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Crowe, Jonathan

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CONSENT, POWER AND MISTAKE OF FACT IN QUEENSLAND RAPE LAW

JONATHAN CROWE*

This article critically examines the legislative definition of rape in Queensland, ten years after the last round of major amendments in 2000. It begins by examining the approach of the Queensland Court of Appeal to the central notion of consent, focusing on cases decided since the amendments. The article then considers the role played by the defence of mistake of fact under s 24 of the Criminal Code 1899 (Qld) in a number of recent appeals from rape convictions. It is argued that the Queensland legislature should consider significantly limiting the application of s 24 to the offence of rape.

I Introduction

In 2000, the Queensland legislature significantly amended ss 347-349 of the *Criminal Code 1899* (Qld), which provide for the offence of rape.¹ Those amendments were substantially inspired by the report, released in 2000, of the Queensland Taskforce on Women and the Criminal Code.² Ten years later, it is fitting to return to the Queensland definition of rape and examine the impact of the amendments on judicial decisions. This article aims to provide a snapshot of the current Queensland approach to the issue of consent in rape law, evaluating the impact of the above changes and asking whether further reforms are needed.

The article begins in Part II by outlining the current legislative definition of rape in Queensland. Part III then examines the approach of the Queensland Court of Appeal to the central notion of consent, looking particularly at cases decided since the 2000 amendments. The discussion focuses on the circumstances in which coercive factors such as threats, intimidation and fraud will vitiate consent to sexual intercourse under the Queensland law. The Queensland courts and legislature have generally responded in a progressive way to challenges in this area, although these changes have led to some ambiguity in the legal position.

* BA (Hons), LLB (Hons), PhD (Qld); Senior Lecturer, T C Beirne School of Law, University of Queensland. I would like to thank Karen Schultz, Kylie Weston-Scheuber and the anonymous referee for their helpful comments on earlier versions of this article.

¹ *Criminal Law Amendment Act 2000* (Qld) s 24.

² Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000).

An issue that arises in a significant proportion of appeals from rape convictions in Queensland is the potential operation of the defence of mistake of fact under s 24 of the *Criminal Code*. In Part IV of the article, I examine this topic in detail, arguing that the Court of Appeal's approach to s 24 has the potential to undermine its otherwise flexible attitude to the issue of consent in rape cases. I therefore suggest that the Queensland legislature consider significantly limiting the application of s 24 to the offence of rape. This could be done straightforwardly by adopting provisions already in force in Tasmania and Canada.

Before proceeding, a note on terminology is appropriate. In what follows, abstract references to complainants and perpetrators of sexual assaults are generally couched in gender neutral terms. This is because the current Queensland definition of rape makes it possible for both men and women to commit the offence.³ It is important to note, however, that the vast majority of rapes, both in Queensland and in other jurisdictions, are committed by men against women.⁴ As such, this article will proceed on the basis that, while both men and women are capable of being the initiators, as well as the complainants, of sexual aggression, by far the most common scenario involves a male assailant and a female victim.

II The current legislative definition

The present ss 348 and 349 of the Queensland *Criminal Code* came into effect on 27 October 2000. Section 349(1) provides for the crime of rape. The offence is defined in s 349(2), in the following terms:

A person rapes another person if –

- a) the person has carnal knowledge with or of the other person without the other person's consent; or

³ *Criminal Code 1899* (Qld) s 349.

⁴ According to the latest available statistics, around 84% of reported sexual assaults in Australia are committed against women, while men make up 99% of offenders: Australian Institute of Criminology, *Australian Crime: Facts and Figures* (2007) 27; Australian Institute of Criminology, *Australian Crime: Facts and Figures* (2001) 64. In the United States, over 90% of reported sexual assaults are committed against women and around 95% of offenders are male: Bureau of Justice Statistics, *Criminal Complainantization in the United States: Statistical Tables, 1996-2006* <http://www.ojp.usdoj.gov/bjs/abstract/cvus/rape_sexual_assault304.htm> and <<http://www.ojp.usdoj.gov/bjs/abstract/cvus/gender749.htm>>; Bureau of Justice Statistics, *Sex Differences in Violent Complainantization, 1994* <<http://www.ojp.usdoj.gov/bjs/abstract/sdvv.htm>>.

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- b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or part of the person's body that is not a penis without the other person's consent; or
- c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

Section 349(2) clearly enshrines a consent-based approach to rape. The term 'consent', as featured in s 349(2), is defined in s 348(1) of the Code to mean 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent.' That definition is further explained by s 348(2), which specifies a number of situations in which consent is taken not to be 'freely and voluntarily given'. Section 348(2) is phrased as follows:

Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained –

- a) by force; or
- b) by threat or intimidation; or
- c) by fear of bodily harm; or
- d) by exercise of authority; or
- e) by false and fraudulent representations about the nature or purpose of the act; or
- f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

The immediate predecessor to the present s 349⁵ substantially reflected the original Queensland definition of rape drafted by Sir Samuel Griffith in 1897.⁶ That Griffith's definition was retained in Queensland, with only minor alterations, for more than a century thereafter and still appears progressive today, is testimony both to Griffith's undoubted skills as a jurist and draftsman and to the slow pace at which rape law has evolved in other parts of the world.

Under Griffith's definition, rape was essentially defined as sexual intercourse which was either non-consensual *or* induced by force, threats, intimidation or specific types

⁵ *Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000).

⁶ For an account of the drafting of the *Queensland Code*, see Geraldine Mackenzie, 'An Enduring Influence: Sir Samuel Griffith and His Contribution to Criminal Justice in Queensland' (2002) 2 *Queensland University of Technology Law and Justice Journal* 53.

of misleading conduct.⁷ The Queensland courts tended to take the view that there was no need to distinguish between the two limbs of this definition, except in exceptional cases;⁸ the chief emphasis of the provision was clearly on the issue of consent. This focus on consent finds unequivocal expression in the current s 349(2), which removes the two-limbed approach altogether.

It is debatable whether the 2000 amendments effected any real change in the definition of consent in Queensland rape law.⁹ One possible view is that the amendments were an attempt to simplify and refine the definition of rape, while giving it much the same scope as it had under the previous provisions. That is, whereas the previous (pre-2000) provisions ostensibly allowed for non-consent and coercion as two alternative ways of establishing the offence, the current definition makes proof of non-consent indispensable, while allowing that element to be established by demonstrating coercion.

The issue is complicated, however, by the fact that the current s 348(2) begins with the words '[w]ithout limiting subsection (1)', indicating that the factors listed in that section may not exhaust the circumstances in which consent will not be 'freely and voluntarily given'. This suggests that the current provision may prove to be significantly wider than its predecessor, in which the list of factors that would legally vitiate consent to sex was presented as exhaustive. This feature of s 348(2) raises a problem of interpretation, which will be discussed further below. In the meantime, however, it will be useful to look more closely at the categories of coercive conduct explicitly mentioned in the section.

⁷ *Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000); *R v Pryor* [2001] QCA 341, [9] (Williams JA).

⁸ *R v IA Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).

⁹ The most obvious change arising from the 2000 amendments relates not to the element of consent, but to the types of sexual contact which are capable of constituting rape. Under the pre-2000 provision, rape could only be constituted by 'carnal knowledge' [*Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000)]. While that term was defined in the Code as including anal intercourse [*Criminal Code 1899* (Qld) s 1 (prior to 27 October 2000)], sexual acts not involving the penetration of either the vagina or the anus by the penis were not covered. The current s 349, by contrast, extends not only to 'carnal knowledge', as previously defined, but to penetration of the vulva, vagina or anus by any object or body part and to penetration of the mouth by the penis. The Queensland Court of Appeal has acknowledged that even marginal and momentary digital penetration of the vagina could form the basis of a rape conviction under s 349(2): *R v PS* [2005] QCA 474, [1] (Williams JA; Jerrard JA and Chesterman J concurring). For a discussion of this change, see Glen Cranny and Paula Quinn, 'Rape: Widening the Net or Diluting the Crime' (2001) 21(3) *Proctor* 16.

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III The Queensland approach to consent

As noted above, the current s 348(2) sets out specific situations in which a person's consent is taken not to be 'freely and voluntarily given'. These situations are essentially the same as those in which 'consensual' carnal knowledge was said to amount to rape under the second limb of the previous Queensland legislation.¹⁰ However, as we saw above, the wording of the provision suggests that the list of factors supplied there may not be exhaustive.

This section begins by surveying the types of situation mentioned in s 348(2), as explained in some recent decisions of the Queensland Court of Appeal. It is suggested that the Queensland approach to these types of scenarios is relatively progressive, particularly by comparison to some United States ('US') decisions, although some interpretive challenges remain. I will then consider the apparently non-exhaustive character of the list of factors in s 348(2), noting that it potentially exacerbates the interpretive problems raised by the provision.

A Threats and intimidation

Under s 348(2), a person's consent is not 'freely and voluntarily given' if it is obtained 'by force; or by threat or intimidation; or by fear of bodily harm'.¹¹ The Queensland Court of Appeal has interpreted these terms widely. The prevailing Queensland approach to threats is illustrated by the 1995 case of *R v PS Shaw*.¹² There, the appellant had been convicted of raping his sister-in-law. The incident had occurred while the complainant was staying with the appellant and his wife in Innisfail. The appellant, who had sexually molested the complainant on previous occasions, told the complainant that he would not permit her to return home to Melbourne unless she agreed to have sex with him while being videotaped. The complainant eventually agreed to the appellant's proposal, but maintained she did so only because she wanted to return home.

The Court of Appeal in *PS Shaw* unanimously held that it was open to the jury to conclude that the appellant's threat not to allow the complainant to return home had vitiated her consent to their videotaped encounter. McPherson JA, in particular, took a broad view of the types of threat that could vitiate consent to sexual intercourse. His Honour considered that the reference to 'threats or intimidation' in s 348(2) did not require that the threats be substantial, in an objective sense: the question was not whether some hypothetical 'woman of average fortitude, maturity or determination'

¹⁰ This can be seen by comparing the terminology of the current s 348(2) with the previous provision. See *Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000).

¹¹ *Criminal Code 1899* (Qld) s 348(2)(a), (b) and (c).

¹² [1995] 2 Qd R 97 ('*PS Shaw*').

would have resisted the threat, but merely whether the threat had induced the complainant's consent in the case at hand.¹³

The Court of Appeal's analysis in *PS Shaw* is in stark contrast to the position adopted by the Supreme Court of Pennsylvania in *Commonwealth v Mlinarich*.¹⁴ There, the sixty-three year old defendant threatened a fourteen year old girl living with him and his wife that he would return her to a detention home if she refused to have sex with him. As the complainant did not want to go back to the home, she gave in to his requests. The Supreme Court upheld an earlier decision to reverse the defendant's rape conviction, reasoning that the complainant had a 'choice' whether or not to engage in sexual contact.¹⁵ The defendant's threat was not viewed as sufficient to remove the girl's capacity to refuse him.

The approach to threats outlined in *PS Shaw* resonates with the stance adopted by the Court of Appeal in the more recent 2004 decision of *R v CV*.¹⁶ In that case, the appellant had sex with his brother's wife on three occasions in the appellant's home. On the complainant's account, the initial assault was accompanied by a verbal threat to 'keep her fucking mouth shut', which was reinforced on later occasions by physical intimidation. The Court of Appeal had little doubt that these threats were legally sufficient to vitiate the complainant's consent.¹⁷

The 2001 Queensland case of *R v R*¹⁸ is relevant to the related issue of intimidation. The appellant in that case had been convicted of the rape of a fifteen year old girl who went into a pool hall owned by the appellant to seek directions. The appellant's defence was that the complainant had led him on and was a consenting party to the sexual contact that eventuated. The Court of Appeal ruled it was open to the jury to find that the complainant's decision to submit to sexual intercourse had been obtained by intimidation.¹⁹ The intimidation was constituted simply by the size and general appearance of the defendant and the fact that the complainant was unfamiliar with the environment in which she found herself.

¹³ Ibid 115. Note, however, the different view of Pincus JA at 114.

¹⁴ 542 A.2d 1335 (1988) ('*Mlinarich*').

¹⁵ *Mlinarich* 542 A.2d 1335, 1341-2 (1988). Note, however, the strong dissent of Larsen J on this issue. The Supreme Court's decision in *Mlinarich* has since met with some criticism, but has not been overruled. It was followed in the more recent Supreme Court case of *Commonwealth v Berkowitz* 641 A.2d 1161, 1164 (1994).

¹⁶ [2004] QCA 411.

¹⁷ Ibid [40] (Jones J; Williams JA and Cullinane J concurring).

¹⁸ [2001] QCA 121 ('*R's Case*').

¹⁹ *R's Case* [2001] QCA 121, [9] (Davies JA; Thomas JA concurring), [40] (Douglas J).

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The 1996 Court of Appeal case of *R v IA Shaw* is also on point.²⁰ That case involved a twenty year old woman who submitted to a number of sexual acts after being directed to an isolated bushland area and threatened with a knife by a man who was older and stronger than her. The Court of Appeal held that, in those circumstances, it was clearly open to a jury to determine that the complainant's acquiescence had been obtained by means of intimidation.

The Court of Appeal's attitude towards intimidation, as illustrated by the above cases, appears extremely broad when compared to some US decisions. In the Maryland case of *State v Rusk*,²¹ for example, the complainant offered the defendant a ride home from a bar. When they got to his apartment, he took her car keys and refused to return them unless she accompanied him inside. Once inside, he had sex with her, although she was obviously unwilling. Although the defendant's rape conviction was ultimately upheld by the Court of Appeals of Maryland, many of the judges who heard the case, including a majority on the Maryland Court of Special Appeals, doubted whether the elements of rape had been satisfied.²² In the words of one judge, there was 'no conduct by the defendant reasonably calculated to make the complainant so fearful that she should fail to resist.'²³

The North Carolina case of *State v Alston*²⁴ provides an even more vivid illustration. There, the complainant and the appellant had been in a relationship, during which the appellant had often been violent towards the complainant. A month after the relationship ended, the appellant accosted the complainant on the street. He blocked her path and threatened her with violence, whereupon she accompanied him to a friend's house. He informed her that he had a right to have sex with her and asked if she was 'ready'. She said she was not. Nevertheless, he undressed her and penetrated her. Although the Supreme Court of North Carolina was satisfied that the complainant had not consented, the appellant's conviction was reversed, on the basis that no physical force had been involved.²⁵

²⁰ [1996] 1 Qd R 641 ('*IA Shaw*').

²¹ 406 A.2d 624 (1979) (Maryland Court of Special Appeals); 424 A.2d 720 (1981) (Court of Appeals of Maryland) ('*Rusk*').

²² Lois Pineau, 'A Response to My Critics' in Leslie Francis (ed), *Date Rape: Feminism, Philosophy, and the Law* (1996) 63, 100; David M Adams, 'Date Rape and Erotic Discourse' in Leslie Francis (ed), *Date Rape: Feminism, Philosophy, and the Law* (1996) 27, 29.

²³ *Rusk* 424 A.2d 720, 733 (1981) (Cole J).

²⁴ 312 S.E.2d 470 (1984) ('*Alston*').

²⁵ The Supreme Court's holding in *Alston* has since been limited to factually similar situations, but has not been expressly overruled: *State v Etheridge* 352 S.E.2d 673 (1987).

Finally, in the Californian case of *People v Burnham*,²⁶ a woman was severely beaten by her husband, then made to engage in sexual acts with her husband and a dog. The California Court of Appeal reversed the husband's rape conviction, due to the trial judge's failure to direct the jury on consent. Clearly, the Court thought it possible that the woman had legally consented to the acts – or, at least, that her husband could reasonably have believed she was consenting – despite the extreme violence to which she was subjected shortly beforehand.

These sorts of scenarios would seem to pose little difficulty under the current Queensland approach to consent. On the facts of *Rusk* and *Alston*, there was no free and voluntary consent within the meaning of s 348 of the *Criminal Code*, as intimidation (in the broad sense set out in *R's Case*) was clearly involved in securing the complainants' acquiescence.²⁷ *IA Shaw* makes it clear that the violence in *Burnham* would be sufficient to vitiate consent to sex under the Queensland law; significantly, the Court of Appeal has held that violence need not necessarily be temporally proximate to a sexual act in order to have induced the complainant's consent.²⁸ However, *Burnham* also raises questions about the possible application of the defence of mistake of fact, provided for in s 24 of the *Criminal Code*. We will return to this issue in Part IV below.

B Fraud and mistake

In addition to dealing explicitly with situations where consent is induced by force, threat or intimidation, s 348(2) also provides that a person's consent to sexual contact is not 'freely and voluntarily given' if it is obtained 'by false or fraudulent representations about the nature or purpose of the act; or by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.'²⁹ Here, again, the Queensland Court of Appeal has imparted a progressive interpretation to the relevant terms. The Queensland legislature has also shown itself willing to broaden the wording of the provision.

Perhaps the most prominent Australian decision on the issues of fraud and mistake in relation to rape is *R v Papadimitropoulos*.³⁰ In that case, the accused had fraudulently represented to a woman that they had married, when, in fact, they had only applied for a marriage licence. By means of that ruse, the man induced the

²⁶ 176 Cal. App. 3d 1134 (1986) ('*Burnham*').

²⁷ For a recent Queensland Court of Appeal case involving a fact scenario with some similarities to *Rusk*, see *R v C* [2003] QCA 561 (conviction upheld).

²⁸ *R v Parsons* [2001] 1 Qd R 655, 658 per curiam.

²⁹ *Criminal Code 1899* (Qld) s 348(2)(e) and (f).

³⁰ (1957) 98 CLR 249 ('*Papadimitropoulos*').

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woman to have intercourse with him on several occasions. There was evidence that the woman had not intended to have sex until after she was married. The accused was convicted of rape; he appealed to the High Court.

In an unanimous joint judgment, the Court noted there had traditionally 'been some judicial resistance to the idea that an actual consent of sexual intercourse can be no consent because it is vitiated by fraud or mistake.'³¹ That traditional resistance was reflected in the Court's approach to the case at hand. The appellant's conviction was overturned, on the basis that only a mistake about the identity of a person's sexual partner or the fundamental nature of the act in which the person was engaging would be legally effective to vitiate consent to sex.³²

According to the High Court, the fact that the complainant in *Papadimitropoulos* had thought that she was engaging in 'marital intercourse', whereas she was engaging in 'extra-marital intercourse', did not make her consent less real.³³ She was not mistaken about the identity of her partner and she knew that she was engaging in sexual intercourse and not some other activity. The Court also noted that the law's scrutiny is properly placed on the nature of the complainant's mistake, rather than the extent of the fraud perpetrated by the accused.³⁴

The Queensland Court of Appeal encountered issues related to those raised in *Papadimitropoulos* in the 2001 case of *R v Pryor*.³⁵ In that case, a man who broke into a house to commit a burglary had sex with a woman whom he found there. The woman had been asleep and was still in a drowsy state when she encountered the burglar. At first, she reciprocated his advances, as she thought he was her usual sexual partner, who was asleep in the house at the time. When she realised her mistake, she threw him off and raised the alarm.

By majority, the Court of Appeal rejected the burglar's appeal against his rape conviction. The legislative definition of rape, as it applied at the time of the alleged offence, made carnal knowledge rape where consent was obtained 'by means of false or fraudulent representations as to the nature of the act, or, in the case of a married female, by personating her husband.'³⁶ On the facts of *Pryor*, a problem of interpretation arose, as the complainant did not mistake the burglar for her 'husband'

³¹ Ibid 255.

³² Ibid 261.

³³ Ibid 261

³⁴ Ibid 260.

³⁵ [2001] QCA 341 (*'Pryor'*).

³⁶ *Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000).

(in fact, she was not married), but rather mistook him for a person who was described in evidence as her 'sole sexual partner'.³⁷

The majority of the Court, comprising Williams JA and Dutney J, looked beyond this difficulty. Those judges considered it was open to the jury to decide that no real consent had been given by the complainant. However, Byrne J was unprepared to go beyond a narrow reading of the provision. He would have overturned the appellant's conviction, on the basis that the complainant had, in fact, consented and none of the enumerated grounds in the legislative definition of rape cast doubt upon the effectiveness of that consent.

The Queensland Parliament responded in 2000 to the difficulties posed under the previous definition of rape by cases such as *Pryor*. The current s 348(2)(f) refers not to the case where the accused impersonates a married woman's husband, but rather to the existence of 'a mistaken belief induced by the accused person that the accused person was the person's sexual partner.' This wording makes it clear that cases like *Pryor* fall within the provision. Nevertheless, the difference of judicial opinion in that case illustrates the difficulties the courts face in interpreting the quite specific legislative provisions that attempt to set out what sorts of mistakes will be legally effective to vitiate consent to sex.

As we have seen, the High Court in *Papadimitropoulos* recognised two types of mistake which might vitiate consent. The first was mistake as to identity, as discussed in *Pryor*. The second was mistake as to the nature of the act. *Papadimitropoulos* made it clear that this second category was to be narrowly interpreted. The English decisions of *R v Williams*³⁸ and *R v Flattery*³⁹ illustrate the types of situations that fall within this category. The former case concerned a singing teacher who had intercourse with a student, having represented the act as an operation to improve her breathing. In the latter case, a quack doctor had sex with a patient, while representing that he was carrying out surgery.

The potential shortcomings of the *Papadimitropoulos* approach are illustrated by the contentious Victorian case of *R v Mobilio*.⁴⁰ There, the defendant, a radiographer, carried out internal vaginal examinations on several female patients using ultrasound transducers. The examinations had no medical utility, being only for the defendant's sexual gratification. The defendant was convicted of rape, but the Victorian Court of Appeal overturned his conviction, based on the approach prescribed by the High Court. The women were not mistaken about the nature of the act being performed,

³⁷ *Pryor* [2001] QCA 341, [2] (Williams JA).

³⁸ [1922] All ER 433 ('*Williams*').

³⁹ (1877) 2 QBD 410 ('*Flattery*').

⁴⁰ [1991] VR 339 ('*Mobilio*').

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but only as to its purpose; according to *Papadimitropoulos*, this type of error was not enough to vitiate their consent.⁴¹

Such a case would once have presented a challenge to the Queensland law. The potential problems posed by this type of scenario are acknowledged by the present wording of s 348(2)(e) of the Queensland Code. That provision extends the *Papadimitropoulos* doctrine (and the wording of the previous legislative definition of rape⁴²), by speaking of ‘false and fraudulent representations about the nature *or purpose* of the act.’⁴³ This extended phrasing seems designed to encompass cases such as *Mobilio*.⁴⁴ While the women in that case were not deceived as to the nature of the acts perpetrated on them, they were clearly misled as to their purpose. They thought the acts had a medical rationale, while, in reality, they were performed simply to gratify the desires of the defendant.

The suitability of the current s 348 to deal with situations similar to *Mobilio* was confirmed in the 2005 Queensland case of *R v BAS*.⁴⁵ The appellant in that case was convicted of multiple counts of rape and sexual assault committed on young women and minors during treatments represented as ‘alternative therapy’. The appellant admitted that many of the so-called ‘treatments’ took place, but claimed he genuinely believed in their medical value; that claim was evidently rejected by the jury. There was no dispute that the complainants and their parents had consented to the treatments; however, there was clear evidence that they would not have done so if they had thought then, as they did later, that the sessions had no genuine therapeutic purpose. The Court of Appeal unanimously upheld the appellant’s convictions. The judges appeared to accept without serious question that the scenario would fall within the meaning of the amended s 348(2)(e).⁴⁶

⁴¹ Compare the Canadian case of *R v Harms* [1944] 2 DLR 61 (Saskatchewan Court of Appeal), where a man posing as a doctor was charged with raping a female patient. The patient had just returned from a series of medical tests. The accused falsely represented to her that she was afflicted with a life-threatening disease, which could only be cured by administering a serum. The serum, the woman was told, had to be introduced by means of sexual intercourse. On that basis, the woman reluctantly agreed to intercourse with the alleged doctor.

⁴² *Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000).

⁴³ *Criminal Code 1899* (Qld) s 348(2)(e) (emphasis added).

⁴⁴ In recommending the amendment in question, the Queensland Taskforce on Women and the Criminal Code makes explicit reference to *Mobilio*: Queensland Taskforce on Women and the Criminal Code, above n 2, 230-231, 242.

⁴⁵ [2005] QCA 97 (*‘BAS’*).

⁴⁶ See particularly *BAS* [2005] QCA 97, [3]-[4] (McPherson JA), [87]-[89] (Fryberg J; Davies JA concurring). Somewhat confusingly, however, the judges also held that the definition of

It is a good question exactly how far the amended wording of s 348(2)(e) extends. There is, as yet, no clear judicial authority on the point. Under a legalistic reading of the provision, it would even seem to encompass a case where one person persuades another to engage in sexual activity by representing the purpose of the act as the mutual expression of their love for each other, when in fact she or he merely sees it as a way of achieving short-term sexual gratification. Patently, however, the legislature, in enacting the current s 348, would not have intended rape charges to be brought on the basis of this type of situation.⁴⁷

It is submitted that this uncertainty concerning s 348(2)(e) is a symptom of the incremental approach Australian legislatures have tended to take in broadening the definition of rape to cope with unanticipated scenarios.⁴⁸ Such an approach to the issue of impersonation also led to the interpretive problem discussed in *Pryor*. It is, however, difficult to see how such incremental reform can be avoided within the present legislative framework. Significant responsibility therefore rests on the courts to adopt a purposive approach to construing the relevant provisions, as was done by the majority judges in *Pryor*.

C A non-exhaustive list?

I noted earlier in this article that the current s 348(2), unlike the previous Queensland definition of rape,⁴⁹ seems not to provide an exhaustive list of the circumstances in which consent to sex will be vitiated by coercion. Rather, the provision emphasises that the overriding requirement, as expressed in s 348(1), is that consent will only be legally effective if it is 'freely and voluntarily given'.

The inclusion of the words '[w]ithout limiting subsection (1)' at the beginning of s 348(2) raises a problem of interpretation. Are there coercive factors not listed in s 348(2) that will render consent to sex legally ineffective and, if so, what are they? The Queensland courts have so far avoided confronting this issue directly, preferring to deal with the cases before them by applying the factors listed in s 348(2). However, similar questions have arisen in other jurisdictions. In Western Australia, for

consent outlined in s 348 does not directly apply to a charge of sexual assault under s 352 of the *Criminal Code*: *ibid* [51], [90] (Fryberg J; Davies JA concurring).

⁴⁷ Similar concerns have been raised in other jurisdictions. See, for example, George Syrota, 'Rape: When Does Fraud Vitate Consent?' (1995) 25 *University of Western Australia Law Review* 334, 340; Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26 *University of Western Australia Law Review* 223, 229. For detailed judicial discussion of the Western Australian position on fraud, see *Michael v Western Australia* [2008] WASCA 66 ('*Michael*').

⁴⁸ Compare Simon Bronitt, 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289, 297.

⁴⁹ *Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000).

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example, the equivalent wording of s 319(2) of the *Criminal Code 1902* (WA) has attracted both academic and judicial consideration.⁵⁰

We saw above that there are already problems of vagueness and overbreadth in the list of factors in s 348(2). If the list is non-exhaustive, the problem is potentially exacerbated. This issue has been widely discussed in Western Australia, where commentators have adopted a variety of views. Some have argued that the range of coercive factors covered by s 319(2) should be read down by reference to the common law position.⁵¹ Others have argued for legislative reform, but typically without specifying precisely what should be done.⁵²

There is a difficult balancing act to be struck here with both the Queensland and Western Australian provisions. On the one hand, a potentially open ended list of coercive factors risks uncertainty. On the other hand, a static list of factors has in the past created the need for regular amendments to the legislation in response to new types of problematic cases. This can be clearly seen in the legislative reactions to decisions such as *Pryor* and *Mobilio*.

It may be that, given the difficulties presented by both options, the current wording of s 348(2) strikes a reasonable balance. Some level of discretion in interpreting and applying the various coercive factors is inevitable. The current wording has the merit of allowing judges and juries to look beyond the strict wording of the enumerated categories where this is clearly appropriate. The Queensland courts have so far taken a cautious approach in applying s 348(2) to new scenarios. The danger of vagueness posed by open ended wording may therefore be less significant than the problems inherent in a static list of coercive factors.

IV The defence of mistake of fact

An issue that arises in a significant proportion of rape appeals in Queensland is the potential operation of the defence of mistake of fact under s 24 of the *Criminal Code*. Section 24(1) reads as follows:

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

⁵⁰ See, for example, Morgan, above n 47, 227-8, 230-1. For judicial consideration of the issue, see *Michael* [2008] WASCA 66, [78] (Steytler P); [277]-[278] (Heenan AJA).

⁵¹ Syrota, above n 47, 342; *Michael* [2008] WASCA 66, [364]-[365], [373]-[376], [384] (Heenan AJA). For discussion, see Morgan, above n 47, 228-31.

⁵² Morgan, above n 47, 240; *Michael* [2008] WASCA 66, [88]-[89] (Steytler P).

Appeals to s 24 in rape cases typically concern an alleged mistake by the defendant about whether the complainant was consenting to sexual intercourse. It is common, for example, for the defence to advance two alternative case theories at trial: either the complainant consented to sex or, if the complainant did not consent, the defendant mistakenly believed the contrary.⁵³

A Judicial application of the defence

I referred above to the Californian case of *Burnham*, where it was held that a woman might have legally consented to sex with her husband – or, at least, that he might have reasonably thought she was consenting – even though she had been viciously beaten shortly beforehand. I mentioned that, due to authorities such as *IA Shaw*, it seems clear that the violence that occurred in *Burnham* would legally vitiate the complainant's consent under Queensland law. Nonetheless, it is still possible that the defendant in such a case might be able to rely on the defence of mistake of fact under s 24. The prevailing interpretation of that defence in Queensland is illustrated by the Court of Appeal case of *R v Parsons*.⁵⁴

In *Parsons*, the appellant had been convicted of raping his stepdaughter on three occasions. He contested two of those convictions on the basis that the trial judge had erred in not directing the jury to consider the relevance of s 24. The complainant had testified at trial that, on the two occasions in question, she had not consented to intercourse with the appellant. The jury was taken to have accepted that testimony. However, the evidence also showed that the complainant did not communicate her lack of consent to the appellant or physically resist his advances. When the complainant was asked why she did not resist, she referred to repeated incidents of violence by the appellant against her, her mother and her brother. She recalled having been threatened by the appellant with an axe, knives and a gun. She had also been raped by him on a previous occasion.

Despite these circumstances, the Court of Appeal ordered a new trial on the two counts. It was held that the issue of reasonable mistake ought to have been left to the jury, as there was scope on the evidence for the appellant to argue that 'the Crown had not established that any belief in the appellant that the complainant was consenting would have been unreasonable'.⁵⁵ If it could potentially be 'reasonable',

⁵³ Section 24 overrode the common law position, which provided that a person could not be guilty of rape if she or he honestly believed, no matter how unreasonably, that the complainant was consenting: *Director of Public Prosecutions v Morgan* [1976] AC 182; Bronitt, above n 48, 304.

⁵⁴ [2001] 1 Qd R 655 ('*Parsons*').

⁵⁵ *Ibid* 658 per curiam.

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within the meaning of s 24, for a man to mistake the passive non-resistance of a girl whom he had previously raped, beaten, chased with an axe and shot at with a gun for legally effective consent to sexual intercourse, then a similar analysis might well apply to a situation like that in *Burnham*.

A series of more recent Queensland Court of Appeal Cases confirms the potential difficulties created by the application of s 24 in rape cases. In *R v Mrzljak*,⁵⁶ the Court of Appeal held that it was relevant to the application of s 24 that the appellant spoke little English and had a mild mental impairment; this meant that he might reasonably hold a belief about consent that would not be reasonable if held by a native English speaker of average intelligence. This principle was later applied, with disturbing results, in the 2007 case of *R v Kovacs*.⁵⁷

The appellant in *Kovacs* ran a takeaway shop in Weipa with his wife, a Philippine national. The appellant and his wife had arranged for the complainant, also a Philippine national, to travel to Weipa to live with them and work in the shop. As soon as the complainant arrived in the country, the appellant began to sexually molest her; this continued over several months. The complainant was in Australia illegally, knew little English and had no independent means of support. It seems clear that the appellant systematically abused her dependence on him;⁵⁸ in this respect, the case bears some similarity to *PS Shaw*.

The Court of Appeal in *Kovacs* held that the defence of mistake of fact under s 24 should have been left to the jury. The decision was based, in part, on the complainant's lack of English; it was held that the language differences between the parties may have led the appellant to form a mistaken belief that the complainant was consenting to sex. This was despite evidence that the complainant had repeatedly resisted the appellant's advances both verbally and by conduct.⁵⁹ It was also despite evidence suggesting that the appellant had brought the complainant to a country where she could not speak the language as part of a plan to abuse her; in other words, the appellant's strategy to make the complainant vulnerable to him was instrumental in enabling him to rely on s 24.

It is hard to escape the impression that the appellants in cases such as *Parsons* and *Kovacs* are using s 24 as a way to circumvent the general approach of the Queensland courts to the impact of coercion on consent to sex. The progressive view of intimidation in *R's Case* counts for little if defendants can rely on s 24 to avoid being

⁵⁶ [2005] Qd R 308.

⁵⁷ [2007] QCA 143 (*'Kovacs'*).

⁵⁸ The facts in this case seem to form part of a wider pattern of predatory behaviour on the part of the appellant. See the unrelated case of *R v Kovacs* [2007] QCA 441.

⁵⁹ [2007] QCA 143, [3] (McMurdo P and Holmes JA).

held accountable. This impression is hardly dispelled by other recent Queensland decisions in which rape convictions have been overturned because s 24 was not afforded sufficient attention at trial.⁶⁰

In the 2008 case of *R v Dunrobin*,⁶¹ for example, the complainant was staying overnight at the appellant's house. After she went to bed, the appellant entered the room and asked for sexual intercourse. The complainant refused. The appellant then climbed on top of her and molested her while she struggled, before pulling off her clothes and penetrating her against her protests. The Court of Appeal held that s 24 should have been left to the jury.

Similarly, in the 2009 case of *Phillips v The Queen*,⁶² the twenty-one year old appellant was spending the night at the home of the thirteen year old complainant. The appellant entered the complainant's room while she was asleep, climbed on top of her and penetrated her while she tried to push him off. Similar events occurred on three other occasions, resulting in four charges in total. The jury convicted the appellant of rape on the fourth count, but convicted him only of unlawful carnal knowledge on the first and third counts, each of which involved physical resistance by the complainant. The second count resulted in an acquittal.

The Court of Appeal considered that the jury must have thought either that the complainant was consenting to the first and third counts or that the appellant mistakenly believed she was consenting. However, since the evidence of resistance was greater on those counts than on count four, which resulted in a conviction for rape, the latter verdict was considered unreasonable. The Court therefore substituted a verdict of unlawful carnal knowledge.

The end result in *Phillips* was that no rape convictions were recorded, even though counts one and three involved the complainant physically struggling against the appellant as he penetrated her. In this respect, the unsound aspect of the verdicts seems to be not so much that the jury convicted on the fourth count, but that they

⁶⁰ For a decision that reached the opposite result, see *R v Cutts* [2005] QCA 306. The appellant had entered the complainant's home uninvited and proceeded to kiss and penetrate her, even though she said 'no' to his initial advance and thereafter remained silent. The complainant was wheelchair bound with cerebral palsy. McMurdo P and Williams JA held that s 24 was not open on the evidence; however, Jerrard JA dissented and would have allowed the appeal.

⁶¹ [2008] QCA 116 ('*Dunrobin*').

⁶² [2009] QCA 57 ('*Phillips*'). The case attracted some attention in legal circles due to a ground of appeal concerning improper behaviour by a judge's associate, who gave a thumbs up sign and mouthed encouragement to the prosecutor following her closing address. Relatively little attention was given to its implications for reliance on s 24 in rape cases.

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failed to convict on counts one and three. However, the Court of Appeal treated that aspect of the verdicts as potentially supported by the application of s 24. It therefore appears that, according to the Court, the defence of mistake of fact may cover a case where a twenty-one year old man climbs on top of a thirteen year old girl in her bed and penetrates her while she struggles.

B A proposal for reform

Section 348(2) of the *Criminal Code* recognises that consent to sexual intercourse will be legally vitiated in a range of coercive circumstances. This provision has been liberally applied by the courts. Nonetheless, defendants have not infrequently been able to make an end run around s 348(2), by arguing that they mistakenly believed the complainant was consenting, despite the presence of coercive circumstances that would suggest otherwise. This has been a winning submission in a significant number of recent appeals, as discussed above.

The implications of s 24 for Queensland rape law could be mitigated if the Court of Appeal was willing to make more of the requirement that the relevant mistake of fact be reasonable. It is hard to see how leaving the defence open to the jury in cases such as *Parsons*, *Kovacs* and *Dunrobin* is consistent with a robust application of this requirement. However, perhaps due to a reluctance to place limits on the jury's assessment of the factual circumstances, the Court of Appeal has been unwilling to take a strong stance on this issue.

A model for legislative reform in this area is provided by provisions already adopted in Tasmania and Canada. Section 14A(1) of the Tasmanian *Criminal Code*, as amended in 2004,⁶³ 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.

This provision goes some way towards ensuring that the defendant cannot rely on the defence of mistake of fact where she or he acted with disregard for the

⁶³ *Criminal Code Amendment (Consent) Act 2004* (Tas).

complainant's sexual autonomy. It does this in three ways: first, by precluding defendants from relying on mistakes caused by self-induced intoxication; second, by looking at whether the defendant was reckless as to whether the complainant consented; and, third, by requiring the defendant to take reasonable steps, in the circumstances known to her or him at the time, to determine whether the complainant was consenting to each sexual act between them.

The Tasmanian provision was styled by some opponents as effectively reversing the onus of proof in rape trials. Patently, however, it does nothing of the sort; as Judy Jackson, then Tasmanian Attorney-General, noted when proposing s 14A(1), those critics must not have read the legislation.⁶⁴ Even if the defence of mistake of fact was made wholly inapplicable to the issue of consent in rape trials, the prosecution would still have to prove beyond a reasonable doubt that the complainant did not consent to sexual intercourse. Under the Tasmanian approach, by contrast, the prosecution is also obliged to prove (again, beyond a reasonable doubt) that at least one of the three limbs of s 14A(1) – intoxication, recklessness or failure to take reasonable steps – applies to the defendant in the case at hand.

A precursor to the Tasmanian provision can be found in the Canadian *Criminal Code*.⁶⁵ The scope of the provisions is very similar, although the wording differs slightly. Commentators have interpreted the Canadian provision as an attempt to move towards a positive consent standard in rape law, where the party who possesses the greater coercive power is expected to take active steps to ascertain that her or his partner is willing to engage in each new form of sexual contact.⁶⁶ A similar point can be made about the Tasmanian version.

The Canadian provision's consistency with the national Charter of Rights and Freedoms was considered by the Ontario Court of Appeal in *R v Darrach*.⁶⁷ The judges in that case considered and rejected the argument that the provision violated the Charter by shifting the evidential onus onto the accused, citing reasons similar to those mentioned above. The Court also rejected the view that a person who initiates

⁶⁴ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003 (Judy Jackson, Attorney-General and Minister for Justice and Industrial Relations, Second Reading Speech, Criminal Code Amendment (Consent) Bill 2003).

⁶⁵ *Criminal Code of Canada* s 273.2. The issue of when the defence of mistake of fact should go to the jury in rape cases has proved controversial in Canada. See, for example, *R v Davis* (1999) 139 CCC (3d) 193, [74]-[99]; *R v Esau* (1997) 116 CCC (3d) 289.

⁶⁶ Pineau, above n 22, 64-5. See also Simon Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' (1995) 18 *Criminal Law Journal* 249.

⁶⁷ (1998) 122 CCC (3d) 225, [83]-[94] per curiam ('*Darrach*').

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sex without taking reasonable steps to determine consent may be 'morally innocent' and therefore ought not to be punished.⁶⁸

There is a curious statement in the Court of Appeal's judgment in *Darrach* that 'were a person to take reasonable steps, and nonetheless make an unreasonable mistake about the presence of consent, he or she would be entitled to ask the trier of fact to acquit on this basis.'⁶⁹ It is quite hard to see how someone who takes reasonable steps to ascertain consent could nonetheless end up making an honest but unreasonable mistake about that issue. In any case, the Tasmanian *Code*, unlike its Canadian counterpart, makes it clear that not only must the defendant take reasonable steps to ascertain consent, but any mistake relied on must itself be reasonable.⁷⁰ The same position would apply in Queensland.

A provision following the Tasmanian model holds promise in avoiding some of the problematic outcomes that have arisen from s 24 of the Queensland *Code*.⁷¹ In *Parsons*, for example, the appellant relied upon the passive response of his stepdaughter to his advances as a possible basis for a defence of mistake of fact; clearly, however, he was reckless as to whether she consented and did not take reasonable steps to ascertain that she was willing, particularly given his history of violence towards her and her family.

In *Kovacs*, the appellant relied on language differences between himself and the complainant as a possible foundation for the defence under s 24. Again, however, it seems doubtful that he took reasonable steps to determine her consent, particularly given the complainant's vulnerable situation, and a strong case could be made that he was reckless as to her willingness to proceed. Similarly, in *Dunrobin* and *Phillips*, there was no evidence that the appellants took positive measures to ensure the complainants were consenting before initiating sexual contact; indeed, they seem to have disregarded clear and repeated cues to the contrary. Furthermore, in both those cases, the appellants had voluntarily consumed alcohol before making aggressive advances towards the complainants.

Another recent Queensland case where alcohol played a significant part was *R v Soloman*.⁷² The complainant in that case testified that she awoke in her bed to find the

⁶⁸ (1998) 122 CCC (3d) 225, [93] per curiam.

⁶⁹ (1998) 122 CCC (3d) 225, [90] per curiam.

⁷⁰ *Criminal Code 1924* (Tas) s 14.

⁷¹ The Queensland Taskforce on Women and the Criminal Code recommended in 2000 that where s 24 is raised in rape cases, 'the jury be directed to look at what steps the accused took to ensure that the complainant consented': Queensland Taskforce on Women and the Criminal Code, above n 2, 241.

⁷² [2006] QCA 244.

appellant, a guest staying overnight in her home, penetrating her sexually. The appellant was able to rely on s 24, despite having consumed 'at least a carton of stubbies of full strength beer during that day and evening, a dozen cans of rum and cola, and about five cones of cannabis.'⁷³

V Conclusion

This article has presented a snapshot of the current approach to consent in Queensland rape law. What should we say about the state of the law? We can begin by noting that the general Queensland approach to consent is relatively flexible; on issues such as threats, intimidation, fraud and mistake, the Queensland law compares very favourably with at least some alternative approaches. The various parts of s 348(2) present some interpretive difficulties, but the courts in cases like *Pryor* and *BAS* have dealt with these in a purposive manner.

On the other hand, the progressive attitude of the Queensland judiciary to the above issues has been undermined by its application of the mistake of fact defence in s 24. In a number of recent Court of Appeal cases, appellants have successfully invoked s 24 despite showing clear disrespect for the sexual autonomy of the complainants. This problem could be avoided in at least some cases by introducing a provision similar to s 14A(1) of the *Tasmanian Code*.

The problematic impact of s 24 on the state of Queensland rape law has not attracted widespread comment. It is, however, an issue that deserves to be on the legislative agenda. There is a clear sense in which coercive and fraudulent sexual behaviour demands a well-targeted and effective legal response. The law plays a crucial role in setting the boundaries of socially and culturally acceptable conduct. Unfair or exploitative forms of behaviour that disproportionately affect particular segments of the community have the potential, if not afforded legal recognition, to reinforce existing patterns of social discrimination.⁷⁴

This consideration is highly pertinent in relation to sexual ethics, as popular sexual mores have historically been an important vehicle for the social and economic oppression of women. It is hoped that the arguments advanced in this article can help to spark a continuing dialogue on Queensland rape law, building on the contributions that have been made in this regard by bodies such as the Queensland Taskforce on Women and the Criminal Code.

⁷³ *Ibid* [12].

⁷⁴ For further discussion, see Jonathan Crowe, 'Reinterpreting Government Neutrality' (2004) 29 *Australian Journal of Legal Philosophy* 118.