

In Search of a Model Provision for Rape in Australia

ANDREW HEMMING*

Abstract

The purpose of this article 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 article 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.

Keywords

Law Reform; Rape; Sexual Assault; Model Provision

I INTRODUCTION

The burden of proof required to prove rape in a criminal court can never be satisfied; if we are to abandon the formulation used in many jurisdictions, that the defendant who reasonably believed that the victim consented is innocent, and rely instead upon the victim's statement that she did not consent as sufficient, then we will have to lighten the tariff. We will have to reduce the penalties for rape.¹

* Senior Lecturer in Law, University of Southern Queensland. The author would like to thank the anonymous referees for their helpful comments.

¹ Germaine Greer, *On Rape* (Melbourne University Press, 2018) 27–8. The low rape prosecution rate has been illustrated by recent figures released for the Australian Capital

This article seeks to identify a model provision for rape (or the equivalent offence) judged against (1) the twin criteria of clarity and comprehensiveness; (2) the need to accommodate the different architecture of criminal provisions in Australia; and (3) the requirement to incorporate the fault elements, and the treatment of mistake of fact and intoxication in the model provision. As will be seen, 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. It will be argued that the differences in the framework and statutory construction between the three broad criminal regimes in Australia² can be overcome in the treatment of rape by specifically restricting the meaning of the fault elements and the operation of the ‘defences’ of mistake of fact and intoxication to the relevant Division of the respective Crimes Act or Criminal Code.

The use of comprehensive statutory language has been criticised as potentially leading to greater difficulties in judicial interpretation with a resultant loss of clarity, and lengthy statutory prescription means that the legislation is less adaptable to emerging situations not anticipated by the legislature. For example, Fisse has highlighted the disparity between the theory that a criminal code should be internally self-consistent and self-sufficient with the practical reality that ‘inevitable ambiguities of language make this impossible’.³ An alternative way of considering this question is to examine whether it is beyond the capacity of any Australian legislature in the 21st century to clearly state its intentions in a manner that is sufficient for the ordinary citizen to fully comprehend his or her criminal liability.

Simester, Spencer, Sullivan and Virgo, writing of the situation in the United Kingdom, put their finger on the heart of the challenge:

A degree of imprecision is inherent in the enterprise of legal ordering: statutes are necessarily expressed in general terms, and must be interpreted and applied to particular cases. The agent of this process is the court. In practice, the judicial task is more substantial than it need be. While legislators cannot be expected to foresee every variant case that might arise

Territory for the six month period between September 2018 and February 2019, where just 4 rape charges proceeded from 75 reports (5%), and for the cases that came to court in the same period approximately half resulted in convictions. See Clare Sibthorpe, ‘Canberra’s low rape prosecution rate shows ‘monumental failure’ of justice system, services say’ *ABC News* (online, 21 March 2019) <https://www.abc.net.au/news/2019-03-21/5-per-cent-of-rape-reports-to-act-police-progress-to-charges/10903578?WT.ac=statenews_act>.

² The Australian Capital Territory and the Northern Territory have adopted Chapter 2 of the *Criminal Code 1995* (Cth); Queensland, Tasmania and Western Australia can be grouped as Griffith Codes; and New South Wales, Victoria and South Australia can be grouped together under the rubric of statutorily following the ‘common law’.

³ Brent Fisse, *Criminal Law* (The Law Book Company Limited, 5th ed, 1990) 4.

when they create an offence, the standard of draftsmanship in this country is such that offences frequently omit to specify quite obvious matters ...⁴

Given the severe penalties that apply following a conviction for rape, this article proceeds on the basis that the standard of statutory language in Australia for this offence can be uniformly improved such that an ordinary person better understands his or her exposure to criminal liability in an area of the criminal law that is all too frequently before the courts.

For the offence of rape (sexual intercourse without consent) this article specifically addresses three questions: (1) the consistency of the vitiating factors for consent; (2) the consistency of the fault elements, particularly the scope of the definition of recklessness or reckless indifference; and (3) the consistency of the ‘defences’ of mistake of fact and intoxication. The overall purpose is twofold: (1) to make the test for mistaken belief in consent more objective; and (2) to make the process of adjudging guilt for rape more objective.⁵

II THE CONSISTENCY OF THE VITIATING FACTORS FOR CONSENT

Rape is sexual intercourse or sexual penetration without consent.⁶ A comprehensive definition of ‘sexual penetration’ can be found in s 35A of the *Crimes Act 1958* (Vic),⁷ and ‘to sexually penetrate’ is defined in s 319 of the Criminal Code (WA).⁸ Queensland uses the expression ‘carnal knowledge’ which is defined in s 6 of the Criminal Code (Qld).⁹

⁴ AP Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart, 4th ed, 2010) 45. Examples given include failure to specify the burden of proof or even the *mens rea* requirement in an offence.

⁵ More generally, see Andrew Hemming, ‘Reasserting the Place of Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests’ (2011) 13 *The University of Notre Dame Australia Law Review* 69.

⁶ Queensland, South Australia, Tasmania and Victoria use the term ‘rape’ in their criminal legislation. The Australia Capital Territory and Northern Territory refer to ‘sexual intercourse without consent’ and Western Australia to ‘sexual penetration without consent’. New South Wales uses the term ‘sexual assault’ to refer to a sexual offence involving penetration.

⁷ Section 35A(1) states that: A person (A) sexually penetrates another person (B) if — (a) A introduces (to any extent) a part of A’s body or an object into B’s vagina; or (b) A introduces (to any extent) a part of A’s body or an object into B’s anus; or (c) A introduces (to any extent) their penis into B’s mouth; or (d) A, having introduced a part of A’s body or an object into B’s vagina, continues to keep it there; or (e) A, having introduced a part of A’s body or an object into B’s anus, continues to keep it there; or (f) A, having introduced their penis into B’s mouth, continues to keep it there.

⁸ *To sexually penetrate* means — (a) to penetrate the vagina (which term includes the *labia majora*), the anus, or the urethra of any person with — (i) any part of the body of another person; or (ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes; or (b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the *labia majora*), the anus, or the urethra of the offender by part of the other person’s body; or (c) to introduce any part of the penis of a person into the mouth of another

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'.¹⁰ 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.'

The circumstances in which a person does not consent to sexual intercourse as set out in Australian criminal law jurisdictions are broadly similar, but there are some significant variations which require attention. Given the common thread that runs through the lists of these circumstances negating consent, it is unfortunate that such variations exist but are easily remediable. The position taken in this article is that the more exhaustive and comprehensive the list of circumstances the greater the clarity, especially if the list is buttressed by examples, such as the one used in s 46(3)(h) of the *Criminal Law Consolidation Act 1935* (SA) discussed below.

There is a misconception, particularly amongst lawyers wedded to the purported advantages of the organic development of the common law, that there is a tension between comprehensiveness and clarity on the one hand versus the risk of inflexibility on the other hand. The argument runs that seeking comprehensiveness overlooks the unforeseen circumstances that may arise in the future which the drafters of the legislation may not have envisaged. Such an argument is challenged in this article on the basis that the legislative starting point is a search for comprehensiveness. While the model provision in this paper does allow for a degree of judicial discretion to be exercised in genuinely unforeseen circumstances, it is beholden on the legislature following such a decision to amend the legislation accordingly so that it remains comprehensive and up to date. Thus, 'comprehensive' does not mean 'exhaustive' in the sense of being ossified, moribund, fossilised or frozen in time, but the meaning of 'comprehensive' also encompasses parliament's endorsement, amendment or rejection of the 'temporary' circumstance of vitiation of consent that emerged from the case law. In effect, this is no more than a statement acknowledging the

person; or (d) to engage in cunnilingus or fellatio; or (e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).

⁹ Section 6 states: (1) If 'carnal knowledge' is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent. (2) 'Carnal knowledge' includes anal intercourse.

¹⁰ *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).

supremacy of parliament and the need to draft legislation minimising judicial discretion so that citizens know where they stand in relation to criminal responsibility.

Examination of the relevant sections dealing with the factors that vitiate consent reveals that s 36(2) of the *Crimes Act 1958* (Vic) contains the most comprehensive list.¹¹ However, note that the sub-section specifically states that the list is not closed.

- (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;

¹¹ 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.'

- (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.

The above list has been designed to take account of previous cases, such as s 36(2)(j) which has statutorily reversed *R v Mobilio*¹² by providing that a person does not freely agree if they mistakenly believe that the act is for medical or hygienic purposes. South Australia usefully provides an example in the equivalent section to s 36(2)(j) above, namely, s 46(3)(h) of the *Criminal Law Consolidation Act 1935* (SA):

- (h) the person is mistaken about the nature of the activity.

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.

The above example could be inserted under s 36(2)(j) of the *Crimes Act 1958* (Vic), which would helpfully explain how the sub-section is intended to operate. Similarly, the circumstance set out above in s 36(2)(l), which states ‘the person does not say or do anything to indicate consent to the act’, could be supplemented by the example given in s 46(3)(d) of the *Jury Directions Act 2015* (Vic), namely, ‘the person may freeze and not do or say anything’.

The breadth of s 36(2) of the *Crimes Act 1958* (Vic) can be seen in sub-section (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 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

¹² [1991] 1 VR 339. In *R v Mobilio* the fraud caused the victim to believe that penetration (by a medical instrument) was being undertaken for medical diagnostic purposes, whereas the procedure was unnecessary and engaged upon solely for the sexual gratification of the operator.

rape or sexual penetration without consent is committed: see *R v Mayberry*.¹³ Another relevant case to the same effect is *Kaitamaki v The Queen*,¹⁴ 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’.

The least exhaustive list is presently to be found in s 319(2)(a) of the *Criminal Code* (WA) where ‘consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means’. The broad phrase ‘deceit, or any fraudulent means’¹⁵ was the subject of critical judicial comment in *Michael v State of Western Australia*.¹⁶ In this case, the appellant deceived two sex workers who were also drug addicts into believing he was a police officer. The appellant threatened both sex workers that he would make trouble for them if they did not agree to provide their services at a reduced rate (in the case of one sex worker) and for free (for the other). Both women gave evidence to the effect that they only consented to the ‘discount’ because of their belief the appellant was a police officer and the vulnerability of their profession.

Steytler P dismissed the appeal because the impersonation of the police officer facilitated the threat to make trouble, and therefore it was unnecessary to decide the scope of deceit or fraud for the purpose of vitiating consent. Steytler P suggested that the most appropriate solution was for the legislature to amend the legislation as ‘the use of the words “deceit or any fraudulent means” renders the section susceptible to an interpretation that is dramatic in its reach’.¹⁷ EM Heenan AJA (dissenting) took the view that ‘s 319(2) must be limited to avoid ‘indiscriminate applications’ of the section to ‘antecedent matters, such as representations

¹³ [1973] Qd R 211, 229 (Hanger J).

¹⁴ [1985] 1 AC 147.

¹⁵ Western Australia is not alone in Australia in having a very broad approach to the treatment of fraud as a vitiating factor for consent. Section 2A(f) of the *Criminal Code* (Tas) states as a circumstance where a person does not freely agree to an act if the person ‘agrees or submits because of the fraud of the accused’. Similarly, s 67(1)(g) of the *Crimes Act 1900* (ACT) states consent is negated ‘by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person’.

¹⁶ [2008] WASCA 66.

¹⁷ *Ibid* [89].

about payment when dealing with prostitutes, or fraudulent blandishments intended to make a person more attractive, such as the wiles of a seducer.’¹⁸

Thus, the main judicial concern in *Michael v State of Western Australia*¹⁹ was for the legislature to clarify the reach of s 319(2)(a) as it related to vitiation of consent for ‘deceit, or any fraudulent means’. The obvious danger with such a broad definition is that it could potentially encompass broken promises that the community would not consider vitiated consent to sexual intercourse, such as promising to buy a horse or jewellery in exchange for sexual intercourse.²⁰ Indeed, EM Heenan AJA notes that there are numerous deceptions or concealments that may surround sexual intercourse, such as marital status or ‘exaggerated protestations of wealth’.²¹ His Honour notes that while such may be ‘deplorable’, it is not ‘so criminal as to justify a conviction for the most serious form of sexual offence’.²² Thus, it would be ‘surprising indeed if, by such an indirect means, as the amendment to s 319(2) of the *Criminal Code*, Parliament had intended to effect such a far-reaching change to the law’.²³

The solution appears to lie in the Western Australian Parliament more clearly specifying the nature of the deceit or fraud. EM Heenan AJA considered ‘that the scope of deceit or any fraudulent means in s 319(2) should be treated as referring to those frauds or misrepresentations which deprived the person concerned of a full comprehension of the nature and purpose of the proposed activity or his or her legal status of the person as a spouse, or his or her identity as an acceptable sexual partner’.²⁴ This solution is implied in s 36(2) of the *Crimes Act 1958* (Vic) by virtue of the lack of a general fraud provision such ‘deceit, or any fraudulent means’,

¹⁸ Ibid [384].

¹⁹ [2008] WASCA 66.

²⁰ See *R v Winchester* [2011] QCA 374, [84]–[85] (Muir JA).

²¹ *Michael v State of Western Australia* [2008] WASCA 66, [373].

²² Ibid.

²³ Ibid.

²⁴ Ibid [376]. EM Heenan AJA adopted the narrow view of fraudulent behaviour vitiating consent favoured by George Syrota and Neil Morgan, as opposed to the wide view that any fraudulent behaviour which induces a person to have sexual intercourse will vitiate consent, favoured by Simon Bronitt. See George Syrota, ‘Rape: When Does Fraud Vitiate Consent’ (1995) 25 *University of Western Australia Law Review* 334; Neil Morgan, ‘Oppression, Fraud and Consent in Sexual Offences’ (1996) 26 *University of Western Australia Law Review* 223; Simon Bronitt, ‘Rape and Consent’ (1992) 16 *Criminal Law Journal* 289. For more recent support for the narrow view, see Jonathan Rogers, ‘The effect of “deception” in the Sexual Offences Act 2003’ (2013) 4 *Archbold Review* 7. For more recent support for the wide view, see Andrew Dyer, ‘Final Submission to the NSW Law Reform Commission’s Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences’, *Final Submission to the New South Wales Law Reform Commission* (Web Page, 1 February 2019) [25] <<https://sydney.edu.au/content/dam/corporate/documents/sydney-law-school/research/centres-institutes/sic-final-submission-to-the-nsw-law-reform-commissions-review-of-consent-and-knowledge-of-consent-in-relation-to-sexual-assault-offences.pdf>>.

and the inclusion of specific references to mistaken identity in s 36(2)(i) and mistake as to the nature of the act in s 36(2)(g) and (h). However, 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 act²⁵ and the identity of the person.²⁶

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 lying about one’s marital status or wealth) discussed below. If the broad definition of fraud is retained 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*²⁷ (discussed previously) 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 condom²⁸ or withdrawing his penis before ejaculating to avoid becoming pregnant,²⁹ 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 model provision in Part IV) than attempt to lump all manner of possibilities under an unconfined generic

²⁵ This is consistent with the Court of Appeal’s decision in *R v Jheeta* [2007] EWCA Crim 1699 that the victim had to be deceived as to the nature and purpose of the sexual act itself (a comparatively rare case), and not merely deceived as to extraneous circumstances.

²⁶ Rebecca Williams refers to this test as the *non est factum* test, on the analogy of the test for the invalidity of deeds: Rebecca Williams, ‘Deception, mistake and vitiating of the victim’s consent’ [2008] *Law Quarterly Review* 131.

²⁷ [2008] WASC 66.

²⁸ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849. See also *R v Hutchinson* 2014 SCC 19, where the appellant had sabotaged the condom by poking holes in the condom and the complainant became pregnant against her express wishes. The conviction was upheld on the basis that condom protection was an ‘essential feature’ of the sexual activity, and therefore the complainant did not consent to the ‘sexual activity in question’. Essentially, the Supreme Court of Canada preferred the view that there was no voluntary agreement by the complainant to engage in the ‘sexual activity in question’, rather than taking the view that the condom sabotage constituted fraud with the result that no consent was obtained.

²⁹ *R(F) v DPP* [2014] QB 581.

word as ‘fraud’ or ‘misrepresentation’, which is potentially an overreach of criminal responsibility.

In coming to this conclusion on the definition of frauds or misrepresentation, the author respectfully disagrees with Professor Jonathan Crowe who has argued that avoiding the problem of vagueness regarding the relevance of fraud to consent in rape law ‘through legislative drafting alone is simply not possible’.³⁰ Vagueness can be minimised by the use of examples and the inclusion of a note specifying the types of frauds that are excluded. It is an abrogation of Parliament’s responsibility not to clearly inform citizens what types of activity entail criminal responsibility, especially in the area of sexual relationships, by falling back on the rubric of provisions striking a balance ‘between certainty on the one hand, and flexibility on the other’ and the inevitability of ‘[a] certain degree of imprecision in the statutory rules’.³¹

As with ‘stealthing’, 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.³² Again, 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

³⁰ Jonathan Crowe, ‘Fraud and Consent in Australian Rape Law’ (2014) 38 *Criminal Law Journal* 236, 246.

³¹ *Ibid* 247.

³² See, eg, 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. On the distinction between non-disclosure and fraud (lying about your HIV status) and the implications of being charged with a non-fatal offence against the person or a sexual offence, see Karl Laird, ‘Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003’ [2014] *Criminal Law Review* 491. See also JR Spencer, ‘Sex by Deception’ (2013) 9 *Archbold Review* 6, who argues that a general offence of obtaining sexual activity by threats is needed, as well as an offence of obtaining sexual activity by false pretences. However, in *R v Cuerrier* [1998] 2 SCR 371 and *R v Mabior* 2012 SCC 47 the Supreme Court of Canada ruled that knowingly exposing a sexual partner to HIV constitutes aggravated sexual assault. Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk or causes actual serious bodily harm (deprivation). For a contrary view as to the decision in *R v Mabior*, see Samantha Ryan, ‘“Active Deception” v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ [2019] 1 *Criminal Law Review* 1, 12, who takes the view that non-disclosure, as opposed to deception, ‘does not necessarily prevent a sexual partner from making an informed choice’. For a fuller discussion of HIV transmission and transgender sexual relations, see Jack Vidler, ‘Ostensible Consent and the Limits of Sexual Autonomy’ (2017) 17 *Macquarie Law Journal* 103.

element and not on whether the transmission constituted fraud as a vitiating factor for consent.³³

The solution in the United Kingdom has been to distinguish between ‘active’ and ‘passive’ deceptions or the act/omission distinction as found in s 76(2)(a) of the *Sexual Offences Act 2003*: ‘(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act, and (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.’ The distinction between active deception and non-disclosure of information has been criticised as providing an inadequate basis for setting the parameters of criminal liability, being insufficiently clear-cut to avoid analytical collapse and criminal liability overreach.³⁴ This view would appear to be sound, as not all ‘active’ deceptions have been found to vitiate consent. In *R v McNally*,³⁵ Leveson LJ held that lying about one’s financial status fell outside the ambit of vitiation of consent in taking a ‘common sense’ approach.³⁶

The conclusion to be drawn as to the definition of consent is that it would be a relatively straightforward matter to standardise the list of factors which vitiate consent for sexual offences across Australian criminal law jurisdictions. There is no apparent reason why the various criminal jurisdictions in Australia could not agree on a list of vitiating factors for consent in a section dealing with such an important offence as rape. Such a list in no way impacts on the architecture or design of the various criminal law statutes in Australia.

The benchmark is that the list needs to be as comprehensive (all-encompassing) as possible, including the use of examples, without leaving

³³ In *R v Reid* [2006] QCA 202, the section under consideration was s 317(b) of the *Criminal Code* (Qld), and the appeal focused on the meaning of ‘intent’. The appellant argued there was no evidence of malice towards the complainant. The Court of Appeal inferred the necessary intent from: (1) the appellant’s taunting of the complainant; and (2) the appellant’s failure to inform the complainant of steps that would have reduced the possibility of HIV infection.

³⁴ See, for example, Alex Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception’: A Flawed Approach’ (2016) 80(1) *The Journal of Criminal Law* 28, 44. For a contrary view, see Jonathan Herring, ‘Mistaken Sex’ [2005] *Criminal Law Review* 511, who argues that non-disclosure of information considered material to the complainant ought to vitiate consent. In a similar vein, see also Tom Dougherty, ‘Sex, Lies and Consent’ (2013) 123(4) *Ethics* 717, who argues that when the liar’s actual profession would be a deal breaker for the victim of the deception, such a deception vitiates the victim’s sexual consent.

³⁵ [2013] EWCA Crim 1051, [25].

³⁶ This ‘common sense’ list would presumably include a deception involving infidelity, wealth, marital status, use of a birth control device (by a woman), intention to marry, and intention to pay a prostitute: see DP Bryden, ‘Redefining Rape’ (2000) 3 *Buffalo Criminal Law Review* 317, 470–5, 480–7 where 519 male and female respondents were surveyed. Interestingly, lying about having a venereal disease and failing to disclose a venereal disease were both considered by respondents to be sufficient to vitiate consent.

the statutory language so open as to raise doubt as to the reach of the section, such as in s 319(2)(a) of the *Criminal Code* (WA) where the phrase ‘deceit, or any fraudulent means’ has caused difficulty. It is suggested that the starting point for the design of a comprehensive list of factors which vitiate consent for sexual offences is s 36(2) of the *Crimes Act 1958* (Vic). A proposed model list of vitiating factors with some examples is set out in Part IV. It will be seen that the model list 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. Readers of this article may disagree with the content of the model list, but hopefully there will be consensus that such a list should apply to all Australian jurisdictions.

III THE CONSISTENCY OF THE FAULT ELEMENTS FOR RAPE

This section considers the consistency of the fault element for rape (sexual intercourse without consent) across Australian jurisdictions. As such, this section is more problematic than the previous section on the consistency of the vitiating factors for consent, because three jurisdictions, Queensland, Tasmania and Western Australia (the Griffith Codes), do not expressly recognise knowledge and recklessness as a fault element for any criminal offence.³⁷

An examination of the fault elements for rape across Australian jurisdictions reveals that there are marked differences in approach for the necessary mental elements to sheet home criminal responsibility. However, knowledge or recklessness are the fault elements for the *Model Criminal Code* as well as in New South Wales, South Australia, the Australian Capital Territory and Northern Territory.³⁸ As such, knowledge and recklessness provide the base for building consistent fault elements for rape in Australia.

At this point it should be made clear this examination also includes the treatment of mistake of fact and intoxication as ‘defences’, even though on

³⁷ The standard formula for offences in the Griffith Codes is not to set out a fault element. Instead, the main criminal responsibility provision in Queensland and Western Australia (s 23) and Tas (s 13) deals with voluntariness and accident or chance (now the ‘reasonably foreseeable consequence’ test in Qld). The result is that the *sub silentio* underlying fault element in the Griffith Codes is negligence: see *Stephen Edward Taiters* (1996) 87 A Crim R 507, 512: ‘The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome’.

³⁸ *Model Criminal Code*, cl 5.2.6; *Crimes Act 1900* (ACT), s 54; *Crimes Act 1900* (NSW), s 61HE; *Criminal Code* (NT), s 192(3); *Criminal Law Consolidation Act 1935* (SA), s 48.

one view such ‘defences’ are not strictly fault elements. One reason for this approach is that the Griffith Codes of Queensland, Tasmania and Western Australia, by failing to specify a fault element, effectively treat rape as a crime of strict liability.³⁹ The wording of these provisions yield the result that if sexual intercourse has taken place and consent is the issue, then mistake of fact is the only defence to a strict liability offence.⁴⁰

A Fault Elements

The starting point of this examination is to consider those jurisdictions that specifically identify knowledge and recklessness as fault elements for rape, commencing with s 192 of the *Criminal Code* (NT) which deals with sexual intercourse without consent. For present purposes, the relevant subsections are s 192(3) and s 192(4A), which are based on cl 5.2.6 of the *Model Criminal Code* and has been ignored by the Griffith Code States of Queensland, Tasmania and Western Australia.

- (3) A person is guilty of an offence if the person has sexual intercourse with another person:
- (a) without the other person's consent; and
 - (b) knowing about or being reckless as to the lack of consent.

Maximum penalty: Imprisonment for life.

- (4A) For subsection (3) being reckless as to a lack of consent to sexual intercourse includes not giving any thought to whether or not the other person is consenting to the sexual intercourse.

The Northern Territory is in the process of adopting Chapter 2 of the *Criminal Code 1995* (Cth), and the meaning of knowledge and recklessness in s 192 follows the definitions of those fault elements in the *Criminal Code 1995* (Cth),⁴¹ as set out in s 43AJ and s 43AK in the *Criminal Code* (NT) below.

43AJ 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.

43AK RECKLESSNESS

³⁹ *Criminal Code* (Qld), s 349; *Criminal Code* (Tas), s 185; *Criminal Code Act Compilation Act* (WA), s 325.

⁴⁰ See, eg, s 349(1) and (2) of the *Criminal Code* (Qld): (1) Any person who rapes another person is guilty of a crime; (2)(a) A person rapes another person if — the person has carnal knowledge with or of the other person without the other person's consent. See also s 325(1) of the *Criminal Code Act Compilation Act* (WA): A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.

⁴¹ See s 5.3 Knowledge and s 5.4 Recklessness of the *Criminal Code 1995* (Cth).

- (1) A person is reckless in relation to a result if:
 - (a) the person is aware of a substantial risk that the result will happen; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (2) A person is reckless in relation to a circumstance if:
 - (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

Thus, it can be seen that s 192(3) above specifies knowledge and recklessness as alternative fault elements. However, s 192(4A) expands the definition of recklessness to include ‘not giving any thought to whether or not the other person is consenting to the sexual intercourse or act of gross indecency’.

In South Australia, s 48(1) of the *Criminal Law Consolidation Act 1935* (SA), which deals with the crime of rape, also specifies knowledge (awareness) and recklessness as alternative fault elements.

48 — Rape

- (1) A person (the "offender") is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who —
 - (a) does not consent to engaging in the sexual intercourse; or
 - (b) has withdrawn consent to the sexual intercourse,and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be).

The phrase ‘recklessly indifferent’ in s 48(1) above is defined in s 47 of the *Criminal Law Consolidation Act 1935* (SA).

47 — Reckless indifference

For the purposes of this Division, 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.

Section 47 of the *Criminal Law Consolidation Act 1935* (SA) specifies three alternative ways in which 'reckless indifference' is satisfied. Both s 47(a) and s 47(b) require an awareness of the possibility that the other person might not be consenting, either by proceeding regardless of that possibility (advertent recklessness) or by failing to take reasonable steps (an objective test) to ascertain whether the act is consensual before deciding to proceed (culpable inadvertence).⁴² The third alternative, set out in s 47(c), not giving any thought to consent before deciding to proceed, mirrors s 192(4A) of the *Criminal Code* (NT) above. Judged by the criterion of comprehensiveness, s 47 of the *Criminal Law Consolidation Act 1935* (SA), usefully covers the field and provides a model definition of the fault element of 'recklessness'.

Thus, a baseline position for ascribing criminal responsibility for rape (sexual intercourse without consent) would be to specify the alternative fault elements of 'knowledge' as defined in the *Criminal Code 1995* (Cth), which is adopted in s 43AJ of the *Criminal Code* (NT), and recklessness as found in the definition of 'reckless indifference' contained in s 47 of the *Criminal Law Consolidation Act 1935* (SA).

This conclusion invites comparison with the treatment of the fault element of rape in other Australian jurisdictions, commencing with New South Wales, which also specifies the alternative fault elements of knowledge and recklessness in s 61HE(3) of the *Crimes Act 1900* (NSW).

(3) Knowledge about consent

A person who without the consent of the other person (the 'alleged victim') engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if:

- (a) the person knows that the alleged victim does not consent to the sexual activity, or
- (b) the person is reckless as to whether the alleged victim consents to the sexual activity, or
- (c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.

⁴² See *R v Banditt* [2004] NSWCCA 208, [78]–[79] (James J).

- (4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:
- (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
 - (b) not including any self-induced intoxication of the person.

Unlike the *Criminal Code* (NT), there is no definition of ‘knowledge’ or ‘recklessness’⁴³ in the *Crimes Act 1900* (NSW). However, s 61HE(3)(c) does specify an additional alternative fault element in the form of no reasonable grounds for believing the other person was consenting, which has the purpose of negating the ‘defence’ of mistake of fact and will be further discussed in the next section.⁴⁴ Each of the three alternative fault elements (knowledge, recklessness, or no reasonable grounds for belief) as to consent, is to be determined by all the circumstances of the case including any steps taken to ascertain consent, but excluding self-induced intoxication.

As regards s 61HE(4)(a) above, Dyer has argued⁴⁵ that the NSW Parliament should reverse the decision in *R v Lazarus*⁴⁶ where Bellew J held that a step involves the taking of some positive act, but this does not have to be a physical act. A ‘step’ therefore includes a person’s consideration of events he or she hears, observes or perceives. Dyer’s solution is to insert into s 61HE(4)(a) the words ‘physical or verbal’ between ‘any’ and ‘steps’: (a) including any *physical or verbal* steps taken ...⁴⁷

In the suggested model provision for rape in Part IV, the reasonable steps provision is preferred to s 61HE(4)(a), with the addition of Dyer’s solution, so that the provision becomes ‘reasonable physical or verbal steps’. 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

⁴³ In New South Wales, there is considerable case law on the meaning of ‘recklessness’: *R v Hemsley* (1988) 36 A Crim R 334; *R v Kitchener* (1993) 29 NSWLR 696; *R v Tolmie* (1995) 37 NSWLR 660. Essentially, this trio of cases is authority for the meaning of recklessness to encompass the situation where the accused considered that the victim might not be consenting yet continued regardless, and as such constituted sufficient *mens rea* under the previous equivalent section to s 61HE(3)(b). However, case law is no substitute for the legislature distilling a consistent meaning from the cases and inserting statutory endorsement into the relevant section.

⁴⁴ Section 61HE(3)(c) is essentially a statutory statement of honest and reasonable but mistaken belief. See *Bank of New South Wales v Piper* [1897] AC 383, discussed below (n 68).

⁴⁵ Andrew Dyer, ‘Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need for s 61HE of the Crimes Act to Be Changed (Except in One Minor Respect)’ (2019) 43 *Criminal Law Journal* 78, 98–9.

⁴⁶ [2017] NSWCCA 279, [146]–[147] (Bellew J).

⁴⁷ Dyer (n 45) 99.

the honesty of the accused's asserted belief in consent, as the Supreme Court of Canada appears to have acknowledged in *R v Barton*.⁴⁸

Furthermore, in cases of rape where a defendant is suffering from a delusional psychotic illness or personality disorder, a delusional belief that a victim was consenting cannot be considered a reasonable one. In *R v B*,⁴⁹ there was evidence that B had been suffering from a mental disorder at the time of the offences, but he did have the capacity to know that what he was doing was wrong. The Court held that the *Sexual Offences Act 2003* (UK) deliberately does not make a genuine belief in consent enough. The belief must not only be genuinely held; it must also be reasonable in all the circumstances. A delusional belief in consent, if entertained, would be by definition irrational and thus unreasonable, not reasonable.

Lord Justice Hughes stated:

We conclude that unless and until the state of mind amounts to insanity in law, then under the rule enacted in the Sexual Offences Act beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably arise without it.⁵⁰

The treatment of the offence of rape in the remaining Australian jurisdictions is inadequate, especially in the three Griffith Codes, although Tasmania in 2004 introduced s 14A Mistake as to consent in certain sexual offences, which is discussed in the next section. The Griffith Codes suffer the fatal flaw recognised by Dixon CJ, that the central criminal responsibility section is expressed in general but negative terms and often has little or nothing to say as to the elements of offences.⁵¹ Indeed, the inadequacy of the Queensland and Western Australia provisions can be seen by the interaction between the offence provision for rape (sexual intercourse without consent) in s 349(2)(a) in the *Criminal Code* (Qld)⁵² and s 325(1) in the *Criminal Code* (WA)⁵³ where no fault element is stated,

⁴⁸ 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.'

⁴⁹ [2013] EWCA Crim 3.

⁵⁰ *R v B* [2013] EWCA Crim 3 [40].

⁵¹ *Vallance v The Queen* (1961) 108 CLR 56, 59.

⁵² Section 349(2)(a): 'A person rapes another person if — (a) the person has carnal knowledge with or of the other person without the other person's consent.'

⁵³ Section 325(1): 'A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.'

and s 24 Mistake of fact which is identical in both Queensland and Western Australia.⁵⁴

The lack of a fault element 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 and Western Australia provisions are more victim-centric because they are strict liability offences 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 and Western Australia provisions reflect their 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 next section). 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. The strength of this argument would appear to have been accepted by the Queensland government following a recent referral of the defence of mistake of fact to the Queensland Law Reform Commission.⁵⁵

South Australia is a good example of a jurisdiction that has recognised the nexus between the fault element for rape and the boundaries of mistake as it pertains to lack of consent. Thus, as discussed above, s 48(1) of the *Criminal Law Consolidation Act 1935* (SA) specifies knowledge or reckless indifference as the alternative fault elements for rape, while s 47 specifies three alternative meanings of reckless indifference to the fact that the other person does not consent. Under these alternatives, it is hard to

⁵⁴ Section 24: 'A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.'

⁵⁵ See Josh Robertson, 'Queensland will abolish rape defence 'loophole' if law reform experts recommend it' *ABC News* (online, 10 July 2019) <<https://www.abc.net.au/news/2019-07-09/mistake-of-fact-defence-review-queensland/11291856>>.

understand an interpretation that the SA legislation could be construed as exculpating an accused person who has given some thought to the question of consent but is unreasonably unaware of the possibility of non-consent. Unreasonable unawareness would seem to equate to not giving any thought as to consent. In any event, the purpose of s 47 is to make the test for mistaken belief as to consent more objective, and to avoid the subjective element of ‘honest’ but mistaken belief in s 24 of the Queensland and Western Australia Criminal Codes.

The Australian Capital Territory relies on the fault element of recklessness in s 54(1) of the *Crimes Act 1900* (ACT).⁵⁶ The definition of recklessness follows the *Criminal Code 1995* (Cth), but there is no further refinement of the definition of recklessness to be found in s 54 of the *Crimes Act 1900* (ACT). This compares unfavourably with s 192(4A) of the *Criminal Code* (NT) and s 47 of the *Criminal Law Consolidation Act 1935* (SA).

Queensland, Western Australia and Tasmania follow the Griffith Code model. As can be seen below, s 185 of the *Criminal Code* (Tas) specifies no fault element.

Section 185 Rape

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

The same absence of a fault element applies to s 349 of the *Criminal Code* (Qld) and s 325 of the *Criminal Code Act Compilation Act* (WA), which is in keeping with the Griffith Code design, namely, to define offences by reference to conduct and circumstances. As Devereux and Blake have explained under the Griffith Codes ‘the question becomes, simply: Did the victim consent?’⁵⁷ Bronitt and McSherry have stated that the fault element for rape in the Griffith Codes is one of strict liability.⁵⁸ This follows from the victim's lack of consent forming part of the *actus reus* or physical element, while the defendant's belief that the victim was consenting is the essence of the only defence to a strict liability offence, namely, mistake of fact.

B Mistake of Fact

At the outset of this section, it should be remembered that the defence of mistake of fact must satisfy the evidential onus of a reasonable possibility

⁵⁶ Section 54(3) of the *Crimes Act 1900* (ACT) states: ‘For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.’

⁵⁷ John Devereux and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis, 9th ed, 2016) 341 [14.26].

⁵⁸ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) tbl 1 649 [11.35].

that the matter exists or does not exist.⁵⁹ In *R v Barton*,⁶⁰ the Supreme Court of Canada pointed out that the availability of the defence of honest but mistaken belief in communicated consent was not unlimited.

An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence. This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent. This Court recently confirmed that where there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, the defence of honest but mistaken belief in communicated consent must not be left with the jury (see *R v Gagnon* 2018 SCC 41).⁶¹

Section 61HE(3)(c) of the *Crimes Act 1900* (NSW) discussed above opens up the possibility of adding the fault element of ‘no reasonable grounds for believing’ the other person was consenting to the baseline position previously identified of knowledge and ‘reckless indifference’ contained in s 47 of the *Criminal Law Consolidation Act 1935* (SA). The use of the word ‘reasonable’ imports an objective test. The term ‘no reasonable belief’ is also to be found in s 38(1)(c) of the *Crimes Act 1958* (Vic).

Section 38 Rape

- (1) A person (A) commits an offence if —
- (a) A intentionally⁶² sexually penetrates another person (B); and
 - (b) B does not consent to the penetration; and
 - (c) A does not reasonably believe that B consents to the penetration.

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. This mirrors and supplements the further refinement of the meaning of ‘recklessness’ in s 192(4A) of the *Criminal Code* (NT) to include not giving any thought to whether or not the other person is consenting.

⁵⁹ See, for example, *Criminal Code 1995* (Cth) s 13.3(6).

⁶⁰ 2019 SCC 33.

⁶¹ *Ibid* [121].

⁶² A’s intention to sexually penetrate another person (B) is usually not in dispute. The issue is one of consent and whether A had a reasonable belief B was consenting. Victoria has chosen not follow the *Model Criminal Code* in specifying knowledge and recklessness as the fault elements for rape, but instead has sought to minimise the reach of mistake of fact through an objective test.

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.⁶³

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. Intoxication is discussed in the next section, but unfortunately recklessness is not defined in s 1 Interpretation, and the term 'reasonable steps in the circumstances known to him or her at the time' is left open to judicial interpretation.

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;⁶⁴ 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.

Notwithstanding the limitations of s 14A(1), it can be respectfully stated that it is a marked improvement on s 24 Mistake of fact in the other two

⁶³ 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.

⁶⁴ The Tasmanian approach is to focus on the relevance of evidence of intoxication as it relates to a claim of mistaken belief as to the existence of consent, as opposed to the relevance of evidence of intoxication as it relates to the mental element (*mens rea*).

Griffith Codes of Queensland and Western Australia.⁶⁵ Section 24(1) states:

- (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.

Section 24(1) above contains both a subjective (honest) and objective (reasonable) test for mistake of fact. The inclusion of the word ‘reasonable’ at least avoids the wholly subjective common law test set out in *Director of Public Prosecutions v Morgan*⁶⁶ whereby the honest belief that the complainant was consenting can be unreasonable.⁶⁷ On one view, the decision in *Morgan* was concerned with the common law requirements of *mens rea* as regards the genuineness of the belief in consent; while another view posits that if the accused has an honest and reasonable but mistaken belief in circumstances that, if they existed, would have rendered his or her act non-criminal, he or she does in fact lack *mens rea*.⁶⁸ In any event, as Crowe has pointed out,⁶⁹ 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*,⁷⁰ *R v Mrzljak*,⁷¹ *R v Kovacs*,⁷² *R v Dunrobin*,⁷³ and *Phillips v The Queen*.⁷⁴

⁶⁵ See Jonathan Crowe, ‘Consent, Power and Mistake of Fact in Queensland Rape Law’ (2011) 23(1) *Bond Law Review* 21, where the author argues that s 14A(1) provides a model for Queensland. More recently, see Jonathon Crowe, ‘Consent is not a ‘romance killer’: the mistake of fact defence needs to go’ *The Guardian* (online, 8 January 2019) <<https://www.theguardian.com/commentisfree/2019/jan/08/consent-is-not-a-romance-killer-the-mistake-of-fact-defence-for-needs-to-go>>. See also Josh Robertson, ‘Queensland rape laws ‘a hangover from old attitudes’, former judge says’ *ABC News* (online, 20 March 2019) <<https://www.abc.net.au/news/2019-03-20/sexual-consent-laws-queensland/10905688>>.

⁶⁶ [1976] AC 182.

⁶⁷ The decision in *DPP v Morgan* has been statutorily overruled by virtue of s 1(c) of the *Sexual Offences Act 2003* (UK) which states: ‘A person (A) commits an offence if — (c) A does not reasonably believe that B consents.’

⁶⁸ *Bank of New South Wales v Piper* [1897] AC 383, 389–90, where the Judicial Committee stated: ‘the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.’ As Brennan J pointed out in *He Kaw Teh v The Queen* (1985) 157 CLR 523, 572–3, referring to *Bank of NSW v Piper*: ‘This was the view also of Sir Samuel Griffith who, when he submitted his draft Criminal Code, stated the common law to be the source of the provision drafted as s 26 and enacted as s 24 of the Criminal Code (Q).’

⁶⁹ Crowe, ‘Consent, Power and Mistake of Fact in Queensland Rape Law’ (n 65) 34–7.

⁷⁰ [2001] 1 Qd R 655.

⁷¹ [2005] Qd R 308.

⁷² [2007] QCA 143.

⁷³ [2008] QCA 116.

⁷⁴ [2009] QCA 57.

In *R v Kovacs*,⁷⁵ the defence case was that consensual sexual intercourse had taken place in exchange for payment. The trial judge stated there was no evidence to support the defence proposition. McMurdo P and Holmes JA, at [25], held that this misstatement of evidence meant the judge did not fairly put the defence case before the jury as it directly concerned a limb of the defence case (honest and reasonable belief the complainant was consenting for payment).

In *R v Dunrobin*,⁷⁶ the complainant's evidence was that she had physically resisted the appellant and consistently told him to stop, although at some point she admitted she had frozen because she was scared. Muir JA (with whom Fryberg and Lyons JJ agreed) held, at [32], the trial judge's direction to the jury on s 24 was deficient in stating acceptance of the complainant's evidence meant it was unlikely that the defendant thought she was consenting: 'Relevant to that defence was the appellant's state of mind and what was said and done at relevant times which bore on the existence or non-existence of that state of mind.'

In *Phillips v The Queen*,⁷⁷ the appellant was tried on four counts of rape of a thirteen year old girl. The Court of Appeal was troubled by the apparent inconsistency in the verdicts. Holmes JA gave the leading judgment and focused, at [29], on the trial judge's decision to rule out mistake of fact for counts 1 and 3 where the complainant (K) had specifically said she tried to push the appellant away, and only directing the jury on s 24 on counts 2 and 4. The jury acquitted the appellant of rape in respect of counts 1 and 3, returning instead verdicts of guilt of carnal knowledge on those counts. On count 4, however, on which the mistake of fact direction had been given, the jury returned a verdict of rape.

This led Holmes JA, at [34], to conclude that the verdict on count 4 was unreasonable and to therefore substitute a verdict of guilt of carnal knowledge on count 4.

The evidence could not explain a conclusion that the Crown had both established the lack of consent and ruled out the possibility of mistake so as to lead to conviction on count 4, while failing to do so in relation to counts 1 and 3, so as to lead to acquittals on those counts.

The conclusion to be drawn from the above cases on s 24 is that Queensland Court of Appeal will accept the evidence most favourable to the defendant (such as sex for payment); applies a subjective test to s 24 (defendant's state of mind); and adopts a low bar in leaving s 24 with the jury (such as with multiple counts).

⁷⁵ [2007] QCA 143.

⁷⁶ [2008] QCA 116.

⁷⁷ [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. Section 14A(1)(a) above states that a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated. Given the importance of dealing with the issue of intoxication in a model rape provision, it is timely to turn to the treatment of intoxication.

C Intoxication

As the person is often intoxicated at the time of the alleged offence, s 36B(1)(a) of the *Crimes Act 1958* (Vic) deals with the effect of self-induced intoxication on reasonable belief.⁷⁸ The test is objective in that the standard to be applied is that of a reasonable person who is not intoxicated.

Section 36B Effect of intoxication on reasonable belief

- (1) In determining whether a person who is intoxicated has a reasonable belief at any time —
 - (a) 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.

The treatment of intoxication and its effect on reasonable belief in s 36B(1)(a) of the *Crimes Act 1958* (Vic) is preferable to the treatment of intoxication as regards sexual offences in New South Wales. New South Wales follows *DPP v Majewski*⁷⁹ in distinguishing between crimes of specific and basic intent.⁸⁰ Crimes of specific intent are set out in s 428B of the *Crimes Act 1900* (NSW), and only s 61K which covers assault with intent to have sexual intercourse is listed in s 428B. This follows from rape

⁷⁸ The Victorian approach is to focus on the relevance of evidence of intoxication as it relates to the mental element (*mens rea*), as opposed to the relevance of evidence of intoxication as it relates to a claim of mistaken belief as to the existence of consent.

⁷⁹ [1977] AC 443. See also Queensland, where s 28(3) of the *Criminal Code* (Qld) states: ‘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.’

⁸⁰ An offence of basic intent is one where the defendant intends to commit the proscribed conduct such as to strike the victim in a case of common assault. For an offence of specific intent some further intention is required such as not only intending to strike the victim but also intending to cause the victim serious harm in a case of causing serious harm.

being a crime of basic intent,⁸¹ and s 61HE(3)(e) of the *Crimes Act 1900* (NSW) which excludes any consideration of self-induced intoxication of the person from a finding of knowledge about consent. However, greater clarity is provided by abandoning the distinction between crimes of basic and specific intent for rape,⁸² and adopting 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).

By the same token, the convoluted treatment of intoxication under the *Criminal Code 1995* (Cth) is also best avoided.⁸³ By virtue of s 8.2, the *Criminal Code 1995* (Cth) has, on the surface, opted for the *Majewski* model of distinguishing between offences of specific and basic intent. However, the Commonwealth Criminal Code's Guide to Practitioners states that 'specific intent has no counterpart in Chapter 2 and basic intent is given a restricted definition' such that *Majewski* is 'of little or no use in determining the application of the Code provisions'.⁸⁴

Section 8.2(1) of the *Criminal Code 1995* (Cth) states that evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed. However, s 8.2(1) is qualified by a note that states that 'a fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent', and by subsections which allow self-induced intoxication to be taken into consideration in determining whether the conduct was accidental (s 8.2(3)) or whether the person had a mistaken belief about facts (s 8.2(4)). As Odgers has pointed out, the prohibition on the use of evidence of voluntary intoxication has no application in determining whether a fault element existed in relation to 'a physical element of circumstance or a physical element of result; an ulterior (or specific) intention; or knowledge, recklessness or negligence'.⁸⁵ It is contended that the note and the two exceptions have the effect of making the prohibition in s 8.2(1) virtually meaningless.

⁸¹ See *R v Woods* (1982) 74 Cr App R 312.

⁸² In Tasmania, 'since the decision of the Court of Criminal Appeal in 1998 in *Weiderman* (*Attorney-General's Reference No 1 of 1996*) (1998) 7 Tas R 293, the accused may also rely upon intoxication to explain absence of knowledge as to consequences or circumstances but not imputed knowledge': Rebecca Bradfield, Kate Warner and Jenny Rudolf, Tasmanian Law Reform Institute, *Intoxication and Criminal Responsibility*, (Final Report No 7, August 2006) 5.

⁸³ For a fuller discussion of the limitations of the treatment of intoxication in the *Criminal Code 1995* (Cth), see Andrew Hemming, 'Banishing Evidence of Intoxication in Determining Whether a Defendant Acted Voluntarily and Intentionally' (2010) 29(1) *The University of Tasmania Law Review* 1.

⁸⁴ Ian Leader-Elliott for the Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code — A Guide for Practitioners* (2002) 145.

⁸⁵ Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 4th ed, 2019) [8.2.100] 103.

Finally, on the question of treatment of intoxication in a rape case, it is unclear why South Australia has, by virtue of s 268(3)(a) of the *Criminal Law Consolidation Act 1935* (SA), elected to leave intoxication as a potential defence in a case in which it is necessary to establish that the defendant foresaw the consequences of his or her conduct. In other words, s 268(2), which otherwise presumes the mental element if the objective elements of an alleged offence are established against an intoxicated defendant and if the defendant would, if his or her conduct had been voluntary and intended, have been guilty of the offence, does not apply in a case where awareness (knowledge) is an element of the offence. The exception to the operation of s 268(3)(a) is the offence of rape by virtue of s 268(3)(b). Such an exception is necessary because the Crown, in order to secure a conviction for rape, has to establish the defendant was aware of the circumstances surrounding his or her conduct under s 48(1) of the *Criminal Law Consolidation Act 1935* (SA). This seems a cumbersome approach, and it is contended that the Victorian objective standard of a reasonable person who is not intoxicated is the better solution.

268 — Mental element of offence to be presumed in certain cases

- (1) If the objective elements of an alleged offence are established against a defendant but the defendant's consciousness was (or may have been) impaired by intoxication to the point of criminal irresponsibility at the time of the alleged offence, the defendant is nevertheless to be convicted of the offence if it is established that the defendant —
 - (a) formed an intention to commit the offence before becoming intoxicated; and
 - (b) consumed intoxicants in order to strengthen his or her resolve to commit the offence.
- (2) If the objective elements of an alleged offence are established against a defendant but the defendant's consciousness was (or may have been) impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, the defendant is nevertheless to be convicted of the offence if the defendant would, if his or her conduct had been voluntary and intended, have been guilty of the offence.
- (3) However, subsection (2) does not extend to —
 - (a) a case in which it is necessary to establish that the defendant foresaw the consequences of his or her conduct; or
 - (b) except where the alleged offence is an offence against section 48 (rape) — a case in which it is necessary to establish that the defendant was aware of the circumstances surrounding his or her conduct.

IV THE MODEL PROVISION FOR RAPE

The preferred position for the definitions and elements of the crime of rape (sexual intercourse without consent) can be summed up in the following terms:

1. The starting point for the design of a comprehensive list of factors which vitiate consent for sexual offences is s 36(2) of the *Crimes Act 1958* (Vic).
2. Specification of the alternative fault elements of knowledge, as defined in s 5.3 Knowledge of the *Criminal Code 1995* (Cth), and 'reckless indifference' as defined in s 47 of the *Criminal Law Consolidation Act 1935* (SA).
3. The addition of a third alternative fault element in the form of no reasonable grounds for believing the other person was consenting, as found in s 61HE(3)(c) of the *Crimes Act 1900* (NSW).
4. Reasonable belief in consent to depend on all the circumstances and to include any reasonable physical or verbal steps that the person has taken to find out whether the other person consents, modified from s 36A of the *Crimes Act 1958* (Vic).
5. The effect of self-induced intoxication on reasonable belief to be determined by the objective standard of a reasonable person who is not intoxicated, as found in s 36B(1)(a) of the *Crimes Act 1958* (Vic).

This preferred position can now be set out as a model provision for rape (or the equivalent offence).

- (1) Consent means free and voluntary agreement.
- (2) Circumstances in which a person does not consent to an act include, but are not limited to,⁸⁶ 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,⁸⁷ whether to that person or someone else or an animal;

⁸⁶ The list of vitiating factors is non-exhaustive to allow some 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 provided it supports the case law.

⁸⁷ The fear of harm of any type covers non-violent threats, but for clarity sub-section (c) covers intimidatory or coercive conduct, or other threat, that does not involve a threat of force, which is taken from s 61HE(8)(b) of the *Crimes Act 1900* (NSW).

- (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;⁸⁸
- (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 or hygienic 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

⁸⁸ Taken from s 61HE(8)(c) of the *Crimes Act 1900* (NSW).

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.

- (3) 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;⁸⁹
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;⁹⁰ 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.
- (4) For the purpose of sub-section (3)(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.

- (5) 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.

V CONCLUSION

The justification for such a broad model provision for the offence of rape (sexual intercourse without consent) is: (1) comprehensiveness; (2) clarity; (3) consistency; and (4) maximising the reach of criminal responsibility for rape by the inclusion of objective tests. These objective tests are found in the definition of the fault element of 'recklessly indifferent'; in the reasonable steps test to ascertain whether the other person is consenting,

⁸⁹ 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).

⁹⁰ 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.

thereby minimising the reach of the ‘defence’ of mistake of fact; and in the standard of the reasonable person who is not intoxicated, thereby minimising the reach of the ‘defence’ of intoxication. The overall purpose is to make the test of mistaken belief in consent more objective and less subjective, as well as to make the process of adjudging guilt for rape more objective. It is contended that this model provision can be readily adapted to all Australian jurisdictions by virtue of the definitions contained within the provision, and demonstrates that it is possible to reform key criminal offences in a uniform manner which may also reduce some of the well-known difficulties in securing a conviction for rape.