

RAPE, THE MENTAL ELEMENT AND CONSISTENCY IN THE CODES

THOMAS CROFTS*

ABSTRACT

This article explores the mental element in rape in Australia. It briefly examines the position in the common law jurisdictions, which require mens rea, and the code jurisdictions, which do not. Although the Northern Territory (NT) is a code jurisdiction the approach to the offence of sexual intercourse without consent fits more appropriately with the common law states since the decision in *DPP (NT) v WJI* (2004) 219 CLR 43. This article examines the reasons for the High Court favouring an approach similar to common law in the NT. It will also explore whether the decision in *DPP (NT) v WJI* (2004) 219 CLR 43 might affect the law in the other state codes and whether there should be any change in the code approach to this offence.

I INTRODUCTION

Within Australia there are two broad approaches to the mental element in the offence of rape.¹ In the common law jurisdictions the prosecution must prove that the accused intentionally or recklessly penetrated the victim without their consent, whereas the code rape provisions are satisfied merely with proof of the physical elements. This means that while consent remains the central element in the offence of rape throughout Australia the code and common law jurisdictions generally take differing approaches where there is a mistaken belief in consent. Although a code jurisdiction, the NT rape provisions have recently been interpreted along the lines of the common law in the recent High Court case of *DPP (NT) v WJI* (2004) 219 CLR 43. This paper will briefly explain the traditional position in the common law and code jurisdictions before examining the reasons for the High Court's decision in *DPP (NT) v WJI* (2004) 219 CLR 43. It will then discuss whether this decision is likely, or ought, to affect the law

* LLB, LLM, Dr iur, Senior Lecturer in Law, School of Law, Murdoch University.

¹ The term rape will generally be used in this paper, unless referring to the specific offence in one of the jurisdictions not using this term. The offence is called rape in Queensland (*Criminal Code* (Qld) s 349), South Australia (*Criminal Law Consolidation Act 1935* (SA) s 48), Tasmania (*Criminal Code* (Tas) s 185) and Victoria (*Crimes Act 1958* (Vic) s 38). In the NT and the Australian Capital Territory (ACT) the offence is called sexual intercourse without consent (*Criminal Code* (NT) s 192(3); *Crimes Act 1900* (ACT) s 54); whereas in Western Australia it is sexual penetration without consent (*Criminal Code* (WA) s 325). In New South Wales (NSW) it is sexual assault (*Crimes Act 1900* (NSW) s 61I).

on rape in the other state codes. While touching on recent developments in each group of jurisdictions it will be shown that this decision in aligning the NT provisions with the traditional common law approach is not a positive development and should not influence the other code jurisdictions.

II THE TRADITIONAL COMMON LAW APPROACH

Historically, the offence of rape was defined as ‘the carnal knowledge of a woman forcibly and against her will’.² The offence was originally silent on the issue of mens rea and it was not until *DPP v Morgan*³ that its inclusion and the effect that this had on mistakes about consent was settled. The House of Lords held that a belief in consent, even if unreasonable, would negate mens rea provided that the belief was honest. Although subject to a degree of criticism, such as that it represented a ‘rapist’s charter’,⁴ this is still the approach to the offence in the common law jurisdictions in Australia (aside from Victoria). Rape requires proof of the physical elements of penetration without consent and also the mental element that the offender not only intended to penetrate but knew the victim was not consenting or was reckless as to whether the victim was consenting.⁵ Recklessness is generally understood subjectively to mean that the offender was aware that it was possible that the victim was not consenting but continued regardless.⁶ In NSW there is case law suggesting a wider understanding of recklessness which includes situations where the offender gave no thought to whether the victim was consenting, provided that the risk of non-consent would have been obvious to someone with the accused’s mental capacity.⁷

The requirements of force and lack of will were replaced by the concept of consent in the mid 19th century. The turning point was the case of *R v Camplin*,⁸ where a woman was penetrated after being made drunk by the accused. Faced with no evidence of force against the victim, the House of Lords decided that there could be rape if the penetration took place without the consent and against the will of the victim. In focusing on consent rather than force it has been argued that the offence does not capture the real nature of rape.⁹ Feminists have expressed several concerns about whether the focus on consent adequately protects women.¹⁰ Firstly, an undesirable consequence of making the

² St G Tucker, *Blackstone’s Commentaries* (William Young Birch and Abraham Small, IV, 1803) 210.

³ *DPP v Morgan* [1976] AC 182.

⁴ J Temkin, *Rape and the Legal Process* (Sweet & Maxwell, 1987) 79.

⁵ *Crimes Act 1900* (ACT) s 54; *Crimes Act 1900* (NSW) s 61I and s 61R(1); *Criminal Law Consolidation Act 1935* (SA) s 48; *Crimes Act 1958* (Vic) s 38.

⁶ See *DPP v Morgan* [1976] AC 182, 215; *Satnam and Kewal* (1983) 78 Cr App R 149; *Turris v R* [2003] ACTCA 23; *R v Brown* (1975) 10 SASR 139; *Wozniak and Pendry* (1977) 16 SASR 67, 175. Only Victoria and South Australia have a legislative definition of recklessness in relation to this offence. Section 38 *Crimes Act 1900* (Vic) states that recklessness requires that the offender is aware that the victim is not or might not be consenting, while s 48 of the *Criminal Law Consolidation Act 1935* (SA) requires that the offender be recklessly indifferent as to whether the victim is consenting.

⁷ *R v Kitchener* (1993) 29 NSWLR 696; *R v Tolmie* (1995) 37 NSWLR 660. It was noted by Kirby that such situations where an accused fails to give any thought to whether a victim is consenting must, however, be rare, *R v Tolmie* (1995) 37 NSWLR 660, 669. See also Carruthers J in *R v Kitchener* (1993) 29 NSWLR 696, 700.

⁸ *R v Camplin* (1845) 1 Cox 22. The decision was confirmed in *R v Fletcher* (1859) 8 Cox 131.

⁹ V Tadros, ‘Rape Without Consent’ (2006) 26 *Oxford Journal of Legal Studies* 515, 516. See also V Tadros, ‘No Consent: A Historical Critique of the *Actus Reus* of Rape’ (1999) 3 *Edinburgh Law Review* 317, 330.

¹⁰ For further discussion see P Western, ‘Some Common Confusion About Consent in Rape Cases’ (2004) 2 *Ohio State Journal of Criminal Law* 333-359.

consent of the victim the central question has been that criminal trials tend to focus on the conduct and sexual history of the victim rather than on the behaviour of the accused.¹¹ A second criticism is that ‘the ordinary use of the term “consent” does not sufficiently distinguish between cases in which the accused submits out of fear and cases in which she is willing to engage in sexual intercourse’.¹² Finally, it has been argued that the notion of consent cannot be determined fairly while jurors and judges rely on their stereotypical views about sexual roles in their assessment of consent (such as, put bluntly, ‘yes’ means ‘no’; that women fantasise about being raped; or that women could resist if they really wanted to).¹³

Recognising these difficulties with the concept of consent, Victoria undertook significant reform in 1991 taking the offence of rape away from the traditional common law approach and reflecting a ‘communicative’ model of sexuality.¹⁴ A new definition of consent was introduced based on a positive standard of free agreement. Aside from listing circumstances when a person will not be taken to have freely agreed to penetration, the *Crimes Act (Vic)* includes directions which should be given to the jury where these are relevant to the facts. Juries are directed that if a person does or says nothing to indicate consent then this is sufficient to show that there was no consent¹⁵ and where a mistaken belief is claimed they must assess whether the belief was reasonable in all the circumstances.¹⁶

The Victorian law has been influential in the recent reforms undertaken in England and Wales which have also overturned the common law rule that a mistaken belief in consent need only be honest. The *Morgan* approach was argued to be partly responsible for the low rate of convictions for the offence of rape because it allowed a person to evade conviction however ‘irrational or crazy’ their belief, provided that the jury found the belief to be honest.¹⁷ The *Sexual Offences Act 2003 (UK)* s 1(1) now defines rape as intentional penetration without the victim’s consent, where the accused does not reasonably believe that the victim is consenting. All the circumstances, including the steps taken by the accused to ascertain whether the victim was consenting, are to be considered in determining whether any mistaken belief is reasonable.¹⁸

III THE TRADITIONAL CODE APPROACH

As the offence of rape traditionally did not mention a mental element, it is unsurprising that none was included when the Griffith Code was drafted. Even though common law went on to include a mental element in the offence of rape the codes remained faithful to the traditional position. As a result, in the code jurisdictions the prosecution need

¹¹ Tadros, above n 10, 326.

¹² *Ibid.*

¹³ See Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) 310.

¹⁴ See for instance, B McSherry, ‘Legislating to Change Social Attitudes: The Significance of Section 37(a) of the Victorian Crimes Act 1958’ in Eastaerl (ed), *Without Consent: Confronting Adult Sexual Violence* (1993) 380; S Bronitt, ‘The Direction of Rape Law in Australia: Toward A Positive Consent Standard’ (1994) 18 *Criminal Law Journal* 249-253.

¹⁵ *Crimes Act 1958 (Vic)* s 37(1)(a).

¹⁶ *Crimes Act 1958 (Vic)* s 37(1)(c).

¹⁷ J Drown, *UK Parliamentary Debates*, House of Commons, (16 Jul 2002) col 174.

¹⁸ *Sexual Offences Act 2003 (UK)* s 1(2).

only prove the physical elements of penetration and lack of consent for this offence.¹⁹ The mental state of the offender will therefore only be relevant where one of the general provisions of criminal responsibility in the codes is at issue; the most likely being where the offender claims that they mistakenly believed that the victim was consenting. In such cases the codes provide that where a person makes a mistake they are to be treated as if the state of affairs is as they believed it to be, provided that their belief is both honest and reasonable.²⁰

The general mistake provisions in the state codes do raise the question of how reasonableness is to be determined. For instance, should the jury 'be asked to consider what they themselves would have done in that situation'?²¹ and is the reasonable person a person of the same gender, social status, ethnic group or mental capacity as the accused? Such questions were discussed in the Queensland (Qld) case of *Mrzljak*,²² where the complainant and the accused were mildly intellectually impaired, and the accused, a Bosnian immigrant, spoke little English. While the Court held that the test of 'reasonableness' was to be determined by whether there were reasonable grounds for the belief, not what a reasonable person would have believed, there was disagreement about which subjective factors could be taken into account in ascertaining whether the belief was reasonable.

McMurdo P held that since ss 26 and 27 covered cases of mental impairment 'intellectual or mental characteristics amounting to a natural mental infirmity' could not be considered when determining the objective test for the purposes of mistake of fact.²³ Holmes J delivered the leading judgement and held, conversely, that a variety of characteristics could be taken into account: 'the section directs attention to the actual belief of the accused; nothing in its language invites reference to the reasonable man's putative view. What must be considered... is the reasonableness of an accused's belief based on the circumstances as he perceived them to be'.²⁴ Ultimately Her Honour concluded that 'a jury might be prepared to accept a belief which would not be reasonable if held by a native English speaker of normal IQ, was honestly held by the appellant on reasonable grounds'.²⁵ Similarly, Williams JA added:

the belief must be based on reasonable grounds, it is nevertheless the belief of the offender which is critical...the critical focus is on the offender rather than a theoretical reasonable person. It is the information available to the offender which must determine whether the belief was honest and also was reasonable. That must mean that factors such as intellectual impairment, psychiatric problems and language difficulties are relevant considerations though none would necessarily be decisive.²⁶

There is also a concern that the reasonableness requirement focuses attention on the victim's behaviour rather than that of the accused. In doing so it does not challenge

¹⁹ *R v Thompson* [1961] Qd R 503; *Snow* [1962] Tas SR 271; *A-G's Reference (No 1 of 1977)* [1979] WAR 45; *R v Arnol* [1981] Tas R 157; *Bennet v R* [1991] Tas R 11; *BRK v R* [2001] WASCA 161.

²⁰ See s 24 *WA Code*; s 24 *Qld Code*; s 32 *NT Code*; ss 14 and 14A *Tas Code*.

²¹ Model Criminal Code Officers Committee, *Model Criminal Code: Chapter 5 – Sexual Offences Against the Person* (Canberra: AGPS, 1999) 77.

²² *R v Mrzljak* (2004) 152 A Crim R 315.

²³ *Ibid* 321.

²⁴ *Ibid* 331-2.

²⁵ *Ibid* 335.

²⁶ *Ibid* 326.

‘misogynous stereotypes about female sexuality’.²⁷ It may therefore allow ‘an accused to base a defence on widely accepted, but largely untested, assumptions about the way people behave, particularly about the way women behave and about their sexual behaviours and desires’.²⁸

While still preferable to the *Morgan* approach there is capacity for improvement. In order to ensure that people do not simply rely on outmoded presumptions and do actually make efforts to determine whether a victim is consenting, a new section has been added to the general provision on mistake in the Tasmanian *Criminal Code*. Section 14A now specifies that a mistaken belief in consent will not be reasonable where the accused ‘did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act’.²⁹ This section also clarifies that a mistake made due to self-induced intoxication is not a reasonable mistake. It must also be acknowledged though that legal changes can only go so far without a change in social values. As noted by Warner:

The law can change the meaning of rape/sexual assault in the statute books, but changing its meaning in practice is another matter. The same values and beliefs about sexuality and attitudes to women underlie the reasons why men rape, and impact on the prosecution of sexual offences, the trial and penal process making it difficult to shift the boundaries between lawful sex and sexual assault. A widespread change to community attitudes through education and other media is needed so that sexuality is seen as an expression of equal sharing relationships.³⁰

IV THE NT APPROACH: THE DECISION IN *DPP (NT) V WJI*

Section 192(3) of the *Criminal Code* (NT), provides that: ‘Any person who has sexual intercourse with another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for life’. As with the other state codes there is no mention of any mental element in the offence provision. Despite this absence of a mental element the trial judge in *DPP (NT) v WJI* (2004) 219 CLR 43 directed the jury that for this offence the prosecution had to establish three things: that the accused had sexual intercourse with the victim; that the victim did not consent; and that the accused knew that the victim was not consenting or may not be consenting and that he proceeded regardless. The jury were told that if the accused mistakenly believed that the victim was consenting then he would not have intended to have sexual intercourse without her consent. Accordingly, the Crown had to establish beyond reasonable doubt that the accused held no mistaken belief that the victim consented. Such a mistake need only be honest, it need not be based on reasonable grounds.

The DPP (NT) disagreed with this interpretation contending that the Crown need only establish that the accused intended to have sexual intercourse but not that the accused intended to have non-consensual intercourse. If the accused was mistaken then the defence of an honest and reasonable mistake would have been open to him.³¹ The DPP

²⁷ Bronitt, above n 15, 307.

²⁸ Mr Parkinson, Second Reading, *Criminal Code Amendment (Consent) Bill 2003 (no 102)*, Parliamentary Debates (Legislative Council), Tasmania (18 November 2004) 31.

²⁹ *Criminal Code* (Tas) s 14A(1)(c).

³⁰ K Warner, ‘Sexual Offending: Victim, Gender and Sentencing Dilemmas’ in Chappell & Wilson (eds), *Issues in Australian Crime and Justice* (2005) 247.

³¹ Under s 32 of the *Criminal Code* (NT).

appealed to the NT Court of Criminal Appeal questioning whether the trial judge had been correct in stating that the prosecution must prove intention or recklessness in relation to the lack of consent and that a mistaken belief in consent need only be honest not reasonable. The majority of the Court of Criminal Appeal held that the trial judge had been correct in his directions and this decision was confirmed by the majority when appealed to the High Court of Australia.³²

Given that the High Court follows the principle that so far as language permits the codes should be interpreted consistently,³³ it is important to investigate the reasons for the High Court interpreting the NT provisions out of step with the other codes and in line with the common law approach. Two main arguments can be found for the High Court's decision to incorporate a mental element into the offence of sexual intercourse without consent in the NT: textual considerations of the NT *Criminal Code* and reasons of policy.

A *Textual considerations*

As s 192(3) *Criminal Code* (NT) makes no mention of any mental element any such element must be read into the offence by way of the general provisions in the Code on criminal responsibility. Section 31(1) of the NT Code provides that: 'A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct'. The central question in this case therefore became which of the physical elements of the offence did the word 'act' cover? This in turn would answer the question of to which of the physical elements intention or recklessness extended.

This focus on whether the word 'act' extended to the lack of consent as well as the penetration, is founded on the debate in code jurisdictions, as to whether 'act' is to be interpreted widely to include all elements of the offence other than the mental element (as such akin to the concept of *actus reus* at common law) or whether it should be narrowly confined to bodily movement and the contemporaneous consequences thereof. In relation to the other state codes it seems to be generally accepted that the word 'act' has a narrow meaning. The majority in *Vallance v R*³⁴ found that 'act' meant bodily actions and the immediate and contemporaneous consequences of a bodily movement. Similarly, in the case of *Kaporonovski v R*³⁵ it was said by Gibbs J that 'it would be a departure from the ordinary meaning of that word to regard it as including all the ingredients of the crime other than the mental element'.

The High Court did not, however, feel bound to follow this narrow interpretation of the word 'act', noting that the NT Code is in many ways unique; it is much younger than the other state codes and was enacted in view of much of the case law on the other codes.³⁶ One major difference in language is that unlike the other state codes, the NT Code contains a definition of the word 'act', with s 1 providing that 'act' means 'deed

³² Gleeson CJ, Gummow, Kirby and Heydon JJ; Hayne J dissenting.

³³ Kirby J in *DPP (NT) v WJI* (2004) 210 CLR 43, 67; see also *Barlow* (1997) 188 CLR 1, 32; *Charlie* (1999) 199 CLR 387, 410.

³⁴ *Vallance R* (1961) 108 CLR 56.

³⁵ *Kaporonovski v R* (1973) 133 CLR 209, 230. This narrow interpretation of the word 'act' seems to have been preferred by the High Court in *R v Falconer* (1990) 171 CLR 30; and more recently in *Murray v R* (2002) 211 CLR 193. See also *Ugle v R* (2002) 211 CLR 171.

³⁶ *DPP (NT) v WJI* (2004) 210 CLR 43, 50 (Gummow and Heydon JJ); 67-8 (Kirby J).

alleged to have been done' and it is 'not limited to bodily movement'. Gummow, Heydon and Kirby JJ felt that in choosing these terms the NT legislature was deliberately endorsing the wide view of 'act' taken by Dixon CJ and Windeyer J in relation to the Tasmanian Code in *Vallance v R*.³⁷ In this case, Windeyer J explained that 'the act referred to is thus a deed'.³⁸ Dixon CJ was also noted to have used the phrase 'external elements' in *Vallance v R* in a similar fashion to Professor Glanville Williams in *Criminal Law - the General Part* who spoke of the actus reus as meaning 'the external situation forbidden by law – the external elements of the offence'.³⁹

Kirby J found further support for a wide reading of this word from the fact that the NT Code refers in s 31(1) to the combination of 'act, omission or event'.⁴⁰ He argued that because of this compendious phrase it would be a mistake to interpret the words in isolation from their context in the sentence.⁴¹ This combination contrasts to the wording of the other state codes, which speak of 'act' (and 'omission') separately from 'event'. Separating the words in s 23 of the Qld Code indicated a narrow understanding of the word 'act' to Gibbs J in *Kapronovski v R*. He found that the meaning of the word 'act' was:

to be found in the very words of that paragraph, which, by distinguishing between an act and its consequences, show[s] that 'act' is not intended to embrace the consequences as well as the action that produced them.⁴²

The fact that the lack of consent is the key element of this offence and marks a legally neutral act from a criminal act, was also recognised as an argument for extending the word 'act' to this element of the offence. Kirby J found that because s 31 referred to when a person is not criminally responsible for an act, the act should be understood to be the act to which criminal responsibility is attached, namely the act of penetration without consent.⁴³ Similarly, Gleeson CJ held that:

Having sexual intercourse with someone who is not consenting is a 'deed' which is not limited to the bodily movement of the perpetrator. It involves violence, and a serious affront to the dignity and personal integrity of the victim. It is consistent with the ordinary use of language to describe the absence of consent as part of the deed which attracts criminal responsibility. It is a defining aspect of the deed.⁴⁴

In contrast, Hayne J clearly favoured interpreting the NT Code in line with the other state codes and disagreed with a wide understanding of the word 'act', finding that to take this approach would:

³⁷ *Vallance v R* (1961) 108 CLR 56, 60-61 (Dixon CJ) and 78-80 (Windeyer J). Referred to by Gummow and Heydon JJ in *DPP (NT) v WJI* (2004) CLR 43, 52, 55 and 56-7; also Kirby J, 71.

³⁸ *Vallance v R* (1961) 108 CLR 56, 79. Referred to by Gummow and Heydon JJ in *DPP (NT) v WJI* (2004) 219 CLR 43, 55.

³⁹ Gummow and Heydon JJ in *DPP (NT) v WJI* (2004) 219 CLR 43, 56, citing G Williams, *Criminal Law – the General Part*, (Stevens, 2nd ed, 1961) 30.

⁴⁰ *DPP (NT) v WJI* (2004) 219 CLR 43, 70.

⁴¹ *Ibid* (Kirby J). Although such a wide reading of 'act' does leave open the question of whether the word 'event' has any independent meaning at all. In defining the relative meanings of act and event in s 1 it is evident that these words should be capable of being understood independently of one another.

⁴² *Kapronovski v R* (1973) 133 CLR 209, 23.

⁴³ *DPP (NT) v WJI* (2004) 219 CLR 43, 70.

⁴⁴ *Ibid* 49-50.

represent a radical departure from what, for so long, has been the understanding of the provisions of the state Criminal Codes dealing with criminal responsibility and the identification, for the purposes of those Codes, of the relevant ‘act’ of an accused. That step should not be taken.⁴⁵

He argued, following the judgment of Gibbs J in *Kaporonovski v R*, that neither the composite term ‘act, omission or event’ nor the words used separately will necessarily cover all elements of the offence.⁴⁶ Some elements may not fall under either ‘act’ or ‘event’,⁴⁷ but are better regarded as an ‘extrinsic circumstance’, such as consent in a case of rape.⁴⁸ Furthermore, a wide reading of s 31:

finds no footing in the text because of the evident focus in s 31 on what the accused did or did not do (not what the complainant did) and because consent of the complainant could never be a *consequence* of the relevant conduct of the accused.⁴⁹

B Policy considerations

The severity of this offence, which carries a maximum penalty of life imprisonment in the NT was, according to Kirby J, a fundamental reason to give the word ‘act’ a wide reading, because according to the general principles of criminal law mens rea would normally be implied into serious offences and would cover the whole offence:

On the face of things (absent express language) it is therefore one of those crimes ordinarily informed by the general principle that subjective intent or foresight ... must be proved by the prosecution in order to secure a conviction.⁵⁰

This refers to the basic presumption of criminal law, confirmed by the High Court in *He Kaw Teh*,⁵¹ that mens rea is an element of all statutory offences even though the offence is defined only by reference to its external elements. The more serious the offence and the potential consequences are for the accused, the less likely it is that the courts will find that intention or foresight has been omitted. As this offence was only defined by reference to its external elements, mens rea would have to be read into the offence through the general provision contained in s 31(1). This point is significant for Kirby J and one which convinces him to take a wide reading of the word ‘act’ so that intention or foresight would be attached to all the physical or external elements.⁵²

Gummow and Heydon JJ noted that this approach is in line with the common law, as stated in *DPP v Morgan*,⁵³ at the time that the NT Code was enacted in 1983.⁵⁴

⁴⁵ Ibid 88.

⁴⁶ Ibid 86.

⁴⁷ Ibid 85.

⁴⁸ Ibid 84-5 citing Gibbs J in *Kaporonovski v R* (1973) 133 CLR 209, 231.

⁴⁹ *DPP (NT) v WJI* (2004) 219 CLR 43, 87.

⁵⁰ Ibid 62-3 (Kirby J) referring to *He Kaw Teh* (1985) 157 CLR 523, 594.

⁵¹ *He Kaw Teh* (1985) 157 CLR 523.

⁵² *DPP (NT) v WJI* (2004) 219 CLR 43, 65.

⁵³ *DPP v Morgan* [1976] AC 182. It should be noted that *Morgan* is no longer good law in the UK since the enactment of the *Sexual Offences Act 2003* (UK). According to s 1(1)(c) a person is liable for the offence of rape if they intentionally penetrate the victim, without the consent of the victim and without reasonably believing that the victim is consenting.

⁵⁴ *DPP (NT) v WJI* (2004) 219 CLR 43, 59 (Gummow and Heydon JJ).

Furthermore, the directions by the trial judge requiring intention or recklessness regarding the lack of consent were found to have been used for at least 17 years. In that time the NT legislature had changed the law on sexual offences and s 31, however, no attempt had been made to alter the approach taken to this offence. On this basis, Kirby J found that 'it is more reasonable than otherwise to infer that the approach of the Northern Territory courts to the operation of the NT Code was deemed acceptable to the legislature'.⁵⁵ Added to this is the fact that:

This would be unsurprising, given that it is the same approach as is adopted in the states with the major population centres of Australia and it is the approach that conforms to foundational principles of the criminal law.⁵⁶

It is surprising to note that although reference is made to the common law existing at the time of the adoption of the NT Code no comment is made about the fact that there was much criticism of the decision in *Morgan*.⁵⁷ Even more astounding is that no words are wasted on the fact that some common law jurisdictions (Victoria and England) no longer follow *Morgan*. Furthermore, while the approach of implying mens rea may sit well with the common law jurisdictions it is not so comfortable with the code jurisdictions. The presumption that mens rea is implied in all serious offences is a principle of common law:

A unique contextual feature of governing how criminal statutes are constructed is that interpretation incorporates and is dependent on common law concepts from the "General Part" of the criminal law. Accordingly every statutory offence is interpreted in light of those concepts and each offence is placed in a common law context.⁵⁸

This presumption is not, however, one which has been adopted by the code jurisdictions. The 'Griffith Code enacted what was at the time thought to be the common law position of objective criminal responsibility and has remained faithful to that position as a general proposition'.⁵⁹ As a result, in the code jurisdictions if the offence provision does not require a mental element then none need be proven. As noted by Hayne J (dissenting)⁶⁰ this lack of need for proof of mens rea was for Griffith a key feature of the Qld Code:

It is never necessary to have recourse to the doctrine of mens rea, the exact meaning of which has been the subject of much discussion. The test now to be applied is whether this prohibited act was, or was not, done accidentally or independently of the exercise of the will of the accused person.⁶¹

The policy aspect of the decision in *WJI* shows a clear common law leaning in the interpretation of the NT Code with little regard to the distinct features of the other

⁵⁵ Ibid 74-5 (Kirby J).

⁵⁶ Ibid 75 (Kirby J).

⁵⁷ See for instance K Stevenson, 'Observations on the Law Relating to Sexual Offences: the Historic Scandal of Women's Silence' [1999] 4 *Web Journal of Current Legal Issues*.

⁵⁸ M Gani, 'Codifying the Criminal Law: Implications for Interpretation' (2005) 29 *Criminal Law Journal* 264, 271.

⁵⁹ M Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 157.

⁶⁰ *DPP (NT) v WJI* (2004) 219 CLR 43, 82.

⁶¹ *Widgee Shire Council v Bonney* (1907) 4 CLR (Pt 2) 977, 981.

codes. Only Hayne J was concerned to interpret the NT Code consistent with the other state codes. The other judgments avoid the question of why it might be appropriate not to imply mens rea into this specific offence, or why the code approach of requiring that the mistake be both honest and reasonable might as a matter of policy be preferable. Given the recent common law reforms in Victoria and England and Wales, which have moved away from the traditional approach and require an assessment of whether the mistake was reasonable in the circumstances, this decision is all the more extraordinary.

V EFFECT OF *DPP (NT) v WJI* ON THE OTHER STATE CODES

The decision in *WJI*, which seems to a degree to have been driven by a desire to achieve consistency between the NT and the common law approach to rape, raises the question of whether *WJI* is likely to influence the other state codes position on rape. Particularly, whether it may lead to a wide reading of the word ‘act’ in the other codes and also whether it could, or indeed it should, lead to the inclusion of a mental element in this offence.

A key reason Kirby J saw for a wide reading of the word ‘act’ was that if this word was read as only covering bodily movement it would extend to the penetration but not the actual element that makes the act criminal, namely the lack of consent. This would then mean that a person could be liable for this offence, carrying the potential of life imprisonment, without having intended to act without the consent of the victim or at least being reckless as to whether the victim was consenting. It is this concern, based on common law principles, to include a mental element in serious offences, such as rape, which could lead an expectation that in future, there might be a leaning towards a wide interpretation of the word ‘act’ in the other state codes.

This desire to incorporate a mental element is, however, unlikely to lead to a change in the understanding of the word ‘act’ in the other codes. Firstly, it is debateable whether s 31 really was drafted to be different from the corresponding provisions in the other state codes,⁶² and therefore whether the wide interpretation of ‘act’ was correct even in relation to the NT Code. One of the main arguments supporting this approach was the fact that the definition of the word ‘act’ in s 1 was thought to clarify that the wide understanding embraced by Dixon CJ and Windeyer J in relation to the Tasmanian Code in *Vallance v R*,⁶³ had been incorporated in the NT Code. This interpretation of the word ‘act’ would have been more convincing, however, if there had been, as Gray points out, ‘more support for the High Court’s assertion that the NT legislature had clearly intended a broader interpretation’.⁶⁴ This is especially so considering the fact that such an interpretation is at odds with the majority view in *Vallance* and the approach generally supported by the High Court.⁶⁵ Furthermore, Gray notes that Des Sturgess QC, the principal drafter of the NT Code is reported to have said that s 31 was an attempt ‘to set down ... in different language exactly what Sir Samuel Griffith

⁶² See for instance S Gray, ‘The State of Things in the Territory: Literalism, Principle and Policy in Northern Territory Criminal Law’ (2005) 29 *Criminal Law Journal* 37, 40.

⁶³ *Vallance v R* (1961) 108 CLR 56, 60-61 (Dixon CJ) and 78-80 (Windeyer J). Referred to by Gummow and Heydon JJ in *DPP (NT) v WJI* (2004) CLR 43, 52, 55 and 56-7; also 71 (Kirby J).

⁶⁴ Gray, above n 63, 39.

⁶⁵ See for instance, *R v Falconer* (1990) 171 CLR 30 and more recently in *Murray v R* (2002) 211 CLR 193. See also *Ugle v R* (2002) 211 CLR 171.

attempts to set down in his section 23'.⁶⁶ If this is the case then the decision in *WJI* should be seen as anomalous and should not influence the approach in the other codes.

The provision that a person is only criminally responsible for an act that they willed or that was voluntary and intentional, suggests that the word 'act' was not designed to encompass all physical or external elements of the offence, rather only those that the offender could consciously control,⁶⁷ i.e. bodily movement and any immediate contemporaneous consequences thereof. This understanding also accords with the natural and ordinary meaning of the word 'act', rather than a strained and technical meaning (akin to the concept of *actus reus*) of all elements of the offence other than those relating to the mind of the offender. Accordingly, there may be elements of the offence which although external elements, in the sense that they do not relate to the mind of the offender, are also extrinsic circumstances in that they are not capable of being under the control or will of the offender, for instance the lack of consent of the victim. As stated by Gibbs J in *Kaporonovski v R*:

putting aside cases where a specific intention is required, there are many offences which are constituted only if the act of the accused was accompanied by some extrinsic circumstance (eg absence of consent on a charge of rape or the age of the girl on a charge of unlawful carnal knowledge) or had some particular consequence (eg the causing of grievous bodily harm ...). It would be straining language to regard the word "act" as extending to all such external circumstances.⁶⁸

This aside, even if a wide reading of the word 'act' were accepted as correct this would not lead to the incorporation of a mental element into the offence of rape in the other state codes. As discussed above, the Griffith Code makes no mention in s 23 of a mental element in relation to the 'act'. Although the Tasmanian Code does require that an act must be voluntary *and intentional* this is not a reference to the mental element of intention, rather it relates to the fact that the act must be willed or under the mental control of the offender.⁶⁹

A court faced with the mental element in rape at 'microscopic proportions'⁷⁰ might then seek other ways of incorporating a mental element such as by implying it from the words constituting the offence. Blackwood argued in 1982 that just because the codes do not mention any specific mental element does not necessarily mean that none is required.⁷¹ He noted that *Morgan* confirmed that in relation to the offence of rape in the UK, a mental element could be implied into its statutory definition:

Not only would it be repugnant for any common law crime of this gravity to lack a mental element, but as Lord Diplock pointed out in *Sweet v. Parsley* ..., both statutory and common law offences employ habitually in their definitions words which impliedly

⁶⁶ Gray, above n 63, 40.

⁶⁷ Hayne J, dissenting, took this view in *DPP (NT) v WJI* (2004) 219 CLR 43, 87. He argued that the words 'act, omission or event' appear to relate to what the accused did or did not do and the consequences thereof rather than the circumstances accompanying the 'act, omission or event'.

⁶⁸ *Kaporonovski v R* (1973) 133 CLR 209, 231.

⁶⁹ As noted in *Falconer v R* (1990) 171 CLR 30, 40 intention is something quite distinct from will or voluntariness. See also *Vallance* [1960] Tas SR 51, 90.

⁷⁰ Chambers J in *Ingram v R* [1972] Tas SR 250, 263.

⁷¹ J Blackwood, 'The Mental Element in Rape in the Criminal Codes' (1982) 56 *Australian Law Journal* 474.

import into the definition of the crime an implication of an intent or state of mind in the accused.⁷²

From this Blackwood followed that:

just as at common law the words ‘without her consent’ have been held to imply a mental element, those same words, which are part of the definition of rape in all code jurisdictions, could be held to imply the same mental element.⁷³

Blackwood then found support for this approach by way of example of the case of *Vallance* where Kitto and Taylor JJ read a mental element into the Tasmanian Code offence of unlawful wounding even though none was mentioned in the offence definition.⁷⁴ This approach was not, however, accepted by the courts in relation to rape. *Arnol v The Queen*⁷⁵ confirmed the decisions of *R v Snow*⁷⁶ and *R v Ingram*,⁷⁷ which rejected the notion that a mental element could be implied into the offence of rape. The Tasmanian Court of Criminal Appeal felt unable to adopt the approach taken in *Vallance* such that a mental element could be implied from the definition of the words making up the offence. This was because ‘unlawful’ and ‘wounding’ were words defining the offence which were therefore capable of interpretation. In contrast, the word ‘rape’ was merely the label for the offence not one of its definitional elements in need of construction.⁷⁸ It should also be noted that the decision to imply a mental element in *Morgan* was based on the common law presumption that mens rea is included in serious offences. As already discussed this is not a presumption of code jurisdictions and therefore does not support the implication of a mental element in a code offence provision.

VI IS THE TRADITIONAL CODE APPROACH IN NEED OF REFORM?

Given that a mental element cannot be incorporated into the offence of rape in the state codes by a wide reading of the word ‘act’ or by implication from the wording of the offence, the question remains are there compelling reasons to include a mental element by way of legislative amendment to the code provisions. As discussed above, a main argument for such change is that it is a fundamental principle of common law that intention or recklessness should be required for offences which are serious and carry potentially severe consequences for the accused. In the UK the Heilbron Committee found in 1975 that intention or recklessness should be required for the act of penetration and the lack of consent because to extend the offence of rape further ‘would be to extend the definition of a grave crime to include conduct, which, however, deplorable, does not in justice or in common sense justify branding the accused as a guilty man’.⁷⁹

⁷² *R v Morgan* [1975] 2 WLR 913, 933 (Lord Hailsham of St Marlebone).

⁷³ Blackwood, above n 72, 475.

⁷⁴ *Vallance v R* (1961) 108 CLR 56.

⁷⁵ *Arnol v The Queen* [1981] Tas SR 157.

⁷⁶ *R v Snow* [1962] Tas SR 271.

⁷⁷ *R v Ingram* [1972] Tas SR 250.

⁷⁸ *Arnol v The Queen* [1981] Tas SR 157 at 165 (per green CJ) and at 170 (per Neasy J). For discussion see Blackwood, above n 72, 480.

⁷⁹ Heilbron Committee, *Report of the Advisory Group on the Law of Rape* (London: HMSO, 1975) para 76.

Even though the presumption that mens rea is included in all offences is not a presumption of code jurisdictions, it could be argued that it is time that the code jurisdictions caught up with the developments in the common law in relation to the fault element. However, while it is generally desirable that a mental element is required for serious offences (and indeed it is generally included in the offence provisions of the more serious offences in the codes) there may be cases where, for policy reasons, it is thought that even without proof of intention or recklessness an accused ought to be convicted.

It has been commented that the view that a mental element must be required for the offence of rape ‘indicates an obsessive concern with the rights of the offender and the need for a “guilty mind”, neglecting the need to protect victims from the physical and psychological trauma of sexual assault’.⁸⁰ Rape may be considered an offence which, despite the potentially serious consequences for the accused, ought not to require a mental element. As argued by Temkin, ‘the guiding principle in the law of rape should be the protection of sexual choice for women’.⁸¹ Acting without concern for whether a victim is consenting is blameworthy and deserving of punishment, as is forming a belief based on unreasonable assumptions. It is not inappropriate to require that the perpetrator consider whether the person is consenting and if they make a mistake that they should have reasonable grounds for such a mistake. Such a requirement would not be unjust nor unreasonable, because:

it is possible for a man to ascertain whether a woman is consenting with minimal effort. She is there next to him. He only has to ask. Since to have sexual intercourse without her consent is to do her great harm, it is not unjust for the law to require that he inquire carefully into consent and, it may be added, process that information carefully as well. An unreasonable mistake in the context of rape is ‘an easily avoided and self-serving mistake produced by the actor’s indifference to the separate existence of another’.⁸²

There are therefore strong reasons to support the traditional code approach which does not require proof that the offender intended to act without the consent of the victim or that the offender was reckless as to whether the victim was consenting. An offender only escapes liability in these jurisdictions where they thought about whether the victim was consenting and mistakenly (but based on reasonable grounds) believed that they were. This suggests that the objections to the traditional code approach of not requiring proof of mens rea or not allowing any mens rea to be negated by an honest even if unreasonable mistake are:

outweighed in the case of sexual offences, where the parties are necessarily in close proximity and where intercourse without consent would be a fundamental violation of the victim. Surely out of respect for the autonomy and sexual choice of B, A should take the opportunity to be clear that B does consent. In most situations this is an easy thing to do, and there is a strong reason for doing it.⁸³

⁸⁰ K Warner, ‘The Mental Element and Consent Under the New “Rape” Laws’ (1983) 7 *Criminal Law Journal* 245, 249.

⁸¹ J Temkin, ‘The Limits of Reckless Rape’ [1983] *Criminal Law Review* 5, 15.

⁸² *Ibid* 15–16.

⁸³ J Temkin and A Ashworth, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328, 340.

There are of course concerns that the reasonableness requirement means that dangerous stereotypes (such as that the victim must have been consenting because of the way they dressed or because they were intoxicated) are not challenged. There are also doubts about 'whether this conception of the reasonable person could play any significant role in shaping male attitudes toward female sexual autonomy and protecting a woman's right to refuse to engage in sexual activity'.⁸⁴ Such concern could be addressed by specifying that where nothing is said or done there cannot be a presumption that consent is forthcoming. Furthermore, there should be an express requirement that the steps which the accused took to ascertain whether the victim was consenting should be examined to determine whether the mistake was reasonable. This step has been taken in Tasmania where the Code provides that a mistake is not reasonable where the accused 'did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act'.⁸⁵ This makes it clear that it is the responsibility of each person to ensure that the other is freely entering into sexual relations and not simply assume that consent is given. It is recommended that such provision be included in the other state codes.

A more fundamental issue perhaps is whether the law of rape should make lack of consent the central component of the offence rather than the use or threat of violence or force. It is argued that focus on the latter elements would more appropriately reflect the essence of rape.⁸⁶ Furthermore, requiring proof of a lack of consent means that criminal trials tend to concentrate on the behaviour and sexual history of the victim rather than the conduct of the accused.⁸⁷ However, moving away from the concept of consent to a focus on force is problematic because 'undermining the sexual autonomy of the victim need not involve violence or the threat of violence'.⁸⁸ It is also a 'fallacy that defining rape solely in terms of non-consent fails to protect women from pressures from which they ought to be free'.⁸⁹ An appropriate definition of consent will seek to determine whether there was a free agreement and this will include examining whether there were any unacceptable pressures affecting the person's decision. Requiring an assessment of the steps that the accused took to determine whether consent was given also shifts the focus away from the behaviour of the victim to the conduct of the accused.

VII CONCLUSION

The case of *WJI* raised the question of whether, for the offence of sexual intercourse without consent, intention or subjective recklessness extended to the lack of consent as well as the act of sexual intercourse in the NT. This in turn determined the question of whether any mistake made by the accused about whether the victim was consenting, need only be honest or whether it must be both honest and based on reasonable grounds. The offence provision in the NT Code makes no mention of a mental element in relation to the offence and therefore the key issue in this case was the correct understanding of s 31(1) of the NT Code. The specific point was whether the act, which must be intended

⁸⁴ S Bronitt, 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289, 307.

⁸⁵ Section 14A(1)(c) *Criminal Code (Tas)*. Section 1(2) of the UK *Sexual Offences Act 2003* similarly provides that the reasonableness of the mistake is to be determined with regard to all the circumstances including the steps that the accused took to ascertain whether the victim was consenting.

⁸⁶ Tadros, above n 10, 516.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Westen, above n 11, 357.

or foreseen as possible, was to be understood narrowly as meaning only bodily actions (and thus not consent) or broadly as meaning all the physical elements of the offence (thus including consent). The High Court took a broad view of the word 'act' in the NT Code as encompassing the act of intercourse without consent, thus interpreting the NT provisions in line with the traditional common law approach. This permits an accused to escape liability if their mistake was honest without an examination of whether it was reasonable. Such a step cannot be regarded as progress, especially in the light of common law jurisdictions such as Victoria and England and Wales moving away from this position.

It is unlikely that that the decision in *WJI* will influence the approach in the code jurisdictions to the offence of rape. In these jurisdictions the word 'act' has generally been interpreted narrowly, which means that in relation to rape it is not necessary to prove that the offender knew that the victim was not consenting or was aware that this was possible. The decision in *WJI* to deviate from this narrow interpretation was based on the different wording of the NT Code and on reasons of policy. The uniqueness of the NT Code means that it is unlikely to influence the other codes. More fundamentally, there are good reasons of policy to preserve the law in relation to the absence of a mental element in rape as it currently stands in the other state codes. This means that a person claiming a mistaken belief in consent will only evade liability if their belief is both honest and reasonable. While the question of reasonableness may leave room for stereotypes and assumptions about consent, it is preferable to the traditional common law approach, which does not enquire into the grounds for the belief. Any shortcoming in the traditional code approach could be addressed by reform such as that recently undertaken in Tasmania, where the code has been amended to clarify that a mistake is not reasonable if reasonable steps are not taken to ascertain whether the person was consenting. This sends out the clear message that sexual relations must be entered into freely with responsibility firmly on both parties to ensure that this is the case. The priority in this offence should be the protection of the sexual autonomy of the victim. Allowing an accused to escape liability only when they have directed their attention to whether the victim was consenting and erroneously, but reasonably concluded that they were, strikes a more appropriate balance between the need to protect the victim and the avoidance of possible injustice to the perpetrator. All that is being asked of the perpetrator is that they act as a reasonable person would in that situation.⁹⁰

⁹⁰ Temkin and Ashworth, above n 84, 340.