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## Chapter 8

# The Mental Element of Rape

### INTRODUCTION

8.1 This Chapter deals with the mental element for rape and for sexual assault. The mental element (or *mens rea*) is the state of the mind of the accused which must be established beyond reasonable doubt before the accused can be convicted. The Chapter recommends a change to the mental element. The proposed change will prevent an accused person from avoiding culpability if he did not take reasonable steps in the circumstances known to him at the time to ascertain whether or not the complainant was consenting.

### THE CURRENT LAW

8.2 In Victoria, the prosecution in a rape case must prove that the accused intentionally sexually penetrated the complainant without her consent and also that the accused was aware that the complainant was not consenting, or might not be consenting. Victorian law reflects the House of Lords decision in *DPP v Morgan*,<sup>1057</sup> which established that an honest belief in consent, however unreasonable, prevents an accused from having the necessary *mens rea* for the crime. Lord Hailsham recognised that the absence of reasonable grounds for the belief could be relevant in deciding whether the accused held an honest belief.

8.3 This subjective approach to the mental element has been applied by Victorian, New South Wales, South Australian and ACT courts and codified in their statutes.<sup>1058</sup> In its 1991 Report on Rape the former Law Reform Commission

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1057 [1976] AC 182. See the discussion of this case in the Interim Report paras 7.82–3. This case has been described as the ‘highpoint’ of subjectivism. See, for example, Brian Rolfes, ‘The Golden Thread of Criminal Law — Moral Culpability and Sexual Assault’ (1998) 61 *Saskatchewan Law Review* 87.

1058 *Crimes Act 1958* s 38, *Crimes Act 1900* (NSW) s 61I, *Criminal Law Consolidation Act 1935* (SA) s 48 and *Crimes Act 1900* (ACT) s 54. The subjective approach is also (presently) required in the Northern Territory: see *Director of Public Prosecutions Reference No 1 of 2002* [2002] NTCCA 11

of Victoria recommended that the subjective approach to the mental element should not be changed to an objective approach.<sup>1059</sup> However, the Commission recommended that juries should be directed that in reaching a decision on the state of mind of the accused they should take into account whether his alleged belief in consent was reasonable in the circumstances. This provision is now contained in section 37(1)(c) of the *Crimes Act 1958*.

8.4 Western Australia, Queensland and Tasmania do not apply *Morgan*. In their respective Criminal Codes, the mental state for rape is satisfied by a mere intention to have intercourse.<sup>1060</sup> The prosecution must prove that the complainant did not consent but does not have to prove that the accused knew the complainant was not consenting or that he was reckless as to consent. In his defence, the accused can, however, argue that he honestly and reasonably believed the complainant consented.<sup>1061</sup> Once the defence is raised, the prosecution must prove beyond reasonable doubt that the accused did not have an honest and reasonable belief that the complainant consented.

8.5 In the Interim Report the Commission weighed up the arguments for and against moving towards a more objective approach to the mental element of rape and concluded that a stronger argument can be made for modifying the current subjective mental element than for retaining the current approach.

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(Unreported, Martin CJ, Thomas and Bailey J, 19 December 2002), but note that special leave has been granted to appeal to the High Court. In this case the majority held that the trial judge was correct in directing the jury that the Crown must prove beyond reasonable doubt not only that the accused had sexual intercourse with the complainant without her consent but also that he intended to have sexual intercourse with her without her consent and that any mistaken belief in consent need not be based on reasonable grounds.

1059 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure* Appendixes to Interim Report No 42 (1991).

1060 *Criminal Code Act 1913* (WA) s 325, *Criminal Code Act 1899* (Qld) s 349, *Criminal Code Act 1924* (Tas) s 185. Australian criminal law derives from legislation, decisions of courts (common law) or a combination of both of these. The Code jurisdictions of Qld, WA, Tas and the NT have codified the criminal law and in so doing have departed significantly from the common law principles. In the 'common law' States of Vic, SA, the ACT and NSW, the *mens rea* of rape is now statutorily defined, although it is broadly consistent with the common law as stated in *DPP v Morgan* [1976] AC 182.

1061 In *BRK and Ors v R*, the Western Australian Court of Criminal Appeal held that 'reasonableness' was to be determined 'by the standards of a reasonable person of the same age, background, and level of intellectual functioning as the accused.' *BRK and Ors v R* (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, Murray, Parker and Owen JJ, 25 May 2001), [36]. Further, the 'reasonable person' has been held to be a sober person: *Daniels v The Queen* (1990) 1 WAR 435, 445, Kennedy J.

## WHY THE CURRENT SUBJECTIVE MENTAL ELEMENT SHOULD BE MODIFIED

8.6 The following arguments can be made in favour of modifying the mental element:

- the present law does not adequately protect the autonomy of people to refuse to participate in sexual activity;
- a person who has not given any consideration to whether another person has consented to a sexual assault should not be able to avoid culpability;
- the ‘communicative model’ of consent is undermined by the current subjective approach;
- the ‘mental element’ has an important influence on the outcome of sexual offence trials; and
- other jurisdictions have modified the subjective approach to the mental element.

These arguments are briefly outlined below.

## THE PRESENT LAW DOES NOT ADEQUATELY PROTECT SEXUAL AUTONOMY

8.7 The present subjective approach does not provide adequate protection to women and children.<sup>1062</sup> It supports the attitude that a person is entitled to have sex, unless the other person actively indicates they do not wish to do so. This places the onus on a person approached for sex to indicate lack of consent, instead of requiring the initiator to ascertain whether the other person is consenting.

8.8 Judges routinely direct juries that reasonableness is ‘one of many guides’ to be taken into account in deciding whether the accused was aware that the complainant was not consenting or might not be consenting.<sup>1063</sup> However the

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1062 Women and children make up the overwhelming majority of sexual assault victims. See Interim Report para 2.22.

1063 *Crimes Act 1958* s 37(1)(c) reads: ‘in considering the accused’s alleged belief that the complainant was consenting to the sexual act it must take into account whether that belief was reasonable in all the relevant circumstances.’ See Chapter 7, paras 7.51–64 for a discussion of judges’ directions in relation to the accused’s state of mind. The Commission found that the comprehensibility of the directions on this varied somewhat between judges. Some were very unclear. For example, the judge in Trial 3 directed: ‘Now in dealing with the reasonableness of belief, take care to appreciate that in relation to the reasonableness of an accused’s belief an objective test is not involved. It is not what you might

Commission does not believe that this provision adequately protects sexual autonomy. The accused may have various distorted beliefs about sex. For example, he may believe that women like to struggle, that he has the right to have sex after buying a woman a meal, or that he has to ‘seduce’ a woman by overcoming her resistance. L’Heureux-Dubé J’s comments in the leading Canadian Supreme Court case of *R v Park*<sup>1064</sup> are relevant to these concerns:

Few would dispute that there is a clear communication gap between how most women experience consent, and how many men perceive consent. Some of this gap is attributable to genuine, often gender-based, miscommunication between the parties. Another portion of this gap, however, can be attributed to the myths and stereotypes that many men hold about consent.

8.9 A jury may or may not be sympathetic to an accused who argues that on the basis of his sexual experience he believed that silence and passivity on the part of the woman meant she had consented.

8.10 A mental element of rape in which an accused can be acquitted where he held an honest belief in consent runs the real risk of affirming and legitimising such myths and stereotypes. It has been argued that the subjective approach means that ‘the more drunk, insensitive, boorish, or self-delusional the male, the more likely that an acquittal will ensue’.<sup>1065</sup>

#### **AN ACCUSED PERSON SHOULD NOT BE ABLE TO AVOID CULPABILITY IF HE HAS NOT CONSIDERED THE ISSUE OF CONSENT**

8.11 Under current Victorian law an accused may be able to avoid culpability where he did not give any thought at all as to whether the complainant was consenting or not. The Court of Appeal in *R v Ev Costa*<sup>1066</sup> held that there must be a conscious advertence to the question of the complainant’s consent in order to satisfy the mental element. Similarly, the Supreme Court has said that the accused must have been ‘aware that the woman was not consenting, or else realised that

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have believed or others might have believed in the circumstances you find existed, it is the reasonableness of the belief held by the accused at the time, that is, his subjective belief; that is, you are looking at his state of mind...’

1064 [1995] 2 SCR 836, 864-5. L’Heureux-Dubé J’s judgment was agreed with by the majority of the Supreme Court of Canada.

1065 Brian Rolfes, ‘The Golden Thread of Criminal Law —Moral Culpability and Sexual Assault’ (1998) 61 *Saskatchewan Law Review* 87 para [88].

1066 *R v Paul E v Costa* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA and Southwell AJA, 2 April 1996).

she might not be and determined to have intercourse with her whether she was consenting or not'.<sup>1067</sup>

8.12 This approach may be compared with that in New South Wales. In *R v Kitchener*<sup>1068</sup> it was held that 'where consent to intercourse is withheld, a failure by the accused to avert at all to the possibility that the complainant was not consenting, necessarily means that the accused is "reckless as to whether the other person consents"...'<sup>1069</sup> which is sufficient to satisfy the *mens rea* of the offence in New South Wales. Kirby P, then President of the Court of Appeal, commented that:

To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrong-doing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today... Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women.<sup>1070</sup>

8.13 No accused should be acquitted just because he has completely failed to turn his mind to the question of consent. The act of penetration is an act which cannot be done accidentally. If an accused is physically capable of penetration and mentally capable of forming the intent to penetrate, then it should be expected that he is also able to turn his mind to whether or not the other person is consenting to the act.<sup>1071</sup> The mental element should be changed to prevent an accused from escaping criminal liability if he has simply failed to consider whether the woman is consenting.

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1067 *R v Flannery and Prendergast* [1969] VR 31, 33.

1068 (1993) 29 NSWLR 696.

1069 *Ibid* 703 (Carruthers J, with whom Kirby P and Smart J agreed).

1070 *Ibid* 697 (Kirby P). In *R v Tolmie* (1995) 37 NSWLR 660, 671 Kirby P. said: 'The criminal law, at least in respect of conduct as seriously invasive as sexual intercourse, should not fall more heavily on those who exhibit some attention to the rights of others while exculpating those who are so insensitive to the rights of others that they do not consider their wishes in respect of sexual intercourse although they are necessarily relevant and important in the process of initiation and continuation of sexual intercourse.'

1071 Toni Pickard, 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 20 *University of Toronto Law Journal* 75–6.

## THE PRESENT LAW UNDERMINES THE 'COMMUNICATIVE MODEL' OF CONSENT

8.14 Section 37(1)(a) of the *Crimes Act 1958* was intended to overcome the view that passivity is equivalent to consent and to encourage a more communicative approach to consent for sexual activity. The section reads:

The fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement.

8.15 The current subjective mental test for rape, which focuses on the accused's *honest* belief in consent, does nothing to discourage the *assumption* of consent in ambiguous situations. Consider the case where the complainant is 'frozen' by fear and does not respond in any way to an accused's sexual advances. If the accused can convince a jury that he penetrated her on the basis of an 'honest' (but uninformed) belief that her silence means consent, he will be acquitted. This flies directly in the face of the communicative model of consent presented in section 37(1)(a) of the *Crimes Act 1958*.

8.16 In Chapter 7 we refer to jury charges in which judges directed that past consensual sexual intercourse between the complainant and accused or complainant and others may be taken into account by the jury in deciding whether the accused in this instance had an honest belief that the complainant consented. For example:

...you must...take into account the past dealings between these people, if any, as you find them to be, to see whether you think it would have been reasonable for him to believe on this occasion that she was consenting to intercourse, given for example, their past sexual history, if you accept that occurred.<sup>1072</sup>

8.17 Section 36 of the *Crimes Act* says that consent means 'free agreement' and section 37(1)(a) requires that such free agreement is communicated in some way. These provisions are undermined if evidence of previous consensual sexual activity with the accused or others can be taken into account in deciding whether or not

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1072 Trial 8. Trial 1 is another example of such a direction. There the judge directed the jury that: 'You are also more entitled to more readily accept, if you see fit, an accused statement that he believed a woman was consenting to multiple sexual partners, when she says to him that she had previously enjoyed such activity, or he is aware that she previously so enjoyed such activity.' See paras 7.52–5.

the accused on the occasion in question honestly believed the complainant was consenting.

8.18 The Commission believes that the law should encourage the initiator of sexual activity to take responsibility for ascertaining the wishes of the other person. When weighed against the serious harm of rape, such a simple step could hardly be said to be onerous. As Toni Pickard writes:

He is about to engage intentionally in the specific act which can itself be harmful, and whether or not the act is harmful in any particular instance cannot be determined without reference to the world outside him. That is sufficient reason to require him, as an initial matter, to inquire into consent before proceeding.<sup>1073</sup>

8.19 In her study of 34 rape trials in the County Court of Victoria between 1996-98,<sup>1074</sup> Dr Melanie Heenan found that honest belief in consent was raised by the accused defence in the very trials in which it was unlikely that the complainants were capable of freely agreeing.<sup>1075</sup> Heenan found that in the four trials where belief in consent was argued, the complainants were either asleep or unconscious during the incident.

8.20 Our findings were similar. In our judges' directions study<sup>1076</sup> we found that belief in consent was argued in eight trials.<sup>1077</sup> Of these, *six* involved one or more of the vitiating factors listed in section 36.<sup>1078</sup>

## THE EFFECT OF THE SUBJECTIVE APPROACH ON TRIAL OUTCOMES

8.21 One of the reasons which the former Law Reform Commission of Victoria (LRCV) advanced for retaining the subjective mental element was that a change to a more objective approach would only affect 'belief' trials i.e. trials in which the defence explicitly argued that the accused had a mistaken but honest belief in

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1073 Toni Pickard, 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 20 *University of Toronto Law Journal* 75-6. She comments further: 'in terms of simple balancing of interests, it is sound policy to require reasonable care, given the capabilities of the actor' (p 77).

1074 Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (Unpublished PhD Thesis, Monash University, 2001). See also Interim Report para 7.69 for a discussion of this study.

1075 Ibid.

1076 Reported in Chapter 7.

1077 Trials 3, 5, 7, 8, 12, 14, 20 and 23.

1078 Section 36 defines consent as 'free agreement' then sets out a non-exhaustive list of situations in which a person does not freely agree to a sexual act. See paras 7.42-50.

consent.<sup>1079</sup> The LRCV examined 53 DPP files covering rape trials<sup>1080</sup> and reported that ‘belief in consent’<sup>1081</sup> was the primary issue in only three cases (6%), and in another nine (17%) the accused relied on a mix of ‘consent’ and ‘belief in consent’ in their defence. The LRCV concluded that the mental element is rarely the main issue in rape trials.<sup>1082</sup> It went on to say that this finding was not surprising. It was suggested that mistaken belief in consent was an unattractive line for the defence to take because it required a concession by the defence that the complainant may not have consented.

8.22 The LRCV argument that ‘belief’ cases are rare does not recognise that in the so called ‘straight consent’ trials the mental element of rape must still be established. It may not be the ‘main issue’ from the point of view of the lawyers but it cannot be assumed that the same is true of the jurors.<sup>1083</sup> Even if defence counsel does not explicitly argue that the accused had an honest belief in the complainant’s consent, the jury is obliged to consider the state of mind of the accused in their deliberations. Juries in Victoria are directed to consider each and every element of the crime of rape<sup>1084</sup> and be convinced beyond reasonable doubt on each.

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1079 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure* Appendixes to Interim Report No 42 (1991) 13–5.

1080 Reported in *Ibid* 84–91.

1081 ‘Straight belief’ cases were classified in the study as follows: there is ‘relatively little disagreement about what was said or done by either party and the defence conceded either directly or indirectly, that there was a real possibility of mistake on the part of the accused’. In contrast, ‘straight consent’ cases were those ‘characterised by marked disagreements about what had taken place...Logically, in such cases the accused was also asserting a belief in consent, but the claim was that this belief was well grounded, rather than the result of a possible mistake’. *Ibid* 86.

1082 Report No 43, above n 1079, 13.

1083 Any speculation about how and on what basis juries decide cases is just that, speculation.

1084 In Australia’s common law jurisdictions, trial judges have discretion to give only a minimal *mens rea* direction in cases where there is no ‘mistake’ argument i.e. where the accused is relying only on the argument that the complainant consented, but, as Jeremy Gans rightly points out: ‘Even assuming that those judges exercise that discretion in ‘straight consent’ cases, it cannot be assumed that the lack of an elaborate direction would cure any juror misconceptions that may arise. It could scarcely be argued that jurors will ignore a direction just because it is short or will not apply it just because its full legal content is not explained.’ Jeremy Gans, ‘When Should the Jury be Directed on the Mental Element of Rape?’ (1996) 20 *Criminal Law Journal* 247 259. For a fuller version of Jeremy Gans’ criticism of the interpretation of the LRCV study findings, see Jeremy Gans, ‘Rape Trial Studies: Handle with Care’ (1997) 30 *The Australian and New Zealand Journal of Criminology* 26 30. David Brereton did the original study and makes a reply to these criticisms in David Brereton, ‘A Response to Jeremy Gans’ (1997) 30 *The Australian and New Zealand Journal of Criminology*, 36.

8.23 It is likely that jurors place importance on the mental element of rape in both ‘consent’ and ‘straight belief’ trials<sup>1085</sup> even when the presence or absence of consent is the primary *legal* issue in a case. A jury may, for example, decide in a ‘straight consent’ case that the complainant did not consent, but nonetheless still acquit the accused because they consider he honestly but unreasonably believed the complainant had consented.<sup>1086</sup> Jeremy Gans argues that a ‘well-motivated juror, aware of the importance of the *mens rea* issue in a rape trial, may feel that a higher standard of prosecutorial proof is required for *mens rea* than for the issue of actual consent’.<sup>1087</sup>

8.24 If the jury takes the view that the accused subjectively believed that the complainant consented they may also be more likely to accept that she was in fact consenting. In any event, it seems clear that the test applied to the mental element of rape is likely to influence how the issue of actual consent is decided.

8.25 In our view the effect of the subjective approach to the mental element is not confined to cases in which the accused relies on a mistaken belief in consent in his defence, but has a more far-reaching effect.

#### OTHER JURISDICTIONS HAVE MODIFIED THE SUBJECTIVE MENTAL ELEMENT

8.26 A number of other Commonwealth jurisdictions have moved away from an entirely subjective approach to the mental element. New Zealand abolished the *Morgan* principle when it adopted an objective test for the mental element of rape in 1985.<sup>1088</sup> The mental element required for rape in Canada includes an objective

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1085 Jeremy Gans, ‘When Should the Jury be Directed on the Mental Element of Rape?’ (1996) 20 *Criminal Law Journal* 247–259. For a definition of what is meant here by ‘straight consent’ and ‘straight belief’ see above n 1081.

1086 In other words, as Gans says, the jury decides that ‘the complainant was raped but not by a rapist’. *Ibid* 261.

1087 *Ibid* 261.

1088 *The Crimes Act 1961* (NZ) s 128, as amended by s 3 of the *Crimes Amendment Act (No 3) 1985* reads: ... (2) A male rapes a female if he has sexual connection with that female occasioned by the penetration of her [[genitalia]] by his penis—

(a) Without her consent; and

(b) Without believing on reasonable grounds that she consents to that sexual connection.

See Rosemary Barrington, ‘Standing in the Shoes of the Rape victim: Has the Law Gone Too Far?’ (1986) *New Zealand Law Journal* 408 for a discussion of the NZ amendments. She concludes that the amendments represent a positive step and have definitely not gone too far.

component.<sup>1089</sup> Following an extensive review of sexual offences laws by the Home Office,<sup>1090</sup> England recently passed legislation which introduced an objective test for the *mens rea* of rape.<sup>1091</sup> The rationale for this amendment was stated by the Home Office as follows:

We believe the difficulty in proving that some defendants did not truly have an ‘honest’ belief in consent contributes in some part to the low rate of convictions for rape. This in turn leads many victims, who feel that the system will not give them justice, not to report incidents or press for them to be brought to trial.<sup>1092</sup>

The Code States in Australia (Western Australia, Tasmania and Queensland) also apply a largely objective approach.<sup>1093</sup> Thus, in modifying the current subjective

1089 See discussion below para 8.31. Here it should be noted that even the well-known Canadian subjectivist Professor Donald Stuart recognised the need for some degree of objectivity in the *mens rea* element of rape: ‘The time had arrived for Parliament to declare some criminal responsibility for objectively unreasonable sexual behaviour.’ Don Stuart, ‘Sexual Assault: Substantive Issues Before and After Bill C-49’ (1993) 35 *Criminal Law Quarterly* 241 255. Professor Stuart’s objection to the model introduced by the Canadian Parliament in 1992 was not that it contained an objective element for *mens rea*, but that it failed to recognise the distinction in culpability between a deliberate rapist and one who was unreasonable in not anticipating that the complainant may not be consenting where he should have.

1090 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences ; Volume 1. Summary, Report and Recommendations*. (2000).

1091 The *Sexual Offences Act 2003* (UK) s 1 (Rape) reads:

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

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

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

1092 Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (2002) 17.

1093 *Criminal Code Act 1913* (WA) s 324D, *Criminal Code Act 1899* (Qld) s 349, *Criminal Code Act 1924* (Tas) s 185.

In the main High Court case on mistake, *R v He Kaw Teh* (1985) 157 CLR 523, Brennan J regarded the question of whether the subjective or objective approach to the mental element of rape as unsettled and made some suggestions as to why an objective approach may be more favourable. This was, of course, obiter dictum, as the case concerned a statute on drugs. It is also worth noting that Victorian statutory sexual offences against children and young people allow a defence of honest and reasonable mistake as to the age of the child.

test, Victoria would be moving into line with a number of other Australian and overseas jurisdictions.

## SUMMARY

8.27 The Commission believes that the law of rape should be changed to ensure that an accused cannot escape culpability where he failed to turn his mind to the question of whether or not the complainant was consenting, or failed to take any adequate initiative to ascertain whether she was consenting.<sup>1094</sup> The current test for the mental element of rape undermines the communicative model of consent in section 37(1)(a) of the *Crimes Act 1958*. A mental test which includes some objective elements would encourage responsible sexual relations in the community. It would protect sexual autonomy and make an important symbolic statement that the law no longer accepts outdated views on female sexuality, seduction and sexual conquest. Such an approach would be consistent with changes to the law in New Zealand, Canada, and England.

## THE PROPOSED MODELS

8.28 The Interim Report discussed three possible ways of amending the law to place more emphasis on the reasonableness of the accused's belief that the complainant was consenting.

### OPTION 1

*A person commits rape if:*

- (a) *he or she intentionally sexually penetrates another person without that person's consent; and*
- (b) *(i) is aware that the person is not consenting or might not be consenting; or  
(ii) a reasonable person would, in all the circumstances, have been aware that the person was not consenting or might not be consenting.*

8.29 The first model is a purely objective approach under which the prosecution would not have to prove that the accused was aware that the

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Here it should also be noted that a partially objective approach (i.e. putting the evidential burden on the accused to raise mistaken belief in consent) was the law in Victoria in 1947. See *R v Burles* [1947] VLR 392, 404.

1094 Interim Report Recommendation 78.

complainant was not consenting. The accused would be convicted if the prosecution proved beyond reasonable doubt that a reasonable person would, in all the circumstances, have been aware that the complainant was not consenting or might not be consenting.

## OPTION 2

*A person commits rape if he or she intentionally sexually penetrates another person without that person's consent. It is a defence to a charge of rape if the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.*

8.30 Under this model, which applies in the Code States of Western Australia, Tasmania and Queensland, the prosecution is only required to prove that the accused had an intention to sexually penetrate the complainant and that the penetration occurred without her consent. Where the accused raises mistaken belief in consent as a defence (there must be some evidence in support of an assertion of mistaken belief), the prosecution must then prove, beyond reasonable doubt, that the belief was neither honest nor reasonable.

## OPTION 3

*A person commits rape if he intentionally sexually penetrates another person without that person's consent.*

*It is a defence to a charge of rape that the accused held an honest belief that the complainant was consenting to the sexual penetration. However where an accused alleges that he believed that the complainant consented to the sexual penetration, a judge must be satisfied that there is sufficient evidence of the existence of such a belief before the defence of honest belief can be considered by the jury.*

*The defence is not available where:*

- (i) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or*
- (ii) the accused did not turn his or her mind to the possibility that the complainant was not consenting.*

8.31 This third option is similar to the Canadian approach.<sup>1095</sup> In Canada, a defence of honest but mistaken belief in consent is available to the accused once certain conditions are satisfied. The accused must raise some plausible supporting evidence to give an ‘air of reality’ to the defence of mistaken belief.<sup>1096</sup> The trial judge must then decide, based on all the evidence, whether or not there is sufficient evidence to put the defence to the jury. The Canadian Supreme Court has said:

Essentially, for there to be an ‘air of reality’ to the defence of honest but mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence...that evidence must amount to something more than a bare assertion. There must be some support for it in the circumstances.<sup>1097</sup>

Once the trial judge decides there is sufficient evidence for the defence to go to the jury, the prosecution must prove beyond reasonable doubt that the accused did not have this belief.

## SUBMISSIONS

8.32 The Commission called for submissions as to the most appropriate model for reform of the existing element for rape. Three submissions rejected all the proposed models outright and advocated retention of the status quo. The Criminal Bar Association was of the opinion that the ‘current law should be retained’.<sup>1098</sup> They wrote:

The retention of an entirely subjective test is consistent with the approach adopted in other offences contained within the *Crimes Act 1958*, such as the crime of theft. A person’s state of mind is subjective. Offences requiring the proof of *mens rea* render a person criminally culpable for their conscious and voluntary acts. A person ought not be held criminally culpable for conduct that was unintended...

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1095 In 1992, a statutory definition of consent was enacted (Bill C 49). Criminal Code RSC 1985, c C-46, s 273.1 lists circumstances where a person is taken not to be consenting. Section 273.2 lists circumstances in which a defence of belief in consent is not available to the accused.

1096 A preliminary discussion of the Canadian model can be found in the Interim Report paras 7.109–13.

1097 *R v Park* [1995] 2 SCR 836, 853 (L’Heureux-Dubé J, with Lamer CJC, La Forest, Gonthier, Cory and McLachlin JJ concurring).

1098 Submission 42.

Victoria Legal Aid agreed with the Criminal Bar Association's submission on this point.

8.33 The Victorian Bar's attitude was similar:

The Bar opposes the adoption of any of the options suggested by the Commission for change in relation to the mental element for the crime of rape. We oppose the introduction of an objective test into an assessment of mental intention in the most serious criminal offences.<sup>1099</sup>

The Victorian Bar expressed agreement with the principles stated in *DPP v Morgan*<sup>1100</sup> and went on to say:

If the accused honestly believed that the woman consented, he should not be guilty of rape, even if that belief was unreasonable.

8.34 The County Court was opposed in principle to removing the 'element of subjectivity which has always been regarded as such a vital aspect of the mens rea of crime'.<sup>1101</sup> Although it rejected Options 1 and 2, it did not specifically reject Option 3, which it described as 'the least objectionable of the three'.

8.35 All other submissions that commented on this point supported a move to a more objective model but were divided about which model was preferable. Four submissions supported Option 1,<sup>1102</sup> one Option 2<sup>1103</sup> and eight were in favour of Option 3.<sup>1104</sup> For example, the Violence Against Women Integrated Services (VAWIS) said:

[W]e support Option 1: An Objective Fault Element for Rape, along with the other proposed changes to The Mental Element of Rape to ensure that an accused cannot escape culpability because he held an honest but unreasonable belief in the complainant's consent.<sup>1105</sup>

And the Domestic Violence Incest Resource Centre (DVIRC) stated:

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1099 Submission 48.

1100 [1976] AC 182.

1101 Submission 52.

1102 Submissions 20, 24, 26 and 44.

1103 Submission 45.

1104 Submissions 16, 17 (supported both Options 2 and 3), 19, 27, 32, 40, 47 and 51.

1105 Submission 24.

[W]e support Option 1 because it promotes and upholds the communicative model of sexual relations which we believe is a necessary benchmark for sexual conduct in a just society.<sup>1106</sup>

The Department of Human Services also thought that Option 1 was the most appropriate model:

This model is preferred as it applies a strict standard when judging sexual behaviour, thus sending out a strong symbolic message to the community...<sup>1107</sup>

8.36 Barwon CASA preferred the model encompassed by Option 3:

because this puts the responsibility with the accused to show they took reasonable steps to ascertain that the complainant was consenting. Our experience indicates that some people ‘freeze’ as a reaction to an attack upon themselves and this has been taken as consent by some defence lawyers. Option 3 supports a communicable and mutual mode of sexual interaction.<sup>1108</sup>

The Federation of Community Legal Centres also supported Option 3:

We support Option 3...because it bolsters the communicative model. While the legislative change may have a limited impact on trial outcomes it is an important message to send to the community, and to those working in the CJS [criminal justice system]. Under this model the assertion by the accused that he believed the complainant was consenting is not sufficient. He must provide sufficient evidence that he held such a belief.

## WHICH MODEL?

The Commission favours a variation on Option 3, which includes both subjective and objective elements. This model draws on but is not identical to the Canadian approach and is arguably simpler for juries and judges to apply than Options 1 or 2, or the present wholly subjective model. The recommended model is as follows:

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1106 Submission 20.

1107 Submission 44.

1108 Submission 16. Three other CASAs also supported Option 3: Loddon Campaspe CASA (Submission 19), CASA House (Submission 27) and West CASA (Submission 32).

**RECOMMENDATION(S)**

174. The *Crimes Act 1958* should be amended to include the following formulation of the mental element of rape:
- A person commits rape if he intentionally sexually penetrates another person without that person's consent.
  - It is a defence to a charge of rape that the accused held an honest belief that the complainant was consenting to the sexual penetration.
  - The accused must produce some evidence that he had an honest belief that the complainant consented before this matter can be left to the jury. The mere assertion by an accused that he believed the complainant was consenting shall not constitute sufficient evidence of an honest belief as to consent.
  - Where an accused alleges that he believed that the complainant consented to the sexual penetration, a judge must be satisfied that there is sufficient evidence of the existence of such a belief before the defence of honest but mistaken belief in consent can be considered by the jury.
  - The defence of honest belief in consent is not available where:
    - the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting;
    - the accused did not turn his or her mind to the possibility that the complainant was not consenting; or
    - one or more of the circumstances listed in section 36(a)–(g) existed and the accused was aware of the existence of such circumstances.
  - In considering the question of whether the accused took reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting, the jury shall not have regard to any evidence of the accused's self-induced intoxication.
  - If relevant to the facts in issue in a proceeding, the judge must direct the jury that—in considering the accused's alleged belief that the complainant was consenting to the sexual act it must take into account whether that belief was reasonable in all the relevant circumstances. [current section 37(1)(c) *Crimes Act 1958*].

## HOW OUR RECOMMENDED MODEL WILL WORK

8.37 The model we propose has both subjective and objective elements. In this section we explain how it would work in practice. Because there are similarities between our proposal and the Canadian approach<sup>1109</sup> to the mental element of rape, we draw on the Canadian jurisprudence which has developed following introduction of the 1992 *Criminal Code* provisions. The following section includes a discussion of:

- the evidentiary burden and the persuasive burdens of proof;
- the threshold test for the defence of mistaken belief in consent;
- issues which must be considered by the jury (reasonable steps, inadvertence, vitiating factors listed in section 36 of the *Crimes Act 1958*); and
- the effect of self-induced intoxication.

## BURDENS OF PROOF

8.38 Under our recommendations the defence will have the burden of producing some evidence of the existence of an honest but mistaken belief in consent (the evidentiary burden). For the reasons discussed in 8.42 this will not affect the normal right of the accused to decline to give evidence. The prosecution will still have to prove beyond reasonable doubt that there was intentional sexual penetration of the complainant without her consent and, if the defence of honest but mistaken belief in consent is put to the jury, must also prove beyond reasonable doubt that the accused did not have an honest belief in consent.

'Evidential burden': the burden of introducing enough evidence to be placed before the jury or other tribunal of fact. To be decided by the judge.

'Persuasive burden': the burden of proof. To be decided by the jury in a jury trial.

## THE THRESHOLD ISSUE—FOR THE TRIAL JUDGE

8.39 The trial judge will have to decide whether or not the evidential burden for the 'mistake defence' has been satisfied. Only then will it be necessary to direct the jury on this issue. In cases where the mistake defence is not raised or does not

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1109 The models are not, however, identical and there are some important differences between them.

have an ‘air of reality’, the judge will direct the jury only on the requirement that there must be sexual penetration without the complainant’s consent.

8.40 The rationale behind requiring supporting evidence when raising the mistaken belief defence is expressed by McLachlin J in *R v Osolin*:

A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them...A person who commits a sexual assault without some support in the circumstances for inferring the consent of the complainant has, at very least, been wilfully blind as to consent.<sup>1110</sup>

8.41 The purpose of the threshold test is to ensure that the jury is only directed on issues which are relevant to the case. In other words, the jury should not be left to consider or instructed to consider the issue of the accused’s belief in consent if there is no evidence that it is in issue.<sup>1111</sup> This overcomes the potential problem of jury speculation, discussed above.<sup>1112</sup> Cory J in the Canadian Supreme Court case of *R v Osolin*<sup>1113</sup> gives a useful description of the threshold test:

The term ‘air of reality’ simply means that the trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. If the evidence meets that test then the defence must be put to the jury. This is no more than an example of the basic division of tasks between judge and jury.

8.42 In the determination of the threshold issue, there is no requirement for corroborating evidence as such, but the evidence must be more than a mere assertion by the accused.<sup>1114</sup> Supporting evidence may come from the testimony of

1110 *R v Osolin* [1993] 4 SCR 595, para [118]. L’Heureux-Dubé J quoted this passage with approval in *R v Park*, above n 1097, 853.

1111 L’Heureux-Dubé J in the leading Canadian Supreme Court case of *R v Park*, above n 1097, 846-63 analysed exhaustively the ‘air of reality’ test (Lamer CJC, La Forest, Gonthier, Cory and McLachlin JJ concurring). The judge made it clear that ‘[i]t is a legal threshold, not a factual one.’ (p 848). And further: ‘The test is the means by which a judge demarcates the limits of the jury’s fact-finding responsibilities. A jury must not be invited to speculate on issues that are not realistically before it.’ (p 848).

1112 See paras 8.21–5.

1113 *R v Osolin*, above n 1110, para [198]. This statement of Cory J is cited approvingly by L’Heureux-Dubé J in *R v Park*, above n 1097. See also *R v Pappajohn* [1980] 2 SCR 120 and *R v Esau* [1997] 2 SCR 777.

1114 Cory J for the majority in *R v Osolin*, above n 1110, para [208] held: ‘...the mere assertion that ‘I believed [he] was consenting’ will not be sufficient. What is required is that the defence of mistaken

the accused alone, from the complainant's evidence-in-chief or cross-examination or from evidence from other sources. It is important to note here that there is no obligation on the accused to testify in order to raise the defence. The accused's right to silence is therefore maintained.

8.43 In the Canadian context L'Heureux-Dubé J's analysis of the threshold test in *R v Park*<sup>1115</sup> provides guidance on when the defence of mistake should or should not generally be put to the jury. Where the accused's and complainant's evidence on the facts is similar and the only difference is in their interpretation of what happened, generally the defence should be put to the jury. Where their stories are opposed, for example, the accused argues that the complainant was a willing and active participant and the complainant argues that she did not consent, then the defence should generally not be put to the jury as it is merely a question of consent or no consent. Further, evidence which may support an honest belief on the part of the accused that the complainant *would* consent to sexual activity is not capable of supporting, on its own, the defence of honest but mistaken belief in consent. This is because consent can be withdrawn at any time<sup>1116</sup> and therefore may not be present at the time of the actual sexual activity.

8.44 Lamer CJ in the Canadian Supreme Court case of *R v Davis*<sup>1117</sup> attempted to give some guidance to trial judges in deciding the threshold issue, holding that the trial judge must consider the totality of evidence but not attempt to weigh it:

The sole concern is 'with the facial plausibility of the defence', and the judge should 'avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence'. Care should be taken not to usurp the role of the trier of fact. Whenever there is a possibility that a reasonable trier of fact could acquit on the basis of the defence, it must be considered.

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belief be supported by evidence beyond the mere assertion of a mistaken belief...more that a 'facile mouthing of some easy phrase of excuse'.

1115 *R v Park*, above n 1097, 858-9.

1116 *Ibid* 855 (L'Heureux-Dubé J). In the Saskatchewan Court of Appeal, Wakeling JA in the case of *R v Silva* (1994) 120 Sask R 139, 146-7 dismissed as unresponsive evidence of the complainant's alleged conduct prior to the rape, which the accused pointed to in support of his assertion of an honest belief in consent:

'If a woman engages in 'dirty dancing' during a party that would not normally give a man who is at the party along with others the right to think that later in the evening she is disposed to consensual sexual intercourse with that man. Similarly the fact that a woman consents to kissing and necking with a man would not normally give the man the right to think that she is also consenting to sexual intercourse with him.'

1117 [1999] 3 SCR 759, para [82], quoting in part from Major J in *R v Ewanchuk* [1999] 1 SCR 330.

8.45 A recent case in which the Alberta Court of Appeal held that there was no ‘air of reality’ to the accused’s defence provides another example of how the ‘air of reality’ test applies.<sup>1118</sup> The case was an appeal by the Crown against the acquittal of the respondent husband on sexual assault charges against his former wife.<sup>1119</sup> The relationship had been characterised by physical and mental abuse by the accused of his wife. Following separation, the accused had lured his wife out of her brother’s house and abducted her. Out of fear for her safety, she had agreed to have sexual intercourse with him. The Court of Appeal set aside the acquittal and entered a conviction, holding that the accused husband could not rely on the defence of honest but mistaken belief in consent as any such belief could only have arisen from his own wilful blindness and unwillingness to face the fact of the fear that he had caused his wife by his conduct. In the circumstances of the case there was no air of reality to his defence, knowing as he did that he had abducted his wife and that she was afraid of him.

#### ISSUES FOR THE JURY’S DETERMINATION

8.46 Once the accused has satisfied the trial judge that there is some evidence in support of his assertion that he honestly believed the complainant had consented, the judge must direct the jury to consider the defence. The jury will be directed that the prosecution must prove beyond reasonable doubt the following three things:

- that the accused intentionally sexually penetrated the complainant;
- that the complainant did not consent; and
- that the accused did not honestly believe that the complainant consented.

8.47 It should be noted that this retains the subjective aspect of the mental element of rape. However, under the Commission’s proposed model, the jury cannot find that the accused had an honest but mistaken belief in consent if :

- the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting;  
or
- the accused did not turn his or her mind to the possibility that the complainant was not consenting; or

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1118 *R v MacFie* [2001] A.J. No 207; (2001) ABCA 43.

1119 Note that it is not possible for the Crown to appeal against an acquittal in Victoria.

- one or more of the circumstances listed in section 36(a)–(g) [of the *Crimes Act* 1958] are applicable.

If the jury is convinced beyond reasonable doubt of any one of the above three factors, then the accused must fail on the defence of mistaken belief in consent.<sup>1120</sup>

### ‘Reasonable Steps’

8.48 One clear advantage of the Commission’s proposed model (and of the Canadian approach on which it is based) is that it avoids the problem of deciding whether the accused behaved like a reasonable person. As we pointed out in the Interim Report, this makes it unnecessary to define the characteristics of a hypothetical reasonable person. It also makes it unnecessary to consider whether certain attributes of the accused (for example their cultural background or intelligence) should be attributed to the so-called reasonable person.<sup>1121</sup> In other areas of the law the concept of a ‘reasonable person’ or an ‘ordinary person’ has given rise to difficulties.<sup>1122</sup>

8.49 ‘Reasonable steps’ obviously requires a consideration of standards of reasonableness, but not to the same degree as the reasonable person test. At the

1120 It is at this stage that the Commission’s proposed model differs significantly from the Canadian model. Under the Canadian *Criminal Code* RSC 1985, c. C-46, Part VIII, self-induced intoxication, recklessness or wilful blindness as to consent and failure to take reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting will preclude the accused from raising the defence of mistake i.e. the defence will not get beyond the threshold stage (although it seems that since *Ewanchuk* was decided in 1999 (see below), ‘reasonable steps’ is to be left to the jury). The relevant section in the Canadian *Criminal Code* reads:

s 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused’s belief arose from the accused’s

- (i) self-induced intoxication, or
- (ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Although the section has been interpreted differently in various courts, the current Supreme Court interpretation is represented by the majority decision in *R v Ewanchuk* [1999] 1 SCR 330 (Major J, Lamer CJC, Cory, Iacobucci, Bastarache and Binnie JJ), which held that the consideration of whether or not the accused took ‘reasonable steps’ is not part of the threshold ‘air of reality’ test but is rather an issue of fact for the jury to consider once the defence has been left to them.

1121 Interim Report paras 7.104–5.

1122 For a discussion of the conceptual uncertainty surrounding the ‘ordinary person’ test for provocation, see Victorian Law Reform Commission, *Defences to Homicide* Options Paper (2003) paras 3.83–90.

time of its passage in 1992, the then Canadian Minister of Justice (Kim Campbell) described the provision relating to ‘reasonable steps’ as a modified objective test because it takes into account the circumstances known to the accused at the time, not the circumstances the accused ought to have known.<sup>1123</sup> She went on to say in her Second Reading Speech:

Clearly, consent to sexual activity cannot be assumed, presumed or believed unless reasonable steps have been taken to ascertain that consent has in fact been given.

Common sense and responsible conduct so demand.<sup>1124</sup>

8.50 The reasonable steps requirement appears to impose not only an obligation to be vigilant as to the possibility that no consent has been given, but a further obligation to take *affirmative action* to ascertain the existence of consent.<sup>1125</sup>

8.51 As for the meaning of ‘reasonable steps’, as yet there is relatively little case law from the Canadian Supreme Court to guide us. One of the clearest statements from a Supreme Court majority on the issue is contained in *R v Ewanchuk*.<sup>1126</sup>

Once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding to further intimacies. The accused cannot rely on the mere lapse of time or the complainant’s silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to ‘test the waters’.

8.52 Justice McLachlin in her dissenting opinion in *R v Esau*<sup>1127</sup> made an even stronger statement concerning reasonable steps:

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1123 See also John McInnes and Christine Boyle, ‘Judging Sexual Assault Law Against a Standard’ (1995) 29 *U.B.C.L. Rev.* 341 for a detailed discussion of the reasonable steps requirement.

1124 Cited in Brian Rolfes, ‘The Golden Thread of Criminal Law — Moral Culpability and Sexual Assault’ (1998) 61 *Saskatchewan Law Review* 87 para 80.

1125 It is conceivable that due to extreme circumstances, the only ‘reasonable steps’ open to a person is to stand back and wait for the other person to make a sexual advance of her own volition. An example of such a situation is where a man assaults and falsely imprisons a woman such that she is in fear for her safety.

1126 *R v Ewanchuk* [1999] 1 SCR 330.

1127 *R v Esau* [1997] 2 SCR 777, para [80].

A person is not entitled to take ambiguity as the equivalent of consent. If a person, acting honestly and without wilful blindness, perceives his companion's conduct as ambiguous or unclear, his duty is to abstain or obtain clarification on the issue of consent.

8.53 What is required of 'reasonable steps' will be different according to the particular circumstances of each case.<sup>1128</sup> Where, for example, there is an extreme power imbalance between the parties, it may be necessary for the accused to wait for any initiation of sexual contact to come from the complainant herself.<sup>1129</sup>

8.54 The jury should be directed by the trial judge that in considering what reasonable steps were required of the accused in the circumstances known to him, no regard shall be had to any evidence of the accused's self-induced intoxication. We discuss the issue of self-induced intoxication in detail below.

### Failure to Consider Consent

8.55 If the prosecution can convince the jury beyond reasonable doubt that the accused did not turn his mind to the possibility that the complainant was not consenting then the accused's defence of mistaken belief will fail.

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1128 Elizabeth Sheehy has identified several lower court Canadian decisions in which guidelines for the 'reasonable steps' issue have been formulated. Elizabeth Sheehy, 'From Women's Duty To Resist To Men's Duty To Ask: How Far Have We Come?' (2000) 20 (3) *Canadian Women Studies* 98. She discusses: *R v Thompson* [1995] OJ no 4528 (Ct Just Gen Div); *R v KRC* [1995] YJ No 74 (Yukon Terr Ct), *R v TS* [1999] OJ No 268 (Ct Just Gen Div), *R v RJS* [1994] PEIJ No. 109; *R v RG* (1994) 38 CR (4th) 123 (BCCA), 130. In *R v KRC* the Yukon Territory Court held: 'Adequate freedom to say no, requires an absence of any real or apprehended coercion. Having said no while in the bathroom within the embrace of the accused or within his reach on the floor, the complainant was not afforded the physical space necessary to freely consider or reaffirm her initial position. It was unreasonable for the accused not to remove himself from the bathroom to ensure that the complainant could consider her position without real or apprehended coercion to consent and without fear of any harm if she refused...' (cited in Sheehy, 100–1).

1129 In *R v RG*, cited in Sheehy, *Ibid* 101, the accused and complainant were separated, although he continued to press for reconciliation. Prior to the sexual assault in question, the accused physically assaulted the complainant after she refused his advances, causing her vomit from fear. She later acquiesced to sexual intercourse with him out of fear as to what may happen if she 'upset' him again. Further, she was in a strange town where she knew no-one and had no money with which to get herself and her children home. The British Columbia Court of Appeal held that in such circumstances, 'it would require the most compelling evidence of a subsequent unequivocal indication of consent by the complainant to give a defence of honest but mistaken belief in consent any air of reality'.

8.56 This reverses the current law in Victoria, under which an accused may avoid culpability where he did not give any thought at all as to whether the complainant was consenting or not.<sup>1130</sup>

### Relevance of Vitiating Factors from Section 36

8.57 The categories of non-consent are set out in section 36 of the *Crimes Act 1958* and are discussed in detail in Chapter 7 of this Report.<sup>1131</sup> The section provides a non-exhaustive list of circumstances in which a person ‘does not freely agree to an act’. These include where a person:

- is asleep, unconscious or so affected by alcohol or drugs as to be incapable of freely agreeing;
- submits out of force or harm or fear of force or harm to that person or someone else;
- submits because she or he is unlawfully detained;
- is mistaken about the sexual nature of the act; or
- is mistaken about the identity of the other person or is incapable of understanding the sexual nature of the act.<sup>1132</sup>

8.58 The Commission’s study of judges’ directions revealed that judges do not always direct the jury on these factors, even when they are apparently relevant on the facts of the case.<sup>1133</sup> Under the Commission’s proposed model for the mental element of rape, the jury will be directed by the trial judge that if it is convinced that any of the vitiating factors existed and the accused knew about the existence of those circumstances, then he cannot succeed on the defence of mistaken belief in consent.<sup>1134</sup>

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1130 See discussion above paras 8.11–3.

1131 See paras 7.42–50.

1132 Section 36 (a)–(g) *Crimes Act 1958*.

1133 In only seven out of thirteen cases where the expanded categories of non-consensual sex were assessed as being relevant did judges direct the juries on them. See para 7.43.

1134 This part of the model is based in part on s 75 of the new English legislation, the *Sexual Offences Act 2003* (UK).

8.59 This change should encourage prosecutors to make greater use of section 36<sup>1135</sup> and will also emphasise the importance of the communicative model of consent intended by the legislation. It will send an important message to the community about the nature of consent in sexual relations.

## INTOXICATION AND THE MENTAL ELEMENT OF RAPE

8.60 Research tells us that alcohol plays a large role in sexual assault. The Rape Law Reform Evaluation Project found that 40% of those accused of rape reportedly had a history of drug or alcohol dependence and just over 20% of accused were allegedly intoxicated at the time of the offence.<sup>1136</sup> In Canada, selected police forces have reported that alcohol or drug consumption was apparent for 28% of accused.<sup>1137</sup>

8.61 There are two ways in which intoxication may be relevant to the required mental element for rape and other sexual assaults.<sup>1138</sup> First, the defence may argue that the defendant was so drunk that acts which would otherwise be criminal were actually unintentional or involuntary. In the context of rape, for example, it would be argued that the accused was so intoxicated that he was incapable of being aware that he was sexually penetrating the complainant without her consent.<sup>1139</sup> This principle is based on the High Court decision in *R v O'Connor*.<sup>1140</sup>

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1135 Based on the Commission's study of judges' directions, as judges often failed to direct on the s 36 circumstances, it was assumed that prosecutors were not raising them in the course of their arguments.

1136 Melanie Heenan and Helen McKelvie, *Crimes (Rape) Act 1991, An Evaluation Report* (1997) 32. A total of 242 case files were examined that related to 255 accused and 282 complainants.

1137 Wolff, L. and Reingold, B. 'Drug Use and Crime', (1994) 14 (6) *Juristat*, p8, cited in Canadian Advisory Council on the Status of Women, *The Intoxication Defence in Canada: Why Women Should Care* (1995) 7. In these cases, 66% of the victims suffered physical injuries, compared with 59% of the women who were victims of men not known to have consumed alcohol or drugs.

1138 As Tolmie says: 'Intoxication has no independent status of its own.' Julie Tolmie, 'Intoxication and Criminal Liability in New South Wales: A Random Patchwork?' (1999) 23 *Criminal Law Journal* 218 236.

1139 Ibid. Such a defence is of course rare in practice and when raised, not often successful. See also George Smith, 'Footnote to O'Connor's Case' (1981) 5 *Criminal Law Journal* 270. Judge Smith makes the comment (p 277): '...any 'defence' of drunkenness poses enormous difficulties in the conduct of a case. To name but one, if the accused has sufficient recollection to describe relevant events, juries will be reluctant to believe that he acted involuntarily or without intent whereas, if he claims to have no recollection, he will be unable to make any effective denial of facts alleged by the Crown'.

1140 (1980) 146 CLR 64.

8.62 Second, it may be argued that, although the accused was not acting involuntarily, his alcohol consumption affected his assessment of the circumstances, so that he had an honest, albeit unreasonable belief in the complainant's consent. The policy question is whether legislation should be enacted to prevent the accused relying on irrational and wishful beliefs about another party's consent that come about because of his intoxicated state.

#### *SHOULD THE O'CONNOR PRINCIPLE BE CHANGED?*

8.63 Under the *O'Connor* principle a person who is grossly intoxicated, to the extent that he or she is incapable of forming an intention to commit a criminal offence, must be acquitted. *O'Connor* reflects the general principle of criminal responsibility that a person who is incapable of forming the intention to commit the crime should not be held criminally culpable. In essence the defence is not that the person was drunk but that his or her action was not voluntary.<sup>1141</sup>

8.64 The Commission is aware that many members of the community find the *O'Connor* principle difficult to accept. However Australian law reform bodies that have reviewed *O'Connor* have generally recommended its retention.<sup>1142</sup> For example, in 1999 the Parliament of Victoria Law Reform Committee recommended that *O'Connor* should continue to be the law in Victoria.<sup>1143</sup>

8.65 The Commission does not recommend abolition of the *O'Connor* principle. The Commission believes that if such a fundamental change were to be made to the principles of criminal law, it would be inappropriate to do so in the

1141 Submission to Parliament of Victoria Law Reform Committee by Robert Richter QC, Minutes of Evidence, 30 March 1999, 117 cited in Law Reform Committee, Parliament of Victoria, *Criminal Liability for Self-Induced Intoxication* Report (1999) 103.

1142 For example see Law Reform Committee Ibid; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* Report No 34 (1990) paras 218–219; Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility* Discussion Draft (1992) 51; South Australian Criminal Law and Penal Methods Reform Committee (1977), *The Substantive Criminal Law: Fourth Report*, 48. The New Zealand Law Reform Committee and the Law Commission of England and Wales have also recommended that the *O'Connor* approach to evidence of intoxication conforms best to general principles of criminal law: New Zealand Criminal Law Reform Committee (1984) *Report on Intoxication as a Defence to a Criminal Charge*: Report, para 45; Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability* (London: HMSO, 1995) cited in Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 251.

1143 Law Reform Committee, Parliament of Victoria, *Criminal Liability for Self-Induced Intoxication* Report (1999) above, n 1141, Recommendation 3.

context of sexual offences alone. This approach is consistent with the view of the Criminal Bar Association that ‘the question of self-induced intoxication as a defence should not be confined to sexual offence cases’ and should be examined more generally.<sup>1144</sup>

8.66 In addition, we believe that changing the *O’Connor* principle would have a minimal effect on trial outcomes. This is confirmed by surveys which considered the practical effect of *O’Connor* and of *R v Daviault*,<sup>1145</sup> the Canadian Supreme Court decision which applied the equivalent principle in Canada.<sup>1146</sup> In the rare cases in which accused persons raise *O’Connor* in their defence, juries are unlikely to believe that an accused who was physically capable of sexual penetration was so incapacitated by alcohol or drugs as to be incapable of forming the intention to commit the act.

***SHOULD AN ACCUSED BE PRECLUDED FROM RELYING ON HONEST BUT MISTAKEN BELIEF ON CONSENT WHERE THE BELIEF AROSE FROM SELF-INDUCED INTOXICATION?***

**The Situation in Canada**

8.67 In *Daviault*, the Canadian Supreme Court held that an accused, whose gross intoxication prevented him from forming an intention to sexually penetrate the complainant without her consent, could not be convicted. Legislation was,

1144 Submission 42. Victorian Legal Aid agreed with the Criminal Bar Association’s submission on this on this point (Submission 54).

1145 [1994] 3 SCR 63; (1994 ) 33 CR (4th) 165. For a detailed discussion of *Daviault* see Patrick Healy, ‘Criminal Reports Forum on *Daviault*: Extreme Intoxication Akin to Automatism Defence to Sexual Assault: Another Round on Intoxication’ (1994) 33 *Criminal Reports (4th) (Canada)* 269.

1146 In *R v Daviault*, Ibid the Canadian Supreme Court held in a 6 to 3 majority that self-induced intoxication could be a defence to rape in the ‘rarest of cases’ where the intoxication is so extreme as to be akin to automatism or insanity. Following the decision an exhaustive survey by two Canadian academics of reported and unreported judgments revealed only 11 ‘*Daviault*’ cases over a 9 month period: see Martha Drassinower and Don Stuart, ‘Nine Months of Judicial Application of the *Daviault* Defence’ (1995), 39 CR (4th) 280, cited in Don Stuart, *Canadian Criminal Law: A Treatise* (4th ed) (2001) 441. See also Canadian Advisory Council on the Status of Women, *The Intoxication Defence in Canada: Why Women Should Care* (1995) 6. These survey results were similar to those of Judge G. Smith’s survey of 510 trials in the District Court of New South Wales in the year following the *O’Connor* judgment: see George Smith, ‘Footnote to *O’Connor’s Case*’ (1981) 5 *Criminal Law Journal* 270. The judge found that the intoxication defence was raised in only 11 cases (or 2.16 percent of the total) where it would not previously have been available. Three acquittals resulted, but the judge reported that in only one ‘could it be said with any certainty that the issue of intoxication was the factor that brought about the acquittal’ (p 277).

however, soon enacted to overcome the effect of the decision.<sup>1147</sup> As a result of this legislation, which is now incorporated in the *Criminal Code*, accused persons cannot rely on their gross intoxication to relieve them from criminal liability in Canada.

8.68 The Canadian *Criminal Code* also provides that a person cannot rely on the defence of honest but mistaken belief in consent where that belief arose from the accused's self-induced intoxication.<sup>1148</sup> This means that the defence of honest and reasonable belief will not be put to the jury if the trial judge is satisfied that the accused's belief in consent arose from self-induced intoxication. In this situation, the trial judge will instruct the jury that they need only determine that there was sexual penetration which occurred without the complainant's consent.

### Submissions and Recommendations

8.69 There was considerable support in the submissions for legislation to explicitly prevent accused persons relying on self-induced intoxication in their defence. Eight out of the 10 submissions that addressed the issue of self-induced intoxication supported changing the law to ensure that accused persons in sexual assault matters cannot rely on self-induced intoxication in their defence.<sup>1149</sup>

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1147 The amendment was known as Bill C-72. The provision is now contained in the Canadian *Criminal Code*.

RSC 1985, c. C-46, s 33.1 which reads:

33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders that person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under the Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

For a discussion of the Bill, see Isabel Grant, 'Second Chances: Bill C-72 and the Charter' (1995) 33 *Osgoode Hall Law Journal*, 379.

1148 *Criminal Code* RSC 1985, c. C-46, s 273.2. For the text of this section see n 1120.

1149 See Submissions 16, 17, 24, 26, 27, 30, 44 and 51.

8.70 We have set out above the reasons why the Commission is not recommending legislation to overrule the *O'Connor* principle.<sup>1150</sup> However, the Commission has decided to recommend legislative change to the effect that evidence of self-induced intoxication is not a relevant consideration for the jury in its deliberations on the defence of mistaken belief in consent. The Commission recognises that there is some inconsistency in retaining the *O'Connor* principle and recommending that intoxication cannot be taken into account in determining whether the accused believed the complainant consented. However, due to the extreme rarity of *O'Connor-type* cases, the practical effect of this inconsistency is minimal.

8.71 The Commission has decided to adopt a variation of the Canadian approach.<sup>1151</sup> Under our model self-induced intoxication is not a threshold issue for the trial judge. It is relevant only once the defence of mistaken belief in consent has been put to the jury. At this stage the trial judge will instruct the jury that in considering whether the accused took reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting, any evidence of self-induced intoxication should be disregarded.<sup>1152</sup>

8.72 The Commission considers that an explicit legislative reference to self-induced intoxication is necessary in relation to the 'reasonable steps' component of the mistake defence. This is intended to prevent an accused from arguing that 'in the circumstances known to him at the time'—the subjective element of the test—must take into account that he was intoxicated. An accused could argue that the reasonable steps required in the circumstances were less onerous than they otherwise might be by reason of the fact that he was intoxicated. Our recommendation will prevent the test being undermined in this way.

8.73 The jury could be directed to consider the issue of 'reasonable steps' as follows:

- Did the accused take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting? and

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1150 See paras 8.64–6.

1151 The obvious problem with the Canadian approach is that of determining the necessary degree of intoxication to warrant exclusion of the defence of honest but mistaken belief in consent. How intoxicated does the accused have to be before he is precluded from relying on the defence? How is a trial judge to decide this as a threshold issue when such decision-making process precludes a weighing of the factual evidence? See the discussion of the threshold issue above paras 8.39–45.

1152 See Recommendation 175 above.

- In determining what reasonable steps were required of the accused in the circumstances known to him, no regard shall be had to any evidence of the accused's self-induced intoxication; and
- The 'reasonable steps' required of a drunken accused are exactly the same 'reasonable steps' required of a sober person in the same circumstances.

8.74 The Commission recognises that this approach requires the jury to consider a fiction. However, this 'fiction' is no more difficult for a jury to apply than that currently required in the Code States. In Western Australia, for example, it has been held that in considering the question of honest and reasonable belief in consent, the belief must be that 'held by a reasonable person in the circumstances of the accused person' but that such 'reasonable person is a sober person'.<sup>1153</sup>

8.75 A further potential criticism of this approach is that it arguably penalises the accused for being intoxicated but if the complainant is intoxicated her case is not affected. This disregards the likely fact that a complainant who was intoxicated at the time of the alleged offence may be less believable to the jury when she says she did not consent. Further, Victoria Police detectives report that when a complainant is intoxicated it is less likely that the brief will be authorised for prosecution.<sup>1154</sup>

## CASE STUDY

8.76 In this section we apply the Commission's recommended model to a case study to illustrate how it may operate in practice. The facts of this case study are taken from an actual rape trial (the names are fictional). The jury charge in this trial was included the Commission's study on judges' directions reported in Chapter 7.

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1153 The trial judge directed the jury that: 'The term 'reasonable' means that such a belief must be an objective belief, that is, a belief held by a reasonable person in the circumstances of the accused person. Plainly, the consumption of alcohol or indeed any other intoxicating substance is not relevant to that issue. In other words, if a person thinks something because they were intoxicated, then the fact that they think that because of the intoxicant doesn't make the belief a reasonable one. A reasonable person is a sober person...' Cited in *Labriola v The Queen* [2001] WASCA 341 (Unreported, Malcolm CJ, Wallwork and Anderson JJ, 6 November 2001) [26] (Malcolm CJ). The trial judge's direction was upheld in this appeal.

1154 See para 2.68.

**CASE STUDY**

Mary is 17 years old. She met David through some friends and spent most of that afternoon and evening with him and mutual friends. Mary was attracted to David and made no secret of the fact. David drove them to a quiet location where they kissed and fondled each other and removed some clothing. Mary said to David, when he started touching her genital area: 'I'm not going to have sex with you' to which he replied 'I won't have sex with you. You're one of Frieda's friends'. The kissing continued and after five or ten minutes, David moved to penetrate Mary. Mary said to him: 'No. I still don't want to do this. I thought you weren't going to have sex with me'. David however, proceeded to penetrate Mary, who said nothing more for a while. Eventually Mary said 'We have to go', at which David stopped.

David's story was essentially the same as Mary's until the point of penetration. He agreed that Mary told him that she didn't want to have sex with him, five to ten minutes prior to penetration. He said that after he had pulled his and her pants down and it was apparent that he wanted to penetrate her, Mary said nothing, so he proceeded to have sex with her. After he finished, he said that Mary grabbed his thighs and pulled him towards her as if she wanted more, so they had sex again. In his record of interview with police, David said: '...if she didn't want it I wouldn't have done it. I wouldn't have done it. She said 'No' but her actions didn't seem that way.'

**ACTUAL CONSENT**

David is entitled to argue that Mary changed her mind after initially saying no and to rely on his evidence of her alleged behaviour as indicating her change of mind. If his evidence about Mary's behaviour prior to and after penetration leaves the jury in reasonable doubt about the question of whether Mary freely agreed to penetration at the time of penetration, then David should be acquitted. It is unlikely that David's evidence as to Mary's silence prior to penetration will help him due to the existence of section 37(1)(a) of the *Crimes Act 1958* which states: 'the fact that a person did not say or do anything to indicate free agreement to the particular sexual act at the time that the act occurred is normally enough to show that the act took place without that person's free agreement'.<sup>1155</sup>

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1155 For a discussion of the operation of this section see para 7.22–44.

### *THRESHOLD TEST FOR MISTAKE DEFENCE*

8.77 David will attempt to raise the mistaken belief defence. He is likely to point to Mary's amorous behaviour as evidence in support of his honest belief in consent. In this case, both Mary and David agreed that Mary said 'I don't want to have sex with you' some five to ten minutes prior to penetration. According to David's evidence, after making that remark nothing in the circumstances changed; they continued kissing and fondling as before. When he prepared to penetrate Mary she said and did nothing. He may also rely on Mary's alleged amorous behaviour following penetration as supporting his argument that she had changed her mind regarding penetration.

8.78 It is likely that David will be excluded at the threshold stage from relying on the defence of honest mistake for two reasons. First, the evidence on which he seeks to rely—Mary's alleged amorous behaviour—is inconsistent with an important fact that is not in dispute in the trial, namely, that Mary said she did not wish to have sex with him. He can offer no evidence in support of a change of mind on her part. Given that silence or passivity cannot be taken as consent, Mary's apparent submission is clearly insufficient to indicate consent. David's denial of Mary's account that she said 'no' immediately before penetration is a mere denial of evidence of her non-consent at the time, rather than evidence of his belief that she had changed her mind. Second, David's account of Mary's alleged amorous behaviour after penetration clearly cannot support an argument about David's mistake prior to that time. That evidence goes only to the issue of Mary's non-consent.

8.79 If the trial judge is not satisfied that the evidential burden has been discharged, he or she will direct the jury that to convict David they must be convinced beyond reasonable doubt that Mary did not consent. Both David's and Mary's accounts can be considered by the jury on this issue. As sexual penetration is not in issue and as David has not produced sufficient evidence to satisfy the evidential burden in relation to his argument of honest belief in consent, actual non-consent is the only issue for the jury's consideration.

### *'REASONABLE STEPS' AND INADVERTENCE*

8.80 If, on the other hand, the trial judge determines that the evidential burden has been discharged, the mistake defence is unlikely to succeed. David would not be able to point to any 'reasonable steps' he had taken to ascertain consent after Mary told him she did not wish to have sex. The circumstances known to him at the time included that Mary had said that she did not want to have sex with him

some five to ten minutes prior to penetration. David's own evidence reveals clearly his state of mind as regards Mary's consent: 'She said 'No' but her actions didn't seem that way'. This is a classic case of 'she said 'no' but she really meant 'yes''. It could also be argued by the prosecution that David failed to turn his mind to whether or not Mary was in fact consenting at the time of penetration, indicated by his lack of direct inquiry into the issue after being told 'no' a mere five to ten minutes earlier.<sup>1156</sup>

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1156 In the real trial of this matter in the County Court, the result was a hung jury. Although a new trial was ordered, the Crown entered a *Nolle Prosequi* a short time later.

