
LAW REFORM COMMISSION

REPORT

KNOWLEDGE OR BELIEF CONCERNING CONSENT IN RAPE LAW

(LRC 122-2019)



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

Report

Knowledge or Belief Concerning Consent in Rape Law

(LRC 122 – 2019)

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OVERVIEW AND EXECUTIVE SUMMARY

1. This Report, which follows the publication of the Commission's *Issues Paper on Knowledge or Belief Concerning Consent in Rape Law*,¹ arises from a request made by the then Attorney General in April 2017 under section 4(2)(c) of the *Law Reform Commission Act 1975*, which 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*."²
2. Section 2(1) of the *Criminal Law (Rape) Act 1981* (the 1981 Act)³ 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, which 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, which is the fault or mental element of the offence (the *mens rea*).
3. Section 2(2) of the 1981 Act adds that if, at a trial for a rape offence, the jury has to consider "whether the man believed that a woman was consenting to sexual intercourse" 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 is based on the wording used in the England & Wales *Sexual Offences (Amendment) Act 1976* and the Northern Ireland *Sexual Offences (Northern Ireland) Order 1978* which had, in turn, put into statutory form the test set out in 1975 by the UK House of Lords in *DPP v Morgan*.⁴ The *Morgan* test was that if the accused "honestly believed" the woman was consenting, even though a reasonable person would not have so 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.

¹ *Issues Paper on Knowledge or Belief Concerning Consent in Rape Law* (LRC IP 15-2018).

² *The People (DPP) v C O'R* [2016] IESC 64, [2016] 3 IR 322.

³ In this Report, "the 1981 Act" shall be understood to mean the 1981 Act *as amended*.

⁴ *DPP v Morgan* [1975] UKHL 3, [1976] AC 182.

5. In *The People (DPP) v C O'R*⁵ in 2016, the Supreme Court confirmed that the test to be applied under section 2 of the 1981 Act is primarily subjective. 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, mistake that the woman was consenting is a defence to rape."⁶ The Supreme Court also added, however, that the accused's "alleged belief in consent must be genuinely held."⁷ 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."⁸
6. The Attorney General's request asked 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. The request arose 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* (the 2017 Act). The 2017 Act made significant amendments to the general law on rape and other sexual assault offences. The Oireachtas debated whether to include in the 2017 Act reform of the law concerning knowledge or belief under section 2 of the 1981 Act, but it was ultimately agreed that this matter would be referred to the Commission for further analysis.
7. Against that background, the Commission considers in this Report the impact on the Attorney General's request of the provisions in the 2017 Act concerning the general law on consent in rape law. The Commission has also considered developments in other countries concerning the specific question of the test for determining the state of knowledge or belief of the accused in a rape trial concerning consent. Such a comparative review is an invariable practice of the Commission in carrying out its research and making proposals for reform.
8. Following the publication in 2018 of the Issues Paper on this project, the Commission received many submissions from individuals and bodies with an interest in this area, and we very much appreciate those contributions. They greatly assisted our further reflection and analysis on the complex issues that the Attorney General's request has raised, and we discuss those submissions in the detailed content of this Report.

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

⁶ *Ibid*, at para. 51.

⁷ *Ibid*.

⁸ *Ibid*, at para. 57.

9. The Commission is fully aware of the wider social setting in which the Attorney General's request arises, not only globally where sexual violence and the law's response has been widely debated, but also in Northern Ireland and this State. Therefore, in **Chapter 1**, the Commission discusses aspects of that wider setting. This includes the existing data in Ireland on the prevalence of sexual violence, notably in the 2002 Report *Sexual Abuse and Violence in Ireland* (the SAVI Report). The Commission notes the Government decision in 2018 to support a new Sexual Violence Survey on the prevalence of sexual violence in Ireland. The SAVI Report, and comparable work by many bodies engaged in this area, have also pointed to a high attrition rate in connection with sexual violence (including rape), that is, a very low percentage of reporting to An Garda Síochána and subsequent criminal trials. While the conviction rates in the trials that occur are high, the attrition rate is a significant issue that remains to be addressed.
10. The Commission also notes the establishment by the Department of Justice and Equality of an expert working group to review the investigation and prosecution of sexual offences. The establishment of that working group mirrored the establishment of a similar review of the law in Northern Ireland, carried out by Sir John Gillen, following the outcome of a widely-publicised rape trial in Belfast.
11. The Commission also discusses in **Chapter 1** the extent to which rape myths and misconceptions have an impact on the criminal justice process. The Commission acknowledges that the impact of rape myths and misconceptions may be of more direct relevance to the review of the investigation and prosecution of sexual offences being carried out by the Department of Justice and Equality's expert working group. In particular, they may be relevant to any resulting recommendations for procedural reform that emerge from the group's report, as opposed to the question of the knowledge or belief of the accused in a rape trial. The Commission considers, however, that since the current subjective honest belief test may relate in some respects to some myths and misconceptions, it is appropriate to consider them in the context of the questions that arise in the Attorney General's request to the Commission.
12. In **Chapter 2**, the Commission examines the current law on rape in section 2 of the 1981 Act. This examination distinguishes between the conduct or physical elements of the offences (the *actus reus*) and the fault or mental elements (the *mens rea*). In light of the clear scope of the Attorney General's request, the Commission focuses on the fault or mental element of the offence, which refers to the knowledge or belief of the accused concerning consent. The Commission then discusses the arguments for and against the current law, which limits the fault or mental elements to situations where the accused man either has actual knowledge of lack of consent or is subjectively reckless as to whether there is consent. The Commission concludes that the main arguments for the current law are outweighed by the arguments against, and

therefore the Commission recommends that the current primarily subjective test should be replaced.

13. In **Chapter 3**, the Commission proceeds to discuss what test should replace the current primarily subjective test. In this context, the Commission notes that a more objective test has been enacted in a number of countries that previously applied the primarily subjective test set out in the *Morgan* case, including in all parts of the UK itself. Having reviewed these developments, the Commission concludes and recommends that the current law should be replaced with a primarily objective test of reasonable knowledge or belief concerning consent, taking account of some aspects of the accused's personal capacity and any steps taken by the accused to ascertain consent.
14. The Commission's recommended reforms involve 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.
15. 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 emphasises 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.
16. The Commission's third proposed reform is that, where the question of reasonable belief arises, the jury is also to have regard to any steps taken by the accused man to ascertain whether the woman consented to the intercourse.
17. In **Chapter 3**, the Commission also recommends 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.
18. 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 first element, "does not reasonably believe", is objective. The second element, for the jury to have regard to

certain aspects of the accused's personal capacity, is subjective. The third element, for the jury to have regard to any steps that the accused may have taken, is also subjective.

19. **Chapter 4** addresses a question raised in the Issues Paper 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 overwhelming majority of consultees were strongly opposed to such an offence, as was the Gillen Review in Northern Ireland which also considered this matter. The Commission agrees with the views of consultees and with the analysis in the Gillen Review, and concludes that it should not be introduced. Such an offence would be completely inconsistent with the recommendations for reform made in Chapters 2 and 3.
20. **Chapter 4** also notes some proposals made by consultees for reform of the general law on sexual offences. These fall outside the scope of the Attorney General's request, but will be addressed by the Commission in a wide-ranging project in its Fifth Programme of Law Reform that will review the law on sexual offences, and on which the Commission will begin work immediately after the publication of this Report.
21. **Appendix A** contains a summary of the recommendations in the Report.
22. **Appendix B** contains a *Draft Criminal Law (Rape) (Amendment) Bill* intended to implement the recommendations in the Report.

CHAPTER 1 CONTEXTUAL BACKGROUND

1. Introduction

- [1.1] The Attorney General's request involves the Commission examining the fault or mental element (the *mens rea*) of the offence of rape, in particular the current primarily subjective test of honest belief as to consent currently set out in section 2 of the *Criminal Law (Rape) Act 1981* (the 1981 Act). As noted below in Chapter 2, the request came against the immediate background of the wide-ranging reforms of sexual offences enacted in the *Criminal Law (Sexual Offences) Act 2017* (the 2017 Act). During the Oireachtas debates on the 2017 Act, there was considerable discussion of the policy and societal context against which the reforms in the 2017 Act were being considered. While the Attorney General's request is limited to a narrow aspect of the law on sexual offences, indeed to a narrow aspect of the law of rape, it is appropriate for the Commission to consider the context within which that request is to be examined.
- [1.2] That context includes, of course, the significant reforms enacted in the 2017 Act itself, so that the Commission's review of section 2 of the 1981 Act, discussed in Chapter 2 below, has taken account, where relevant, of the reforms enacted by the Oireachtas in the 2017 Act. More generally, the Commission has also taken into account, again where relevant, the wider context against which the Attorney General's request arises.

2. Relevance of background context to other research and to this Report

- [1.3] The wider context includes the widespread debate in recent years, nationally and internationally, about the prevalence of sexual violence and the response of the criminal justice process to that reality. In this State, and in Northern Ireland, this has included the need to examine the consequences of historical sexual abuse. This is not, however, merely a matter of historical enquiry, though that has been necessary. The issue of contemporary sexual violence also presents challenges to our substantive law and to the procedural pre-trial and trial stages of the criminal justice system. This includes the prevalence rate of sexual violence in Ireland, the high attrition rate that results in a low percentage of cases coming to trial and what are usually referred to as rape myths and misconceptions.
- [1.4] The Commission is also conscious in this respect of the establishment by the Department of Justice and Equality of an expert working group to review the

investigation and prosecution of sexual offences.¹ The establishment of that working group mirrored the establishment of a similar review of the law in Northern Ireland, carried out by Sir John Gillen former judge of the Northern Ireland Court of Appeal (the Gillen Review),² which followed a widely-publicised rape trial in Belfast. The Commission notes that some of the potential reforms to the Northern Irish justice system discussed in the Gillen Review have already been implemented in Ireland (for example, the prohibition on the general public attending rape trial hearings³).

[1.5] It is likely that issues such as the prevalence of sexual violence, attrition rates and rape myths and misconceptions will be of particular significance to the deliberations of the expert working group, as they were for the Gillen Review in Northern Ireland. This is clear from its terms of reference: to review the adequacy of the mechanisms available in law and practice relating to the protection of vulnerable witnesses in the investigation and prosecution of sexual offences, including in particular:

- access to specialist training for An Garda Síochána, members of the judiciary and legal professionals dealing with sexual offences;
- practical supports for vulnerable witnesses through the reporting, investigation and trial processes;
- provision of additional legal supports to witnesses during the court processes;
 - measures in place to protect vulnerable witnesses during evidence, including the use of measures such as pre-recorded evidence or video-link;
 - the causes of delay in sexual offence trials, and the effect of delay upon vulnerable witnesses;
 - the use of pre-trial hearings to determine evidential issues including conflicts of evidence and sexual experience evidence;
 - provision for restrictions on public attendance at, and media reporting on, trials of sexual offences; and
- such other relevant issues that may arise during the course of the review process.

¹ On the establishment of the expert working group and its terms of reference, see the Department of Justice's press release: <http://www.justice.ie/en/JELR/Pages/PR18000279>.

² Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019), available at: <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>.

³ Section 11 of the *Criminal Law (Rape) (Amendment) Act 1990* (exclusion of the general public, while allowing media attendance and reporting).

[1.6] It may also be the case that other matters concerning reform of the law on sexual offences that fall outside the terms of reference of the expert working group could require separate consideration. In that respect, the Commission's Fifth Programme of Law Reform includes a wide-ranging project on the review and consolidation of the law on sexual offences,⁴ which may address matters outside the terms of reference of the expert group, notably in terms of the substantive law of sexual offences. The Commission intends to proceed with its work on that Fifth Programme project immediately after completion of this Report on the Attorney General's request.

[1.7] Without prejudice to the work of the expert group and the scope of the Commission's pending Fifth Programme project, it is nonetheless important that the Commission takes account of the background context in approaching the specific issue concerning the fault or mental element of the rape offence in section 2 of the 1981 Act. When, in 2000, the English Home Office reviewed the primarily subjective "honest belief" defence that applied at that time in the law of rape in England and Wales (and the rest of the UK), and which currently applies in Ireland under the 1981 Act, it noted the competing issues of law and policy that arose where reform of the test was being considered. The review commented:

"The law at present does not require the reasonableness of a defendant's belief to be tested (although other tests are possible) so making it possible for a defendant to claim he held a completely irrational but honest belief in the consent of the woman: if this is upheld, he must be acquitted. In terms of subjectivist legal principle this [the honest belief defence] is right. In terms of social policy, it makes some very large assumptions. By allowing the belief of the accused to be paramount, the law risks saying to a victim/survivor who feels violated and betrayed that they were not really the victim of crime, and that what they thought, said or did was immaterial. It is seen to validate male assumptions that they can assume consent without asking. It is an issue that utterly divides opinion, and divided those of us undertaking the review."⁵

[1.8] The Commission agrees that this passage captures the challenge involved in the Commission's review of the law in this Report. On the one hand, the current primarily subjective test of "honest belief" as to consent can be seen as consistent

⁴ See *Report on Fifth Programme of Law Reform* (LRC 120-2019), Project 5.

⁵ Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences Volume 1* (2000), at 23.

with the general criminal law principle that often, though not invariably, begins with asking whether the accused subjectively intended to commit the offence in question, or was subjectively reckless about whether, in the case of rape, there was consent. On the other hand, the current honest belief test may validate the assumption held (wrongly) by (some) men that they can assume consent without asking. To that extent, as the English Home Office review noted, the current law may be seen to reinforce a rape myth or misconception. For this reason, it is appropriate to consider these issues in the context of the questions that arise in the Attorney General's request.

3. Prevalence of sexual violence, and attrition rates

- [1.9] Several studies in Ireland have identified rape and sexual violence more generally as a source of fear, psychological distress and physical injury for many women.⁶ Rape and sexual violence can cause significant physical injury and psychological injury to complainants. Society is also harmed by rape and sexual violence because it often limits people's lives and freedom.⁷ Studies internationally have shown that rape can impose significant financial costs on society.⁸ The Supreme Court has stated that the crime of rape "is about the right of a woman to be protected against a gross violation of her mental and physical integrity."⁹
- [1.10] The most recent substantial survey conducted in Ireland of the prevalence of sexual violence in Ireland was the 2002 Report *Sexual Abuse and Violence in Ireland* (the SAVI Report).¹⁰ The SAVI Report involved a survey of nearly 3,000 randomly selected adults in 2002, and it found that 42% of women had experienced some form of sexual abuse in their lifetime, and that over 6% of women had experienced rape.¹¹
- [1.11] For many years, including during the Oireachtas debates on the 2017 Act, considerable criticism has been voiced that there has been no study conducted since 2002, comparable to the SAVI Report, on the prevalence of sexual violence in Ireland. This significant gap in knowledge will, however, be addressed in the

⁶ Dublin Rape Crisis Centre and School of Law, Trinity College Dublin, *The Legal Process and Victims of Rape* (Dublin Rape Crisis Centre, 1998), at 25.

⁷ *Ibid*, at 28.

⁸ Dubourg, Hamed and Thorns, *The Economic and Social Costs of Crime Against Individuals and Households 2003/04* (English Home Office, 2005).

⁹ *The People (DPP) v C O'R* [2016] IESC 64, at para 47; [2016] 3 IR 322, at para. 53.

¹⁰ McGee, Garavan, de Barra, Byrne and Conroy, *The SAVI Report: Sexual Abuse and Violence in Ireland* (Liffey Press 2002). The Report was carried out by the Health Services Research Centre, Department of Psychology at the Royal College of Surgeons in Ireland, and was funded primarily by the Department of Health and the Department of Justice and Equality.

¹¹ *Ibid*, at 344.

coming years. In November 2018, the Minister for Justice and Equality announced that the Government had approved the funding of a Sexual Violence Survey, which will be conducted under the auspices of the Central Statistics Office over a 5 year period, including a full pilot survey in 2020.¹²

- [1.12] Pending the findings of this new Sexual Violence Survey, the SAVI Report remains the most up to date and complete survey of its kind conducted in Ireland. Other more recent surveys provide, nonetheless, similar information. In a 2014 EU-wide survey undertaken by the European Union Agency for Fundamental Rights (FRA), 8% of Irish women surveyed stated that they had experienced sexual violence since the age of 15, compared with the EU average of 11%.¹³ Whether by reference to the SAVI Report data or the FRA survey, it is clear that sexual violence against women is a widespread and serious problem affecting a large proportion of the population.
- [1.13] While examining the incidence of sexual violence it is necessary to acknowledge the existence of high attrition rates throughout the process. The SAVI Report found that only about 7% of sexual offences were reported to An Garda Síochána, with a higher rate of 12% being reported to a counsellor.¹⁴ In a 2009 report that included Ireland¹⁵, the authors found that, in nearly all of the jurisdictions studied, the number of rape cases reported to the police had generally increased over time, but the number of prosecutions had not increased by the same proportion.¹⁶
- [1.14] The Commission is aware, from the submissions received during the consultative process after the publication of the Issues Paper (and also from submissions received as part of the preparation of its Fifth Programme of Law Reform¹⁷), that this attrition rate remains a significant problem: a high proportion of sexual assaults are simply not reported to the criminal justice authorities. It may be open to question whether the issue of attrition rates would be addressed by any reform that arises from this Report. Indeed, as noted above, it may be that reforms of

¹² Dáil Éireann Debates, 16 May 2019, Written Question No.16 (Sexual Offences Data), available at: https://www.oireachtas.ie/en/debates/question/2019-05-16/16/#pq_16.

¹³ *Violence Against Women: an EU-wide Survey* (European Union Agency for Fundamental Rights, 2014).

¹⁴ McGee, Garavan, de Barra, Byrne and Conroy, *The SAVI Report: Sexual Abuse and Violence in Ireland* (Liffey Press 2002), at 149.

¹⁵ Corr, O'Mahoney, Lovett and Kelly, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases in Eleven Countries. Country Briefing: Ireland* (Child & Woman Abuse Studies Unit, 2009).

¹⁶ *Ibid*, at 3.

¹⁷ As noted above, the Commission's Fifth Programme of Law Reform, which was approved by Government in March 2019 in accordance with the *Law Reform Commission Act 1975*, includes a project on the review and consolidation of the law on sexual offences: see *Report on Fifth Programme of Law Reform* (LRC 120-2019), Project 5.

procedural matters at the pre-trial and trial stages of the criminal justice process would be of greater significance to the deliberations of the Department of Justice and Equality's expert working group to review the investigation and prosecution of sexual offences.

- [1.15] Healy, in a wide-ranging literature review published in October 2019, referred to 20 studies that explored best practices concerning complainants of sexual violence. The research suggested that certain practices may help to improve their experiences of the criminal justice system, including the provision of: (a) high-quality information and supportive treatment, (b) coordinated, holistic and multi-disciplinary responses, (c) advocacy to ensure that complainant's rights are respected and their needs are met and (d) special measures in the courtroom.¹⁸ It is likely that this review will assist in the development of policy and associated legislative reform of criminal justice procedure in the future.
- [1.16] It should also be noted that in recent years, the rate of conviction for rape offences that result in a trial has been increasing. The 2017 Annual Report of the Office of the Director of Public Prosecutions¹⁹ showed that out of the 114 rape cases prosecuted in 2016, 17 resulted in conviction by the jury, 17 led to convictions on a guilty plea, 12 were convicted of a lesser charge, 10 were acquitted by the jury, and 50 were classified as "for hearing", meaning that the verdict was not yet recorded at the time of that Annual Report. Of 56 rape cases finalised in 2016, 82% resulted in convictions. In 2015, this figure was 79%, and in 2014, 68%.²⁰ While these data indicate an increased conviction rate, the Commission acknowledges that the attrition rate remains a significant matter that remains to be addressed.

4. Myths and misconceptions surrounding rape

- [1.17] While as noted above the prevalence of rape and sexual violence is significant, a number of myths and stereotypes surrounding rape exist. It has been said that "[t]here is probably no other criminal offence that is as intimately related to broader social attitudes and evaluations of the complainant's conduct as sexual assault."²¹ Some of these cultural misconceptions are often referred to as rape myths, defined as "prejudicial, stereotyped, or false beliefs about rape, rape victims,

¹⁸ Healy, *Exploring Victims' Interactions with the Criminal Justice System: A Literature Review* (Department of Justice and Equality, October 2019), at 69, available at: [http://www.justice.ie/en/JELR/Victim Interactions with the Criminal Justice System.pdf/Files/Victim Interactions with the Criminal Justice System.pdf](http://www.justice.ie/en/JELR/Victim%20Interactions%20with%20the%20Criminal%20Justice%20System.pdf/Files/Victim%20Interactions%20with%20the%20Criminal%20Justice%20System.pdf).

¹⁹ Office of the Director of Public Prosecutions, *Annual Report 2017*, at 28.

²⁰ *Ibid*, at 30.

²¹ Temkin and Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008), at 33.

and rapists".²² Research seems to indicate that beliefs in rape myths tend to be held (a) by men more so than women, (b) by older people more so than younger people, and (c) by people who generally hold misogynistic beliefs.²³

- [1.18] The 2019 Gillen Review in Northern Ireland noted how the "safety myth" theory (a mind-set that the world is inherently a safe place and that if negative things happen to people it must at least partially be their own fault) may be the root cause of many of these assumptions. Blaming the conduct of the complainant serves a psychological purpose: reinforcing an observer's own personal safety and the safety of his or her family.²⁴ The Gillen Review also noted how even rape complainants themselves might be influenced by rape myths and, for example, blame themselves for not resisting their attacker. This in turn might lead to a complainant refusing to label her experience as rape and not coming forward to the relevant authorities.²⁵ This "safety myth" phenomenon tends to manifest in attitudes that focus on the complainant's behaviour as the root cause of sexual assaults (including rape), such as what the woman was wearing and whether or not she was drinking at the time of the assault.

(a) Focus on complainant's behaviour

- [1.19] The 2002 SAVI Report found that 29% of respondents thought that women who dressed provocatively were inviting rape.²⁶ A more recent 2016 Eurobarometer poll indicated that 21% of Irish respondents thought that having sexual intercourse without consent might be acceptable in certain situations. 9% of the Irish respondents said that intercourse without consent may be justified if a person voluntarily went home with someone, for example after a party or date. 9% of Irish respondents stated that sexual intercourse without consent may be justified if the person had been wearing revealing, provocative or sexy clothing. 7% of the Irish participants stated that sexual intercourse without consent may be justified if the person is out walking alone at night.²⁷
- [1.20] While the Eurobarometer survey represents a more recent source of opinion than the SAVI Report, the Commission notes that no definition of consent was provided

²² Burt, "Cultural myths and supports for rape" (1980) 38(2) *Journal of Personality and Social Psychology* 217, at 217.

²³ Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019), at 196.

²⁴ *Ibid*, at 195.

²⁵ *Ibid*, at 196-197.

²⁶ McGee, Garavan, de Barra, Byrne and Conroy, *The SAVI Report: Sexual Abuse and Violence in Ireland* (Liffey Press 2002), at 158.

²⁷ European Commission, *Special Eurobarometer 449: Report on Gender-based Violence* (2016) T23.

to interviewees. As such, there are questions as to whether the respondents understood consent to mean voluntary agreement, which reflected the legal position at the time the survey was conducted,²⁸ or a lack of resistance, which could reflect some of the myths and misconceptions around rape. In addition, of relevance to this Report, it is not clear if respondents were made aware that, as the law currently stands in Ireland, sexual intercourse where actual consent is not present may be lawful where a jury concludes that the man honestly believes the woman was consenting even if this was not the case.

- [1.21] What women wear is clearly not relevant to consent, but these surveys indicate that significant challenges remain about how some members of society in Ireland view this. It is outside the scope of this project and Report to address such attitudes, but the Commission notes the welcome increase in discussion about consent in Ireland, including within the education sector.
- [1.22] The Commission is also conscious that what women wear remains a matter that is sometimes discussed in detail during rape and sexual offences trials. Indeed, the discussion of this matter formed part of the background to the establishment of the Gillen Review in Northern Ireland. And, as noted above, the Department of Justice and Equality subsequently established the expert working group to review the investigation and prosecution of sexual offences. Shortly after the expert group was established, there was widespread criticism of a reference by defence counsel in a rape trial in Cork in November 2018 to the type of underwear worn by the complainant in that case.²⁹ As noted above, it is likely that the question of how the criminal trial process addresses what women wear, and whether it should, is more relevant to the review being carried out by the expert working group than to the subject matter of this Report.

(b) Stereotypes related to stranger rape and the use of violence

- [1.23] Another misconception traditionally surrounding rape is that it is commonly committed by strangers who attack unsuspecting victims, and involves the use of violence over and above the violence inherent in the act of rape itself. It is now widely accepted that in most instances the rapist is known to the woman. It is also accepted, and reflected in current Irish law, that the essence of rape is non-consensual sexual intercourse. The infliction of additional violence is not an ingredient of the offence, nor is the infliction of such violence required in order to secure a conviction. In some jurisdictions, such as the Scandinavian jurisdictions

²⁸ As noted by the Court of Criminal Appeal in *The People (DPP) v C* [2001] 3 IR 345: see para. 2.13, below.

²⁹ See for example: <https://www.irishexaminer.com/breakingnews/ireland/counsel-for-man-acquitted-of-rape-suggested-jurors-should-reflect-on-underwear-worn-by-teen-complainant-883613.html>.

discussed in Chapter 4, the definition of rape still requires proof of violence (absence of violence leading to a lesser offence where there is no consent), which reflects a very old definition of rape in Ireland, but it is not the law as it currently stands.

- [1.24] According to this stereotype, rape happens in a public location, the perpetrator is a stranger, who is violent or threatens violence, and the victim physically protests and suffers a physical injury. It has been argued that such a stereotypical view of the offence is likely also to generate a stereotypical view of the victim, namely one who is chaste and does not engage in risky behaviour such as consuming alcohol or dressing provocatively.³⁰ According to this argument, if the circumstances in a rape trial do not match these stereotypes, the prosecution may have difficulty convincing a jury beyond reasonable doubt that a rape occurred.³¹

- [1.25] As noted, the reality is that this stereotype is clearly wrong. The majority of rape cases prosecuted in Ireland involve a complainant and an accused who know each other. A 2009 survey of rape trials found that the accused was a stranger in just 20% of cases.³² Another 2009 review, the Rape and Justice in Ireland Report, found that 34% of complainants interviewed were raped by a stranger.³³ In 2014, a survey of trials in the Central Criminal Court found that the accused was a stranger in just 17.58% of cases.³⁴

- [1.26] The English 2019 London Rape Review³⁵ found similar evidence. In the sample of rape cases analysed by the Review the majority of complainants knew their attackers to some degree. Only 7% of rape cases involved an attacker who was a stranger to the complainant. The Review found that nearly three-fifths of all rape cases studied occurred in a domestic setting rather than in the street, which again undermines the common assumption that rape occurs in public places (a belief closely related to the myth that most rapists are strangers).

³⁰ Leahy, "Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland" (2014) 14(1) *Irish Journal of Applied Social Studies* 18, at 19.

³¹ *Ibid.*

³² Corr, O'Mahoney, Lovett and Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries. Country briefing: Ireland* (Child & Woman Abuse Studies Unit 2009), at 5.

³³ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 134.

³⁴ Leahy, "Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland" (2014) 14(1) *Irish Journal of Applied Social Studies* 18, at 21.

³⁵ Mayor of London Office for Policing and Crime, *London Rape Review: A review of cases from 2016* (2019), at 22.

- [1.27] Before 1845, rape was traditionally defined as the “unlawful carnal knowledge of a woman by force and against her will”.³⁶ In 1845, in the English case *R v Camplin*³⁷ it was established that the use or threat of force was not an essential element of the offence. Despite this, Rook and Ward note that some courts in England and Wales continued to direct juries that the use of force by the accused and resistance by the complainant were essential to prove that rape occurred.³⁸ This effectively placed a requirement on a complainant to prove that she “resisted to the utmost”,³⁹ in order to adduce evidence that the rape actually occurred “against her will.”⁴⁰
- [1.28] Section 9 of the *Criminal Law (Rape) (Amendment) Act 1990*, which is discussed in detail in Chapter 2, provides, among other matters, that any failure or omission by a woman to offer resistance does not of itself constitute consent. Notwithstanding this, the 2009 Rape and Justice in Ireland study found that jurors tend to negatively view complainants who do not appear to have resisted or suffered injury.⁴¹ Similarly, an English study found that jurors are less likely to believe claims of non-consensual sex where there is no evidence of physical force or resistance.⁴² Indeed, another English study found that defence counsel deliberately appealed to stereotypical misconceptions surrounding rape in order to discredit the complainant.⁴³
- [1.29] This is particularly troubling given that the 2009 Rape and Justice in Ireland study found that most victims do not fight back, and that a low level of force is usually employed by the perpetrator.⁴⁴ The study found that physical injuries were reported by only a quarter of complainants. Of those who did not resist, the reasons given included that they were unconscious, that they were frozen in fear and that they feared violence. The authors note that “although almost two-thirds of

³⁶ Archbold, *Pleading, Evidence and Practice in Criminal Cases* (Roome and Ross 1922), at 1016.

³⁷ *R v Camplin* (1845) 1 Cox CC 220.

³⁸ Rook and Ward, *Sexual Offences Law and Practice* (3rd edn, Sweet & Maxwell 2004), at 6.

³⁹ Estrich, *Real Rape* (Harvard University Press 1987), at 30.

⁴⁰ 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* 1321, at 1329.

⁴¹ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 25.

⁴² Ellison and Munro, “Reacting to Rape: Exploring Mock Jurors’ Assessment of Complaint Credibility” (2009) 49 *British Journal of Criminology* 202.

⁴³ Temkin, Gray & Barrett, “Different Functions of Rape Myth use in Court: Findings From a Trial Observation Study” (2018) 13(2) *Feminist Criminology* 205.

⁴⁴ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 28.

respondents attempted to resist their attackers using physical force and verbal means, these strategies did not prevent the rape."⁴⁵

- [1.30] Little, in an American context, argues that rape victims are faced with a difficult situation whereby, if they resist, they risk escalating the attack and incurring more severe injuries whereas, if they do not resist, they may not be believed when they report their rape.⁴⁶

(c) False accusations of rape

- [1.31] The 2009 Rape and Justice in Ireland study found that either An Garda Síochána or the Director of Public Prosecutions indicated that the complaint may be false in approximately 6% of cases.⁴⁷ In another 2009 study, 9% of the allegations in the case tracking sample were designated as false.⁴⁸
- [1.32] Research in England and Wales found that 4% of sexual assaults reported to the police were false.⁴⁹ The 2019 London Rape Review, a study of 501 English rape cases undertaken by the Mayor of London Office for Policing and Crime, found that the complainant admitted to making up an allegation in 14 of the 501 cases studied.⁵⁰
- [1.33] The 2009 Rape and Justice in Ireland study noted that, while there are difficulties in gathering data on this issue, there is "broad consensus among scholarly commentators that the rate of false reporting in rape cases is low and no higher than the rate of reporting in other offences."⁵¹
- [1.34] It is clear, therefore, that false allegations of rape occur, but they are rare. Despite this, a number of surveys indicate that those surveyed consider that false allegations of rape are more common. The 2002 SAVI Report found that 37.9% of

⁴⁵ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 136.

⁴⁶ 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* 1321, at 1330.

⁴⁷ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 249 – 250.

⁴⁸ Corr, O'Mahoney, Lovett and Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries. Country briefing: Ireland* (Child & Woman Abuse Studies Unit 2009), at 7.

⁴⁹ Kelly, Lovett and Regan, *A gap or a chasm? Attrition in reported rape cases*, Home Office Research Study 293 (2005).

⁵⁰ Mayor of London Office for Policing and Crime, *London Rape Review: A review of cases from 2016* (2019), at 14.

⁵¹ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 19.

women and 42.3% of men thought that allegations of rape are often false.⁵² The 2009 Rape and Justice in Ireland study referred to other surveys that seemed to demonstrate the prevalence of a similar belief.⁵³ In a 2017 survey for the Sexual Health and Attitudes Galway Report (which chiefly sampled university students), 10% of women and 22% of men agreed with the statement that “a lot of times, girls who say they were raped often led the guy on and then had regrets”.⁵⁴

- [1.35] There is also some evidence that, in criminal trials, jurors may overestimate the prevalence of false accusations of rape. Charleton et al. note that:

“[h]istorically, it seems to have been genuinely believed that women would lightly invent rape allegations against men for reasons of spite... While the writers’ experience is that such false allegations are extremely rare, juries have sometimes acquitted men accused of rape for this apparent reason...”⁵⁵

- [1.36] Concerns about false rape allegations were evident in some submissions received by the Commission following the publication of the Issues Paper. The consultees submitted that any reform to the law on rape could risk increasing the prevalence of false allegations of rape. A specific concern was that women allege rape when they regret consensual sex or when they wish to protect their reputation.
- [1.37] An unfounded rape allegation has the capacity to ruin an innocent person’s reputation, relationships, and health. False allegations of rape have led to prosecutions (as was noted in the submissions received by the Commission) either for the common law offence of perverting the course of justice or the statutory offence of making a false report or statement under section 12 of the *Criminal Law Act 1976*. In that respect, the Commission considers that, regardless of any proposals for reform that are made in this Report, the current law is fully capable of addressing the small number of false rape allegations where they occur.

(d) General impact on the criminal justice process and juries

- [1.38] The 2009 Rape and Justice in Ireland study noted that it is accepted by nearly all commentators that rape myths and misconceptions may make it more difficult for a

⁵² McGee, Garavan, de Barra, Byrne and Conroy, *The SAVI Report: Sexual Abuse and Victimisation in Ireland* (Liffey Press 2002).

⁵³ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 17.

⁵⁴ Byrnes and MacNeela, *SHAG report 2017. Sexual health and attitudes Galway* (National University of Ireland Galway 2017), at 94.

⁵⁵ Charleton, McDermott and Bolger, *Criminal Law* (Bloomsbury Professional 1999), at 8.147-8.148.

rape trial to succeed.⁵⁶ This is supported by other studies that suggest that misconceptions concerning rape affect the judgement of those involved at each stage of the decision-making process in the criminal justice system.⁵⁷

- [1.39] In 2019, the New Zealand Law Commission⁵⁸ suggested that the existence of myths and stereotypes risks distracting jurors above all else. Jurors who endorse these beliefs might focus excessively on whether or not the complainant is to blame rather than on key issues of consent that are central to a rape trial, for example, where attention is drawn to what the woman was wearing (was it “revealing” or “provocative”).
- [1.40] The 2019 Gillen Review in Northern Ireland also addressed how influential these attitudes may be on jurors in rape trials, albeit in the context of the applicable law of England and Wales (and Northern Ireland, although it accepted that the research into the situation in Northern Ireland had not yet been fully complete at the time of publication of its Report).⁵⁹ The research indicates that most jurors (but not all) refuse to believe the “obvious” rape myths such as the resistance requirement (that it is not rape if the victim physically acquiesces) or that provocative clothing contributes to rape. It was noted, however, that a “significant minority” of jurors were “not sure” about myths such as that people are more likely to be raped by a stranger than by an acquaintance. While these myths may be less harmful in character than believing a lack of resistance negates rape, for example, they also possess the capacity for negatively influencing the thought processes of jurors. The Gillen Review concluded that jury directions were required to dispel rape myths and misconceptions, an issue the Commission considers is likely to come within the terms of reference of the expert working group to review the investigation and prosecution of sexual offences.
- [1.41] It is notable that, since the Gillen Review was published in May 2019, comparable findings and recommendations have been made in juror research conducted by Professor Cheryl Thomas,⁶⁰ the project leader of the University College London Jury Project. The project aims to conduct research with actual juries as opposed to mock

⁵⁶ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 16.

⁵⁷ Temkin and Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008), at 1.

⁵⁸ New Zealand Law Commission, *Second Review of the Evidence Act 2006* (2019), at 210.

⁵⁹ Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019), at 204-205.

⁶⁰ Previous juror research by Professor Thomas was discussed by the Commission in its *Report on Jury Service* (LRC 107-2013), at paras. 8.18-8.20, 10.24-10.25 and 11.11-11.13.

juries.⁶¹ While the detailed findings of this research had not, at the time of writing (October 2019), been published, Professor Thomas gave a summary of the findings in an interview in June 2019.⁶² The research involved a series of interviews conducted with 50 juries. The research indicates that these juries were affected only minimally by what Professor Thomas described as the longstanding myths such as “dressing provocatively”, drinking and going out alone as being an “invitation for rape.” She also stated that “virtually all” jurors recognised that it was extremely difficult for a complainant both to make a rape allegation and to subsequently give evidence in a courtroom setting. However, a third of jurors surveyed admitted to being unsure about whether or not a person was more likely to be raped by a stranger than by someone they knew. On this, Professor Thomas advocated, like the Gillen Review, the use of detailed jury directions in order to dispel any misconceptions jurors might have. The Commission acknowledges that concise jury directions play an important role in dispelling the influence of rape myths and misconceptions at the trial stage. However, the Commission has decided that any recommendations as to what form jury directions should take is outside the narrow scope of this Report.

5. Discussion

- [1.42] The Commission has pointed out above that the impact of rape myths and misconceptions may be of more direct relevance to the work being carried out by the Department of Justice and Equality’s expert working group to review the investigation and prosecution of sexual offences.
- [1.43] It may also be that other matters concerning reform of the law on sexual offences that fall outside the terms of reference of the expert working group will require review as part of the Commission’s project on the review and consolidation of the law on sexual offences in its Fifth Programme of Law Reform.⁶³ As noted above, the Commission intends to proceed with its work on that project immediately after completion of this Report on the Attorney General’s request.
- [1.44] Nonetheless, as was pointed out when the primarily subjective “honest belief” test was under review in England and Wales in 2000, that test may validate the assumption held (wrongly) by (some) men that they can assume consent without asking. To that extent, it is important to have such myths of misconceptions in mind in this Report.

⁶¹ University College London Faculty of Laws, Trial by Jury, available at: <https://www.ucl.ac.uk/laws/research/making-impact/trial-jury>.

⁶² BBC Radio 4, *Law in Action: Rape Myths* (first broadcast, 27 June 2019), available at: <https://www.bbc.co.uk/sounds/play/m000671m>.

⁶³ See *Report on Fifth Programme of Law Reform* (LRC 120-2019), Project 5.

- [1.45] The Commission acknowledges that the current primarily subjective test of “honest belief” as to consent can be seen as consistent with the general criminal law principle that often begins with asking whether the accused subjectively intended to commit the offence in question, or was subjectively reckless about whether, in the case of rape, there was consent. That subjective starting point is not, however, the invariable approach to addressing criminal culpability for very serious crimes. Thus, the fault or mental element for some serious criminal offences, including manslaughter, is defined by reference to a standard based on negligence, which does not require any subjective state of intention, knowledge or advertent recklessness; and many important defences to criminal liability are also based on objective standards, rather than subjective tests.⁶⁴
- [1.46] Bearing in mind this context, the Commission turns in Chapter 2 to discuss the current law and to assess the arguments for and against whether it should be reformed.

⁶⁴ In its *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) the Commission recommended retention of the subjective approach to culpability in murder, and retention of the objective standard of culpability in one type of manslaughter, gross negligence manslaughter. Similarly, in the *Report on Defences in Criminal Law* (LRC 95-2009), the Commission recommended retaining the current mixture of subjective and objective elements involved in a range of defences in criminal law.

CHAPTER 2 CURRENT LAW ON KNOWLEDGE OR BELIEF CONCERNING CONSENT: ARGUMENTS FOR AND AGAINST

1. Introduction

- [2.1] In this Chapter, the Commission discusses the current law as to knowledge or belief concerning consent in section 2 of the *Criminal Law (Rape) Act 1981* (the 1981 Act). As will become clear from that discussion, this is a primarily subjective test, which was reaffirmed in 2016 by the Supreme Court in *The People (DPP) v C O'R*.¹ While the current test is primarily subjective, the Supreme Court² also confirmed that the test has some objective elements, allowing a jury to apply their common sense view of what an ordinary or reasonable man would have realised in the circumstances.³
- [2.2] The Commission discusses in detail in this Chapter the case law under section 2 of the 1981 Act, then considers the arguments for and against retaining the current law, and finishes the Chapter by drawing general conclusions on those arguments.
- [2.3] Section 2 of the 1981 Act provides:

“(1) A man commits rape if –

- (a) he has⁴ 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

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

² The Supreme Court comprised Denham CJ, O'Donnell, McKechnie, Clarke, Laffoy, Dunne and Charleton JJ. A single judgment was delivered by Charleton J, with which the other members of the Court agreed.

³ *The People (DPP) v C O'R* [2016] IESC 64, at para. 51; [2016] 3 IR 322, at para. 57.

⁴ Section 2(1)(a) of the 1981 Act as originally enacted contained the word “unlawful” before “sexual intercourse”. The word “unlawful” was repealed by both the Schedule and section 21 of the *Criminal Law (Rape) (Amendment) Act 1990*.

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."

- [2.4] Section 2(1)(a) provides for the conduct or physical element of the offence (the *actus reus*), while section 2(1)(b) provides for the fault or mental element of the offence (the *mens rea*). Section 48 of the *Offences Against the Person Act 1861* provides for a maximum sentence on conviction for rape of life imprisonment. Rape is, under the 1981 Act, a gender specific offence that may be committed only by a man against a woman. Sexual intercourse for the purposes of the 1981 Act means vaginal penetration by a penis. Other kinds of sexual penetration are covered by the "section 4" rape offence under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990* (the 1990 Act), which also carries the same maximum sentence of life imprisonment.⁵ A male of 10 years or older may be charged with rape,⁶ and the female involved may be any age.
- [2.5] A man therefore commits rape under section 2 of the 1981 Act if he has sexual intercourse with a woman who, at the time of the intercourse, does not consent to it and, at that time, he knows she is not consenting or is reckless as to whether she is or is not consenting. This can be visualised as follows:

⁵ 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."

⁶ Section 1(3) of the 1981 Act had originally provided that, in defining the word "man", the 1981 Act was not to "affect any rule of law by virtue of which a male person is treated by reason of his age as being incapable of committing an offence of any particular kind." The words in quotation marks had therefore retained the common law rule that a person under the age of 14 was presumed incapable of committing the crime of rape. These words were repealed by section 21 and the Schedule of the *Criminal Law (Rape) (Amendment) Act 1990*. Section 52(3) of the *Children Act 2001*, as substituted by section 129 of the *Criminal Justice Act 2006*, now provides that a male aged 10 years of age or older may be prosecuted for rape.

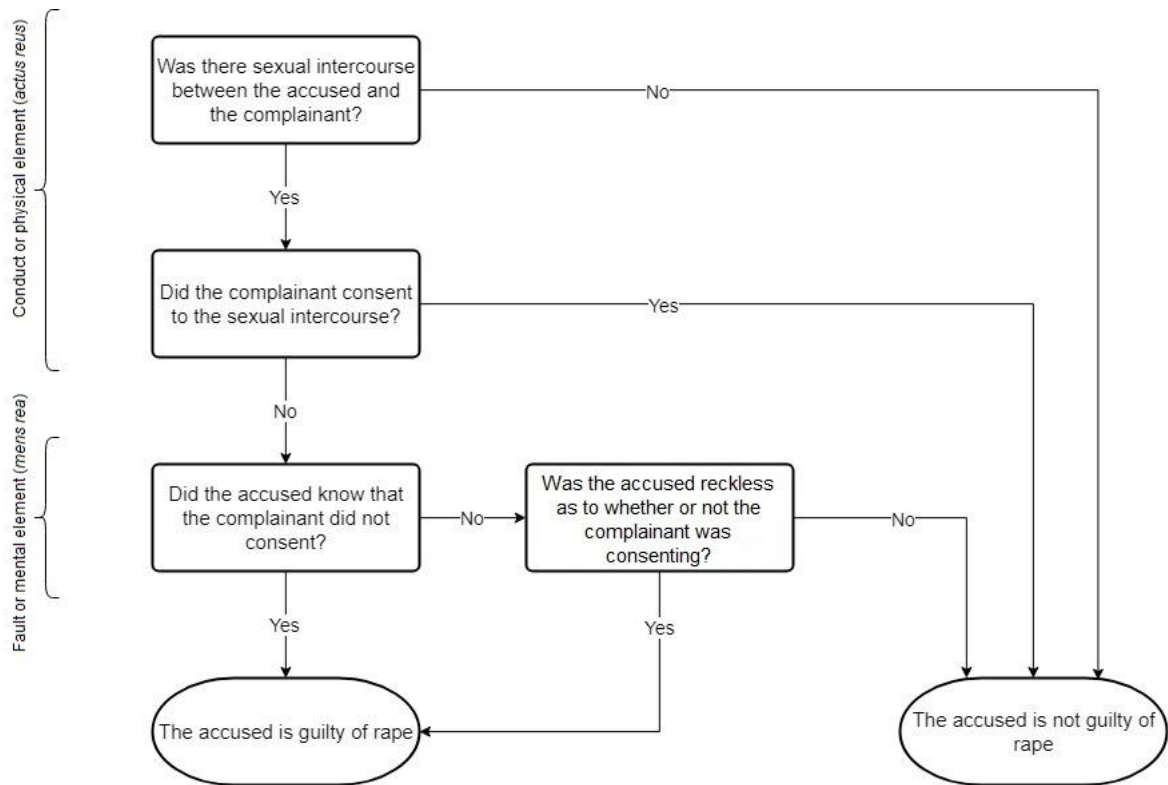


Figure 1. Prosecution proofs under the current law

- [2.6] At the trial of a rape offence, the prosecution must prove beyond reasonable doubt both the conduct or physical element (the *actus reus*) and the fault or mental element (the *mens rea*). The conduct or physical element has two constituent parts:
- (1) Sexual intercourse; and
 - (2) The absence of consent on the part of the complainant.
- [2.7] The fault or mental element (the *mens rea*) can be either:
- (1) Knowledge of the woman's lack of consent, or
 - (2) Recklessness as to the woman's lack of consent.
- [2.8] The accused will be convicted if he fails to raise a reasonable doubt with the jury as to any elements of the prosecution's case, namely:
- (1) That sexual intercourse occurred, or
 - (2) That the complainant did not consent, or
 - (3) That he knew that the complainant did not consent, or

- (4) That he was reckless as to whether she was consenting. As discussed below, under the current law the accused is not reckless if he had an honest belief that the woman was consenting.⁷

[2.9] The Attorney General's request requires the Commission to examine the fault or mental element (the *mens rea*) of the offence, specifically, whether the honest belief defence should either be reformed or retained. Before discussing that in Part 3 of this Chapter, the Commission will examine the codification in the 2017 Act of the existing pre-2017 law on consent, which forms part of the conduct or physical element (the *actus reus*) of the offence.

2. 2017 Act codified existing law on consent

[2.10] Section 48 of the *Criminal Law (Sexual Offences) Act 2017* (the 2017 Act) substituted a significantly expanded section 9 of the *Criminal Law (Rape) (Amendment) Act 1990* (the 1990 Act), the effect of which was to codify the pre-2017 general definition of consent as well as the circumstances in which consent is deemed not to be present. This codification, on which there was widespread consensus in the Oireachtas, applies to a wide range of sexual offences, including rape. It is important to note that section 9 of the 1990 Act, as substituted by section 48 of the 2017 Act, did not involve any reform as such of the law on consent, because it broadly reflected the pre-2017 position in Irish law in this area, as reflected in case law: see the discussion below. Nonetheless, by placing the existing law on a statutory footing, the law on consent has been clarified with the benefits that flow from that.

[2.11] During the Dáil Éireann Report Stage debate on this codification of the law on consent, the Oireachtas also considered whether the law on knowledge or belief concerning consent under section 2 of the 1981 Act should also be reformed. A proposal was brought forward that would have replaced the current primarily subjective test in section 2 of the 1981 Act with a primarily objective test, largely modelled on the reforms to that effect enacted in England and Wales in 2003, in

⁷ Whether these grounds raised by the accused amount to a "true" defence in criminal law is not clear. This may depend on whether the ingredients of a criminal offence comprise the *actus reus* and *mens rea* only or should be taken to be both those elements and the absence of a defence. If the first description is correct, then as a mistaken belief in consent negates the *mens rea* of the offence, it is not a defence in the true sense of the word. Substantive defences, on the other hand, apply where the accused has fulfilled the *actus reus* and the *mens rea* of the offence, but is entitled to an acquittal because of some justifying or excusing circumstance or condition. Examples of "true" defences in that sense are self-defence, provocation and duress. See McAuley and McCutcheon, *Criminal Liability* (Round Hall, 2000), at 113-116, and Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press, 2015), at 321-322. Whatever the correct description, these grounds are often referred to as a "defence" and this approach is followed in this Report.

Northern Ireland in 2008 and in Scotland in 2009.⁸ As this proposal was brought forward at a late stage in the debates on the 2017 Act, and as it would have involved a significant reform of what was agreed is a complex area of the law (as opposed to the codification of the existing law on consent inserted by section 48 of the 2017 Act), it was withdrawn on the agreed basis that this matter would be referred by the Attorney General to the Commission for analysis.⁹ Against this background, it is important to discuss the significantly expanded provisions of section 9 of the 1990 Act, as inserted by section 48 of the 2017 Act.

[2.12] Section 9(1) of the 1990 Act, as inserted by section 48 of the 2017 Act, provides:

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

[2.13] This is the first statutory definition of what positively constitutes consent for the purpose of the law on sexual offences, including rape. In its 1988 *Report on Rape and Allied Offences*,¹⁰ the Commission had recommended that it would be helpful if the Oireachtas were to clarify in statutory form that consent should be defined as being based on free and voluntary agreement. In 2001, the Court of Criminal Appeal in *The People (DPP) v C*¹¹ defined consent in the law of rape as:

“voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity.”

[2.14] In 2016, the Supreme Court in *The People (DPP) v C O’R*¹² similarly explained consent for the purposes of the law of rape as follows:

⁸ The text of the proposed amendment is discussed at para. 3.37, below.

⁹ See Vol. 937 *Dáil Éireann Debates*, at 135: Criminal Law (Sexual Offences) Bill 2015 [Seanad]: Report Stage (1 February 2017), in which the Minister for Justice and Equality stated: “I note that Deputy Shortall said she will withdraw... amendment [No.54: see para. 3.37 of this Report, below]... It is a very complex area of law. I have discussed it in detail with the Attorney General. What the Minister [for Children and Youth Affairs], Deputy Zappone, said to Deputy Shortall is correct, namely, that we agreed to refer it to the Law Reform Commission for a full report on it in order to deal with it effectively at a later point.” Available at: <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2017-02-01/debate/mul@/main.pdf>.

¹⁰ *Report on Rape and Allied Offences* (LRC 24-1988), at para. 17.

¹¹ [2001] 3 IR 345, at 360.

¹² *The People (DPP) v C O’R* [2016] IESC 64, at para. 36; [2016] 3 IR 322, at para. 42.

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

- [2.15] Against that background, section 9(1) of the 1990 Act, as inserted by section 48 of the 2017 Act, clearly involves a codification of the existing law as to what constitutes consent. While it is therefore declaratory of the law, it is, as the Commission noted in the 1988 Report, helpful to have the definition of consent stated in statutory form.
- [2.16] Section 9(2) of the 1990 Act, as inserted by section 48 of the 2017 Act, also contains for the first time a list of 8 specific circumstances in which a person does not consent if those circumstances exist, as follows:

“(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,
- (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.”

- [2.17] Like the definition of consent in section 9(1), these 8 circumstances reflect the long-standing law as to when consent is not present.
- [2.18] The first circumstance, the presence of force and threats of force, has long been part of the law. This position had been restated in 1981 by the English Court of Appeal in *R v Olugboja*,¹³ where the Court confirmed that submission obtained by force, fear or fraud is not consent. The Court stated that "there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent."¹⁴
- [2.19] Similarly, the second circumstance, where the party is asleep or unconscious, has also been long established as a situation where there is no consent.¹⁵ O'Malley notes that there are cases dating back to the 19th century that sexual intercourse with a sleeping woman amounts to rape.¹⁶
- [2.20] The third circumstance, that there is no consent where the party is incapable of consenting due to intoxication, has been the common law position since 1845.¹⁷ It may be a difficult task for juries to decide whether a complainant was too intoxicated to consent.¹⁸ In *R v Lang*,¹⁹ the English Court of Appeal held that the critical question is whether the complainant understood her situation and was capable of making up her mind.²⁰
- [2.21] The fourth circumstance, a physical disability that prevents a person from communicating agreement, also reflects the pre-2017 case law and is entirely consistent with the communication necessarily required by the general definition of consent, which requires, as the Supreme Court noted in *The People (DPP) v C O'R*,²¹ "active communication".

¹³ *R v Olugboja* [1981] EWCA Crim J0617-1, [1982] QB 320.

¹⁴ *Ibid*, at 332.

¹⁵ Section 75 of the *Sexual Offences Act 2003* provides that if the complainant was asleep or unconscious at the time of act, the complainant is presumed to not have consented to the act unless the accused can adduce sufficient evidence to rebut this presumption.

¹⁶ O'Malley, *Sexual Offences* (2nd edn, Roundhall, 2013), at 47.

¹⁷ *R v Camplin* (1845) 1 Cox CC 220. This was affirmed by the English Court of Appeal in *R v Bree* [2007] EWCA Crim 804, [2008] QB 131.

¹⁸ Leahy, "Reform of Irish Rape Law: The Need for a Legislative Definition of Consent" (2014) 43(3) *Common Law World Review* 231, at 236.

¹⁹ *R v Lang* [1975] EWCA Crim J1016-1, [1975] 62 CrAppR 50.

²⁰ For more discussion on the prevalence of alcohol in sexual offence cases, see Chapter 3, Part 5, below.

²¹ *The People (DPP) v C O'R* [2016] IESC 64, at para. 36; [2016] 3 IR 322, at para. 42.

- [2.22] The fifth and sixth circumstances, where there is a mistake as to the nature and purpose of the act, also reflect the existing law. In the English case of *R v Williams*,²² a singing teacher told his pupil that the sexual intercourse was necessary to improve her singing abilities. The defendant was subsequently convicted of rape because he had pretended that the sexual intercourse was a surgical procedure, therefore “wilfully and fraudulently” misleading the pupil as to the nature and purpose of the act. In another English case, *R v Dee*,²³ the accused entered the complainant’s bedroom and had intercourse with her. She believed him to be her husband but then realised her mistake. The Court convicted the accused because it found that he knew that she was mistaken as to his identity. This approach was confirmed by the Court of Criminal Appeal in *The People (DPP) v C*,²⁴ where similar circumstances arose. The Court of Criminal Appeal stated that:

“If [the accused] knows that consent to sexual intercourse is given because the woman concerned believes him to be another person then he knows that there is no consent by the woman to having sexual intercourse with him.”

- [2.23] The seventh circumstance, that the complainant is being unlawfully detained at the time at which the act takes place, also reflects the long-standing position that a person who has been abducted, for example, cannot consent.
- [2.24] The eighth circumstance, that there is no consent where the only expression of consent to the act comes from someone other than the complainant, was the situation in the English case *DPP v Morgan*,²⁵ discussed below.
- [2.25] It is important to note that these 8 circumstances constitute a non-exhaustive list. Thus, section 9(3) of the 1990 Act, as inserted by section 48 of the 2017 Act, 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”. This allows the courts to provide for additional circumstances where consent is absent.
- [2.26] Section 9(4) of the 1990 Act, as inserted by section 48 of the 2017 Act, also restates the common law position that consent to a sexual act may be withdrawn both before the act begins, and during the act.²⁶

²² *R v Williams* [1923] 1 KB 340.

²³ *R v Dee* (1884) Cox CC 579.

²⁴ *The People (DPP) v C* [2001] 3 IR 345, at 360.

²⁵ *DPP v Morgan* [1975] UKHL 3, [1976] AC 182.

²⁶ See *R v Kaitamaki* [1985] AC 147. See also Leahy and Fitzgerald O’Reilly, *Sexual Offending in Ireland* (Clarus Press 2017), at 14.

- [2.27] Section 9(5) restates the sole content of the original section 9 as originally enacted in 1990, namely, 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 that lack of resistance by the complainant may currently be used as evidence as to the accused's honest belief in consent under section 2(2) of the 1981 Act.²⁷

3. Fault or mental elements of the offence

- [2.28] As noted above, the fault or mental element (the *mens rea*) of the rape offence is either (1) knowledge of lack of consent or (2) recklessness as to consent. Thus, in order to secure a conviction for rape, the prosecution must prove beyond reasonable doubt that the accused either knew that the complainant did not consent or else was reckless as to her consent. The fault or mental element of the offence could also be proved by establishing beyond reasonable doubt that the accused was aware of, or reckless as to, the existence of one of the 8 situations in section 9(2) of the 1990 Act in which consent is not present, for example, that the woman was asleep. This can be visualised as follows:

²⁷ O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013), at 37.

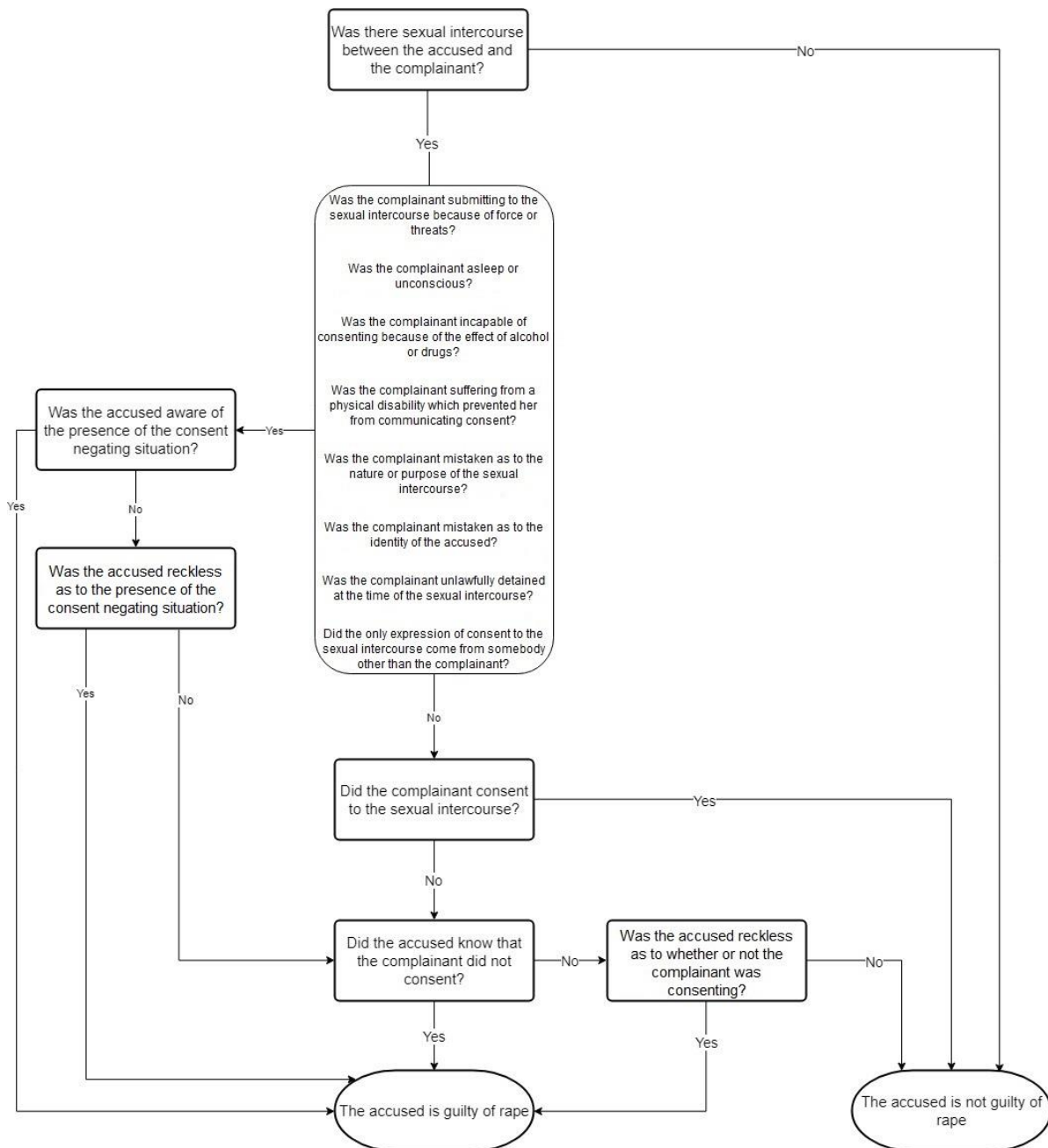


Figure 2. Proof of fault or mental elements of rape

(a) Knowledge or belief concerning consent

- [2.29] The accused will be guilty of rape if the prosecution can prove beyond reasonable doubt that either (a) he knew that the complainant was not consenting, or (b) he was reckless as to whether she was consenting. As such, an accused could be acquitted if he asserts that he honestly believed that the complainant was positively consenting at the time of the sexual intercourse, and this puts a reasonable doubt in the jury's mind as to the prosecution's case.

- [2.30] As knowledge of, or recklessness as to, lack of consent is part of the fault or 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 fault or mental element.
- [2.31] The current Irish law in section 2 of the 1981 Act on the fault or mental element in the offence of rape broadly follows the approach of the majority decision of the UK House of Lords in 1975 in *DPP v Morgan*.²⁸ Prior to this decision, if an accused asserted that he believed that the complainant was consenting, this mistake would be treated as an ordinary mistake of fact defence, under which a mistake had to be based on objectively reasonable grounds.²⁹ The *Morgan* decision established that if the accused had a mistaken belief in consent, even if there was no reasonable basis for this belief, then the mental element of the offence was not satisfied and he was not guilty of rape.³⁰ The majority held that it was logically incoherent for the offence to require that the prosecution prove that the accused intended to have non-consensual intercourse, while the accused could only raise a doubt as to that element if his belief in consent was based on reasonable grounds.³¹ Knowledge of lack of consent is negated by an honest belief in consent, regardless of whether the belief in consent is reasonable or unreasonable. If the belief in consent were required to be reasonable, that would involve another standard that could prevent the accused from rebutting the prosecution's case.
- [2.32] The majority decision of the House of Lords in *Morgan* held that, while the jury should consider the presence or absence of such grounds, this consideration is merely a factor in the jury's determination of whether the belief was truly held. Because the only standard against which the asserted belief is judged is whether it was honestly held by the accused, it is described as a primarily subjective test. This is in contrast to an objective test of honest belief, which adds an additional requirement to the test of belief, that is, that to exculpate an accused, that belief must also be reasonable or one that an "average person" would have formed.³²
- [2.33] The circumstances in *Morgan*, which involved 4 accused, were that the first accused, Morgan, had been drinking with 3 junior work colleagues when he invited them to his house, apparently with the intention of saying that they could have sex with his wife. The 3 friends later claimed that Morgan had told them that his wife was

²⁸ *DPP v Morgan* [1975] UKHL 3, [1976] AC 182. In 1975, the Appellate Committee of the UK House of Lords was the highest court in the UK court system. In 2009, it was replaced by the UK Supreme Court.

²⁹ Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* Volume 1 (2000), at 10.

³⁰ *Ibid.*

³¹ *DPP v Morgan* [1975] UKHL 3, [1976] AC 182, at 214.

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

“kinky” and that she would pretend to protest if they had sex with her (a claim that Morgan denied at their joint trial). Morgan’s wife was sleeping separately from her husband at the time, and was in fact asleep with her 11 year old son when the 4 accused came into the house. The 4 dragged her from the bed and each had forcible intercourse without her consent while the others held her down. She initially screamed for her son and his older brother to call the police, but said that the men choked her until she submitted. After the gang rape, she immediately made a complaint to the police.

[2.34] Morgan’s 3 friends were charged with rape. Morgan was charged with aiding and abetting the act of rape because, at that time, it was thought that a husband had a virtual immunity from being charged with raping his wife.³³ The accused pleaded that they had honestly believed that Mrs Morgan had consented to sexual intercourse. The trial judge directed the jury that the accused would not be guilty of rape if they honestly believed that the woman was consenting, provided that their belief in consent was reasonably held. The jury convicted all 4 accused, and they appealed. The House of Lords, by a 3-2 majority, held that the trial judge had not directed the jury correctly on the law. The majority held that an honest but mistaken belief that the complainant was consenting would provide a complete defence; and that the basis for that belief did not need to be objectively reasonable provided the jury was satisfied that the accused honestly believed it. This significant change in the pre-1975 understanding of the law led to widespread outcry. It is worth noting that the House of Lords upheld all 4 convictions in the case on the basis that no reasonable jury would have ever acquitted the accused even if they had been directed by the trial judge on the basis of the new law as set out by the majority.

[2.35] Despite this outcome of the case itself, the analysis of the majority decision in the House of Lords was described as a “rapist’s charter”.³⁴ As a result, an Advisory Group on Rape was established, chaired by the English High Court judge Ms Justice Rose Heilbron. The resulting 1975 *Report of the Advisory Group on Rape* (the Heilbron Report)³⁵ concluded that the decision in *Morgan* was, essentially, correct as a matter of law. This was because the fault or mental element for rape was either knowledge or recklessness, and that this would be negated where the accused had an honest, even if unreasonable, belief that the woman had consented. The Heilbron Report recommended that legislation should be enacted to place the

³³ The so-called “marital rape” immunity was not formally abolished in Irish law until the enactment of the *Criminal Law (Rape) (Amendment) Act 1990*, as recommended by the Commission in its 1988 *Report on Rape and Allied Offences* (LRC 24-1988).

³⁴ Adler, *Rape on Trial* (Routledge & Kegan Paul 1987), at 29 citing this description of *Morgan* by the leading English academic writer Jennifer Temkin.

³⁵ Home Office, *Report of the Advisory Group on the Law of Rape* (Cmnd 6352, 1975), at 12.

Morgan test on a statutory footing, to include a reference as to whether the jury considered that there were reasonable grounds for an accused's honest belief.³⁶ As a result, section 1 of the *Sexual Offences (Amendment) Act 1976* (the 1976 Act), which applied in England and Wales, provided:

"(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—

(a) he has unlawful 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 consents to it;

and references to rape in other enactments (including the following provisions of this Act) 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."

[2.36] The 1976 Act was broadly replicated in Northern Ireland in Article 3 of the *Sexual Offences (Northern Ireland) Order 1978*, which provided:

"(1) A man commits rape if—

(a) he has unlawful 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 consents to it;

³⁶ Home Office, *Report of the Advisory Group on the Law of Rape* (Cmnd 6352, 1975), at 14.

and any reference to rape in a statutory provision 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."

- [2.37] As already noted, section 2 of the 1981 Act broadly followed the approach in section 1 of the 1976 Act and, even more closely in terms of the precise wording, Article 3 of the *Northern Ireland 1978 Order*.³⁷ As noted in Chapter 3 below, the 1976 Act and *Northern Ireland 1978 Order* have been replaced by consolidating legislation on sexual offences (in 2003 and 2008, respectively), which have replaced the primarily subjective test with a primarily objective test.
- [2.38] For present purposes, the Commission notes that the current position in Irish law, as set out in section 2 of the 1981 Act, adopts the primarily subjective test from the UK House of Lords decision in *Morgan* case. The reference to the "reasonable grounds" for any belief in consent in section 2(2) of the 1981 Act (as had been the case in section 1(2) of the England & Wales 1976 Act and in Article 3(2) of the Northern Ireland 1978 Order) is not the key factor in determining the accused's honest belief as to whether the woman was consenting. Rather, it is a matter to which the jury is to have regard when deciding on the veracity of the asserted belief.
- [2.39] The primarily subjective nature of the test in section 2 of the 1981 Act was reaffirmed by the Supreme Court in 2016 in *The People (DPP) v C O'R*.³⁸ The accused was charged with the rape of his mother. At his trial in the Central Criminal Court, he accepted that he had had sexual intercourse with her, but he claimed that it had been with her consent. His mother, who was described as a frail woman in her 60s with restricted mobility due to previous surgery and who was on related medication at the time, denied that she had consented. The accused had visited his

³⁷ The Heilbron Report also made other significant recommendations on procedure in rape trials, including placing restrictions on the extent to which the complainant's sexual history could be discussed, and also largely prohibiting reporting the names of the complainant and the accused. These recommendations were also enacted in the England & Wales 1976 Act and the Northern Ireland 1978 Order, and were also followed in the 1981 Act. The effective prohibition on naming the accused was later repealed in England (in 1988) and in Northern Ireland (in 1994), but it remains in place under the 1981 Act: see also para. 1.4 of the Report, above.

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

mother on the evening of Mother's Day. It was commonly agreed that at the time both parties had taken strong drink. She had been in bed at the time and got up to answer the door to him. The accused contended that she greeted him as if he were her late husband, involving a passionate kiss and invoking his name. His mother denied this. It was agreed that they had danced: his mother described this as ballroom dancing, the accused said it involved physical erotic movement. The accused claimed that this escalated into foreplay which resulted in them both lying on the ground: his mother also denied this. She said that after the ballroom dancing there was perhaps a momentary lack of consciousness brought about perhaps by a fall, or perhaps it was simply a failure in recollection, and that she found herself on the floor with the accused having sexual intercourse with her. She said this was not consensual and that she had also told him to "leave me alone" repeatedly.

- [2.40] At the end of a 4 day trial, prosecution counsel stated in the closing address to the jury that rape is committed where the accused had no reasonable belief that the woman had consented. Counsel for the accused raised objections to this, and in his closing address to the jury stated that the prosecution had incorrectly stated the law, which required only the accused's honest belief that consent was present. The trial judge instructed the jury that they must take their instruction on the law from him and the trial judge then directed the jury on the test as set out in section 2 of the 1981 Act, without commenting on the correctness or otherwise of the test as set out by the counsels on both sides. The accused was convicted of rape and sentenced to 15 years imprisonment, with the last two and a half years suspended. On appeal, the Court of Appeal dismissed the accused's appeal against conviction.
- [2.41] The accused then sought leave of the Supreme Court to appeal to that Court, and the Supreme Court granted leave on the question as to whether the fault or mental element of rape excuses 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.
- [2.42] The Supreme Court referred to the law in a number of other jurisdictions, including New Zealand, England and Wales and Northern Ireland, where a primarily objective test as to knowledge or belief has been enacted.³⁹ The Court referred to section 128(2) of the New Zealand *Crimes Act 1961* (as amended by the New Zealand *Crimes Amendment Act 2005*), which defines the fault or mental element of rape as being where the accused has an "unlawful sexual connection", involving penetration, with a woman "without believing on reasonable grounds" that the woman was consenting. The Court also pointed out that England and Northern Ireland had departed from the primarily subjective *Morgan* test and had also

³⁹ [2016] IESC 64, at para 44; [2016] 3 IR 322, at para. 50.

moved towards a primarily objective test by repealing, respectively, the 1976 Act and 1978 Order. The Court noted that the *Morgan*-derived test had been replaced, respectively, by section 1 of the England and Wales *Sexual Offences Act 2003* and Article 5 of the *Sexual Offences (Northern Ireland) Order 2008* both of which, as the Court noted, provide that rape occurs where the accused "does not reasonably believe" that the woman consented, and that whether a belief is reasonable is to be determined "having regard to all of the circumstances" including "any steps [the accused] has taken to ascertain whether" the woman has consented.

- [2.43] The Court, having already quoted the text of section 2 of the 1981 Act, then commented:⁴⁰

"In this country, the model chosen in the Act of 1981, as amended, clearly adopts 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 consent. Recklessness is the taking of a serious and unjustified risk. That does not mean that a reasonable man would be aware that a woman may not be consenting; ascribing to the accused what a reasonable or ordinary person would have perceived. Rather, recklessness is advertent. As Hardiman J put it in *The People (Director of Public Prosecutions) v. Cagney* [2007] IESC 46, [2008] 2 I.R. 111 at para. 52, p. 127: 'an accused in Ireland must have foreseen the risk that his conduct would bring about the relevant result, but have elected to proceed with his conduct nonetheless.' "

- [2.44] By contrasting the position under the 1981 Act with the objective test adopted in the other jurisdictions cited, the Court thus underlined that Irish law retains the primarily subjective test derived from the *Morgan* case. Thus, the accused's honest belief under the 1981 Act is not what a reasonable man believed as to the presence of consent, but rather what the individual accused actually believed. The Court also reaffirmed that the recklessness referred to in section 2 of the 1981 Act is subjective recklessness as held by the Supreme Court itself in the *Cagney and McGrath* case.

- [2.45] As to the conviction of the accused in the *C O'R* case itself, the accused had argued that the trial judge had misdirected the jury on the ingredients of the offence. The

⁴⁰ [2016] IESC 64, at para 45; [2016] 3 IR 322, at para. 51.

Supreme Court rejected this argument. The Court noted that the trial judge had quoted the text of section 2 of the 1981 Act to the jury and while it referred to the direction as “somewhat thin” it did not consider it was inadequate on that ground. Indeed, the Court noted that the trial judge had included a matter that had gone beyond what was permitted by section 2 of the 1981 Act and had been in the accused’s favour, when he had said that the jury could acquit the accused if they came to the conclusion that the accused believed that his mother “might be consenting to the act”. The Court held that this was not correct and had been in the accused’s favour. As the jury had, in any event, convicted the accused this was not a basis on which to overturn the verdict. The Court therefore dismissed the appeal.

- [2.46] The Court, bearing in mind the direction in this case, went on to provide some general guidance on future jury directions. Where the question of honest belief arises, the Court commented, in a passage that is worth quoting in full:⁴¹

“Where, however, the accused claims to have mistakenly believed that a woman was consenting, then the jury should examine all of the facts which may support or which may undermine that claimed belief. They should consider all of the circumstances and focus on whether there are, or are not, any reasonable grounds for that belief. As s.2(2) of the Criminal Law (Rape) Act 1981 states: ‘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.’ That means that where 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. 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 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. This defence requires genuine belief.”

- [2.47] This passage explains clearly the effect of the primarily subjective test in section 2 of the 1981 Act. Reflecting the subjective recklessness element of section 2(1) of the 1981 Act, the result is that an honest, though unreasonable, mistake that the

⁴¹ [2016] IESC 64, at para 51; [2016] 3 IR 322, at para. 57.

woman was consenting is a defence to rape. The Supreme Court also added, however, that the accused's alleged belief in consent must be genuinely held and that the jury is under no obligation to believe an obviously false story from the accused. This invokes the partly objective element in section 2(2) of the 1981 Act, in which the jury may use, as the Court stated, its 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.

- [2.48] In this respect, while the current test in section 2 of the 1981 Act is primarily subjective, the Supreme Court also held that the test has some objective elements, allowing a jury to apply their view of what an ordinary or reasonable man would have realised in the circumstances. The more plausible an asserted belief is, the more likely a jury is to accept that it is true. Conversely, the more outlandish and unreasonable the accused's asserted belief is, the less likely the jury is to accept that it is true.

(b) Recklessness as to consent not the same as "couldn't care less"

- [2.49] As already noted, the prosecution is not always required to prove that the accused knew that the complainant was not consenting. This is because, as the Supreme Court noted in *The People (DPP) v C O'R*, section 2(1) of the 1981 Act also provides that, alternatively, the accused is guilty of rape if he was reckless as to whether the woman was consenting. The Commission considers that it is important to discuss the concept of recklessness in Irish law in more detail here, in particular because there has been some discussion in the case law as to whether recklessness can be equated with the situation where the accused "couldn't care less" as to whether the woman was consenting.
- [2.50] In the 1976 Supreme Court decision *The People (DPP) v Murray*,⁴² Henchy J endorsed the following definition of recklessness in section 2.02(2)(c) of the American Law Institute's Model Penal Code (the MPC):

"A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree".

⁴² *The People (DPP) v Murray* [1977] IR 360.

[2.51] In *The People (DPP) v Cagney and McGrath*⁴³ the Supreme Court as a whole affirmed that the test for recklessness in Ireland is the MPC subjective test. Recklessness thus consists of the conscious taking of “a substantial and unjustifiable risk”.

[2.52] The Supreme Court in *The People (DPP) v C O’R* also clearly explained the subjective test for recklessness in the context of rape:

“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 consenting but he proceeded to have, or continue, intercourse with her in spite of this, then recklessness is established.”⁴⁴

[2.53] Thus, in the context of rape, an accused is reckless where he was conscious of the risk that the woman was not consenting and, ignoring this, continued with the act of sexual intercourse regardless. It is notable that the Supreme Court in *C O’R* did not use the MPC phrase “substantial and unjustified” when describing the risk involved. This appears to support the view that, because the consequence of non-consensual sex is grave, and because the availability of an answer to the question of consent is easily accessible, the question of recklessness in the context of rape does not necessarily centre on the “substantial and unjustified” aspect of the definition of recklessness.⁴⁵ Conversely, of course, an accused will not be reckless in a situation where he considered a risk, took prudent actions to minimise or mitigate that risk, and then continued, even if the harm still occurred.

[2.54] In 2018, the Court of Appeal in *The People (DPP) v MC*⁴⁶ considered a direction given by a trial judge in a rape case that recklessness meant “couldn’t care less”.⁴⁷ The Court of Appeal stated that “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.”⁴⁸ The Court continued that: “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

⁴³ *The People (DPP) v Cagney and McGrath* [2007] IESC 46, [2008] 2 IR 111.

⁴⁴ *The People (DPP) v C O’R* [2016] IESC 64, at para 50; [2016] 3 IR 322, at para. 56.

⁴⁵ See Charleton, *Offences Against the Person* (Round Hall Press 1992), at 276.

⁴⁶ *The People (DPP) v MC* [2018] IECA 137.

⁴⁷ *Ibid*, at para. 28.

⁴⁸ *Ibid*, at para. 29.

whether the other person is consenting or not, or is indifferent to the wishes and feelings of the other, that person is reckless.”

- [2.55] In *MC*, the Court of Appeal quoted from the trial judge’s jury directions,⁴⁹ in which he had quoted with approval the following passage from a 2000 report of the Law Commission of England and Wales:⁵⁰

“On the question of recklessness, case law is that in rape and other sexual offences the defendant is reckless if he does not have a belief that the other person is consenting, in circumstances in which he either knows there is a risk she does not consent or his attitude is one of indifference as to whether she consents or not. Thus it covers a situation where he knows that there is a risk that she does not consent and carries on regardless. It also appears to apply where a defendant has not specifically considered whether she consented, could not care less whether or not she is consenting or presses on regardless. To put it another way, if a jury is sure that the defendant was indifferent to the wishes and feelings of the victim aptly described as ‘couldn’t care less’, then in law he is ‘reckless’ for the purpose of sex offences.”

- [2.56] O’Malley, also citing the same report of the Law Commission of England and Wales, has noted that the term “couldn’t care less” here is not useful. This is because the term carries with it an implication that the accused was aware of, but apathetic towards, the risk of non-consent. Instead, O’Malley suggests that the question should be: “‘did he care at all?’ Did the accused even bother to consider the possibility that the complainant was not consenting?”⁵¹ The phrase “couldn’t care less” would only be appropriate when it is understood “to imply that the matter about which the accused was heedless or uncaring was present in his mind, and not something that never occurred to him.”⁵² The Commission agrees with this view, and that it would therefore be preferable to avoid the phrase “couldn’t care less” in the context of a discussion of recklessness.

⁴⁹ *The People (DPP) v MC* [2018] IECA 137, at para. 27.

⁵⁰ Law Commission of England and Wales, *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000), at 62-63.

⁵¹ O’Malley, *Sexual Offences* (2nd edn, Round Hall 2013), at 64.

⁵² *Ibid*, at 65.

- [2.57] Indeed, this view was also endorsed in 2019 by the Court of Appeal in *The People (DPP) v JK*,⁵³ which also concerned the type of direction in *MC*. The Court of Appeal in *JK* agreed that the trial judge had indeed erred in his directions to the jury on recklessness in the context of rape. The Court also agreed with O'Malley's description of the phrase "couldn't care less" as potentially representing indifferent recklessness as opposed to the current position in Irish law that recklessness requires actual advertence to a risk:

"To the extent that [the inclusion in the charge to the jury of the Report of the Law Commission of England and Wales, which had also been quoted by the trial judge in the *MC* case⁵⁴] might have been construed as suggesting that objective recklessness forms any part of Irish law it represented a misdirection. However, it must be said that it was a misdirection only in so far as it suggested the possibility of an occasionally arising nuance to the general rule, which general rule was correctly stated. It is true that no nuance such as that suggested in fact ever arises under Irish law. However, we believe that the jury were not left under any misapprehension as to the correct position, (save to the extent of being led incorrectly to believe that an occasional exception might arise), namely, that for there to be criminal liability based on recklessness the accused must have adverted to a substantial and unjustified risk, and that he proceeded regardless of that risk."⁵⁵

- [2.58] It is worth noting that the Court of Appeal in *JK* also stated that questions of recklessness had not arisen during the initial trial in question, as the accused had asserted that the complainant had been consenting at the time of the alleged offence, and as such this ground of the appeal was rejected by the Court.⁵⁶
- [2.59] The Commission concludes from this review that the term "couldn't care less" is best avoided in the context of the test of recklessness as it applies in the law of rape, and that the approach of the Supreme Court in *The People (DPP) v C O'R* is to be preferred.

⁵³ *The People (DPP) v JK* [2019] IECA 200.

⁵⁴ As quoted in para. 2.55.

⁵⁵ *The People (DPP) v JK* [2019] IECA 200, at para. 52.

⁵⁶ *Ibid*, at paras. 47-52.

(c) Retaining knowledge and recklessness in section 2 of the 1981 Act after any proposed reform

- [2.60] A separate, but related, question that arises in connection with this discussion of recklessness is whether, if the current primarily subjective test of honest belief is to be replaced by a move towards a more objective test of reasonable belief, should section 2 of the 1981 Act retain the current reference to recklessness, or should it be replaced by a simple reference to the absence of reasonable belief.
- [2.61] The Commission has considered this matter in preparing this Report, and has concluded that it would be preferable to retain the current references in section 2 of the 1981 Act to knowledge and recklessness and that any proposal to provide for a move towards an objective reasonable belief test should be added as an additional component of the fault or mental element (the *mens rea*) of the offence of rape. At present, section 2 of the 1981 Act provides that the fault or mental element can comprise either (a) knowledge of lack of consent or (b) recklessness as to whether the woman was consenting. A third category, absence of reasonable belief, would not add much in the way of particular complexity.
- [2.62] This approach would also have the advantage of underlining the different forms of the fault or mental element in rape. The Commission also notes in this respect that, in response to the Issues Paper, one consultee suggested that the offence of rape be reformed to remove the element of recklessness, and thus limit rape to the first category, knowledge of lack of consent. The Commission does not accept that this would be a suitable approach. Most serious offences in Ireland can be committed either intentionally or recklessly, while some extremely serious offences such as gross negligence manslaughter can be committed on the basis of an objective test of fault that requires neither intent nor recklessness. To remove recklessness from the mental or fault element of rape would therefore effectively de-criminalise highly risky behaviour in sexual encounters. For that reason, the Commission rejects that suggestion.

R. 2.01 The Commission recommends that the current references in section 2 of the 1981 Act to knowledge and recklessness as alternative fault or mental elements (the *mens rea*) of the offence of rape should be retained, and that any recommendation to provide for a move towards an objective reasonable belief test should be added to section 2 of the 1981 Act as an additional form of the fault or mental element of the offence.

4. Arguments for and against the current law on honest belief concerning consent

- [2.63] The Issues Paper set out 5 perceived advantages and 6 perceived disadvantages to the present law which requires that the accused must be proved to have known or believed that the complainant was not consenting, or to have been reckless in that regard. Consultees were asked for their views as to whether this aspect of the law should be retained or reformed.
- [2.64] The Commission therefore turns now to discuss the 5 identified advantages and the 6 identified disadvantages of the current primarily subjective formulation of rape in light of the strengths and weaknesses of subjectivity and objectivity, as applied to the law on rape. The Commission emphasises at the outset that this is not necessarily an “either or” choice. Irish criminal law and rape law in other jurisdictions are often comprised of elements combining subjectivity and objectivity.

(a) Arguments for the current mental or fault element of rape

(i) Presumption requiring intention, knowledge or conscious recklessness should be retained

- [2.65] The first advantage in retaining the current definition of honest belief is that it is in line with the longstanding common law presumption of the need to prove intention, knowledge or conscious recklessness as the standard fault or mental element (*mens rea*) in serious crimes. This is a presumption that, for a person to be convicted of a serious crime, he or she must have intended the wrongdoing, or have known that he or she was doing it, or have been reckless, that is, adverted to the risk of it happening because of his or her actions but nonetheless chose to proceed. The underlying basis for this presumption is that people should be responsible for the consequences that they choose to bring about and, therefore, legal culpability should apply where the person has chosen to act in a manner that merits labelling him or her as a criminal. According to this argument, it would not be appropriate to change the definition of rape to potentially hold criminally liable those who honestly but 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.
- [2.66] In response to the Issues Paper, some submissions agreed with this argument. But many other submissions highlighted that this perspective fails to take into account that many serious criminal offences, including manslaughter, are defined by reference to a standard based on negligence, which does not require any subjective

state of intention, knowledge or advertent recklessness.⁵⁷ This is discussed further in Chapter 3, Part 3.

(ii) Unfair to hold someone liable for a serious crime when he could not foresee the risk of harm

- [2.67] The second argument in favour of maintaining a requirement of knowledge or recklessness as to lack of consent, as opposed to holding persons liable in situations where they mistakenly but unreasonably believed that consent was present, is that it is unfair to hold someone liable for a serious crimes when they did not foresee the risk of injury. This argument asserts that to add any element such as "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. 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 an accused by objective criteria may amount to punishing him for his incapacity.
- [2.68] However, many consultees noted that any capacity issue can be taken into account in the jury's determination of whether the belief was reasonable. As will be discussed later in Chapter 3, any reforms to the honest belief test could include provisions that protect an accused where his decision-making capacity may be in question in relation to sexual matters. This could eliminate any concerns that introducing an element of objectivity into the test is excessively harsh on individuals whose decision-making capacity may be in question.

(iii) Criminalising inadvertence is not an effective deterrent

- [2.69] Another question raised in the Issues Paper was whether the present law, with its emphasis on subjectively mistaken behaviour, is an effective deterrent. A law that does not require a person to consider his contemplated behaviour with some degree of objectivity or reasonableness, having regard to the circumstances, in order to avoid incurring criminal liability is arguably less effective as a deterrent than one that does. 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.

⁵⁷ In its *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) the Commission recommended retention of the subjective approach to culpability in murder, and retention of the objective standard of culpability in one type of manslaughter, gross negligence manslaughter. Similarly, in the *Report on Defences in Criminal Law* (LRC 95-2009), the Commission recommended codifying the mixture of subjective and objective elements involved in a range of defences.

- [2.70] However, a number of consultees pointed out that, in the same way that crimes with intent or knowledge as a mental element communicate to the public that they should not intentionally engage in that prohibited act, the criminalisation of mistaken behaviour also communicates that people should take extra care not to commit that crime accidentally. In the context of rape, this would encourage people to enquire about consent before proceeding with a sexual act, or to take more care in forming their beliefs in consent.

(iv) Criminalising inadvertence is contrary to fair labelling

- [2.71] The Issues Paper suggested that it could be argued that reforming the offence to hold someone liable for a mistaken belief in consent would be contrary to fair labelling principles. A criminal conviction carries stigma, and rape is one of the most stigmatic 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.⁵⁸ On this basis, it could be argued that 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 honestly believed that the complainant was consenting, as well as those who knowingly committed rape, all being labelled as rapists and potentially at risk of receiving a punishment of life imprisonment.⁵⁹
- [2.72] The Commission notes in this context that many submissions were concerned with the stigma and censure that a rape conviction carries, and that a high level of blameworthiness should therefore apply. One consultee suggested that only actual knowledge of lack of consent was appropriate for the rape offence, and that the current alternative ground of recklessness as to consent should be repealed. It is nevertheless important to note that other serious crimes which are based on objective standards, such as manslaughter, can lead to a maximum sentence of life imprisonment.

(v) Honest belief is rarely the central issue at trial

- [2.73] Fifthly, the Issues Paper suggested that the experience of many practitioners was that "honest belief" was rarely bought up at trial. The Commission understands from its consultation process since the Issues Paper was published that the issue of *the factual consent* (the physical or conduct element of the offence, the *actus reus*) is more commonly the disputed issue in rape trials, and that, in practice, this is addressed by questions concerning the credibility of the complainant. Some

⁵⁸ Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press 2006), at 88.

⁵⁹ Ashworth, *Principles of Criminal Law* (2nd edn, Oxford University Press 1993), at 341.

consultees therefore proposed that there was little to be gained by changing the mental element, as it risks complicating the law even further while having little material benefit. However, while it may be that such cases are unusual, the Commission believes that this should not in itself be a basis for declining to reform the law.

(b) Arguments against the current mental or fault element of rape

(i) Honest belief test not consistent with consent as “free and voluntary agreement”

- [2.74] The Issues Paper suggested that the honest belief defence may run contrary to, and could undermine, the definition of consent as “free and voluntary agreement”. Many submissions noted that the definition of consent in section 9 of the 1990 Act, as inserted by section 48 of the 2017 Act, confirms the existing concept from case law: that to be legally valid consent must be actively communicated between those engaged in sexual intercourse.
- [2.75] Many submissions similarly noted that the current honest belief test in section 2 of the 1981 Act allows the accused to form a unilateral belief as to the woman’s consent. Therefore, it contradicts both (a) the need for communication that is an inherent part of the definition of consent in the case law, and (b) the legal definition of consent as “free and voluntary agreement” that was inserted into the 1990 Act by the 2017 Act.
- [2.76] It has been suggested that in cases where the complainant was frozen in fear, an accused could argue that he interpreted the complainant’s silence as consent.⁶⁰ 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.⁶¹ Some submissions were concerned that the availability of the honest belief defence may even *encourage* men not to check that the other party is consenting. As the Supreme Court stated in *The People (DPP) v C O’R*:⁶²

“Because insensibility, be it caused by sleep or an intoxicated or drugged state, cannot be any expression of consent, it follows that there should be communication from the woman through the senses that intercourse is to be allowed.”

⁶⁰ Leahy and Fitzgerald O’Reilly, *Sexual Offending in Ireland* (Clarus Press 2017), at 39.

⁶¹ See Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), chapter 8.

⁶² *The People (DPP) v C O’R* [2016] IESC 64, at para. 36; [2016] 3 IR 322, at para. 42.

(ii) The honest belief test allows an accused to rely on unreasonable beliefs and “places premium on ignorance”

- [2.77] The Issues Paper also noted that the honest belief defence has been criticised because it might allow an accused who relies on unreasonable beliefs about consent to be acquitted of rape. By allowing an accused person to rely on his unreasonable beliefs about consent, it has also been argued that the honest belief defence perpetuates disrespect for women’s sexual autonomy, something which may have broader implications for how society views rape and its victims. O’Malley similarly states that the subjective test “places a premium on ignorance, lack of consideration, and insensitivity”.⁶³
- [2.78] By allowing an accused person to defend himself on the basis of unreasonable beliefs in consent, the accused may appeal to morally retrograde stereotypes. In this way, the defence bolsters and legitimises sexist stereotypes which lead to attitudes and perceptions that blame the complainant. Where an accused has been acquitted on the basis of such beliefs, it has been argued that the law may encourage an accused to adhere to sexist stereotypes to defend himself, thereby entrenching sexist ideologies.⁶⁴ This in turn may have consequences for women who have been subjected to rape by deterring them from engaging with the criminal justice system.

(iii) Harm is caused regardless of the accused’s mental state

- [2.79] The Issues Paper noted that there are concerns that the honest belief defence ignores 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. This view was echoed in a number of submissions, which noted that the complainant still suffers a great harm, regardless of what the accused may have thought at the time. It may make little difference to the complainant whether or not the accused knew that she was not consenting.

(iv) Unreasonably believing that a woman is consenting is culpable behaviour

- [2.80] The Issues Paper also suggested that failing to notice that the other party in a sexual situation 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

⁶³ O’Malley, *Sexual Offences* (2nd edn, Round Hall 2013), at 61.

⁶⁴ Murray, “The Mens Rea of Rape in Ireland; Legal, Moral and Social Consequences” (2017) 27(1) *Irish Criminal Law Journal* 2, 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.

because it could not have been avoided by the accused. However, it could also be argued that failure to realise that the other party was not consenting, when a reasonable person in the situation would have, is also blameworthy. A failure to notice an obvious risk can show just as much of an insufficient concern for others as a conscious choice to disregard it.⁶⁵ 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 consent.⁶⁶ It may be argued that in a situation as intimate as sexual intercourse, there is an obligation to take the minimal step of ensuring that it is consensual.⁶⁷

(v) Primarily subjective test allows man who gave no thought to consent to be acquitted

- [2.81] The Issues Paper also suggested that an accused who had not given any thought whatsoever as to whether the complainant was consenting could be acquitted of rape under the current primarily subjective test. Criminalising conscious advertence to the possibility of non-consent, but excusing the failure of the accused to give minimal thought to consent at all, is arguably contrary to the goal of protecting the bodily autonomy of women.⁶⁸ For a relatively minor amount of effort a significant amount of harm could be avoided prior to engaging in sexual intercourse. Seen in this way, it is arguable that the law should hold a person guilty if he did not consider the issue of consent at all.⁶⁹

(vi) Requirement to prove knowledge could cause procedural problems

- [2.82] The Issues Paper noted that it has been argued that the requirement of knowledge of non-consent can contribute to difficulties of proof in sexual offence trials; and that it could be difficult to convince a jury that there was no way in which the accused had not honestly believed that the complainant had given consent.⁷⁰ Because no evidence is required to substantiate the assertion, it may be relatively

⁶⁵ See Stark, *Culpable Carelessness* (Cambridge University Press 2017).

⁶⁶ 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.

⁶⁷ 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) *Cambridge Law Journal* 381, at 393.

⁶⁸ Murray, "The Mens Rea of Rape in Ireland; Legal, Moral and Social Consequences" (2017) 27(1) *Irish Criminal Law Journal* 2, at 6.

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

⁷⁰ Leahy and Fitzgerald O'Reilly, *Sexual Offending in Ireland* (Clarus Press 2017), at 39.

easy for an accused to lie and assert that he honestly believed that the complainant was consenting.

- [2.83] While the Supreme Court highlighted in *The People (DPP) v C O'R*⁷¹ that a jury is not obliged to believe obviously false claims, and the likelihood of a completely unsubstantiated assertion being wholly accepted by jurors is low, it may still raise a reasonable doubt in their minds, which could lead to an acquittal.
- [2.84] Some consultees agreed with this analysis and that, in the “he said, she said” nature of rape cases, jurors may struggle to identify false claims of honest belief, particularly in light of common assumptions and misconceptions about rape. Indeed, 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.”⁷² At the same time, a number of practitioners raised doubts as to whether this happens in practice.

5. Discussion and conclusion

- [2.85] The Commission has considered in detail the arguments for and against the current law, in particular the honest belief defence in section 2(2) of the 1981 Act, taking account of the submissions received.
- [2.86] The Commission has concluded that the arguments against the current law greatly outweigh the arguments for retaining the present honest belief defence. In particular, the Commission considers that a significant issue is that the availability of a primarily subjective honest belief defence is not consistent with the fact that consent must involve “free and voluntary agreement”. This has been the how Irish law has defined consent since at least the decision of the Court of Criminal Appeal in 2001 in *The People (DPP) v C*,⁷³ confirmed in 2016 by the Supreme Court in *The People (DPP) v C O'R*⁷⁴ and now placed on a statutory footing in section 9(1) of the 1990 Act, as inserted by the *Criminal Law (Sexual Offences) Act 2017*. Similarly, the 8 (non-exhaustive) circumstances derived from the case law and now included in section 9(2) of the 1990 Act (as also inserted by the 2017 Act) emphasise a clear communicative basis for consent. The Commission has concluded that continuing a primarily subjective, and unilateral, understanding of belief in consent undermines the long-standing concept of consent, now placed on a statutory footing in the 2017 Act.

⁷¹ *The People (DPP) v C O'R* [2016] IESC 64, at para. 51; [2016] 3 IR 322, at para. 57.

⁷² Law Commission of England and Wales, *Consultation Paper (No 139) Consent in the Criminal Law* (1995), at 92.

⁷³ [2001] 3 IR 345, at 360.

⁷⁴ *The People (DPP) v C O'R* [2016] IESC 64, at para 37; [2016] 3 IR 322, at para. 43.

- [2.87] While the Commission acknowledges the arguments identified above that can be made for the current honest belief defence, a second significant argument against it is that it appears to place a premium on ignorance, lack of consideration, and insensitivity. Consent is something that should be identified when engaging in sexual intercourse: its presence is not something that can, or should, be assumed by default.
- [2.88] For all the reasons discussed, the Commission has concluded, and recommends, that the current honest belief defence in section 2(2) of the 1981 Act should be repealed and replaced. The Commission turns in Chapter 3 to consider the detailed reforms that arise from this.

R. 2.02 The Commission recommends that the current honest belief defence to rape in section 2(2) of the *Criminal Law (Rape) Act 1981* should be repealed and replaced.

CHAPTER 3 REFORM OF KNOWLEDGE OR BELIEF CONCERNING CONSENT

1. The Constitution and an objective test of “reasonable belief”

- [3.1] In Chapter 2, the Commission concluded and recommended that the current primarily subjective honest belief defence in section 2(2) of the 1981 Act should be repealed and replaced. Before discussing the details of any proposed reform, it is necessary to address a matter discussed in the Issues Paper: whether the inclusion of an objective element such as “does not reasonably believe” or “without any reasonable belief” in the fault or mental element (the *mens rea*) of the offence would raise constitutional concerns or otherwise be in conflict with basic principles of criminal liability. This concerns in particular the relevance and effect of the Supreme Court decision in *CC v Ireland*.¹ While the majority of submissions considered that the CC case did not involve a barrier to such a reform, it is important to examine this point in some detail before coming to a conclusion.
- [3.2] As already noted in Chapter 2, there is a long-standing common law presumption that the fault or mental element (the *mens rea*) for serious crimes requires proof that the accused committed the act involved intentionally, knowingly or recklessly. This is, indeed, the basis for the current law in section 2 of the 1981 Act. Expanding liability for rape to situations where the accused did not reasonably believe that the complainant was consenting goes beyond this presumption. However, as discussed below, there are many other serious offences in Irish law where the fault or mental element of those offences is based on such an objective standard.
- [3.3] *CC v Ireland*² concerned section 1 of the *Criminal Law Amendment Act 1935*, which made it an offence to have sexual intercourse with a girl under the age of 15 (unlawful carnal knowledge), carrying on conviction a maximum sentence of life imprisonment. The crucial point addressed in the CC case was that this was a strict liability offence, in which no defence was available, such as whether the accused had either an “honest” (subjective) or a “reasonable” (objective) belief that the girl was over the age of 15. The Supreme Court held that, because section 1 of the 1935 Act contained no such defence, it was unconstitutional.³ The Court accepted that there were strong public policy objectives in seeking to protect young girls

¹ There were two limbs to the legal proceedings in the CC case. The first limb of the proceedings is cited as *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1. The second limb of the proceedings dealt with the constitutionality of the offence and is cited as *CC v Ireland* [2006] IESC 33 [2006] 4 IR 66.

² [2005] IESC 48, [2006] 4 IR 1; [2006] IESC 33 [2006] 4 IR 66.

³ See Prendergast, “The Constitutionality of Strict Liability Offences” (2011) 33 *Dublin University Law Journal* 285.

from predatory behaviour, but that this needed to be achieved in a manner that did not involve a strict liability offence.

- [3.4] It is important to note that the majority of the Supreme Court in *CC* added that, had section 1 of the 1935 Act included a defence of reasonable belief as to age, it would have been constitutional. Fennelly J held that the fault or mental element (the *mens rea*) of unlawful carnal knowledge of a girl under the age of 15 could be put in two ways:

“either the prosecution is required to prove knowledge on the part of the accused that the girl was under age or the accused must be permitted to prove as a defence that he was mistaken, on reasonable grounds, as to her age.”⁴

- [3.5] He added:

“[there is] clear authority for the proposition that, insofar as s.1(1) of the Act of 1935 is concerned, in the absence of compellingly clear exclusion of its necessity, the prosecution should have to prove not only that the accused had sexual intercourse with a girl under fifteen, but that he knew that she was under that age. The alternative formulation is that there should be a defence of mistaken belief (on reasonable grounds) as to the age of the girl. I do not mean, of course, that proof of express subjective knowledge would be requisite. The surrounding circumstances would in many cases furnish sufficient *prima facie* proof.”⁵

- [3.6] Geoghegan J took the view that a subjective belief as to age would be sufficient:

“On the question, however, as to whether it is sufficient for the belief to be genuine without it having to be objectively reasonable, I am firmly of the opinion that that is the case. Once by reason of the governing principles requiring *mens rea*, the court permits such a defence, it is illogical to require that the belief must be objectively reasonable.”⁶

- [3.7] Hardiman J did not consider that the Court should express a view on this issue, but that rather it was a matter for the Oireachtas to consider. He stated:

⁴ *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1, at para. 137.

⁵ *Ibid*, at para. 146.

⁶ *Ibid*, at para. 121.

"Counsel... posits a 'reasonable belief' defence on the basis that the existence of such a defence would save the section from unconstitutionality. But so too would a defence which left the defendant's knowledge of age to be proved by the prosecution as part of the *mens rea* of the offence, very likely a defence based on presumptions and perhaps other forms of defence... But for present purposes it is sufficient to say that there is, obviously, more than one form of statutory rape provision which would pass constitutional muster, and it does not appear to be appropriate for the court, as opposed to the legislature, to choose between them."⁷

- [3.8] In response to *CC*, the Oireachtas enacted new offences of defilement of a young person under the age of 15 in the *Criminal Law (Sexual Offences) Act 2006* (the 2006 Act), which provided for a defence of honest belief as to age. The *Criminal Law (Sexual Offences) Act 2017* (the 2017 Act) made a number of amendments to a range of sexual offences. The offences governing sexual activity with children under the age of 15 and 17 years old were reformed to include a "reasonableness standard." The 2017 Act amended the 2006 Act to require that the accused should be "reasonably mistaken" as to age. It also provided that, in considering whether the accused was reasonably mistaken that the child had reached the particular age, "the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age." If the accused's mistaken belief in age was not one that a reasonable person would have made, or if it cannot be proved to the civil standard, the accused will be found guilty.
- [3.9] There are a number of other serious offences with objective elements in Irish criminal law. The act of manslaughter is committed when the accused causes the victim's death in the course of committing a dangerous crime, and "dangerousness" is to be judged objectively.
- [3.10] Regarding gross negligence manslaughter, a person is guilty when he or she causes the death of another through gross negligence. In *Joel v Director of Public Prosecutions*,⁸ it was argued that gross negligence manslaughter is unconstitutional on the ground of vagueness. In rejecting this argument, the High Court stated that:

"Criminally negligent manslaughter arises where the death of another person is caused in circumstances which objectively amount to a very high degree of negligence and which, in the

⁷ *CC v Ireland* [2006] IESC 33, [2006] 4 IR 66, at para. 69.

⁸ *Joel v DPP & Ors* [2012] IEHC 295.

circumstances in question, to any reasonable person the fact that a serious risk was unjustifiably taken with the life of another would be apparent.”⁹

- [3.11] Prior to the *Joel* case, it had also been suggested that gross negligence is a culpable mental state:

“It involves a failure to take proper precautions for a task or failing to prevent a result through not exercising proper care. That may include neglecting to pay heed while doing something, or failing to prepare adequately for an undertaking, or failing to act in all the circumstances where a duty to act is clearly imposed. In any of these cases blame attaches to the accused because he either has not applied his mind to the task or has not taken such ordinary care as any responsible person would have felt compelled to take in the circumstances. The accused is held accountable because by the application of concentration the death of the victim could have been avoided.”¹⁰

- [3.12] The offences of dangerous driving and driving without due care and attention also include objective standards. Section 52 of the *Road Traffic Act 1961* provides for the offence of careless driving, and section 53 of the 1961 Act provides for the offence of dangerous driving.
- [3.13] The meaning of “dangerous driving” was considered in *The People (AG) v Quinlan*.¹¹ The Circuit Court (Ó Briain J) described it as “driving in a manner in which a reasonably prudent motorist, having regard to all the circumstances, would clearly recognise as involving a direct and serious risk of harm to the public.” Smith and Hogan state that the use of negligence for driving offences is justified because where a person has voluntarily assumed a responsibility by partaking in a dangerous activity, it is necessary for a safe environment that liability is imposed where people fall below the standard expected of them.¹²
- [3.14] The Supreme Court in *The People (DPP) v O’Shea*¹³ addressed a situation where the accused had been temporarily blinded by the sun while driving before colliding

⁹ *Joel v DPP & Ors* [2012] IEHC 295, at 12.

¹⁰ Charleton, *Offences Against the Person* (Round Hall 1992), at 86.

¹¹ *The People (AG) v Quinlan* (1963) 97 ILTR 219.

¹² Ormerod and Laird, *Smith and Hogan’s Criminal Law* (14th edn, Oxford University Press 2015), at 189.

¹³ *The People (DPP) v O’Shea* [2017] IESC 41, [2017] 3 IR 684.

with a vehicle. During the course of the collision, he pinned another man to the vehicle and caused his death. The accused was charged with careless driving causing death under section 52 of the *Road Traffic Act 1961*. At his trial, the judge directed the jury that careless driving was a strict liability offence. The accused was found guilty but, on appeal, the Court of Appeal overturned his conviction on the grounds that the offences of dangerous and careless driving are not strict liability offences, but actually require proof of intention or recklessness.¹⁴ The Director of Public Prosecutions then appealed to the Supreme Court, and the Court allowed the appeal and ordered a retrial.

- [3.15] The Supreme Court found the decision of the Court of Appeal to be incompatible with the law on gross negligence manslaughter and dangerous driving. The Court explained the blameworthiness inherent in carelessness and compared this with another driver who may have also caused an accident but who is blameless because he or she drove with reasonable care:

“The degree of negligence is lower than that involved in dangerous driving, since the driving does not, for the purposes of this offence, have to create the ‘direct, immediate and serious’ risk that characterises dangerous driving...

This does not mean that a ‘blameless’ driver is liable to be convicted and punished. In the first place, a person who drives without due care and attention in a public place is not properly described as ‘blameless’ if harm is caused as a consequence of such driving. On the other hand, a driver may be involved in an accident, and may even have caused that accident, and yet be held blameless if he or she met the standard of the reasonably competent or prudent driver in the circumstances.”¹⁵

- [3.16] The Court did highlight that there is a difference in blameworthiness between a careless driver and a dangerous driver, and that sentencing should reflect the relative lower culpability of carelessness even where the consequences of the two are the same:

“It is also essential to stress that the fact that a death or serious bodily harm results does not mean that a conviction for careless driving is the same as a conviction for dangerous

¹⁴ *The People (DPP) v O’Shea* [2017] IESC 41, [2017] 3 IR 684. Judgment of O’Malley J, at para. 11.

¹⁵ *Ibid.* Judgment of O’Malley J, at paras. 48-49.

driving causing the same consequence. The risk created by the careless driver is less than that created by the dangerous driver, and the careless driver is therefore less blameworthy in respect of the result. The question of the appropriate sentence remains a matter for the court, and while it is clear that the consequence of the offence must be taken into consideration, it does not determine the punishment to the exclusion of other relevant factors.”¹⁶

[3.17] In a concurring judgment in *O’Shea*, Clarke J stated:

“In order that there be a serious offence concerning general failure to comply with reasonable standards it seems to me that it is arguable that it must be demonstrated that there is a reasonable proportionality between the importance of the area of human endeavour concerned, the likely risk or consequences of a failure of proper care in the area concerned and the degree of severity of the crime identified by reference to the maximum sentence permitted. While the Oireachtas, as the arbiters of policy, may well enjoy a significant margin of appreciation in such matters I doubt very much whether that margin of appreciation is without constitutional limitation. Creating a very serious criminal offence for a very minor failure in an area not known for generating significant risk to the public might well fail such a proportionality test.”¹⁷

[3.18] This passage recognises that there is a moral question in prosecuting a serious offence based on a “very minor failure”. However, Clarke J noted that the law is not solely concerned with retribution as it can also assist in deterring future harms. Driving is a highly regulated activity, where one assumes a high level of responsibility because of the high level of risks associated with it. Criminal liability must cover and deter not just advertently bad driving, but inconsiderate and careless driving regardless of whether the driver knew he or she was driving dangerously.¹⁸ Thus, Clarke J held that liability for failing to meet reasonable standards for serious offences should be governed by a proportionality test.

¹⁶ *The People (DPP) v O’Shea* [2017] IESC 41, [2017] 3 IR 684. Judgment of O’Malley J, at para 49.

¹⁷ *Ibid.* Judgment of Clarke J, at para. 2.7.

¹⁸ Prendergast, “Culpability in Careless Driving and the So-Called ‘Third Category’ of Criminal Offence” (2018) 36(4) *Irish Law Times* 63, at 63.

- [3.19] The Supreme Court judgments in *O'Shea* indicate that objective standards of criminal liability are acceptable where they are proportionate to the public interest. As previously stated, the consequences of a failure to exercise care regarding consent in the context of sexual intercourse are extremely serious and the cost of exercising care is minimal. Indeed, the maximum sentence permitted is life imprisonment, but, as noted by the Court in the *O'Shea* case, the lesser degree of blameworthiness of carelessness can be taken into account during sentencing.
- [3.20] Many common law defences in Ireland have straddled the subjective/objective divide. Where the defence of duress arises, the accused will escape criminal liability on the basis that he or she was coerced or compelled into committing a criminal act by threats from another. An objective test for duress was established by the Court of Criminal Appeal in *Attorney General v Whelan*.¹⁹ The Court held that for the defence of duress to succeed, the threat must be "so great as to overbear the ordinary power of human resistance".²⁰ However, a person who is threatened with immediate death or serious personal violence is expected to display reasonable firmness in the face of the threat. Accordingly, the defence of duress is defeated if the prosecution proves that the threats would not have overborne the will of an ordinary person.
- [3.21] This was confirmed by the Supreme Court in 2018 in *The People (DPP) v Gleeson*.²¹ The Court essentially clarified that the test includes both objective and subjective elements:
- "...duress excuses criminal conduct where unwished for constraint compels an accused of reasonable firmness, of the age, sex and other relevant fixed and permanent characteristics of the accused, into criminal conduct. That coercion, on a reasonable view, should be so serious as to overcome the resistance of the person seeking to assert the defence... If any reasonable opportunity exists for the person who claims to be under duress to take any lawful evasive action, particularly seeking the assistance of law enforcement authorities, it must be taken."²²
- [3.22] The Supreme Court in *Gleeson* noted that the defence of provocation was the only defence in Irish law "which entirely depends on what the accused claims to be his

¹⁹ *Attorney General v Whelan* [1934] IR 518.

²⁰ *Ibid*, at 526.

²¹ *The People (DPP) v Gleeson* [2018] IESC 53.

²² *Ibid*, at para. 39.

internal mental, or in other words, subjective, viewpoint.”²³ Provocation reduces a murder charge to manslaughter where the accused can show that he was provoked to suffer a “sudden and temporary loss of self-control, rendering him or her for that moment not the master of their mind.”²⁴ In 1978, the Court of Criminal Appeal in *The People (DPP) v MacEoin*²⁵ departed from the traditional common law approach to provocation, which required the response to be reasonable, and laid down a subjectivist approach for the test:

“[T]he trial judge at the close of the evidence should rule on whether there is any evidence of provocation which, having regard to the accused’s temperament, character and circumstances, might have caused him to lose control of himself at the time of the wrongful act and whether the provocation bears a reasonable relation to the amount of force used by the accused.”²⁶

- [3.23] In framing the subjective standard, the Court relied on a minority judgment in *Moffa v The Queen*,²⁷ a decision of the High Court of Australia. In that case, Murphy J criticised the “reasonable man” component of the traditional test of provocation on the grounds that the “objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is.”²⁸
- [3.24] Drawing on Murphy J’s judgment in *Moffa*, the Court held in *MacEoin* that the objective test was “profoundly illogical”. In particular, there was difficulty in determining which of the accused’s characteristics should be attributed to the reasonable man.²⁹
- [3.25] In 2001, in *The People (DPP) v Davis*,³⁰ the Court of Criminal Appeal accepted the need for a re-examination of the subjective approach to provocation. The Court stated that *MacEoin*³¹ was an extreme standard of subjectivity and it might be

²³ *The People (DPP) v Gleeson* [2018] IESC 53, at para. 24.

²⁴ McIntyre, McMullen, and Ó Toghda, *Criminal Law* (Roundhall 2012), at 265.

²⁵ *The People (DPP) v MacEoin* [1978] IR 27.

²⁶ *Ibid*, at 34.

²⁷ *Moffa v The Queen* (1977) 138 CLR 625.

²⁸ *Ibid*, at 627.

²⁹ Law Reform Commission, *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27 – 2003).

³⁰ *The People (DPP) v Davis* [2001] 1 IR 146.

³¹ *The People (DPP) v MacEoin* [1978] IR 27.

necessary to place limitations on it. The Court noted that “[t]he totally subjective criteria for the defence of provocation had been criticised by a number of commentators who [had expressed] concern that it places an exceptionally onerous burden on the prosecution”.³² In this regard, it was noted that the policy considerations on which the defence is based may change over time and that “[t]hese considerations may dictate that the defence should be circumscribed or even denied in cases where [allowing it would] promote moral outrage.”³³

- [3.26] Prendergast notes that despite the perception that provocation in Ireland is wholly subjective, it still has an element of objectivity in that the “provoking act” by the deceased is judged objectively.³⁴ He notes that in *The People (DPP) v Curran*,³⁵ O’Donnell J stated that “nothing which could remotely constitute provocation emanating from the victims... occurred”.
- [3.27] Although the defence of provocation is judged now in a primarily subjective sense, there are some objective aspects to it and there have been calls for more objective standards to be added. The Commission’s *Report on Defences in Criminal Law* recommended that the defence be based on a mixed text, primarily on the standard of an ordinary person’s power of self-control, informed by characteristics of the accused, not including mental disorder, state of intoxication or temperament.³⁶
- [3.28] To successfully raise the defence of self-defence, where that force is fatal, the force must be necessary. Where the fatal force used is unnecessary, but the accused honestly believed it to be necessary, the accused will be guilty of manslaughter. In *The People (AG) v Dwyer*, the Supreme Court held that an accused’s perception of the threat must be based on “reasonable grounds” to justify the use of self-defence and to be acquitted of a homicide charge.³⁷
- [3.29] Some submissions drew attention to the potential disconnect between lowering the threshold for the imposition of liability for rape and the maximum sentence that can be imposed upon conviction. Section 48 of the *Offences against the Person Act 1861* provides for a maximum sentence of life imprisonment for those convicted of rape.

³² *The People (DPP) v Davis* [2001] 1 IR 146, at 157.

³³ *Ibid*, at 159.

³⁴ See Prendergast, “Criminal Culpability and Sexual Offences Reform” in Liz Heffernan and David Prendergast (eds), *Criminal Law and Practice Review* (Clarus Press 2018).

³⁵ *The People (DPP) v Curran* [2011] 3 IR 785, at 799.

³⁶ Law Reform Commission, *Report on Defences in Criminal Law* (LRC 95 – 2009), at 222.

³⁷ *The People (AG) v Dwyer* [1974] 108 ILTR 17, at 24.

- [3.30] In *CC v Ireland*,³⁸ Hardiman J considered that, in assessing the constitutionality of an offence, the Court should have regard to the *maximum* sentence possible pursuant to a conviction, and not just the *likely* sentence in determining the proportionality of an offence.³⁹ It is certainly arguable that a sentence of life imprisonment in a case where the accused did not have a reasonable belief as to consent, as opposed to being aware of a lack of consent, or being reckless as to consent and proceeding anyway, could be regarded as disproportionate. However, what is important is that the *range* of possible sentences is proportionate to the *range* of possible offending. In Ireland, it is constitutionally required that the sentence for every offence which is governed by a maximum, as opposed to a mandatory, penalty must be proportionate to the gravity of the offence and the personal circumstances of the offender.⁴⁰
- [3.31] The Commission has previously considered the test of proportionality in sentencing in detail in its *Report on Mandatory Sentences*⁴¹ and its *Issues Paper on Suspended Sentences*.⁴² From that analysis it is clear that culpability and harm to the victim are very significant factors in assessing the proportionality of a sentence. This is reinforced by the view of the Supreme Court in the *O'Shea* case, discussed above, that the issue of proportionality can be addressed in the context of sentencing. To include a test of reasonable belief in the offence of rape would expand the range of possible offending to some extent, and thus would have a corresponding effect on likely sentencing outcomes.
- [3.32] On the basis of this discussion, the Commission considers that there is no constitutional obstacle to introducing an objective test of reasonable belief into the mental or fault offence of rape.

2. Overview of reform of knowledge or belief in other jurisdictions

- [3.33] The Commission now turns to discuss the detailed elements of the provisions that should replace the current primarily subjective test in section 2 of the 1981 Act. This requires consideration of whether an entirely objective test would be appropriate or whether the law should provide for a mixed approach, in which the law would provide for a general objective standard of "reasonable belief" while also taking

³⁸ *CC v Ireland* [2006] IESC 33, [2006] 4 IR 66.

³⁹ *Ibid*, at paras. 29 and 32.

⁴⁰ See *The People (DPP) v M* [1994] 3 IR 306; *The People (DPP) v Kelly* [2005] 2 IR 321; and *Gilligan v Ireland* [2013] IESC 45, [2013] 2 IR 745.

⁴¹ *Report on Mandatory Sentences* (LRC 108-2013), at paras. 1.45-1.101.

⁴² *Issues Paper on Suspended Sentences* (IP 12-2017), at paras. 1.05-1.08. The Commission intends to publish its Report on this subject in 2020.

account of some relevant subjective circumstances, such as the physical capacity or decision-making capacity of the accused man.

- [3.34] Inserting a form of objective test of reasonable belief into the fault or mental element of the rape offence would mirror reform in other jurisdictions, such as England and Wales, Northern Ireland, Scotland and New Zealand. As noted in Chapter 2, the Supreme Court in *The People (DPP) v C O'R*⁴³ the Supreme Court referred to a number of other jurisdictions, including New Zealand, England and Northern Ireland, where a primarily objective test as to knowledge or belief has been enacted.
- [3.35] The Supreme Court referred to section 128(2) of the New Zealand *Crimes Act 1961* (as amended by the *New Zealand Crimes Amendment Act 2005*), which defines the fault or mental element of rape as being where the accused does that "without believing on reasonable grounds" that the woman was consenting. The Court also pointed out that England and Northern Ireland had departed from the primarily subjective *Morgan* test and had also moved towards a primarily objective test by repealing, respectively, the 1976 Act and 1978 Order. The Court noted that the *Morgan*-derived test had been replaced, respectively, by section 1 of the *England & Wales Sexual Offences Act 2003* and Article 5 of the *Sexual Offences (Northern Ireland) Order 2008* both of which, as the Court noted, provide that rape occurs where the accused "does not reasonably believe" that the woman consented, and that whether a belief is reasonable is to be determined "having regard to all of the circumstances" including "any steps [the accused] has taken to ascertain whether" the woman has consented. Although the Supreme Court did not mention it in *C O'R*, the same approach has been adopted in Scotland in section 1 of the *Sexual Offences (Scotland) Act 2009* which provides that rape occurs where the accused has sexual intercourse with a woman "without any reasonable belief" that the woman consents.
- [3.36] While the reforms in those jurisdictions have involved differences in detail, they have in common a move from the primarily subjective test that emerged from the UK House of Lords decision in *DPP v Morgan*⁴⁴ towards some form of objective test of reasonable belief. This has usually also been accompanied with some subjective elements that take account of specific circumstances. In other words, a mixed test with an objective starting point and some subjective elements, a kind of reverse order approach to the current test.
- [3.37] The reforms in those jurisdictions formed the basis for the proposed amendment to section 2(2) of the 1981 Act put forward during the Oireachtas debates on the

⁴³ [2016] IESC 64, at para 44; [2016] 3 IR 322, at para. 50, discussed at paras. 2.39-2.48, above.

⁴⁴ *DPP v Morgan* [1975] UKHL 3, [1976] AC 182, discussed in paras. 2.31-2.35, above.

Criminal Law (Sexual Offences) Act 2017. This proposal would have substituted the following for section 2(2) of the 1981 Act:

“(2) (a) It is hereby declared that if at a trial for a rape offence the jury is to consider whether the defendant believed that the complainant was consenting to sexual intercourse, this belief must be based on reasonable grounds.

(b) Whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps the defendant took to ascertain whether the complainant was consenting.”⁴⁵

- [3.38] This proposal involved a variation of the mixed test found in other jurisdictions, in which the objective reasonable belief test in paragraph (a) of the proposal is accompanied by subjective elements in paragraph (b), namely “all the circumstances”, which could take account of the man’s physical or decision-making capacity, and any steps taken to ascertain whether the complainant was consenting.
- [3.39] The Commission considers that the proposal put forward during the Oireachtas debates on the 2017 Act provides a useful starting point for discussion of the detailed elements of the reform of section 2(2) of the 1981 Act discussed in this Chapter.

3. Reform of fault or mental element of the offence

- [3.40] The Issues Paper asked whether any reform of knowledge or belief as to consent should be introduced as an amendment to the fault or mental element of the offence, or alternatively, as a defence to a strict liability rape offence. Most consultees were in favour of amending the fault or mental element of the offence to provide that the accused had “no reasonable belief” that the woman was consenting. Many consultees were concerned that making rape a strict liability offence, whereby the offence would be proved where it was established that there was non-consensual sexual intercourse, irrespective of the accused’s mental state, would be contrary to the presumption of innocence, and thus risk incompatibility with the right to a fair trial in Article 38 of the Constitution and Article 6(2) of the Council of Europe Convention on Human Rights.

⁴⁵ *Criminal Law (Sexual Offences) Bill 2015*, Report Stage, Proposed Amendment No.54, available at: <https://data.oireachtas.ie/ie/oireachtas/bill/2015/79/dail/4/amendment/numberedList/eng/b79c15s-drn.pdf>, at 16.

- [3.41] A minority of submissions were in favour of removing the mental elements from the offence, on the basis that requiring the prosecution to prove the internal mindset of the accused at the time was seen as too onerous. These submissions were of the opinion that such a formulation would remove the focus and scrutiny from the complainant, and put the spotlight on the accused's conduct. One submission noted that an offence and defence of this type would be in line with the offences of sexual activity with children and protected persons, and it would be beneficial if sexual offences were consistent in this way.
- [3.42] The Commission has concluded that the benefits of having the "reasonable belief" element in the definition of the offence outweigh the benefits of strict liability with a "reasonable belief defence". Such a formulation indicates that while being the victim of non-consensual sexual intercourse is a significant injury, the culpability in committing such an act is engaging in the behaviour based on an unreasonable belief. As such, it is appropriate for the prosecution to prove a lack of reasonable belief in consent in order to convict a person of rape.

R. 3.01 The Commission recommends that the fault or mental element of the rape offence in section 2(1) of the 1981 Act should be amended to include that the accused man did not reasonably believe at the time of the sexual intercourse that the woman was consenting.

4. Factors to be considered in the reasonable belief test

(a) Not suitable to provide that regard be had to "all the circumstances"

- [3.43] The Issues Paper asked whether section 2 of the 1981 Act should provide that "all the circumstances" should be considered in the determination of whether the belief concerning consent was reasonable. The majority of submissions were against including the phrase "all the circumstances".
- [3.44] The England & Wales *Sexual Offences Act 2003* and the *Sexual Offences (Northern Ireland) Order 2008* (but not, as noted below, the *Sexual Offences (Scotland) Act 2009*) provide that the Court shall consider "all the circumstances" in determining what it was reasonable for the accused to believe. The *Criminal Law (Sexual Offences) Act 2017*, where it deals with mistaken belief as to age in sexual activities involving children, also provides that regard is to be had to "all the circumstances of the case" to determine whether that mistaken belief is reasonable.
- [3.45] The effect of these provisions is that the jury is to consider the totality of evidence. This maintains an element of subjectivity by looking at the belief in the context of the particular facts of the case.

- [3.46] The Issues Paper noted that the inclusion of this phrase has been criticised in England and Wales. The purpose of this term was to ensure that any disability 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.⁴⁶ Ashworth similarly warns elsewhere that there is a danger that the phrase “all the circumstances” blunts the objectivity of the reasonableness requirement and allow juries to modify the standard to take account of a particular accused’s belief system. He states that since the England & Wales *Sexual Offences Act 2003* does not indicate the boundaries of objectivity or subjectivity required by the test, there is room for the operation of “questionable socio-sexual myths.”⁴⁷
- [3.47] The Scottish Law Commission, in its analysis of the honest belief defence, concluded that the phrase “having regard to all the circumstances” effectively meant that the test amounted to the question whether or not “given the accused’s attributes, including his belief systems, was his belief as to consent reasonable?”⁴⁸ They noted that this standard does not significantly differ from the subjective test, and thus opted against recommending its inclusion in the Scottish legislation. This view was accepted and the *Sexual Offences (Scotland) Act 2009* does not therefore refer to “all the circumstances.”
- [3.48] 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.⁴⁹ The authors conducted mock jury studies during which participants were asked to apply the reasonable belief defence to a case. Their research found:

“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)

⁴⁶ Temkin and Ashworth, “The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent” (2004) *Criminal Law Review* 328, at 328.

⁴⁷ Ashworth, *Principles of Criminal Law* (6th edn, Oxford 2009) at 342.

⁴⁸ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (2007), at 56.

⁴⁹ Finch and Munro, “Breaking boundaries? Sexual consent in the jury room” (2006) 26(3) *Legal Studies* 303, at 317 – 318.

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.”⁵⁰

- [3.49] 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.⁵¹ Overall, they concluded, it was not difficult to establish that an accused’s belief was reasonable.⁵²

- [3.50] Simester and Sullivan note that, in other areas of law, it goes without saying that decisions are made taking account of “all the circumstances”. They give the example that “if a driver is sued for negligence it helps her not at all to argue that, though her driving fell short of the objective standard of the reasonable person, by the standards of a person with her mental disabilities she was doing rather well.”⁵³ They submit that if “all the circumstances” were taken to include all those that are internal to the accused, this could have the effect of retaining a subjective formulation.⁵⁴

- [3.51] In some submissions, consultees expressed concern that explicitly including the phrase would influence the jury to take into account irrelevant circumstances of the case, which might be influenced by the jurors’ own assumptions about rape. Other consultees were of the view that including the phrase would mean retaining a significant subjective element, because part of “all the circumstances” could be taken to include the accused’s own prejudicial beliefs.

- [3.52] Other consultees argued that no constraints should be put on the jury as to the circumstances it should consider. Indeed, the exclusion of the phrase “all the

⁵⁰ Finch and Munro, “Breaking boundaries? Sexual consent in the jury room” (2006) 26(3) *Legal Studies* 303, at 318.

⁵¹ 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.

⁵² *Ibid*, at 248.

⁵³ Simester et al. *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (6th edn, Bloomsbury 2016), at 489.

⁵⁴ *Ibid*, at 489.

circumstances” does not prevent the jury from considering all the circumstances, it merely does not highlight it.

- [3.53] The Commission has concluded that the available research appears to indicate that the phrase “in all the circumstances of the case” could permit the jury to take into account characteristics of the accused that are irrelevant as to whether or not his belief in consent was objectively reasonable. It could risk eroding the primarily objective standard being proposed by reintroducing a substantial subjective element.
- [3.54] This is not to say that the jury should ignore certain specific characteristics of the accused. Rather, the Commission considers that it would be preferable to address this by referring to relevant specific matters such as the physical or decision-making capacity of the accused, any relevant illness or the age and maturity of the accused. The Commission discusses these matters below.

R. 3.02 The Commission recommends that section 2 of the 1981 Act should not include a provision that, where the issue of reasonable belief arises in a trial, the jury is to have regard to “all the circumstances of the case”.

(b) Jury to have regard to specific characteristics

- [3.55] Those jurisdictions that have moved towards an objective reasonable belief test have diverged as to what extent the test should be wholly objective or involve a primarily objective test with some subjective elements. The test for reasonableness could either take the form of:
- (1) what the “reasonable person” would have believed in the circumstances of the case; or
 - (2) whether the belief was based on reasonable grounds; or
 - (3) whether the accused’s belief was reasonable.
- [3.56] The reasonable person is a hypothetical ordinary person, and does not necessarily share the personal characteristics of the accused. This can set a high standard, depending on how far the accused’s characteristics depart from those of the abstract reasonable person. Similarly, requiring that the belief be based on “reasonable grounds” alone requires no consideration of the characteristics of the accused, but only of the surrounding circumstances of the incident. The question of whether the accused’s belief was reasonable is more subjective, because it is more a question of whether it was reasonable for that individual to hold that belief. The Issues Paper asked consultees which test they thought was the most appropriate for the rape offence.

- [3.57] The law in England and Wales, Northern Ireland, and Victoria requires the prosecution to prove that the accused did not “reasonably believe” the complainant consented. In Scotland, the test is whether penetration occurred “without any reasonable belief” in consent. Some submissions were concerned that a test based on “reasonable belief”, such as the legislation in the UK, was not sufficiently objective and allowed the jury to consider too many of the accused’s characteristics.
- [3.58] There was some support for a test based on the reasonable person, but many submissions were concerned that a test based on the reasonable person would be too objective and harsh. Rook and Ward note that the UK government indicated in its report *Protecting the Public*⁵⁵ that the test of the reasonableness of a belief would be determined by reference to what an objective third party would have believed in that situation. This report resulted in the England & Wales *Sexual Offences Bill*, and while the main elements of that Bill were enacted in the *Sexual Offences Act 2003*, the provision on reasonable belief was amended during the course of the debates in the UK Parliament to include a subjective element that allows the jury to consider “all the circumstances”, and this could thus include the characteristics of the accused.⁵⁶
- [3.59] In 2018, the Law Reform Commission of New South Wales began a review of the law on sexual offences and consent. It noted that many of its submissions supported the current mental element of the offence which includes “the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.”⁵⁷ It also highlighted a submission that noted that basing a test on “reasonable grounds”, without directing the jury to regard what a reasonable person would have believed, would require the fact finder to conduct a “convoluted analysis” of the circumstances. It also noted that there is a view that the test is unreasonably difficult for the prosecution to satisfy.⁵⁸
- [3.60] The New South Wales Commission also noted that, as the law in that jurisdiction provides that rape is proved if the accused has “no reasonable grounds” for believing that the complainant consented, a case could arise where an accused

⁵⁵ Rook and Ward, *Sexual Offences Law and Practice* (4th edn, Sweet & Maxwell 2010), at 96.

⁵⁶ *Ibid*, at 97.

⁵⁷ See New South Wales Law Reform Commission, *Consent in relation to sexual offences. Consultation Paper 21* (2018).

⁵⁸ *Ibid*, at 71.

could be acquitted if the accused established a single reasonable ground for that belief, despite other considerable evidence that the belief was unreasonable.⁵⁹

- [3.61] The New South Wales Commission accepted this criticism and, in October 2019, it published draft reforms which proposed replacing the “no reasonable grounds” test with a test of “not reasonable in the circumstances”.⁶⁰ This proposal involves a move towards a clearer objective test.
- [3.62] The Commission has already concluded that the fault or mental element of the offence should be amended to provide that the accused man did not reasonably believe at the time of the sexual intercourse that the woman was consenting. The Commission considers that it should also be provided that where this issue arises in a trial, the jury should have regard to a specific set of circumstances and factors, and only those, which should be limited to relevant characteristics of the accused where these would affect the capacity of the accused to understand whether the woman was consenting. The Commission considers that this is preferable to a more general reference to all the circumstances in which the sexual intercourse occurs, and would therefore avoid consideration of irrelevant factors such as any personal bias of the accused.

R. 3.03 The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to a specific set of circumstances, and only those, which should be limited to relevant characteristics of the accused where these would affect the capacity of the accused to understand whether the woman was consenting.

- [3.63] The Commission considers that the specific set of circumstances should be (a) the physical, mental or intellectual disability of the accused, (b) any mental illness or (c) the age or maturity of the accused where these are relevant to the reasonableness of the belief as to consent. These are discussed in turn below.
- [3.64] As the Commission previously noted in the Commission’s *Report on Sexual Offences and Capacity to Consent*,⁶¹ there is a risk that any language used in this context will be affected by what Professor Steven Pinker has described as the “euphemism treadmill”, that terminology that at a given time seems respectful may in the future

⁵⁹ McNamara et al. *Preliminary Submission PCO85*, at 3, quoted in New South Wales Law Reform Commission, *Consent in relation to sexual offences. Consultation Paper 21* (2018).

⁶⁰ New South Wales Law Reform Commission, *Consent in relation to sexual offences. Draft Proposals* (2019), at 20-21. At the time of writing (October 2019), these proposals have not yet been finalised.

⁶¹ Law Reform Commission, *Report on Sexual Offences and Capacity to Consent* (LRC 109 – 2013) at 1-4.

be seen to be disrespectful.⁶² Nonetheless, the Commission has concluded that, in identifying the specific circumstances and factors relevant to reasonable belief, it is important to ensure that the terminology used in this Report is consistent with the most recent relevant legislation, in this case the *Criminal Law (Sexual Offences) Act 2017* (the 2017 Act). While this choice may seem less desirable, it has the advantage of ensuring that the proposed reforms in this Report are closely aligned to the language in the 2017 Act, whereas the use of other terms could lead to the conclusion that this was intended to suggest a different meaning.

- [3.65] Thus, the Commission will refer to the term “physical, mental, or intellectual disability” because it is referred to in the 2017 Act in relation to sexual consent. The term “mental illness” is also used in the 2017 Act and is therefore also used in the discussion below. The Commission acknowledges that “physical, mental, or intellectual disability” and “mental illness” are entirely separate concepts and are therefore discussed separately below. The Commission also took this approach in its *Report on Sexual Offences and Capacity to Consent*,⁶³ where it stated that “while a relevant person’s lack of capacity to consent may arise because of (a) a disability or (b) ill health, the fact of disability or of ill health does not, in itself, mean that the relevant person lacks capacity to consent and that each should be treated quite separately.”⁶⁴
- [3.66] The Commission has also concluded that, in assessing the relevance of these characteristics, it should also apply the general approach taken to them in the 2017 Act. Section 21 of the 2017 Act, which concerns the question whether a person with a disability or, as the case may be, a mental illness, is consenting to a sexual act, applies a functional test of capacity to this issue, that is, whether the person has, or lacks, the capacity to understand the nature and consequences of the sexual act. This functional approach in the 2017 Act also followed the recommendation to that effect in the Commission’s *Report on Sexual Offences and Capacity to Consent*.⁶⁵ While this Report addresses the separate question of whether the *accused’s* disability or, as the case may be, his mental illness, affected his reasonable belief as to consent, the Commission considers that a functional test is the appropriate test in principle to apply. This is because the test would require a jury to accept that the accused lacked the capacity to understand whether the woman was consenting,

⁶² This concept is explored by Professor Pinker in *The Blank Slate: The Modern Denial of Human Nature* (Viking 2002).

⁶³ Law Reform Commission, *Report on Sexual Offences and Capacity to Consent* (LRC 109 – 2013), at 5.

⁶⁴ *Ibid.*

⁶⁵ Law Reform Commission, *Report on Sexual Offences and Capacity to Consent* (LRC 109 – 2013), Chapter 2. This functional test is also consistent with the general approach to capacity in the *Assisted Decision-Making (Capacity) Act 2015*, and also with the equality principle in the 2006 UN Convention on the Rights of Persons With Disabilities (UNCPRD).

which the Commission considers is not only consistent with the functional test approach in the 2017 Act but also sets a suitably high threshold for the accused.

(c) Physical, mental and intellectual disability of the accused

- [3.67] Consistently with the presumed capacity of adult persons, and the equality principle in the UN Convention on the Rights of Persons with Disabilities (UNCRPD), a person with a disability is presumed to have responsibility for their sexual acts. At the same time, disability sometimes also brings a limit to capacity as well as the risk of exploitation. In its *Report on Sexual Offences and Capacity to Consent* the Commission sought to achieve a balance between autonomy and protection, and this approach is broadly reflected in Part 3 of the 2017 Act which prohibits sexual acts with protected persons. Part 3 of the 2017 Act was enacted in the wake of that Report.
- [3.68] In relation to physical disability, the Commission notes that the Supreme Court in *The People (DPP) v C O'R*⁶⁶ described consent as being composed of "active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse". This approach was, as discussed in Chapter 2, codified in the definition of consent in the 2017 Act. This definition of consent as being inherently communicative in nature has certain implications for an accused who may have, for example, a visual or a hearing impairment. A person who has a visual impairment might not be able to comprehend a woman's absence of consent, such as an expression of fear or negative body language. A person with impaired hearing might not be able to hear a woman's objections to unwanted sexual intercourse. This being said, an accused with a hearing impairment might easily be able to see negative body language just as an accused with a visual impairment could hear a woman protesting unwanted sexual intercourse.
- [3.69] With regard to the question of reasonable belief, the Commission considers that, as discussed above, a physical disability should only be relevant where, applying a functional test, this meant that the man lacked the capacity to understand a woman's specific feedback of consent or non-consent. It may also be noted that a person may have his vision or hearing temporarily impaired, and that, consistent with the functional approach, he should not be compared to a reasonable person lacking his (temporary) condition.
- [3.70] As to mental or intellectual disability, the Commission has already noted that section 21 of the 2017 Act provides a functional test for courts to assess the decision-making capacity of persons with a mental or intellectual disability or, as the case may be, a mental illness, by reference to their ability to understand the nature or the reasonably foreseeable consequences of the act, their ability to

⁶⁶ [2016] IESC 64, at para. 36; [2016] 3 IR 322, at para. 42.

evaluate “relevant information” for the purposes of deciding whether or not to engage in that act, and their capacity to communicate his or her consent to that act either by speech, sign language, or other such means. While the Commission notes that this test cannot be directly transplanted into a situation where the decision-making capacity of an *accused* may be in question it nonetheless provides a recent legislative example of the functional test for individuals with diminished decision-making capacity to engage in sexual relations.

- [3.71] The functional test can be contrasted with the older status test, which assumed, in effect, that people with a disability or mental illness are incapable of ever having capacity to consent. This was the approach applied in section 5 of the *Criminal Law (Sexual Offences) Act 1993*, which was repealed and replaced by the functional approach in the 2017 Act, thus bringing the law more in line with the UNCRPD.
- [3.72] The Commission fully supports the functional approach, so that the mere presence of a disability does not extinguish all aspects of the fault or mental element (*mens rea*) needed for a rape offence. It is entirely possible that a court will conclude that the accused’s mental or intellectual disability is not relevant for the purposes of assessing reasonable belief in consent and as a result of this the jury finds the accused guilty. It is important to note that this does not preclude the presence of such conditions from being relevant at the sentencing stage. As is normal in criminal trials, the specific circumstances of the accused must be taken into account by the court when formulating a proportionate penalty.
- [3.73] In response to the Issues Paper, many consultees agreed that the jury should have regard to the decision-making capacity of the accused. This would address the potentially harsh effects of holding someone with a disability, who did not have the capacity to understand whether the complainant was consenting, to the community standard of “reasonableness.” This would maintain an objective test, while making an allowance for characteristics over which the accused does not have control. Many submissions on this point noted that, if the unreasonable belief emanates from a condition over which the accused has no control, then there is no moral blameworthiness. As such, consultees agreed that the law should expressly direct the jury to consider these factors in its determination of whether the belief was unreasonable or not.
- [3.74] A person who suffers severe brain injury and subsequent cognitive dysfunction due to a motorcycle accident, for example, clearly cannot be judged according to the same reasonable standard as a person without such an injury. Cognitive disruptions resulting from brain injuries could foreseeably interfere with a person’s ability to understand consensual signals prior to engaging in sexual intercourse. Non-traumatic brain injury has similar effects as traumatic brain injury but has different

causes. Of key importance is the fact that brain injury can result in disinhibition.⁶⁷ It may also interfere especially with the visual interpretation of body language and recognition of facial expressions. This, in turn, generates poor social skills, especially if the subject is young.⁶⁸ These characteristics were also referenced in the Commission's *Report on Sexual Offences and the Capacity to Consent*, albeit in a context where it was acknowledged by the Commission that these characteristics may affect a person's capacity to consent (as opposed to the capacity to ascertain consent).⁶⁹

- [3.75] Intellectual (or learning) disabilities (that often accompany autism, for example) are defined as conditions present from childhood that involve "a greater than average difficulty in learning" and reduced adaptive skills.⁷⁰ Intellectual disabilities may make it difficult for the accused to interpret consensual signals due to inadequate socialisation or impaired mental function. There is, as noted by the Law Commission of England and Wales, a possibility that a person with an intellectual disability might not have "sufficient knowledge or understanding about sex and sexual relationships" due to a lack of effective sex education.⁷¹ Although the Law Commission here was referring to the sexual decision-making capacity of *complainants*, it is reasonable to assume that an *accused* with an intellectual disability could also have difficulty understanding the concept of sexual consent.
- [3.76] For these reasons, the Commission concludes, and recommends, that section 2 of the 1981 Act should provide that the jury shall have regard to any physical, mental or intellectual disability the accused man had at the time the intercourse occurred where this was such that he lacked the capacity to understand whether the woman was consenting.

⁶⁷ Milders, Fuchs and Crawford, "Neuropsychological Impairments and Changes in Emotional and Social Behaviour Following Severe Traumatic Brain Injury" (2003) 25(2) *Journal of Clinical and Experimental Neuropsychology* 157, at 157.

⁶⁸ *Ibid*, at 158.

⁶⁹ Law Reform Commission, *Report on Sexual Offences and Capacity to Consent* (LRC 109 – 2013), at 6.

⁷⁰ Inclusion Ireland (formerly NAMHI), *Intellectual Disability Causes and Prevention*, available at: <https://www.inclusionireland.ie/sites/default/files/attach/basic-page/512/causesandpreventionbooklet.pdf>.

⁷¹ Law Commission of England and Wales, *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000), at 33.

R. 3.04 The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to any physical, mental or intellectual disability the accused man had, at the time the intercourse occurred where this was such that he lacked the capacity to understand whether the woman was consenting.

(d) Mental illness

- [3.77] The Commission acknowledges that the issue of mental illness raises a specific challenge, namely, what level of illness would negate the fault or mental element (the *mens rea*) of the rape offence, but fall short of the test of insanity under the *Criminal Law (Insanity) Act 2006*. This arose in the English case of *R v B(MA)*,⁷² which involved the section in the *Sexual Offences Act 2003* that provides that in determining whether the accused's belief in consent is reasonable the jury is to have regard to "all the circumstances."
- [3.78] In *R v B(MA)* the accused had been convicted in the English Crown Court on two counts of rape. He had at the time a complex mental illness, which appeared to include paranoid schizophrenia, as a result of which he held a number of delusional beliefs. He believed that he had sexual healing powers and had a special connection to God. An expert witness at trial in the Crown Court stated that the accused was not legally insane at the time the offences were committed, because he had the capacity to know that what he was doing was wrong. So the delusional beliefs, although they impaired his ability to interpret events normally, did not extend to a belief that the woman involved was consenting. The trial judge therefore directed the jury that the accused's illness was not relevant to his understanding of whether the woman was consenting to sexual intercourse or saying no.⁷³ On appeal against his conviction, the accused argued that the trial judge should have directed the jury that his mental illness was a factor that they should, or could, consider when deciding whether any belief in consent was reasonable. The English Court of Appeal held that, as the accused had not given evidence that he might have thought that the woman's submission to intercourse was consent, this argument was based on mere speculation and it therefore dismissed the appeal and upheld the two rape convictions.
- [3.79] The Court went on, nonetheless, to consider the extent to which a mental illness, or mental disorder, could negate criminal liability. The Court pointed out that the *Sexual Offences Act 2003* provides that, by contrast with the pre-2003 law, the test to be applied is whether the accused's belief as to consent is reasonable in all the

⁷² See *R v B(MA)* [2013] EWCA Crim 3, [2013] 1 Cr App R 36.

⁷³ *Ibid*, at para. 24.

circumstances, and that an honest belief in consent is no longer sufficient. On that basis, the Court stated:⁷⁴

“A delusional belief in consent, if entertained, would be, by definition, irrational and thus *unreasonable*, not reasonable. If such delusional beliefs were capable of being described as reasonable, then the more irrational the belief of the defendant the better would be its prospects of being held reasonable... We conclude that unless and until the state of mind amounts to insanity in law, then under the rule enacted in the Sexual Offences Act [2003] beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably arise without it.” (emphasis in original)

- [3.80] The Court did not, however, completely preclude a person from successfully claiming that a mental illness or disorder had impaired their capacity to appreciate that the woman was not consenting:⁷⁵

“It does not follow that there will not be cases in which the personality or abilities of the defendant may be relevant to whether his positive belief in consent was reasonable. It may be that cases could arise in which the reasonableness of such belief depends on the reading by the defendant of subtle social signals, and in which his impaired ability to do so is relevant to the reasonableness of his belief.”

- [3.81] The decision in *R v B(MA)* provides some useful guidance on the application of the primarily objective test in a case involving mental illness. First, it illustrates the complexity of addressing this matter where the accused has a profound and complex illness that falls short of meeting the legal test of insanity. Second, it supports the Commission’s view that there should be a clear link between the illness and the capacity or incapacity of the accused to understand whether the woman was consenting. How this matter is applied in practice is best left to be determined in the context of a specific case through suitable directions by the trial judge and with the benefit of expert evidence, as occurred in *R v B(MA)* itself.

⁷⁴ *R v B(MA)* [2013] EWCA Crim 3, [2013] 1 Cr App R 36, at paras. 35 and 40.

⁷⁵ *Ibid* at para. 41.

R. 3.05 The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to any mental illness the accused man had at the time the intercourse occurred where this was such that he lacked the capacity to understand whether the woman was consenting.

(e) Age and maturity of the accused

- [3.82] A male of 10 years or older may be charged with rape.⁷⁶ The question arises whether, just as the specific characteristic of an adult male discussed above may affect his capacity to understand whether a woman was consenting, the age and maturity of a person under the age of 18⁷⁷ may also be taken into account.
- [3.83] In the early teens, the brain is developmentally immature and the child is still undergoing developments in regulating behaviour. The areas of the brain responsible for decision-making and impulse control are not fully mature until at least the age of 20 years old.⁷⁸ The relative neurodevelopmental immaturity of adolescents contributes to their increased propensity for risky and potentially criminal behaviour. There are profound differences between the brains of adults and those of juveniles. The juvenile brain differs (a) in terms of function and morphology, (b) in the composition of grey and white matter, and (c) in terms of neurotransmission. The differences in the make-up of the adolescent brain as compared that that of a child or adult are, as Steinberg asserts, beyond debate.⁷⁹
- [3.84] In comparison to adults, juveniles are less able to suppress impulsive and/or emotional reactions in favour of rational responses.⁸⁰ This leads them to prioritise

⁷⁶ Section 1(3) of the 1981 Act had originally provided that, in defining the word “man”, the 1981 Act was not to “affect any rule of law by virtue of which a male person is treated by reason of his age as being incapable of committing an offence of any particular kind.” The words in quotation marks had therefore retained the common law rule that a person under the age of 14 was presumed incapable of committing the crime of rape. These words were repealed by section 21 and the Schedule of the *Criminal Law (Rape) (Amendment) Act 1990*. Section 52(3) of the *Children Act 2001*, as substituted by section 129 of the *Criminal Justice Act 2006*, now provides that a male aged 10 years of age or older may be prosecuted for murder and rape.

⁷⁷ In the context of criminal liability, section 3(1) of the *Children Act 2001* defines a child as a person under the age of 18 years.

⁷⁸ *Brain Waves 4: Neuroscience and the Law* (The Royal Society 2011), available at: https://royalsociety.org/~media/Royal_Society_Content/policy/projects/brain-waves/Brain-Waves-4.pdf.

⁷⁹ Steinberg, “A Behavioural Scientist Looks at the Science of Adolescent Brain Development” (2010) 72 *Brain and Cognition* 160, at 160.

⁸⁰ Blakemore and Choudhury, “Development of the adolescent brain: implications for executive function and social cognition” (2006) 47 *Journal of Child Psychiatry and Psychology* 296; Dumontheil et al., “Taking perspective into account in a communicative

immediate rewards over long-term consequences.⁸¹ Studies have shown that this increase in impulsive, risk-taking and sensation-seeking behaviour peaks in late adolescence before decreasing.⁸² The parts of the brain responsible for restraint over impulsive behaviour do not begin to mature until the age of 17.⁸³

- [3.85] Average juveniles may have less direct experience and less general knowledge than average adults. They may lack an adult's capacity for mature judgement. Often, they are not aware or are ignorant of social norms and indeed they may challenge social norms as a formative part of their development. Juveniles may be less aware of their duty to others and they may also be less able to assess the risks that their actions might violate their duty to others. The research suggests that expecting a child to act and behave like a reasonable adult is a fruitless venture.⁸⁴ Adolescence is a period of a person's life during which one is at greater risk of making reckless decisions without considering the consequences, and as such juveniles are overrepresented in "virtually every" category of reckless behaviour.⁸⁵ This proclivity towards reckless behaviour without regard for moral or legal consequences could make an average juvenile less able to understand consensual signals than an average adult. In addition, the average juvenile has not gathered as much empirical data about the moral landscape of society as an average adult has: he knows less, he has experienced less, and consequently he has a weaker concept of what constitutes a right or a wrong action. You could also conclude from this that an average adolescent is likely to be less sexually experienced than an average adult (on account of youth), which would affect his ability to understand consensual signals prior to the act of sexual intercourse. It would seem unjust on the basis of this knowledge to subject a juvenile accused of rape to the same reasonable standard of honest belief that an adult would be subjected to.

task" (2010) 52(4) *Neuroimage* 1574; Giancola, et al., "Executive Cognitive Functioning and Aggressive Behaviour in Preadolescent Boys at High Risk for Substance Abuse/Dependence" (1996) 57(4) *Journal of Studies on Alcohol* 352; Mesulam, "Behavioural Neuroanatomy: Large-Scale Networks, Association Cortex, Frontal Syndromes, the Limbic System, and Hemispheric Specializations" in Mesulam (ed), *Principles of Behavioural and Cognitive Neurology* (OUP 2000).

⁸¹ Steinberg et al. "Age differences in future orientation and delay discounting" (2009) 80(1) *Child Development* 28.

⁸² Steinberg et al., "Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation" (2018) 21(2) *Developmental Science*.

⁸³ Beckham, "Crime, Culpability and the Adolescent Brain" (2004) 305(5684) *Science* 596.

⁸⁴ Northrop and Rozan, "Kids Will be Kids: Time for a "Reasonable Child" Standard for the Proof of Objective Mens Rea" (2017) 69(1) *Maine Law Review* 110, at 117-118.

⁸⁵ Arnett, "Reckless Behavior in Adolescence: A Developmental Perspective" 12 *Developmental Review* 339, at 339-340.

- [3.86] It has been noted in prior research that juveniles may possess a surprising amount of maturity when it comes to making medical decisions. For example, research has indicated that children as young as 8 who have experienced significant amounts of medical treatment can often understand their treatment, the effects of their condition, and can make decisions on matters of life or death.⁸⁶ However, as noted by the American Psychological Association, medical decisions permit more deliberative, reasoned decision-making and emotional and social pressures on a person's judgement in a medical context are minimised. By comparison, situations of a criminal nature elicit impulsivity and are associated with high levels of emotional arousal and/or social coercion (and by their nature do not facilitate expert engagement or advice). The higher likelihood that juveniles would be beholden to impulsivity and social pressures ensure that their decision-making capacities here would be less developed than those of adults.⁸⁷
- [3.87] Children mature at different rates. This has often been taken as axiomatic in psychological research: as maturity is greatly affected by the environment in which a person is raised, and each person has a unique upbringing, so too will rates of maturity differ even among people with similar age brackets. It was suggested in research that children who had divorced parents "grow up a little faster", and that familial disruptions, economic hardship, the presence of danger, and other such factors have a significant impact on whether the "subjective age" of a person is accelerated relative to their chronological age.⁸⁸
- [3.88] For example, children who are brought up in a household where there is an absentee guardian may mature quickly relative to their chronological age if they have to care for siblings. As such they may often possess wisdom and judgement far beyond what their chronological age may infer. Children may as such become "parentified", with a corresponding increase in emotional maturity and capacity for conscientious judgement.⁸⁹ Research has also indicated that homeless children may begin the "adultification" process earlier than children of similar ages due to the danger and desperation inherent in living on the streets.⁹⁰ Similarly, children may

⁸⁶ Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre, 2005), at 25.

⁸⁷ Steinberg, Cauffman, Woolard, Graham and Banich, "Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA 'Flip-Flop'" (2009) 64(7) *American Psychologist* 583, at 592.

⁸⁸ Johnson and Mollborn, "Growing up Faster, Feeling Older: Hardship in Childhood and Adolescence" (2009) 72(1) *Social Psychology Quarterly* 39, at 39–40.

⁸⁹ Burton, "Childhood Adultification in Economically Disadvantaged Families: A Conceptual Model" (2007) 56 *Family Relations* 329, at 331.

⁹⁰ Schmitz and Tyler, "Growing Up Before Their Time: The Early Adultification Experiences of Homeless Young People" (2016) 64 *Children and Youth Services Review* 15.

lag behind in emotional maturity depending on the circumstances of their upbringing.

- [3.89] Chronological age is inadequate to assess maturity on its own: cognitive development may indeed outstrip (or be outstripped by) physical development depending on a variety of genetic or external factors.⁹¹ In most cases, mental development generally runs parallel with physical development. But the literature also indicates that it is impossible to understand mental development in simplistic, objective or linear terms. Development has been interpreted as not solely being a biological, but also a social, construct: "Parent's aspirations for their children's development, the expectations and demands placed on children, the cultural, economic and social environments in which they grow up, as well as their own unique life experiences, all impact on the ranges and level of capacities that children acquire and exercise."⁹²
- [3.90] In this way, a male child or juvenile may have less ability to understand the feelings of a woman and also less ability to measure the risk that she is not consenting. It would be unfair to hold a child to the standard of a reasonable person, as a child may not have the capacity to act reasonably.
- [3.91] The *Children Act 2001* (which also uses the term "age and understanding"), section 32 of the *Children and Family Relationships Act 2015* and section 9 of the *Adoption (Amendment) Act 2017* refer to the "age and maturity" of children. This is an indicator that the Oireachtas has already acknowledged the need to judge maturity in conjunction with age. The need to avoid exclusively using age as an indicator of maturity has been noted previously by the Commission in its *Report on Children and the Law: Medical Treatment*,⁹³ where the Commission acknowledged that, as in these legislative examples, broad "age bands" of maturity need to be recognised. Childhood involves both a biological and a social aspect,⁹⁴ and as such it is important to indicate in the wording of any legislation that both aspects should be taken into consideration when assessing maturity for the purposes of decision-making capacity. The Commission notes that the *Children Act 2001* uses both the term "age and understanding" and the term "age and maturity". The Commission has concluded that "maturity" is a more objective and appropriate external standard against which a young person should be measured.

⁹¹ Silverman, "The Construct of Asynchronous Development" (1997) 72 *Peabody Journal of Education* 36, at 39–41.

⁹² Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre, 2005), at 13.

⁹³ Law Reform Commission, *Children and the Law: Medical Treatment* (LRC 103-2011), at 14.

⁹⁴ *Ibid*, at 11–12.

- [3.92] As mentioned above, cognitive development may outstrip (or be outstripped by) biological development. A 10 year old may have the emotional or social maturity of a 16 year old depending on (a) if he could be considered “gifted” for his age, and/or (b) if he has been “fast-tracked” towards a standard of mental maturity. Applied to a sexual context, it is highly likely (but not certain) that a child of 10 would be less able to determine consensual signals than a 16 year old. Therefore it is necessary to consider the age of the accused in conjunction with his individual maturity (which could be expertly evaluated). Including “age and maturity” also clears up any doubts about the word “maturity” being intended to refer to just age on its own, as maturity can either mean physical or mental maturity. Placing it in a legislative provision accompanying the term “age” clearly indicates an intention to refer to mental and/or emotional maturity. The Commission therefore recommends that the jury should consider the age and maturity of the accused where either of these meant that the accused lacked the capacity to understand whether the woman was consenting.

R. 3.06 The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to the age and maturity of the accused man at the time the intercourse occurred where either his age or maturity was such that he lacked the capacity to understand whether the woman was consenting.

(f) Steps taken to ascertain consent

- [3.93] The Issues Paper also asked consultees whether section 2 of the 1981 Act should include a requirement that the accused must take steps to ascertain consent in order to rely on the defence of reasonable belief or that this would be a factor to be taken into account. There was some, but limited, support for a positive requirement on the accused to show that he took such steps. On the other hand, there was strong support that there would be some reference to such conduct of the accused. It was suggested that this could be incorporated by a direction to the jury to consider, in their determination of whether the belief was reasonable, any steps that the accused took to ascertain consent. By highlighting “any steps taken”, the law would be drawing attention to any relevant fact, and giving guidance to the jury in its task of ascertaining whether a belief was reasonable. A number of submissions noted that a reasonable belief in consent, defined as free and voluntary agreement, involves some level of communication and mutuality.
- [3.94] Nearly all the common law jurisdictions that have a form of “reasonable belief” test in their rape offence have a provision highlighting the steps taken by the accused to ascertain consent. The majority of these provide that it is a matter to be taken into account, not a positive obligation.

[3.95] In England and Wales, section 1(2) of the *Sexual Offences Act 2003* provides:

"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."

[3.96] Similarly, article 5(2) of the *Sexual Offences (Northern Ireland) Order 2008* provides:

"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."

[3.97] In Scotland, section 16 of the *Sexual Offences (Scotland) Act 2009* provides:

"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."

[3.98] In the Australian state of Victoria, section 36A of the *Crimes Act 1958* provides:

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

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

[3.99] In the Australian state of New South Wales, section 61HA of the *Crimes Act 1900* provides:

"the trier of fact must have regard to all the circumstances of the case:

(a) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but

(b) not including any self-induced intoxication of the person.”⁹⁵

- [3.100] In two other jurisdictions, Canada and the Australian state of Tasmania, failure to take reasonable steps completely prevents the accused from relying on a reasonable belief defence. In Canada, the defence may not be raised by the accused unless he took reasonable steps to ascertain consent.⁹⁶ In Tasmania, the failure to take steps to ascertain consent will establish that the mistaken belief is not honest or reasonable and therefore cannot be relied on.⁹⁷
- [3.101] The majority of the jurisdictions surveyed tend not to impose strict legal requirements on the accused to take steps in order to be entitled to rely on the defence. Thus, when section 1(2) of the England & Wales 2003 Act was being debated in the UK Parliament, the sponsoring Minister stated that “any steps” indicated that not every sexual act has to be preceded by specific actions on part of the accused, especially where the accused and the complainant are in a well-established, consensual sexual relationship but that “it is still imperative that the accused must be certain that his partner consents to the sexual activity at the time in question.”⁹⁸
- [3.102] Thus, a failure to take steps will not, of itself, mean that the accused is guilty of rape. The provisions are a direction that in cases in which such steps have been taken, the jury shall have regard to them in deciding whether the accused’s asserted belief in consent was reasonable. In the same way, where such steps were *not* taken, this should also be taken into account. A jury is entitled to have regard to the fact that the accused took no steps to ascertain consent, but still find that his belief was reasonable. Likewise, an accused may have taken steps to ascertain consent but still come to the unreasonable conclusion that the complainant was consenting.
- [3.103] As a number of submissions suggested, it can be argued that communication to ascertain consent is required by the definition of consent as “free and voluntary agreement”, as has now been codified in the 2017 Act.⁹⁹ Consent has already been explicitly described in the case law as involving “active communication”.¹⁰⁰ This indicates that consent in the context of sexual relationships is no longer purely

⁹⁵ On the reform proposals made in October 2019 by the New South Wales Law Reform Commission, see para. 3.106 below.

⁹⁶ Section 273.2 of the *Canadian Criminal Code*.

⁹⁷ Section 14A of the Tasmanian *Criminal Code Act 1924*.

⁹⁸ Baroness Scotland, *Hansard*, HL Vol. 649 col.669 (3 June 2003).

⁹⁹ See the discussion in paras. 2.10-2.27, above.

¹⁰⁰ *The People (DPP) v C O’R* [2016] IESC 64, at para. 36; [2016] 3 IR 322, at para. 42.

about a mental state (which can easily be misinterpreted by other persons) but also about communication and signals that the woman also has the requisite willing mental state to consent. An emphasis on steps taken reinforces the communication and mutuality of obligation in relation to consent.¹⁰¹

- [3.104] It is also important to note that a requirement that the jury consider “the steps, if any, taken” is *subjective*, because the steps, if any, the jury is to have regard to are those the accused took, not “reasonable steps” that a hypothetical reasonable person would have taken.
- [3.105] To the knowledge of the Commission, at the time of writing (October 2019), the “steps” requirement that applies in the 3 UK jurisdictions (England and Wales, Northern Ireland and Scotland) has not been considered by an appeal court. The comparable provision in New South Wales was, however, considered in 2017 in *R v Lazarus*.¹⁰² This concerned a case in which the trial judge had acquitted the accused of rape, but failed to consider the steps he had taken to ascertain consent. The Director of Public Prosecutions appealed this decision to the Criminal Court of Appeal of New South Wales, where it was explained that:

“[A] ‘step’ for the purposes of s 61HA(3)(d) [of the NSW *Crimes Act 1900*] must involve the taking of some positive act. However, for that purpose a positive act does not necessarily have to be a physical one. A positive act, and thus a ‘step’ for the purposes of the section, extends to include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.”¹⁰³

- [3.106] In 2018, the New South Wales Law Reform Commission criticised this analysis as being a description of a subjective state of mind, and thus being an inaccurate description of steps. In this way, it does not fulfil the purpose of a definition of consent as “free and voluntary agreement”.¹⁰⁴ In the October 2019 draft proposals, it proposed that juries should be required to consider whether the accused said or did anything to ascertain whether or not the complainant consented. It also proposed that the law should not require a person to take steps to ascertain

¹⁰¹ Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press 2000), at 22.

¹⁰² *R v Lazarus* [2017] NSWCCA 279.

¹⁰³ *Ibid*, at para. 147.

¹⁰⁴ New South Wales Law Reform Commission, *Consent in relation to sexual offences. Consultation Paper 21* (2018), at 79-80.

consent, but that the failure to take such steps might instead be an important consideration for evidential purposes.¹⁰⁵

- [3.107] The Commission agrees with this criticism and analysis, and is of the view that “steps” must mean physical or verbal communication to ascertain consent. This mirrors the Supreme Court’s description in *The People (DPP) v C O’R* of consent as “active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse.”¹⁰⁶ The steps taken to ascertain consent can be verbal or non-verbal. Verbal communication does not have to be an outright question such as: “Do you consent to this?” It could be: “Should I get a condom?” or “Do you like this?” or “What would you like me to do?” Non-verbal communication could be pausing to check the woman’s reaction or moving the woman’s hand to a body part. Relying on the woman’s passivity as consent should not be regarded as a step. Less onerous steps will be expected in established relationships, whereas, in circumstances where there is no established relationship between the parties, more steps are likely to be expected.¹⁰⁷
- [3.108] The Commission has concluded that, viewed in this way, the requirement to have regard to the steps, if any, that the accused took, provides a suitable subjective element to complement the primarily objective test of reasonable belief. The Commission does not consider that the accused always must be required to take steps as a pre-condition to having a reasonable belief. Rather it is sufficient to have regard to such steps if any that he has taken within the wider context of the communication-based definition of consent.

R. 3.07 The Commission recommends that section 2 of the 1981 Act should provide that, where the issue of reasonable belief arises in a trial, the jury shall have regard to the steps, if any, the accused took to ascertain whether the woman was consenting.

5. Self-induced intoxication not a defence to rape

- [3.109] It is long established that where a man is charged with rape, a claim by him that his own self-induced (voluntary) intoxication meant that he was “too drunk to know” that the complainant was not consenting is no defence.¹⁰⁸

¹⁰⁵ New South Wales Law Reform Commission, *Consent in relation to sexual offences. Draft Proposals* (October 2019), at 23.

¹⁰⁶ *The People (DPP) v C O’R* [2016] IESC 64, at para. 36; [2016] 3 IR 322, at para. 42.

¹⁰⁷ Rook and Ward, *Sexual Offences Law and Practice* (4th edn, Sweet & Maxwell 2010), at 100.

¹⁰⁸ See *The People (DPP) v Reilly* [2004] IECCA 9, [2005] 3 IR 111 and *The People (DPP) v Power* [2018] IECA 164, which followed the approach to this effect in the UK House of Lords decision in *R v Majewski* [1976] UKHL 2, [1977] AC 443. See also the Commission’s

- [3.110] Under the current “honest belief” test, if the accused’s honest belief in consent was the result of self-induced intoxication, he would be regarded as not having had that belief, had he been sober. He would, in that case, be found to have been reckless as to the complainant’s consent. The accused may alternatively argue that he would have believed that the complainant was consenting had he been sober, in which case he would have to argue that he held a reasonable belief by reference to any reasonable grounds for that belief. However, the accused’s self-induced intoxication is not a “reasonable ground” relevant to the jury in deciding whether there are reasonable grounds for his alleged belief.¹⁰⁹
- [3.111] The Issues Paper asked consultees whether the law on intoxication, as it relates to rape charges, should be changed. The vast majority of submissions were against any change being made to the law on the accused’s self-induced intoxication. The main reason for this was the view that the behaviour is still criminal and harmful, regardless of the person’s intoxication. Society is entitled to punish intoxicated people who pose a threat to the community.¹¹⁰ The submissions were also in agreement that the choice to consume alcohol is a risk, and people should take responsibility for the harm they cause resulting from that choice.
- [3.112] One submission suggested that intoxication should be a defence to a rape charge, on the ground that intoxication can vitiate the woman’s ability to consent. The current law, it was argued, generates an undesirable asymmetry between the way intoxicated men and women are treated in the context of a rape charge. A woman will be able to rely on her intoxication as proof that she did not consent, but the accused will not be able to rely on his intoxication as proof that he lacked the mental or fault element (the *mens rea*) to commit the offence. According to this position, if an accused, because of his intoxication, does not know that consent is absent, then he should not be found guilty because he did not have the requisite guilty intent and he lacked the capacity to realise that the complainant was not consenting.
- [3.113] However, as noted above, it is difficult to prove that the complainant was too intoxicated to consent where she was not unconscious. Moreover, even if it is established that the complainant was too intoxicated to consent, the accused may

Report on Defences in Criminal Law (LRC 95-2009), paras. 1.49-1.54, which noted that although the decision in *Majewski* has been criticised, it has been accepted in Irish law in the *Reilly* case. Since that Report was published, this has been reiterated in 2018 in the *Power* case.

¹⁰⁹ See *R v Woods* [1981] 74 CrApp R 312, concerning section 1(2) of the England and Wales *Sexual Offences (Amendment) Act 1976* (as originally enacted), which, as noted above (see paras. 2.3 and 2.35-2.37), was broadly followed in section 2 of the *Criminal Law (Rape) Act 1981*.

¹¹⁰ *R v Daviault* [1994] 3 SCR 63.

argue that he would have still believed that she was consenting had he been sober. An accused may defend himself on the basis that the other party was actively engaged in the intercourse or that she was responding positively to such a degree that a reasonable sober person would have believed that she was consenting.

- [3.114] In addition, there is a policy rationale to prohibit self-induced intoxication from excusing a man accused of rape. If the law were changed to allow self-induced intoxication to be a defence to a rape charge, it would send the message that a decision to become intoxicated excuses lower standards of behaviour. Such a law could be criticised for effectively giving permission to people to rape as long as they become intoxicated first.
- [3.115] Indeed, one submission noted that such a rule would increase the difficulties of proving that rape occurred. The 2009 Rape and Justice in Ireland study found that a majority of the accused persons in the cases they studied were intoxicated at the time of the alleged offence. 40.8% of those accused were described as severely intoxicated, and 26.6% were moderately intoxicated.¹¹¹ The submission noted that permitting a defence where the accused was voluntarily intoxicated would impact on the majority of rape cases.
- [3.116] This concern is further undermined by the data that shows that societal attitudes towards victims of rape who were intoxicated at the time of their assault is a major source of attrition. The Rape and Justice in Ireland study found that victims who consumed alcohol at the time of the rape were more likely (a) to blame themselves, (b) to not report the rape, or (c) to subsequently withdraw the complaint.¹¹² In a 2016 Eurobarometer survey by the European Commission, 11% of Irish respondents believed that being drunk or on drugs may make having sexual intercourse without consent justified.¹¹³
- [3.117] Studies have concluded that individuals generally found an intoxicated accused less blameworthy than a sober one, while intoxicated complainants were judged more harshly.¹¹⁴ A mock juror study by Finch and Munro found a correlation between societal disapproval of female intoxication and the attitudes of jurors. In practical terms, jurors in the mock study shifted responsibility for the sexual assault away from the accused and onto the complainant when they learned that the

¹¹¹ Hanly, Healy, and Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Liffey Press 2009), at 227.

¹¹² *Ibid*, at 146 – 148.

¹¹³ European Commission, *Special Eurobarometer 449 Report: Gender-Based Violence* (European Commission, 2016). The study involved surveying EU citizens in 28 Member States of the European Union, which included 1,002 Irish adults.

¹¹⁴ Richardson and Campbell, "Alcohol and Rape: The Effect of Alcohol on Attributions of Blame for Rape" (1982) 8(3) *Personality and Social Psychology Bulletin* 468.

complainant had been drinking at the time of the assault.¹¹⁵ Their research showed that even in situations where the complainant's intoxication was not self-induced, rather where the accused pressured her into drinking more or surreptitiously added alcohol to the complainant's drink, the jurors still held the complainant to be responsible for not "standing her ground" or not watching her drink.¹¹⁶ The authors noted that the normalisation of alcohol in socio-sexual scenarios played "a role in rendering participants less inclined to condemn the accused for his sexual advances", and would lead participants to label this behaviour as "taking advantage" of the complainant, rather than calling the behaviour "rape".¹¹⁷

- [3.118] It should also be noted that the recommendations in this Report to reform the fault or mental element of the offence towards a primarily objective "reasonable belief" standard would lead to a more straightforward consideration of the accused's self-induced intoxication than under the current law. As noted above, the current mental element is subjective and determined by the accused's actual knowledge or belief concerning consent. In cases where the accused was intoxicated at the time of the offence and drunkenly believed that the complainant was consenting, the accused may argue that he *would* have believed that the complainant was consenting, *had he been sober*, which can then be demonstrated by reference to whether the hypothetical belief would have been reasonable.
- [3.119] Under the Commission's proposal of a "reasonable belief" test, if the accused was intoxicated and asserts that he believed that the complainant was consenting, the jury will have to consider whether a reasonable sober person in that situation would have also believed that the complainant was consenting. If the accused voluntarily becomes so intoxicated that he cannot ascertain that the complainant was not consenting, where any reasonable sober person would have, the accused will be guilty of rape. If a reasonable sober person in that situation would have believed that the complainant was consenting, the accused will not be guilty.
- [3.120] Under this approach, which is the position in the 3 UK jurisdictions, the test for reasonable belief in the context of intoxication thus involves a two stage test:¹¹⁸

¹¹⁵ Finch and Munro, "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16(4) *Social & Legal Studies* 595, at 600.

¹¹⁶ *Ibid*, at 599 – 600.

¹¹⁷ *Ibid*, at 603.

¹¹⁸ Rook and Ward, *Sexual Offences Law and Practice* (4th edn, Sweet & Maxwell 2010), at 103. This is similar to the two stage test under the England and Wales *Sexual Offences Act 2003* as set out by the English Court of Appeal in *R v Grewal* [2010] EWCA Crim 2448, at para. 30. As the 2003 Act does not refer to a "reasonable person", the test described in that case differs slightly:

- (i) At the time of the sexual intercourse, did the accused genuinely believe that the complainant was consenting?
If the answer is no, then the prosecution has proved the mental element. If the accused may have had such a belief, the jury must consider the second question.
- (ii) Was that belief one that a reasonable sober person would have held?

[3.121] This can be visualised as follows:

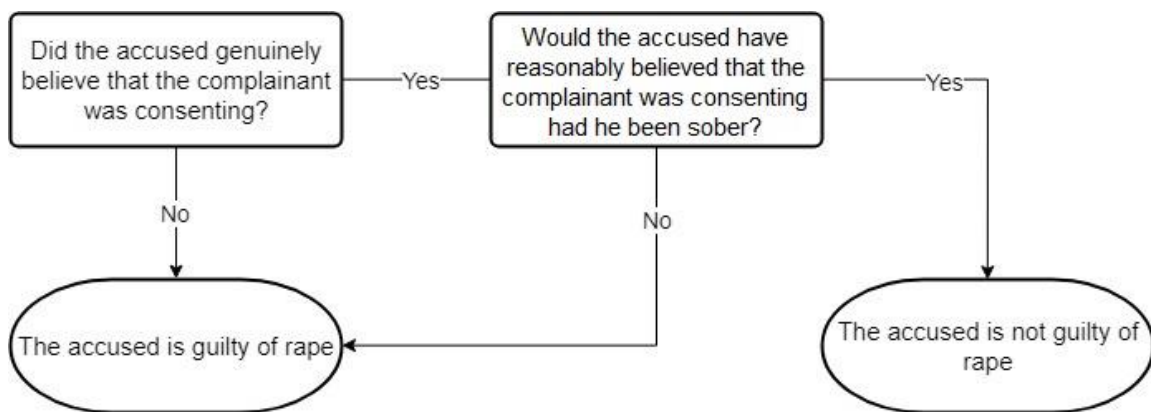


Figure 3. Description of reasonable sober person test.

[3.122] The Commission therefore recommends that there should not be any change in the current law on self-induced intoxication as it applies to the offence of rape. In order to avoid any doubt on this issue, the Commission recommends that section 2 of the 1981 Act should provide that where the man, by virtue of self-induced intoxication, was at the time of the sexual intercourse so intoxicated by the effect of alcohol or some other drug that he lacked the capacity to understand whether the woman was consenting, this shall not be a defence to a charge of rape; and that it should also provide that, where the level of self-induced intoxication was such that the man did have the capacity to understand whether the woman was consenting, the jury shall determine whether the man's belief was reasonable by reference to

- (i) Could the accused genuinely have believed that the complainant was consenting? If the answer is no, the mental element is proved. If the answer is yes, consider the second question.
- (ii) Could the accused have reasonably believed that the complainant was consenting? Intoxication is not a relevant circumstance. The jury will need to consider whether the accused's belief may have been reasonable had he been sober.

whether his belief would have been reasonable if he had been sober, that is, had not been intoxicated.

R. 3.08 The Commission recommends that section 2 of the 1981 Act should provide that where the man, by virtue of self-induced intoxication, was at the time of the sexual intercourse so intoxicated by the effect of alcohol or some other drug that he lacked the capacity to understand whether the woman was consenting, this shall not be a defence to a charge of rape; and that it should also provide that, where the level of self-induced intoxication was such that the man did have the capacity to understand whether the woman was consenting, the jury shall determine whether the man's belief was reasonable by reference to whether his belief would have been reasonable if he had not been intoxicated.

CHAPTER 4 GROSS NEGLIGENCE OFFENCE AND REFORM OF OTHER SEXUAL OFFENCES

1. No additional gross negligence rape offence

- [4.1] The Issues Paper raised the possibility, as an alternative to reforming the current law by moving towards a primarily objective test of reasonable belief, of retaining the offence in section 2 of the 1981 Act as it currently stands and instead enacting a new, lesser, offence of gross negligence rape. This proposed new offence would capture situations where the accused honestly believed that the complainant was consenting, but that belief was unreasonable.
- [4.2] Under this proposal, an accused who knew of, or was reckless as to, the complainant's lack of consent will be guilty of rape which is the current position under the 1981 Act. An accused who mistakenly, but unreasonably, believed that the complainant was consenting would be guilty of the lesser offence. Finally, an accused who mistakenly believed that the complainant was consenting but that belief was deemed reasonable would not be guilty of any offence, as an element of the lesser offence would be acting unreasonably.
- [4.3] This proposed offence was based on negligent rape offences enacted in Sweden and Iceland in 2018 (the maximum sentence for the offence in Sweden being 4 years imprisonment). The Issues Paper noted that in those jurisdictions, the definition of rape remains based on the use of threats or violence by the man, which as discussed above has long been discarded as elements of the offence in common law jurisdictions, including Ireland.
- [4.4] The overwhelming majority of consultees were strongly against the introduction of the proposed lesser offence. Many submissions stressed that the effects of rape on a woman are the same whether it results from knowledge or recklessness, or from an unreasonable belief as to consent.
- [4.5] Another serious concern raised in the submissions was that such a lesser offence could render the more serious offence of rape obsolete in some cases. This is because the lesser offence would, by its nature, be easier to prosecute and that, even if prosecuted as a fall-back charge to rape, juries could also feel more secure in opting for the lesser charge or verdict. This could reduce the relevance of the offence of rape in legal proceedings and ultimately diminish the deterrent effect of rape.
- [4.6] The 2019 Northern Ireland Gillen Review noted that the Commission's Issues Paper had sought the views of consultees on whether an offence of gross negligence rape

should be introduced.¹ Like the views of the Commission's consultees, the Gillen Review stated that it was unequivocally opposed to the introduction of a gross negligence rape offence in Northern Ireland, stating that there should be no "hierarchy of rape." The Review noted that rape is an especially heinous crime with dire consequences for the victim, and that to introduce a lesser offence of rape would severely diminish the particular gravity of the rape offence.²

- [4.7] The Gillen Review also referred to the low conviction rate for serious sexual offences in England and Wales, but added that this should not be allowed to distort the approach to reform. Low conviction rates, the Review argued, are a consequence of the inherently personal nature of sexual crimes in which it may be one person's word against another in a situation in which both parties often have no prior criminal history. In order to address the low conviction rates for sexual crimes, the Review recommended that more robust jury and public education on the reality of sexual offences (including the dispelling of myths and misconceptions) is a necessity. Additionally, it argued that judges should be offered maximum flexibility at the sentencing stage.³ The Review concluded that although the introduction of a gross negligence rape offence might increase the number of convictions for rape, the harm to the complainant is identical whether she was raped "negligently" or otherwise, and thus proscribing a lesser offence for the same harm is against the spirit of the rape offence. The Review also noted that submissions in relation to the possibility of a gross negligence offence were almost unanimously opposed to it.⁴
- [4.8] The Commission fully supports and agrees with the views expressed by consultees, and with the analysis and conclusions of the Gillen Review. In addition, the Commission considers that the introduction of such a lesser offence would be entirely inconsistent with the recommendations it has made in Chapters 2 and 3 for reform of the current law.

R. 4.01 The Commission recommends that an offence of gross negligence rape should not be enacted.

2. Reform of other sexual offences

- [4.9] In response to the Issues Paper, a number of submissions proposed reform of the law concerning other sexual offences. These submissions raised issues outside the

¹ Gillen Review, *Report into the law and procedures in serious sexual offences in Northern Ireland* (2019), at 370.

² *Ibid*, at 371.

³ *Ibid*, at 372.

⁴ *Ibid*, at 376.

scope of the Attorney General's request to the Commission and are therefore not addressed in this Report. As already noted, however, the Commission's Fifth Programme of Law Reform includes a wide-ranging project on the review and consolidation of the law on sexual offences,⁵ and the Commission intends to begin work on that project immediately after the publication of this Report. That Fifth Programme project will therefore allow consideration of the issues raised in submissions.

- [4.10] Without prejudice to that project, submissions referred to the offence of sexual assault under section 2 of the *Criminal Law (Rape) (Amendment) Act 1990* (the 1990 Act) and rape under section 4 of the 1990 Act. Section 2 of the 1990 Act enacted a statutory offence of sexual assault that, broadly, mirrors and replaced the older common law offence of indecent assault. The assault element of this offence builds on the definition of assault in the *Non-Fatal Offences Against the Person Act 1997* but the mental or fault element (the *mens rea*) as to *consent* aspect remains defined by the common law. This means that the primarily subjective test derived from *Morgan* and as set out in *The People (DPP) v C O'R* still applies to sexual assault. It is at least arguable that the logic of the Commission's analysis in this Report should be applicable to other sexual offences such as sexual assault: this was certainly the approach adopted in other jurisdictions that engaged in full codification of the law on sexual offences. However, this may not necessarily be the case, and the Commission will address this matter in its wide-ranging Fifth Programme project.
- [4.11] A number of consultees also drew attention to the gendered nature of the rape offence in the 1981 Act, in that at present the offence may only be committed by a man against a woman. The issue of other extremely serious sexual offences of equivalent gravity is currently addressed by section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*, which does not involve a gendered approach. Bearing in mind the narrow focus of the Attorney General's request to the Commission, this matter also falls outside the scope of this Report, but the Commission also intends to examine this in its Fifth Programme project on sexual offences.

⁵ See *Report on Fifth Programme of Law Reform* (LRC 120-2019), Project 5.

APPENDIX A SUMMARY OF RECOMMENDATIONS

Chapter 2 Current law on knowledge or belief concerning consent: arguments for and against

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| R 2.01 | The Commission recommends that the current references in section 2 of the 1981 Act to knowledge and recklessness as alternative fault or mental elements (the <i>mens rea</i>) of the offence of rape should be retained, and that any recommendation to provide for a move towards an objective reasonable belief test should be added to section 2 of the 1981 Act as an additional form of the fault or mental element of the offence. |
| R 2.02 | The Commission recommends that the current honest belief defence to rape in section 2(2) of the Criminal Law (Rape) Act 1981 should be repealed and replaced. |

Chapter 3 Reform of knowledge or belief concerning consent

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|---------------|---|
| R 3.01 | The Commission recommends that the fault or mental element of the rape offence in section 2(1) of the 1981 Act should be amended to include that the accused man did not reasonably believe at the time of the sexual intercourse that the woman was consenting. |
| R 3.02 | The Commission recommends that section 2 of the 1981 Act should not include a provision that, where the issue of reasonable belief arises in a trial, the jury is to have regard to "all the circumstances of the case". |
| R 3.03 | The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to a specific set of circumstances, and only those, which should be limited to relevant characteristics of the accused where these would affect the capacity of the accused to understand whether the woman was consenting. |
| R 3.04 | The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to any physical, mental or intellectual disability the accused man had, at the time the intercourse occurred where this was such that he lacked the capacity to understand whether the woman was consenting. |

- R 3.05** The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to any mental illness the accused man had at the time the intercourse occurred where this was such that he lacked the capacity to understand whether the woman was consenting.
- R 3.06** The Commission recommends that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to the age and maturity of the accused man at the time the intercourse occurred where either his age or maturity was such that he lacked the capacity to understand whether the woman was consenting.
- R 3.07** The Commission recommends that section 2 of the 1981 Act should provide that, where the issue of reasonable belief arises in a trial, the jury shall have regard to the steps, if any, the accused took to ascertain whether the woman was consenting.
- R 3.08** The Commission recommends that section 2 of the 1981 Act should provide that where the man, by virtue of self-induced intoxication, was at the time of the sexual intercourse so intoxicated by the effect of alcohol or some other drug that he lacked the capacity to understand whether the woman was consenting, this shall not be a defence to a charge of rape; and that it should also provide that, where the level of self-induced intoxication was such that the man did have the capacity to understand whether the woman was consenting, the jury shall determine whether the man's belief was reasonable by reference to whether his belief would have been reasonable if he had not been intoxicated.

Chapter 4 Gross negligence offence and reform of other sexual offences

- R 4.01** The Commission recommends that an offence of gross negligence rape should not be enacted.

APPENDIX B DRAFT CRIMINAL LAW (RAPE) (AMENDMENT) BILL

DRAFT CRIMINAL LAW (RAPE) (AMENDMENT) BILL 2019

CONTENTS

Section

1. Short title and commencement
2. Amendment of Criminal Law (Rape) Act 1981

ACTS REFERRED TO

Criminal Law (Rape) Act 1981 (No 10)

DRAFT CRIMINAL LAW (RAPE) (AMENDMENT) BILL 2019

Bill

entitled

An Act to amend the Criminal Law (Rape) Act 1981.

Be it enacted by the Oireachtas as follows:

Short title and commencement

1. (1) This Act may be cited as the Criminal Law (Rape) (Amendment) Act 2019.
- (2) This Act shall come into operation on such day as the Minister for Justice and Equality may appoint by order.

Explanatory note

Section 1 is a standard provision setting out the short title and commencement arrangements.

Amendment of Criminal Law (Rape) Act 1981

2. The Criminal Law (Rape) Act 1981 is amended by the substitution of the following section for section 2:
 - “2. (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—
 - (i) knows that she does not consent to the intercourse, or
 - (ii) is reckless as to whether or not she consents to the intercourse, or
 - (iii) does not reasonably believe that she consents to the intercourse.

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

- (2) If at a trial for a rape offence, the jury has to consider whether the man reasonably believed that, at the time of the alleged commission of the offence, the woman was consenting, the jury shall have regard to—
 - (a) the circumstances referred to in *subsection (3)*, and only those circumstances, and
 - (b) the steps referred to in *subsection (4)*.
- (3) The circumstances referred to in *subsection (2)(a)* are where the man, at the time the intercourse occurred, lacked the capacity to understand whether the woman was consenting or not by reason of—
 - (a) any physical, mental or intellectual disability the man had at that time, or
 - (b) any mental illness the man had at that time, or
 - (c) the age and maturity of the man at that time.
- (4) The steps referred to in *subsection (2)(b)* are the steps, if any, taken by the man to ascertain whether the woman consented to the sexual intercourse.
- (5) Where the man, by virtue of self-induced intoxication, was at the time of the sexual intercourse—
 - (a) so intoxicated by the effect of alcohol or some other drug that he did not have the capacity to understand whether the woman was consenting, this shall not be a defence to a charge of rape, but
 - (b) where his level of self-induced intoxication was such that he did have the capacity to understand whether the woman was consenting, the jury shall determine whether the man's belief was reasonable by reference to whether his belief would have been reasonable if he had not been intoxicated.”.

Explanatory note

Section 2 sets out an amended section 2 of the *Criminal Law (Rape) Act 1981*, taking account of the recommendations in the Report.

Section 2(1)(b) implements Recommendation **R 2.01**, that the current references in section 2 of the 1981 Act to knowledge and recklessness as alternative fault or mental elements (the *mens rea*) of the offence of rape should be retained, and that any recommendation to provide for a move towards an objective reasonable belief test should be added to section 2 of the 1981 Act as an additional form of the fault or mental element of the offence.

Section 2(1)(b)(iii) implements: recommendation **R 2.02**, that the current honest belief defence to rape in section 2(2) of the 1981 Act should be repealed and replaced; and Recommendation **R 3.01**, that the fault or mental element of the rape offence in section 2(1) of the 1981 Act should be amended to include that the accused man did not reasonably believe at the time of the sexual intercourse that the woman was consenting.

Section 2(2) implements: recommendation **R 3.02**, that section 2 of the 1981 Act should not include a provision that, where the issue of reasonable belief arises in a trial, the jury is to have regard to “all the circumstances of the case”; and recommendation **R 3.03**, that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to a specific set of circumstances, and only those, which should be limited to relevant characteristics of the accused where these would affect the capacity of the accused to understand whether the woman was consenting.

Section 2(3)(a) implements recommendation **R 3.04**, that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to any physical, mental or intellectual disability the accused man had, at the time the intercourse occurred where this was such that he lacked the capacity to understand whether the woman was consenting.

Section 2(3)(b) implements recommendation **R 3.05**, that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to any mental illness the accused man had at the time the intercourse occurred where this was such that he lacked the capacity to understand whether the woman was consenting.

Section 2(3)(c) implements recommendation **R 3.06**, that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to the age and maturity of the accused man at the time the intercourse occurred where either his age or maturity was such that he lacked the capacity to understand whether the woman was consenting.

Section 2(4) implements recommendation **R 3.07**, that section 2 of the 1981 Act should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to, the steps, if any, the accused took to ascertain whether the woman was consenting.

Section 2(5) implements recommendation **R 3.08**, that section 2 of the 1981 Act should provide that where the man, by virtue of self-induced intoxication, was at the time of the sexual intercourse so intoxicated by the effect of alcohol or some other drug that he lacked the capacity to understand whether the woman was consenting, this shall not be a defence to a charge of rape; and that it should also provide that, where the level of self-induced intoxication was such that the man did have the capacity to understand whether the woman was consenting, the jury shall determine whether the man's belief was reasonable by reference to whether his belief would have been reasonable if he had not been intoxicated.

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

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The Law Reform Commission is a statutory body established
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