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Mistake of Fact Excuse in Rape and Sexual Assault Law**

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## SUBMISSION TO WESTERN AUSTRALIAN LAW REFORM COMMISSION

### MISTAKE OF FACT EXCUSE IN RAPE AND SEXUAL ASSAULT LAW

- [1] This submission is made by **Professor Jonathan Crowe, Dr Rachael Burgin and Ms Saxon Mullins** on behalf of **Rape and Sexual Assault Research and Advocacy (RASARA)**. Professor Crowe is Professor of Law at Bond University and Director of Research at RASARA. Dr Burgin is Senior Lecturer in Law at Swinburne University of Technology and Executive Director of RASARA. Ms Mullins is a survivor-advocate and 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, Dr Burgin and Ms Holli Edwards (a PhD candidate in law at Bond University) have recently conducted a comprehensive survey of post-1990 Western Australian appeal decisions dealing with the mistake of fact excuse in rape and sexual assault cases. The research has been blind peer reviewed and published in the *University of Western Australia Law Review*. A copy of the full published article is **attached** to this submission.
- [4] Australian rape law has moved towards an affirmative consent standard, with recent reforms in New South Wales, the Australian Capital Territory and Victoria exemplifying this trend. Professor Crowe, Dr Burgin and Ms Edwards's research found that the mistake of fact excuse as applied in Western Australia undermines this approach, allowing the defendant to rely on passive non-resistance or past acts by the complainant to excuse their behaviour.

- [5] These arguments have succeeded in Western Australia even where there is a history of violence between the parties or the previous acts are unrelated. Intoxication or impaired capacity by the defendant also lower the bar for the mistake of fact excuse, potentially exacerbating these outcomes.
- [6] The attached article examines recent and proposed reforms in other Australian jurisdictions that could help resolve these issues. Recent legal changes in New South Wales, the Australian Capital Territory and Victoria follow Tasmania in limiting the application of the mistake of fact excuse to issues of sexual consent, including by imposing a requirement that defendants do or say something to ascertain consent. A similar model has been proposed in Queensland.
- [7] There are some differences between the approaches taken in the jurisdictions mentioned above. For example, New South Wales and Victoria have incorporated an exception to the requirement to do or say something to ascertain consent where the defendant has a cognitive impairment. Tasmania and the Australian Capital Territory have no such exception.
- [8] The issue of cognitive impairment raises complex considerations. It has been advanced by some commentators as a reason not to limit the mistake of fact excuse [see Discussion Paper, 5.112]. However, the New South Wales and Victorian approach shows that, if the concerns are accepted, this can be addressed by creating an exception [Discussion Paper, 5.113].
- [9] The research in the attached article supports the following responses to the specific issues in **Question 20** in the Discussion Paper:

*Should the Code provide that a belief in consent is not honest and/or reasonable if the accused did not take measures to ascertain the complainant's consent?*

Yes.

*If so, how should this requirement be framed?*

We recommend generally following the approach proposed by Professor Crowe and Ms Bri Lee in Queensland. This would involve inserting a provision to the following effect into the *Criminal Code*:

**Section 24A – Mistake as to consent in certain sexual offences**

In proceedings for an offence against section 325 or 326, 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 did not, within a reasonable time before or at the time of each sexual act, say or do anything to ascertain that the complainant was consenting; or
- (c) the complainant was in a state of intoxication and did not clearly and positively express his or her consent to each act; or
- (d) the complainant was unconscious or asleep when any part of the act or sequence of acts occurred.

*For example, should the relevant provision:*

- *Refer to both the honesty and reasonableness of the accused's belief, or focus solely on the assessment of reasonableness.*

Honesty is a subjective notion, whereas reasonableness is objective. However, juries may sometimes have difficulty distinguishing these ideas. The above section seeks to maximise clarity by providing that a mistaken belief is 'not honest or reasonable' if it does not meet these conditions. However, it could be contended that it is more consistent with the existing law to place the focus on reasonableness.

- *Require the accused to have taken 'reasonable steps' to ascertain consent, or require them to have 'said or done something' to find out if the complainant consented.*

We recommend the wording 'say or do anything' from the New South Wales, Australian Capital Territory and Victorian amendments. This avoids potentially contentious disputes about what counts as a 'reasonable step'. This requirement should also be supplemented with an additional provision requiring the jury to have regard to anything the accused said or did to ascertain the complainant's consent. (See the response to Question 21 below).

- *Refer to the timing of the accused's measures to ascertain consent. For example, it could specify that the accused must have said or done something to ascertain consent at the time of the sexual activity, or within a reasonable time before that activity.*

Some reference to timing is important, since it is commonly suggested in rape trials that words or actions by the complainant a significant period before the sexual interaction could give rise to a mistaken belief in consent. The above provision uses the wording 'reasonable time'.

- *Make allowances for people whose capacity to actively seek consent may be impaired in some way. For example, it could specify that the provision does not apply if the accused has a cognitive impairment or mental illness, and that condition was a substantial cause of the accused not saying or doing anything to find out whether the*

*complainant consented to the sexual activity. The burden could be placed on the accused to prove these matters.*

We submit that an exception of this kind is not necessary. As discussed in detail in the attached article, creating an exception to the requirement to seek consent is not the most appropriate way to deal with cognitive differences in relation to a seriously harmful act such as rape. It is arguably inconsistent with the law in relation to other serious criminal offences.

We would therefore recommend following Tasmania and the Australian Capital Territory in not creating an exception for cognitive impairment. However, this is a complex issue. The New South Wales and Victorian approach of including exceptions is also a reasonable response.

[10] The research in the attached article further supports the following responses to the specific issues in **Question 21** in the Discussion Paper:

*Should the Code require or permit the jury to consider any measures the accused took to ascertain consent in determining whether their belief in consent was honest and/or reasonable?*

Yes. The jury should be required to have regard to anything the accused said or did to ascertain the complainant's consent.

*If so, how should this provision be framed? For example, should the relevant provision:*

- *Require the jury to consider any measures the accused took to ascertain consent or simply permit them to have regard to those measures.*

We recommend adopting the stronger wording. Juries should be required to have regard to these matters. This would be consistent with the limitations on the mistake of fact excuse proposed in relation to Question 20.

- *Refer to the 'steps' the accused took to ascertain consent, or to anything the accused 'said or did' to find out if the complainant consented.*

We recommend a reference to anything the accused 'said or did'. This would avoid the extremely broad interpretation of steps adopted by the New South Wales Court of Criminal Appeal in the *Lazarus* case [Discussion Paper, 5.139].

- *Refer to the timing of the accused's measures to ascertain consent. For example, it could refer to anything the accused said or did at the time of, or immediately before, the sexual activity.*

A reference to timing is appropriate for the reasons given in relation to Question 20 above.

- *Complement a provision requiring the accused to take measures to ascertain the complainant's consent or act as an alternative to such a provision.*

We recommend two complementary provisions. The mistake of fact excuse should not be available unless the accused said or did something to ascertain consent (see the response to Question 20 above). Additionally, the jury should be required to have regard to what, if anything, the accused said or did to ascertain consent. This is consistent with the New South Wales approach.

[11] The research in the attached article further supports the following responses to the specific issues in **Question 19** in the Discussion Paper:

*Should the Code provide legislative guidance to assist juries to determine whether a mistaken belief in consent was reasonable?*

Yes. See the proposed provision in the response to Question 20 above.

*If so, what guidance should be provided? For example, should the Code: [...] Prevent the jury from taking the accused's self-induced intoxication into account in determining whether the accused's belief was honest and/or reasonable.*

Yes. The accused person should not be able to argue, in effect, that they were so drunk they made a mistake about consent. Self-induced intoxication is generally not an excuse for criminal behaviour.

*[...] Specify that a belief in consent is not reasonable if there is no evidence that the complainant said or did anything to indicate consent.*

This requirement should apply, at a minimum, where the complainant is intoxicated. (See the response to Question 20 above.) However, a strong case could be made for adopting such a requirement across the board. This would assist clarity and avoid disputes about whether the complainant was intoxicated.

[12] Thank you for considering our submission. Please feel free to contact us if we can be of any further assistance.

Yours faithfully,

A handwritten signature in cursive script, appearing to read 'Jonathan Crowe'.

for

Jonathan Crowe  
Rachael Burgin  
Saxon Mullins

# AFFIRMATIVE CONSENT AND THE MISTAKE OF FACT EXCUSE IN WESTERN AUSTRALIAN RAPE LAW

JONATHAN CROWE,<sup>†</sup> RACHAEL BURGIN\* AND HOLLI EDWARDS<sup>‡</sup>

*This article discusses the application of the excuse of mistake of fact to the offence of sexual penetration without consent (the equivalent to rape) in Western Australia. Australian rape law has moved towards an affirmative consent standard, but the mistake of fact excuse undermines this approach, allowing the defendant to rely on passive non-resistance or past acts by the complainant to excuse their behaviour. These arguments have succeeded in Western Australia even where there is a history of violence between the parties or the previous acts are unrelated. Intoxication or impaired capacity by the defendant also lower the bar for the excuse, potentially exacerbating these outcomes. We examine recent and proposed reforms in other Australian jurisdictions that could help resolve these issues.*

## I INTRODUCTION

In Western Australia, ‘consent’ for the purposes of the offence of ‘sexual penetration without consent’,<sup>1</sup> called ‘rape’ in most Australian jurisdictions,<sup>2</sup> is defined as ‘consent freely and voluntarily given’.<sup>3</sup> Western Australia’s *Criminal Code* further provides that ‘consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means’.<sup>4</sup> Additionally, ‘a failure ... to offer physical resistance does not of itself constitute consent’.<sup>5</sup>

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<sup>1</sup> *Criminal Code 1918* (WA) s 325. The aggravated offence appears in s 326.

<sup>2</sup> *Criminal Code 1899* (Qld) s 349; *Crimes Act 1958* (Vic) s 38; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code 1924* (Tas) s 185. New South Wales employs the term ‘sexual assault’: *Crimes Act 1900* (NSW) s 61I. The Australian Capital Territory and the Northern Territory use ‘sexual intercourse without consent’: *Crimes Act 1900* (ACT) s 54; *Criminal Code 1983* (NT) s 192.

<sup>3</sup> *Criminal Code 1918* (WA) s 319(2)(a).

<sup>4</sup> *Criminal Code 1918* (WA) s 319(2)(a).

<sup>5</sup> *Criminal Code 1918* (WA) s 319(2)(b).



A defendant charged with sexual penetration without consent may contend that there was no sexual penetration or, alternatively, that the complainant consented. Another line of argument open to the defendant is to claim that even if the complainant did not in fact consent to sexual penetration, the defendant honestly and reasonably believed the complainant did consent. This argument relies on the excuse of mistake of fact in s 24 of the *Criminal Code*. That section relevantly 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 he [*sic*] believed to exist.

This article is based on a review of recent Western Australian appellate cases concerning the application of the mistake of fact excuse to sexual penetration without consent. The article seeks to advance understanding of how the excuse is interpreted and applied in Western Australian courts and assess whether reform to the application of mistake of fact to the issue of consent is needed. The cases were identified by searching the Western Australian reported cases in the Westlaw and AustLII databases for references to ss 24, 325 and 326 of the *Criminal Code* and keywords such as ‘rape’, ‘sexual assault’ and ‘mistake’. The search was limited to cases decided after 1990 to limit the sample size and provide an up-to-date picture of the law.

The article focuses on those cases that illustrate the interaction between the mistake of fact excuse and consent. Cases that merely mention the excuse without casting light on this issue were omitted. The study is limited to appellate case law. This focus is due mainly to the difficulty of accessing judgments and transcripts in unreported cases. Although appellate cases are not necessarily a representative sample, they can provide a useful window into the issues raised at trial, as well as the approaches of trial and appellate judges. They can also raise issues of appellate procedure. We have taken account of these factors in our analysis.

The article begins by examining some general principles the Western Australian Court of Appeal has developed when applying the mistake of fact excuse to sexual penetration without consent. We then explore the relationship between mistake of fact and affirmative consent, arguing that affirmative consent is undermined if a defendant can rely on passive non-resistance or past conduct by the complainant as the basis for an alleged mistake about consent, as has occurred in recent cases.

We continue by highlighting some consequences of the application of the mistake of fact excuse in cases of impairment by the defendant.

We conclude by discussing how Western Australian law might be reformed to address these issues. Recent or proposed reforms in other Australian jurisdictions provide a model. We discuss recent legal changes in New South Wales, the Australian Capital Territory and Victoria that follow Tasmania in limiting the application of the mistake of fact excuse to issues of sexual consent, including by imposing a requirement that defendants do or say something to ascertain consent. We also consider a similar reform proposed in Queensland which Western Australia could readily adopt, given the substantial similarities between the *Criminal Codes*.

## II GENERAL PRINCIPLES

The Western Australian Court of Appeal has developed a series of general principles in applying the mistake of fact excuse to sexual penetration without consent. Three significant procedural principles are: first, the mistake of fact excuse involves a split burden between the defence and prosecution; second, the excuse is only available where the jury is satisfied beyond a reasonable doubt that the complainant was not consenting; and, third, the excuse is not open where the defendant's contention at trial was that the complainant had enthusiastically consented. We consider these issues in turn, before moving to an important substantive principle, namely, that the mistake of fact excuse involves a hybrid test incorporating both the subjective honesty of the defendant's belief and its objective reasonableness.

### A *Procedural Principles*

The first of the procedural principles mentioned in the introduction to this section is that the mistake of fact excuse involves a split burden. The defendant bears the evidential burden of raising the excuse. This then places a burden on the prosecution to negate the excuse beyond a reasonable doubt. In other words, if the defendant leads evidence that indicates a reasonable possibility that they held an honest and reasonable but mistaken belief that the complainant was consenting, then the prosecution must prove beyond a reasonable doubt that the belief was not honest and reasonable. A recurring ground of appeal is that the trial judge erred in

finding the excuse was not raised on the evidence, therefore failing to instruct the jury on the issue.<sup>6</sup>

The second procedural principle is that the mistake of fact excuse is only available where the jury is satisfied beyond a reasonable doubt that the complainant was not consenting.<sup>7</sup> This issue arises because the mistake of fact excuse allows a defendant to advance a dual case theory that (a) there was consent or (b) in the alternative, they honestly and reasonably believed there was consent. However, if the jury is not satisfied beyond a reasonable doubt that there was no consent, then there is no need for the excuse, as the elements of the offence are not made out.

For example, in *Hancock*, the appellant was convicted at trial of sexually penetrating the 25-year-old complainant in his lounge room following a night of drinking. The appellant argued that the complainant had consented; she reported that she awoke to find him raping her.<sup>8</sup> The sole ground of appeal was that the trial judge failed to properly direct the jury on the difference between the appellant's case that the complainant consented and the mistake of fact excuse.<sup>9</sup> The Court of Appeal rejected this argument, saying it was clear to the jury that they could only consider mistake of fact if they were first satisfied that there had been no consent.<sup>10</sup>

Third, the Court of Appeal has held in a series of cases that the mistake of fact excuse is not open where the defendant's contention at trial was that the complainant had enthusiastically consented.<sup>11</sup> For example, in *Eades*, the 38-year-old appellant was convicted of four counts of sexual penetration without consent and indecent assault against the 16-year-old complainant following a night of smoking cannabis, but was acquitted of three other counts.<sup>12</sup> At trial, the appellant

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<sup>6</sup> Examples include *WCW v Western Australia* [2008] WASCA 232 and *Higgins v Western Australia* [2016] WASCA 142 (discussed further below).

<sup>7</sup> *Hancock v The Queen* [2003] WASCA 218, [15] (per curiam); *Ainsworth v The Queen* [2001] WASCA 212, [23] (Steytler J; Kennedy and Miller JJ agreeing); *Higgins v Western Australia* [2016] WASCA 142, [25]-[26] (McLure J).

<sup>8</sup> [2003] WASCA 218, [1]-[4] (per curiam).

<sup>9</sup> [2003] WASCA 218, [6]-[10] (per curiam).

<sup>10</sup> [2003] WASCA 218, [15] (per curiam).

<sup>11</sup> *Eades v The Queen* [2001] WASCA 329, [42] (Murray J; Templeman and Roberts-Smith JJA agreeing); *Ainsworth v The Queen* [2001] WASCA 212, [27] (Steytler J; Kennedy and Miller JJ agreeing); *Munmurrie v Western Australia* [2013] WASCA 167, [43]-[46] (Buss JA; Mazza JA and Hall J agreeing); *Harman v Western Australia* [2004] WASCA 230, [42] (Steytler J; Murray and Pullin JJ agreeing).

<sup>12</sup> [2001] WASCA 329, [1]-[2], [5], [16] (Murray J; Templeman and Roberts-Smith JJA agreeing).

denied the facts giving rise to the counts of which he was acquitted, but claimed the complainant ‘expressly consented’ to the conduct giving rise to the other counts of which he was convicted.<sup>13</sup>

Another ground of appeal in *Eades* was that the trial judge erred by not appropriately directing the jury as to the mistake of fact excuse.<sup>14</sup> The complainant’s evidence was that no consent was given, she had been tearful and repeatedly told the appellant to stop.<sup>15</sup> The appellant’s evidence was that he continuously obtained her express consent for each sexual activity.<sup>16</sup> The Court of Appeal found that, given this evidence, if the jury accepted the complainant’s version of events then mistake of fact would be unavailable, whereas if they rejected the complainant’s version about lack of consent, then ‘no additional question really arose as to whether upon the complainant’s evidence alone the applicant had acted under an honest and reasonable but mistaken belief that he had the complainant’s consent to what occurred’.<sup>17</sup>

Similarly, in *Ainsworth*, the appellant was convicted of four counts of sexual penetration without consent.<sup>18</sup> The appellant and his associate had arranged for the complainant, a sex worker, to come to their home and provide sexual massages, but not intercourse.<sup>19</sup> The complainant said the appellant forced himself on her after she refused sexual intercourse, she told him to stop and did not call out to her driver because she was scared.<sup>20</sup> The appellant said the intercourse was consensual and the complainant only became upset when he ejaculated on her lingerie.<sup>21</sup>

The Court of Appeal in *Ainsworth* found that ‘it was simply not open to the jury to have acquitted the applicant upon the ground that the Crown had failed to negative the defence of mistake.’<sup>22</sup> This was because the stark contrast in the complainant’s and appellant’s versions regarding consent did not allow ‘room for reasonable doubt’ on the question of mistake.<sup>23</sup> The complainant’s evidence was

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<sup>13</sup> [2001] WASCA 329, [4]-[6] (Murray J; Templeman and Roberts-Smith JJA agreeing).

<sup>14</sup> [2001] WASCA 329, [43] (Murray J; Templeman and Roberts-Smith JJA agreeing).

<sup>15</sup> [2001] WASCA 329, [40] (Murray J; Templeman and Roberts-Smith JJA agreeing).

<sup>16</sup> [2001] WASCA 329, [41] (Murray J; Templeman and Roberts-Smith JJA agreeing).

<sup>17</sup> [2001] WASCA 329, [42] (Murray J; Templeman and Roberts-Smith JJA agreeing).

<sup>18</sup> [2001] WASCA 212, [4] (Steytler J; Kennedy and Miller JJ agreeing).

<sup>19</sup> [2001] WASCA 212, [6]-[8] (Steytler J; Kennedy and Miller JJ agreeing).

<sup>20</sup> [2001] WASCA 212, [9] (Steytler J; Kennedy and Miller JJ agreeing).

<sup>21</sup> [2001] WASCA 212, [10] (Steytler J; Kennedy and Miller JJ agreeing).

<sup>22</sup> [2001] WASCA 212, [24] (Steytler J; Kennedy and Miller JJ agreeing).

<sup>23</sup> [2001] WASCA 212, [27] (Steytler J; Kennedy and Miller JJ agreeing).

that she had verbally and physically refused; the appellant's version was that she had actively participated and enjoyed the sexual activity. Ultimately this ground of appeal was also dismissed as no substantial miscarriage of justice was found to have occurred.<sup>24</sup>

The Western Australian Court of Appeal's approach to this issue is sensible and avoids problems that have arisen in other jurisdictions. For example, in the Queensland case of *Soloman*, the complainant's evidence was that she woke up to the defendant raping her, while the defendant's testimony was that the complainant enthusiastically consented. Queensland's Court of Appeal ruled that the jury should have been directed on the mistake of fact excuse, despite it not being raised by either the appellant's or the complainant's version of events. The Court of Appeal said 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'.<sup>25</sup>

The Queensland approach is problematic insofar as it allows the defendant to advance one account of the facts at trial and then seek to rely on a contradictory version of the facts on appeal. A defendant who adopts this strategy will generally not have discharged the evidential burden of raising a reasonable possibility that they held an honest and reasonable but mistaken belief in consent. As McLure P observed in the Western Australian case of *Narkle*, '[a] mere assertion of consent without exposing the factual basis for the claim is incapable of supporting any reasonable basis for such a belief'.<sup>26</sup> A similar point was made by the High Court in *The Queen v Baden-Clay*.<sup>27</sup> The Queensland Court of Appeal in that case had allowed the defendant to advance a different theory of the case on appeal from that offered at trial, but the High Court disapproved this, noting the theory was 'not available on the evidence'.<sup>28</sup>

It is arguably contrary to both the adversarial tradition and the finality principle to allow the defence to advance different case theories at trial and appeal. The

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<sup>24</sup> [2001] WASCA 212, [28] (Steytler J; Kennedy and Miller JJ agreeing).

<sup>25</sup> [2006] QCA 244, [34] (Jerrard JA, quoting McHugh J in *Stevens v The Queen* (2005) 80 ALJR 91, 100 [29]). See also *Elomari* [2012] QCA 27; *Cook* [2012] QCA 251. For further discussion, see Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39 *University of Queensland Law Journal* 1, 18-19.

<sup>26</sup> [2011] WASCA 160, [4].

<sup>27</sup> (2016) 258 CLR 308.

<sup>28</sup> (2016) 258 CLR 308, [5] (per curiam).

prosecution may not have the opportunity to fully test a case theory that is not advanced at trial but then used as the basis for an appeal, while the defence gains a second bite at the cherry by abandoning an unsuccessful case theory in favour of another. These pitfalls are averted by the Western Australian position.

### B *Substantive Principles*

The most important substantive principle articulated by the Western Australian Court of Appeal in applying the mistake of fact excuse concerns the hybrid subjective and objective test.<sup>29</sup> The test was developed in *BRK*<sup>30</sup> and *Aubertin*.<sup>31</sup> The six appellants in *BRK* were each convicted of raping the complainant, giving rise to a total of 25 offences. One ground of appeal was that the trial judge did not

make it clear to the jury that the Crown was required to prove beyond reasonable doubt that the accused ... did not himself, in the circumstances as they were known to him, reasonably believe or have reasonable grounds for believing that the complainant was consenting to the particular form of sexual penetration or the application of force in question.<sup>32</sup>

This ground was dismissed. The Court of Appeal emphasised that the Crown is not required to prove the defendant knew the complainant was not consenting.<sup>33</sup> Rather, questions about the defendant's knowledge of non-consent only arise if a defendant raises the mistake of fact excuse.<sup>34</sup>

The Court of Appeal clarified that the focus of the mistake of fact excuse is 'with the accused person's positive belief, genuinely or actually held. It is that belief which must be reasonable ... in all the circumstances'.<sup>35</sup> The relevant circumstances are the ones of which the accused had knowledge.<sup>36</sup> The Court of Appeal found it is generally inappropriate to direct the jury to consider the intellectual and other characteristics of the accused person when determining

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<sup>29</sup> *BRK v The Queen* [2001] WASCA 161, [34] (Murray J; Owen and Parker JJ agreeing); *Aubertin v The Queen* [2006] WASCA 229, [42]-[43] (McLure JA; Roberts-Smith and Buss JJA agreeing); *Munmurrie v Western Australia* [2013] WASCA 167, [30] (Buss JA; Mazza JA and Hall J agreeing).

<sup>30</sup> [2001] WASCA 161, [34] (Murray J; Owen and Parker JJ agreeing).

<sup>31</sup> [2006] WASCA 229, [42]-[43] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>32</sup> [2001] WASCA 161, [31] (Murray J; Owen and Parker JJ agreeing).

<sup>33</sup> [2001] WASCA 161, [91]-[93] (Murray J; Owen and Parker JJ agreeing).

<sup>34</sup> [2001] WASCA 161, [98] (Murray J; Owen and Parker JJ agreeing).

<sup>35</sup> [2001] WASCA 161, [34] (Murray J; Owen and Parker JJ agreeing).

<sup>36</sup> [2001] WASCA 161, [36] (Murray J; Owen and Parker JJ agreeing).

whether a mistaken belief is reasonable.<sup>37</sup> The belief, in other words, must be one the accused person subjectively held and, furthermore, it must be objectively reasonable given the circumstances known to them. It is not enough that the belief appeared reasonable to the defendant due to intellectual impairment or intoxication. No error was found in *BRK* as the trial judge had made clear it was ‘the reasonableness of the belief of the accused which was to be judged.’<sup>38</sup>

In *Aubertin*, the appellant was convicted after trial of one count of sexual penetration without consent and one count of indecent assault.<sup>39</sup> The complainant and her boyfriend stayed at a hotel with the appellant and other friends. Cocaine was used and the group went to a nightclub before returning to the hotel. The complainant gave evidence that the appellant had tried to touch her groin while they were dancing at the nightclub and later at the hotel she awoke to find him engaging in oral sex with her, which she told him to stop. The appellant said the complainant had engaged in ‘erotic dancing’ with him at the club and the oral sex was consensual.

The first ground of appeal contended the trial judge erred in directing the jury that the reasonableness of a mistaken belief in consent for the purposes of s 24 was to be ‘assessed by reference to the ordinary person in the accused’s position’.<sup>40</sup> The appellant argued that two lines of authority existed on the test for s 24: first, that reasonableness is an objective test, based on reference to the reasonable ordinary person; and, second, that reasonableness is a subjective test that considers whether there were reasonable grounds for the belief in light of the appellant’s personal characteristics.<sup>41</sup> After reviewing authorities from several jurisdictions, the Court of Appeal held that the hybrid test adopted in *BRK* was appropriate.<sup>42</sup>

The Court of Appeal noted that the defendant’s intoxication is excluded as a relevant consideration when determining whether a mistaken belief in consent is reasonable, due to ‘obvious public policy considerations.’<sup>43</sup> The accused’s values (cultural, religious or other) are also not relevant to this issue:

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<sup>37</sup> [2001] WASCA 161, [39]-[40] (Murray J; Owen and Parker JJ agreeing).

<sup>38</sup> [2001] WASCA 161, [40] (Murray J; Owen and Parker JJ agreeing).

<sup>39</sup> [2006] WASCA 229, [2] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>40</sup> [2006] WASCA 229, [3] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>41</sup> [2006] WASCA 229, [25] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>42</sup> [2006] WASCA 229, [42]-[43] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>43</sup> [2006] WASCA 229, [44] (McLure JA; Roberts-Smith and Buss JJA agreeing).

For example, values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn, cannot positively affect or inform the reasonableness of an accused's belief. Values do not impact on the capacity to perceive or appreciate primary objective facts or the capacity to process that information.<sup>44</sup>

As the trial judge was found to have directed the jury using the hybrid test for reasonableness, this ground of appeal was dismissed.<sup>45</sup>

### III MISTAKE OF FACT AND AFFIRMATIVE CONSENT

Rape law in Western Australia, as in other Australian jurisdictions, has taken important steps to overcome prejudices and stereotypes concerning 'real rape' and the 'ideal victim'.<sup>46</sup> One harmful component of these outdated views on rape (often called 'rape myths') is the idea that the complainant must 'resist to the utmost' to be considered credible. This notion is associated with a myth of 'real rape' as a violent assault carried out by a stranger in a public place, as well as the patriarchal construction of the 'ideal victim' as a 'chaste', 'modest' woman who would rather risk death than surrender her 'virtue'. Data from the Australian Bureau of Statistics, by contrast, confirms women are most at risk of being sexually victimised in a residential location, by a person known to them, 'without the use of a weapon' or overt physical injuries.<sup>47</sup>

It is important to note that there are several well-documented reasons why a complainant may not resist or express non-consent. These include the express or implicit threat of violence; the 'freeze response' (or 'tonic immobility') that is a common psychological reaction to aggression or trauma;<sup>48</sup> the 'tend and befriend'

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<sup>44</sup> [2006] WASCA 229, [46] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>45</sup> [2006] WASCA 229, [48] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>46</sup> See, for example, 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 *Law and Philosophy* 217. For a recent Australian discussion, see Anastasia Powell, Nicola Henry, Asher Flynn and Emma Henderson, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22 *Griffith Law Review* 456.

<sup>47</sup> Australian Bureau of Statistics, 'Reports of Sexual Assault Reach Six-Year High', Media Release (13 July 2016) <<https://tinyurl.com/ybwm8sf7>>.

<sup>48</sup> See, for example, S D Suarez and G G Gallup, 'Tonic Immobility as a Response to Rape in Humans: A Theoretical Note' (1979) 29 *Psychological Record* 315; G C Mezey and P J Taylor, 'Psychological Reactions of Women who Have Been Raped: A Descriptive and Comparative Study' (1988) 152 *British Journal of Psychiatry* 330; G Galliano et al, 'Victim Reactions during



response that leads victims to pacify the aggressor, rather than confront them directly;<sup>49</sup> or a rational judgment that it is preferable to endure the assault, rather than risk escalating the encounter. Requirements that women actively express lack of consent, whether initially or during an assault, are therefore inappropriate.

Western Australian law expressly recognises that passive non-resistance by the complainant does not, in itself, demonstrate consent to sexual contact.<sup>50</sup> This reflects a broader trend across Australia away from rape myths and towards an affirmative model of consent.<sup>51</sup> Affirmative consent requires, at a minimum, that a person demonstrates an ongoing willingness to engage in a sexual act either verbally or through their actions. Consent, to be legally effective, must therefore be positively expressed; mere passive acquiescence is not enough. This idea is captured in Victorian law through the express provision that there is no consent if the complainant ‘does not say or do anything to indicate consent to the act’.<sup>52</sup> Furthermore, consent must be present when the sexual act occurs and continue while the encounter continues. It cannot be inferred from the complainant’s actual or perceived behaviour in hours or days leading up to the act, nor can it be based on a pre-existing relationship.

It is also increasingly recognised that affirmative consent has implications for rape law beyond the definition of consent itself.<sup>53</sup> For example, affirmative consent is undermined by the mistake of fact excuse if the defendant can rely on the complainant’s passive acquiescence or past conduct as the basis for their alleged

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Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates’ (1993) 8 *Journal of Interpersonal Violence* 109.

<sup>49</sup> See, for example S E Taylor et al, ‘Biobehavioral Responses to Stress in Females: Tend-and-Befriend, Not Fight-or-Flight’ (2000) 107 *Psychological Review* 441; S E Taylor et al, ‘Sex Differences in Biobehavioral Responses to Threat: Reply to Geary and Flinn’ (2002) 109 *Psychological Review* 751.

<sup>50</sup> *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(b).

<sup>51</sup> See, for example, Rachael Burgin and Jonathan Crowe, ‘The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?’ (2020) 32 *Current Issues in Criminal Justice* 346; Rachael Burgin and Asher Flynn, ‘Women’s Behavior as Implied Consent: Male “Reasonableness” in Australian Rape Law’ (2021) 21 *Criminology and Criminal Justice* 334; Rachael Burgin, ‘Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform’ (2019) 59 *British Journal of Criminology* 296; Asher Flynn and Nicola Henry, ‘Disputing Consent: The Role of Jury Directions in Victoria’ (2012) 24 *Current Issues in Criminal Justice* 167.

<sup>52</sup> *Crimes Act 1958* (Vic) s 36(2)(l).

<sup>53</sup> For discussion, see Crowe and Lee (n 25) 5-7. See also Burgin and Crowe (n 51); Burgin and Flynn (n 51); Burgin (n 51).

mistake. These factors may not be determinative of consent, but this counts for little if they can be used to establish an ‘honest and reasonable’ belief in consent and thereby secure an acquittal. A legal framework that treats alleged mistakes about consent based on these factors as reasonable legitimises understandings of consent that are directly at odds with an affirmative consent model. This problem has been documented in several Australian jurisdictions, including Queensland,<sup>54</sup> Victoria<sup>55</sup> and New South Wales.<sup>56</sup> It also afflicts Western Australian law, as we show below.<sup>57</sup>

### A *Passive Non-Resistance*

The Western Australian Court of Appeal has held that passive non-resistance by the complainant can provide a factual basis for the mistake of fact excuse, even in a context of other violence by the defendant. For example, in *WCW*, the sole ground of appeal was whether the trial judge erred by failing to put the mistake of fact excuse to the jury in respect of three counts of aggravated sexual penetration without consent (counts 3, 11 and 13),<sup>58</sup> charged along with several other sexual and non-sexual offences. The appellant was convicted of some of these charges.<sup>59</sup>

The complainant was the 24-year-old ex-partner of the appellant and the mother of their two children. The relationship had been characterised by family violence and a restraining order was in place when the acts occurred.<sup>60</sup> The complainant’s evidence was that on each occasion of sexual penetration she told the appellant ‘no’, but he forced himself on her and threatened her. In relation to one count of

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<sup>54</sup> Crowe and Lee (n 25); Jonathan Crowe, ‘Consent, Power and Mistake of Fact in Queensland Rape Law’ (2011) 23(1) *Bond Law Review* 21.

<sup>55</sup> Burgin and Flynn (n 51); Burgin (n 51).

<sup>56</sup> Burgin and Crowe (n 51); Annie Cossins, ‘Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law of Consent’ (2019) 42 *University of New South Wales Law Journal* 462; Gail Mason and James Monaghan, ‘Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases’ (2019) 31 *Current Issues in Criminal Justice* 24.

<sup>57</sup> Critics of the trend towards an affirmative model of consent in Australia include Andrew Dyer. See Andrew Dyer, ‘Mistakes that Negate Apparent Consent’ (2018) 43 *Criminal Law Journal* 159; Andrew Dyer, ‘Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr’ (2019) 7 *Griffith Journal of Law and Human Dignity* 17. It is beyond the scope of this article to defend affirmative consent against these criticisms. Rather, we seek to explore its implications for the current Western Australian approach to the mistake of fact excuse.

<sup>58</sup> *WCW v Western Australia* [2008] WASCA 232, [1] (Buss JA).

<sup>59</sup> [2008] WASCA 232, [24]-[26] (Miller JA).

<sup>60</sup> [2008] WASCA 232, [40]-[42] (Miller JA); [124] (Murray AJA).

aggravated sexual penetration (count 3), the appellant's evidence was that the complainant didn't say 'no' or struggle.<sup>61</sup> In relation to another (count 11), the complainant testified that the appellant asked her for sex before the police arrived. She replied she didn't want to have sex, but when he insisted, she told him to 'hurry the fuck up'.<sup>62</sup> The appellant's evidence was similar but did not mention the initial refusal.<sup>63</sup>

The Court of Appeal held by majority that the trial judge erred in respect of s 24 in relation to counts 3 and 11. Buss JA noted that the test for determining whether sufficient evidence exists for the mistake of fact excuse to be left to the jury is 'whether, on the version of events most favourable to the accused that is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused did not have an honest and reasonable, but mistaken, belief.'<sup>64</sup> The trial judge had failed to apply this test, as he did not adequately consider the appellant's evidence and failed to appreciate the jury may have accepted parts of the complainant's evidence, rather than accepting or rejecting it entirely.<sup>65</sup>

The majority judges held s 24 should have been left to jury on the two counts outlined above. Miller JA (with whom Buss JA agreed<sup>66</sup>) said:

It was only in relation to those counts that the appellant laid a foundation for the defence. He clearly did so in relation to count 3, because he said, 'She didn't say "No" or didn't make no struggle or anything'. He also did so in relation to count 11, because he said, 'I just asked her for sex and she told me to hurry up and walked into the room ... She laid on her stomach, pulled her pants down ... and [I went] into her vagina from behind'.<sup>67</sup>

Murray AJA dissented. His Honour observed that the trial judge was obliged to leave the mistake of fact excuse to the jury 'if, on a view of the evidence fairly open, necessarily that most favourable to the appellant, the jury might be required, if a fair trial was to be had, to deal with the question of mistake under s 24'.<sup>68</sup> He

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<sup>61</sup> [2008] WASCA 232, [100] (Miller JA).

<sup>62</sup> [2008] WASCA 232, [79] (Miller JA).

<sup>63</sup> [2008] WASCA 232, [94] (Miller JA).

<sup>64</sup> [2008] WASCA 232, [9].

<sup>65</sup> [2008] WASCA 232, [13]-[14].

<sup>66</sup> [2008] WASCA 232, [18].

<sup>67</sup> [2008] WASCA 232, [102].

<sup>68</sup> [2008] WASCA 232, [119].

noted that the relationship between the appellant and the complainant ‘involved a considerable amount of violence towards the complainant by the appellant, both physical violence and emotional abuse’.<sup>69</sup> For example, ‘[t]owards the end of the relationship, [the appellant] would regularly attack [the complainant] physically, about weekly, punching her and kicking her.’<sup>70</sup> He further noted it is important to place mistake of fact ‘in the context of the other offences charged of which the appellant was convicted’.<sup>71</sup> That is, since the appellant was convicted of a range of non-sexual violent offences, the use of violence by the appellant against the complainant must be considered when determining whether the appellant’s alleged belief as to consent was honest and reasonable. Murray AJA then reviewed the evidence pertaining to each of the counts in question. His Honour concluded in relation to count 3 that the jury ‘could not accept the complainant’s evidence that she did not consent without accepting that she made that non-consent clear to the appellant.’<sup>72</sup> A similar analysis applied to count 11.<sup>73</sup>

The majority judges’ stance in *WCW* is at odds with an affirmative consent standard for at least two reasons. First, Miller JA’s reasoning (with which Buss JA agreed) treats mere passive acquiescence (or, more precisely, contested testimony from the appellant indicating passive acquiescence) as providing an evidential foundation for an honest and reasonable mistake about consent, even in the absence of any positive steps to ascertain that the complainant was consenting. This undermines the notion of affirmative consent for the reasons explained previously.

Second, Miller JA’s reasoning in upholding the grounds for appeal (unlike Murray AJA’s dissent<sup>74</sup>) neglects the context of violence that preceded and accompanied the counts.<sup>75</sup> The complainant testified that her relationship with the appellant involved (in Miller JA’s words) ‘a good deal of domestic violence, including both physical and emotional abuse’.<sup>76</sup> She obtained a restraining order,<sup>77</sup> which he

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<sup>69</sup> [2008] WASCA 232, [124].

<sup>70</sup> [2008] WASCA 232, [139].

<sup>71</sup> [2008] WASCA 232, [129].

<sup>72</sup> [2008] WASCA 232, [156].

<sup>73</sup> [2008] WASCA 232, [181].

<sup>74</sup> [2008] WASCA 232, [124], [129].

<sup>75</sup> The Queensland case of *R v Motlop* [2013] QCA 301 raises similar issues. For discussion, see Crowe and Lee (n 25) 7-8.

<sup>76</sup> [2008] WASCA 232, [40].

<sup>77</sup> [2008] WASCA 232, [42].

repeatedly breached.<sup>78</sup> The complainant further testified that the appellant raped her repeatedly in the lead up to the two counts in question,<sup>79</sup> as well as threatening to violently assault and kill her.<sup>80</sup> The appellant was convicted of ‘the count of aggravated burglary, of three counts of aggravated sexual penetration, of the two counts of deprivation of liberty, of aggravated assault occasioning bodily harm and robbery’.<sup>81</sup> The jury therefore must have substantially believed the complainant, although not necessarily in all particulars.

It is hard to see any reasonable interpretation of the evidence in *WCW* that did not involve a significant context of violence leading up to the sexual acts in question. This is, or should be, relevant to the mistake of fact excuse in at least two respects. First, it raises the question of whether it could be considered reasonable for the appellant to hold a mistaken belief that the complainant was consenting to sexual intercourse with him when he had repeatedly assaulted and threatened her shortly beforehand. Second (and relatedly), if the appellant’s evidence that the complainant did not resist his advances were accepted, the pattern of violence that preceded the counts provides an explanation as to why this may have occurred, but not one that supports the reasonableness (or indeed the honesty) of the alleged mistake. Murray AJA’s reasoning is preferable for taking this context into account.

Nonetheless, the majority view in *WCW* has been followed in subsequent cases. It was cited with approval in *Higgins*,<sup>82</sup> which involved multiple counts of sexual offences (including sexual penetration without consent) by the appellant against two complainants during massage services provided by the appellant. The trial judge did not direct the jury to consider mistake of fact.<sup>83</sup> McLure P clarified that the excuse only arises if (1) the jury is satisfied beyond reasonable doubt that the complainant did not consent; and (2) the evidence leaves open the possibility of an honest and reasonable mistaken belief in consent.<sup>84</sup> Her Honour (with whom Corboy J agreed<sup>85</sup>) found after a brief discussion that the complainant’s conduct provided a factual foundation for the excuse and the jury should have been directed accordingly.<sup>86</sup>

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<sup>78</sup> [2008] WASCA 232, [44].

<sup>79</sup> [2008] WASCA 232, [50], [52], [57], [62].

<sup>80</sup> [2008] WASCA 232, [53], [56].

<sup>81</sup> [2008] WASCA 232, [25].

<sup>82</sup> [2016] WASCA 142, [81] (Mazza JA).

<sup>83</sup> [2016] WASCA 142, [22]-[23] (McLure P).

<sup>84</sup> [2016] WASCA 142, [25]-[26] (McLure P).

<sup>85</sup> [2016] WASCA 142, [165].

<sup>86</sup> [2016] WASCA 142, [29].

Mazza JA provided a more detailed analysis of the factual basis for the mistake of fact excuse. His Honour found the excuse was not open in relation to the first and fourth occasions. The appellant ‘denied engaging in the conduct the subject of the charges and accepted that there was no physiological or other justification for massaging a person’s breasts or groin area.’<sup>87</sup> Thus, the subjective element of mistake was not present.<sup>88</sup> Additionally, the complainant told the appellant to stop on the fourth occasion and dressed herself. However, Mazza JA found s 24 should have been left open to the jury in relation to the second and third occasions.<sup>89</sup> The distinction was based on what Mazza JA called the complainant’s ‘appearance of consent’ on the second and third occasions because she ‘knew what to expect, that is, a “full body massage” which involved touching of her breasts and vaginal area’.<sup>90</sup>

This reasoning is problematic for treating a lack of resistance by the complainant as creating the factual foundation for an honest and reasonable mistake about consent. This approach, as discussed previously, undermines affirmative consent by putting the onus on complainants to actively resist unwanted sexual contact, while removing any responsibility of the appellant to ascertain consent. This is particularly concerning given the prevalence of the freeze response in contexts of sexual violence. Indeed, the complainant in *Higgins* testified in relation to the third occasion that she did not object to the conduct due to anxiety and a desire to avoid conflict,<sup>91</sup> while on the fourth occasion she was ‘shocked’ and ‘just froze’.<sup>92</sup>

### B *Prior Conduct*

The Western Australian Court of Appeal has also held that prior conduct by the complainant can give rise to a mistaken belief about consent, even where this conduct is unrelated to the sexual encounter in question or indeed is non-sexual in nature. The case of *Bolton* relates primarily to sections of the *Evidence Act 1906* (WA), regarding whether the trial judge erred in refusing to admit evidence of sexually explicit electronic communications between the appellant and

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<sup>87</sup> [2016] WASCA 142, [27].

<sup>88</sup> [2016] WASCA 142, [91]-[92].

<sup>89</sup> [2016] WASCA 142, [95]-[96].

<sup>90</sup> [2016] WASCA 142, [95]-[96].

<sup>91</sup> [2016] WASCA 142, [46].

<sup>92</sup> [2016] WASCA 142, [48].

complainant prior to the offending.<sup>93</sup> However, this issue is intertwined with the s 24 excuse.<sup>94</sup> The appellant and complainant began a relationship via an online chat forum and later met in person.<sup>95</sup> At a subsequent meeting sexual contact occurred.<sup>96</sup> The complainant's evidence was she did not consent and told the appellant to stop because he was hurting her.<sup>97</sup> The appellant's evidence was that the conduct was consensual.<sup>98</sup>

The Court of Appeal, upon finding the evidence of the online conversations was admissible, held that this resulted in a miscarriage of justice as it was relevant to (1) 'the appellant's understanding of why it was that the complainant went to his house and hence ... the issue of consent'; (2) the appellant's state of mind in relation to mistake of fact under s 24; and (3) the complainant's credibility.<sup>99</sup> The Court of Appeal's reasoning is based on the premise that prior conduct by the complainant in the form of sexually explicit messages and attendance at the appellant's house can enliven the mistake of fact excuse. This undermines the notion of affirmative consent, since it contradicts the requirement under such a standard that consent must be ascertained by the parties immediately before and during the encounter and thus cannot be assumed from the complainant's prior unrelated behaviour.

The Court of Appeal in *Bolton* only found that the evidence of online conversations could contribute to discharging the evidential burden in relation to s 24. The Court of Appeal did not suggest that this evidence alone would or should establish the honesty and reasonableness of the appellant's belief to the satisfaction of a jury. The Court of Appeal's reasoning does indicate that there is nothing inherently unreasonable under Western Australian law about an alleged mistaken belief in consent formed on these grounds. However, a belief in consent based on prior online conversations would not be one that is consistent with an affirmative consent model.

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<sup>93</sup> [2007] WASCA 277, [12]-[16] (Steytler P; Buss and Miller JA agreeing).

<sup>94</sup> See Burgin and Flynn (n 51) for a discussion of prior acts and claims of reasonable belief in consent in the Victorian context.

<sup>95</sup> [2007] WASCA 277, [2]-[8] (Steytler P; Buss and Miller JA agreeing).

<sup>96</sup> [2007] WASCA 277, [6] (Steytler P; Buss and Miller JA agreeing).

<sup>97</sup> [2007] WASCA 277, [7]-[8] (Steytler P; Buss and Miller JA agreeing).

<sup>98</sup> [2007] WASCA 277, [9] (Steytler P; Buss and Miller JA agreeing).

<sup>99</sup> [2007] WASCA 277, [68] (Steytler P; Buss and Miller JA agreeing).

*Higgins*, discussed previously, raises similar concerns. As noted, the case involved multiple incidents of unwanted touching of the complainant's breasts and vulva during massages. In the words of Mazza JA, on the first occasion, the appellant 'simply did it [i.e. the sexual touching], knowing that, according to his evidence, in the context of a massage, he should not do so'.<sup>100</sup> Mazza JA found that, for this reason, the mistake of fact excuse was not available on the first incident. However, the excuse was available in relation to the second and third incidents, when the behaviour recurred, because the complainant 'knew what to expect' and did not clearly object.<sup>101</sup> Mazza JA's reasoning has the paradoxical consequence that if a complainant has been previously sexually assaulted by the same person, then their failure to unambiguously resist on later occasions may enliven the mistake of fact excuse. This is at odds with affirmative consent since it absolves the appellant from obtaining agreement to each sexual activity, instead placing an onus on the complainant to express their resistance.

The reasoning in *Higgins* is also questionable given the well-documented role of grooming in sexual abuse. Grooming frequently involves 'the gradual sexualization of the relationship between the offender and the victim'.<sup>102</sup> The aim is to obtain the victim's compliance by normalising abusive behaviour and thereby overcoming the victim's resistance.<sup>103</sup> A victim of grooming may be subjected to unwanted sexual or other touching as a precursor to more serious and sustained abuse. The reasoning in *Higgins*, however, rewards this behaviour on the part of the abuser by allowing the victim's prior lack of resistance to unwanted sexual contact to provide a foundation for an alleged mistaken belief in consent on later occasions. Grooming is commonly associated with child sexual abuse, but it is also present in sexual abuse of adult victims.<sup>104</sup> The conduct in *Higgins* arguably reflects aspects of this pattern.

The case of *Narkle* is also relevant to this issue. The appellant in that case was convicted after a judge-alone trial of two counts of unlawful indecent assault and

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<sup>100</sup> [2016] WASCA 142, [93] (Mazza JA).

<sup>101</sup> [2016] WASCA 142, [95]-[96] (Mazza JA).

<sup>102</sup> Samantha Craven, Sarah Brown and Elizabeth Gilchrist, 'Sexual Grooming of Children: Review of Literature and Theoretical Considerations' (2006) 12 *Journal of Sexual Aggression* 287, 295.

<sup>103</sup> *Ibid.*

<sup>104</sup> See, for example, Grant Sinnamon, 'The Psychology of Adult Sexual Grooming: Sinnamon's Seven Stage Model of Adult Sexual Grooming' in Wayne Petherick and Grant Sinnamon (eds), *The Psychology of Criminal and Antisocial Behaviour: Victim and Offender Perspectives* (Academic Press, 2017).



four counts of sexual penetration without consent.<sup>105</sup> The complainant was homeless and the appellant offered for him to stay in the appellant's campervan, where the offences occurred.<sup>106</sup> The appellant's case at trial was that some sexual acts had occurred, but not penetration.<sup>107</sup> Further, he contended that the acts that occurred were consensual.<sup>108</sup> The second ground of appeal was on the basis that the trial judge erred by finding no evidence of consent or, alternatively, a mistaken belief in consent.<sup>109</sup> The trial judge had refused to admit statements made by the appellant to police, off-camera, in which the appellant conceded that he had sex with the complainant but stated this was consensual.<sup>110</sup> The Court of Appeal found the trial judge did not err by concluding the appellant had not satisfied the evidentiary burden of the mistake of fact excuse.<sup>111</sup>

The question according to the Court of Appeal in *Narkle* is whether the evidence, taken at its highest in favour of the accused, is such that it 'leaves open, as a reasonable possibility, that the accused could honestly and reasonably but erroneously believe that the complainant consented'.<sup>112</sup> The Court of Appeal found that none of the evidence allowed for a *reasonable* belief that the complainant consented.<sup>113</sup> That included evidence that the pair drank and took drugs together, the appellant's evidence that the complainant told the appellant he was gay and offered sex to 'get by on the streets' and that the appellant gave the complainant money, food and clothing.<sup>114</sup> Furthermore, the trial judge's finding that the appellant behaved threateningly towards the complainant in order to force him to comply with sexual demands 'negated the *reasonableness* of any defence under s 24'.<sup>115</sup>

As noted previously, McLure P observed in *Narkle* that '[a] mere assertion of consent without exposing the factual basis for the claim is incapable of supporting any reasonable basis for such a belief'.<sup>116</sup> The reasoning in *Narkle* is sensible and

<sup>105</sup> [2011] WASCA 160, [1], [5] (McLure P).

<sup>106</sup> [2011] WASCA 160, [10]-[11] (Buss JA; McLure P and Hall J agreeing).

<sup>107</sup> [2011] WASCA 160, [17] (Buss JA; McLure P and Hall J agreeing).

<sup>108</sup> [2011] WASCA 160, [17], [33] (Buss JA; McLure P and Hall J agreeing).

<sup>109</sup> [2011] WASCA 160, [25] (Buss JA; McLure P and Hall J agreeing).

<sup>110</sup> [2011] WASCA 160, [35]-[36] (Buss JA; McLure P and Hall J agreeing).

<sup>111</sup> [2011] WASCA 160, [1] (McLure P).

<sup>112</sup> [2011] WASCA 160, [3] (McLure P). See also [41] (Buss JA; McLure P and Hall J agreeing).

<sup>113</sup> [2011] WASCA 160, [44]-[48] (Buss JA; McLure P and Hall J agreeing).

<sup>114</sup> [2011] WASCA 160, [43] (Buss JA; McLure P and Hall J agreeing).

<sup>115</sup> [2011] WASCA 160, [48] (Buss JA; McLure P and Hall J agreeing).

<sup>116</sup> [2011] WASCA 160, [4].

balanced in comparison to *Bolton* and *Higgins*, where prior conduct not directly related to the sexual contact in question was held to enliven the mistake of fact excuse. *Narkle* illustrates that the legislative framework can be interpreted in such a way as to exclude mistake of fact arguments based on prior conduct as unreasonable, but unfortunately the Court of Appeal's approach has not been consistent.

The potential for appellants to rely on past conduct by the complainant as a basis for mistake of fact can also be seen in the Court of Appeal's approval of the so-called 'rough sex defence' in *Carroll*. The appellant in *Carroll* was convicted of twenty-seven counts of sexual offending on two occasions against the same complainant.<sup>117</sup> Among the grounds of appeal was that the trial judge failed to properly put the defence case to the jury in directing the jury on the mistake of fact excuse, but not on the defence claim that several of the incidents never happened.<sup>118</sup> It was further argued that the jury's verdicts on the various counts were inconsistent.<sup>119</sup>

The trial judge left s 24 to the jury on the basis that if the jury found the complainant had not given free and voluntary consent, they could not convict unless satisfied beyond reasonable doubt that the appellant did not honestly, although mistakenly, believe on reasonable grounds the complainant was consenting.<sup>120</sup> The Court of Appeal stated there could be no issue with this direction, despite the defence case at trial being that the acts did not occur, or if they did, they were consensual.<sup>121</sup> The Court of Appeal also noted that s 24 may have been open to the jury because of evidence that sex between the appellant and complainant on previous occasions had been 'robust and rough', such that the appellant 'may have misinterpreted what was intended by the complainant to convey non-consent'.<sup>122</sup> This aspect of the judgment effectively endorses what has been called the 'rough sex defence' in other jurisdictions.<sup>123</sup>

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<sup>117</sup> [2004] WASCA 254, [23] (Roberts-Smith J; Malcolm CJ and Murray J agreeing).

<sup>118</sup> [2004] WASCA 254, [26] (Roberts-Smith J; Malcolm CJ and Murray J agreeing).

<sup>119</sup> [2004] WASCA 254, [5] (Murray J; Malcolm CJ agreeing).

<sup>120</sup> [2004] WASCA 254, [4] (Murray J; Malcolm CJ agreeing).

<sup>121</sup> [2004] WASCA 254, [4] (Murray J; Malcolm CJ agreeing); [208] (Roberts-Smith J; Malcolm CJ and Murray J agreeing).

<sup>122</sup> [2004] WASCA 254, [7] (Murray J; Malcolm CJ agreeing).

<sup>123</sup> See, for example, Susan S M Edwards, 'Consent and the "Rough Sex" Defence in Rape, Murder, Manslaughter and Gross Negligence' (2020) 84 *Journal of Criminal Law* 293.

The ‘rough sex defence’ refers to the argument that since the defendant and complainant had engaged in (or discussed) rough sexual activity on previous occasions, the complainant therefore consented to rough sexual activity on the occasion in question. It may also be argued that the defendant mistakenly thought the complainant consented, even if they physically resisted, on the basis that roughness had been a feature of previous sexual discussions or activities.<sup>124</sup> This argument is concerning from an affirmative consent perspective since it allows the defendant to infer consent to rough sex from previous encounters, even in contexts involving severe violence or where the complainant physically resists. Affirmative consent places the responsibility on all parties to a sexual encounter to ensure consent is present and ongoing; this duty is heightened, not relaxed, where physical force is involved. The Court of Appeal’s endorsement of the ‘rough sex defence’ in *Carroll* therefore ramifies the concerns about the reliance placed on prior conduct in *Bolton* and *Higgins*.

#### IV MISTAKE OF FACT AND IMPAIRMENT

The mistake of fact excuse also has the potential to undermine affirmative consent in cases involving impairment of the defendant or complainant. The most prominent issues in Western Australian appellate cases involve intoxication and mental impairment of the defendant. The Court of Appeal has held, consistently with other jurisdictions,<sup>125</sup> that both these factors may lower the bar for the mistake of fact excuse. On this analysis, the defendant’s intoxication may make their putative mistake more likely to be honest, although not necessarily reasonable.<sup>126</sup> Mental impairment by the defendant, on the other hand, may make their mistake more likely to be deemed both honest and reasonable.<sup>127</sup> Defendants may therefore rely on both circumstances to bolster the excuse. This can lead to concerning outcomes, as we discuss below.

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<sup>124</sup> For discussion, see Rachael Burgin and Jonathan Crowe, ‘A Critique of the “Rough Sex Defence” in Australian Rape Law’ in Hannah Bows and Jonathan Herring (eds), *‘Rough Sex’ and the Criminal Law: Global Perspectives* (Emerald, 2023); Burgin and Flynn (n 51).

<sup>125</sup> For an overview of the Queensland case law, see Crowe and Lee (n 25) 13-24.

<sup>126</sup> *Aubertin v Western Australia* [2006] WASCA 229, [43]-[44]; *Gust v Western Australia* [2008] WASCA 166; *Pramzo v Western Australia* [2009] WASCA 25; *Prazmo v Western Australia (No 2)* [2010] WASCA 99, [15].

<sup>127</sup> *Aubertin v Western Australia* [2006] WASCA 229, [43]; *Butler v Western Australia* [2013] WASCA 242, [23] (McLure P), [129]-[130] (Buss JA), [158]-[159] (Hall J).

### A Intoxication

The Western Australian *Criminal Code*, unlike the law in some other Australian jurisdictions,<sup>128</sup> does not expressly exclude a defendant's intoxication from consideration in relation to mistaken belief in consent. An examination of the Western Australian Court of Appeal's decisions reveals intoxication is considered relevant to mistake of fact, though its impact on the elements of the excuse varies. In particular, the Court of Appeal has held the defendant's intoxication is relevant to the honesty of their belief (the subjective element), but it is not necessarily relevant to the reasonableness of that belief (a mixed<sup>129</sup> subjective-objective element).<sup>130</sup>

The Court's decisions in *Gust* and later *Pramzo* and *Pramzo (No 2)* suggest a defendant's intoxication tends to support their honesty in claiming a mistaken belief in consent. In *Gust*, Wheeler JA (sitting alone) affirmed a jury is entitled to consider the defendant's intoxication when determining the honesty of their belief as to consent.<sup>131</sup> This was cited with approval by Miller JA (sitting alone) in *Pramzo*.<sup>132</sup> The full Court of Appeal then affirmed Miller JA's reasoning in *Pramzo (No 2)*.<sup>133</sup> Wheeler JA reflected in *Gust* that '[i]t would be a matter of fairly common experience that an intoxicated person may honestly believe something, but may do so wholly unreasonably.'<sup>134</sup> This indicates a defendant's intoxication will generally support the honesty of their claimed mistaken belief, bolstering the first limb of the excuse, although the belief may nonetheless be unreasonable.

Reasonableness is often the decisive question when a mistaken belief in consent is raised. The Court of Appeal's decision in *Aubertin* (discussed previously) represents the authority on the relevance of the defendant's intoxication to the

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<sup>128</sup> See, for example, *Crimes Act 1958* (Vic) s 36B; *Crimes Act 1900* (NSW) s 61HK(5)(b); *Criminal Code 1924* (Tas) s 14A.

<sup>129</sup> *Munmurrie v Western Australia* [2013] WASCA 167, [30].

<sup>130</sup> *Aubertin v Western Australia* [2006] WASCA 229, [43]-[44] (McLure JA; Roberts-Smith and Buss JJA agreeing); *Gust v Western Australia* [2008] WASCA 166, [17] (Wheeler JA); *Pramzo v Western Australia* [2009] WASCA 25, [21]-[23] (Miller JA); *Prazmo v Western Australia (No 2)* [2010] WASCA 99, [15] (McLure P; Owen and Buss JJA agreeing).

<sup>131</sup> *Gust v Western Australia* [2008] WASCA 166, [17].

<sup>132</sup> *Pramzo v Western Australia* [2009] WASCA 25, [21]-[23] (Miller JA); *Prazmo v Western Australia (No 2)* [2010] WASCA 99, [15] (McLure P; Owen and Buss JJA agreeing).

<sup>133</sup> [2010] WASCA 99, [15] (McLure P; Owen and Buss JJA agreeing).

<sup>134</sup> *Gust v Western Australia* [2008] WASCA 166, [17].

reasonableness of their belief. Miller JA in *Pramzo* relied on *Aubertin* for the principle that the defendant's intoxication is irrelevant in determining the reasonableness of their belief.<sup>135</sup> However, closer examination of *Aubertin* reveals the principle is less resounding. *Aubertin* does not entirely exclude the defendant's intoxication from determining the reasonableness of the defendant's belief. Rather, the Court of Appeal held the defendant's intoxication should not be used to *support* the reasonableness of the belief.<sup>136</sup> Instead, the Court emphasised that '[s]elf-induced impairment by alcohol or drugs can *only be a negative or at best neutral factor* in assessing whether the appellant's belief was reasonable.'<sup>137</sup> The defendant's intoxication is therefore not wholly excluded from the jury's considerations of the issue of reasonableness.

The principles discussed above produce a somewhat complex picture. The defendant's intoxication may be relevant to and indeed bolster the honesty of a claimed mistaken belief. Effectively, the defendant can submit that they were so drunk that they made a mistake as to consent. The defendant's intoxication will not support the reasonableness of the belief, but it may be relevant as a negative or neutral factor. This framework has the potential to produce confusion when applied in the context of a criminal trial. Jurors may not rigorously distinguish the subjective and objective components of the test, rather taking a holistic view of the circumstances.<sup>138</sup>

The role of the defendant's intoxication in rape trials is particularly complex in the relatively common scenario where both the defendant and the complainant are affected by alcohol or drugs. The defence's case theory may be, expressly or implicitly, that both parties were drunk and therefore perhaps acted irresponsibly or out of character, but in the circumstances the defendant's conduct was excusable. This case theory is inconsistent with affirmative consent, since it seeks to absolve the defendant of responsibility for ensuring the complainant is consenting (and has capacity to do so). It is also potentially bolstered by rape myths that blame victims for being assaulted where they are intoxicated or

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<sup>135</sup> [2009] WASCA 25, [21].

<sup>136</sup> Compare *Pramzo v Western Australia* [2009] WASCA 25, [20]. The trial judge's directions to the jury, not disturbed on appeal, were that the defendant's intoxication was 'not a relevant factor in support of' the reasonableness of his belief.

<sup>137</sup> *Aubertin v Western Australia* [2006] WASCA 229, [44] (McLure JA; Roberts-Smith and Buss JJA agreeing) (emphasis added).

<sup>138</sup> See Jonathan Crowe and Lara Sveinsson, 'Intimidation, Consent and the Role of Holistic Judgments in Australian Rape Law' (2017) 42 *University of Western Australia Law Review* 136.

otherwise vulnerable due to their behaviour. It is partly for this reason that other Australian jurisdictions that have moved towards an affirmative consent model have excluded the defendant's intoxication from consideration entirely in relation to an alleged mistaken belief in consent.<sup>139</sup>

### B *Mental Impairment*

The Western Australian Court of Appeal traditionally considered it inappropriate to direct a jury to consider a defendant's personal characteristics in relation to the mistake of fact excuse.<sup>140</sup> However, within the last decade, this position has reversed. In *Aubertin*, the Court of Appeal expressed the reasonableness element as a mixed subjective and objective test. The reasonableness of the defendant's belief as to consent is to be judged, not by comparison to the 'reasonable person', but with consideration of 'the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances' such as age, maturity, gender, ethnicity and physical or mental disabilities.<sup>141</sup> These personal characteristics do not represent an exhaustive list. However, the Court has expressly excluded a defendant's values and religious beliefs from consideration of the reasonableness of their belief. The Court emphasised misogynistic perceptions of women's clothing as purportedly indicating consent were not relevant to the mixed test.<sup>142</sup>

Mental impairment on the part of the defendant, in particular, is viewed as pertinent to both the honesty and reasonableness of an alleged mistaken belief. In *Butler*, the appellant's 'material intellectual impairment' and evidence he consequently did not understand that consent had been withdrawn was considered relevant by the Court of Appeal to considering the application of mistake of fact. The recorded police interview evidenced the appellant's intellectual impairment was significant. For example, the defendant was unable to articulate that he understood the police cautions, forgot what he had told police ten minutes before, presented difficulty focusing and could not answer simple questions such as where he lived.<sup>143</sup>

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<sup>139</sup> *Crimes Act 1958* (Vic) s 36B; *Crimes Act 1900* (NSW) s 61HK(5)(b); *Criminal Code 1924* (Tas) s 14A.

<sup>140</sup> *BRK v The Queen* [2001] WASCA 161, [39]-[40] (Murray J; Owen and Parker JJ agreeing).

<sup>141</sup> [2006] WASCA 229, [43] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>142</sup> [2006] WASCA 229, [46] (McLure JA; Roberts-Smith and Buss JJA agreeing).

<sup>143</sup> [2013] WASCA 242, [7] (McLure P).

The Court of Appeal found the trial judge had erred by failing to direct the jury of the relevance of the appellant's intellectual impairment to the mistake of fact excuse. The appellant's impairment, the Court explained, was relevant to both the honesty and reasonableness of the appellant's mistaken belief as to consent.<sup>144</sup> The Court declined to exercise its discretion to order a retrial, due to the time served by the appellant, and subsequently acquitted him.<sup>145</sup> Thus, while both the complainant's and the appellant's evidence indicated the complainant withdrew her consent to sexual intercourse and this was expressly communicated at the time,<sup>146</sup> the appellant's mental impairment nonetheless resulted in his acquittal.

The Court of Appeal's approach in *Butler* means the mistake of fact excuse may be open in a case where the complainant is not merely passive, but actively communicates lack of consent, if the defendant has a mental impairment. Similar results have occurred in other jurisdictions.<sup>147</sup> This issue raises complex questions of law and policy. It might be suggested that if mental impairment was excluded from consideration in determining the reasonableness of a defendant's mistaken belief, then this would result in the defendant being punished for their mental impairment. On the other hand, the fact that the defendant's impairment led to them having sex with the non-consenting complainant is a serious wrong deserving legal recognition. The Western Australian approach appears to privilege the former consideration.

An analogy could be drawn with the situation where a defendant kills another person but does not believe, due to a mental impairment, that their actions would be likely to kill (or endanger life). The defendant's state of mind would negate the intention element of murder.<sup>148</sup> They might then be charged with manslaughter.<sup>149</sup> The question of how the mistake of fact excuse could (or should) apply in such a context is a difficult legal issue that cannot be considered fully here. The approach taken in *Butler* suggests it could exculpate the defendant entirely. However, there is authority in Victoria that the test for negligent manslaughter is purely objective and the issue of mental impairment should be dealt with at the sentencing stage:

<sup>144</sup> [2013] WASCA 242, [23] (McLure P), [129]-[130] (Buss JA), [158]-[159] (Hall J).

<sup>145</sup> [2013] WASCA 242, [44] (McLure P), [151] (Buss JA), [161] (Hall J).

<sup>146</sup> [2013] WASCA 242, [26]-[27] (McLure P), [73], [82]-[83] (Buss JA).

<sup>147</sup> See, for example, the Queensland cases of *R v Mrzljak* [2004] QCA 420 and *R v Dunrobin* [2008] QCA 116. For discussion, see Crowe and Lee (n 25) 20-2.

<sup>148</sup> *Criminal Code 1918* (WA) s 279. For an instructive, albeit dated, discussion of this issue in Queensland law, see Colin Howard, 'The Reasonableness of Mistake in the Criminal Law' (1961) 4 *University of Queensland Law Journal* 45, 49-51.

<sup>149</sup> *Criminal Code 1918* (WA) s 280.

[T]he crime is one of causing death by actions which fall so short of the standard of care which a reasonable person would have exercised in the circumstances and which involved such a high risk of death or serious injury that the conduct merits criminal punishment ... The crime is, thus, one which requires an objective comparison to be made between the conduct of the accused and the conduct to be expected of the reasonable person. The objectivity which marks out the crime does not permit, in its commission, any distinction to be drawn between the intelligent and the handicapped or the appreciative and the ignorant. That is why one finds, over the years, that those distinctions have been drawn in the range of penalties imposed for the crime. Thus, persons of sound intellect who cause death by driving motor vehicles in a grossly negligent fashion will, as a rule, attract high levels of punishment because the degree of criminality involved in their departure from the standard of care expected of a reasonable person is high; whereas persons who, either because of their background or sub-normal intellect [*sic*] or both, cause death by grossly negligent conduct will usually be adjudged of lesser moral culpability simply because, for the purposes of punishment, their standards cannot be equated with those of a reasonable person.<sup>150</sup>

It could be argued that rape, too, is a crime involving ‘actions which fall so short of the standard of care which a reasonable person would have exercised in the circumstances’ and involving ‘such a high risk of ... serious injury that the conduct merits criminal punishment’. This might suggest issues of impairment are best dealt with through mechanisms other than the mistake of fact excuse. There are, for example, special provisions in Western Australian law so that perpetrators who do not have the cognitive capacity of an adult are not tried similarly to other adults.<sup>151</sup> Judges also have significant discretion when sentencing someone with a different mental capacity, so they are not punished excessively given their cognitive difference.<sup>152</sup> An opposing case could, however, be made that people with cognitive impairments should not be criminalised even when they commit seriously harmful acts such as manslaughter and rape, but rather receive appropriate care and treatment.<sup>153</sup> The issue deserves more detailed and specific analysis than is possible in this article.

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<sup>150</sup> *R v Richards and Gregory* [1998] 2 VR 1, 9-10 (Winneke P; Brooking and Tadgell JA agreeing).

<sup>151</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

<sup>152</sup> *Sentencing Act 1995* (WA) s 8.

<sup>153</sup> For an argument along these lines, see Andrew Dyer, ‘Progressive Punitiveness in Queensland’ (2020) 48 *Australian Bar Review* 326, 332-7.



## V OPTIONS FOR REFORM

The application of the excuse of mistaken belief in the context of rape has been the subject of recent reforms in other Australian jurisdictions. The first Australian jurisdiction to amend the law in this area was Tasmania in 2004.<sup>154</sup> More recently, New South Wales revised its legislation in 2021,<sup>155</sup> substantially in response to the widely discussed case of *R v Lazarus*,<sup>156</sup> which raised issues of passive acquiescence and intoxication like those considered in this article. The Australian Capital Territory and Victoria have recently followed suit.<sup>157</sup> These reforms have the effect of limiting the application of the mistake of fact excuse (or its common law equivalent) for issues of sexual consent.<sup>158</sup> Similar reforms have also been proposed in Queensland that Western Australia could adopt, given the legal similarities between those jurisdictions.

The Tasmanian provision dealing with sexual consent and mistake of fact, which was based on the Canadian law,<sup>159</sup> 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.<sup>160</sup>

This section limits the application of the mistake of fact excuse to issues of sexual consent in three ways. First, it excludes the defendant's self-induced intoxication

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<sup>154</sup> *Criminal Code Amendment (Consent) Act 2004* (Tas).

<sup>155</sup> *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW). The amendments took effect on 1 June 2022.

<sup>156</sup> [2017] NSWCCA 279. For critical discussion of the case, see Burgin and Crowe (n 51); Cossins (n 56); Mason and Monaghan (n 56).

<sup>157</sup> *Crimes (Consent) Amendment Act 2022* (ACT); *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

<sup>158</sup> Tasmania is a code jurisdiction, while New South Wales and Victoria are common law states. The Australian Capital Territory was a common law jurisdiction prior to adopting the *Criminal Code 2002* (ACT). It retains elements of the common law framework.

<sup>159</sup> *Criminal Code of Canada*, RSC 1985, c C-46, s 273.2(b).

<sup>160</sup> *Criminal Code Act 1924* (Tas) s 14A.

entirely as a factor that could support either the honesty or the reasonableness or a mistaken belief in consent, instead providing that the defendant's belief should be assessed as if they were not intoxicated. This addresses the ambiguity about the relevance of intoxication raised in this article. Second, it excludes the excuse where the defendant was reckless as to consent. Third, it excludes the excuse where the defendant failed to take reasonable steps in the circumstances at the time to find out whether the complainant was consenting. These components prevent the defendant from relying on passive non-resistance or prior conduct to establish the excuse where the defendant was either inadvertent as to consent or did not take steps to ascertain it.

The most prominent criticism of the Tasmanian provision since its enactment is that its intended effect has been thwarted, as trial judges have been slow to modify their practices.<sup>161</sup> This shows the importance of coupling consent law reforms with follow up measures to ensure consistent adoption and, if necessary, cultural change among judges and police. It has also been argued that the inclusion of both recklessness and the reasonable steps requirement in this provision and similar models is redundant, since a defendant who is reckless would either fail to direct their mind to the question of consent and therefore not be under a mistaken belief or, alternatively, would fail to meet the reasonable steps requirement.<sup>162</sup>

More recent reforms in New South Wales, the Australian Capital Territory and Victoria have adopted the core features of the Tasmanian approach. The New South Wales law was amended to read as follows:

- (1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if—
  - (a) the accused person actually knows the other person does not consent to the sexual activity, or
  - (b) the accused person is reckless as to whether the other person consents to the sexual activity, or
  - (c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.
- (2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a

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<sup>161</sup> 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.

<sup>162</sup> Dyer (n 153) 366-7.

reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.

- (3) Subsection (2) does not apply if the accused person shows that—
  - (a) the accused person had at the time of the sexual activity—
    - (i) a cognitive impairment within the meaning of section 23A(8) and (9), or
    - (ii) a mental health impairment, and
  - (b) the impairment was a substantial cause of the accused person not saying or doing anything.
- (4) The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.
- (5) For the purposes of making any finding under this section, the trier of fact—
  - (a) must consider all the circumstances of the case, including what, if anything, the accused person said or did, and
  - (b) must not consider any self-induced intoxication of the accused person.<sup>163</sup>

This provision adapts the main features of the Tasmanian model for New South Wales's common law context. Subsection (1)(b) incorporates a recklessness requirement for a mistaken belief in consent, while subsection (2) incorporates a positive steps requirement. Self-induced intoxication is entirely excluded from consideration in subsection (5)(b). The wording 'say or do anything' in subsection (2) was adopted instead of the Tasmanian wording 'reasonable steps' (or similar) to avoid the interpretation placed on the previous New South Wales law by the Court of Criminal Appeal in *Lazarus*. In that case, a requirement that the courts consider 'any steps taken' by the defendant when assessing the reasonableness of an alleged mistaken belief in consent was construed extremely widely to include the defendant's merely directing their mind to the question without taking any external action.<sup>164</sup>

Another notable feature of the New South Wales provision is the treatment of cognitive and mental health impairments in subsection (3). This subsection creates an exception to the positive steps requirement for defendants who did not say or do anything to ascertain consent due to a cognitive or mental health condition. It could be argued, as discussed earlier in this article, that this is not the most appropriate way to deal with cognitive differences in relation to a seriously

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<sup>163</sup> *Crimes Act 1900* (NSW) s 61HK.

<sup>164</sup> [2017] NSWCCA 279, [147] (Bellew J, with whom the other judges agreed).

harmful act such as rape. However, the New South Wales legislature has adopted the contrary view that such acts should not be criminalised when linked to a cognitive impairment. More recently, Victoria has also taken a similar approach to this issue.<sup>165</sup>

The amendments adopted by the Australian Capital Territory in 2022 also contain the central features of the Tasmanian model.<sup>166</sup> They provide that a person who is reckless as to consent cannot rely on a mistaken belief about consent.<sup>167</sup> Furthermore, a mistaken belief in consent will not be reasonable if the defendant ‘did not say or do anything to ascertain whether the other person consented’.<sup>168</sup> Australian Capital Territory law prior to these amendments already excluded self-induced intoxication from consideration in determining whether a mistaken belief is reasonable,<sup>169</sup> although it may be considered in determining whether the belief exists.<sup>170</sup> The amendments include no specific provision relating to cognitive impairment.<sup>171</sup>

The Tasmanian law was also used as the basis for the model provision proposed by Jonathan Crowe (one of the authors of this article) and Bri Lee in their study of the mistake of fact excuse in Queensland rape law.<sup>172</sup> Crowe and Lee’s proposal precedes the changes in New South Wales, the Australian Capital Territory and Victoria. It contains the same main features with wording tailored to Queensland. The following modified version of this provision could straightforwardly be adopted in Western Australia:

**Section 24A – Mistake as to consent in certain sexual offences**

In proceedings for an offence against section 325 or 326, 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

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<sup>165</sup> *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

<sup>166</sup> *Crimes Act 1900* (ACT) s 67.

<sup>167</sup> *Crimes Act 1900* (ACT) s 67(3).

<sup>168</sup> *Crimes Act 1900* (ACT) s 67(5).

<sup>169</sup> *Criminal Code 2002* (ACT) s 33(3).

<sup>170</sup> *Criminal Code 2002* (ACT) s 33(1).

<sup>171</sup> A person cannot generally rely on a mental impairment to deny the fault element of an offence: *Criminal Code 2002* (ACT) s 29(1).

<sup>172</sup> Crowe and Lee (n 25) 28.

- (b) the accused did not, within a reasonable time before or at the time of each sexual act, say or do anything to ascertain that the complainant was consenting; or
- (c) the complainant was in a state of intoxication and did not clearly and positively express his or her consent to each act; or
- (d) the complainant was unconscious or asleep when any part of the act or sequence of acts occurred.

Crowe and Lee's proposal extends the main components of the Tasmanian provision to address further issues identified in the Queensland case law. It also responds to the issues identified here in relation to Western Australia. The provision excludes the defendant's voluntary intoxication from consideration in applying the excuse, as is the case not only in Tasmania, but also in Victoria and New South Wales.<sup>173</sup> It requires the defendant to take positive and reasonable steps to ascertain consent before they can rely on a mistaken belief. Finally, the provision addresses cases where the complainant was intoxicated, unconscious or asleep when the assault occurred. We did not find any appellate cases in Western Australia where the mistake of fact excuse was successfully relied upon despite the complainant being asleep or unconscious, but cases of this kind have been documented in Queensland.<sup>174</sup> It would be prudent to exclude this use of the mistake of fact excuse in Western Australia.

Crowe and Lee's original proposal required the defendant to take 'positive and reasonable steps' to ascertain consent before relying on a mistaken belief. A potential loophole in the provision is that this requirement could be found to be satisfied by mere thoughts in the mind of the defendant if the interpretation of similar words in *Lazarus* were followed.<sup>175</sup> This interpretation has not been adopted in other jurisdictions and it is not obvious that it would be, particularly since it has been widely criticised.<sup>176</sup> However, the possibility would be avoided by incorporating the wording 'say or do anything' from the New South Wales, Australian Capital Territory and Victorian amendments.<sup>177</sup> This is reflected in the modified provision set out above. We have also removed the reference to

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<sup>173</sup> *Crimes Act 1958* (Vic) s 36B; *Crimes Act 1900* (NSW) s 61HK(5)(b).

<sup>174</sup> See, for example, *R v CU* [2004] QCA 363; *R v SAX* [2006] QCA 397. For discussion, see Crowe and Lee (n 25) 17-20.

<sup>175</sup> Dyer (n 153) 369-70.

<sup>176</sup> See, for example, Burgin and Crowe (n 51) 349, 354-5; Mason and Monaghan (n 56) 33-4.

<sup>177</sup> For the amended Victorian wording, see *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

recklessness that appears in both the Tasmanian provision and Crowe and Lee's original proposal, as this has been criticised as redundant.<sup>178</sup>

Crowe and Lee's model amendment follows Tasmania in not providing an exception for mistakes due to cognitive impairment. This is also consistent with the Australian Capital Territory amendments. However, the New South Wales and Victorian changes take a different approach.<sup>179</sup> Western Australia could follow either model depending on the view taken on the issues about impairment discussed previously in this article. Cognitive impairment has been advanced by some commentators as a reason not to limit the mistake of fact excuse for rape.<sup>180</sup> However, the New South Wales and Victorian model shows that, if the concerns are accepted, this can be readily addressed.

## VI CONCLUSION

This article has critically evaluated the Western Australian law on the application of the mistake of fact excuse to the crime of sexual penetration without consent. We first identified some of the general principles developed by the Western Australian Court of Appeal in applying the excuse of mistake of fact to the offence of sexual penetration without consent and then examined the implications of the mistake of fact excuse for the shift towards an affirmative consent standard in Australian rape law. We contended, in particular, that allowing defendants to rely on passive acquiescence or unrelated past conduct by the complainant to establish a mistaken belief in consent is contrary to an affirmative consent model.

The application of mistake of fact in Western Australian cases involving impairment of the defendant also warrants consideration in evaluating potential reform options. The defendant's intoxication remains relevant to the honesty and, in a limited context, the reasonableness of an alleged mistaken belief in consent.

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<sup>178</sup> Dyer (n 153) 366-7. Dyer also suggests Crowe and Lee's proposal is 'an attempt ... to remove the [mistake of fact] excuse by stealth' by 'ensuring that all acts of non-consensual sexual activity between adults ... amount to either rape or sexual assault': *ibid* 370, 367. This claim is at odds with the experience following the enactment of similar provisions in Tasmania and Canada. Neither jurisdiction has seen the mistake of fact excuse disappear from rape cases. See Cockburn (n 160) 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.

<sup>179</sup> *Crimes Act 1900* (NSW) s 61HK(3); *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

<sup>180</sup> Dyer (n 153) 332-7.

This creates space for the jury to potentially excuse defendants based on their intoxication. Furthermore, defendants with mental impairments can rely on the mistake of fact excuse even where the complainant actively expressed a lack of consent.

We concluded by canvassing potential reforms to the Western Australian law in this area. Other Australian jurisdictions, including Tasmania and more recently New South Wales, the Australian Capital Territory and Victoria, have limited the application of the mistake of fact excuse to issues of sexual consent. Similar reforms have also been proposed in Queensland. The core features of these reforms, which broadly follow the Tasmanian model, could straightforwardly be incorporated into Western Australian law, for example by following or adapting the proposal developed by Crowe and Lee in the Queensland context. This would be an important step towards implementing an affirmative consent model in Western Australia.