Submission to the Queensland Women's Safety and Justice Taskforce: Mistake of Fact Excuse in Queensland Rape and Sexual Assault Law

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13 December 2021

SUBMISSION TO WOMEN'S SAFETY AND JUSTICE TASKFORCE

MISTAKE OF FACT EXCUSE IN QUEENSLAND RAPE AND SEXUAL ASSAULT LAW

[1] This submission is authored by **Professor Jonathan Crowe**, **Dr Rachael Burgin, Ms Bri Lee** and **Ms Saxon Mullins** on behalf of **Rape and Sexual Assault Research and Advocacy (RASARA).** It is endorsed by RASARA's Board of Directors. Professor Crowe is Professor of Law at Bond University and Director of Research at RASARA. Dr Burgin is Lecturer in Law at Swinburne University of Technology and Executive Director of RASARA. Ms Lee is a PhD Candidate in Law at the University of Sydney. Ms Mullins is Director of Advocacy at RASARA.

[2] RASARA is an independent, not-for-profit organisation established to develop an evidence base for addressing sexual violence across Australia and to advocate for best practice in community and legal responses to rape and sexual assault. RASARA's mission is to produce and amplify research that drives reform to the laws and systems that help prevent and respond to sexual violence. More information about RASARA is available at http://rasara.org.

[3] Professor Crowe and Ms Lee have conducted a comprehensive survey of all the recent (post-1990) Queensland appeal decisions dealing with the mistake of fact excuse in rape and sexual assault cases. This is the most detailed research on the mistake of fact excuse in rape and sexual assault law ever conducted in Australia and, to our knowledge, the world. Their analysis of these cases formed the basis for a report submitted to the Attorney-General and Minister for Women in March 2019. The research was subsequently blind peer reviewed and published in the *University of Queensland Law Journal*.

[4] Professor Crowe and Ms Lee's research formed the basis for submissions to the Queensland Law Reform Commission's Review of Consent Laws and the Excuse of Mistake of Fact. The QLRC's Report was published in June 2020. The Report failed to recommend any substantive changes to the current law. It was widely criticised for

effectively denying the role of rape myths in Queensland rape trials. This rape myth denialism has since been contradicted by reports issued by the New South Wales and Victorian Law Reform Commissions.

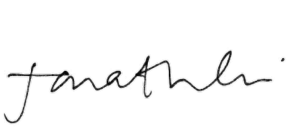
[5] Queensland rape and sexual assault law remains in urgent need of reform to address problems with the application of the mistake of fact excuse documented by Professor Crowe and Ms Lee. New South Wales has responded to similar problems in that jurisdiction by enacting legislative amendments in November 2021. Victoria has indicated an intention to enact similar reforms. This contrasts markedly with the Queensland government's decision to endorse the QLRC Report and enact legislation making purely technical changes.

[6] It is our submission that Queensland should enact similar reforms to sexual consent law to those recently adopted in New South Wales. This is necessary to address the problems in the current law raised previously by Professor Crowe and Ms Lee. Recent developments in other states shows that Queensland is increasingly out of step on this issue. The Queensland law is currently letting down survivors of sexual violence. Survivors in Queensland are receiving second rate justice compared to those in other states that have acted on this issue.

[7] We attach to this submission Professor Crowe and Ms Lee's peer reviewed article in the *University of Queensland Law Journal* that documents the problems with the current law. The Queensland legal position has not changed significantly since this article was written. We also attach an article by Professor Crowe published on *The Conversation* website in August 2020 explaining why the Queensland legislative changes do nothing to address the serious problems with the current law on mistake of fact in relation to sexual offences.

[8] We ask the Taskforce to consider the need for further legislative reforms in this area in issuing its report on women's experiences of the criminal justice system. We are prepared to meet with the Taskforce to discuss this issue further. We would be happy to share our perspectives on the recent law reform process in New South Wales and how these might inform Queensland approaches, as well as providing further details on this research informing this submission.

Yours faithfully,



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The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform

Jonathan Crowe* and Bri Lee†

This article considers the role of the excuse of mistake of fact in Queensland rape and sexual assault law. We argue that the excuse has undesirable and socially regressive consequences by allowing reference to factors such as the complainant's social behaviour, relationship to the defendant or lack of overt resistance that are at odds with the definition of free and voluntary consent. The excuse has also led to problematic results in cases involving impaired capacity (such as intoxication, mental incapacity or linguistic incapacity) by the defendant or the complainant. We canvass two potential reforms aimed at addressing these issues. The first would render the excuse inapplicable to the issue of consent in rape and sexual assault cases, while the second would limit the excuse to address its most troubling outcomes.

I Introduction

The crime of rape is defined in Queensland (as it is throughout Australia) as sexual intercourse without free and voluntary consent.[1] The notion of free and voluntary consent is further clarified by the inclusion of a list of factors that will render consent not freely and voluntarily given, such as threats, intimidation and fraud.[2] The original list of vitiating factors included by Sir Samuel Griffith in the Queensland *Criminal Code* was highly progressive by world standards. Subsequent amendments have focused on refining and broadening these factors in response

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1 *Criminal Code 1899* (Qld) ss 348(1), 349. Cf *Crimes Act 1900* (NSW) ss 61I, 61HA; *Crimes Act 1958* (Vic) ss 34C, 38; *Criminal Code 1902* (WA) ss 319(2), 325; *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 48; *Criminal Code Act 1924* (Tas) ss 2A, 185; *Criminal Code Act 1983* (NT) s 192; *Crimes Act 1900* (ACT) ss 54, 67(1).

2 *Criminal Code 1899* (Qld) s 348(2).

to specific problematic cases.[3] Much depends in practice on how the notion of consent and the associated vitiating factors are interpreted by the courts, including both judges and juries. The Queensland Court of Appeal has tended to construe the vitiating factors relatively broadly by comparison to other Australian (as well as international) jurisdictions.[4]

The notion of consent in rape law has long been the site of fraught legal, social and academic discussions. Scholars have long argued, for example, that consent should not be assumed where the complainant is silent, intoxicated, unconscious or does not physically resist the defendant's advances.[5] Australian rape law now clearly reflects the notion that passive non-resistance by a complainant does not equate to consent, particularly in the presence of vitiating factors such as threats or intimidation.[6] A complainant's consent likewise cannot automatically be inferred from unrelated social behaviour, such as her clothes, level of intoxication or willingness to accompany the defendant to a private location. The Australian appellate courts have been willing to take a holistic view of the circumstances of the case in identifying the role of coercive factors inducing consent, although problems certainly remain.[7]

A further feature of the Queensland legal framework relevant to the notion of consent in rape law is the excuse of mistake of fact under s 24 of the *Criminal Code*.[8] Section 24(1) provides:

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

The relevance of s 24 in rape and sexual assault trials typically arises in relation to the defendant's mistaken belief that the complainant consented. The availability of the excuse leaves it open to the defendant to offer two concurrent

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3 An overhaul of the definition of consent in 2000 addressed issues highlighted by the Queensland case of *R v Pryor* [2001] QCA 341 ('*Pryor*') and the Victorian case of *R v Mobilio* [1991] VR 339. See *Criminal Law Amendment Act 2000* (Qld) s 24; Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (Office of Women's Policy, 2000).

4 For discussion, see Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21.

5 See, eg, Nils Christie, 'The Ideal Victim' in E Fattah (ed), *From Crime Policy to Victim Policy* (Oxford University Press, 1986); Susan Estrich, *Real Rape* (Harvard University Press, 1988); Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8(2) *Law and Philosophy* 217.

6 For an overview of the Australian legislation and case law in this area, see Jonathan Crowe and Lara Sveinsson, 'Intimidation, Consent and the Role of Holistic Judgments in Australian Rape Law' (2017) 42(1) *University of Western Australia Law Review* 136.

7 Ibid. See also Crowe (n 4); Jonathan Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38(4) *Criminal Law Journal* 236.

8 *Criminal Code 1899* (Qld) s 24.

case theories: first, the complainant consented; and, second, if she did not, then the defendant mistakenly believed that she did.[9] The former line of argument raises the question of whether any consent was freely and voluntarily given. The second, by contrast, shifts the focus to the question of what the defendant believed and whether any mistake was honest and reasonable.

This article is based on a comprehensive survey of all the recent Queensland appellate cases to consider the application of the mistake of fact excuse in the context of the offence of rape. The cases were identified by searching the Queensland reported cases in the Westlaw database for references to ss 24, 348, 349 and 352 of the *Criminal Code*, and using keywords such as 'rape', 'sexual assault' and 'mistake'. The search was limited to cases decided after 1990, both to make the sample size manageable and to give an accurate picture of current judicial approaches. The present article focuses on those cases that illustrate the interaction between the mistake of fact excuse and the definition of consent in Queensland rape law. Cases that raise the excuse without casting light on this issue were omitted. We have also omitted a significant body of cases involving multiple counts where an appeal was raised based on inconsistent jury verdicts.[10] Some cases falling into this category are discussed below where they also feature instructive commentary on the issue of consent.[11] However, cases involving multiple charges and apparently inconsistent verdicts raise complex legal and procedural issues that we have not attempted to cover in detail here. The specific challenges raised by multiple counts in relation to the mistake of fact excuse in rape and sexual assault cases could fruitfully form the basis for future research.

Two limitations of the research project should be acknowledged at the outset. The first is that our survey is limited to appellate case law. Appellate cases can provide a useful window into the kinds of issues being raised at trial and the jury directions and verdicts that follow. However, they do not necessarily offer a representative sample of cases at the trial level. The focus on appellate case law also adds a layer of issues about appellate procedure that can complicate the

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9 This article uses the feminine pronoun when referring to complainants in sexual offences and the masculine pronoun when referring to defendants. This reflects the fact that 84 per cent of reported sexual assaults in Australia are committed against women, while men make up 99 per cent of offenders: Australian Institute of Criminology, *Australian Crime: Facts and Figures 2007* (2008) 27; Australian Institute of Criminology, *Australian Crime: Facts and Figures 2001* (2002) 64. However, the crimes of rape and sexual assault in Queensland are defined in gender-neutral terms: *Criminal Code 1899* (Qld) ss 349, 352. It is important to acknowledge that men can be complainants in these offences and, as such, may also be affected by the issues canvassed in this article. Women can also be perpetrators, although this is uncommon. An example is *R v O'Loughlin* [2011] QCA 123 ('*O'Loughlin*'), discussed below Part III(A).

10 See, eg, *R v Lennox* [2018] QCA 311 ('*Lennox*'); *R v Peggie* [2017] QCA 93; *R v Lorraway* [2007] QCA 142; *R v Johnston* [2013] QCA 171; *R v Douglas* [2014] QCA 187.

11 See, eg, *R v Motlop* [2013] QCA 301 ('*Motlop*'); *Phillips v The Queen* [2009] QCA 57 ('*Phillips*').

substantive legal analysis. The second limitation of our study is that we have only looked at Queensland cases. We have adopted this emphasis in order to undertake a deep and wide assessment of the case law in that state and contribute to current discussions around law reform. We have not attempted to survey cases in other comparable jurisdictions, even where they raise similar issues.[12] A comparative analysis of this type could help illuminate the problems that mistake of fact raises and show how potential reforms might operate. However, such a comparison is outside the scope of the present article.

Our research shows that the application of the mistake of fact excuse in Queensland rape law has a number of undesirable and socially regressive consequences. The main concern, which we address in the first part of this article, is that the excuse effectively undermines the way that Queensland law construes the notion of free and voluntary consent. Consent cannot be established, as we noted above, by the complainant's social behaviour, relationship to the defendant or lack of overt resistance. However, all these factors have been found by the Court of Appeal to be potentially important in cases where the mistake of fact excuse is enlivened. The efforts of the Queensland courts to appropriately define the notion of consent by excluding prejudicial or irrelevant social or contextual factors, in other words, are undermined by the defendant's ability to cite those factors as inducing or rationalising his mistaken belief as to consent.

The article then considers several more specific concerns raised by the mistake of fact excuse in rape and sexual assault trials. We argue that the excuse has led to problematic results when applied to cases involving impaired capacity — such as intoxication, mental incapacity or linguistic incapacity — by either the defendant or the complainant. The intoxication, mental incapacity or linguistic incapacity of the defendant or the complainant cannot establish consent; indeed, it may properly support a lack of consent where it affects the complainant's capacity or shows that the defendant failed to comprehend verbal or behavioural cues. The Queensland courts, however, have considered these factors to be relevant in establishing the mistake of fact excuse, even where evidence exists that the defendant exploited the complainant's vulnerability. Paradoxically, intoxication on the part of both the defendant and the complainant has been held to support the excuse — even though the complainant's intoxication may also indicate lack of capacity to consent to sexual activity.

We conclude the article by discussing two possible avenues for reform. The first would render the mistake of fact excuse inapplicable to the issue of consent

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[12] The discussion in this article is most relevant to code-based Australian jurisdictions, such as Queensland, Western Australia and Tasmania, although related issues arise in common-law jurisdictions in relation to the *mens rea* element of sexual offences. Western Australia currently has the same approach to the mistake of fact excuse as Queensland, while Tasmania also uses the excuse, but with modifications: *Criminal Code 1913* (WA) s 24; *Criminal Code Act 1924* (Tas) ss 14, 14A. Some of the alternative models found in other comparable jurisdictions are discussed below Part IV.

in rape and sexual assault cases. This change would avoid serious injustices occasioned by the current law, without compromising the defendant's right to a presumption of innocence or a fair trial. However, it is admittedly a strong reform that has not been adopted elsewhere in Australia. We therefore also consider an alternative reform that may be more achievable. This involves inserting a new s 24A into the Queensland *Criminal Code* to qualify the application of the excuse in rape and sexual assault proceedings. Specifically, the provision would limit the excuse in cases where the defendant was reckless as to consent or did not take reasonable and positive steps to find out whether the complainant was consenting, as well as cases involving self-induced intoxication of the defendant or intoxication or incapacity of the complainant. This is a moderate and achievable change that would address the most troubling features of the excuse detailed throughout this article.

II Mistake of Fact and Consent

The potential for the mistake of fact excuse to lead to problematic consequences for the way the Queensland courts construe consent in rape and sexual assault trials is best illustrated by some case studies. As noted previously, the Queensland appellate courts have taken a relatively progressive view of the circumstances in which consent to sexual intercourse may be vitiated by factors such as threats, intimidation or fraud. Consent may be overridden by factors such as verbal threats,[13] non-verbal intimidation,[14] unfamiliar or threatening environments,[15] tacit impersonation of the complainant's usual sexual partner,[16] false promises of payment or benefits,[17] and past violent or threatening behaviour.[18] It is not necessary, where these factors are present, for the prosecution to show that the complainant physically resisted the defendant's advances or expressed her lack of consent by words or action.

The recognition that passive non-resistance by a complainant is not tantamount to consent is an important and hard-won feature of the current Queensland law. There are several reasons why a complainant may not resist or express lack of consent even though she is unwilling. First, she may be afraid to do so due to the express or implicit threat of physical violence. Second, she may

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13 *R v PS Shaw* [1995] 2 Qd R 97.
14 *R v IA Shaw* [1996] 1 Qd R 641 ('*IA Shaw*'); *R v Cutts* [2005] QCA 306 ('*Cutts*').
15 *R v R* [2001] QCA 121; *R v Kovacs* [2007] QCA 143 ('*Kovacs*').
16 *Pryor* (n 3).
17 *R v Winchester* [2011] QCA 374.
18 *R v Parsons* [2000] QCA 136.

be affected by the 'freezing response' (or 'tonic immobility', to use the technical psychological term) that is a common psychological reaction to aggression or trauma.[19] Third, she may be inclined to pacify ('tend and befriend') the aggressor, rather than confronting him directly (due to both natural hormonal reactions and learned social conditioning).[20] Fourth, she may rationally judge that it is preferable to 'get it over with', rather than risk escalating or prolonging the encounter. Many cases will feature a combination of these factors. None of them equates to consent. Traditional common-law requirements that women resist sexual assault physically or by clear words are therefore unrealistic and inappropriate, as the current Queensland law recognises.

The current Queensland law has also gone some way towards overcoming regressive and entrenched social attitudes towards sexual consent captured by the notions of 'rape myths' and the 'ideal victim'.[21] Rape law in many jurisdictions has long been influenced by harmful myths such as the idea that most rapes are committed by strangers, 'no' sometimes means 'yes', or that women are responsible for being raped if they dress provocatively, drink alcohol, engage in flirtatious conduct, or accompany the assailant to a private location. These pernicious myths feed into the social construct of the ideal victim as a chaste, modest woman who is raped violently by a stranger in a public place. However, recent data from the Australian Bureau of Statistics confirms that women are most at risk of being sexually victimised in a residential location, by someone known to them, 'without the use of a weapon', and rarely with corresponding physical injuries.[22] As mentioned above, Queensland rape law now recognises that rape can be committed in private by someone known to the complainant, and that consent cannot automatically be inferred from the complainant's dress, level of intoxication, sexual history or lack of overt resistance. These are, as we have said, hard-won and important features of the current legal framework, although more

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19 See, eg, SD Suarez and GG Gallup, 'Tonic Immobility as a Response to Rape in Humans: A Theoretical Note' (1979) 29(3) *Psychological Record* 315; GC Mezey and PJ Taylor, 'Psychological Reactions of Women Who Have Been Raped: A Descriptive and Comparative Study' (1988) 152(3) *British Journal of Psychiatry* 330; G Galliano et al, 'Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates' (1993) 8(1) *Journal of Interpersonal Violence* 109.

20 See, eg, SE Taylor et al, 'Biobehavioral Responses to Stress in Females: Tend-and-Befriend, Not Fight-or-Flight' (2000) 107(3) *Psychological Review* 411; SE Taylor et al, 'Sex Differences in Biobehavioral Responses to Threat: Reply to Geary and Flinn' (2002) 109(4) *Psychological Review* 751.

21 Christie (n 5); Pineau (n 5) 225–9. For a recent Australian discussion, see Anastasia Powell et al, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456.

22 Australian Bureau of Statistics, 'Reports of Sexual Assault Reach Six-Year High' (Media Release, 13 July 2016) <https://tinyurl.com/ybwm8sf7>.

work remains to be done in eradicating rape myths from both law and popular culture.[23]

The mistake of fact excuse, however, effectively provides a back-door way for factors such as the complainant's lack of overt resistance, level of intoxication, dress, prior behaviour and relationship to the defendant to be presented as supporting acquittal. This problematic consequence is illustrated by a number of reported cases in Queensland and elsewhere.[24] We will focus for present purposes on several Queensland case studies that illustrate the concerns raised in this Part. The first is the case of *R v Cutts* ('*Cutts*').[25] The complainant in that case had cerebral palsy and was confined to a wheelchair. The defendant was a taxi driver who was employed to drive her home. Once they arrived at the complainant's home, the defendant entered the flat against the complainant's wishes. She said 'no' to his sexual advances, but he persisted. She ultimately followed his instructions because (on her testimony) he refused to leave and she was afraid. The defendant appealed his conviction on the basis that mistake of fact should have been put to the jury. The contention was that the complainant's actions in following the defendant's instructions, despite her clear initial refusal, could give rise to a reasonable and mistaken belief that she was consenting (although, on the evidence, she was not). The Court of Appeal rejected this submission by a 2:1 majority, although Jerrard JA dissented and would have allowed the appeal. The case therefore shows that the acts of a complainant who complies through fear and intimidation may potentially be used as a basis for arguing that a mistake of fact occurred.

A second illustrative case is *R v Motlop* ('*Motlop*').[26] The defendant in that case violently assaulted the complainant with a knife because he thought she was cheating on him due to messages on her mobile phone. He threatened to kill her and chopped her hand with the knife, drawing blood. He then beat her with a stick and a chair, bending the legs of the chair in the process. The defendant instructed the complainant to take a shower to wash off the blood, which she did. When she emerged from the shower, he took the knife and stabbed her phone, shattering it. He then punched her three times in the head. After these violent assaults, the defendant had sex with the complainant multiple times. She passively complied, while expressing her reluctance and confusion as to why he would want to do so after assaulting her, and communicating that she was in pain. In between the incidents, she said she loved him. She testified that she did so because 'she was

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23 For empirical evidence, see Powell et al (n 21).

24 For a recent well-publicised New South Wales case that prompted a review of consent laws in that state, see *R v Lazarus* [2017] NSWCCA 279 ('*Lazarus*').

25 *Cutts* (n 14).

26 *Motlop* (n 11).

scared and "it was my way of survival"'.[27] The Court of Appeal held that the complainant's expression of love could provide 'a rational basis' for the jury to conclude that the defendant had a mistaken and reasonable belief in consent.[28]

It is important to recognise that the appeal in *Motlop* arose because the jury had convicted the defendant of one rape and acquitted him of another, even though the two incidents were only minutes apart. The defendant alleged that the two verdicts were inconsistent. The Court of Appeal's finding that the acquittal on the second charge had a rational basis therefore had the effect of upholding the conviction on the first charge. Nonetheless, both the jury's verdict and the Court of Appeal's analysis illustrate the potentially troubling implications of the mistake of fact excuse when applied to such scenarios. Specifically, *Motlop*, like *Cutts*, shows how a relatively minor aspect of a complex scenario, combined with passive non-resistance, can be used to rely on the mistake of fact excuse. The excuse was apparently not negatived by the serious and sustained violence that was previously inflicted on the complainant.

The case of *Phillips v The Queen* ('*Phillips*')[29] provides another example of how mistake of fact can be relied upon despite clear evidence of coercion. The 13-year-old complainant in that case was asleep in bed when the defendant, a 21-year-old man staying overnight in her house, entered her room, climbed on top of her, and penetrated her while she tried to push him off. Similar events occurred on three other occasions, resulting in four charges in total. The first and third counts involved evidence of physical resistance by the complainant, while the second and fourth incidents involved passive compliance, although she was not consenting. The defendant was charged with rape and unlawful carnal knowledge as alternatives (since the complainant was under the legal age of consent). The jury convicted the appellant of rape on the fourth count, but convicted him only of unlawful carnal knowledge on the first and third counts. The second count resulted in an acquittal. It is difficult to see how the jury could have reached that conclusion, given that the first and third counts involved active resistance. The Court of Appeal considered that the jury must have thought either that the complainant was consenting to the first and third counts or that the appellant mistakenly believed she was consenting within the meaning of s 24. However, since the evidence of resistance was greater on those counts than on count four, the latter verdict was considered unreasonable. The Court therefore substituted a verdict of unlawful carnal knowledge on the fourth count as well.

It is, of course, legally impossible for a 13-year-old girl to consent to sexual intercourse,[30] but the use of rape and unlawful carnal knowledge as alternative

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27 Ibid [18].
28 Ibid [54].
29 *Phillips* (n 11).
30 *Criminal Code 1899* (Qld) s 215.

charges obliges the jury to distinguish between sex that is non-consensual due to the complainant's age and sex that is non-consensual for other reasons. The evidence was that, on two occasions, the complainant tried to push the defendant off her and on two occasions she was passive and did not resist. The fact that the complainant did not resist does not, in itself, establish consent, particularly given the circumstances of the encounters. However, her level of resistance ended up being central to the Court of Appeal's reasoning. Ironically, it was because the Court of Appeal thought she must have been less likely to have been consenting where she resisted (contrary to the jury's verdict) that it substituted a verdict of unlawful carnal knowledge where she did not resist. The availability of s 24 therefore seems to turn substantially on the question of whether the complainant struggled.[31] When a 21-year-old man climbs on top of a 13-year-old girl in her bed and penetrates her without invitation or encouragement, it does not matter legally whether she struggles or not. However, even if a lack of vigorous physical resistance does not establish consent, the reasoning in *Phillips* shows that it may be relevant to the mistake of fact excuse.

The case of *R v Dunrobin* ('*Dunrobin*')[32] provides a further illustration of the potential for passive compliance by the complainant following initial resistance to provide a basis for arguing mistake of fact. The complainant was asleep in the house of a friend of the defendant. She awoke to find the defendant lying next to her. He asked her for sexual intercourse, but she refused. He then climbed on top of her and groped her breasts, while she repeatedly told him to stop and attempted to physically push him off. He proceeded to pull off her jeans and have intercourse with her. The complainant testified that although she continued to tell him to stop, she 'froze in a way', because she was scared.[33] She also realised the hopelessness of the situation, because she had been molested as a child.[34] The Court of Appeal upheld the defendant's appeal against his conviction on the basis that the jury had been improperly directed on the issue of mistake of fact. The Court took the view that the fact that the defendant had paranoid schizophrenia, meaning that he had difficulty interpreting the actions of others, 'was relevant to the appreciation of what, on his part, constituted a reasonable belief'.[35] Fryberg J

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31 Holmes J, with whom the other judges agreed, clearly recognises the complainant's degree of resistance as the main factor in determining the applicability of the mistake of fact excuse in her comment that '[n]othing in the evidence explains why the jury, at the least, considered that the Crown had not ruled out mistaken belief in consent in relation to counts 1 and 3, despite K's evidence of having offered physical resistance to the appellant, yet convicted of rape on count 4, in which there was no equivalent evidence of any resistance': Phillips (n 11) [31].

32 [2008] QCA 116 ('*Dunrobin*').

33 Ibid [5]. Compare the studies on the 'freezing response' (n 19).

34 *Dunrobin* (n 32) [5].

35 Ibid [45].

specifically held that any 'expressions of negativity and physical resistance' should be mentioned by the trial judge when directing the jury on s 24,[36] indicating that verbal and physical resistance, if established on the evidence, will not necessarily rule out the excuse, although they will be relevant in assessing its applicability.

The cases considered above show how survival responses or coping mechanisms by the complainant can potentially be interpreted in such a way as to found an argument based on mistake of fact. *R v Kovacs* ('*Kovacs*')[37] provides another relevant example. The complainant in that case was a Philippine national. She travelled from the Philippines to Weipa to work in a takeaway shop run by the defendant and his wife, also a Philippine national and a relation of the complainant. The complainant was in Australia illegally. She knew little English, had no independent means of support, and was living with the complainant and his wife. As soon as the complainant arrived in the country, the appellant began to sexually molest her. This continued over several months. He sometimes gave her money afterwards, which she accepted due to her vulnerable position and dependence on him for her livelihood. The defendant was convicted of rape, but this was overturned due to deficiencies in the trial judge's instructions to the jury.[38] The Court held that it was open to the jury on the facts to find that the defendant formed a reasonable but mistaken belief that the complainant agreed to have sex for payment.[39] This was despite evidence that the complainant had resisted the appellant's advances both verbally and by conduct,[40] as well as the significant power imbalance between the parties, which appeared to have been deliberately orchestrated by the defendant.[41]

The case of *R v Wilson*[42] set a strong precedent on the importance of the subjective requirement of the test of mistake of fact, despite being for a driving offence and not a sexual one. McMurdo P stated that '[t]he belief must be both subjectively honest and objectively reasonable but it is the accused person's belief

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36 Ibid [69].

37 *Kovacs* (n 15).

38 The instructions that led to the appeal being upheld related to how the jury should deal with evidence of lies by the defendant, and whether there was any evidence that the complainant consented to sex for payment. The latter issue was potentially relevant to mistake of fact: ibid [25]. The trial judge's direction on mistake of fact itself, although also found to be deficient, did not result in a successful appeal, as the error was favourable to the defendant: ibid [18].

39 Ibid [9] (McMurdo P and Holmes JA).

40 Ibid [3].

41 The facts in this case formed part of a wider pattern of predatory behaviour on the part of the appellant. See *R v Kovacs* [2007] QCA 441.

42 [2008] QCA 349.

which is of central relevance.'[43] This passage was then cited in *R v Rope* ('*Rope*'),[44] an appeal against guilty verdicts for sexual offences, where convictions were overturned and a new trial was ordered. Chesterman JA (with whom the other two members of the bench agreed) made the following comment about specific factors arising on the evidence that may have led a jury to believe that s 24 applied had they been properly directed:

> In particular the absence of objection, verbal or physical; the proximate potential assistance of a male friend who was not called on; and the lack of actual or threatened violence against the complainant which might have explained subjection on her part make it possible that the appellant did believe there was consent.[45]

This passage constitutes clear acknowledgement that factors that the Queensland law properly declines to treat as establishing consent — the absence of overt objection or resistance, failure to alert bystanders and the lack of violence by the assailant — are relevant to the mistake of fact excuse. This statement therefore illustrates how the excuse allows rape myths and constructions of the ideal victim to reassert themselves in the law. These factors were considered probative in *Rope* despite other clear evidence of lack of consent — in particular, the complainant gave evidence that when the defendant said, 'You want me', she replied, 'I don't think so.'

The reasoning in the recent Court of Appeal case of *R v Makary* ('*Makary*')[46] might appear at first glance to remedy some of the problems raised in this section, but it is doubtful whether it does so. The case involved a serial predator who drugged and raped several young Korean women who had recently arrived in Australia. The defendant was charged with three such offences; while on bail, he committed a fourth offence.[47] Defence counsel submitted both at trial and on appeal that the mistake of fact excuse was raised on the facts.[48] Richards DCJ at trial declined to direct the jury on the excuse. The Court of Appeal unanimously held that her Honour was correct to do so. The judgment of Sofronoff P, with whom Bond J agreed, advanced a novel view of the application of the mistake of fact excuse to the offence of rape. His Honour reasoned that the definition of consent in s 348 of the *Criminal Code* has two elements: first, there must be consent as a state of mind and, second, consent must be 'given'.[49] It follows that

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43 Ibid [20].
44 [2010] QCA 194, [48].
45 Ibid [57]. Compare *IA Shaw* (n 14) 646.
46 *R v Makary* [2018] QCA 258 ('*Makary*').
47 Ibid [76]–[77].
48 Ibid [28]–[31].
49 Ibid [49].

s 24 will arise in relation to consent only where there is evidence that the defendant believed *both* that the complainant was consenting *and* that consent was 'given'.[50]

The view articulated by Sofronoff P could alleviate some (although not all) of the difficulties raised above if it were understood as requiring evidence of active enquiries into consent by the defendant or positive expressions of consent by the complainant. However, Sofronoff P does not present the requirement in that way. His Honour makes it clear that consent can be 'given' by omission or implied from previous conduct:

> The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, *a representation might also be made by remaining silent and doing nothing.* Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, *evaluated against a pattern of past behaviour.*[51]

Furthermore, evidence that the defendant believed consent was 'given' need not involve any positive act by the defendant or the complainant. Rather, 'an omission to act' by the complainant may provide a factual basis for invoking s 24:

> [T]hat will require some evidence of acts *(or, in particular circumstances, an omission to act)* by a complainant that led the defendant to believe that the complainant had a particular state of mind consisting of a willingness to engage in the act and believed also that that state of mind had been communicated to the defendant, that is, that consent had been 'given'.[52]

The steps the Queensland law has taken to eradicate rape myths from the law of consent — such as the idea that lack of consent must be clearly and actively expressed by either words or physical resistance — are significantly undermined if similar assumptions can be introduced through the mistake of fact excuse. The above cases illustrate how this occurs. A lack of robust and sustained resistance by the complainant can provide the basis for the defence to argue a mistaken and reasonable belief in consent. Even if the complainant did resist, other factors (such as subsequent passivity or the exchange of money) can support the excuse. This line of reasoning has, furthermore, been approved by the Court of Appeal, even where there is a clear power imbalance between the parties. The cases discussed above therefore show how rape myths and social expectations around sexuality influence the application of the mistake of fact excuse. Complainants

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50 Ibid [54].
51 Ibid [50] (emphasis added).
52 Ibid [54] (emphasis added).

who go along with the defendant's advances under duress, who express affection after an assault has commenced to placate a defendant, who experience a freezing response or otherwise do not vigorously resist, or who have an ongoing financial, employment or other relationship with the defendant may well find that these factors are considered relevant when the excuse is applied.[53]

III Impaired Capacity

The cases discussed in the previous part indicate the propensity for the mistake of fact excuse to introduce confusion into the legal principles applicable in rape trials by placing emphasis on the complainant's lack of robust and sustained resistance or surrounding social behaviour. A further factor bolstering this effect is the potential for the excuse to be enlivened by intoxication or lack of mental or linguistic capacity on the part of either the defendant or the complainant. This part of the article considers a series of Queensland cases relevant to this issue. We will discuss these cases under four broad and overlapping categories. The first concerns intoxication of the defendant; the second pertains to intoxication of the complainant; the third relates to mental capacity; and the fourth considers the role of linguistic issues.

Each of these considerations has been found by Queensland courts to effectively lower the bar for the mistake of fact excuse. The effect of voluntary intoxication by the defendant in lowering the bar for the excuse is particularly problematic. This effectively means that the defendant can say, 'I was so drunk I thought she [the complainant] was consenting.' Intoxication of the complainant also lowers the bar for application of the excuse — meaning that, effectively, the

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[53] The pernicious influence of social norms and expectations on the *mens rea* element of sexual offences can be further seen from Tupman J's reliance, in the New South Wales case of *Lazarus*, on testimony by a female friend of the defendant to the effect that she sometimes consented to anal sex with men she had first met the same night. See *Lazarus* (District Court of New South Wales, 2013/00242040) 67, 72. This evidence was, of course, completely irrelevant to whether the complainant in that case had consented. However, Tupman J held that it provided 'objective insight into contemporary morality' that was relevant to the reasonableness of the defendant's state of mind. It is puzzling, to say the least, how testimony by one individual about her own past sexual experiences could constitute 'objective insight into contemporary morality'. The more troubling aspect of the reasoning, however, is the weight it gives to social expectations around sexuality in determining the defendant's culpability. According to Tupman J's reasoning, the complainant's lack of vigorous resistance does not legally establish her consent, but it is relevant to evaluating the defendant's mistaken belief. And its relevance occurs against a background where the defendant's belief in consent is effectively assumed to be genuine and reasonable, because (according to the defendant's friend) consent is sometimes given by other people in broadly similar circumstances.

defendant can say, 'She was so drunk I thought she was consenting.' This argument can succeed even where the complainant was, in fact, so intoxicated that she was comatose and legally incapable of consent. The cumulative effect of these interpretations is that where the defendant and complainant are both intoxicated, the bar for establishing the excuse may be set extremely low. Mental and linguistic incapacity can also have a similar effect.

A *Intoxication of the Defendant*

The most recent Queensland Court of Appeal case in which a defendant's voluntary self-intoxication benefited his mistake of fact excuse is *R v Duckworth* ('*Duckworth*').[54] This is one of a series of recent Queensland cases where the complainant gave evidence that she was asleep or unconscious when the initial sexual penetration occurred, but the defendant successfully argued on appeal that the jury was inadequately directed on mistake of fact.[55] The prosecution case at trial was that the complainant was so extremely intoxicated that she could not stop vomiting and needed help to get to bed. When she awoke, it was due to a sharp pain in her vagina, as the defendant was raping her. She tried to stop him, but found herself physically unable to scream or push him away. When a friend of the complainant entered the room, the defendant moved away from the complainant. The complainant and her friend subsequently left. Although the defendant did not give or call evidence at trial, the defence case was that no intercourse had occurred at all. However, the jury rejected this and found the defendant guilty.

An appeal against conviction was made on multiple grounds and was unanimously allowed. One of the grounds of appeal upheld by Burns J and McMurdo P related to the trial judge's direction to the jury on the mistake of fact excuse. The trial judge had identified that a mistake of fact direction was required, despite the defence case denying any intercourse at all, because of one witness's testimony that the complainant had draped the defendant's arm over her while they were lying together. Her Honour directed the jury that 'intoxication doesn't relieve a person of responsibility for committing a crime'[56] and, when explaining s 24 to the jury, said that '[i]t is not what an intoxicated person might think, but

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54 [2016] QCA 30 ('*Duckworth*').

55 See also *R v Cook* [2012] QCA 251 ('*Cook*'); *R v Soloman* [2006] QCA 244 ('*Soloman*'); *R v CU* [2004] QCA 363 ('*CU*'). These cases are discussed further below.

56 *Duckworth* (n 54) [104]. Her Honour also made many other similar references to people being responsible for their actions even when drunk.

the question is what is reasonable for a sober person to believe from the circumstances known to the accused.'[57]

According to Burns J, with whom McMurdo P agreed,[58] '[t]he problem with these directions is that the trial judge failed to direct the jury that the appellant's state of intoxication was relevant to the jury's consideration whether he had an honest belief that the complainant was consenting.'[59] According to the majority judges, in other words, the bar for establishing an honest but mistaken belief in consent is lower for a defendant who is intoxicated than one who is sober, although it must still be shown that the mistake was reasonable. Philippides J dissented on this point (while allowing the appeal on other grounds), noting that '[t]he jury clearly had no difficulty in concluding beyond a reasonable doubt that a sober person in the appellant's position would not have had a reasonable doubt that the complainant was consenting to intercourse.'[60] Her Honour summarised the law as follows:

> In *R v Hopper*, this Court explained that a condition of inebriation (as the appellant in that case claimed to have had at the relevant time) may help to induce a belief that a person is consenting to the intercourse; to that extent it may find to show the belief to be genuine or 'honest'. However, the Court emphasised that it did not touch the question whether in terms of s 24 that belief is reasonable; a mistaken belief that is induced by intoxication is not one that can be considered 'reasonable' as distinct from 'honest'.[61]

The majority judges, by contrast, declined to find that it was not open to the jury on the facts to conclude that the defendant's putative mistake was not only honest (given his inebriation), but also reasonable.[62]

The majority judges in *Duckworth* relied upon a series of previous decisions as precedent for the defendant's voluntary intoxication contributing to an honest belief in the complainant's consent. The prosecution's case in *R v Hopper* ('*Hopper*')[63] was that the complainant (a 17-year-old woman) went with two male friends to a warehouse that served as a clubhouse for a group of bikies, arriving at 4:00am. While there, the complainant met a man called McLeod (not the defendant), and they went to a separate room where McLeod physically overpowered the complainant, covering her mouth to stifle screams, and then raped her with his fingers and then his penis. When Hopper (the defendant)

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57 Ibid [105].
58 Ibid [1].
59 Ibid [106].
60 Ibid [25].
61 Ibid [19].
62 Ibid [108].
63 [1993] QCA 561.

entered the room, McLeod covered the complainant's face with a pillow, physically restraining her. The defendant then took physical control of the complainant, raping her, and McLeod left them. The complainant cried and pleaded with the defendant to stop, and to help her, and he then did, but when McLeod returned he said to the defendant, 'Just fuck her', and upon that statement the defendant pushed the complainant down and raped her again. 'After that', as the Court of Appeal put it, 'various other sexual indignities and offences were committed upon her by McLeod and the appellant, who at some stage were assisted by other men who had come upstairs.'[64]

One of the grounds of appeal related to the alleged failure of the trail judge to direct the jury on the effect of intoxication and its relevance to the mental state of the defendant. The defendant himself gave no evidence at trial, but in a recorded police statement he said about the first instance of rape:

> Then I walked up the stairs up to the top floor and there was a girl there, I didn't know her, but she was laying out. Didn't have anything on. No clothes on. And being how I was, I was pretty well inebriated, I got on top of her. And she lay there, she didn't struggle, she just lay there and I heard that she started crying.[65]

This evidence, according to the Court of Appeal, created a foundation for the mistake of fact excuse under s 24.[66] It was held that the defendant's inebriation could 'help to induce a belief that a woman is consenting to intercourse; to that extent it may tend to show the belief to be genuine or "honest"' for the purposes of the excuse.[67] Overall, the appeal against conviction was dismissed, as their Honours found the trial judge's directions to the jury on s 24 to be slightly confusing, but that 'confusion is not the same as misdirection'.[68] *Hopper* is a violent gang rape case where s 24 was found to be raised on the facts — although the Court of Appeal makes it clear that no reasonable jury could have found the excuse to be made out, since '[n]o one could reasonably believe that a woman being held down with a pillow over her face was consenting to sexual intercourse with the next man who arrived'.[69] The case continues to serve as precedent for voluntary intoxication assisting a defendant's case that he had an honest but mistaken belief that the complainant consented.

The appellate case law suggests that juries commonly request further guidance as to what use they can make of a defendant's voluntary intoxication. Jury directions on this issue are a frequent source of confusion and are regularly raised on appeal. *R v O'Loughlin*[70] was an appeal against conviction for rape and is

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64 Ibid 4.
65 Ibid 7.
66 Ibid.
67 Ibid 10.
68 Ibid 11.
69 Ibid 10.
70 *O'Loughlin* (n 9).

one of the few cases in which the defendant was also a woman. The alleged offence occurred in a bathroom of a pub, in which the complainant and defendant were consensually kissing, but the defendant then digitally penetrated the complainant's vagina and anus without consent. The jury had asked for a restatement of the mistake of fact excuse. The appellant's submission was that, while intoxication was irrelevant to the reasonableness of a belief under s 24, it was relevant to whether that belief was honest. It was contended that the trial judge had inadequately explained this to the jury, thereby depriving them of the opportunity to decide that the belief was honestly held, due to the accused's intoxication. The appeal succeeded on the basis that the relationship between s 24 and intoxication had not been adequately explained; although the trial judge's comments could be inferred to have related to reasonableness, rather than honesty, this was not made sufficiently clear to the jury.[71]

B *Intoxication of the Complainant*

The cases mentioned above show that the defendant's reliance on the mistake of fact excuse is generally bolstered by his intoxication, since this makes the mistaken belief more likely to be honest. The intoxication of the complainant may also be a factor that assists the defendant in relying on the excuse, even though severe intoxication by the complainant might be reasonably thought to show a lack of actual consent. In *R v CU* ('*CU*'),[72] the complainant's evidence was that she was so drunk that she was vomiting and went to bed in her home, then awoke to find the defendant raping her with a vibrator. She asked him to leave the house, but then awoke again later to him raping her mouth with his penis. The jury convicted the defendant of two counts of rape, having also heard that the complainant had rejected multiple advances from him earlier the same evening. The defendant's appeal against his conviction succeeded on the basis that the trial judge had misdirected the jury on the issue of mistake of fact. Jerrard JA referred to a question posed by the jury as to whether, if the complainant did not have 'the cognitive ability to give consent as she was drunk', the defendant could nonetheless have formed 'an honest and mistaken belief that she was awake, but she was unaware of her actions as she was so drunk'.[73] According to Jerrard JA, 'the answer to that question was "yes"'.[74] The mistake of fact excuse, in other words, can potentially be utilised where the complainant is in fact incapable of

71 Ibid [36].
72 *CU* (n 55).
73 Ibid 5.
74 Ibid.

giving consent because she is unconscious, provided that the defendant honestly and reasonably believes that the complainant, although so drunk as to be unaware of her actions, is nonetheless awake.

R v SAX ('*SAX*')[75] further illustrates the potential for intoxication on the part of the complainant to be used in support of a mistake of fact argument. The complainant's evidence was that she was so drunk she blacked out. The defendant gave conflicting evidence that she was conscious, although significantly affected by alcohol. The Court of Appeal concluded that the jury may have thought that the complainant was 'conscious but stupefied'.[76] This was held to create the possibility for arguing mistake of fact, along with evidence to the effect that the complainant willingly got into the defendant's car and walked into his apartment. This case therefore suggests that a complainant who is extremely drunk, but not unconscious, and therefore does not or cannot strenuously resist the defendant's advances, could find her intoxication adduced as a basis for the defendant's mistake of fact. This line of argument was left open by the Court of Appeal even where the defendant was also significantly affected by alcohol.[77]

R v Elomari[78] is one of a series of cases in which the defence position at trial was that the complainant willingly participated, but the judge's failure to direct the jury on mistake of fact was later raised on appeal. The appeal was ultimately denied, but McMurdo P dissented and would have allowed the appeal, partly based on the complainant's level of intoxication. According to her Honour, the main evidence raising the excuse was a comment by the defendant that he 'believe[d]' that the complainant was consenting.[79] However, this was supported by other factors:

> There was other evidence capable of supporting an honest and reasonable belief as to consent. The complainant had accepted the appellant's invitation to come alone to his house after midnight. Inside the laundry of the house they kissed consensually. When he kissed her on the neck and grabbed her buttock she giggled. She smoked three large

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75 [2006] QCA 397 ('*SAX*').

76 Ibid [20] (Keane JA).

77 This possibility is further illustrated by *Soloman* (n 55), one of the authorities relied upon in *SAX* (n 75). See also *Cook* (n 55).

78 [2012] QCA 27 ('*Elomari*'). See also *Soloman* (n 55). The complainant's evidence in that case was that she was asleep when the assault occurred, while the defendant testified that she enthusiastically consented. The Court of Appeal ruled that the jury should have been directed on mistake of fact, despite its not being raised by either party's version of events, as the jury may refuse to accept the account of either party and 'work out for themselves a view of the case which did not exactly represent what either party said': *Soloman* (n 55) [34] (Jerrard JA, quoting McHugh J in *Stevens v The Queen* (2005) 80 ALJR 91, 100 [29]). *Cook* (n 55) raises similar issues, although the defendant's evidence there was that no sexual intercourse occurred at all. The jury rejected this; mistake of fact was then raised on appeal.

79 *Elomari* (n 78) [4].

> cones of marijuana with him and was, on her evidence, 'very stoned'. Some of the marks later found on her body could have been made consensually. The previous day she had a tattoo executed on the lower part of her back and this was hurting her at the time of the alleged offence. A jury could have considered that she may not have communicated her lack of consent effectively to the appellant because she was heavily affected by marijuana. They may have considered that he misinterpreted any signs of displeasure and discomfort as being caused by the pain from her recent tattoo rather than a demonstration of her lack of consent.[80]

McMurdo P's comments raise a number of factors that cannot be equated to consent under the current law, but may nonetheless support a finding of mistake of fact. These include the complainant's consent to come to the defendant's house late at night, consensual kissing, and her level of intoxication. Her Honour's comments that evidence of physical resistance or expressions of pain may not be clear enough communication of lack of consent are also problematic. Indeed, this may be so even where these expressions are accompanied by physical force by the defendant:

> The area where the incident occurred was cramped so that the appellant's grabbing of the complainant's hair to prevent her head from hitting the bottom stair was not necessarily inconsistent with a belief she was consenting. Prior to the act of oral intercourse she was sitting astride him. It is true that the complainant gave evidence that the appellant grabbed her hair and put her head down to his crotch before putting his penis in her mouth. But in the complex area of human sexual relations, the jury may have considered that even the appellant's hand on the complainant's head during the act of oral sex did not necessarily negate an honest and reasonable belief that the appellant [sic] was consenting.[81]

Signs of discomfort and protest by the complainant, then, are not enough to negative the excuse, and neither is physical coercion by the defendant, provided this might under other circumstances be done consensually.

The cases discussed above show that not only the defendant's intoxication, but also the complainant's intoxication, can materially assist in establishing mistake of fact. These factors may operate even where there is other clear evidence of lack of consent, including verbal or physical resistance by the complainant. Cases such as *SAX*,[82] *R v Soloman* ('*Soloman*')[83] and *R v Cook* ('*Cook*')[84] illustrate the potential for mistake of fact to be utilised where *both* the complainant and the defendant are seriously intoxicated; in these circumstances, the combined intoxication of both parties may significantly lower the bar for the

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80 Ibid [5].
81 Ibid [6].
82 *SAX* (n 75).
83 *Soloman* (n 55).
84 *Cook* (n 55).

excuse to be applied, even where the complainant's level of intoxication may raise real doubts about her legal capacity to consent at all.

The complainant's evidence in *Soloman* was that she woke up to the defendant penetrating her, while the defendant's testimony was that the complainant was a willing participant (despite him leaving her apology messages the following day). The Court of Appeal ruled that the defendant at trial should have been afforded the benefit of s 24, despite having consumed 'at least a carton of stubbies of full strength beer during that day and evening, a dozen cans of rum and cola, and about five cones of cannabis'.[85] In *Cook*, the defendant denied at trial that intercourse had occurred, but acknowledged that he was heavily intoxicated on the night in question. Defence counsel submitted that the complainant had drunk about 10 cans of XXXX Gold, and that she must have been so tired and confused that when the defendant merely 'grabbed her legs' she mistakenly believed she was being raped.[86] This was evidently rejected by the jury; however, an appeal succeeded based on mistake of fact.

C *Mental Incapacity*

A further factor that can lower the bar for the mistake of fact excuse is the mental incapacity of the defendant or the complainant (or both). As with intoxication, mental incapacity on the part of either party tends to favour the defendant where the mistake of fact excuse is concerned. The defendant's mental incapacity can lower the bar for the excuse by making his mistake more likely to be honest and, to a limited extent, reasonable. However, the complainant's mental incapacity also lowers the bar by enabling the defendant to contend that he misunderstood her resistance. Similarly to intoxication, this argument can succeed even where the complainant's incapacity is such as to cast doubt on her ability to consent in the first place.

We saw previously in this article that the Court of Appeal in *Dunrobin* was willing to consider the defendant's paranoid schizophrenia as a relevant factor in evaluating the genuine and reasonable character of any mistake of fact. This finding was substantially based on the earlier Court of Appeal decision in *R v Mrzljak* ('*Mrzljak*').[87] The defendant in that case had a low IQ; he was also Bosnian and spoke only a few words of English. The complainant was intellectually impaired. The complainant's evidence was that she did not want to have sex with

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85 *Soloman* (n 55) [12].
86 *Cook* (n 55) 5.
87 [2004] QCA 420 ('*Mrzljak*').

the defendant. 'She told him to "stop", said "no", then tried to push him away.'[88] However, she also complied with his instructions to take off her clothes and touch his penis. The Court of Appeal held by a 2:1 majority that the defendant's intellectual and linguistic incapacity could support the excuse of mistake of fact. This meant, in particular, that a mistake made by the defendant could be considered reasonable even though it would not be reasonable when made by a person with different intellectual and linguistic abilities.[89]

A psychologist at trial gave evidence for the prosecution that the complainant had a mental age of between six and 10 years. The defendant gave evidence that he did not know of the complainant's impairment, and that she was physically responding positively to his advances. There were alternative verdicts open to the jury to decide whether the complainant was legally unable to consent due to her mental state, or whether she was technically capable of giving consent but on the facts at trial she did not. The Court of Appeal had received information to consider at the appeal that the defendant had a 'mild mental retardation' himself, which would affect his belief that the complainant was consenting. McMurdo P remarked that '[b]ecause of his natural mental infirmity and his language difficulties, he was unable to pick up the social cues to allow him to make a rational judgment as to whether she had the cognitive capacity to consent.'[90] However, as in *Dunrobin*, the evidence suggests that the complainant was not merely relying on subtle 'social cues' that needed 'detecting'[91] in order to repel the defendant's advances, but was rather physically and vocally protesting.

Holmes J identified two options available to the jury: that the defendant was mistaken as to the complainant's ability to consent, or that the defendant was mistaken as to the complainant's actual consent. Her Honour continued:

> But the question here is whether the section provides an excuse from criminal responsibility where the mistaken belief is one which is honest and which would have been held by a reasonable person; or whether it applies where the mistake is honest and the belief is one held by the accused on reasonable grounds. It is clear that a requirement that a belief be on reasonable grounds does not equate to a requirement that a reasonable person would have held it. … What must be considered, in my view, is the reasonableness of an accused's belief based on the circumstances as he perceived them to be.[92]

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88 Ibid [3].
89 Ibid [92] (Holmes J).
90 Ibid [10].
91 Ibid [11].
92 Ibid [79], [81].

It therefore appears that, to this extent, the mental incapacity of a defendant may affect both the honesty of his belief and its reasonableness (insofar as this depends on the circumstances being as he perceived them).

The facts of *Dunrobin* have been outlined previously: the complainant awoke to the defendant initiating sex, to which she said 'no' repeatedly and tried to push him away, but the defendant then proceeded to initiate intercourse. In cross-examination the complainant agreed that she 'froze' at some point, and the defence case at trial was that the defendant 'misinterpreted' her consent, continuing to ask 'until he [felt] there was a yes response'.[93] The defendant had been diagnosed with chronic paranoid schizophrenia and was the subject of an involuntary treatment order resulting in him being on anti-psychotic medications. His treating psychiatrist gave evidence that he had 'difficulty understanding grey areas' and that 'complex decision making would be hard for him'. Muir J ruled that '[t]he jury should have been instructed also that the appellant's mental condition was relevant to the appreciation of what, on his part, constituted a reasonable belief'[94] and ordered a retrial.

Lyons J remarked that the trial judge should have directed the jury on how specifically to apply the defendant's 'black and white' thinking to the complainant's 'freeze' response, seeming to disregard the jury's acceptance of the complainant's evidence that she both physically and verbally tried to stop the defendant at the beginning of their interactions.[95] Interestingly, Fryberg J recommended that 'some reconsideration should be given to the reformulation of the direction' on mistake of fact specifically with regard to the separation of the elements of subjectivity and objectivity.[96] This comment seems to recognise the potential (if not the likelihood) that factors permitted to be considered in relation to the honesty of a belief (such as the defendant's intoxication or lack of mental capacity) may come to be incorrectly considered by the jury in relation to the belief's reasonableness (or, indeed, simply as part of a holistic assessment of whether the excuse should be applied on the facts).[97]

D *Linguistic Incapacity*

Cases involving a defendant who is not proficient in the same language as the complainant (regardless of whether that language is English) may present an opportunity for a s 24 excuse, as counsel are able to paint a picture of 'grey areas'

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93 *Dunrobin* (n 32) [23].
94 Ibid [45].
95 Ibid [84].
96 Ibid [73].
97 For discussion of the fundamental role played by holistic judgments in rape trials, see Crowe and Sveinsson (n 6).

and 'miscommunications' that might otherwise not seem realistic or likely. Linguistic incapacity being used to bolster mistake of fact arguments is at odds with the law not requiring a complainant to 'fight back' to establish a lack of consent, since allowing language barriers to paint quaint pictures of earnest miscommunication in effect places extra pressure on women to fight back harder if their assaulter or attacker does not speak their language. Society might think it more reasonable to expect two people with a language barrier to take extra care in communicating with each other in sexual situations. Moreover, even where speaking does take place, much communication happens through tone and context, not just words. In cases where there is evidence that a complainant physically rejected the defendant's advances, the language barrier therefore ought to be largely moot.

The facts in *Mrzljak* have already been outlined, and the case involved evidence that the complainant repeatedly communicated her lack of consent at the beginning of their interactions in non-verbal ways so that, despite the language barrier, her feelings toward the defendant were clear. The Court of Appeal defined a 'reasonable' belief by the defendant as that of a 'reasonable person' who had the cognitive and linguistic abilities of the defendant, not a 'reasonable person' in the broader, more average sense.[98] This conflation of the subject and objective tests for s 24 is particularly important to note, as typically the defendant's individual state of mind would only support the honesty of the mistaken belief, not the reasonableness of it.

The language barrier in *Mrzljak* coincided with an intellectual handicap. These factors were treated as having a cumulative effect on both the honesty and the reasonableness of the defendant's mistaken belief. Holmes J wrote:

> The circumstances of the present case point up the inevitability of reference to the characteristics of an accused in considering the reasonableness of mistake. It would be absurd here to introduce a fiction that the appellant had a full command of the language into the process of considering whether he laboured under a reasonable but mistaken apprehension as to the existence of consent. But if one accepts … that a language handicap is a feature of the accused relevant to assessment of the reasonableness of his belief, it becomes difficult to assert that an intellectual handicap is not similarly such a feature.[99]

The defendant's linguistic abilities, like his mental capacities, therefore seem to be a matter that potentially impacts on not only the subjective honesty of any mistaken belief, but also its objective reasonableness. In such situations, the onus on the complainant to communicate her lack of consent may be extremely high. This may be a difficult burden for the complainant to discharge in practice,

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98 *Mrzljak* (n 87) [92] (Holmes J).

99 Ibid [89].

particularly in cases where linguistic issues are reinforced by other forms of impairment.

One of the grounds advanced by defence counsel in *Makary* (discussed previously) as providing a foundation for the mistake of fact excuse was that '[the defendant] says that he does not speak Korean and Mary [the complainant] spoke limited English. As a result "the situation in which he found himself" was one which could "inhibit his capacity to recognise the complainant's responses and interpret them"'.[100] This submission was rejected by the Court of Appeal, but it illustrates the willingness of defence counsel to rely on linguistic differences as a basis for s 24, even given evidence that the defendant sought out the complainant due to her non-English speaking background.

IV Options for Reform

This article has shown that the application of the mistake of fact excuse in rape trials in Queensland leads to a number of unsatisfactory outcomes at odds with the legal standard of free and voluntary consent to sexual intercourse. We have seen that in cases where legally effective consent did not exist, the defendant may still rely upon the excuse of mistake of fact, citing factors that are properly regarded as not determinative of consent in order to establish his belief as genuine and reasonable. These factors, as we have seen, potentially include the complainant's lack of continued and vigorous resistance, her behaviour before and during the assault, the level of intoxication of both the defendant and the complainant, the defendant's mental and linguistic capacity, and the lapse of time between violent assaults by the defendant and subsequent sexual intercourse. The prospect of relying upon these factors provides defendants with a way of evading accountability for disregarding the complainant's sexual autonomy. It also introduces a level of confusion into the legal principles, by creating a situation where factors that are now well recognised as not establishing consent are nonetheless treated as probative in excusing the defendant's behaviour.

We have also seen several circumstances in which the threshold for the excuse of mistake of fact is set quite low, due to the cumulative effect of factors such as intoxication, mental incapacity, and linguistic difficulties. If the defendant is intoxicated, this effectively makes any mistaken belief more likely to be honest; if the complainant is intoxicated, this also makes any mistaken belief more likely to be honest and perhaps reasonable, even if the complainant's capacity to consent is impaired. Similarly, if either the defendant or the complainant suffers from mental incapacity or linguistic difficulties, this

[100] *Makary* (n 46) [31].

potentially makes any mistaken belief more likely to be both honest and reasonable. This is so even if the complainant's mental incapacity is so significant as to raise a serious question about her ability to consent in the first place.

The impact of these factors on the mistake of fact excuse needs to be considered in the light of the broader issues outlined in the opening part of this article. In cases where intoxication or linguistic incapacity is at play, the Court of Appeal has been willing to consider a wide range of considerations as supporting the mistake of fact excuse, including some that have long been considered incapable of establishing the existence of consent itself. These include such factors as the complainant being alone with the defendant at night, her previous social or sexual behaviour with the defendant, and her lack of clear and unambiguous physical and verbal resistance. Even where the complainant did physically and verbally resist, her later passivity or partial relinquishing to the defendant's demands have sometimes been treated as validating his mistake (as, for example, in *Dunrobin* and *Mrzljak*). Indeed, McMurdo P's analysis of the mistake of fact issue in *Cook* appears to suggest that the complainant's conduct in running her hand up the defendant's body *after* the penetration had already occurred could retrospectively enliven the mistake of fact excuse.[101] This conclusion seems clearly wrong in law, but shows the range of factors that have been found to be relevant in determining whether the excuse is available on the facts.

The large number of problematic decisions raised in this article creates a strong prima facie argument for legal reform. The present section therefore canvasses two alternative law reform options. The first of these would render the mistake of fact excuse inapplicable to the issue of consent in relation to rape and sexual assault charges. We show that potential criticisms concerning the impact of this change on the defendant's right to a presumption of innocence or a fair trial are unfounded. We then consider a more moderate reform option that may be considered more politically expedient. This involves, first, linking the mistake of fact excuse to a positive consent standard and, second, limiting the excuse in cases involving self-induced intoxication by the defendant or intoxication or incapacity by the complainant. A readily applicable model for this kind of reform is found in the current Tasmanian provisions, as well as the long-standing legal position in Canada.

A *Removing the Excuse*

One potential response to the issues raised in this article would be to make the mistake of fact excuse in s 24 inapplicable to the issue of consent in rape and

[101] *Cook* (n 55) 7.

sexual assault cases. Section 24(2) currently provides that '[t]he operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.' The excuse could therefore be rendered inapplicable to the issue of consent in relation to rape and sexual assault by inserting words to the following effect in ss 349 and 352 of the *Criminal Code*:

> Section 24 does not apply in relation to a belief of the person that the other person is consenting to activity that forms the basis for a charge under this provision.[102]

There could, perhaps, be other kinds of honest and reasonable mistakes relevant to charges under these provisions, such as a mistaken belief that a person was not engaging in sexual contact but some other kind of contact, although such scenarios are hard to imagine and we have not found any in the case law. In any event, such possibilities are not excluded by our proposed amendment, which targets the issues about consent discussed in this article.

A recent empirical study into Australian stakeholder perceptions of the mistake of fact excuse in rape law — including lawyers, sexual assault professionals and members of the broader community — found that many participants viewed the notion of reasonable belief in consent as vague, overly broad and 'biased in favour of the defendant'.[103] Among the law reform proposals generated and discussed by stakeholders was the option of removing the excuse entirely. One participant who spoke in favour of this proposal reasoned that 'consent itself has enough in it to provide a defence where it's warranted'; this view was endorsed by other focus group members.[104] There is also evidence that the more moderate reforms we discuss below may not be sufficient to overcome the pernicious effects of the mistake of fact excuse discussed in this article. Studies have found that incremental reforms in Tasmania and Canada have been inconsistently applied; at least some judges in both jurisdictions continue to instruct juries as if the reforms had not occurred.[105] These findings bolster the case for removing the excuse, rather than tinkering with its formulation.

The kinds of objections likely to be levelled at this proposal can be predicted by examining debates in other jurisdictions. A more modest reform to the mistake

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102 For analogous wording, see *Criminal Code 1899* (Qld) s 365B; *Criminal Code of Canada*, RSC 1985, c C-46, s 273.2.

103 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.

104 Ibid 623.

105 Helen M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 199–204; Elaine Craig, 'Ten Years After *Ewanchuk* the Art of Seduction Is Alive and Well: An Examination of the Mistaken Belief in Consent Defence' (2009) 13 *Canadian Criminal Law Review* 247, 264–9.

of fact excuse in Tasmania — discussed in detail in the next section — resulted in accusations that the change was effectively reversing the onus of proof for rape charges.[106] This claim was incorrect, since the Tasmanian reforms merely changed the elements needing to be proved beyond a reasonable doubt by the prosecution to secure a conviction. A similar point applies to the reform proposed above. The proposal does not reverse the onus of proof, as the prosecution would still have to prove beyond a reasonable doubt that the complainant did not consent to sexual contact. It does mean, however, that the prosecution would no longer have to prove beyond a reasonable doubt that the defendant lacked an honest and reasonable belief that the complainant was consenting where the evidence shows that consent was not given.

This change would in no way compromise the defendant's right to the presumption of innocence or a fair trial. The prosecution, as noted above, would still have to prove beyond a reasonable doubt that the complainant did not consent. Any concerns that might be raised about fairness to defendants as a result of such a change effectively rest on the existence of cases where the prosecution can prove, beyond a reasonable doubt, some time later, that the complainant was not consenting, but where the defendant could not or should not have known this at the time. We have not, in our extensive review of the appellate case law, found any cases that fit into this category (although it is possible, given the limits of the current study, that such cases might exist at the trial level and either did not go on appeal or resulted in acquittals).

Many of the cases discussed above show, at best, an irresponsible disregard by the defendant for the complainant's sexual autonomy. A salutary consequence, in this respect, of the proposed reform is to place responsibility for any failure to properly ascertain consent on the defendant. It does not seem unreasonable to require that anyone who engages in sexual activity with another person ascertain that the other person is consenting. A person who does not care enough to ascertain whether another person is consenting where, given the objectively available evidence, it can be proven beyond a reasonable doubt months or years after the fact that she was not, commits a moral and social wrong that should be strongly discouraged by law. The proposed reform, in this sense, places responsibility where it ought to lie, whereas the current law enables culpable parties to avoid accountability.

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[106] For discussion, see Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003 (Judy Jackson, Attorney-General and Minister for Justice and Industrial Relations, Second Reading Speech, Criminal Code Amendment (Consent) Bill 2003).

B *Limiting the Excuse*

Rendering the mistake of fact excuse inapplicable to the issue of consent in rape and sexual assault trials would be a straightforward reform that sends a clear message to judges and juries. There are, however, other reforms that could address some of the issues raised in this article and may prove more attainable. We propose that, if the proposal to remove the excuse is not adopted, an amendment should be enacted along the following lines:

> **Section 24A — Mistake as to consent in certain sexual offences**
> In proceedings for an offence against section 349 or 352, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if —
>
> (a) 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; or
> (b) the accused was reckless as to whether or not the complainant consented; or
> (c) the accused did not take positive and reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to each act; or
> (d) the complainant was in a state of intoxication and did not clearly and positively express his or her consent to each act; or
> (e) the complainant was unconscious or asleep when any part of the act or sequence of acts occurred.

This model provision accomplishes two main things. First, it links the mistake of fact excuse to a positive consent standard, requiring the defendant to take positive and reasonable steps to ascertain consent before the excuse can be relied upon. This would go some way towards addressing the problematic impact of the existing excuse upon the definition of consent. Second, it renders the excuse inapplicable in cases involving voluntary intoxication by the defendant or where the complainant is asleep or unconscious, while limiting its application in cases where the complainant is intoxicated.[107] Paragraphs (a)–(c) have a clearly applicable precedent in the current Tasmanian legislation,[108] as well as the

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[107] The question of whether the complainant was intoxicated, unconscious or asleep for the purposes of the section, like the question of whether the accused was intoxicated or reckless, is an evidentiary matter to be determined on the facts. The accused could not, however, rely upon a putative mistake about these facts to escape liability if they are found to be established on the evidence. The relevant standard of proof would be, as usual, beyond a reasonable doubt.

[108] Section 14A(1) of the Tasmanian *Criminal Code*, as amended by the *Criminal Code Amendment*

current legislation in Canada.[109] The experience in those jurisdictions show that the reforms are politically feasible and can be implemented without compromising the rights of defendants.

1 *A Positive Consent Standard*

The notion of positive consent captures the idea that a person engaging in sexual activity is expected to take active steps to ascertain that her or his partner is willing to engage in each new form of sexual contact.[110] The closest that Australian rape law comes to this idea is in the definition of consent in Victoria, which provides that a person does not consent if 'the person does not say or do anything to indicate consent to the act'.[111] This provision captures the idea, now also well accepted in Queensland, that a person who passively acquiesces to sexual advances is not thereby taken to have given consent. The problem that arises under the current Queensland law, as we have seen throughout this article, is that passive acquiescence can give rise to an argument for mistake of fact, undermining the notion of free and voluntary consent. This problem is mitigated in Victoria by the stipulation that the circumstances to be taken into account in assessing the mistake of fact excuse 'include any steps that the person has taken to find out whether the other person consents'.[112] This provision does not necessarily require that a person take positive steps in order to rely upon the excuse, although it does require the lack of positive steps to be taken into account

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(Consent) Act 2004 (Tas), reads as follows:

> In proceedings for [rape, indecent assault or unlawful sexual intercourse], a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused —
> (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
> (b) was reckless as to whether or not the complainant consented; or
> (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

109 *Criminal Code of Canada*, RSC 1985, c C-46, s 273.2(b) provides:

> It is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
> (a) the accused's belief arose from the accused's
> (i) self-induced intoxication, or
> (ii) recklessness or wilful blindness; or
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

110 For an influential discussion, see Pineau (n 5).

111 *Crimes Act 1958* (Vic) s 36(2)(l).

112 Ibid s 36A(2). A similar provision exists in New South Wales. See *Crimes Act 1900* (NSW) s 61HE(4)(a).

in determining whether a mistake about consent should be considered honest and reasonable.

The Tasmanian law goes one step further, providing that a mistake of fact will not be considered honest or reasonable where the accused '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'.[113] A person is also precluded from relying on the excuse if he was 'reckless as to whether or not the complainant consented'.[114] Section 273.2 of the Canadian *Criminal Code* is to similar effect. The Tasmanian approach is worthy of adoption in Queensland (and is incorporated in paras (b) and (c) of our proposed amendment). This change would send a message to judges and juries that mere passive acquiescence is not enough to enliven the mistake of fact excuse where the defendant did not take reasonable steps to determine whether the complainant was actually consenting. The requirement of 'reasonable steps' is, of course, susceptible to different interpretations.[115] An amendment that expressly provides that 'positive steps' are necessary, as in para (c) of our model provision, would therefore be an improvement on the Tasmanian wording.

2. *Intoxication and Incapacity*

The Tasmanian section on mistake of fact provides that the excuse is not available if the defendant 'was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated'.[116] A provision to similar effect is found in the Victorian legislation, which states that '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'.[117] These sections both effectively provide that a defendant cannot rely on his state of self-induced intoxication as an excuse for making a mistake about consent. This avoids the problems that have arisen in the Queensland cases considered previously involving intoxication by the defendant. The wording from the Tasmanian legislation is therefore included in para (a) of our model amendment.

The shortcoming of this change, however, is that it does not address the issue of intoxication or incapacity of the complainant. As demonstrated earlier in this article, a series of cases have arisen in Queensland where the defendant was able to rely on the mistake of fact excuse on appeal even though the complainant was

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113 *Criminal Code Act 1924* (Tas) s 14A(1)(c).

114 Ibid s 14A(1)(b).

115 For a discussion of the varying interpretations of the requirement adopted by Tasmanian judges, see Cockburn (n 105) 199–204.

116 *Criminal Code Act 1924* (Tas) s 14A(1)(a).

117 *Crimes Act 1958* (Vic) s 36B(1)(a).

so heavily intoxicated as to cast doubt on her ability to consent. In some cases, the excuse was held to be raised on the facts even though the evidence indicated that the complainant was asleep or unconscious when the initial sexual penetration occurred. This issue would be addressed to some extent by making the mistake of fact subject to a reasonable and positive steps requirement. However, we propose that more robust reform is needed to address the pattern identified earlier in this article.

Paragraphs (d) and (e) of our proposed amendment represent a two-pronged response to this challenge. The former paragraph provides that a mistake about consent will not be considered honest or reasonable if 'the complainant was in a state of intoxication and did not clearly and positively express his or her consent to each act'. A defendant who seeks to rely on the mistake of fact excuse to excuse non-consensual sex with an intoxicated person would have to show not only that he took positive steps to find out whether the person was consenting, but also that his partner expressed consent in a clear and positive way. Paragraph (e) then precludes a defendant from relying on the excuse where 'the complainant was unconscious or asleep when any part of the act or sequence of acts occurred'. This would mean that the excuse is not available in cases like *Duckworth*, *Cook* or *CU*, where the evidence indicated that the sexual acts commenced while the complainant was incapacitated.

V Conclusion

The definition of rape in Queensland (and elsewhere in Australia) centres around the notion of free and voluntary consent. The principle behind this area of law is that having sex with someone who is not freely and voluntarily consenting (or is incapable of doing so) is a serious wrong to that person and society at large, which properly attracts criminal sanctions. The legal understanding of consent in Queensland rape law has evolved over time, but it now clearly recognises that consent cannot be automatically inferred from the complainant's passivity or unrelated social conduct, such as drinking alcohol, flirting or going with the defendant to an isolated place. It is no longer a requirement of Queensland rape law (if it ever was) that a complainant vigorously resist the defendant's advances through either words or action. It is likewise well recognised that a person does not consent to sexual intercourse when she or he is asleep or unconscious. These ideas are now integral components of what it means in Queensland to give free and voluntary consent to sexual intercourse.

We have shown in this article, however, that these important and hard-won aspects of Queensland rape law are being undermined by the mistake of fact excuse in s 24 of the *Criminal Code*. The recent appellate case law on the application of s 24 to the issue of consent in rape cases, which we have exhaustively surveyed in this article, shows that a range of factors that are

properly regarded as not determinative of consent have been cited as enlivening the mistake of fact excuse either at trial or on appeal. These include the complainant's lack of overt resistance, her social behaviour (such as expressions of affection for the defendant, kissing the defendant or being at the defendant's house late at night), her level of intoxication and her limited linguistic abilities. Furthermore, the bar for enlivening the excuse has sometimes been set extremely low, due to the cumulative effect of the factors mentioned above, along with the intoxication or diminished capacity of the defendant. Effectively, a defendant can contend that he was so drunk that he thought that the complainant was consenting.

The current application of the mistake of fact excuse in Queensland therefore creates uncertainty around the factors that are relevant in establishing legally effective consent to sexual contact. In at least some cases, the excuse has been used successfully by violent, predatory or repeat sexual offenders to avoid culpability for their behaviour. We conclude that reforms are needed. One possible response would be to render the mistake of fact excuse inapplicable to the issue of consent in relation to rape and sexual assault charges. This would send a clear message to judges and juries — not to mention potential rapists and the community at large — that free and voluntary consent is paramount in the legal framework. However, we have also suggested an alternative reform that may be more achievable. This involves inserting a new s 24A into the Queensland *Criminal Code* to limit the application of the excuse of mistake of fact in rape and sexual assault proceedings.

This model amendment, which is partially based on the current law in Tasmania and Canada, would address the key issues outlined above. It would mean that defendants cannot rely on their own drunkenness to utilise the excuse; furthermore, they cannot rely on the excuse if they were reckless as to the complainant's consent or did not take positive and reasonable measures to find out whether she was consenting. Finally, the provision would remove the excuse where the complainant was intoxicated and did not express positive consent, as well as where the complainant was unconscious or asleep when the assault occurred. This is a modest and feasible amendment that would make a real difference to the vulnerable members of the community who are the most likely to fall prey to predatory or exploitative sexual behaviour. It would take seriously the aspiration of Queensland rape and sexual assault law to ensure that consent to sexual contact is genuine, mutual, and freely and voluntarily given.

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Queensland rape law ‘loophole’ could remain after review ignores concerns about rape myths and consent

August 4, 2020 2.05pm AEST

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Professor of Law, Bond University

The Queensland government has quietly released the state Law Reform Commission’s long-awaited report on reforming the state’s controversial sexual consent laws.

After much lobbying by survivors of sexual assault for comprehensive changes to the law, the recommendations are a huge disappointment.

The QLRC review was prompted by concerns about the mistake of fact excuse in rape cases — what some have called a “loophole” that allows rapists to walk free.

Defendants in rape trials often argue the other person consented to sex. However, the mistake of fact excuse also allows defendants to argue they *honestly and reasonably* believed the other person consented to sex — even if that person did not. The excuse has been part of Queensland law since 1899.

Read more: Australian law doesn't go far enough to legislate affirmative consent. NSW now has a chance to get it right

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The state attorney-general, Yvette D'Ath, asked the QLRC to examine the mistake of fact excuse last July, along with the state's consent laws generally.

This followed a high-profile campaign led by Women's Legal Service Queensland, author and activist Bri Lee and myself.

The Queensland Law Society and the Queensland Bar Association both strenuously opposed any reforms to the existing laws on consent and mistake of fact, claiming there was insufficient evidence of the need for changes. The QLRC's report effectively endorses this position, while giving the superficial appearance of progressive change.

None of the five recommendations significantly changes the existing law. The proposals do nothing to strengthen the law on sexual consent, nor do they address the problems that prompted the review in the first place.

The definition of consent

Rape in Queensland is defined as sexual intercourse without free and voluntary consent. The QLRC's report recommends three amendments to the definition of consent in the criminal code.

The first change would state that a person is not assumed to have consented to a sexual act just because they don't actively say no. This is an important principle. However, as the QLRC acknowledges, it is already well established in case law.

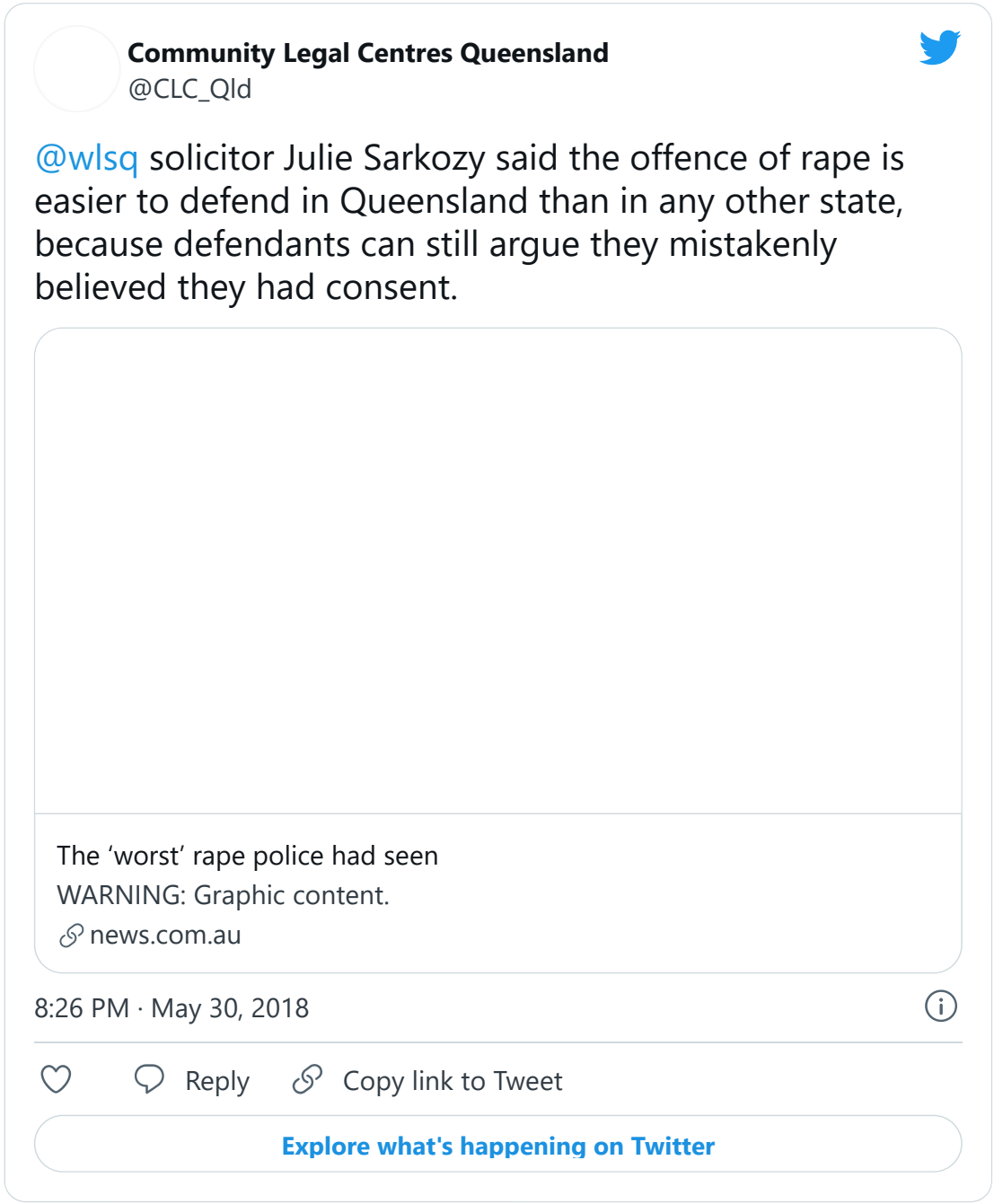
Importantly, this proposal leaves open the possibility that passivity can still amount to consent in some circumstances. The QLRC quotes a recent judgement by the Queensland Court of Appeal president, which says "in some circumstances" consent may be expressed "by remaining silent and doing nothing".

Read more: Rape, sexual assault and sexual harassment: what's the difference?

The second recommendation by the QLRC would clarify the same definition of consent applies to rape and other sexual assaults. This is a technical reform that does not change the definition of consent itself.

The third reform would amend the law to state there is no consent in situations where a sexual act continues after consent is actively withdrawn. This principle, too, is already part of case law.

This reform is potentially problematic because it seems to put the onus on people who are subjected to unwanted sexual acts to withdraw their consent. This may not be realistic when a previously consensual sexual encounter turns violent or the nature of the activity suddenly changes.



Mistake of fact and consent

The QLRC's fourth and fifth reforms address the mistake of fact excuse.

The fourth reform would allow juries to consider anything a defendant said or did to determine if the other person wanted to have sex in deciding whether the defendant made an honest and reasonable mistake.

This amendment, too, does not change the existing law. Notably, the proposal falls short of requiring defendants show the positive steps they took to ascertain consent — as is the case in Tasmania.

In practice, this means defendants could point to anything they said or did to determine consent, no matter how inadequate, to bolster their mistake of fact argument. On the other hand, a defendant who did nothing to ascertain consent may still be able to use the excuse.

The QLRC's fifth recommendation clarifies that a defendant cannot rely on their drunkenness to argue a mistake about consent was reasonable. This principle, like the others, is already part of case law.

Under the existing law, a defendant's intoxication does not make their mistaken belief more likely to be reasonable. It can, however, make the mistake more likely to be considered honest.

The defendant's drunkenness can therefore lower the bar for the mistake of fact excuse. The QLRC's proposal does nothing to change this.

Survivors' concerns ignored

The QLRC's report completely ignores the most serious problems with the current law. The mistake of fact excuse can potentially be used even if a person is asleep or heavily intoxicated when a defendant has sex with them. The report says nothing about this.

There is also no mention of the role of the freezing response in mistake of fact cases, where rape victims "freeze" and are unable to vigorously fight off their attackers.

The QLRC's own research found the mistake of fact excuse was raised more often in cases where a victim gives evidence of freezing during an attack or trying to placate an attacker. This potentially allows the defendant to use the victim's lack of resistance to avoid conviction.

Read more: Cyber justice: how technology is supporting victim-survivors of rape

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The QLRC report also ignores the role of rape myths in the mistake of fact excuse. Rape myths are false beliefs about sexual violence, like the idea that flirting with someone, kissing them or going to their house means you are "asking for sex". All these factors have been found to potentially support a defendant's mistaken belief in consent.

The QLRC report relies heavily on research from the UK to dismiss the idea that jurors are influenced by rape myths. This research, as the QLRC admits, "has not yet been published or peer reviewed".

By contrast, the report overlooks recent peer-reviewed Australian research showing rape myths continue to influence rape trials.

What would real reform look like?

Bri Lee and I have proposed in peer-reviewed research that the mistake of fact excuse be limited so it can't be used when a defendant is reckless or does nothing to find out if the other person is consenting.

Our proposal would also remove the excuse in cases where a victim is asleep, unconscious or heavily intoxicated, as well as preventing a defendant's drunkenness from counting in their favour.

This proposal was unanimously endorsed by 39 sexual violence survivors and their supporters at a consultation session held by the QLRC in February.

The QLRC report mentions the session in passing, but does not discuss the views expressed at the meeting. The legal profession's preference for the status quo seems to have prevailed over survivors' calls for reform.

If you or someone you know is impacted by sexual assault or family violence, call 1800RESPECT on 1800 737 732 or visit www.1800RESPECT.org.au. In an emergency, call 000.