52 The current law on “voluntary or self-induced” intoxication (that is, where a person voluntary consumes alcohol or drugs, as opposed to where a person has unwittingly

59 *Ibid.*

60 See judgment of Kirby P in the New South Wales decision of *R v Kitchener* (1993) 29 NSWLR 69.

61 Leahy, “When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law” (2013) 23(1) *Irish Criminal Law Journal* at 4–5.

62 Murray, “The Mens rea of Rape in Ireland: Legal, Moral and Social Consequences” (2017) 27(1) *Irish Criminal Law Journal* at 8; See also Leahy, “When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law” (2013) 23(1) *Irish Criminal Law Journal* 2.

63 See Rape Crisis Network Ireland, *Alcohol and Sexual Violence* (2011). Available at: <https://www.rcni.ie/wp-content/uploads/Rcni-FS01.pdf>; Rape Crisis Network Ireland, *RCNI Submission to the Joint Oireachtas committee on Justice, Defence and Equality, on the issue of Gratuitous Violence arising from Alcohol and substance abuse* (2012). Available at: <https://www.rcni.ie/wp-content/uploads/RcniAlcoholharmsubmissionOireachtasJusticeCommittee.pdf>

64 Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009) at 61.

65 McGee, Garavan, de Barra, Byrne and Conroy, *The SAVI Report: Sexual Abuse and Victimisation in Ireland* (Liffey Press 2002) at 101.

66 Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009) at 225.

67 *Ibid* at 273.

consumed them) as a defence in criminal law was set out by the Court of Criminal Appeal in 2004 in *The People (DPP) v Reilly*⁶⁸ and reaffirmed by the Court of Appeal in 2018 in *The People (DPP) v Power*.⁶⁹ These decisions followed the approach to voluntary intoxication as a defence developed by the UK House of Lords in *R v Majewski*.⁷⁰

- 1.53 In both *Reilly* and *Power*, following the approach in *Majewski*, the courts drew a distinction between what are called crimes of specific intent and crimes of basic intent.
- 1.54 Crimes of specific intent are those where the prosecution must prove that the accused acted knowingly or intentionally, the highest standard of fault or mental element for a crime: examples are murder, theft, robbery and handling stolen goods. The courts in *Reilly* and *Power* held that in crimes of specific intent, voluntary or self-induced intoxication *can be a limited defence* if the level of intoxication is so high that it prevented the accused from having the necessary knowledge or intention. If, for example, in a murder case, the accused proves that intoxication prevented him or her from forming the required knowledge or intention for murder, he or she could be found guilty of manslaughter, which, as noted below, is a crime of basic intent. That was the situation in *Reilly*, where the Court of Criminal Appeal upheld the defendant's conviction for manslaughter.
- 1.55 Crimes of basic intent are those where the prosecution does not have to prove that the accused acted knowingly or intentionally, but need only prove a lower standard of fault or mental element for a crime, such as subjective recklessness or an objective standard such as gross negligence: examples are manslaughter, rape, sexual assault, kidnapping, false imprisonment and assault. The courts in *Reilly* and *Power* held that in crimes of basic intent, voluntary or self-induced intoxication is never a defence. As noted, this followed the approach of the UK House of Lords in *Majewski*, which held that the accused's voluntary intoxication (in that case drugs-related) was not a defence to a charge of assault.
- 1.56 The Commission, in its 2009 *Report on Defences in Criminal Law*⁷¹ noted that there has been considerable criticism of the distinction drawn in the current law between crimes of specific intent and crimes of basic intent. In particular, there appears to be no logical underpinning that explains why intoxication may be a defence in crimes of specific intent but not in crimes of basic intent. Nonetheless, the 2009 Report also noted that, in *Reilly*, this so-called "*Majewski* rule" distinction was applied, so that voluntary intoxication can be used to convict persons of a lesser or fall-back offence, for example, manslaughter rather than murder. The Commission's conclusion in the

68 *The People (DPP) v Reilly* [2004] IECCA 9, [2005] 3 IR 111.

69 *The People (DPP) v Power* [2018] IECA 164.

70 *R v Majewski* [1976] UKHL 2, [1977] AC 443.

71 Law Reform Commission, *Report on Defences in Criminal Law* (LRC 95-2009), paras 1.52-1.54.

2009 Report that the “*Majewski* rule” has proved influential and is firmly part of Irish law has since been confirmed by the decision of the Court of Appeal in 2018 in *Power*.

- 1.57 The general question as to whether the current law on intoxication as a defence should be reformed is outside the scope of this project. Nonetheless, given the reality that, as discussed above, intoxication is present in a high percentage of cases of rape and other sexual assaults, it would be remiss not to refer to this issue.
- 1.58 Since, as already noted, rape is a basic intent offence, a claim by the accused that his voluntary or self-induced intoxication meant that he was “too drunk to know” that the complainant was not consenting is, simply, no defence to a charge of rape. This is because, under section 2 of the 1981 Act, the fault or mental element (*mens rea*) in rape is that the accused either knows *or was reckless* as to whether the complainant was consenting. If the fault or mental element in section 2 of the 1981 Act was solely that the accused must “know” that the complainant was consenting, rape would be classified as a crime of specific intent, and voluntary intoxication could be argued as a defence. However, because section 2 of the 1981 Act provides that a man is guilty of rape where he is reckless as to whether the complainant was consenting, it is classified as a crime of basic intent, and voluntary intoxication is not a defence under the current law.
- 1.59 If the accused’s honest belief in consent was borne of self-induced intoxication, he will be regarded as not having had that belief if he would have been sober. He will, in that case, be found to have been reckless as to the complainant’s consent.
- 1.60 The accused may alternatively argue that he *would* have believed that the complainant was consenting had he been sober, in which case he will have to argue that the belief would have been held by reference to reasonable grounds for that belief. However, he may not argue that the jury should take into account his voluntary intoxication as a basis for considering, under section 2(2) of the 1981 Act, that there were reasonable grounds for his belief that the complainant was consenting. In the English case *R v Woods*,⁷² the English Court of Appeal rejected the defendant’s argument that section 1(2) of the English *Sexual Offences (Amendment) Act 1976* permitted the jury to consider the defendant’s intoxicated state as a ground for his belief that the woman was consenting. This Act, as noted above, placed the *Morgan* case on a statutory footing and it is reflected in identical terms in section 2(2) of the 1981 Act. The Court instead held that the defendant’s self-induced intoxication is not “reasonable ground” relevant to the jury in deciding whether there are reasonable grounds for his alleged belief.
- 1.61 As to the intoxication of complainants in rape trials, section 9(2)(c) of the *Criminal Law (Rape) Amendment Act 1990*, as inserted by section 48 of the *Criminal Law (Sexual Offences) Act 2017*, provides that a “person does not consent to a sexual act if he or she is incapable of consenting because of the effect of alcohol or some other drug.” Leahy notes that where complainants are intoxicated, but short of unconsciousness, it may be a difficult task for juries to decide whether a complainant

⁷² *R v Woods* [1981] 74 CrApp R 312.

was too intoxicated to consent.⁷³ In *R v Lang*,⁷⁴ the English Court of Appeal held that the critical question is whether the complainant understood the situation and was capable of making decisions.

QUESTION 1

Your views are sought on the following questions:

- 1(a) Do you think that the fault or mental element (*mens rea*) in rape, knowledge or recklessness as to consent, should be maintained in its current form?
- 1(b) Do you think that the fault or mental element in rape should be extended beyond knowledge and recklessness?
- 1(c) Do you consider that any change should be made to the law that self-induced or voluntary intoxication is not a defence to a charge of rape?

⁷³ Leahy, "Reform of Irish Rape Law: The Need for a Legislative Definition of Consent" (2014) 43(3) *Common Law World Review* at 236.

⁷⁴ *R v Lang* [1975] 62 CrAppR 50.

ISSUE 2

POSSIBLE HONEST AND REASONABLE BELIEF AMENDMENT TO THE RAPE OFFENCE

A. Introduction

- 2.01 The mental element of the rape offence could be reformed to require that the honest belief in consent be “reasonable”, or in other words, to match an objective or the community standards upon which acceptable beliefs in consent are based. Adding reasonableness to the mental element of the rape offence would mirror reform in other common law jurisdictions, such as England and Wales, Northern Ireland, Scotland, New Zealand, and various Australian states.
- 2.02 Under such a reform, the requirement that the belief be reasonable would hold the accused’s mistaken belief to a higher standard than the current law. An accused would not be able to rely on unreasonable grounds to avoid conviction. Conversely, an accused who engaged in non-consensual intercourse, but who held a mistaken and reasonable belief in consent, would be acquitted.
- 2.03 There will be cases where the jury is satisfied that the accused knew that the complainant was not consenting. In these cases, there simply was no belief that the complainant was consenting, and there need not be any discussion of reasonableness. This could also be because the accused was aware of any of the situations negating consent in section 9(2) of the *Criminal Law (Rape) (Amendment) Act 1990*, as amended by the *Criminal Law (Sexual Offences) Act 2017*. In cases where the accused did believe that the complainant was consenting, the jury must decide whether that belief was reasonable.

B. How an honest and reasonable belief test could be incorporated into the 1981 Act

- 2.04 Adding a “reasonableness” or objective element to the rape offence would be consistent with certain other offences in Irish criminal law. A number of other serious

offences in Irish law include objective elements,⁷⁵ such as dangerous driving,⁷⁶ and the defence of reasonable mistake of age to the offence of sexual activity with children.⁷⁷ Objective elements also feature in defences to criminal charges, such as the defences of duress and self-defence.⁷⁸

- 2.05 The requirement of reasonableness could replace the mental elements of knowledge and recklessness in the positive definition of the offence. The prosecution would be required to prove at the outset that the accused had no reasonable belief in consent. This is similar to the formulation of the rape offence in England and Wales, Scotland and Northern Ireland.
- 2.06 Alternatively, rape could be formulated without a mental element in the positive definition of the offence, but instead allow an accused to raise a defence of honest and reasonable belief in consent. The prosecution would be required to establish non-consensual intercourse at the outset. A defence is raised if the judge is satisfied that there is some evidence on which the jury could find in the accused's favour. This is called the "evidential burden". Once the defence is raised, the onus is on the prosecution to disprove the defence beyond a reasonable doubt. Under this possible reform option, for the defence to meet the evidential burden, the accused would have to point to some evidence to show that he had a reasonable belief that the complainant was consenting. The prosecution would then be required to prove beyond a reasonable doubt that the accused had no such belief, or that belief was unreasonable. If the defence is not raised, or sufficient evidence has not been adduced, the judge will direct the jury only on whether the prosecutor proved beyond reasonable doubt that there was non-consensual intercourse.
- 2.07 However, some defences require the accused to prove the defence on the balance of probabilities, and the honest and reasonable belief defence to a rape offence could be legislated for as such. This is similar to the formulation of the offences of sexual activities with children and vulnerable adults in sections 2, 3 and 3A of the *Criminal Law (Sexual Offences) Act 2006*, as amended by the *Criminal Law (Sexual Offences) Act 2017*.⁷⁹
- 2.08 Further, there are different ways in which the "reasonableness" test could be formulated. Jurisdictions have diverged as to what extent the test should be objective or "mixed" objective and subjective. The test for reasonableness could either take the form of:
- (i) what the "reasonable person" would have believed in the circumstances of the case; or

⁷⁵ For further discussion see Prendergast, "Recent Developments in Criminal Defences and *Mens rea*: A Retreat From Subjectivism" *Criminal Law: Recent Developments and Emerging Trends*, 19 April 2018.

⁷⁶ Section 53 of the Road Traffic Act, 1961. See *The People (AG) v Quinlan* [1963] 97 ILT 219, *The People (DPP) v O'Shea* [2017] IESC 41.

⁷⁷ Sections 2, 3, 3A of the *Criminal Law (Sexual Offences) Act 2006*, as amended by the *Criminal Law (Sexual Offences) Act 2017*. See also section 22 of the *Criminal Law (Sexual Offences) Act 2017*.

⁷⁸ See the Law Reform Commission *Report on Defences in Criminal Law* (LRC 95-2009).

⁷⁹ Sections 2, 3, 3A of the *Criminal Law (Sexual Offences) Act 2006*, as amended by the *Criminal Law (Sexual Offences) Act 2017*. See also section 22 of the *Criminal Law (Sexual Offences) Act 2017*.

(ii) whether the belief was based on reasonable grounds; or

(iii) whether the accused's belief was reasonable.

- 2.09 The reasonable person is a hypothetical ordinary person, and does not necessarily share the personal characteristics of the accused.⁸⁰ This can set a high standard, depending on how far the accused's characteristics depart from those of the abstract reasonable person.⁸¹ Similarly, requiring that the belief be based on "reasonable grounds", alone requires no consideration of the characteristics of the accused, only the surrounding circumstances of the incident.
- 2.10 Another approach to constructing a reasonableness standard for the honest belief test is a hybrid or mixed standard of reasonableness. This test focuses on the reasonableness of the accused's belief. This test involves considering the accused's personal characteristics and the circumstances of the situation. The English *Sexual Offences Act 2003* and the Irish law on sexual activities with children and vulnerable adults provide that the Court shall consider "all the circumstances" in determining what was reasonable for the accused to believe.⁸² The test then becomes a question of what was reasonable for a person with the relevant characteristics to believe in that situation. This reduces the potential harshness of a wholly objective test in situations where the accused has physical or psycho-social disabilities that prevent him from perceiving what a reasonable person would have perceived.
- 2.11 However, there has been academic criticism of the inclusion of "all the circumstances" in the English *Sexual Offences Act 2003*. The issue with this phrase is that it does not clearly delineate what should and should not be considered. Academics have noted that jurors could understand "all the circumstances" to include the defendant's biases and personal views on sexual behaviour. Temkin and Ashworth have noted that if too many of the attributes of the defendant are taken into account, then the reasonableness test may be more favourable to the defendant than the wholly subjective law.⁸³ Reasonable belief is therefore reduced to an effectively subjective test. It is for this reason that the Scottish Law Reform Commission recommended against including the phrase in its law on rape.⁸⁴
- 2.12 Clearly delineating in the legislation what should and should not be considered by the court or jury may mitigate such problems. For example, many jurisdictions explicitly state that a belief based on self-induced intoxication may not be considered in the test.
- 2.13 The legislation could also explicitly bar a jury from considering the accused's personal opinions and values in its determination of whether his belief in consent was reasonable. This would allow the jury to consider physical and intellectual disabilities that may inhibit the accused's capacity to perceive things that a

80 Criminal Law Review, State of Victoria, Department of Justice & Regulation, *Victoria's New Sexual Offence Laws. An Introduction* (2015) at 14.

81 *Ibid.*

82 *Ibid.*

83 Temkin and Ashworth, "The sexual offences act 2003: Rape, Sexual Assaults and the Problems of Consent" (2004) *Criminal Law Review* at 328.

84 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (2007) at 56.

reasonable person would have noticed, while expressly excluding beliefs formed by the accused's sexist or other biases. A limited test of reasonableness could direct the jury to focus on the relevant matters such as what was communicated between the parties, and the mental capacity and age of the accused.

- 2.14 Some jurisdictions specifically state that the Court shall consider, among other relevant factors, any steps the accused took to ascertain whether the complainant consented in determining if the belief was reasonable. By expressly including this consideration in the legislation, it draws the jurors' attention to the importance of examining the accused's conduct, and not just the complainant's behaviour. A failure to take steps would be a factor that the jury may consider in assessing the accused's asserted belief that the complainant was consenting.

C. Discussion of the honest and reasonable belief test

- 2.15 The main argument expressed in favour of amending the mental element of rape to require that a belief in consent be reasonable is that it would recognise that engaging in non-consensual sexual penetration without having a reasonable ground for believing that the woman consents is a significant wrongdoing. Adding an objective standard would establish that there are socially accepted standards of conduct in sexual situations to which everyone must adhere. This reform would thus prevent an accused who bases his belief in consent on unreasonable or objectionable grounds from avoiding conviction.
- 2.16 It is arguable that given the ease with which consent can be confirmed, when measured against the risk of grave harm caused by non-consensual sex, there is a moral obligation to have reasonable grounds for believing that the other party is consenting.⁸⁵ Such a reform could therefore encourage people to be certain of their partner's consent before continuing with the encounter, which is arguably the aim of the definition of consent as free and voluntary agreement.⁸⁶ In this way, it could be said that a wholly subjectivist definition of rape is inappropriate for this definition of consent.
- 2.17 This reform option could also hold liable the accused who do not give any thought at all as to whether the complainant was consenting. Because the current mental element requires that the accused positively knows that the woman is not consenting or adverts to the risk that she is not (subjective recklessness), an accused who has not considered the issue of consent would not be criminally liable. If the mental element were changed to some formulation of "no honest or reasonable belief in

⁸⁵ Criminal Law Review, State Government Victoria, Department of Justice, *Review of sexual offences: consultation paper* (2013) at 3 - 38; See also Ashworth and Horder, *Principles of Criminal Law* 7th ed (Oxford 2013) at 354-355; Burgess-Jackson, *Rape: A Philosophical Investigation* (Aldershot 1996) at 142; Tadros, "Rape Without Consent" (2006) 26(3) *Oxford Journal of Legal Studies* at 532; Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* at 3.

⁸⁶ Section 9(1) of the *Criminal Law (Rape) (Amendment) Act 1990*, as amended by the *Criminal Law (Sexual Offences) Act 2017*.

consent”, any accused who did not positively hold such a belief in consent would be guilty.

- 2.18 Further, this approach could address some of the difficulties of proof associated with the subjective test. Because this model does not wholly rely on the mind-set of the accused, the prosecution need not attempt to establish beyond reasonable doubt what the accused actually knew or believed. It instead looks at the circumstances of the case, as well as the relevant characteristics of the accused and extrapolates the relevant information.
- 2.19 The main objections to reforming the honest belief defence to an “honest and reasonable” standard reflect the justifications for subjectivism in criminal law, as discussed above. Adding reasonableness to the mental element of rape would be contrary to the presumption that serious or “truly criminal” offences require intention or recklessness, and falling below a reasonableness standard does not suffice for criminal liability.⁸⁷
- 2.20 It is also necessary to consider the difference in culpability between an intentional rapist, and one who bases his beliefs on unreasonable grounds. The man who had sexual intercourse with a woman in the knowledge that she was not consenting is more blameworthy than the man who genuinely believed she was a willing participant, even if that his belief was not one that a reasonable person would have had. It could be argued that it is unfair to be labelled a rapist for making a mistake. Rape is one of the most stigmatised offences, and to be labelled a rapist could extremely disadvantage a person’s life prospects. Further, a rape conviction carries a potential maximum punishment of life imprisonment.
- 2.21 It is arguably unfair to impose a criminal sanction on a person who made an honest mistake because he or she may not have the capacity to act “reasonably” nor the opportunity to change his or her behaviour.⁸⁸ However, as previously stated, there are ways to incorporate a “reasonableness” standard to the rape offence that allows for consideration of relevant characteristics of the accused in deciding what is reasonable. The rape offence provided in the English *Sexual Offences Act 2003* provides that a jury should consider “all the circumstances” in determining whether the belief was reasonable. The law could also specifically state that the jury should consider the accused’s decision-making capacity. This would avoid unfairness to those who may be incapable of achieving the objectively reasonable standard, while not excusing those who are capable, but chose not to exercise that capacity.⁸⁹
- 2.22 Another concern is the coherency of the concept of “reasonableness”. At one level, a “reasonableness” test appears to be straightforward and it is one of the most commonly used concepts both in society in general and in the law, reflecting an assessment based on objective, community, standards. The difficulty in the context of rape and sexual offences is that jurors, whether male or female, may hold views or

⁸⁷ See *R. v City of Sault Ste. Marie* [1978] 2 SCR 1299; *Pappajohn v The Queen* [1980] 2 SCR 120 at 152.

⁸⁸ Pickard, “Culpable Mistakes and Rape: Relating *Mens rea* to the Crime” (1980) 30 *University of Toronto Law Journal* at 78 – 82.

⁸⁹ *Ibid* at 79.

beliefs about women's sexuality that may be difficult to describe as objective, and may then accept an accused's belief as "reasonable" when it may not be.⁹⁰

- 2.23 Indeed, some studies from the United Kingdom made after the introduction of a "reasonableness" standard have found that it is not a high threshold to meet, and has not resulted in a change in the acceptance of asserted beliefs.⁹¹ Carline and Gunby found that "it was generally considered that it was not difficult for a defendant to establish that his belief in consent was reasonable" based on complainant behaviour such as flirting or failing to actively demonstrate lack of consent through protest.⁹²

90 See MacKinnon, "Rape: On Coercion and Consent" in Conboy, Edina and Stanbury (eds) *Writing on the Body: Female Embodiment and Feminist Theory* (Columbia University Press 1989).

91 Finch and Munro, "Breaking boundaries? Sexual consent in the jury room" (2006) *Legal Studies* 26(3) at 317 – 318; Carline and Gunby, "'How an Ordinary Jury Makes Sense of it is a Mystery': Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003" (2011) 32(3) *Liverpool Law Review* 237.

92 Carline and Gunby, "'How an Ordinary Jury Makes Sense of it is a Mystery': Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003" (2011) 32(3) *Liverpool Law Review* 237 at 248. See Appendix.

QUESTION 2

Your views are sought on the following questions:

- 2(a) Do you think that the honest belief test should be replaced with an honest and reasonable belief test?
- 2(b) If so, do you consider that the test for reasonableness should be determined by reference to the (i) "reasonable person", (ii) the accused's reasonable belief, or by reference to (iii) reasonable grounds?
- 2(c) Do you think "all the circumstances" should be considered in the jury's determination of whether a belief in consent was reasonable?
- 2(d) Do you think that the law should explicitly state that certain grounds for a belief in consent are unreasonable? If so, what grounds should be included?
- 2(e) Do you think that the law should explicitly exclude "self-induced intoxication" from the jury's consideration?
- 2(f) Do you think that the laws should explicitly exclude any characteristics from the jury's consideration?
- 2(g) Do you think that the "unreasonable belief" should be the mental element in the positive definition of the offence or, alternatively, that "reasonable belief" should be available as a defence?
- 2(h) If you think it should be a defence to be raised by the accused, do you think it should be required to meet the evidential burden or should it be proved by the accused on the balance of probabilities?

ISSUE 3

POSSIBLE REASONABLE STEPS REQUIREMENT ADDED TO THE HONEST BELIEF DEFENCE

A. Introduction

- 3.01 The second possible option for reform examined is the addition of a requirement that in order to rely on the honest belief defence, the accused must have taken reasonable steps to ascertain consent.
- 3.02 If Ireland's rape law were reformed to require "reasonable steps", it would be following similar reforms enacted in some other common law jurisdictions. In England and Wales, Northern Ireland, Scotland, Victoria and New South Wales, whether or not the accused took steps to ascertain consent is one of the factors to be taken into account by the jury in its consideration whether the belief was reasonable. In Canada and Tasmania, a failure to take steps to ascertain consent will bar reliance on the defence. In Canada, the honest belief defence may not be raised by the accused unless he took reasonable steps to ascertain consent. In Tasmania, the failure to take steps to ascertain consent will establish that the mistaken belief is not honest nor reasonable and therefore cannot be relied on.

B. How a "reasonable steps" requirement would be incorporated into the 1981 Act

- 3.03 The reasonable steps requirement could be incorporated by substituting the elements of "knowledge of and recklessness as to consent" with "no reasonable belief in consent", as discussed in the previous issue, with the additional requirement that a belief in consent will not be reasonable if the accused did not take steps to ascertain consent. The prosecution would bear the burden of proving that there was no reasonable belief in consent at the outset.
- 3.04 Alternatively, a reasonable steps requirement could be incorporated into the rape offence by removing the elements of knowledge and recklessness from the offence and allowing the accused to raise his honest belief in consent as a defence, with the restriction that the defence cannot be raised if there is no evidence of reasonable

steps. Similar to the previous discussion of the honest and reasonable belief defence above, this defence can either be required to meet the evidentiary burden or proved by the accused on the balance of probabilities.

- 3.05 Canadian courts and academics have interpreted “reasonable steps” to mean communication by the accused through language or actions.⁹³ Incremental progression of intimacy between the parties can also constitute reasonable steps, as long as there is reciprocated positive communication of willingness to continue with the intimacy.⁹⁴ The steps expected of the accused will differ according to the facts of each case and the relationship between the parties.⁹⁵ In cases where there is a power imbalance or where the person is intoxicated, stricter steps will be required.

C. Discussion of a “reasonable steps” requirement

- 3.06 The argument in favour of reforming the rape offence to include such a requirement is that it would recognise that initiating sexual penetration without first taking steps to ascertain consent is contrary to the communicative consent standard. A “reasonable steps” requirement arguably reflects the statutory definition of consent, in section 9(1) of the 1990 Act, as amended by the 2017 Act, as well as a moral requirement that the person who initiates sexual intercourse should make sure that the other person is willing.
- 3.07 Pickard argues that it is not unreasonable for the law to require that the accused should take steps to ascertain whether consent is present, and that there is a strong argument for the law to deny a defence of mistaken belief to a person who has failed to taken such a modest step. She argues that “considering the disparate weights of the interests involved, a failure to inquire carefully into consent constitutes, in my view, such a lack of minimal concern for the bodily integrity of others that it is good criminal policy to ground liability on it.”⁹⁶
- 3.08 Communication to ascertain consent is arguably what is required by the new definition of consent as “free and voluntary agreement”. In 2001, the Supreme Court defined sexual consent as “voluntary agreement or *acquiescence*”.⁹⁷ In 2016, consent was defined by the Supreme Court in *The People (DPP) v C O’R* as active communication through words or physical gestures. These definitions arguably imply that consent in sexual circumstances is no longer purely about an internal mental

93 *R v Ewanchuk* [1999] 1 SCR 330; Craig, “Ten Years After Ewanchuk the Art of Seduction is Alive And Well: An Examination of The Mistaken Belief in Consent Defence” (2009) 13 *Canadian Crim L Rev* 3: 247; Craig, *Sex and the Supremes: Towards A Legal Theory of Sexuality*. (2010) PhD thesis, Dalhousie University; Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press 2012).

94 Craig, “Ten Years After Ewanchuk the Art of Seduction is Alive And Well: An Examination of The Mistaken Belief in Consent Defence” (2009) 13 *Canadian Criminal Law Review* 3: 247 at 15 – 16.

95 Craig, “Ten Years After Ewanchuk the Art of Seduction is Alive And Well: An Examination of The Mistaken Belief in Consent Defence” (2009) 13 *Canadian Criminal Law Review* 3: 247; Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press 2012).

96 Pickard, “Culpable Mistakes and Rape: Relating *Mens rea* to the Crime” (1980) 30 *University Toronto Law Journal* at 77.

97 *The People (DPP) v C* [2001] 3 IR 345 at 360.

state (which can other persons may misinterpret) but more about performance and signals that the person has the requisite willing mental state.

- 3.09 Thus, agreement is now a constitutive element of the legality of sexual intercourse. Agreement implies a genuine meeting of minds. Agreements cannot be engaged in unilaterally. Other areas of law that concern “agreement”, such as contract law, require some sort of positive action and do not permit agreement to be derived from silence or passivity. It is therefore arguable that there should be a positive duty on the defendants to take steps to establish the existence of consent, by eliciting signifiers from the other party that she is willing to engage in the sexual encounter. This evokes a more performative understanding of consent than the Supreme Court countenanced in its specific reference to consent by acquiescence in 2001.⁹⁸ It is difficult to imagine of how someone can genuinely believe that the other person “freely and voluntarily agrees” if they have not communicated that agreement or that they have not taken steps to find out.
- 3.10 Leahy argues that the wholly subjectivist honest belief test suggests that it is permissible for defendants to form a unilateral view of their partner’s consent and thus perpetuates the assumption that consent can be presumed until positively withdrawn.⁹⁹ Because of this assumption, the complainant may be required to demonstrate to the jury’s satisfaction that she communicated that she did not wish to engage in the sexual intercourse.¹⁰⁰ It is arguable that by exempting the instigators of sexual intercourse from the responsibility of finding out whether their partners are willing to have sex with them, the complainant bears the burden of resisting. However, it is common for women to freeze in response to assault or to submit because of fear of escalating the situation to violence.¹⁰¹ A reasonable steps requirement could address these situations by requiring that the instigator of a sexual encounter refrain from penetration until he has made sure that his partner is also willing.
- 3.11 Although section 9(5) of the 1990 Act, as amended by the 2017 Act, provides that “[a]ny failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act”, an accused may still argue that he honestly believed that the woman was consenting because she did not resist. A requirement to take reasonable steps would presume that a man understands that a woman does not grant consent until it is affirmatively communicated through verbal or non-verbal signals. It can be argued that this could bring the mental element of the rape in line with the law on consent in section 9(5) of the 1990 Act.
- 3.12 It could also be argued that more communicative standard in sexual relationships will benefit society. A reasonable steps requirement could encourage men to engage

98 *The People (DPP) v C* [2001] 3 IR 345.

99 Leahy, “When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law” (2013) 23(1) *Irish Criminal Law Journal* at 5.

100 Little, “From no means no to only yes means yes: The rational results of an affirmative consent standard in rape law” (2005) 58 *Vanderbilt Law Review* at 1347; Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press 2000) at 25.

101 Galliano, Noble, Travis, and Puechl “Victim reactions during rape/sexual assault: A preliminary study of the immobility response and its correlates” (1993) 8 *Journal of Interpersonal Violence* at 109-114; Burgess and Holmstrom “Coping behavior of the rape victim” (1976) 13(4) *American Journal of Psychiatry* at 413-18.

in rational behaviour by ascertaining whether their partner is willing to engage in sexual intercourse and respecting their wishes. It could encourage women to indicate and communicate their sexual desires and willingness to engage in intercourse, and thus lead men to expect communication and active engagement.¹⁰² According to this argument, a reasonable steps requirement could ultimately discourage passivity, which could cause confusion when a woman may think that she is clearly demonstrating unwillingness in her silence, while a man may think that she is communicating her consent.¹⁰³

- 3.13 However, some concerns may be expressed with regard to a reasonable steps requirement. One common critique is that it could shift the burden of proof from the complainant to the defendant, contrary to the presumption of innocence. It could be argued that it is too difficult and onerous to prove agreement when communication in sexual encounters is often implicit. A standard that requires reasonable steps is may be too easily, too commonly and too innocently contravened in ordinary relationships. The argument follows that men who fail to take steps because they honestly believe that their partner is consenting should not be labelled a rapist and be subject to potential sentence of life imprisonment.
- 3.14 Stuart has expressed concern over unfairness that might arise in ambiguous situations, such as where a man might misinterpret signals from a woman, and honestly and reasonably believe that she consents to intercourse. In such a situation, he would not believe it is necessary to take any steps to ascertain consent, and would thus be guilty under the Canadian law.¹⁰⁴ However, Craig notes that such cases have never been brought to Court in Canada, and if one were, it would not result in a conviction. She notes that judges are far more likely to favour the accused in ambiguous situations.¹⁰⁵ Indeed, this could be seen as a problem with the law – one could argue that it is problematic to defend it by suggesting that it will not be strictly enforced.
- 3.15 A further problem with this requirement is that a review of case law in the jurisdictions where it is part of the law demonstrates that there is actually little engagement by courts with the requirement of reasonable steps. Cockburn notes that the requirement does not appear to have changed the conduct or outcomes in rape trials in Tasmania.¹⁰⁶ However, she argues that it is still useful to the extent that it may assist juries in their evaluation of the question of reasonableness.¹⁰⁷ In Canada, the reasonable steps requirement has had a positive impact, but Craig states that this largely down to the decision of the Supreme Court of Canada in *R v Ewanchuk* limiting

102 Little, "From no means no to only yes means yes: The rational results of an affirmative consent standard in rape law" (2005) *Vanderbilt Law Review* 58 at 1356.

103 See Byrnes and MacNeela, *SHAG report 2017. Sexual health and attitudes* (National University of Ireland, Galway 2017) at 73.

104 Stuart, *Canadian Criminal Law* 4th ed (Carswell 2001) at 304.

105 Craig, "Ten Years After Ewanchuk the Art of Seduction is Alive And Well: An Examination of The Mistaken Belief in Consent Defence" (2009) *Canadian Criminal Law Review* 13 at 247.

106 Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (2012) PhD Thesis, University of Tasmania at 199-204.

107 Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (2012) PhD Thesis, University of Tasmania at 200.

the mistaken belief defence to the immediate and affirmative communication of sexual consent.¹⁰⁸

QUESTION 3

Your views are sought on the following questions:

- 3(a) Do you think that the accused should be explicitly excluded from relying on the honest belief defence where there has been no affirmative communication of consent or reasonable steps taken to ascertain consent?
- 3(b) If so, do you consider that a reasonable steps requirement is best incorporated as a restriction on the honest belief defence to a rape offence, or alternatively, as a restriction on what qualifies as “reasonable” where the mental element in the rape offence is “no reasonable belief in consent”?
- 3(c) If you think it should be a defence to be raised by the accused, do you think it should be required to meet the evidential burden or should it be proved by the accused on the balance of probabilities?
- 3(d) Do you think a reform based on a “reasonable steps requirement” should explicitly exclude “self-induced intoxication” from the jury’s consideration?

¹⁰⁸ Craig, “Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence” (2009) 13 *Canadian Criminal Law Review* 13 at 247.

ISSUE 4

POSSIBLE ADDITION OF GROSS NEGLIGENCE RAPE OFFENCE

A. Introduction

- 4.01 The final reform option that this paper examines is an additional lesser offence for circumstances where an accused honestly but mistakenly believed that there was consent. Swedish law was reformed to this effect in July 2018. Prior to 2018, Swedish law on rape was established by proving that the complainant was compelled to have sexual intercourse with the accused by assault, violence or threat of criminal act, or where the accused exploited the fact that a person was in a “helpless state”.¹⁰⁹ Following a review of the law, since 1 July 2018, Swedish law is based on establishing lack of consent. In addition, the law now provides for a “negligent rape” offence for situations where a person should have been aware of the risk of non-consent, but still engaged in the sexual act.¹¹⁰
- 4.02 The advantages and disadvantages of a requirement of reasonable belief have been explained above and need not be repeated here. The section below will specifically assess the benefits and problems associated with having two separate offences for non-consensual sex.

B. How gross negligence rape could be incorporated into the 1981 Act

- 4.03 Under this possible reform, the prosecution could charge the accused with the lesser offence or it could be an alternative verdict to a rape charge. If a defendant knows that the other person is not consenting, he would be guilty of rape. If he honestly believed that the complainant was consenting, but that belief was unreasonable, he would be guilty of the lesser offence. Where the mistaken belief in consent was reasonable, he would not be guilty of either offence.
- 4.04 In this way, the relationship between the rape offence and the lesser offence would be somewhat akin to the relationship between murder and manslaughter. Those

109 European Institute for Gender Equality, “Legal Definitions in the EU Member States”. Available at: [http://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu?c\[\]=SE](http://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu?c[]=SE)

110 Ministry of Justice, “Consent – the basic requirement of new sexual offences legislation” (2017). Available at: <https://www.government.se/498ee7/contentassets/ee1de9e9781046afb784f034565f32e9/consentthe-basic-requirement-of-new-sexual-offences-legislation>

offences share the same physical element (*actus reus*), causing the death of another person, but are differentiated by the mental state of the accused in so doing. In a trial for murder, a jury may find the accused guilty of manslaughter if it is not satisfied that the accused had the mental state necessary for a murder conviction. The use of alternative verdicts also already operates in the law on sexual offences. Section 8 of the *Criminal Law (Rape) Amendment Act 1990* provides that aggravated sexual assault and sexual assault can be found as alternative verdicts to rape and rape under section 4.

- 4.05 The mental element of the lesser offence could be defined as “no reasonable belief in consent”. The law could also state that a belief will not be reasonable if no reasonable steps were taken, and could also exclude grounds for consideration of what is reasonable.

C. Discussion of gross negligence rape

- 4.06 The main advantage of creating a separate offence for mistaken non-consensual intercourse is that it criminalises non-consensual sex where the accused’s belief in consent was unreasonable, but also recognises that there is a lower degree of moral culpability associated with that wrongdoing than with intentional or reckless rape. In the Victorian Review of Sexual Offences consultation paper, it was noted that some may argue that having a single offence with a mental element of “no reasonable belief” with the one maximum penalty of life imprisonment does not adequately indicate the difference in culpability between an intentional rapist and a mistaken one.¹¹¹ It is arguable that offences should be distinguished and appropriately labelled so as to fairly communicate the extent of the wrongdoing committed and the blameworthiness of the accused. It may be argued that there is a significant difference between the blameworthiness of a person who intentionally engages in non-consensual sex and the person who believes, albeit unreasonably, that his partner is consenting, and the law should reflect this.
- 4.07 The Victorian Review of Sexual Offences consultation paper also noted a second argument in favour of having a lesser offence is that there would be clearer facts available for the judge at the sentencing stage.¹¹² If a single offence covers a range of degrees of culpability, it could be more onerous for the sentencing judge to review the facts of the case and the evidence presented at the trial and decide on the appropriate sentence, than if there were separate rape offences distinguished by culpability, which would present clearer facts to the sentencing judge. The addition of a gross negligence rape offence, according to this argument, could thus lead to more consistent sentencing.
- 4.08 The main disadvantage with the addition of the gross negligence rape offence is that it may make prosecutions for the rape offence more difficult. It may be the case that if jurors cannot agree either on whether there was sexual intercourse or not, or whether or not there was in fact consent, they could compromise by convicting the

111 Criminal Law Review, State Government Victoria, Department of Justice, *Review of Sexual Offences: Consultation Paper* (2013) at 3-42.

112 *Ibid.*

accused of the lesser offence, when the correct verdict may be a rape conviction or alternatively, an acquittal.¹¹³ It may also be that the prosecutors may decide not to charge the accused with intentional rape, preferring the lesser offence because they do not have sufficient proof of knowledge. In such cases, the accused may have been guilty of rape, but rather than pursuing this charge because of concern that the jury will not accept it, the charge is downgraded.

- 4.09 This risks becoming a “self-fulfilling prophecy”, so that only the clearest (likely, the most violent) rape cases are prosecuted as rape, and the cases where there is little physical evidence of non-consent are tried as the lesser offence. In turn, society would only recognise the most violent rapes as rapes, and non-violent rapes as gross negligence rapes. Thus, this model risks restoring the old definition of rape which required proof of force and resistance,¹¹⁴ which is contrary to the recognition of consent as agreement and women’s right to bodily autonomy.
- 4.10 Still, it could be argued that it matters less whether the accused is convicted of intentional or negligent rape, but more so that the accused is convicted of something and that the complainant is recognised as a victim of crime.
- 4.11 However, this possible reform may not lead to more convictions given that, the “reasonableness standard” in sexual assault situations may not be a high standard to meet. As discussed in Issue 2, research has found that jurors sometimes accept grounds for a belief based on rape myths and sexist stereotypes as reasonable.¹¹⁵ Thus, rape charges could be downgraded to the lesser offence, while few actual mistaken rapes result in convictions under the offence, since reasonableness may be a relatively easy test to overcome.¹¹⁶ Thus, a lesser offence could significantly weaken rape law.¹¹⁷
- 4.12 The Victorian Review of Sexual Offences consultation paper also identified the problem that if a distinction were to be made between the knowingly non-consensual sexual intercourse offence and the mistakenly non-consensual intercourse offence, the same distinction would then need to be introduced in all other sexual offences where non-consent was an element. This would lead to a significant increase in the number of sexual offences.¹¹⁸

113 Home Office, *Report of the Advisory Group on the Law of Rape, Cmnd 6352* (1975) at 13.

114 O’Malley, *Sexual Offences* 2nd ed (Round Hall 2013) at 36.

115 Finch and Munro, “Breaking boundaries? Sexual consent in the jury room” (2006) 26(3) *Legal Studies* 303.

116 See Carline and Gunby, “How an Ordinary Jury Makes Sense of it is a Mystery: Barristers’ Perspectives on Rape, Consent and the Sexual Offences Act 2003” (2011) 32(3) *Liverpool Law Review* at 247.

117 Home Office, *Report of the Advisory Group on the Law of Rape, Cmnd 6352* (1975) at 13.

118 Criminal Law Review, State Government Victoria, Department of Justice, *Review of Sexual Offences: Consultation Paper* (2013) at 3-42.

QUESTION 4

Your views are sought on the following questions:

- 4(a) Do you think that a new offence of gross negligence rape, carrying lower penalties than for rape, should be enacted to address circumstances in which a defendant honestly but mistakenly believed that there was consent?

- 4(b) If so, do you think that the accused should be guilty of the lesser charge where the belief in consent was unreasonable or any other ground?

APPENDIX

COMPARATIVE JURISDICTIONS

Introduction

- 4.13 This Appendix examines how a mistaken belief in consent in rape cases is dealt with in a number of other jurisdictions. Reforms in other common law jurisdictions, many of which have added objective, or “reasonableness”, elements to the honest belief defence, are examined, as these were particularly useful for this paper. The Paper also discusses recent reform of rape law in Sweden.

England and Wales

- 4.14 As noted above, the UK House of Lords decided in *DPP v Morgan*¹¹⁹ that an honest, albeit unreasonable, belief in consent could exculpate a defendant charged with rape. Prior to this, the law governing mistake of fact required the belief to be reasonable.
- 4.15 In response to public outcry at the so-called “rapist’s charter”,¹²⁰ a review was launched that culminated in a report by Mrs Justice Heilbron and the Advisory Committee on Rape, which affirmed the *Morgan* decision and recommended that it be clarified in legislation.¹²¹ Subsequently, the *Sexual Offences (Amendment) Act 1976* placed the *Morgan* decision on a statutory footing.
- 4.16 However, dissatisfaction with the honest belief defence remained and the government launched a review into the law on sexual offences in the 1990s. The Home Office found that the law on sexual offences was “archaic, incoherent and discriminatory,” and that it failed to reflect “changes in society and social attitudes”.¹²² Among other issues, the government partly attributed the low rates of rape convictions to the honest belief defence.¹²³ In the *Protecting the Public* report, the Home Office expressed concern that the “difficulty in proving that some defendants did not truly have an ‘honest’ belief in consent contributes in some part to the low rate of convictions for rape. This in turn leads many victims, who feel that the system will not give them justice, not to report incidents or press for them to be

119 *DPP v Morgan* [1975] UKHL 3, [1976] AC 182.

120 Adler, *Rape on Trial* (Routledge & Kegan Paul 1987) at 29.

121 Home Office, *Report of the Advisory Group on the Law of Rape Cmnd 6352* (1975) at 14.

122 Home Office, *Protecting The Public* (2002) at 5.

123 *Ibid* at 17.

brought to trial.”¹²⁴ Following a series of consultations and reports in the early 2000s, the *Sexual Offences Act 2003* (the 2003 Act) was enacted.¹²⁵ The Northern Ireland *Sexual Offences (Northern Ireland) Order 2008* followed this approach.

- 4.17 The honest belief defence was amended to require that the mistaken belief in consent be reasonable. The 2003 Act provides as follows:

“1 Rape

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.”

- 4.18 The 2003 Act replaces the primarily subjectivist test confirmed in *Morgan* and implements a so-called mixed test for honest belief that includes both objective and subjective elements. Now, in order to rely on a mistaken belief to exculpate, an accused’s mistaken belief must be:

- Honest (*subjective*); and
- reasonable (*objective*)
 - according to all the circumstances (*subjective*),
 - including any steps taken to ascertain consent (*objective*).

- 4.19 There is no longer any reference to “recklessness” as a form of mental element for rape under English law. The mental element of “no reasonable belief” encapsulates both recklessness and knowledge.

- 4.20 By requiring that the belief be reasonable in “all the circumstances” of the case, the 2003 Act raises the threshold of what belief will exculpate whilst still maintaining an element of subjectivity by looking at the belief in the context of the particular facts of the case. This mixed test thereby mitigates the possible harsh effects of a wholly objective test, while still holding the defendant accountable to the socially accepted standard of behaviour.¹²⁶ It requires the jury to consider any relevant characteristic of

¹²⁴ Home Office, *Protecting The Public* (2002) at 17.

¹²⁵ See Stevenson, Davies and Gunn, *Blackstone’s Guide to the Sexual Offences Act 2003* (Blackstone 2004).

¹²⁶ “When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law” (2013) 23(1) *Irish Criminal Law Journal* at 6.

the defendant that might affect his ability to understand whether the complainant was consenting, as well as the context in which the sexual intercourse occurred.¹²⁷

- 4.21 The requirement that the jury assess the reasonableness of the accused's belief with reference to any steps that the defendant took to ascertain consent has been supported as "embodying a communicative standard of consent".¹²⁸ The reasonableness test does not necessitate that the accused must have taken any specific steps, or bar an accused from relying on the defence where no steps were actually taken. However, it does state that where such steps have or have not been taken, the jury must take them into account when deciding whether the defendant's asserted belief in consent was reasonable.
- 4.22 A recent assessment of the 2003 Act states that the reasonable belief amendment has been accepted as clear, concise, and easy to apply.¹²⁹ Sjölin notes that few appeal cases have centred on the reasonable belief test, and that uncertainty concerning the meaning and standard of "reasonable" has not obstructed the operation of the test.¹³⁰
- 4.23 Nonetheless, the 2003 Act has been criticised. First, the concept of "reasonableness" can be problematic. What is reasonable to a juror will be influenced by his or her own biases.¹³¹ The socially accepted standard set by the reasonableness test may not be a very high standard to meet and, therefore, may not afford much protection to victims. This issue is compounded by a second one, namely, that in determining whether the defendant held a reasonable belief in consent, the jury must consider "all the circumstances". The purpose of this term was to ensure that any impairment of the accused would form part of the "circumstances" and hence be taken into account in assessing whether the belief was reasonable. While including characteristics of the accused that are not his fault in the consideration of what is reasonable is important in order to mitigate the harsh effects of a strictly objective test, Temkin and Ashworth have noted that "all the circumstances" could be interpreted so broadly that it could empty the reasonableness test of most of its content.¹³² The Scottish Law Commission, in its analysis of the honest belief defence, concluded that the phrase "having regard to all circumstances" effectively meant that the test amounted to the question "given the accused's attributes, including his belief systems, was his belief as to consent reasonable?"¹³³ This does not significantly differ from the subjective test.

127 Crown Prosecution Service, *Legal Guidance on Rape and Sexual Offences*. Available at: http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/

128 Cowan, "Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape" in Munro and Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007) at 62. See also Leahy "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* at 5.

129 Sjölin, "Ten Years On: Consent Under the Sexual Offences Act 2003" (2015) 79(1) *The Journal of Criminal Law* at 34.

130 *Ibid.*

131 Simester, Sullivan, Stark, Virgo and Spencer, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 6th ed (Bloomsbury 2016) at 488.

132 Temkin and Ashworth, "The sexual offences act 2003: (1) Rape, Sexual Assaults and the Problems of Consent" (2004) *Criminal Law Review* 328, at 328.

133 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (2007) at 56.

- 4.24 Research conducted by Finch and Munro supports the views that the looseness of the phrase “all the circumstances” is likely to be interpreted by jurors in a broad manner.¹³⁴ The authors conducted mock jury studies during which participants were asked to apply the reasonable belief defence to a case. Their research found that:

“The introduction of these wider circumstantial factors is problematic because it allows scope for juror reliance on inferences extrapolated from surrounding circumstances, even when those circumstances bore no necessary relevance to the evaluation of consent between the parties themselves. In addition, moreover, it generates an opportunity for the introduction into the jury room of a range of (ill-founded) views about ‘appropriate’ socio-sexual interaction, either on the basis that they are shared by jurors who are assessing the signals sent out by the complainant’s conduct, or on the basis that the jurors, while not sharing these views themselves, nonetheless consider that they may have been harboured by the defendant and so may be relevant to the question of his reasonableness.”¹³⁵

- 4.25 Carline and Gunby interviewed barristers in England who confirmed that in trials, “all of the circumstances” led to a re-examination of the woman’s behaviour including whether she was flirting, or attracted to the man, or being invited to the bedroom. They found that there was an expectation that the woman should actively demonstrate a lack of consent.¹³⁶ Overall, they concluded, it was not difficult to establish that a defendant’s belief was reasonable.¹³⁷
- 4.26 It should be noted that, in addition to England and Wales, many other common law jurisdictions require the mistaken belief in consent to be reasonable, such as Scotland,¹³⁸ Northern Ireland,¹³⁹ New Zealand,¹⁴⁰ Victoria,¹⁴¹ New South Wales,¹⁴² Queensland,¹⁴³ and Western Australia.¹⁴⁴

Canada

- 4.27 In 1982, the Canadian Criminal Code was reformed to abolish rape and it was replaced with 3 sexual assault offences. The sexual assaults governed by sections 271, 272 and 273 include rape. These sexual assaults are defined by the conduct or physical element only. Therefore, a mistaken belief in consent does not negate the

¹³⁴ Finch and Munro, “Breaking boundaries? Sexual consent in the jury room” (2006) 26(3) *Legal Studies* 303, at 317 – 318.

¹³⁵ *Ibid* at 318.

¹³⁶ Carline and Gunby, “‘How an Ordinary Jury Makes Sense of it is a Mystery’: Barristers’ Perspectives on Rape, Consent and the Sexual Offences Act 2003” (2011) 32(3) *Liverpool Law Review* 237 at 247.

¹³⁷ *Ibid* at 248.

¹³⁸ *Sexual Offences (Scotland) Act 2009*, section 1. See Scottish Law Commission, *Report on Rape and Other Sexual Offences* (2007).

¹³⁹ *The Sexual Offences (Northern Ireland) Order 2008*, article 5.

¹⁴⁰ *Crimes Act 1961*, section 128.

¹⁴¹ *Crimes Act 1958*, section 38(1).

¹⁴² *Crimes Act 1900*, section 61HA. The New South Wales Law Reform Commission are currently reviewing this provision. For further information and preliminary submissions, see NSW Government Law Reform Commission “Consent in relation to sexual offences” (2018). Available at: http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Consent.aspx.

¹⁴³ *Queensland Criminal Code*, sections 349 and 24.

¹⁴⁴ *Western Australia Criminal Code*, sections 325 and 24.

mental element of the offence in the same way an honest belief would in the Irish jurisdiction. It is a distinct defence that must meet the evidential burden.

- 4.28 Section 273.2 of the *Canadian Criminal Code* creates a statutory bar to reliance on the honest belief defence where the belief does not have an “air of reality” to it, and where it emanates from wilful blindness or recklessness. It also prohibits reliance on the defence where the accused did not take “reasonable steps” to ascertain consent. Section 273.2 of the *Criminal Code* provides that:

“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 the accused’s

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(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.”

- 4.29 The reasonable steps requirement is both subjective and objective. The steps must be reasonable, but they will be assessed in light of “the circumstances known to the accused at the time.” This aspect of the test emphasises the accused’s actual knowledge, as opposed to what he should have objectively known, thereby retaining a further element of subjectivity. Thus, in order to rely on a mistaken belief defence in Canada, an accused’s mistaken belief must be:

- Honest (*subjective*); and
- supported by “reasonable steps” (*objective*)
 - according to the circumstances known to the accused (*subjective*).

- 4.30 In *R v Park*,¹⁴⁵ the Canadian Supreme Court emphasised that consent must be positive, holding that “the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no”, but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying ‘yes’.”¹⁴⁶

- 4.31 The case of *R v Ewanchuk*¹⁴⁷ is the leading authority on sexual offences and consent in Canada. In this case, the Supreme Court unanimously held that there is no defence of implied consent in Canada.¹⁴⁸ The judgment affirmed the *Park* decision and articulated an affirmative consent standard that “only yes means yes”.¹⁴⁹ The *Ewanchuk* decision was welcomed for shifting the presumption in sexual assault law

¹⁴⁵ *R v Park* [1995] 2 SCR 836.

¹⁴⁶ *Ibid* at para. 39.

¹⁴⁷ *R. v Ewanchuk* [1999] SCJ No 10, [1999] 1 SCR 330.

¹⁴⁸ *Ibid* at 103.

¹⁴⁹ *Ibid* at para. 45.

from the position that women exist in a state of consent unless otherwise communicated, to a position whereby non-consent is the starting point until consent is proven.¹⁵⁰

- 4.32 As previously stated, in order to rely on the mistaken belief in consent defence, the asserted belief must have enough supporting evidence to give it an “air of reality”.¹⁵¹ This is comparable to the evidential burden in this jurisdiction. The belief must also not be borne of recklessness or wilful blindness.
- 4.33 Once it has been established that there is an air of reality to the defence and that the accused had not been reckless or wilfully blind as to whether the complainant had consented, section 273.2(b) requires the judge to determine if the accused, in the circumstances known to him at the time, took “reasonable steps” to ascertain whether the complainant was consenting. In order to rely on the defence, only a mistaken belief that the complainant *communicated* consent is acceptable, not merely a mistaken belief that the complainant was consenting.¹⁵² An accused will not be able to rely solely on the fact that the complainant did not say no.
- 4.34 By requiring “steps”, the behaviour of the accused is scrutinised. This shifts the attention away from the complainant and her actions. Craig argues that the Canadian law means “that what is relevant in establishing *mens rea* is an assessment of the actual interaction between the sexual actors involved and not an assessment of the accused’s potentially distorted perspective regarding the complainant’s sexual interest.”¹⁵³

Tasmania

- 4.35 The Australian state of Tasmania’s law on rape incorporates both “reasonable belief” and “reasonable steps”. In 2004, the Tasmanian Parliament introduced a statutory definition of consent and amended the “honest and reasonable” mistaken belief defence to require that the accused took reasonable steps to ascertain consent.
- 4.36 Section 14A of the *Criminal Code Act 1924* now provides:

“(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 or reasonable if the accused –

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or

150 Gotell, “Rethinking affirmative consent in Canadian sexual assault law: Neoliberal sexual subjects and risky women.” (2008) 41(4) *Akron Law Review* 865 at 869.

151 Section 265(4) of the *Canadian Criminal Code*.

152 *R v Ewanchuk* [1999] 1 SCR 330 at paras. 46 – 47.

153 Craig, *Sex and the Supremes: Towards A Legal Theory of Sexuality*, (2010) PhD thesis, Dalhousie University at 192. See also Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press 2012).

(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.”

4.37 The Tasmanian rape offence contains no mental element. However, the accused may raise a defence of honest and reasonable belief in consent but only if the belief was not borne of self-induced intoxication or recklessness, and if he took reasonable steps to ascertain consent.

4.38 This provision was inspired by the Canadian law.¹⁵⁴ However, while the *Canadian Criminal Code* does not require the belief in consent itself to be reasonable, Tasmanian law does. The test is therefore primarily objective. In order to succeed, the accused’s mistaken belief in consent must be:

- Honest (*subjective*);
- reasonable (*objective*); and
- supported by reasonable steps (*objective*)
 - according to the circumstances known to the accused (*subjective*).

4.39 Cockburn has described the 2004 reforms as amongst the most progressive in the common law world.¹⁵⁵ She states that the reforms were designed to ensure that the issue of consent to sexual conduct would be evaluated according to standards of mutuality and reciprocity.¹⁵⁶ However, her research found that the reforms are not being implemented as intended and that juries receive very little guidance concerning the honest belief defence.¹⁵⁷

Sweden

4.40 Prior to 2018, Swedish law on rape was established by proving that the complainant was compelled to have sexual intercourse with the accused by assault, violence or threat of criminal act, or where the accused exploited that a person was in a “helpless state”.¹⁵⁸ In 2014, the Swedish government initiated a review of its law on sexual offences.

4.41 In 2016, the Report of the Review Committee recommended redefining rape by reference to non-consent and adding a new negligent rape offence.¹⁵⁹ The Report concluded that an act committed by negligence is less serious than an act committed

¹⁵⁴ Cockburn, *The Impact Of Introducing An Affirmative Model Of Consent And Changes To The Defence Of Mistake In Tasmanian Rape Trials*, Doctoral dissertation, University of Tasmania (2012) at 109.

¹⁵⁵ *Ibid* at 5.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid* at 199–201.

¹⁵⁸ Criminal Code, Chapter 6, section 1 (Pre 2018 reform). See European Institute for Gender Equality, “Sweden – Rape”. Available at: <http://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu/sweden-rape> [Last accessed 24 July 2018].

¹⁵⁹ Report: A stronger protection for sexual integrity (2016) [*Ett starkare skydd för den sexuella integriteten*] at 271. Available at: <https://www.regeringen.se/contentassets/8216d40ecc814613bccb394b4b1dfa38/ett-starkare-skydd-for-den-sexuella-integriteten-sou-2016-60.pdf>

intentionally, and that it was important to distinguish them.¹⁶⁰ The recommendations in the report were welcomed, relating as to the proposed new crime of negligent rape. These recommendations were enacted by the Swedish Parliament in 2018.

- 4.42 The Swedish Department of Justice factsheet on the new sexual offences states that the introduction of the negligent rape offence will extend convictions to more situations and cover instances where the accused should have realised the risk that the complainant was not consenting, but proceeded with the sexual act notwithstanding.¹⁶¹ The final bill describes the test for negligent rape as “whether the person could and did do all the things necessary to determine whether consent was actually received”.¹⁶²

¹⁶⁰ *Ibid.*

¹⁶¹ Ministry of Justice, “Consent – the basic requirement of new sexual offences legislation” (2017). Available at: <https://www.government.se/498ee7/contentassets/ee1de9e9781046afb784f034565f32e9/consentthe-basic-requirement-of-new-sexual-offences-legislation>.

¹⁶² Global Legal Monitor “Sweden: Parliament Makes Lack of Consent the Basis for Rape Charges, Introduces Criminal Liability for Negligent Sexual Assault” 3 July 2018. Available at <http://www.loc.gov/law/foreign-news/article/sweden-parliament-makes-lack-of-consent-the-basis-for-rape-charges-introduces-criminal-liability-for-negligent-sexual-assault/>. See Ministry of Justice “New Sexual Crime Legislation Based on Consent” [*Proposition Prop. 2017/18:117: En ny sexualbrottslagstiftning byggd på frivillighet*] Available at <https://www.regeringen.se/4950e9/contentassets/20977a5e47ab41bd89e4ff609208bfa8/en-ny-sexualbrottslagstiftning-byggd-pa-frivillighet-prop.-201718177>.

Table 1 Comparison of laws on mistaken belief in consent in rape in selected jurisdictions

Jurisdiction	Law	Provision
England and Wales	<i>Sexual Offences Act 2003</i> , sections 1, 74, 75, 76	<p>1 Rape</p> <p>(1) A person (A) commits an offence if—</p> <ul style="list-style-type: none"> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents. <p>(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.”</p> <p>74 “Consent”</p> <p>For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.</p> <p>75 Evidential presumptions about consent</p> <p>(1) If in proceedings for an offence to which this section applies it is proved—</p> <ul style="list-style-type: none"> (a) that the defendant did the relevant act, (b) that any of the circumstances specified in subsection (2) existed, and (c) that the defendant knew that those circumstances existed, <p>the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.</p> <p>(2) The circumstances are that—</p> <ul style="list-style-type: none"> (a) any person was, at the time of the relevant act or immediately before it began, using violence against the

complainant or causing the complainant to fear that immediate violence would be used against him;

- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
- (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
- (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

76 Conclusive presumptions about consent

(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—

- (a) that the complainant did not consent to the relevant act, and
- (b) that the defendant did not believe that the complainant consented to the relevant act.

(2) The circumstances are that—

- (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

		(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.
Northern Ireland	<i>Sexual Offences (Northern Ireland) Order 2008</i> , article 5	<p>Rape</p> <p>5.—</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,</p> <p>(b) B does not consent to the penetration, and</p> <p>(c) A does not reasonably believe that B consents.</p> <p>(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.</p> <p>(3) Articles 9 and 10 apply to an offence under this Article.</p> <p>(4) A person guilty of an offence under this Article is liable, on conviction on indictment, to imprisonment for life.</p> <p>(5) Any reference to rape in a statutory provision shall be construed in accordance with paragraph (1).</p> <p>(6) The common law offence of rape is abolished.</p> <p>Evidential presumptions about consent</p> <p>9.—(1) If in proceedings for an offence to which this Article applies it is proved—</p> <p>(a) that the defendant did the relevant act,</p> <p>(b) that any of the circumstances specified in paragraph (2) existed, and</p> <p>(c) that the defendant knew that those circumstances existed,</p> <p>the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.</p>

(2) The circumstances are that—

- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
- (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
- (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In paragraph (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began

Conclusive presumptions about consent

10.—(1) If in proceedings for an offence to which this Article applies it is proved that the defendant did the relevant act and that any of the circumstances specified in paragraph (2) existed, it is to be conclusively presumed—

- (a) that the complainant did not consent to the relevant act, and
- (b) that the defendant did not believe that the complainant consented to the relevant act.

		<p>(2) The circumstances are—</p> <ul style="list-style-type: none"> (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.
Scotland	<i>Sexual Offences (Scotland) Act 2009</i> , sections 1, 16	<p>1 Rape</p> <p>(1) If a person (“A”), with A’s penis—</p> <ul style="list-style-type: none"> (a) without another person (“B”) consenting, and (b) without any reasonable belief that B consents, <p>penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.</p> <p>(2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3).</p> <p>(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.</p> <p>(4) In this Act—</p> <p>“penis” includes a surgically constructed penis if it forms part of A, having been created in the course of surgical treatment, and</p> <p>“vagina” includes—</p> <ul style="list-style-type: none"> (a) the vulva, and (b) a surgically constructed vagina (together with any surgically constructed vulva), if it forms part of B, having been created in the course of such treatment. <p>12 Meaning of “consent” and related expressions</p>

In Parts 1 and 3, "consent" means free agreement (and related expressions are to be construed accordingly).

13 Circumstances in which conduct takes place without free agreement

(1) For the purposes of section 12, but without prejudice to the generality of that section, free agreement to conduct is absent in the circumstances set out in subsection (2).

(2) Those circumstances are—

- (a) where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it,
- (b) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,
- (c) where B agrees or submits to the conduct because B is unlawfully detained by A,
- (d) where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct,
- (e) where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B, or
- (f) where the only expression or indication of agreement to the conduct is from a person other than B.

(3) References in this section to A and to B are to be construed in accordance with sections 1 to 9.

14 Consent: capacity while asleep or unconscious

(1) This section applies in relation to sections 1 to 9.

(2) A person is incapable, while asleep or unconscious, of consenting to any conduct.

15 Consent: scope and withdrawal

(1) This section applies in relation to sections 1 to 9.

		<p>(2) Consent to conduct does not of itself imply consent to any other conduct.</p> <p>(3) Consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct.</p> <p>(4) If the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.</p> <p>16 Reasonable belief</p> <p>In determining, for the purposes of Part 1, whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were.</p>
New Zealand	<i>Crimes Act 1961</i> , section 128	<p>128 Sexual violation defined</p> <p>(1) Sexual violation is the act of a person who—</p> <ul style="list-style-type: none"> (a) rapes another person; or (b) has unlawful sexual connection with another person. <p>(2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—</p> <ul style="list-style-type: none"> (a) without person B's consent to the connection; and (b) without believing on reasonable grounds that person B consents to the connection. <p>(3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B—</p> <ul style="list-style-type: none"> (a) without person B's consent to the connection; and (b) without believing on reasonable grounds that person B consents to the connection. <p>(4) One person may be convicted of the sexual violation of another person at a time when they were married to each other.</p>

Victoria	<i>Crimes Act 1958</i> , sections 38.	<p>38 Rape</p> <p>(1) A person (A) commits an offence if—</p> <ul style="list-style-type: none"> (a) A intentionally sexually penetrates another person (B); and (b) B does not consent to the penetration; and (c) A does not reasonably believe that B consents to the penetration. <p>(2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).</p>
New South Wales	<i>Crimes Act 1900</i> , section 61HA	<p>61HA Consent In Relation To Sexual Assault Offences</p> <p>(1) Offences to which section applies This section applies for the purposes of the offences, or attempts to commit the offences, under sections 61I, 61J and 61JA.</p> <p>(2) Meaning of consent A person "consents" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.</p> <p>(3) Knowledge about consent A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:</p> <ul style="list-style-type: none"> (a) the person knows that the other person does not consent to the sexual intercourse, or (b) the person is reckless as to whether the other person consents to the sexual intercourse, or (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse. <p>For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:</p> <ul style="list-style-type: none"> (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but (e) not including any self-induced intoxication of the person.

(4) Negation of consent A person does not consent to sexual intercourse:

- (a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
- (c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- (d) if the person consents to the sexual intercourse because the person is unlawfully detained.

(5) A person who consents to sexual intercourse with another person:

- (a) under a mistaken belief as to the identity of the other person, or
- (b) under a mistaken belief that the other person is married to the person, or
- (c) under a mistaken belief that the sexual intercourse is for health or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means),

does not consent to the sexual intercourse. For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.

(6) The grounds on which it may be established that a person does not consent to sexual intercourse include:

- (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or
- (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or

		<p>(c) if the person has sexual intercourse because of the abuse of a position of authority or trust.</p> <p>(7) A <i>person</i> who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.</p> <p>(8) This section does not limit the grounds on which it may be established that a <i>person</i> does not consent to sexual intercourse.</p>
Queensland	<i>Criminal Code</i> , sections 349 and 24.	<p>24 Mistake Of Fact</p> <p>(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.</p> <p>(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.</p> <p>349 Rape</p> <p>(1) Any person who rapes another person is guilty of a crime. Penalty: Maximum penalty—life imprisonment.</p> <p>(2) A person rapes another person if—</p> <ul style="list-style-type: none"> (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. <p>(3) For this section, a child under the age of 12 years is incapable of giving consent.</p> <p>(4) The Penalties and Sentences Act 1992, section 161Q states a circumstance of aggravation for an offence against this section.</p> <p>(5) An indictment charging an offence against this section with the circumstance of aggravation stated in the Penalties and</p>

		Sentences Act 1992, section 161Q may not be presented without the consent of a Crown Law Officer.
Western Australia	<i>Criminal Code</i> , sections 24 and 325	<p>24 Mistake of fact</p> <p>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 he believed to exist.</p> <p>The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.</p> <p>325 Sexual penetration without consent</p> <p>(1) A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.</p>
Canada	<i>Criminal Code</i> , sections 265(1), (2) and 273(1), (2)	<p>Assault</p> <p>265 (1) A person commits an assault when</p> <ul style="list-style-type: none"> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs. <p>Application</p> <p>(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.</p> <p>Meaning of consent</p> <p>273.1 (1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273,</p>

		<p>the voluntary agreement of the complainant to engage in the sexual activity in question.</p> <p>Where no consent obtained</p> <p>(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where</p> <ul style="list-style-type: none"> (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity. <p>Subsection (2) not limiting</p> <p>(1) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.</p> <p>Where belief in consent not a defence</p> <p>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</p> <ul style="list-style-type: none"> (a) the accused's belief arose from the accused's <ul style="list-style-type: none"> (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (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.
Tasmania	<i>Criminal Code Act 1924</i> , sections 14A, 185	<p>14A Mistake as to consent in certain sexual offences</p> <p>(1) In proceedings for an offence against section 124, 125B, 127 or 185, a mistaken belief by the</p>

accused as to the existence of consent is not honest or reasonable if the accused –

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

(2) In proceedings for an offence of attempting to commit an offence against section 124 , 125B or 185 , absence of intention to commit the attempted offence is not a defence if it is established that the absence of intent was due to –

- (a) self-induced intoxication; or
- (b) a failure to take reasonable steps in the circumstances known to the accused at the time of the offence to ascertain that the complainant would have consented to the act constituting the offence against section 124 , 125B or 185.

185 Rape

(1) Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.