Submission to Queensland Law Reform Commission on review of consent laws and the excuse of mistake of fact

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This submission is based on the following published article:

Andrew Hemming, 'In Search of a Model Provision for Rape in Australia' (2019) Vol 38(1) *University of Tasmania Law Review* 72-102.

Contents

Executive summary

The purpose of this submission is to set out a comprehensive model provision for the crime of rape (or the equivalent offence) that can be incorporated into all Australian criminal jurisdictions irrespective of whether the particular legislation can be broadly categorised as being a code or a statute. This is in part achieved by defining the specified fault elements, such as knowledge and recklessness, within the provision, thereby overcoming the lack of such definitions in the entire code or statute in some jurisdictions. Given that only the Australian Capital Territory and the Northern Territory have adopted Chapter 2 of the Criminal Code 1995 (Cth), which contains all the general principles of criminal responsibility that apply to any offence, uniform criminal law reform in Australia has stalled. One objective of this submission is to show that it is possible to reform key criminal offences in a uniform manner. Apart from addressing the current inconsistencies in rape provisions in Australia, the proposed model provision is also designed to clarify the vexed question of whether the defendant reasonably believed the victim was consenting. In this way, it is hoped that some of the well-known difficulties in securing a conviction for rape — where it is often one person's word versus another's against a standard of proof of beyond reasonable doubt — may be reduced through the comprehensiveness and clarity of the statutory language employed in the model provision.

Question 1

What aspects, if any, of the definition of consent in section 348 and the excuse of mistake of fact in section 24 of the Criminal Code, as it applies to rape and sexual assault, give rise to particular concern or cause recurrent problems in practice? What is the basis of these concerns or problems?

In the treatment of the offence of rape or sexual intercourse without consent, Australian jurisdictions differ widely in terms of the twin criteria of clarity and comprehensiveness, from Victoria and South Australia which can be classified as 'comprehensive', to Queensland and Western Australia which adopt minimalist statutory language. The latter two jurisdictions rely heavily on judicial interpretation and case law, as can be seen by comparing the list of factors that vitiate consent between Victoria under s 36(2) of the *Crimes Act 1958* (Vic), and s 348(2) of the *Criminal Code* (Qld).

> ***Section 36(2) of the Crimes Act 1958 (Vic)***
> *(2) Circumstances in which a person does not consent to an act include, but are not limited to, the following:*
> *(a) the person submits to the act because of force or the fear of force, whether to that person or someone else;*
> *(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;*
> *(c) the person submits to the act because the person is unlawfully detained;*
> *(d) the person is asleep or unconscious;*
> *(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;*
> *(f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;*
> *Note: This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.*
> *(g) the person is incapable of understanding the sexual nature of the act;*
> *(h) the person is mistaken about the sexual nature of the act;*
> *(i) the person is mistaken about the identity of any other person involved in the act;*
> *(j) the person mistakenly believes that the act is for medical or hygienic purposes;*
> *(k) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;*
> *(l) the person does not say or do anything to indicate consent to the act;*
> *(m) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing.*

This list is complemented by s 46 Direction on *Consent of the Jury Directions Act* 2015 (Vic). Under s 46(1) and (2), the prosecution or defence counsel may request that the trial judge direct the jury on the meaning of consent or on the circumstances in which a person is taken not to have consented to an act. As to the direction on the meaning of consent, under s 46(3) one or

more of five directions may be given by the trial judge, such as the direction in s 46(3)(b):

> *'inform the jury that where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place.'*

The breadth of s 36(2) of the *Crimes Act* 1958 (Vic) can be seen in subsection (b) which covers the fear of harm of any type, thereby including non-physical threats, sub-section (i) where mistaken identity covers 'any other person involved in the act', and sub-section (l) 'the person does not say or do anything to indicate consent to the act', which requires positive communication by treating implied consent as not being 'free and voluntary agreement' because consent has to be express consent, albeit by word ('say') or deed ('do').

> ***Section 348(2) of the Criminal Code (Qld)***
> *(2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—*
> *(a) by force; or*
> *(b) by threat or intimidation; or*
> *(c) by fear of bodily harm; or*
> *(d) by exercise of authority; or*
> *(e) by false and fraudulent representations about the nature or purpose of the act; or*
> *(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.*

The minimalist language to be found in s 348(2) is best seen in sub-section (2)(e). The Queensland legislature has left the interpretation of the meaning of s 348(2)(e) 'by false and fraudulent representations about the nature or purpose of the act' to the judiciary. Given the potential breadth of the coverage of the words 'false and fraudulent representations' for an offence that carries a potential penalty of life imprisonment, the uncertainty attached to the present statutory language is most unsatisfactory.

This minimalist language is compounded by the architecture of the *Criminal Code* (Qld). The defence of mistake of fact, to be found in s 24, is generic and applies to all offences where the defence is open. There has been no attempt by the Queensland legislature to adopt more specific language relevant to an individual Chapter or a Division of the Code. This is the more surprising given that an overwhelming number of offences in the *Criminal Code* (Qld) do not specify a fault element, as seen in s 349 Rape: '1) Any person who rapes another person is guilty of a crime.' This means that in a case of rape where the act of sexual intercourse is not in dispute, the only defence is mistake of fact: that the defendant thought the complainant was consenting.

> ***Section 24***
> *(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.*

The words 'honest and reasonable' have been highlighted as they reveal a two part test: 'honest' (subjective) and 'reasonable' (objective). It should be obvious (as it has been to other jurisdictions in Australia) that leaving a rape case to be decided on a generic mistake of fact section with a dual subjective and objective test is unacceptable. Here again a comparison with Victoria will suffice to make the point.

One of the elements of the offence of rape in Victoria is found s 38(1)(c): 'A does not reasonably believe that B consents to the penetration.' Reasonable belief in consent is defined in s 36A of the *Crimes Act* 1958 (Vic). Section 36A(2) refers to any steps the person has taken to establish if the other person is consenting.

> ***Section 36A Reasonable belief in consent***
> *(1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.*
> *(2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents.*

Thus, s 36A of the *Crimes Act* 1958 (Vic) has the effect of replacing the excuse of mistake of fact (doing an act under an honest and reasonable, but mistaken, belief) for the purpose of establishing whether or not the other person was consenting to sexual intercourse.

The jury directions on 'reasonable belief' are contained in s 47 Direction on reasonable belief in consent of the *Jury Directions Act* 2015 (Vic). Under s 47(1), the prosecution or defence counsel may request that the trial judge direct the jury on reasonable belief in consent. One of the directions open to the trial judge is contained in s 47(3)(b)(i): direct the jury that in determining whether the accused who was intoxicated had a reasonable belief at any time — (i) if the intoxication was self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as the accused at the relevant time.

In concluding this answer to Q1, it can be confidently stated at the outset that if Queensland adopted the Victorian legislation as it relates to rape, this would represent an immediate improvement. However, as the remainder of these answers is designed to show, the Victorian legislation can itself be bettered in terms of clarity, comprehensiveness and objectivity.

Question 2

What considerations and principles should be taken into account in determining whether the definition of consent in section 348 and the excuse of mistake of fact in section 24 of the Criminal Code, as it applies to rape and sexual assault, should be changed?

Consistent with the answer to Q-1 above, the two major principles should be (1) the need for clarity and comprehensiveness, and (2) the adoption of objective tests. A citizen should be able to read the relevant *Criminal Code* (Qld) sections

that apply to rape, and be able to understand the reach of criminal responsibility without recourse to the common law or *Carter's Criminal Law of Queensland*.

Thus, the legislature, acting as proxy for appropriate community standards regarding consent laws and the offence of rape, has the responsibility of determining the detailed content of the relevant sections of the Criminal Code and not leave the workings out of the legislation to the judiciary.

It follows from the above principles that any recommendations should include (a) an extensive list of the factors which vitiate consent under s 348(2); (b) specification of the fault elements under s 349 (at present there are none); (c) the inclusion of a provision in s 349 dealing with the reasonable steps a person has taken to ascertain whether the other person is consenting, rather than, as at present, a generic mistake of fact provision in s 24; and (d) the inclusion of a provision in s 349 dealing with intoxication and a person's awareness, such that regard must be had to the standard of a reasonable person who is not intoxicated.

Question 3

To what extent does the definition of consent in section 348 of the Criminal Code accord with community expectations and standards about the meaning of consent?

Under s 348(1) "consent" means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

Across the criminal law jurisdictions of Australia there is a broad consensus that, for the purpose of sexual offences, 'consent' means 'free and voluntary agreement': *Criminal Code* 1995 (Cth) s 268.14(3); *Crimes Act* 1900 (NSW) s 61HE(2); *Criminal Code* (NT) s 192(1); *Criminal Code* (Qld) s 348(1); *Criminal Law Consolidation Act* 1935 (SA) s 46(2); *Crimes Act* 1958 (Vic) s 36(2); *Criminal Code* (Tas) s 2A(1); *Criminal Code Act Compilation Act* (WA) s 319(2)(a). Only the Australian Capital Territory under s 67 of the *Crimes Act* 1900 which is entitled 'Consent' fails to define consent, presumably treating the meaning of consent as generally understood in the community, and relying instead on the circumstances whereby consent is negated. In the United Kingdom, the equivalent language is to be found in s 74 of the *Sexual Offences Act* 2003, which states: 'For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'

Consequently, it can fairly be stated that the definition of consent in section 348 of the *Criminal Code* accords with community expectations and standards about the meaning of consent as there is broad based consistency across Australian jurisdictions and with the United Kingdom.

Question 4

Should the definition of consent in section 348 of the Criminal Code be amended, for example, to expressly require affirmative consent? Why or why not?

If follows from the answer to Q-3 that the answer is 'no', at least not in s 348(1). However, there is scope for the express provision in s 348(2), and in s 349, which covers the actual offence of rape, of taking reasonable steps to ascertain whether or not the person is consenting. See answer to Q5 below. Furthermore, with the inclusion of a fault element of recklessly indifferent in s 349, the requirement of affirmative consent is further buttressed. See answers to Q-15, Q-16 and Q-17 below.

Question 5

If yes to Q-4, how should the definition be amended, for example:
(a) by expressly including the word 'agreement'?
(b) by expressly providing that a person does not consent if the person does not say or do anything to indicate consent to the sexual act?
(c) by expressly providing that a person must take steps or reasonable steps to ascertain that the other person is consenting to the sexual act (and that they must do so in relation to each type of sexual act involved)?
(d) in some other way (and if so, how)?

As flagged in the answer to Q4, the best solution is to expressly require affirmative consent by the adoption of two separate provisions:

1. Set out in s 348(2) a circumstance that vitiates consent includes the following: 'the person does not say or do anything to indicate consent to the act'.

> *Example*
>
> *The person may be so afraid as to freeze and not do or say anything.*

2. Set out in s 349 a fault element of recklessly indifferent defined as follows:

> *Recklessly indifferent: a person is recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she —*
>
> *(a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or*
>
> *(b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or*
>
> *(c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.*
>
> *For the purpose of sub-section (b), reasonable belief in consent depends on the circumstances known to a person at the time and includes any reasonable physical or verbal steps a person has taken to ascertain whether the other person is consenting.*

Example
Where a person forms a belief about consent in ambiguous circumstances, such as where the other person is very tired or adversely affected by alcohol, without taking reasonable physical or verbal steps to determine if the other person consents.

Standard
At a minimum, it will be reasonable for the defendant to take at least some physical or verbal steps to find out whether the other person is consenting.

Question 6

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

The main difference resulting from such changes is to expressly require affirmative consent by including as a factor that vitiates consent in s 348(2) a person freezing out of fear, and by including in s 349 a fault element of recklessly indifferent that includes the reasonable steps test.

The main advantage is to increase the level of objectivity in ascertaining whether the defendant held a reasonable belief that the person was consenting. The main disadvantage is that the level of subjectivity regarding the defendant's belief in consent is commensurately reduced. For example, the defendant's statement that "I thought the complainant was consenting" or "the complainant did not indicate she was not consenting" would now be weighed against the reasonable steps test.

In effect, mistake of fact has been replaced by the reasonable steps test such that the belief in consent has to be more reasonable than honest, by which is meant the subjective test of 'honest' is a secondary factor to the objective test of 'reasonable'. In this context, the minimum standard of 'reasonable' requires the defendant to take at least some physical or verbal steps to find out whether the other person is consenting. The defendant can no longer assume consent in his or her own mind.

Question 7

Should section 348 of the Criminal Code be amended to include an express provision that a sexual act that continues, after the withdrawal of consent, takes place without consent? Why or why not?

Yes. See, for example, s 36(2)(m) of the *Crimes Act* 1958 (Vic) which specifies a circumstance in which a person does not consent to an act as 'having initially given consent to the act, the person later withdraws consent to the act taking place or continuing'. Section 36(2)(m) reflects the 'continuing act' doctrine. In the event that consent is initially given by the complainant to sexual penetration but is later withdrawn, then under the 'continuing act' doctrine, the offence of rape or sexual penetration without consent is committed: see *R v Mayberry* [1973] Qd R 211, 229 per Hanger J.

Another relevant case to the same effect is *Kaitamaki v The Queen* [1985] 1 AC 147, where the Privy Council held that the actus reus of rape was a continuing

act, and that when the appellant realised consent was withdrawn and he therefore formed the mens rea, the necessary coincidence for criminal responsibility crystallised. Section 36(2)(m) could usefully contain an example of the operation of the 'continuing act' doctrine, by drawing on the direction by the trial judge under s 46(3)(b) of the *Jury Directions Act* 2015 (Vic), namely, 'inform the jury that where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place'. See sub-section (o) and accompanying example of the suggested provision in the answer to Q-10.

On the authority of *R v Mayberry* and *Kaitamaki v The Queen*, the Queensland Supreme Court already interprets s 348(2) as impliedly including the continuing act doctrine as a circumstance that vitiates consent. Consistent with the answer to Q-1, these circumstances should be explicitly stated. See answers to Q-8 and Q-9.

Question 8

Should section 348(2) of the Criminal Code be amended to extend the list of circumstances in which 'a person's consent to a sexual act is not freely and voluntarily given'? Why or why not?

Yes, on the grounds of clarity and comprehensiveness.

Question 9

If yes to Q-8, should the list of circumstances in section 348(2) of the Criminal Code be extended, to include:
(a) where:
(i) the person is asleep or unconscious when any part of the sexual act occurs; or
(ii) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual act?
(b) where the person fails to use a condom as agreed or sabotages the condom?
(c) where the person agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease?
(d) where the person consents to a sexual act under a mistaken belief induced by the other person that there will be a monetary exchange in relation to the sexual act?

Yes to (a)(i) and (ii) and (b). No to (c) and (d). See list in answer to Q-10 below.

For (c), the issue of criminal penalties for a person who intentionally, knowingly or recklessly transmits a serious disease may be better dealt with in a separate criminal provision, rather than include withholding relevant medical information from the complainant as a vitiating factor for consent. See, for example, s 317 *Criminal Code* (Qld) on 'Acts intended to cause grievous bodily harm and other

malicious acts'. In *B* [2006] EWCA Crim 2945, the Court of Appeal concluded that concealment of HIV was not fraud as to purpose in sex cases. If the defendant says nothing and infects the victim, he or she may be guilty of grievous bodily harm but not rape.

There is a balance to be struck between protecting victims of deception and having a broad definition of fraud whose reach potentially extends criminal responsibility too far. Under a separate criminal provision that deals with an intentional transmission of a serious sexual disease, the court's focus will properly be on the mental element and not on whether the transmission constituted fraud as a vitiating factor for consent.

For (d) above, the better solution for the purposes of clarity in the model provision would be to specifically define frauds or misrepresentations, as a vitiating circumstance to consent, as being confined to a full comprehension of the nature and purpose of the act and the identity of the person.

It may be objected that such a definition is overly narrow and reflects the common law notion of fraud developed at a time when rape could only be perpetrated 'against the will' of a person, as opposed to the modern definition of consent in terms of free and voluntary agreement. This view overlooks the need to confine the word 'fraud' to exclude deceptions that would fall under a 'common sense' list (such as a deception involving infidelity, wealth, marital status, intention to marry, and intention to pay a sex worker). See sub-section (q) and accompanying note of the suggested provision in the answer to Q-10.

If a broad definition of fraud is adopted without being confined to a full comprehension of the nature and purpose of the act and the identity of the person, then the concerns raised by the Western Australian Court of Appeal in *Michael v State of Western Australia* [2008] WASCA as to the potential overreach of criminal responsibility would not be addressed. Parliament (not the judiciary) is the appropriate body to either add to the 'common sense' list of exclusions, or to define 'fraud' in the context of rape in a wider manner.

Parliament may, in addition, insert separate sections to address deceit. Thus, if a person's consent was conditional on the other person wearing a condom (*Assange v Swedish Prosecution Authority* [2011] EWHC 2849) or withdrawing his penis before ejaculating to avoid becoming pregnant (*R(F) v DPP* [2014] QB 581), acts colloquially referred to as 'stealthing', then it would be better to have separate sections vitiating consent that cover such eventualities (as in sub-section (p) of the suggested provision in the answer to Q-10) than attempt to lump all manner of possibilities under an unconfined generic word as 'fraud' or 'misrepresentation', which is potentially an overreach of criminal responsibility.

Question 10

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

Yes, as per list below.

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

(a) the person submits to the act because of force or the fear of force, whether to that person or someone else;
(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;
(c) the person submits to the act because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force;
(d) the person submits to the act because of the abuse of a position of authority or trust;
(e) the person submits to the act because the person is unlawfully detained;
(f) the person is asleep or unconscious;
(g) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;
(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;
Note
This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.
(i) the person is incapable of understanding the sexual nature of the act;
(j) the person is mistaken about the sexual nature of the act;
(k) the person is mistaken about the identity of any other person involved in the act;
(l) the person mistakenly believes that the act is for medical orhygienic purposes;
Example
A person is taken not to freely and voluntarily agree to sexual activity if the person agrees to engage in the activity under the mistaken belief that the activity is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene.
(m) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;
(n) the person does not say or do anything to indicate consent to the act;
Example
The person may be so afraid as to freeze and not do or say anything.
(o) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing.
Example
Where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place.
(p) the person gave conditional consent to the act provided the other person wore a condom or withdrew his penis before ejaculating and the condition was not met;
(q) the person agrees or submits to the act because of the fraud or misrepresentation of the accused.
Note
Frauds or misrepresentations, as a vitiating circumstance to consent, are confined to a full comprehension of the nature and purpose of the act and the identity of the person, consistent with ss (j) and (k) above, and specifically exclude a deception involving infidelity, wealth, marital status, intention to marry, and intention to pay a sex worker.

Question 11

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

The difference would clearly be a far more comprehensive and defined set of circumstances that vitiate consent than are currently listed in s 348(2). The advantages are the suggested list of vitiating circumstances has the imprimatur of Parliament, which in turn is taken to reflect current community standards. It will be seen that the suggested provision in answer to Q-10 is not exhaustive by using the phrase 'but are not limited to', so as to allow a degree of judicial discretion where a circumstance not previously considered by the legislature

arises in the future. However, it would then be for the legislature to amend the list accordingly to keep the list comprehensive and up to date, provided it supports the case law.

Question 12

Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code, as it applies to the question of consent in rape and sexual assault? Why or why not?

Yes. As discussed in the answer to Q-1, the defence of mistake of fact, to be found in s 24, is generic and applies to all offences where the defence is open. There has been no attempt by the Queensland legislature to adopt more specific language relevant to an individual Chapter or a Division of the Code. This is the more surprising given that an overwhelming number of offences in the *Criminal Code* (Qld) do not specify a fault element, as seen in s 349 Rape: '1) Any person who rapes another person is guilty of a crime.' This means that in a case of rape where the act of sexual intercourse is not in dispute, the only defence is mistake of fact: that the defendant thought the complainant was consenting.

> ***Section 24***
>
> *(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.*

The words 'honest and reasonable' have been highlighted as they reveal a two part test: 'honest' (subjective) and 'reasonable' (objective). It should be obvious (as it has been to other jurisdictions in Australia) that leaving a rape case to be decided on a generic mistake of fact section with a dual subjective and objective test is unacceptable.

One such jurisdiction that has inserted a specific provision for mistake as to consent in certain sexual offences is Tasmania. In 2004, s 14A, which deals with mistake as to consent in certain sexual offences was inserted into the *Criminal Code* (Tas). It can be seen that the effect of s 14A(1) is to nullify honest and reasonable mistake under three circumstances: intoxication, recklessness as to consent, and not taking reasonable steps to establish consent.

> ***14A Mistake as to consent in certain sexual offences***
>
> *(1) In proceedings for an offence against section 124 [sexual intercourse with a young person], 125B [indecent act with young person], 127 [indecent assault] or 185 [rape], a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused —*
>
> *(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or*
>
> *(b) was reckless as to whether or not the complainant consented; or*

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

By contrast, in a series of cases the Queensland Court of Appeal has given a wide or liberal (to the defendant) interpretation of the meaning of s 24 in rape trials: see *R v Parsons* [2001] 1 Qd R 655; *R v Mrzljak* [2005] Qd R 308; *R v Kovacs* [2007] QCA 143; *R v Dunrobin* [2008] QCA 116; and *Phillips v The Queen* [2009] QCA 57.

The difficulties in the application of the operation of s 24(1) Mistake of fact identified in the five Queensland cases above can be addressed in three ways: (1) inserting a specific provision for mistake as to consent in certain sexual offences akin to s 14A of the *Criminal Code* (Tas); (2) defining the term 'recklessness'; and (3) giving examples of taking reasonable steps to ascertain whether or not the complainant was consenting to the act.

Question 13

Where the excuse of mistake of fact as to consent is relied upon in rape or sexual assault, should the onus of proof:
(a) remain unchanged, so that it is for the prosecution to disprove the defendant's mistaken belief; or
(b) be changed, so that it is for the defendant to prove the mistaken belief was honest and reasonable?
Why or why not?

The answers are 'no' to both questions. This is because the introduction of the reasonable steps test replaces the mistake of fact defence in s 24, and therefore does not leave the onus of proof unchanged. While it is still for the prosecution to disprove the defendant's mistaken belief, there is an onus on the defendant to show he or she took reasonable steps to ascertain whether or not the complainant was consenting to the act. This falls short of placing the onus of proof on the defendant to prove the mistaken belief was honest and reasonable.

As was explained in the answer to Q-6, in effect, mistake of fact has been replaced by the reasonable steps test such that the belief in consent has to be more reasonable than honest, by which is meant the subjective test of 'honest' is a secondary factor to the objective test of 'reasonable'. In this context, the minimum standard of 'reasonable' requires the defendant to take at least some physical or verbal steps to find out whether the other person is consenting. The defendant can no longer assume consent in his or her own mind.

Finally, as mentioned in the answer to Q-4, with the inclusion of a fault element of recklessly indifferent in s 349, the requirement of affirmative consent is further buttressed. See answers to Q-15, Q-16 and Q-17 below.

Question 14

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

The main advantage of introducing the reasonable steps test is that it introduces a primarily objective test: reasonable belief in consent depends on the circumstances known to a person at the time and includes any reasonable physical or verbal steps a person has taken to ascertain whether the other person is consenting.

Question 15

Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to introduce the concept of 'recklessness' with respect to the question of consent in rape and sexual assault? Why or why not?

As the previous answers have indicated, section 24 needs to be replaced with the reasonable steps test, such that s 24 has no role to play in this Part or Division of the *Criminal Code* (Qld). Recklessness should be introduced into s 349 through the inclusion of a fault element of recklessly indifferent.

Question 16

If yes to Q-15, how should this be achieved? For example:
(a) Should the excuse of mistake of fact be excluded if the defendant was reckless as to whether or not the complainant was consenting?
(b) Should 'recklessness' be defined in the Criminal Code and, if so, how?

Section 349 should be rewritten as follows with two alternative fault elements, knowledge and recklessly indifferent.

(1) A person is guilty of rape if the person has sexual intercourse with another person:

(a) without the other person's consent; and
(b) knowing about the lack of consent, or being recklessly indifferent as to the lack of consent, or having no reasonable grounds for believing the other person was consenting.

For the purpose of this sub-section, the following definitions apply:
Knowledge: A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.

Recklessly indifferent: a person is recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she:

(a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility;

or

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

(c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

Under option (a), the person would always have failed the 'reasonable steps' test, and where applicable this option would be preferred by the Crown ahead of option (b). Option (b) presents the greatest difficulty for the Crown where the defendant claims to have taken some positive step to ascertain consent. The primary point of contention between the parties will be whether the positive steps were reasonable.

Question 17

What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes?

The main difference between the proposed s 349(1) and the current section is the inclusion of two alternative fault elements. The lack of a fault element in the present s 349 implies rape is a strict liability offence, with only mistake of fact available as a defence. However, from a practical perspective, the classification of the offence of rape as one of strict liability is artificial as the offence requires lack of consent, and a defendant who pleads not guilty is normally pleading that the sexual intercourse was consensual. Furthermore, s 24 is a generic section with no particular reference to rape or the sexual offences provisions, and contains both a subjective element ('honest') and an objective element ('reasonable'). Thus, to argue that the Queensland provision is more victim-centric because it is a strict liability offence combined with a mistake of fact provision that requires the mistaken belief to be honest and reasonable, overlooks the need to define the fault element for rape (such as reckless indifference). Further, this approach fails to specify the limits of mistaken belief in consent where it applies to rape (proceeding regardless of the possibility of lack of consent, failure to take reasonable steps or not giving any thought as to consent).

In summary, the Queensland provision reflects its 19th century architecture, with no fault element prescribed and a generic mistake of fact provision that is the antithesis of victim-centric provisions dealing with rape, both in its statutory language and its wide or liberal (from the defendant's perspective) judicial interpretation (see discussion in the answer to Q-12). Once the judge allows the defence of mistake of fact to go to the jury, then the burden of proof falls on the Crown to show that the complainant was not consenting. Hence, it is important that the defence be more tightly drawn to encompass what positive steps the defendant took to establish the complainant was consenting. See answers for Q-18 to Q-21.

Question 18

Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to require a person to take 'steps' or 'reasonable steps' to ascertain if the other person is consenting to the sexual act? Why or why not?

Yes, because the defence of mistake of fact has to be more tightly drawn using an objective standard.

Question 19

If yes to Q-18, how should a 'steps' or 'reasonable steps' requirement be framed? For example:
(a) Should the requirement be framed as a threshold test, to the effect that the excuse is not available to a person who did not take positive and reasonable steps, in the circumstances known to them at the time of the offence, to ascertain that the complainant was consenting to the sexual act?
(b) Alternatively, should the requirement be framed as a matter to be taken into account by the trier of fact when assessing whether a person's mistaken belief as to consent was reasonable?

Following on from the proposed s 349(1) set out in the answer to Q-16 above, s 349(2) should be as follows:

> *(2) For the purpose of sub-section (1)(b), reasonable belief in consent depends on the circumstances known to a person at the time and includes any reasonable physical or verbal steps a person has taken to ascertain whether the other person is consenting.*
>
> *Example*
>
> *Where a person forms a belief about consent in ambiguous circumstances, such as where the other person is very tired or adversely affected by alcohol, without taking reasonable physical or verbal steps to determine if the other person consents.*
>
> *Standard*
>
> *At a minimum, it will be reasonable for the defendant to take at least some physical or verbal steps to find out whether the other person is consenting.*

Question 20

If a 'steps' or 'reasonable steps' requirement were introduced, should the Criminal Code specify what steps or reasonable steps should be considered? If yes, what should the specific steps or reasonable steps be?

Yes. See example and standard in Q-19 above.

Question 21

What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes? For example:
(a) Might a 'steps' or 'reasonable steps' requirement have the effect of reversing the onus of proof for a defendant? Why or why not?
    (i) If a 'reasonable steps' requirement is introduced, should the onus fall on the defendant to show that they took steps or reasonable steps?
(b) Might a 'steps' or 'reasonable steps' requirement unfairly exclude the availability of the excuse of mistake of fact to particular categories of defendants? Why or why not?

While the reasonable steps provision may not add a great deal to the question of the accused's mens rea, it does provide a standard against which to measure the honesty of the accused's asserted belief in consent, as the Supreme Court of Canada appears to have acknowledged in *R v Barton* 2019 SCC 33 [113]:

> *'[A]s a practical matter it is hard to conceive of a situation in which reasonable steps would not also constitute reasonable grounds for the purpose of assessing the honesty of the accused's asserted belief.'*

The Supreme Court of Canada was considering s 273.2(b) of the Criminal Code (Canada) which states:

> *'the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.'*

As to the onus of proof, see answer to Q-13. While it is still for the prosecution to disprove the defendant's mistaken belief, there is an onus on the defendant to show he or she took reasonable steps to ascertain whether or not the complainant was consenting to the act. This falls short of placing the onus of proof on the defendant to prove the mistaken belief was honest and reasonable.

If by a "reasonable steps requirement unfairly excluding the availability of the excuse of mistake of fact to particular categories of defendants" is meant defendants to offences other than rape, then the reasonable steps test is only intended to apply to rape or other specified sexual assaults. If what is meant refers to defendants who may be suffering from some kind of mental disability, then the court will be obliged to set the bar of 'reasonable steps' against the medical assessment of the defendant's mental capacity, as in *R v Mrzljak* [2005] 1 Qd R 308; [2004] QCA 420.

Question 22

Is there a need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to specify in what way a defendant's intoxication affects the assessment of mistake of fact as to consent? Why or why not?

Yes, because of the need to deal with the effect of intoxication on reasonable belief using an objective standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time.

Question 23

If yes to Q-22, how should intoxication of a defendant operate in respect of the question of honesty and/or reasonableness of a defendant's belief as to consent?

Following on from the proposed s 349(1) set out in the answer to Q-16 above, and s 349(2) set out in the answer to Q-19 above, the treatment of intoxication should be set out in s 349(3) as follows:

> *(3) In determining whether a person who is intoxicated is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, or has a reasonable belief at any time, if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time.*

Question 24

What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes?

The combination of a reasonable steps test and the standard of a reasonable person who is not intoxicated within the specific section, means that a double objective standard is being applied against which to judge the defendant's defence that he or she thought the act was consensual. Contrast this with the generic section 28 Intoxication in the *Criminal Code* (Qld), and in particular s 28(3) which adopts the distinction between specific and basic intent, following *DPP v Majewski* [1977] AC 443.

> *28(3) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.*

Unlike s 428B of the *Crimes Act* 1900 (NSW), Queensland does not set out a list of crimes of specific intent, although there is authority for rape being a crime of basic intent: *R v Woods* (1982) 74 Cr App R 312. Section 428B of the *Crimes Act* 1900 (NSW) only lists one sexual assault offence, namely, s 61K which is an offence covering assault with intent to have sexual intercourse. This is consistent with rape being a crime of basic intent.

Queensland's position is further muddied by case law on the interaction between s 24 and s 28(3) of the *Criminal Code* (Qld). It would appear that the courts are

treating rape as crime of basic intent, in that there is authority (*R v Duckworth* [2016] QCA 30 at [25] per Philippides JA) for the principle that self-induced intoxication is not relevant in determining whether a mistaken belief is reasonable (objective), but is relevant as to whether a mistaken belief held by a defendant is honest (subjective).

R v Duckworth [2016] QCA 30 at [25] per Philippides JA

> *[25] In the directions given by the trial judge dealing with s 24, her Honour correctly stated that intoxication was irrelevant to the question of whether a mistaken belief was reasonably held. Her Honour did so in the context of also having explained that that question was distinct from whether a mistaken belief was honestly held.*

Also in *R v Duckworth*, Burns J at [106] opined:

> *[106] The problem with these directions is that the trial judge failed to direct the jury that the appellant's state of intoxication was relevant to the jury's consideration whether he had an honest belief that the complainant was consenting (R v O'Loughlin [2011] QCA 123 at 8 [28] per Muir JA). This problem was further compounded by the feature that the trial judge had in unequivocal terms told the jury that the appellant's intoxication was quite irrelevant to the question of criminal responsibility, albeit in connection with the discussion concerning s 23. In the result, it cannot be assumed that the jury gave proper consideration to the existence of the possible defence under s 24 or, more accurately, came to a properly reasoned conclusion that such a defence had been excluded by the Crown beyond reasonable doubt. As in R v O'Loughlin, the "jury may have been confused about how intoxication was to be taken into account, if at all, in considering mistake. ... The appellant was entitled to have the jury properly directed in relation to the role of intoxication in the operation of the exculpating circumstance of mistake. The direction given was inaccurate in part, confused and potentially misleading. It had a distinct potential to confuse and distract the jury" (R v O'Loughlin [2011] QCA 123 at 10 [37]-[38] per Muir JA).*

In terms of the criterion of clarity, the proposed section 349(3) set out in Q-23 above is a clear improvement on s 28(3) of the *Criminal Code* (Qld) and judicial interpretation of s 24, and is consistent with 36B(1)(a) of the *Crimes Act* 1958 (Vic). Essentially, the better solution is to abandon the distinction between crimes of basic and specific intent for rape, and adopt the Victorian objective standard of a reasonable person who is not intoxicated, which is very similar in purpose to s 14A(1)(a) of the *Criminal Code* (Tas).

Question 25

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

No, as they are superfluous and distracting. Section 348 and section 349 should be clear and comprehensive, without further recourse to objectives and principles which achieve nothing in terms of defining criminal responsibility.

Question 26

What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes?

None, other than to muddy the criminal responsibility waters. For example, s 37A and s 37B of the *Crimes Act* 1958 (Vic) either state the obvious (fundamental right to make decisions about sexual behaviour or activity, which in any case is already covered with 'free and voluntary agreement') or engage in social commentary (high incidence of sexual violence against women and sexual offences are significantly under-reported). The most insidious sub-sections are 37B(d) sexual offenders are commonly known to their victims and 37B(e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred. Both of these sub-sections are little more than 'free kicks' to the prosecution if the facts of the case line up with these two sub-sections.

The criminal law does not have an educative function if it is designed to secure a higher percentage of successful prosecutions.

Question 27

Is there a need for legislation to specifically permit the admission of expert evidence in trials of sexual offences in chapter 32 of the Criminal Code, subject to the discretion of the court? Why or why not?

No, as current community awareness of sexual assault is such that the jury is quite capable of understanding from the evidence presented by the Crown why for example a person might have delayed reporting the incident or might not have resisted.

Question 28

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

Not applicable given the answer to Q-27 because there are no areas of expertise in this area that is beyond the ken of the jury. Section 388 of the *Criminal Procedure Act* 2009 (Vic) does allow for the admission of evidence by experts aimed at addressing the responses of adult complainants to sexual offences. This appears to be based on the assumption that the common reactions of complainants of rape are not within the understanding of the average juror. This proposition is difficult to accept, and appears to place complainants of rape in a special position to all other alleged victims of crime. How a person would react after an alleged rape does not call for expert evidence and can be assessed on the basis of the evidence presented, particularly the complainant's evidence, and the strength of the Crown's case. The prosecutor can take the complainant through her or his evidence in chief and seek an explanation for her or his

behaviour. The real danger of an expert witness is to bolster the credibility of the Crown's witnesses and negatively impact on the defendant's right to a fair trial.

Question 29

What difference, if any, would those amendments make to the operation of the current law in Queensland, and what advantages or disadvantages might result from such changes?

The main difference would be to assist the Crown as the jury might give undue weight to the expert evidence, thereby jeopardising the defendant receiving a fair trial.

Question 30

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

Yes, especially if Queensland adopted the wide-ranging reforms to the consent laws and the excuse of mistake of fact being proposed here. Essentially, the proposal is for the adoption of affirmative assent and the application of objective tests, which require a comprehensive education program.

Availability

I would welcome an opportunity to expand upon this written submission.