

# SUBMISSION TO THE QUEENSLAND LAW REFORM COMMISSION'S REVIEW OF CONSENT LAWS AND THE EXCUSE OF MISTAKE OF FACT

**\*Andrew Dyer**

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## **Introduction**

1. I adhere to the views that I expressed in my preliminary submission to this review.<sup>1</sup>
2. In its recent Consultation Paper, the Queensland Law Reform Commission (the Commission) has noted Jonathan Crowe's and Bri Lee's recognition 'that any reforms [to the law concerning consent and mistake of fact, as that excuse applies to sexual offences against adults,] must not impact upon the presumption of innocence and the right of a defendant to a fair trial.'<sup>2</sup> In my submission, once this *is* recognised, it becomes clear that many of the proposals that these commentators favour are insupportable. Mistake of fact should not be rendered 'inapplicable to the issue of consent in rape and sexual assault cases.'<sup>3</sup> Nor should the Queensland government insert into the *Criminal Code Act 1899* (Qld) (the *Criminal Code*) a 'positive and reasonable steps' provision of the type that Crowe and Lee support.<sup>4</sup> As I have argued,<sup>5</sup> such a provision would possibly remove the mistake of fact excuse by stealth. That is certainly its aim. Moreover, the Commission should reject Crowe and Lee's more recent proposal to reverse the onus of proof in rape and/or sexual assault cases where mistake of fact is raised.<sup>6</sup> As would be so if Crowe and Lee's other two recommendations were enacted, if the Queensland Parliament were to legislate for such a reversal, it would almost certainly place itself in breach of the *Human Rights Act 2019* (Qld).<sup>7</sup> It is hard to imagine that the Queensland government would be so foolish as to legislate incompatibly with human rights so soon after passing this statutory charter of rights. The Commission should not encourage it to do so.

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\*Colin Phegan Senior Lecturer, University of Sydney Law School. Deputy Director, Sydney Institute of Criminology.

<sup>1</sup> Andrew Dyer, 'Submission to the Queensland Law Reform Commission's Consent and Mistake of Fact Review' (21 October 2019). See also Andrew Dyer, 'Progressive Punitiveness in Queensland' (2020, Forthcoming) *Australian Bar Review*. I have attached the latter article as an Appendix to this submission; it can also be found on my SSRN page <[https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1874335](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1874335)>.

<sup>2</sup> Queensland Law Reform Commission, 'Review of Consent Laws and the Excuse of Mistake of Fact: Consultation Paper' WP No 78 (December 2019) 16 [73].

<sup>3</sup> Jonathan Crowe and Bri Lee, 'Reform', *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Dyer, 'Progressive Punitiveness', above n 1, 49-53.

<sup>6</sup> See Queensland Law Reform Commission, above n 2, [189]-[196].

<sup>7</sup> If Parliament were to reverse the onus of proof for mistake of fact in rape and sexual assault proceedings, it seems clear that it would breach the right to be presumed innocent, for which *Human Rights Act 2019* (Qld) s 32(1) provides.

3. This is not to say that Queensland law regarding rape and sexual assault should remain exactly as it is. It is merely to argue that any changes must be balanced, proportionate and respectful of human rights. In my submission, if Parliament were to amend the *Criminal Code* in the following ways, the law in this area would be fairer to complainants, without breaching the human rights of the accused.
4. First, s 348(2) of the *Criminal Code* should be amended to provide that a person does not freely and voluntarily consent to an act if s/he ‘consented’ because of a mistaken belief:
  - (a) as to the identity of the accused;<sup>8</sup>
  - (b) about the purpose of the act (including about whether the act is for health, hygienic or cosmetic purposes);<sup>9</sup>
  - (c) that the accused will wear a condom, or will wear a condom that has not been sabotaged, during the act;<sup>10</sup>
  - (d) that the accused will pay her/him - whether by monetary exchange or otherwise - for participating with him/her in the act;<sup>11</sup> or
  - (e) that the accused does not have a serious disease, in circumstances where there is a real risk that the person will contract the disease as a result of her/his participation in the act.<sup>12</sup>

Below, I deal more fully with this proposal.<sup>13</sup> For now, I simply note that I respectfully disagree with the Commission’s suggestion that, to the extent that it deals with such matters, the current s 348(2) correctly focusses on the accused’s *fraudulent* inducement rather than the complainant’s mistake.<sup>14</sup> As the High Court explained in *Papadimitropoulos v The Queen*,<sup>15</sup> such an approach is contrary to principle: it is the complainant’s mistake, not the accused’s fraud, that makes her/his participation non-autonomous – and therefore non-consensual. A focus on fraud is also not necessitated by the importance of ensuring that that ‘the conduct of the defendant has the appropriate criminality, rather than being inadvertent or accidental.’<sup>16</sup> Section 24 of the Code already ensures that, if the accused has not acted culpably, he or she will avoid criminal liability. For example, if, under the provision that I support, a complainant were to consent to penetrative sexual activity because of a mistaken belief that the accused was HIV-negative, but the accused did not induce this belief (for example, because he or she was ignorant of his/her HIV-positive status), the accused would

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<sup>8</sup> See *Crimes Act 1900* (NSW) s 61HE((6)(a). Cf. *Criminal Code Act 1899* (Qld) s 348(2).

<sup>9</sup> New South Wales Law Reform Commission, ‘Consent in relation to sexual offences: Draft Proposals’ (October 2019) 17; see also [6.45]-[6.47].

<sup>10</sup> Andrew Dyer, ‘Which Mistakes Should Negate a Complainant’s Apparent Consent to Sexual Activity’ (2019) 43(3) *Criminal Law Journal* 159, 173. Alternatively, I have no objection to a provision along the lines of that to which the NSW Law Reform Commission has recently lent its provisional support: see *ibid* 11.

<sup>11</sup> See Dyer, ‘Which Mistakes’, above n 10, 173.

<sup>12</sup> *Ibid*.

<sup>13</sup> See also Dyer ‘Which Mistakes’, above n 10. I have also attached the latter article as an Appendix to this submission; and it too can be found on my SSRN page

<[https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1874335](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1874335)>.

<sup>14</sup> Queensland Law Reform Commission, above n 2, 39 [159], 40 [161]-[162].

<sup>15</sup> (1957) 98 CLR 249, 260. See also *Burns v The Queen* (2012) 246 CLR 334, 364 [86]-[87].

<sup>16</sup> Queensland Law Reform Commission, above n 2, 39 [159].

usually be able to establish a reasonable possibility that s/he believed on reasonable grounds that the complainant was consenting. That is because the accused in such a case would often honestly and reasonably believe that the vitiating circumstance did not exist. In those cases where such an accused lacks such an exculpatory belief, his/her conduct is, because of the absence of this state of mind, sufficiently blameworthy for him/her justifiably to be convicted of a serious offence – whether s/he induced the complainant’s mistake or not.

5. Secondly, the s 24 excuse should be limited in two ways.
6. Parliament should insert into the *Criminal Code* a ‘steps’ provision along the lines of that which the NSW Law Reform Commission (NSWLRC) has recently provisionally advocated.<sup>17</sup> That is, in a rape or sexual assault case where the accused relies on mistake of fact, judges should be able to tell juries that, when they come to assess whether the accused might have had the relevant state of mind, they must *take into account* the accused’s failure to do or say anything to ascertain whether the complainant was consenting.
7. Parliament should also put it beyond doubt that, if the accused’s belief that the complainant was consenting arose only because of the accused’s voluntary intoxication, he or she should not be able successfully to raise honest and reasonable mistake of fact. For the reasons that I gave in my preliminary submission,<sup>18</sup> however, it is already very difficult to see how the person who would not have believed in consent if he or she had been sober, could possibly succeed on the basis of the s 24 excuse.

### **The questions in chapter 3 of the QLRC’s Consultation Paper**

8. First, the Commission asks whether the definition of consent in s 348 of the *Criminal Code* accords with community expectations and standards about the meaning of consent.<sup>19</sup> This would no doubt depend on the part of the community to which the Commission is referring. Many in the community seem to believe that, for example, tricking a person into having intercourse with him/her is (usually) not rape.<sup>20</sup> Thirty-one per cent of people seem to think that ‘a lot of the time women who say they were raped had led the man on and then had regrets.’<sup>21</sup> Some others believe that *anyone* who engages in sexual activity with another person without a ‘clear permission’ ‘at every stage of the activity’<sup>22</sup> – whether he or she honestly and reasonably thinks that s/he has been granted such a permission – should be held to have committed a serious crime. As these three examples show, just because views are widely held in a community does not necessarily mean that legislative force should be given to them.

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<sup>17</sup> New South Wales Law Reform Commission, above n 9, 22.

<sup>18</sup> Andrew Dyer, ‘Submission’, above n 1, 26-7, 50-1.

<sup>19</sup> Queensland Law Reform Commission, above n 2, 25.

<sup>20</sup> Certainly, many academic commentators have expressed such views: see, for example, George Syrota, ‘Rape: When Does Fraud Vitate Consent?’ (1995) 25 *Western Australian Law Review* 334.

<sup>21</sup> Queensland Law Reform Commission, above n 2, 69 [272].

<sup>22</sup> *Ibid* 21 [88].

9. The Commission then asks whether s 348 of the *Criminal Code* should be amended, so as expressly to require ‘affirmative consent.’<sup>23</sup> The answer is ‘no.’
10. Nothing would be gained by substituting the words ‘freely and voluntarily *agreed to*’ for the words ‘freely and voluntarily *given*’ in s 348(1).<sup>24</sup> As the Commission notes,<sup>25</sup> in *R v Makary*,<sup>26</sup> the Queensland Court of Appeal (QCA) held that, because of the word ‘given’ in that sub-section, a consent will be valid only if it is communicated in some way by the complainant to the accused. There is therefore no point in substituting for that word (‘given’) language that would reinforce ‘both positive and communicative understandings of consent.’<sup>27</sup> Such understandings are already being reinforced.
11. Nor, for the same reason, would anything be achieved if a provision similar to s 2A(2)(a) of the *Criminal Code Act 1924* (Tas) were inserted into the Code. That provision states that a person does not consent to an activity if he or she does nothing and says nothing to communicate his or her consent. The language is ugly. More fundamentally, because of *Makary*, the provision would be redundant. The NSWLRC has recently provisionally supported a provision along the lines of s 2A(2)(a), because it ‘reflects the communicative model of consent.’<sup>28</sup> ‘Consent is not just an internal state of mind,’ the Commission opines, ‘but a communicated state of mind. Consent must be given by one person to another.’<sup>29</sup> Because *Makary* already gives legal effect to this – in my opinion, erroneous<sup>30</sup> – view of what consent is, there is no need for a s 2A(2)(a)-style provision.
12. The Commission also should not recommend the insertion into the Code of any provision that states that a person *must* take steps, or reasonable steps, to ascertain whether the other person is consenting to the sexual activity, if the person is to be acquitted on the basis of mistake of fact.<sup>31</sup>
13. Section 14A(1)(c) of the *Criminal Code Act 1924* (Tas) provides that a person will be prevented from relying upon mistake of fact unless he or she has taken ‘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.’ The precise reach of this provision depends upon the meaning of the word ‘steps.’ Does a person take a ‘step’ simply by observing the complainant’s behaviour and forming the positive view that s/he is consenting?<sup>32</sup> When interpreting ‘reasonable steps’ provisions in the Canadian *Criminal Code*,<sup>33</sup> the Supreme Court of Canada seems to have indicated that this is so. A person may take ‘reasonable

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<sup>23</sup> Ibid 25.

<sup>24</sup> See ibid 22 [92] and 25.

<sup>25</sup> Queensland Law Reform Commission, above n 2, 23 [96].

<sup>26</sup> [2019] 2 Qd R 528, 543 [49]-[50] (Sopronoff P), 550 [94] (Bond J).

<sup>27</sup> Queensland Law Reform Commission, above n 2, 22 [92].

<sup>28</sup> New South Wales Law Reform Commission, above n 9, 13 [6.9].

<sup>29</sup> Ibid.

<sup>30</sup> See [16] of this submission. See also Andrew Dyer, ‘Submission about the New South Wales Law Reform Commission’s Draft Proposals Concerning Consent in Relation to Sexual Offences’ (18 November 2019) [16]-[20]. I have attached this submission as an Appendix to this submission.

<sup>31</sup> Queensland Law Reform Commission, above n 2, 25.

<sup>32</sup> *R v Lazarus* (2017) 270 A Crim R 378, 407 [147].

<sup>33</sup> RSC 1985, c C-46.

steps’, according to seven Justices in *Morrison v The Queen*,<sup>34</sup> ‘by observing [the complainant’s] conduct or behavior.’ If this is so, this provision seems not to limit mistake of fact at all. In a case where the accused has merely taken this ‘step’, he or she might still be able successfully to raise the s 24 excuse despite his or her failure to take more active steps to ensure that the complainant was participating willingly in the sexual activity. Indeed, consistently perhaps with an observation that the Commission makes in its Consultation Paper,<sup>35</sup> his or her mistake of fact ‘defence’ presumably *would* succeed: leaving the onus of proof to one side, once a jury finds that a person has taken reasonable steps, surely it will go on to find that his or her belief in consent was also reasonable?

14. On the other hand, a person might only take a ‘step’ within the meaning of s 14A(1)(c) if he or she takes more active measures than this. That is, if such a provision were introduced into the Queensland *Criminal Code*, the courts might hold that a person takes ‘reasonable steps’ only if he or she asks the complainant, by words or gesture, whether s/he is consenting. If this were so, mistake of fact would be limited far too greatly; in fact, it is hard to see how it could operate at all. Mistake of fact can only apply if the accused has made a mistake. But how can a person make a mistake about consent if he or she has asked the other person whether s/he is consenting? It follows that, if the law were to state that the only person who can successfully rely on mistake of fact is the person who *has* asked, it would be granting that excuse only to those who have not satisfied one of the necessary pre-conditions for its application. To put the matter differently, it would be ensuring that it in fact could never succeed at a sexual assault or rape trial.<sup>36</sup>
15. For similar reasons, Parliament should not introduce into the *Criminal Code* any other provision that *requires* the accused to have taken ‘steps’ before he or she can succeed on the basis of the s 24 excuse. Again, if a ‘step’ is limited to a physical or verbal request for permission, such a provision would in fact prevent mistake of fact from ever succeeding.<sup>37</sup> As I argued in my preliminary submission, if this were the case - that is, if rape and sexual assault offences were effectively to become absolute liability offences – the state would breach various sections of the *Human Rights Act*.<sup>38</sup>
16. Next, the Commission asks whether s 348 of the *Criminal Code* should expressly provide that there is no consent where a sexual act continues after the complainant’s withdrawal of consent.<sup>39</sup> It *should* - even though, as the Commission notes,<sup>40</sup> there is really no doubt that

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<sup>34</sup> [2019] SCC 15, [112]. See the analysis of that case and also *Barton v The Queen* [2019] SCC 33, in Andrew Dyer, ‘The Mens Rea for Sexual Assault, Sexual Touching and Sexual Act Offences in New South Wales: Leave it Alone (Although You Might Consider Imposing an Evidential Burden on the Accused)’ (2019) 48 *Australian Bar Review* 63, 75-7. I have attached this article as an Appendix to this submission.

<sup>35</sup> See Queensland Law Reform Commission, above n 2, 25 [105].

<sup>36</sup> I have made this argument elsewhere: Dyer, ‘The Mens Rea’, above n 34, 71-3; Andrew Dyer, ‘Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr’ (2019) 7(1) *Griffith Journal of Law and Human Dignity* 1, 10-12. I have attached both articles as Appendices to this submission.

<sup>37</sup> See Dyer, ‘Submission’, above n 1, 52-5.

<sup>38</sup> *Ibid* 41-55.

<sup>39</sup> See Queensland Law Reform Commission, above n 2, 27.

<sup>40</sup> *Ibid* 25-6 [107]-[108].

this is already the law in Queensland. With that said, however, this issue does tend to highlight the difficulties with the view of consent that is reflected in the QCA's reasoning in *Makary*. If consent is not just an internal state of mind, but a communicated state of mind,<sup>41</sup> it seems logically to follow that withdrawal of consent, too, must be communicated before it is effective. This is presumably why, in its Draft Proposals, the NSWLRC has expressed its support for a provision stating that: 'A person may, *by words or conduct*, withdraw consent to a sexual activity at any time before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.'<sup>42</sup> Take, however, the person who 'freezes' during a sexual encounter and is, for this reason, prevented from communicating her or his newfound unwillingness to participate any further in the relevant sexual activity. Under the NSWLRC's provision, this complainant is consenting. Moreover, even if her or his partner realises that such a complainant has frozen and might not be willing any longer to participate in the sexual activity, that partner is not guilty of rape. That is because (a) the complainant is consenting and (b) the accused s/he honestly believes on reasonable grounds that the complainant is merely internally unwilling to continue (i.e. is consenting). Surely such examples call into question the notion that consent (and withdrawal of consent) involves not just an 'action of the mind'<sup>43</sup> but also communication of that state of mind?<sup>44</sup>

17. The next question is whether s 348(2) of the *Criminal Code* should be amended to extend the list of circumstances in which 'a person's consent to a sexual act is not freely and voluntarily given.'<sup>45</sup> In my view, there is no need for the Code expressly to provide that a person does not consent when s/he is asleep, unconscious or so affected by alcohol or other drug as to be unable to consent.<sup>46</sup> Section 348(1) already makes it clear that a person who lacks the 'cognitive capacity' to give consent is not consenting. As the Commission suggests,<sup>47</sup> people who are asleep, unconscious or so affected by alcohol or drugs as to be incapable of consenting, clearly lack such cognitive capacity.
18. As foreshadowed above, however, s 348(2) should be amended to provide that a person is not consenting when s/he agrees to participate in sexual activity because of a mistaken belief that: (a) the other person will wear a (non-sabotaged) condom; (b) the other person does not suffer from a serious disease; and (c) the other person will pay him or her for his or her participation.<sup>48</sup> I adhere to the views that I have expressed elsewhere about this matter.<sup>49</sup> Moreover, and with respect, it is hard to accept the view<sup>50</sup> that all of these scenarios are

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<sup>41</sup> *Makary* [2019] 2 Qd R 528, 543 [49]-[50] (Sopronoff P), 550 [94] (Bond J).

<sup>42</sup> NSW Law Reform Commission, above n 9, 9. [Emphasis added]

<sup>43</sup> *R v Middleton* (1873) LR 2 CCR 38, 63 (Brett J).

<sup>44</sup> I have made the same argument in Dyer, 'Submission about the New South Wales Law Reform Commission's Draft Proposals', above n 30, [16]-[20].

<sup>45</sup> Queensland Law Reform Commission, above n 2, 31.

<sup>46</sup> *Ibid* 31, 36.

<sup>47</sup> *Ibid* 31 [124], 32 [127]-[128], 33 [131].

<sup>48</sup> *Ibid* 37.

<sup>49</sup> Dyer, 'Mistakes', above n 10.

<sup>50</sup> See Queensland Law Reform Commission, above n 2, 34 [136], 36 [142], 36 [145].

already covered by s 348(2)(e) of the *Criminal Code*, which states that ‘a person’s consent to an act is not freely and voluntarily given if it is obtained ... by false and fraudulent representations about the nature or purpose of the act.’ It is true that ‘stealthing’ might be. Certainly, in *Assange v Sweden*,<sup>51</sup> Sir John Thomas P – although he decided the matter on another basis – could see some merit in the view that a deception about condom use was a ‘deception as to the nature and purpose of the act’ within the meaning of s 76(2)(a) of the *Sexual Offences Act 2003* (UK).<sup>52</sup> But it is hard to see how the conduct of a person who induces another wrongly to think that s/he (i.e. the first person) is free of a serious disease, falls within the terms of s 348(2)(e). This person has been honest as to the purpose of the act, namely, sexual gratification. And the case seems far removed from one like *R v Williams*,<sup>53</sup> where the appellant, a choirmaster, had led the complainant, a member of his choir, to think that the penetrative activity was necessary to make an ‘air passage’<sup>54</sup> to correct her breathing. Because of the complainant’s Victorian naivety, she did not know what sexual intercourse was; therefore, she had made a mistake about the ‘nature’ of the act. It is less clear that, in the serious disease case, the complainant has been misled as to the ‘character’<sup>55</sup> of what has been done.<sup>56</sup> Certainly, there is authority that a person will make a mistake as to the ‘nature’ of the act only in very limited circumstances.<sup>57</sup>

19. Further, it seems clear that, where the accused induces the complainant to participate in sexual activity with him/her by falsely representing to her/him that s/he will be paid for such participation, s 348(2)(e) does not apply. In *R v Winchester*,<sup>58</sup> the QCA held that, if the accused fraudulently induced consent by telling the complainant that he would give her a horse if she engaged in the relevant activity, he had not obtained such a permission by false representations as to the ‘nature or purpose of the act.’
20. *Winchester* highlights another issue. The QLRC has asked whether s 348(2) of the Code should provide that there is no consent where a person ‘consents to a sexual act under a mistaken belief induced by the other person that there will be a *monetary exchange* in relation to the sexual act.’<sup>59</sup> The difficulty with this language is that a person’s decision to engage in sexual activity is no more autonomous if it results from a mistaken belief that s/he will be given, say, a horse than it would be if s/he wrongly thought that s/he was to be paid money. Therefore, if the QLRC recommends a provision of this sort – as I think it should<sup>60</sup> –

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<sup>51</sup> [2011] EWHC (Admin) 2849, [87].

<sup>52</sup> See the discussion in Dyer, ‘Mistakes’, above n 10, 170.

<sup>53</sup> [1923] 1 KB 340.

<sup>54</sup> *Ibid* 341.

<sup>55</sup> *Papadimitropoulos* (1957) 98 CLR 249, 260.

<sup>56</sup> But see Rebecca Williams, ‘Deception, Mistake and Vitiating of the Victim’s Consent’ (2008) 124 *Law Quarterly Review* 132, 152.

<sup>57</sup> *R v Mobilio* [1991] 1 VR 339.

<sup>58</sup> [2014] 1 Qd R 44, 68 [86]-[87] (Muir JA), 75 [116] (Chesterman JA), 79 [134] (Fryberg J).

<sup>59</sup> Queensland Law Reform Commission, above n 2, 37.

<sup>60</sup> Dyer, ‘Mistakes’, above n 10, 165-9.

that provision should refer not to a mistaken belief about monetary exchange, but rather a mistaken belief about payment of any sort.<sup>61</sup>

21. The final question in chapter 3 of the Consultation Paper is whether any ‘other specific circumstances [should] be included in section 348(2) of the Criminal Code.’<sup>62</sup> Though I doubt whether this is necessary,<sup>63</sup> I have no objection to a provision that makes it clear that a person who ‘consents’ because s/he is unlawfully detained has not in fact consented. I am also inclined to think that language that focusses on a mistaken belief as to the accused’s ‘identity’ is preferable to the current language in s 348(2)(f).<sup>64</sup> Is there any good reason not to treat as rape or sexual assault (as the case may be), sexual activity that results from a fraudulently induced mistaken belief that the accused is, for instance, a certain rock star? With that said, however, I do accept that not every but for mistake should potentially give rise to rape or sexual assault liability. Accordingly, I adhere to the view that s 348(2) should give judges some guidance about how to decide novel mistake cases that arise.<sup>65</sup>

#### **The questions in chapter 4 of the QLRC’s Consultation Paper**

22. The first questions in chapter 4 concern whether, when a defendant raises mistake of fact in a rape or sexual assault case, the onus of proof should ‘remain unchanged’ or ‘be changed, so that it is for the defendant to prove the mistaken belief was honest and reasonable.’<sup>66</sup> In my submission, the onus of proof should be on the Crown, as it is currently.
23. The Commission notes that, when it comes to the mistake of fact excuse for which s 24 of the Code provides, ‘a reversal of the onus of proof [in rape and sexual assault cases] may be seen as a significant inroad into the presumption of innocence.’<sup>67</sup> In truth, it is difficult to see what other view is possible. Accordingly, the Queensland courts would be very likely to hold such a reverse onus to be incompatible<sup>68</sup> with s 32(1) of the *Human Rights Act 2019* (Qld).
24. As David Hamer has observed, when the English courts have determined whether particular reverse burdens are contrary to Article 6(2) of the *European Convention on Human Rights* – which provides for the right to be presumed innocent of criminal wrongdoing – they have attached much importance to the seriousness of the offence, as reflected by the maximum penalty for it.<sup>69</sup> ‘As the penalty and offence seriousness increases,’ he says, ‘so does the injustice of mistaken conviction. The defendant’s rights are to be given greater weight, and

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<sup>61</sup> The word ‘under’ should be avoided, too: it should be replaced with the word ‘because’. See *ibid* 173-4.

<sup>62</sup> Queensland Law Reform Commission, above n 2, 42.

<sup>63</sup> See *ibid* 41 [166].

<sup>64</sup> *Ibid* 40 [164]. Currently, s 348(2)(f) provides that a person's consent is not freely and voluntarily given if it is obtained ‘by a mistaken belief induced by the accused person that the accused person was *the person’s sexual partner*.’ [Emphasis added]

<sup>65</sup> See Dyer, ‘Mistakes’, above n 10, 173.

<sup>66</sup> Queensland Law Reform Commission, above n 2, 51.

<sup>67</sup> *Ibid* 47 [196].

<sup>68</sup> See *Human Rights Act 2019* (Qld) s 53(2).

<sup>69</sup> David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66(1) *Cambridge Law Journal* 142, 150, 156, 171.

the reverse burden is less likely to be upheld.’<sup>70</sup> For example, in *R v Lambert*,<sup>71</sup> the House of Lords used the interpretative power for which s 3(1) of the *Human Rights Act 1998* (UK) provides, to ‘read and give effect to’ a reverse burden provision in ss 28(2) and (3) of the *Misuse of Drugs Act 1971* (UK) compatibly with Article 6(2). The relevant provisions, the Court held, merely required the accused to discharge an evidential burden before the jury could consider whether the Crown had disproved beyond reasonable doubt his/her claim that s/he did not believe, or suspect, or have reason to suspect that the substance in his/her possession was a controlled drug.<sup>72</sup> As Lord Steyn noted, if they had instead placed a persuasive burden on the accused, ‘there would be a far more drastic interference with the presumption of innocence.’<sup>73</sup> Even if left in doubt about the accused’s guilt, the jury would have convicted him/her,<sup>74</sup> thus exposing him or her to the prospect of imprisonment for life. A person who might be innocent should not be liable to such severe punishment.<sup>75</sup>

25. Three things must be noted. First, the offences for which ss 349 and 352 provides are very serious, stigmatic ones. Indeed, two of them are punishable by life imprisonment.<sup>76</sup> Secondly, when determining whether the right to be presumed innocent has been breached, it is of no moment that the reverse burden is imposed with respect to an excuse – such as that contained in s 24 of the Code – rather than an element of the offence. As Dickson CJ explained in the Canadian case of *R v Whyte*,<sup>77</sup> ‘[t]he real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists.’ That is, because the s 24 excuse ‘is one directly bearing on the moral blameworthiness of the accused’<sup>78</sup> – the person who engages in non-consensual sexual activity with another while honestly and reasonably believing that that other is consenting, is morally innocent – the presumption of innocence would be attacked if the state were to require the accused to prove this excuse.<sup>79</sup> Thirdly, the English courts’ views about the presumption are not eccentric. Various courts around the world have accepted that, the more serious and stigmatic the relevant offence is, the more likely it is that a reverse burden will be incompatible with human rights. As Dickson CJ said in *R v Oakes*,<sup>80</sup> a provision that exposed the accused to the possibility of life imprisonment unless s/he could prove on the balance of probabilities that s/he was not in possession of narcotics *for the purpose of trafficking*, was ‘radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse, and is directly contrary to the presumption of

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<sup>70</sup> Ibid 156.

<sup>71</sup> [2002] 2 AC 545.

<sup>72</sup> Ibid 563 [17] (Lord Slynn), 575 [42] (Lord Steyn), 590 [94] (Lord Hope), 609-610 [157] (Lord Clyde).

<sup>73</sup> Ibid 572 [37].

<sup>74</sup> Ibid.

<sup>75</sup> Likewise, in *Sheldrake v DPP* [2005] 1 AC 264, Lord Bingham (at 313 [51]), when holding that a reverse burden was incompatible with Article 6(2), attached significance to the fact that the terrorist offence at issue carried a maximum penalty of 10 years.

<sup>76</sup> *Criminal Code Act 1899* (Qld) ss 349(1) and 352(3).

<sup>77</sup> [1988] 2 SCR 3, 18. See also *Lambert* [2002] 2 AC 545, 570-1 [35] (Lord Steyn).

<sup>78</sup> *Lambert* [2002] 2 AC 545, 571 [35] (Lord Steyn).

<sup>79</sup> Ibid.

<sup>80</sup> [1986] 1 SCR 103, 135.

innocence enshrined in s 11(d) [of the *Canadian Charter of Rights and Freedoms*].’ The breach, his Lordship found, was not saved by s 1 of the *Charter*.<sup>81</sup> Similarly, in *Manamela v S*,<sup>82</sup> three judges of the Constitutional Court of South Africa indicated that, whatever justifications exist for reverse burdens for ‘regulatory offences’, such burdens become far more constitutionally suspect where ‘pure criminal offences’ are concerned. By majority, that Court read down a provision that required the accused to prove that s/he had reasonable cause to believe that stolen property that s/he had received was in fact the property of the person who gave it to him/her.<sup>83</sup>

26. As I argued in my preliminary submission,<sup>84</sup> it is curious that those responsible for proposals of this nature have asserted that such proposals are ‘progressive’ ones;<sup>85</sup> they are not. The *Human Rights Act* provides more objective guidance than these commentators do about what is, and is not, acceptable in a liberal democratic society; and in my respectful submission the Commission should take that Act’s claims and requirements seriously. Indeed, this debate provides a very good example of the worth of human rights guarantees: they rise above ‘transient notions’ that ‘emerge in reaction to a particular event *or are inspired by a publicity campaign conducted by an interest group*’,<sup>86</sup> subjecting such ideas to dispassionate, reasoned scrutiny. Once more: the Commission should not recommend that rape and sexual offences become offences of absolute liability. Such an arrangement would probably be incompatible with ss 17(b) and 29(2) of the *Human Rights Act* - and it might be incompatible with s 32(1) too.<sup>87</sup> It should not support provisions that make rapists of *everyone* who has non-consensual intercourse without first gaining a clear indication from his/her partner that s/he is consenting. Such provisions are just another way of turning rape and sexual assault into absolute liability offences.<sup>88</sup> And, for the reasons just given, it would be most unwise to reverse the onus of proof for mistake of fact in rape and/or sexual assault cases. It would also be draconian.
27. Next, the Commission asks whether there is a ‘need to amend or qualify the operation of the excuse of mistake of fact in section 24 or otherwise amend the Criminal Code to introduce

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<sup>81</sup> Ibid 142. Section 1 is the counterpart of *Human Rights Act 2019* (Qld) s 13(1), which provides that ‘[a] human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.’

<sup>82</sup> [2000] 5 LRC 65, [29] (Madala, Sachs and Yacoob JJ).

<sup>83</sup> Ibid [59].

<sup>84</sup> Dyer, ‘Submission’, above n 1, 3-4. See also Dyer, ‘Progressive Punitiveness’, above n 1.

<sup>85</sup> See, for example, Wendy Larcombe et al, ‘I Think It’s Rape and I Think He Would Be Found Not Guilty’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law’ (2016) 25(5) *Social and Legal Studies* 611, 624; Jonathan Crowe and Bri Lee, ‘About’, *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/about>>.

<sup>86</sup> *Dietrich v The Queen* (1992) 177 CLR 192, 319 (Brennan J). [Emphasis added]

<sup>87</sup> Dyer, ‘Submission’, above n 1, 43-50.

<sup>88</sup> The person who gives such a clear indication is consenting. If there is to be an acquittal only in such cases, it follows that all of those who commit the physical elements of rape – non-consensual sexual intercourse – will be convicted. Because an absolute liability offence is, by definition, one where all those who perform the physical elements are held liable (see *Wampfler v R* (1987) 11 NSWLR 541, 546), it follows that rape would be an absolute liability offence.

the concept of ‘recklessness’ with respect to the question of consent in rape and sexual assault.’<sup>89</sup> For the reasons that I gave in my preliminary submission,<sup>90</sup> there is clearly no need for the Code to specify that a rape or sexual assault accused is disentitled to rely on mistake of fact if he or she has been ‘reckless.’ As explained there, it is already crystal-clear that a ‘reckless’ accused could not possibly hope to raise mistake of fact successfully. How can an accused who realises that there is a real<sup>91</sup> possibility that the complainant is not consenting<sup>92</sup> have a positive belief<sup>93</sup> that s/he is? And how can an accused who has not even considered whether the complainant is consenting<sup>94</sup> have such a belief?

28. As to whether Parliament should otherwise ‘introduce the concept of recklessness’ into rape or sexual assault proceedings: the only (possible) effect of its doing so would be to excuse a greater number of those who have engaged in non-consensual sexual activity than is currently the case. At present, the accused who realises that there is a *bare* possibility of consent will be guilty of rape/sexual assault if in fact the complainant is not consenting. Such an accused lacks a *positive* reasonable belief in consent, and therefore cannot successfully raise mistake of fact.<sup>95</sup> For the same reason, the accused who does not consider the question of consent, in circumstances where the risk of non-consent would *not* have been obvious to a person of his/her mental capacity if he or she had turned his/her mind to this question, is guilty. All of this might change, however, if the *Criminal Code* were to state that, to be acquitted of rape or sexual assault, an accused who has engaged in the relevant prohibited conduct must either (i) not have been ‘reckless’ or (ii) have had an honest and reasonable belief in consent. For, in NSW – where the law does essentially state this<sup>96</sup> – the current position seems to be that neither the accused who realises that there is a negligible risk of non-consent, but proceeds anyway, nor the accused who fails to consider the question of consent in circumstances where the risk of its absence would *not* have been obvious to someone of his/her mental capacity if s/he had thought about this matter, is guilty of the offences to which s 61HE of the *Crimes Act 1900* (NSW) applies.<sup>97</sup> Such defendants are not very common. In my view, there are good reasons why, if they exist, they should not be held liable.<sup>98</sup> In other areas of the criminal law, the accused who proceeds with conduct despite a foreseen negligible risk is not seen as being culpable enough to warrant the imposition of

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<sup>89</sup> Queensland Law Reform Commission, above n 2, 57.

<sup>90</sup> Dyer, ‘Submission’, above n 1, 51.

<sup>91</sup> *R v Banditt* (2004) 151 A Crim R 215, 232 [92].

<sup>92</sup> This is the test for advertent recklessness: see, for example, *R v Mitton* (2002) 132 A Crim R 123, 129 [28].

<sup>93</sup> Only the accused who (as a reasonable possibility) has a positive belief in consent, can hope to raise mistake of fact successfully: see, for example, *G J Coles & Co Ltd v Goldsworthy* [1985] WAR 183, 188.

<sup>94</sup> An inadvertently reckless accused is the person who gives no thought to the question of consent in circumstances where the risk of non-consent would have been obvious to a person of his or her mental capacity had he or she bothered to think about this circumstance: *Mitton* (2002) 132 A Crim R 123, 129 [28].

<sup>95</sup> See n 93.

<sup>96</sup> *Crimes Act 1900* (NSW) s 61HE(3).

<sup>97</sup> See *R v Banditt* (2004) 151 A Crim R 215, 232 [92]; *Mitton* (2002) 132 A Crim R 123, 129 [28].

<sup>98</sup> I have presented an argument to this effect in Dyer, ‘The Mens Rea for Sexual Assault’, above n 34, 87-8.

liability for the crime that s/he has foreseen.<sup>99</sup> An accused with an intellectual disability who fails to consider the question of consent, in circumstances where the risk of its absence would *not* have been obvious to a person of his intellectual capacity if s/he had turned his/her mind to this question, would seem not to have acted culpably. S/he has reached the standard of care that it is reasonable to expect someone of his/her abilities to reach.<sup>100</sup> Nevertheless, it is necessary to note that the introduction of the concept of recklessness into rape and sexual assault trials would, if anything, favour the defence not the Crown.

29. Next, the Commission asks again about ‘steps’ and ‘reasonable steps’ provisions. I have said above all that I want to say about the latter.<sup>101</sup> I have also said above that there should be no provision that *requires* the defendant to have taken ‘steps’ before he or she can hope to rely successfully on mistake of fact.<sup>102</sup> But that is different from saying that the trier of fact at a rape or sexual assault trial should treat as a neutral consideration the accused’s failure to take, positive, steps to ascertain whether the complainant was consenting. As I have argued elsewhere,<sup>103</sup> the law should encourage people to communicate about consent. Relatedly, it should require judges to tell juries that an accused’s failure to take any physical or verbal steps to ascertain whether the complainant was consenting, should weigh against him or her when those juries consider whether his or her mistake of fact excuse should succeed. Because I adhere fully to those views, I continue<sup>104</sup> also to support the NSWLRC’s proposal that, in proceedings for particular sexual offences, the trier of fact, when assessing whether the accused had a guilty mental state, ‘must have regard to all the circumstances of the case, including whether the accused person said or did anything to ascertain if [sic: whether<sup>105</sup>] the other person consented to the relevant conduct, and if so, what the person said or did.’<sup>106</sup> A provision of this sort would not reverse the onus of proof.<sup>107</sup> The Crown would still need to prove the ultimate issue: that the accused lacked an honest and reasonable belief in consent. In determining whether the Crown had proved that issue, the trier of fact would merely *take into account* the accused’s failure, by word or gesture, to ensure that the complainant was consenting. It is submitted that such a failure is obviously relevant to the reasonableness of such an accused’s asserted belief.
30. I also adhere to the view, however, that if the law were to go further than this and require an accused to have asked the complainant whether s/he was consenting, before that accused could be excused, undesirable consequences would be liable to ensue. Take the accused with

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<sup>99</sup> *Miller v The Queen* (2016) 259 CLR 380, 402 [44]. See also *Irwin v The Queen* (2018) 262 CLR 626, 638 [28], 646 [50].

<sup>100</sup> See in this regard *R v G* [2004] 1 AC 1034, though the defendants in that case did not have intellectual disabilities, but instead were children.

<sup>101</sup> See [13]-[14].

<sup>102</sup> See [15]. Cf. Queensland Law Reform Commission, above n 2, 61.

<sup>103</sup> 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(2) *Criminal Law Journal* 78, 97-9; Dyer, ‘Yes! To Communication’, above n 34, 9-10.

<sup>104</sup> See Dyer, ‘Submission’, above n 1, 57.

<sup>105</sup> Jeremy Butterfield (ed), *Fowler’s Dictionary of Modern English Usage* (OUP, 2015) 394.

<sup>106</sup> NSW Law Reform Commission, above n 9, 21.

<sup>107</sup> See Queensland Law Reform Commission, above n 2, 62.

an intellectual disability,<sup>108</sup> a mental illness<sup>109</sup> or cognitive impairment<sup>110</sup> – or who is youthful or inexperienced. If such a person is caused by his/her youth, inexperience or disability wrongly to believe that the complainant *has* communicated her/his consent, he or she has not acted culpably. Accordingly, his/her failure actually to ask the complainant whether s/he was consenting should not automatically result in a conviction for a very serious offence.

31. The Commission then asks about voluntary intoxication.<sup>111</sup> Should the *Criminal Code* take the mistake of fact excuse away from the accused who only believes in consent due to his or her self-induced intoxication? I continue to have no objection to a provision that has this effect, though I also continue to doubt whether it is necessary.<sup>112</sup>

### **The questions in chapter 5 of the Commission’s Report**

32. The Commission asks whether there is a ‘need’ to amend the *Criminal Code* to introduce a statement of ‘objectives’ or ‘guiding principles’ to which course should have regard when interpreting provisions relating to the offences in Chapter 32 of the Code.<sup>113</sup> I doubt very much whether there is a need for this. For example, if Parliament were to insert into the Code a ‘steps’ provision of the type that I support,<sup>114</sup> it is pretty clear what such a provision means. Judges would not need an interpretative provision stating that ‘sexual activity should involve ongoing and mutual communication, decision and free and voluntary agreement’,<sup>115</sup> before they could work out what such a provision requires them to tell juries.
33. With that having been said, I have previously expressed my support for a statement of guiding principles,<sup>116</sup> and I adhere to this view, mainly because the relevant principles<sup>117</sup> are unobjectionable – though, in my view, this last conclusion does depend upon the presence of the word ‘should’ (as opposed to ‘must’) in principle (c).<sup>118</sup> Because these principles are merely designed to assist judges to interpret the legislation (whether or not they actually would assist them), I am not sure that they will additionally ‘influence directions given by judges to a jury.’<sup>119</sup> But I do agree that it is important that judges refrain from suggesting to juries that an accused person’s failure to ask the complainant whether s/he is consenting is anything more than *relevant* to whether that accused believed on reasonable grounds in the existence of consent. Because of the non-mandatory language in principle (c), I doubt

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<sup>108</sup> See, for example, *R v Mrzljak* [2005] 1 Qd R 307; *Butler v Western Australia* [2013] WASCA 242.

<sup>109</sup> See, for example, *R v Dunrobin* [2008] QCA 116.

<sup>110</sup> See *R v B* [2013] 1 Cr App R 481, 492 [41].

<sup>111</sup> Queensland Law Reform Commission, above n 2, 65.

<sup>112</sup> See Dyer, ‘Submission’, above n 1, 48.

<sup>113</sup> Queensland Law Reform Commission, above n 2, 72.

<sup>114</sup> See [29].

<sup>115</sup> Queensland Law Reform Commission, above n 2, 72 [282].

<sup>116</sup> Dyer, ‘Submission about the New South Wales Law Reform Commission’s Draft Proposals Concerning Consent in Relation to Sexual Offences’, above n 28,

<sup>117</sup> See Queensland Law Reform Commission, above n 2, 72 [282].

<sup>118</sup> See *ibid.*

<sup>119</sup> *Ibid* 72 [283].

whether it could lead to this result. In the unlikely event that it did, the judge would be in error and matter could be dealt with on appeal.

34. The Commission then asks<sup>120</sup> about whether courts should be able to receive expert evidence about ‘the typical reactions of adults or children who have been sexually assaulted.’<sup>121</sup> The competing considerations seem to be fairly finely poised;<sup>122</sup> but on this question I will defer to the views of people who have greater knowledge about the topic than I do.
35. Finally, it seems that there is still ignorance in some parts of the community about rape and sexual assault,<sup>123</sup> so I support public education programmes of the type to which the Commission refers.<sup>124</sup>

### **Conclusion**

36. In my submission, then, Parliament should make certain changes to Queensland law concerning consent and mistake of fact in rape and sexual assault proceedings. But the changes must be sensible, realistic and moderate. Proposals that, if they were enacted, would breach human rights, are emphatically neither of these things. Therefore, the Commission should reject them – and so should Parliament.

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<sup>120</sup> Ibid 76.

<sup>121</sup> Ibid 73 [287].

<sup>122</sup> Ibid 74-5 [291]-[292].

<sup>123</sup> See ibid 69 [272].

<sup>124</sup> Ibid 77.