

NSW Law Reform Commission: Review of Consent in Relation to Sexual Assault Offences

Professor Gail Mason and Mr James Monaghan
Sydney Law School
The University of Sydney

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Submission

- [1] We welcome the opportunity to contribute to the New South Wales Law Reform Commission's review of consent in relation to sexual assault offences.
- [2] We support the broad aim of determining whether the law needs to be amended to better protect victims.
- [3] The terms of reference for the Law Reform Commission are to review consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the *Crimes Act 1900* (NSW). We note that this does not include a review of the definition of sexual assault in s 61I or other provisions in Division 10 of the *Crimes Act 1900* (NSW).¹ Our comments are confined to s 61HA.

The Definition of Consent in s 61HA(2)

- [4] Consent is defined in s 61HA(2): 'A person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse'. Sections 61HA(4)-(6) set out circumstances in which consent must or may be negated.
- [5] This definition was introduced in 2007. The previous common law recognised that 'submission does not amount to consent' but that 'passive acquiescence or physical inaction (by women) might still be taken by juries to equate with consent'.² The current definition of consent is an attempt to introduce a 'more

¹ Some legal commentators have suggested that the definition of sexual assault continues to be hampered by its reliance on the notion of consent. For example, Gardner argues that the terms 'consent' and 'agreement' are actually inconsistent with each other. Consent is an asymmetrical concept whereby one person licenses another to do something *to* them, not *with* them. The concept of agreement only overcomes this if it is understood as a mutual agreement whereby both people actively determine the terms of that agreement: John Gardner, 'The Opposite of Rape' (2018) 38(1) *Oxford Journal of Legal Studies* 48, 57-8, 60-2, 68-9.

² Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999), 264-265.

contemporary and appropriate definition'³ that better recognises values of autonomy and freedom of choice in sexual relations between adults.⁴ The use of the word 'agreement' emphasises that 'consent should be seen as a positive state of mind' – something to be sought and communicated (or not), not assumed.⁵

- [6] Despite the 2007 reforms (and the specification of circumstances in which consent must or may be negated (ss 61HA(4)-(6)), it can still be difficult for juries to determine the difference between consent and mere submission. Determining whether the evidence is sufficient to amount to a lack of consent places extensive scrutiny on the complainant's behaviour (and whether he or she effectively communicated any lack of consent).
- [7] Some Australian jurisdictions have sought to overcome these difficulties by specifying a broader range of circumstances in which a person does not consent to sexual intercourse. The Victorian legislation states that a person does not consent to sexual intercourse (defined as 'free agreement' under s36(1) *Crimes Act 1958* (Vic)) in circumstances where 'the person does not say or do anything to indicate consent to the act' (s 36(2)(l) *Crimes Act 1958* (Vic)). The Victorian provision has its history in a mandatory jury direction that came into force in 1992 to 'alter the presumption of consent' and advance an understanding of sexuality 'based on a communicative' standard of sexual relations.⁶ In Tasmania (where consent also means 'free agreement' under s 2A(1) *Criminal Code Act 1924* (Tas)), a person does not freely agree to sexual intercourse if the person 'does not say or do anything to communicate consent' (s 2A(2)(a) *Criminal Code Act 1924* (Tas)). The standard set by these provisions means that a person who does not positively communicate free agreement through their words or actions is not consenting.

³ NSW Department of Attorney-General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900*, Statutory Review (October 2013), 8. The *Bench Book's* suggested direction to the jury includes the following: 'A person consents to sexual intercourse if [she/he] freely and voluntarily agrees to have sexual intercourse with another person. That consent can be given verbally, or expressed by actions.... Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily' Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (July 2016 update) [5-1566].

⁴ NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584-3585 (John Hatzistergos, Attorney-General); Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999), 43. The Attorney's second reading speech makes reference to the consistency between the positive definition introduced in 2007 and the recommendations of the Model Criminal Code Officers Committee.

⁵ Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999), 43, 58. See also James Monaghan and Gail Mason, 'Communicative Consent in New South Wales: Considering *Lazarus v R*' (forthcoming) 43(2) *Alternative Law Journal*.

⁶ Bernadette McSherry, 'No! (means no?)' (1993) 18 *Alternative Law Journal* 27, 27.

- [8] Inclusion of a mandatory clause similar to the Victorian or Tasmanian provisions may give greater effect to the positive definition of consent in s 61HA(2) by explicitly stating that in circumstances where a person does not say or do anything to indicate consent, the person is not to be regarded as having consented. In clarifying that consent requires positive affirmation, such a change may go some way towards minimising the impact of outdated or ‘victim-blaming’ views amongst the jury by giving them more guidance.⁷
- [9] The extent to which this would make a difference to the complainant’s experience at trial is another matter. An accused may still assert that the complainant *did* say and/or do things to indicate consent. This will continue to place considerable scrutiny on the words and action of the complainant. For example, even where a complainant is found on the evidence to have been silent (eg: she said nothing to indicate either consent or the absence of consent), the jury will still need to consider evidence pertaining to her actions. As in *R v Luke Andrew Lazarus*, did she ‘obey’ an accused’s instructions by not putting her clothes back in place, by not moving away from the accused or by kneeling on the ground when directed by the accused to do so?⁸
- [10] In general, we support the introduction of a provision similar to the Tasmanian or Victorian provisions as this may help clarify for juries that passive acquiescence or physical inactivity does not equate with consent. In other words, it may focus the attention of the fact finder on whether there is evidence to support the presence of consent rather than evidence that supports the absence of dissent. In addition, the term ‘communicate’ in the Tasmanian provision, rather than ‘indicate’ in the Victorian provision, may help signal contemporary understandings of consent as a process of mutual decision-making and agreement between both persons.
- [11] On their own, however, amendments to s 61HA(2) may not do enough to protect victims. The accused’s interpretation of the victim’s conduct is equally important. On this point, it is worth noting that despite the absence of such a provision under current NSW law, in *R v Luke Andrew Lazarus*, Tupman DCJ did conclude that the evidence established beyond reasonable doubt that ‘the complainant, in her own mind, did not consent to the anal sexual intercourse that occurred’⁹, thereby satisfying the physical element of the offence. Rather,

⁷ Natalie Taylor, ‘Juror attitudes and biases in sexual assault cases’ (*Trends and Issues in crime and criminal justice*, Research Paper No 344, Australian Institute of Criminology, August 2007).

⁸ *R v Luke Andrew Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017) 33, 34-35.

⁹ *R v Luke Andrew Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017) 70.

the acquittal in *R v Luke Andrew Lazarus* rested on the prosecution's inability to establish the necessary mental state.

Knowledge of the Absence of Consent in s 61HA(3)

[12] Knowledge of the absence of consent is defined in s 61HA(3). It specifies that an accused will be taken to know that the complainant does not consent to sexual intercourse if he or she knows the other person does not consent (s61HA(3)(a)), is reckless as to consent (s 61HA(3)(b)) or has no reasonable grounds for believing that the other person consents (s 61HA(3)(c)).¹⁰

[13] We note that the current wording of s 61HA(3)(a) is awkwardly repetitive, providing that

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

(a) the person knows that the other person does not consent to the sexual intercourse...

If the general structure of s 61HA(3) is preserved, we recommend that it be reworded thus:

A person who has sexual intercourse with another person without the consent of the other person is **taken to know** that the other person does not consent to the sexual intercourse if:

(a) the person **actually** knows that the other person does not consent to sexual intercourse...

Rewording the opening sentence of s 61HA(3) in this way better reflects the fact that the following phrases include both actual (s 61HA(3)(a)) and constructive (s 61HA(3)(b)-(c)) forms of knowledge.

[14] Section 61HA(3)(c) was introduced in 2007. The introduction of this objective component into the inquiry into the accused's subjective mental state¹¹ was

¹⁰ *R v XHR* [2012] NSWCCA 247 involved a massage therapist who digitally penetrated the complainant's genitalia in the course of providing a massage. On appeal by the DPP, the CCA held that the Crown does not have to show the complainant communicated his or her lack of consent in order to prove that the accused knew that the complainant did not consent.

¹¹ Section 61HA(3)(c) does not set a purely objective standard. The inquiry is still into the accused's subjective state of mind but any subjective belief in consent must be based on reasonable grounds.

intended to offer better protection to victims, especially in situations where the defendant has ‘genuine but distorted views about appropriate sexual conduct’.¹² The earlier law had been criticised by the former NSW Attorney-General on the grounds that it failed ‘to ensure that a reasonable standard of care is taken to ascertain that a person is consenting before embarking on potentially damaging behaviour’.¹³ The Attorney-General’s remarks suggest that part of the motivation for introducing s 61HA(3)(c) was to invite the trier of fact to consider community standards of acceptable sexual behaviour in assessing the accused’s subjective mental state. His remarks further suggest that part of the point of introducing s 61HA(3)(c) was to firmly reject the *Morgan* ‘defence’ in NSW law.¹⁴

[15] Under s 61HA(3)(c), the question of whether or not an accused’s belief is based on reasonable grounds must be objectively assessed on the evidence. This requires the trier of fact to have regard to all of the circumstances of the case, ‘including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse’ (s 61HA(3)(d)). Here, attention must be directed to the question of whether the accused has taken any steps to determine if the complainant is consenting. Together, ss 61HA(3)(c) and (d) have the potential to more fairly distribute responsibility for sexual communication between both parties.

[16] In its 2016 decision, *Lazarus v R*, the New South Wales Court of Criminal Appeal recognised that the complainant need not be the source of the ‘reasonable grounds’ but simply that these grounds ‘be present’.¹⁵ At trial, however, much of the focus still appears to be on the complainant’s actions or omissions – rather than those of the accused – when examining the prosecution’s assertion that the accused had no ‘reasonable grounds’ for a belief in consent.

The test is not wholly objective and is more accurately characterized as a hybrid test. It does not apply a reasonable person standard: see James Monaghan and Gail Mason, ‘Reasonable Reform: Understanding the knowledge of consent provision in section 61HA(3)(c) of the *Crimes Act 1900* (NSW)’ (2016) 40 *CrimLJ* 246.

¹² NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (John Hatzistergos, Attorney-General).

¹³ NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584-3585 (John Hatzistergos, Attorney-General)

¹⁴ James Monaghan and Gail Mason, ‘Reasonable Reform: Understanding the knowledge of consent provision in s 61HA(3)(c) of the *Crimes Act 1900* (NSW)’ (2016) 40 *CrimLJ* 246, 248-9; James Monaghan and Gail Mason, ‘Communicative Consent in NSW: Considering *Lazarus v R*’ (forthcoming) 43(2) *Alternative Law Journal*.

¹⁵ *Lazarus v R* [2016] NSWCCA 52, [6] (Adams J).

[17] The CCA's 2017 decision in *R v Lazarus* makes it clear that it is mandatory for the trial judge to provide a direction on the question of whether the accused had taken any steps to ascertain consent.¹⁶ Arguably, this should help direct the jury's attention to the accused's conduct as well as the complainant's conduct. This is essential if the criminal law is to recognise that responsibility for communication in sexual relations should not just rest with the complainant. For example, the evidence in the trials of Luke Lazarus make it clear that he took no active steps to find out whether the complainant wanted to have sex, what she desired from the sexual encounter or why she was complying with his directions. The CCA has seemingly reinforced the legislative position that there is an onus on such a person to confirm rather than assume consent before proceeding.

[18] However, there is a worrying interpretation of s 61HA(3)(d) in the *R v Lazarus*. The Court of Criminal Appeal sought to clarify the meaning of 'steps'. Citing the Collins English Dictionary, Bellew J, with whom the other members of the Court agreed, stated that the word step is to be given its natural and ordinary meaning which 'connotes doing something positive' or 'the taking of some positive act'.¹⁷ His Honour went on to clarify that:

A positive act, and thus a "step" for the purposes of the section, extends to include a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.¹⁸

[19] In this interpretation a step need be nothing more than a subjective state of mind. It appears to be unnecessary for the accused to make a verbal or other mode of inquiry (such as a gesture) to positively determine consent. This is an unsatisfactory interpretation of s 61HA(3)(d). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This places no expectation on him to actively check whether the cause of her 'obedience' to his commands stems not from willingness (much less enthusiasm) but from fear. This is because a 'mental step' is all that is required to provide him with 'reasonable grounds' for

¹⁶ *R v Lazarus* [2017] NSWCCA 279, [144]. The suggested form of the judicial direction is: 'In determining whether the Crown has proved that [the accused] knew that [the complainant] was not consenting to intercourse with [him/her] you must take into account what steps were actually taken by [the accused] to ascertain whether [the complainant] was consenting to intercourse'. Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (July 2016 update) [5-1566].

¹⁷ *R v Lazarus* [2017] NSWCCA 279, [46-47] (Bellew J).

¹⁸ *R v Lazarus* [2017] NSWCCA 279, [147] (Bellew J).

believing in consent. This is a far cry from the statutory purpose to make liability for sexual assault less dependent on distorted views about sex and more reflective of community expectations that 'a reasonable standard of care is taken to ascertain that a person is consenting before embarking on potentially damaging behaviour'.¹⁹ In situations of ambiguity or uncertainty, the effort required to ask if the other party agrees to sex is minor compared to the harm that might be inflicted if he or she does not want to have sex. This interpretation of s 61HA(3)(d) needs to be reversed by Parliament, for instance, through the insertion of a provision clarifying that a step requires 'positive action' and that this is more than a process of subjective mental reasoning (eg: did the accused ask the complainant if they consented to sex?). If it is not, the lion's share of responsibility for communicating consent, or lack thereof, will continue to fall to the complainant, undermining the purpose of s 61HA(3)(d).

[20] Excessive emphasis on the conduct of the victim in determining whether the mental element has been established beyond reasonable doubt (what did she do to raise the accused's belief in consent and did her behaviour give him reasonable grounds for his belief?) ignores the moral wrongfulness that is intrinsic to the failure to take reasonable care to confirm that the other person wants to have sex. This can only be achieved by placing greater scrutiny on the conduct of the accused. When coupled together, sections 61HA(3)(c) and (d) do have the potential to do this if these provisions are not hamstrung by overly narrow judicial (or juror) interpretations.

[21] Our recommendations so far have been premised on the view that the law of knowledge of consent should operate to direct the fact finder's attention to the steps that prospective sexual partners take to ascertain consent.²⁰ That is, s 61HA ought to direct a fact finder's attention to the question of whether a defendant took steps to discharge the responsibilities that come with engaging in sex. Though s 61HA(3)(d) already provides for this, we have suggested the potential of ss 61HA(3)(c) and 61HA(3)(d) to do this has not been sufficiently realised.

[22] We suggest that a contributing factor here is the convoluted analysis that ss 61HA(3)(c)-(d) demands of fact finders (and of judges instructing juries). Fact finders have to:

¹⁹ NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584-3585 (John Hatzistergos, Attorney-General).

²⁰ See James Monaghan and Gail Mason, 'Communicative Consent in NSW: Considering *Lazarus v R*' (forthcoming) 43(2) *Alternative Law Journal*.

- grasp the fine distinction between a belief and the grounds of that belief;
- understand the very fine distinction between a belief based on reasonable grounds on the one hand, and a reasonable belief or the belief that a reasonable person might have held, on the other;²¹
- avoid appealing to ‘reasonable person’ standards;²² and
- go through a complex multi-step process, considering what belief a defendant held (if any), whether it was based on reasonable grounds, and how all the circumstances of the case (including any ‘steps’ a defendant might have taken) bear upon the fact finder’s assessment of a defendant’s (constructive) knowledge regarding consent.

[23] We propose replacing the ‘no reasonable grounds’ wording with a simpler ‘reasonable belief’ test.²³ Under such a test, the fact finder would first ask if the defendant had a belief as to whether the complainant was consenting – a question about the defendant’s subjective mental state. Then, considering all the circumstances of the case and any steps that the defendant took, they would ask whether that belief was a reasonable one – a question that tests the defendant’s subjective belief against an objective standard.

[24] We submit that a test along these lines preserves one of the virtues of the 2007 amendments – the combination of subjective and objective elements – while removing the confusing distinction between a belief and its grounds. In addition to clarifying the law for fact finders, such a test focuses their attention more directly on the requirement to act reasonably in sexual interactions, and thereby sets a higher standard for sexual responsibility.

²¹ *Lazarus v R* [2016] NSWCCA 52, [156] (Fullerton J).

²² *Ibid.*

²³ Section 38(1)(c) of the *Crimes Act 1958* (Vic) includes the following test in the definition of rape: ‘A does not reasonably believe that B consents to the penetration’.