

## **Sexual offences: consent, knowledge and belief**

This [Report on Knowledge or Belief Concerning Consent in Rape Law \(LRC 122-2019\)](#) follows on from the Commission's 2018 [Issues Paper of the same name \(LRC IP 15-2018\)](#).

The project arose from a request to the Commission made in April 2017 by the Attorney General, in accordance with section 4(2)(c) of the [Law Reform Commission Act 1975](#) where the Commission was asked 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 O'R* [2016] IESC 64.

The [2018 Issues Paper](#) sought views on 4 issues relating to the mental element of rape, and also discussed briefly the separate but related issue of self-induced intoxication, asking if it should be expressly stated in legislation that self-induced intoxication is not a defence to a charge of rape.

In the final report, which contains 11 recommendations, the Commission concluded that the main arguments for the current law are outweighed by the arguments against, and recommended that the current primarily subjective test should be replaced. The recommended reforms involved the following:

First, the fault or mental element of the rape offence in section 2 of the 1981 Act would be reformed by adding that the accused man commits rape if, at the time of the sexual intercourse, he “does not reasonably believe” that the woman was consenting. This is an objective test, and would be in addition to the current two situations under the 1981 Act, that is, where the accused man knows that the woman is not consenting or is subjectively reckless as to whether she is consenting.

The Commission's second proposed reform is that, where the question of reasonable belief arises in a rape trial, the jury is to have regard to a specific list of circumstances related to the accused's personal capacity, and only those circumstances. These are: any physical, mental or intellectual disability of the man, any mental illness of his, and his age and maturity. The Commission emphasised that these factors are only to be considered relevant where any of them are such that the man lacked the capacity to understand whether the woman was consenting. Requiring the consideration of these circumstances introduces a subjective element to the test.

The Commission's third proposed reform is that, where the question of reasonable belief arises, the jury is also to have regard to the steps, if any, taken by the accused man to ascertain whether the woman consented to the intercourse.

The Commission also recommended that the current law on self-induced intoxication, in which it is not a defence to a charge of rape where the intoxication means that the man lacked the capacity to know whether the woman was consenting, should be retained.

In summary, the Commission's proposed reforms involve moving from the current primarily subjective test to a primarily objective test, having regard to certain subjective elements. It is therefore a mixed test.

The Report also addresses the question as to whether a new lesser offence of “gross negligence rape”, which has been enacted in 2018 in Sweden and Iceland, should be introduced. The Commission agreed with the views of consultees and with the analysis in the Gillen Review, and concluded that it should not be introduced.

<b>Draft Legislation in Report</b>
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A Draft Criminal Law (Rape) (Amendment) Bill is contained within this report.

<b>Information on Implementation</b>
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