

**Dublin Rape Crisis Centre (DRCC) Submission to the Law Reform Commission on Knowledge or Belief Concerning Consent in Rape Law**

**Introduction**

The Dublin Rape Crisis Centre (DRCC) is a non-governmental organisation which aims to prevent the harm and heal the trauma of rape and sexual abuse in Ireland. We have provided crisis counselling and long-term therapy services to adult women and men who have experienced rape, sexual assault and childhood sexual abuse and have provided our expertise and experience for policy and advocacy purposes for almost 40 years. Our services include a national 24-hour helpline, one-to-one counselling and support and accompaniment services for those reporting to An Garda Síochána or attending court. We deliver training to those working with victims of sexual violence. We make policy interventions and carry out public awareness campaigns to prevent sexual violence.

This submission is informed by our expertise and experience and by the experiences of the women and men accessing our services who are victims of sexual violence and either had interactions with the criminal justice system or have considered engaging in the process. We would also like to acknowledge Dr. Susan Leahy, UL - Lecturer BA (Criminal Justice) and Co-Director for the Centre for Crime, Justice & Victim Studies - with whom we collaborated closely on this submission.

**Background to Submission**

Given the recent introduction of a statutory definition of consent in the Criminal Law (Sexual Offences) Act 2017, the so-called ‘honest belief in consent’ defence must also be reviewed and reformed so that it does not undermine the ideological and practical benefits of the new definition.

Section 9 of the Criminal Law (Rape)(Amendment) Act 1990 (as amended by section 48 of the Criminal Law (Sexual Offences) Act 2017) provides a positive definition of consent, that is, that ‘[a] person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act’, as well as listing a number of situations where consent will be deemed to be absent. The new definition of consent, centring on ‘free agreement’, embeds the concept of communicative sexuality in Irish law, sending a clear message that, to be legally valid, consent must be negotiated and communicated between sexual partners.

The current formulation of the honest belief in consent defence is at odds with this ethos. The defence provides that a defendant cannot be convicted of rape where he honestly believed that the complainant was consenting. What is problematic about this is the fact that the defence is defined subjectively meaning that the belief does not need to be based on reasonable grounds. Section 2(2) of the Criminal Law (Rape) (Act) 1981 provides that the presence or absence of reasonable grounds for such a belief is only ‘a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed’.

The central problem with the defence as it currently operates is that it allows for a defendant’s unilaterally formed, irrational belief in consent to exculpate him of rape. Of course, as noted by the Supreme Court in *DPP v O’R[[1]](#footnote-1),* ‘no jury is under any obligation to believe an obviously false story’.[[2]](#footnote-2) However, given the complex ‘oath against oath’ nature of rape cases, jurors may well struggle to identify spurious claims of honest belief, particularly where evidence has repeatedly shown that stereotypical and prejudicial attitudes about rape and rape victims continue to influence juror deliberations in these cases. It is suggested that the defence is not widely used.[[3]](#footnote-3) Practitioners anecdotally note that it is easier to attack the credibility of the complainant than call the defendant’s own credibility into question, and thus that the defence is not causing difficulties in the majority of rape trials. However, it still holds the potential to be problematic in those cases in which it is raised.

Further, it may be relevant in a decision taken by a prosecutor in making a decision about the strength of the evidence and whether to prosecute, ever before the case goes to trial.[[4]](#footnote-4) Thus it must be reformed. Apart from those practical reasons, the defence must be reformed for principled reasons to ensure that it does not undermine the message and, potentially, the practical effectiveness, of the new statutory definition of consent.

Central to this submission is a recommendation that Irish law must move to an objective formulation of belief in consent, that is, that a claim of belief must be based on reasonable grounds if it is to exculpate the accused. The move to a reasonable belief standard will hold defendants to an objective standard of behaviour and should ensure that assertions of the defence are genuine and realistic.

However, to ensure that the move to an objective formulation has the desired effects, care will need to be taken in the interpretation of what is ‘reasonable’. First, it is necessary to make sure that the new formulation is sufficiently robust to prevent reliance on stereotypical or prejudicial attitudes about rape to support a claim of reasonable belief. For example, in England and Wales, where the reasonableness of a defendant’s belief in consent is to be determined ‘according to all the circumstances’, mock jury research has shown that the reference to ‘all the circumstances’ may allow questionable stereotypes to creep into determinations of whether a defendant’s belief in consent was reasonable.[[5]](#footnote-5) Second, in light of constitutional protection of defendant’s fair trial rights, it is necessary to consider whether some concession should be made for defendants who, by reason of their personal characteristics (e.g. mental illness or intellectual disability) have a reduced ability to comprehend socio-sexual cues. This could be relevant to the reasonableness of such a defendant’s belief in consent.

**Bearing the foregoing in mind, this submission provisionally recommends the following:**

1. That the *mens rea* for rape be retained as intention and recklessness.
2. That the term ‘honest’ be removed from the description of the defence. A belief by its nature must be honest. A dishonest belief is an untruth.
3. That the current ‘honest belief’ defence be reframed as a ‘reasonable belief’ defence. Thus, the law should provide that a defendant may raise a defence to rape based on belief so that: ‘It shall be a defence to rape for the defendant to show that he reasonably believed that the complainant was consenting.’
4. The law should further provide that ‘A man will be held not to have reasonably believed that the woman was consenting where:
5. The belief arose from the defendant’s (i) self-induced intoxication, or (ii) wilful blindness; or
6. The defendant did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting.’[[6]](#footnote-6)
7. The law should also make clear that, when determining whether a defendant’s belief in consent was reasonable, the jury may, in appropriate cases, be directed to take account of any characteristic of the accused (e.g. mental illness or intellectual disability) which might impair his ability to understand whether the complainant was consenting and, necessarily, to form a reasonable belief in consent.

**With these basic recommendations in mind, we would answer the questions posed by the Commission in the following way:**

**Issue 1**

**1(a) Do you think that the fault or mental element (*mens rea*) in rape, knowledge or recklessness as to consent, should be maintained in its current form?**

The *mens rea* for rape should continue to be defined as intention or recklessness, as the current definition provides. A discussion of restructuring of the *mens rea* of rape should take place in the context of a broader discussion of the general structure of the offence (including *actus reus*). This should be reserved for a more broad-ranging review of the current definitions of sexual offences in Irish law.

**1(b) Do you think that the fault or mental element in rape should be extended beyond knowledge and recklessness?**

No.

**1(c) Do you consider that any change should be made to the law that self-induced or voluntary intoxication is not a defence to a charge of rape?**

No. The current position on voluntary intoxication applies to all criminal offences and there is no reason to create a special rule for rape cases. Indeed, the creation of such a rule would inappropriately increase the difficulties of proving that rape occurred. Alcohol is a factor in a significant proportion of rape cases, with both the complainant and defendant having drunk alcohol prior to the alleged incident in many cases. Thus, permitting a defence where the defendant was voluntarily intoxicated would impact on a significant proportion, if not the majority of, rape cases.

Attitude and mock jury studies have repeatedly shown that there is a tendency to blame victims who have been drinking prior to an attack. For example, in a survey of Irish attitudes to rape in 2016, 11% of respondents believed that being drunk or on drugs may make having sexual intercourse without consent justified.[[7]](#footnote-7) Further, mock jury research conducted in England by Finch and Munro found that women who consume alcohol in the presence of a male drinker will be perceived as being more sexually available than a non-drinking counterpart. Indeed, in that research, even in situations where the complainant’s intoxication was not wholly voluntary (i.e. where her drink was spiked with additional alcohol) the complainant was frequently viewed as partially responsible.[[8]](#footnote-8)

To create a special rule for defendants which allowed them favourable treatment where they were voluntarily intoxicated by drink or other drugs at the time of the incident in a climate where complainants continue to be judged less favourably or even disbelieved when they have been drinking at the time of the alleged incident would further deepen the inequalities inherent in rape trials and unfairly heighten the difficulties of proving that rape occurred.

The law needs to send a clear message that intoxication is no excuse for failing to obtain consent to sexual activity. Allowing a defence where the defendant was voluntarily intoxicated would run counter to the significant work which is currently being done to instil the message that, regardless of the existence of a pre-existing relationship or any other circumstances, one must always ensure that one’s sexual partner is consenting. The law must encourage responsible attitudes towards alcohol and drugs and sexual activity, not allow for excuses when individuals do not obtain consent to sexual activity when they are intoxicated.

**Issue 2**

**2(a) Do you think that the honest belief test should be replaced with an honest and reasonable belief test?**

Yes. However, it is submitted that the terminology of ‘honest’ should be dispensed with as it serves to create confusion. Where a defence is required to be reasonable to exculpate, it stands to reason that it will also be honestly held. Thus, the use of the word ‘honest’ is no longer relevant and should not be retained in future formulations of the defence.

Regarding a move to a reasonable standard, the current subjective formulation of honest belief is out of step with the new communicative model of sexuality which is embedded in the new statutory definition of consent in section 9 of the Criminal Law (Rape)(Amendment) Act 1990 (as amended), which is centred on the idea of ‘free agreement’. To allow a defendant’s unilaterally formed and unreasonable belief in consent to exculpate him undermines the message that consent to sexual activity must always be communicated effectively between sexual partners. Even if the defence is not used that often and accepting that jurors are not obliged to believe a spurious claim of honest belief, the retention of the rule in its current form creates the potential for unfair results in the rare instances where it is pleaded. Potentially it is in the mind of prosecutors weighing up whether to proceed to trial, and, in principle, it runs counter to the new definition of consent, unnecessarily undermining the legislative intent behind the introduction of a positive, communicative model of consent.

**2(b) If so, do you consider that the test for reasonableness should be determined by reference to (i) “the reasonable person”, (ii) the accused’s reasonable belief, or by reference to (iii) reasonable grounds?**

The belief should be objectively reasonable. However, under the proposal put forward here, concession would be made for characteristics of the defendant which would impair his ability to interpret social or sexual cues and thus limit his ability to behave reasonably (e.g. mental illness or intellectual disability). Thus, the harshness of a strictly objective test would be obviated for defendants who genuinely cannot meet the threshold of reasonable behaviour.

**2(c) Do you think “all the circumstances” should be considered in the jury’s determination of whether a belief in consent was reasonable?**

A consideration of all the circumstances of the case is likely to be implicit in a jury’s consideration of whether the defendant held a reasonable belief in consent. To explicitly include it may lead jurors being influenced by irrelevant or prejudicial attitudes when deliberating on reasonable belief. This is evident from mock jury research conducted by Finch and Munro in England and Wales where the reasonable belief is to be determined ‘according to all the circumstances’. In their research, they found that the reference to ‘all the circumstances’ allowed questionable stereotypes to creep into determinations of whether a defendant’s belief in consent was reasonable. Participants in the mock jury study took into account ‘the whole situation, the party, the drinking and so on’ or ‘…the fact that she is at a party, she does look and appear to be drunk, she hasn’t told him no’.[[9]](#footnote-9) Even the fact that the complainant had been passive during sexual activity was deemed by some jurors to be sufficient to support the defendant’s claim to hold a reasonable belief in consent.[[10]](#footnote-10) Based on their study, Finch and Munro suggest that the move to a reasonable belief standard in English rape law ‘may ultimately be undermined by the requirement to take into account “all the circumstances” that the judge and jury deem to be relevant and by the refusal to maintain an emphasis on objectively acceptable standards of behaviour’.[[11]](#footnote-11) Based on this, it seems preferable to exclude a specific reference to ‘all the circumstances’ in legislation.

Jurors will be instructed, as in all cases, to take all the evidence into account when determining the issue of reasonable belief. Thus, the reference to ‘all the circumstances’ is unnecessary.

**2(d) Do you think that the law should explicitly state that certain grounds for a belief in consent are unreasonable? If so, what grounds should be included?**

Yes. Giving specific examples will help to steer jurors away from stereotypical and potentially prejudicial thinking about rape, limiting the potential for rape myth acceptance to influence jurors’ deliberations on reasonable belief. Further, creating a list of situations which are not sufficient to support a claim of reasonable belief in consent will replicate the approach to defining consent which includes a list of situations where consent will be deemed to be absent. Thus, it is proposed that:

‘A defendant will be held not to have reasonably believed that the woman was consenting where:

1. The belief arose from the defendant’s (i) self-induced intoxication, or (ii) wilful blindness; or
2. The defendant did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting.[[12]](#footnote-12)

**2(e) Do you think that the law should explicitly exclude “self-induced intoxication” from the jury’s consideration?**

Yes. See 2 (d) and 1(c).

**2(f) Do you think that the laws should explicitly exclude any characteristics from the jury’s consideration?**

This might be difficult to achieve in practice within a legislative provision and is not evident in other jurisdictions. It may be best that eliminating reliance on stereotypical or prejudicial attitudes/opinions/values on the defendant’s part is best achieved by judicial direction, perhaps aided by the provision of bench book guidance to judges on how best to guide jurors on avoiding resort to myths and stereotypes in their deliberations. Examples of such guidance can be found in the *Crown Court Compendium* in England and Wales which provides judges with sample directions which they can use when directing jurors in rape trials. Although the English *Compendium* does not contain guidance on reasonable belief, a similar publication in an Irish context could provide such directions. The task of drawing up such a bench book might be a suitable task for the promised Judicial Council once it is established.[[13]](#footnote-13)

**2(g) Do you think that the “unreasonable belief” should be the mental element in the positive definition of the offence or, alternatively, that “reasonable belief” should be available as a defence?**

The current understanding of this is as a defence and thus we believe that it should be retained in this form.

**2(h) If you think it should be a defence to be raised by the accused, do you think it should be required to meet the evidential burden or should it be proved by the accused on the balance of probabilities?**

If reasonable belief is formulated as a defence, it should be required to meet the evidential burden. Shifting a burden of proof on the balance of probabilities to the defendant in an offence may raise constitutional difficulties.

**Issue 3**

**3(a) Do you think that the accused should be explicitly excluded from relying on the honest belief defence where there has been no affirmative communication of consent or reasonable steps taken to ascertain consent.**

Yes. See 2(d). Given the communicative standard inherent in the statutory definition of consent in Irish law, where a legally valid consent must represent ‘free agreement’, it is necessary to create an obligation on anyone engaging in sexual activity to take reasonable steps to make sure that his/her partner is consenting.

Communication is central to acceptable socio-sexual behaviour and the law should reflect this. What will constitute reasonable steps will necessarily fall to be determined by the courts on a case-by-case basis but it is to be hoped that judges will encourage jurors to adopt a reasonable threshold for what constitutes meaningful and reasonable steps to ascertain whether one’s partner was consenting to sexual activity.

**3(b) If so, do you consider that a reasonable steps requirement is best incorporated as a restriction on the honest belief defence to a rape offence, or alternatively, as a restriction on what qualifies as “reasonable” where the mental element in the rape offence is “no reasonable belief in consent”?**

See 2(d).

**3(c) If you think it should be a defence to be raised by the accused, do you think it should be required to meet the evidential burden or should it be proved by the accused on the balance of probabilities?**

In the definition proposed here, a claim of reasonable belief is not available where ‘the defendant did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting’. The defendant should be required to meet an evidential standard to show that such steps were taken.

**3(d) Do you think a reform based on a “reasonable steps requirement” should explicitly exclude “self-induced intoxication” from the jury’s consideration?**

Voluntary intoxication of the defendant should always be excluded from the consideration of the reasonableness of the defendant’s belief. No concession should be made for voluntary intoxication in this context. See 1(c).

**Issue 4**

**4(a) Do you think that a new offence of gross negligence rape, carrying lower penalties than for rape, should be enacted to address circumstances in which a defendant honestly but mistakenly believed that there was consent?**

No. Given the inherent complexities which already exist in rape law, creation of another lesser offence of gross negligence rape adds further unnecessary complication. More significantly, it is important that the law sends a clear message that sex without consent is rape and that it is only in the instances where a defendant reasonably believed that a complainant was consenting that he should escape liability for rape.

Gradation in the area may also create the potential for downgrading of charges or encourage guilty pleas to this lesser offence for lower penalties which would fail to recognise the true extent of the harm experienced by rape victims.

**4(b) If so, do you think that the accused should be guilty of the lesser charge where the belief in consent was unreasonable on any other ground?**

N/A

**For any further information on any of our observations above, please contact:**

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1. [2016] IESC 64. [↑](#footnote-ref-1)
2. Ibid, para 51. [↑](#footnote-ref-2)
3. In *DPP v O’R*, Charleton J noted that: ‘It is to be emphasised that in the vast majority of cases no specific issue as to any belief aspect of the mental element in rape arises…. . The circumstances are very rare indeed where a genuine issue could arise that even though the woman did not consent, the man nonetheless believed that she was consenting’: Ibid, para 40. [↑](#footnote-ref-3)
4. <http://dppireland.ie/publications/category/14/guidelines-for-prosecutors/> [↑](#footnote-ref-4)
5. Finch and Munro, “Breaking Boundaries? Sexual Consent in the Jury Room” (2006) 26(3) *Legal Studies* 303. [↑](#footnote-ref-5)
6. Adapted from Section 273.2 of the Canadian Criminal Code. In the Canadian provision, a defendant is prohibited from relying on reasonable belief where his belief arose from recklessness. As recklessness is already part of the mens rea in the current definition of rape in Irish law, it is omitted from the proposed list of circumstances where belief in consent cannot be claimed. [↑](#footnote-ref-6)
7. European Commission, *Special Eurobarometer 449 Report: Gender-Based Violence* (European Commission, 2016). The study involved surveying EU citizens in 28 Member States of the EU. This statistic relates to the 1,002 Irish adults who were surveyed as part of the study. [↑](#footnote-ref-7)
8. Finch and Munro, ‘The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants’ (2007) 16 *Social and Legal Studies* 591, 599. [↑](#footnote-ref-8)
9. Finch and Munro, “Breaking Boundaries? Sexual Consent in the Jury Room” (2006) 26(3) *Legal Studies* 303, 318. [↑](#footnote-ref-9)
10. Ibid, 318 [↑](#footnote-ref-10)
11. Ibid, 319. [↑](#footnote-ref-11)
12. Adapted from Section 273.2 of the Canadian Criminal Code. [↑](#footnote-ref-12)
13. For a discussion of the potential use of such jury directions in Ireland, see: Leahy, “Summing Up in Rape Trials: The Challenge of Guiding Effectively and without Prejudice” (2013) 23(4) *Irish Criminal Law Journal* 102; Leahy, “Defining Consent in Irish Sexual Offences Law: Unfinished Business”, Criminal Justice in Ireland Blog, 18July 2018, available at : <https://criminaljusticeinireland.wordpress.com/2018/07/18/defining-consent-in-irish-sexual-offences-law-unfinished-business/>; Gallagher, “Juries must be instructed on rape myths, says expert”, *Irish Times*, 17 August 2018. [↑](#footnote-ref-13)