



**RCNI Submission to the  
Law Reform Commission on  
Knowledge or Belief concerning Consent in Rape Law  
October 2018**

# RCNI Knowledge or Belief concerning Consent in Rape Law: Submission to Law Reform Commission October 2018

## Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

## Introduction – This Submission

RCNI welcomes very much the opportunity to contribute to this consultation process on Knowledge or Belief concerning Consent in Rape Law initiated by the Law Reform Commission<sup>1</sup>. We have advocated for a long time that the current formulation as to belief in consent in Section 2 of the Criminal Law (Rape) Act 1981<sup>2</sup> as amended, is too subjective. (This Section relates only to vaginal sexual intercourse without consent perpetrated by a male on a female).

It remains possible for an honest but unreasonable belief in consent to be accepted by a jury as a complete defence to a charge of rape under Section 2, even though it must consider “the presence or absence of reasonable grounds for such a belief, in conjunction with any other relevant matters”. We know from our daily work with survivors that the harm done to its victims by the crime of rape is so devastating that it should not be possible for accused persons to escape conviction on the basis of an honestly held but unreasonable belief that the other person was consenting to sexual intercourse.

## Structure of this Submission

This Submission answers each Question in the order presented in the Law Reform Commission Issues Paper and ends with a brief Conclusion summarising our position on knowledge or belief concerning consent in rape law.

## LAW REFORM COMMISSION QUESTION 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?

**RCNI Response: No.** Our view is that it is a simple matter for a man contemplating sexual intercourse with a woman to check that she does indeed consent to it, beforehand. He should assure himself of her free and voluntary agreement if he is in any doubt whatever about whether such agreement exists. If there is no response from her, he is being reckless as to her consent if he proceeds to have

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<sup>1</sup> Available online at: [http://www.lawreform.ie/\\_fileupload/Issues%20Papers/LRC%20IP%2015-2018%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf](http://www.lawreform.ie/_fileupload/Issues%20Papers/LRC%20IP%2015-2018%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf)

<sup>2</sup> Available online at: <http://www.irishstatutebook.ie/eli/1981/act/10/enacted/en/html>

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intercourse with her regardless. In these circumstances, he will be at risk of a charge of rape which could have been easily avoided.

Even if the woman concerned does appear to agree, the man seeking to have intercourse must be sure that none of the relevant circumstances set out in Section 9(2) of the Criminal Law (Rape) (Amendment) Act 1990 as amended by Section 48 of the Criminal Law (Sexual Offences) Act 2017<sup>3</sup> – applies (such as fear of violence, mistake, being intoxicated to the point where she is incapable of giving consent, unlawful detention). If one of these circumstances exists, he is at risk of a charge of rape. It seems to us that each one is very likely to be within his own knowledge already, or else easily ascertainable by him. As the authors of the Issues Paper point out, the new definition of consent and the new list of circumstances in which there is no consent combine to ensure that it is now already more difficult to argue that an unreasonable belief in consent is honestly held and therefore, that the person accused of rape should be acquitted on the sole basis of that belief.

It seems to us that no great burden is placed on any man by the necessity to assure himself beforehand that consent does indeed exist. In our view, any such burden is far outweighed firstly by the potential harm caused to the woman if there is no consent, and secondly, by the risk that a criminal charge may be laid against the man for want of a few moments' attention to his partner's state of mind.

In these circumstances, it seems illogical to retain the current standard of honest but possibly unreasonable, belief in consent. Accordingly, RCNI recommends that the current formulation is replaced by wording which introduces an objective element into the standard of belief, so that a belief in consent must be honestly **and reasonably** held.

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

**RCNI Response: No**, provided that the absence of knowledge (that is, belief in consent) is formulated as a belief which is both honestly **and reasonably** held.

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?

**RCNI Response: No.** We see no rationale for such a change which would benefit potential victims of rape in any way. Accordingly we are not looking for a change in the current law in this regard.

### LAW REFORM COMMISSION QUESTION 2

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

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<sup>3</sup> Section 48 CLSOA 2017 is accessible through this web-link:  
<http://revisedacts.lawreform.ie/eli/2017/act/2/section/48/revised/en/html>

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**RCNI Response: Yes.** We hold this view for the reasons set above, in particular at Response 1(a).

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

**RCNI Response:** We are inclined to think that the most desirable test is (i), that is, one referring to the belief of a “reasonable person”, provided that a form of words can be found which is not likely to result in a successful Constitutional challenge by an accused person.

With regard to (ii), the “accused’s reasonable belief”, this form of words is quite close to that in use in England and Wales (Sexual Offences Act definition of rape in Section 1 (c): “A does not reasonably believe that B consents”). We note the academic evidence from the UK to the effect that “reasonableness” is not a high threshold to meet, and that juries may regard the belief of the accused in consent as reasonable when it is in fact based on rape myths<sup>4</sup>. The net effect of this bias towards acceptance of rape myths may be that there is little difference in reality between an honest though unreasonable belief in consent, and an honest and reasonable belief in consent. It seems to us therefore that it would be better to avoid any formulation which would allow rape myths to be considered “reasonable”, if this can be done.

With regard to (iii), “reasonable grounds”, this is very close to the current formulation in Irish law: “[the presence or absence of] reasonable grounds” [for an honest belief in consent]. Accordingly we see no merit in pursuing it.

A formulation similar to that in the new offences of defilement introduced by the 2017 Act, which introduced a standard of belief (in that case as to the complainant’s age) which was that of a “reasonable person” – would be preferable to the more subjective formulation in (ii), because there would be less risk that “reasonable” rape myths would form the basis for the jury’s decision as to whether any belief in consent was actually held. However, we are also mindful that this most objective form of words must not impinge on the rights of the accused to the point where a Constitutional challenge on the basis that he cannot have a trial “in accordance with law” – might well succeed.

Accordingly, RCNI recommends that (i) should be adopted, but tempered by the addition of qualifiers as to age and capacity, for instance “a reasonable person of the age and with the mental capacity of the accused person”, so that there is no risk that a grave injustice might be caused to any man without the mental capacity needed to formulate a belief as to whether the woman concerned was consenting. If it is proposed that the formulation should instead be (ii), that is, “accused’s reasonable belief”, we submit that it should be explicitly stated that the jury is not entitled to conclude that such a belief was reasonably held based only on evidence of the complainant’s demeanour, dress and previous sexual history (with the accused or with others).

Finally, we submit that the form of words used is not without effect outside the courtroom: it is important that the relevant statutory provisions state the acceptable standard of belief in consent to anyone tempted to commit rape. It should not be possible to proceed to have sexual intercourse with a woman who may or may not want it, in the honest but mistaken and unreasonable belief that consent is present, without any risk of criminal sanction. We submit that a stricter standard of belief will deter at least some men from running this risk.

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<sup>4</sup> See footnotes to paragraphs 2.22 and 2.23 of LRC-IP 15-2018 for the relevant references.

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

**RCNI Response:** We think it should be confined to all the **relevant** circumstances, and it should be specified also which circumstances are to be regarded as **irrelevant**, essentially those which are founded in commonly held and unhappily still pervasive rape myths. Demeanour, clothing, number of sexual partners, previous consensual encounters and existing or prior intimate relationship are all essentially **irrelevant** to the issue of whether this woman at this moment with this man and at no other time, was consenting to sexual intercourse or not.

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?

**RCNI Response:** No. We think that would be too restrictive. If it is decided that it would be better to have a list, it should be an open one.

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

**RCNI Response:** If this question refers to the self-induced intoxication of the accused, it seems to us that because this is not a defence, evidence about it should be led by the prosecution, and both prosecutor and judge should make it clear to the jury that there is nothing exculpatory about it as far as the accused is concerned. If the question refers to the self-induced intoxication of the complainant, it should be made clear to the jury by both prosecutor and judge that this is not a defence, either, and further, that if the intoxication (whoever induced it) is such as to render the complainant incapable of providing consent - in the jury’s view – then there is no consent.

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

**RCNI Response:** Characteristics of the accused should be adduced in evidence if they are relevant to the issues in the trial and it is lawful to do so (e g generally, evidence of previous convictions is not led). Characteristics of the complainant will be mined inevitably by the defence to suggest to the jury that she is not credible for whatever alleged reason(s) if they can be portrayed in a negative light and if it is lawful to do so, though sometimes the relevance of this evidence may be tangential at best. It seems to us that it is time to consider excluding explicitly any evidence suggesting that the complainant is more likely to have consented because she appears to have acted in conformity with the commonly held rape myths set out at Response 2(c) above.

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?

**RCNI Response:** It seems to us that making “reasonable belief” a defence would turn the spotlight away from the complainant and her behaviour and onto the accused and his behaviour. This is already the case with the new offences of defilement and sexual activity with protected persons (2017 Act). However, it is too soon to say whether these offences are easier to prosecute and/or more likely to result in conviction, as a result. There is an argument that it would make sense to wait until the effects of these new offences are available, before proceeding to change the law on rape in this regard. Our view is that it would make sense to have a standard which is more closely aligned

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with that in the defilement and protected person offences, but we qualify it by saying that this is an area where the views of experienced senior prosecutors and judges should have by far the most weight. Provided that the considered view of senior prosecutors and judges at this point is that the introduction of “reasonable belief” as a defence is not likely to make the offence more difficult to prove, we consider that it is appropriate to proceed to introduce “reasonable belief” as a defence without additional delay. In particular, we would wish to avoid recommending such a defence if the considered view of our most experienced prosecutors and other senior lawyers is that a successful Constitutional challenge to it is highly likely.

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?

**RCNI Response:** In this case, we are inclined to think that it would be best for the accused to have to prove that defence on the balance of probabilities, in line with the current defilement and protected person offences. However, once again we qualify this by saying that the views of our most experienced judges, prosecutors and other senior lawyers should be given by far the most weight in any decision on how the law should be changed in this regard.

### LAW REFORM COMMISSION QUESTION 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?

**RCNI Response:** Our understanding from the Issues Paper is that where a formulation based on “reasonable steps taken” has been introduced, there is considerable variance in the interpretation of which steps are reasonable. We are inclined to think therefore that it would not add much to include such an explicit exclusion into our law. It seems to us that it is already implicit in our existing law on consent, that any man considering having sexual intercourse with a woman (not speaking of other sexual encounters) should assure themselves that there is free and voluntary agreement on the part of the woman concerned.

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”?

**RCNI Response: N/A**

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?

**RCNI Response: N/A**

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

**RCNI Response: N/A**

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### LAW REFORM COMMISSION QUESTION 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?

**RCNI Response:** No. Gross negligence rape has the potential to be every bit as devastating in its effects on its victims as intentional, pre-meditated carefully planned rape in which there is no question of consent. Assuring oneself that consent is present must be seen by the law as a minimum requirement. . Where there is no conviction for rape, there is very often a conviction for a lesser offence as matters stand now.

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

**RCNI Response:** N/A

### Conclusion

RCNI concludes that it is time that the existing subjective formulation in relation to belief in consent in Section of the Criminal Law (Rape) Act 1981, was replaced by a formula allowing for an objective element to the reasonableness of that belief to be introduced. We think that the strictest possible formulation is appropriate, provided that it can be introduced without serious risk of a successful Constitutional challenge. That said, we submit that it would be appropriate to qualify the phrase “reasonable person” with “of the same age and mental capacity as the accused.”

Whichever formula is chosen, it should include a provision which states that evidence of the complainant’s dress, demeanour and previous sexual history (if any), is to be disregarded in the assessment of the reasonableness of an accused’s belief, and when considering “all the circumstances”.

We are not persuaded that it would be desirable to introduce a requirement that the accused should have to demonstrate that he took “reasonable steps” to ascertain consent because of the difficulties found in other countries in defining what these steps were, or should be (as set out in the Issues Paper).

We would support the idea of introducing a defence of “reasonable belief” which would have to be raised, or proved on the balance of probabilities by the accused person, only if in the view of our most experienced and senior criminal lawyers, there were little or no risk of a successful Constitutional challenge to it.

In our view, no change which would make voluntary self-intoxication a defence to rape is desirable. Neither do we see merit in introducing any lesser offence of rape such as the “gross negligence rape” offences suggested in the Issues Paper.

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