


LRC has also recommended a provision that states that a person consents to sexual activity if the person (a) freely and voluntarily agrees to the sexual activity; and (b) has the capacity to consent to such activity.

Compare the Scottish provision that relates to the

learning disability) to consent to sexual activities. It states that a mentally disordered person is incapable of consenting t



**Intoxication:** Data shows that at least half of all complainants were intoxicated at the time of intoxication is given in rape trials the conviction rate is lower than when they are sober. Various reasons have been suggested for this finding, including that:

jurors are frequently told to use their common knowledge about intoxication to interpret and what medical research shows; and a complainant who was intoxicated at the time of the assault may be viewed as less credible.

Legislation in all Australian jurisdictions other than Queensland and WA explicitly addresses to consent (see table 4.3 at page 60 of the Discussion Paper volume 1). The various phrases that are used are that a person does not consent to sexual activity if they are:

incapable of agreeing to the act because of intoxication (ACT).  
so affected by alcohol or another drug as to be incapable of consenting (NSW and NT).  
so intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity (SA).  
so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required (Tas).  
so affected by alcohol or another drug as to be incapable of consenting to the act or withdrawing consent to the act (Vic).

The laws are concerned only with circumstances in which alcohol or other drugs affect a do not draw a distinction based on whether the person became intoxicated voluntarily or involuntarily, or whether the intoxication was caused by alcohol or other drugs. All that matters is the extent to which the person was intoxicated.

Arguments in favour of including intoxication as a circumstances in which there is no consent to sexual activity are that such a provision could help mitigate the influence of

emphasising the importance of ensuring that an intoxicated person is capable of consenting laws of most other Australian states and territories.

Arguments against including intoxication as a circumstances in which there is no consent are that the general requirement that a person have the cognitive capacity to give consent

any amendment could introduce confusion and ambiguity into an already settled area of law.

