



THE UNIVERSITY OF  
**SYDNEY**

1 February 2019

NSW Law Reform Commission  
GPO Box 31, SYDNEY NSW 2001,

AUSTRALIA

**To the Commissioners**

**Re: Consent in Relation to Sexual Offences**

Please find enclosed our submission in response to the New South Wales Law Reform Commission (NSWLRC) Consultation Paper 21 ‘Consent in relation to sexual offences’.

In this submission we urge the Law Reform Commission to proceed with caution in recommending reforms to the former s 61HA, now s 61HE.

We note that the 2013 NSW Department of Attorney-General and Justice review of s 61HA concluded that the policy objective of the statutory definition – ‘to give guidance as to what constitutes consent and to provide a more contemporary and appropriate definition than the common law definition’ – is satisfied by the existing legislation. Amendments to s 61HA, now s 61HE, should be contemplated only if they will advance this policy objective and achieve consistent with the public interest, greater justice in balancing the protections offered to victims with the protection of the rights of those accused.

We also take this opportunity to acknowledge the assistance of Institute of Criminology Summer Intern, Ms Penelope Smith, and thank her for her work on this submission.

Thank you in advance for your consideration of our submission.

Sincerely,

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**Submission to the New South Wales Law Reform Commission Consultation Paper 21  
'Consent in relation to sexual offences'**

**Question Three: The meaning of consent**

**Question 3.1: Alternatives to a consent-based approach**

- (1) Should the law in NSW retain a definition of sexual assault based on an absence of consent? If so, why? If not, why not?**
- (2) If the law was to define sexual assault differently, how should this be done?**

As proposed in our preliminary submission<sup>1</sup>, the NSW law should retain a definition of sexual assault based on the absence of consent. Since the 1970s, in Australia and in other jurisdictions world-wide, emphasis has shifted from 'resistance' to 'consent'.<sup>2</sup> As such, consent now plays a central role in the law of sexual assault, functioning as a part of the conduct element (or physical element, the *actus reus*) – the absence of victim's consent is the circumstance that makes the conduct an offence – and also the fault element (or mental element, the *mens rea*) of the offence – the defendant's knowledge, recklessness or lack of reasonable grounds for belief in consent.

NSW thus currently has a consent-based approach to sexual offences.<sup>3</sup> Alternatives to a consent-based approach de-prioritise consent and instead focus on the *consequences* – physical, mental, economic – of sexual assault.<sup>4</sup> Another alternative is to concentrate on the *circumstances* of the sexual assault as involving force or coercion.<sup>5</sup> However, approaches that de-prioritise consent minimise the 'uniquely degrading nature' of non-consensual sexual intercourse,<sup>6</sup> and ignore the essentiality of non-consent to the harm caused. A focus on consent places the emphasis on the violation of bodily autonomy and the rights of victim/survivors, and importantly, is supported by many survivors' groups.<sup>7</sup>

Failing to retain a definition of sexual assault based on the absence of consent would move NSW out of line with comparable common law jurisdictions and would constitute a retrograde step.

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<sup>1</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC065* (2018)

<sup>2</sup> See Julia Quilter 'From Raptus to Rape: A History of the Requirements of Resistance and Injury' (2015) 2 *Law & History*, 89-113.

<sup>3</sup> New South Wales Law Reform Commission Consultation Paper 21 'Consent in relation to sexual offences', 2.104.

<sup>4</sup> Peter Rush and Alison Young, *Preliminary Submission PC059*, 3, 11–12, discussed in New South Wales Law Reform Commission, 'Consultation Paper 21: Consent in relation to sexual offences' (October 2018), 3.32.

<sup>5</sup> *Michigan Penal Code 1931* § 750.520a–750.520l, discussed in Consultation Paper, 3.32.

<sup>6</sup> H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 72; see also J Gardner, *Offences and Defences: Selected Essays in the Philosophy of the Criminal Law* (Oxford University Press, 2007) 24–25; R Tong, *Women, Sex and the Law* (Rowman and Littlefield, 1984) 112–119.

<sup>7</sup> End Rape on Campus Australia, *Preliminary Submission* (2018), 1-2; Rape & Domestic Violence Services Australia, *Preliminary Submission* (2018), 5[1.5].



### **Question 3.2: The meaning of consent**

- (1) Is the NSW definition of consent clear and adequate?**
- (2) What are the benefits, if any, of the NSW definition?**
- (3) What problems, if any, arise from the NSW definition?**

The current NSW definition of consent is premised on a ‘communicative model of consent’ in that it requires a person to have reasonable grounds for believing that another person consents to sexual intercourse with him or her, and requires the trier of fact to have regard to all the circumstances of the case (including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse).<sup>8</sup> This positive definition of consent as free and voluntary agreement is consistent with international developments and points to the enhanced accommodation of the principle of sexual autonomy and protection of victim/survivors. It reflects a communicative model of consent, wherein participants of consensual sexual activity do so freely and voluntarily. As we observed in our preliminary submission, the purpose of the section is to send a clear message that all persons engaged in having sex must be certain there is mutual consent of all other parties involved.<sup>9</sup>

Any issues with the clarity of the definition of consent relate to jury instructions and comprehension and should be dealt with through model judicial directions, rather than in the legislation.

- (4) What are the potential benefits of adopting an affirmative consent standard?**
- (5) What are the potential problems with adopting an affirmative consent standard?**
- (6) If NSW was to adopt an affirmative consent standard, how should it be framed?**

One possible amendment to the new s61HE referenced in the Consultation Paper<sup>10</sup> is to change the definition of consent so that a person does not ‘freely and voluntarily agree’ to the sexual intercourse if they **do not say or do anything** to communicate (or indicate) consent. Such an amendment represents an affirmative consent standard, sometimes colloquially known as ‘enthusiastic consent’, which requires an ‘affirmative expression of willingness’ from participants in a sexual activity.<sup>11</sup>

Victoria and Tasmania have both adopted an affirmative consent standard, and some preliminary submissions have called for NSW to consider an amendment along these lines.<sup>12</sup> Section 2A(2)(a) of the Tasmanian *Criminal Code* provides that ‘a person does not freely agree to an act if the person: (a) does not say or do anything to communicate

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<sup>8</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission* PC065 (2018), 2; David Brown et al., *Criminal Laws* 6th Ed. (Federation Press, 2015), 671.

<sup>9</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission* PC065 (2018), 2.

<sup>10</sup> New South Wales Law Reform Commission Consultation Paper 21 ‘Consent in relation to sexual offences’, 3.36

<sup>11</sup> D Tuerkheimer, “Affirmative Consent” (2016) 13 *Ohio State Journal of Criminal Law* 441, 441.

<sup>12</sup> See, eg, Feminist Legal Clinic, *Preliminary Submission* PC053, 3; Australian Queer Students Network, *Preliminary Submission* PC056, 8; R4Respect, *Preliminary Submission* PC060, 3; Women’s Electoral Lobby, *Preliminary Submission* PC071, 4; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission* PC083, 3; Domestic Violence NSW, *Preliminary Submission* PC091, 5, 10.



consent'.<sup>13</sup> Section 36(2)(1) of the *Crimes Act 1958* (Vic) negates consent where 'the person does not say or do anything to indicate consent to the act'.<sup>14</sup>

#### *Benefits of an affirmative consent standard*

The rationale of this change would be to rid the criminal law of what has been called the 'presumption of consent'.<sup>15</sup> That is, it would clarify the difference between consent and submission, and displace the presumption that submission amounts to consent. As Professor Gail Mason and Mr James Monaghan say in their preliminary submission to this Commission, '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'.<sup>16</sup>

There are reasons to support an affirmative standard requiring the positive act of communicated consent. Whereas under the current law, prosecutors are likely to be reluctant to proceed with a case where the victim has said or done nothing to indicate non-consent,<sup>17</sup> an affirmative standard may encourage them to run such cases. The clarification of consent for the purposes of the conduct element as requiring a form of active assent would serve to underline the importance of seeking consensus in sexual encounters, and help to facilitate a culture shift. A framework of positive agreement may also assist juries in understanding that inaction does not necessarily mean consent.<sup>18</sup>

#### *Problems with an affirmative consent standard*

As explained in our preliminary submission<sup>19</sup>, it is unlikely that an affirmative consent model would have made any difference to the outcome of the *Lazarus* case.<sup>20</sup> The judge made a finding of fact that while the victim did not consent in her own mind,<sup>21</sup> the judge found that she had done things that indicated consent.<sup>22</sup> Therefore, a provision based on an affirmative consent model would not have resulted in the conviction of the defendant.

An affirmative consent amendment will not alleviate many of the problems faced by complainants at trial, as scrutiny will remain on their every word, gesture, action and omission at the time of the sexual intercourse, and how the complainant has communicated consent in the past. Such an approach risks imposing highly normative, homogenous, gender stereotyped and formulaic views of what constitutes consent and ignores the highly

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<sup>13</sup> *Criminal Code* (Tas) s 2A(2)(a).

<sup>14</sup> *Crimes Act 1958* (Vic) s 36(2)(1).

<sup>15</sup> Gail Mason and James Monaghan, Preliminary Submission PC040, 2; Bernadette McSherry, 'Rape Law Reform in Victoria: Can Legislation Change Social Attitudes?' (1993) 18(1) *Alternative Law Journal* 27.

<sup>16</sup> Gail Mason and James Monaghan, Preliminary Submission PC040, 3.

<sup>17</sup> Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (Report, Australian Institute of Criminology, 2007), 2; Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study' (Report, Department of the Prime Minister and Cabinet, Office of the Status of Women, 2004), 1.

<sup>18</sup> *Ibid.*

<sup>19</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission* PC065 (2018), 3

<sup>20</sup> *R v Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017).

<sup>21</sup> *R v Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017 at pp. 30, 32, 40, 41, 70, 72, 73).

<sup>22</sup> *Ibid.*, pp. 34, 40.



individual, human and personal nature of consensual sex between adults<sup>23</sup>; this is highly undesirable. In addition, using the criminal law to educate society regarding the meaning of consent is likely to be ineffectual.<sup>24</sup> Finally we argue that an affirmative standard could unduly broaden the law, be onerous for the accused and lead to injustices.<sup>25</sup>

Overall, we are not convinced that the definition of consent should be amended to include an affirmative consent standard. Importantly as we have emphasised, even if such an amendment is made, the prosecution must still prove the requisite mental element.<sup>26</sup> On this basis, we believe the focus of any reform should be knowledge of consent.

- (7) Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?**
- (8) Do you have any other ideas about how the definition of consent should be framed?**

The Consultation Paper<sup>27</sup> raises the issue of withdrawing consent. Possible amendments include changing the definition of consent in s 61HE(2) to state clearly that consent may be withdrawn at any time. Alternatively, withdrawing consent could be included as a negating circumstance in s 61HE(5).

The NSW definition of consent applies to sexual assault and its aggravated versions (s 61I, s 61J, s 61JA) as well as sexual touching (s 61KC), sexual act (s 61KE) and the aggravated versions of these (s 61KD, s 61KF). In instances of sexual assault, explicitly stating that consent may be withdrawn is unnecessary as the definition of sexual intercourse includes ‘the continuation of sexual intercourse’ (s 61HA(d)) and consent is thus relevant at all stages of continuing intercourse. In contrast, the definitions of sexual touching (s 61HB) and sexual act (s 61HC) do not include their continuation. We would support an amendment including the continuation of sexual touching and sexual acts in s 61HB and s 61HC respectively.

The Consultation Paper (3.82) also highlights that in some cases ‘consent is conditional on the use of contraception’ and that this is not addressed in the definition. Rather than complicating the definition of consent with all of the many factors that may be conditions to consent, we fully endorse the suggestions of Andrew Dyer in his submission<sup>28</sup> to include wearing a condom, and other factors, in an extended, non-exclusive s 61HE(6) list.

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<sup>23</sup> Melanie Randall, ‘Sexual Assault Law, Credibility and “Ideal Victims”’: Consent, Resistance, and Victim Blaming’ (2010) 22(2) *Canadian Journal of Women and the Law* 397, 404-405, 406; Natalie Taylor, ‘Juror Attitudes and Biases in Sexual Assault Cases’ (Report, Australian Institute of Criminology, 2007), 3.

<sup>24</sup> New South Wales Law Reform Commission Consultation Paper 21 ‘Consent in relation to sexual offences’, 3.59; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC065* (2018), 5.

<sup>25</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC065* (2018), 5; New South Wales Law Reform Commission Consultation Paper 21 ‘Consent in relation to sexual offences’, 3.69-3.73.

<sup>26</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC065* (2018), 4.

<sup>27</sup> New South Wales Law Reform Commission Consultation Paper 21 ‘Consent in relation to sexual offences’, 3.79.

<sup>28</sup> Andrew Dyer, Final Submission to the NSW Law Reform Commission’s Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences, 17 January 2019.



## **Question Four: Negation of consent**

### **Question 4.1: Negation of consent**

- (1) Should NSW law continue to list circumstances that negate consent or may negate consent? If not, in what other ways should the law be framed?**
- (2) Should the lists of circumstances that negate consent, or may negate consent, be changed? If so, how?**

The non-exhaustive lists of circumstances that negate consent (s 61HE(5)-(6)) and may negate consent (s 61HE(8)) provide guidance for common circumstances while also allowing the law to react flexibly to new cases. As stated in the Consultation Paper (4.8) most jurisdictions in Australia rely on similar negating factors.

A potential amendment would be to upgrade intoxication from a circumstance that may negate consent to a circumstance that does negate consent after a certain level of intoxication. This would make NSW law more consistent with other jurisdictions.<sup>29</sup> Moreover, complainant intoxication is associated statistically with lower conviction rates,<sup>30</sup> with some research indicating that ‘rape myths’ about intoxicated victims have an influence on practices of blame.<sup>31</sup> An automatic negation of consent for complainants intoxicated beyond a certain level may serve to mitigate this influence.

NSW is also the only Australian jurisdiction that treats violent threats and non-violent threats differently.<sup>32</sup> ‘Threats of force of terror’ (s 61HE(5)(c)) automatically negate consent but other threats and intimidatory or coercive conduct **may** negate consent (s 61HE(8)(b)).

There is an argument for treating all threats and coercive conduct in an equivalent manner: victim/survivors of family and domestic violence for example, report that emotional abuse (which may not include violent threats) is just as overpowering, intimidating and harmful

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<sup>29</sup> *Crimes Act 1958* (Vic) s 36(2)(e)-(f) consent is negated where “the person is so affected by alcohol or another drug as to be incapable of consenting to the act” or “incapable of withdrawing consent to the act”; *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code* (NT) s 192(2)(c); *Criminal Code Act 1924* (Tas) s 2A(2)(h) consent is negated when a person is ‘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’; *Crimes Act 1900* (ACT) s 67(1)(e) consent is negated if it is caused by ‘the effect of intoxicating liquor, a drug or an anaesthetic’

<sup>30</sup> V E Munro and L Kelly “A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales”, in M A H Horvath and J M Brown (ed) *Rape: Challenging Contemporary Thinking* (Willan, 2009) 281–300, cited in Consultation Paper, 4.38.

<sup>31</sup> A Grubb and E Turner “Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming” (2012) 17 *Aggression and Violent Behavior* 443 (finding women who consume alcohol prior to their attack are attributed higher levels of blame than those who are not intoxicated); S McMahon and G L Farmer, “An updated measure for assessing subtle rape Myths” (2011) 35 *Social Work Research* 71, 74. S Croskery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614, 615, cited in Consultation Paper, 4.38.

<sup>32</sup> *Crimes Act 1900* (ACT) s 67(1)(c) and (d); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(ii); *Criminal Code 1899* (Qld) s 348(2)(b); *Criminal Code 1902* (WA) s 319(2)(a), *Crimes Act 1958* (Vic) s 36(2)(b).



as actual or threatened physical violence.<sup>33</sup> As legal professionals and the community come to understand more about the nature of family and domestic violence the difference in the treatment of violent and non-violent threats appears to be increasingly idiosyncratic and outdated.

### **Question Five: Knowledge about consent**

#### **Question 5.1: Actual knowledge and recklessness**

- (1) Should “actual knowledge” remain part of the mental element for sexual assault offences? If so, why? If not, why not?**
- (2) Should “recklessness” remain part of the mental element for sexual assault offences? If so, why? If not, why not?**
- (3) Should “reckless” be defined in the legislation? If so, how should it be defined?**
- (4) Should the term “reckless” be replaced by “indifferent”? If so, why? If not, why not?**

Both actual knowledge and recklessness should both remain part of the mental element for sexual assault offences.

While s 61HE(3)(b) does not define ‘reckless’, at common law it is considered to include both inadvertent and advertent recklessness as explained in the Consultation Paper (5.9). We agree with Justice Callinan’s view, referred to at 5.11, that attempts to define ‘recklessness’ would lead to ‘unnecessary uncertainty’. Moreover, it is not defined in other areas of the *Crimes Act 1900* (NSW), such as in s 18 (homicide) or s 35 (reckless bodily harm or wounding).<sup>34</sup>

The NSW Bar Association holds the position that the mental element to this offence should require a ‘comparable level of criminal culpability or moral blameworthiness’ to actual knowledge, and thus ‘recklessness’ should be replaced by ‘indifference’ as this would capture people who intend to proceed with intercourse ‘even if it were known that consent was absent’.<sup>35</sup>

However, we support all three forms of knowledge in s 61HE(3) as appropriate standards for the mental element of this offence, despite their difference in ‘moral culpability’. We believe that all three forms of knowledge together capture the different mental states that should be criminalised when an individual has sex without consent.

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<sup>33</sup> Ann Coker, Paige Smith, Lesa Bethea, Melissa King and Robert McKeown, ‘Physical Health Consequences of Physical and Psychological Intimate Partner Violence’ (2000) 9 *Archives of Family Medicine* 451, 454; Ann Coker, Keith Davis, Ileana Arias, Sujata Desai, Maureen Sanderson, Heather Brandt and Paige Smith, ‘Physical and Mental Health Effects of Intimate Partner Violence for Men and Women’ (2002) 23(4) *American Journal of Preventative Medicine* 260, 260.

<sup>34</sup> But see relevant case law eg *Banditt v R* [2005] HCA 80, 224 CLR 262 [108] and *R v Crabbe* (1985) 156 CLR 464.

<sup>35</sup> Consultation Paper, 5.13-5.14, quoting NSW Bar Association, Preliminary Submission PCO47, 3-4.



### **Question 5.2: The “no reasonable grounds” test**

- (1) What are the benefits of the “no reasonable grounds” test?**
- (2) What are the disadvantages of the “no reasonable grounds” test?**

Like the former s 61HA, the new s 61HE provides what has been called a ‘communicative model of consent’ in that it requires a person to have reasonable grounds for believing that another person consents to sexual intercourse with him or her,<sup>36</sup> and requires the trier of fact to have regard to all the circumstances of the case, including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse.<sup>37</sup> It introduces an objective element in its reference to ‘reasonable grounds’ and, in effect, overturns the former ‘*Morgan* defence’.<sup>38</sup> The purpose of the objective element is to send the message that there must be reasonable grounds for believing that the other person is consenting to sex; an honest belief on unreasonable grounds is not sufficient. The inclusion of the provision of the objective fault element in the *mens rea* of sexual offences in 2007 was a positive change that marked the modernisation of the law of sexual assault and is broadly consistent with developments in comparable common law jurisdictions, pointing to enhanced accommodation of the principle of sexual autonomy and the protection of victims/survivors. In our view, s 61HE(3) strikes the right balance in protection of, and fairness to the accused, consistent with the seriousness of the offence of sexual assault, on one hand, and consideration of the victim via the objective element in s 61HE(3)(c).

### **Question 5.3: A “reasonable belief” test**

- (1) Should NSW adopt a “reasonable belief” test? If so, why? If not, why not?**
- (2) If so, what form should this take?**

The legislation does not require fact finders to consider ‘what a reasonable person might have concluded about consent’.<sup>39</sup> Instead the trier of fact considers whether the accused believed the complainant was consenting and whether there were reasonable grounds for that belief.<sup>40</sup> This means there is not a purely objective standard imposed upon the accused – they still have to have a subjective belief in consent – and considering the seriousness of the offence, this does strike the right balance. To require the belief, and not the grounds, to be reasonable would make the offence one of almost strict liability and we do not support such a construction of the law of sexual assault.

### **Question 5.4: Legislative guidance on “reasonable grounds”**

- (1) Should there be legislative guidance on what constitutes “reasonable grounds” or “reasonable belief”? If so, why? If not, why not?**
- (2) If so, what should this include?**

We believe the idea of what is ‘reasonable’ should be left to be judged by community standards as manifest in the jury and as may be informed by the use of appropriate expert

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<sup>36</sup> *Crimes Act 1900* (NSW) s 61HE(3)(c)

<sup>37</sup> *Crimes Act 1900* (NSW) s 61HE(4)

<sup>38</sup> *Director of Public Prosecutions v Morgan* [1976] AC 182; New South Wales Law Reform Commission Consultation Paper 21 ‘Consent in relation to sexual offences’, 5.17.

<sup>39</sup> *Lazarus v R* [2016] NSWCCA 52 [156] quoted in Consultation Paper, 5.27.

<sup>40</sup> *Ibid.*





evidence in a given case. Any attempt to define ‘reasonable grounds’ or ‘reasonable belief’ is likely to prove excessively difficult and unhelpful.

**Question 5.5: Evidence of the accused’s belief**

- (1) Should the law require the accused to provide evidence of the “reasonableness” of their belief? If so, why? If not, why not?**
- (2) If so, what form should this requirement take?**

The Consultation Paper (5.56) presents the possibility of removing the mental element from the offence entirely, so that the Prosecution would merely be required to prove non-consensual intercourse. The accused would then be allowed to argue as a defence that they held an honest and reasonable belief that the complainant consented. This is similar to the legislation in Queensland and Western Australia.<sup>41</sup> This would require the accused to provide evidence of a reasonable belief and to satisfy the court to an evidentiary standard that they had such a belief.

Another option is to introduce a ‘rebuttable presumption’ such that, if the complainant did not consent, the defendant is guilty unless there is an honest, reasonable belief.<sup>42</sup> This would also place a similar evidentiary burden on the accused.

We do not support this change. We believe the section as currently worded more appropriately deals with the offence and would caution against unfairly reversing the onus onto the accused, considering the seriousness of the offence.

**Question 5.6: “Negligent” sexual assault**

**Should NSW adopt a “negligent” sexual assault offence? If so, why? If not, why not?**

The Consultation Paper (5.61) raises the option of creating a separate offence with a lower maximum penalty for ‘situations involving a mistaken but unreasonable belief in consent’ or even ‘failure to take reasonable steps to ascertain consent’. This was suggested by Stephen Odgers during the 2005 Taskforce process, and suggested again during consultations on the 2007 draft bill, but ultimately not included.<sup>43</sup>

However, the range of moral culpability within the sexual assault offence as it stands can be considered during the sentencing process, and a lesser offence may lead prosecutors to favour the lesser offence.

Introducing a negligent sexual assault offence would be a retrograde step and inconsistent with community standards which require that the criminal law treat sexual assault with appropriate seriousness, given the serious harm that it causes to victims/survivors and to the community.

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<sup>41</sup> *Criminal Code 1899* (Qld) s 24, s 349; *Criminal Code 1902* (WA) s 24, s 325.

<sup>42</sup> Consultation Paper, 5.58.

<sup>43</sup> Consultation Paper, 5.61-5.65.



**Question 5.7: “No reasonable grounds” and other forms of knowledge**

- (1) Should a test of “no reasonable grounds” (or similar) remain part of the mental element for sexual assault offences?**
- (2) If not, are other forms of knowledge sufficient?**

Yes, an objective test of ‘no reasonable grounds’ should remain part of the mental element for sexual assault offences for reasons discussed above.

**Question 5.8: Defining “steps”**

- (1) Should the legislation define “steps taken to ascertain consent”? If so, why? If not, why not?**
- (2) If so, how should “steps” be defined?**

The current wording of s 61HE(4)(a) requires that the trier of fact *must*, when considering whether they are satisfied beyond reasonable doubt that a defendant had knowledge of a lack of consent, ‘have regard to all the circumstances of the case’. In this way, attention is placed more squarely on the actions and omissions of the accused, rather than just those of the complainant. By virtue of s 61HE(4)(a), these circumstances include ‘any steps taken by the person to ascertain whether the alleged victim consents’. The Court of Criminal Appeal in *R v Lazarus* interpreted ‘steps’ to ‘include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.’<sup>44</sup>

A finding of fact that the defendant did not take any steps to ascertain consent does not necessarily mean that the defendant has knowledge of lack of consent. However, in practice, it would be difficult for a defendant to raise a reasonable doubt about knowledge, or to raise evidence of reasonable grounds for a belief in the presence of consent, if they did not even undertake the internalised subjective ‘steps’ referred to by the CCA in *R v Lazarus*.<sup>45</sup>

In order to clarify the meaning of ‘steps’, it seems that s 61HE(4)(a) might be amended by adding the words ‘physical or verbal’ to s 61HE(4)(a) as follows:<sup>46</sup>

‘For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

- (a) Including any *physical or verbal* steps taken by the person to ascertain whether the alleged victim consents to the sexual activity’ (emphasis added).

As our colleague Andrew Dyer explains in his Final Submission<sup>47</sup>, such an addition promotes a communicative model of consent and ensures the ‘steps’ involve active measures and positive actions and not merely the internal reflections indicated to be satisfactory by the court in *R v Lazarus*.

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<sup>44</sup> *R v Lazarus* [2017] NSWCCA 279, [147].

<sup>45</sup> *Ibid*.

<sup>46</sup> Andrew Dyer, Preliminary Submission PCO50, 11; Andrew Dyer, Final Submission, 17 January 2019, 48.

<sup>47</sup> Andrew Dyer, Final Submission, 17 January 2019, 48.



**Question 5.9: Steps to ascertain consent**

- (1) Should the law require people to take steps to work out if their sexual partner consents? If so, why? If not, why not?**
- (2) If so, what steps should the law require people to take?**

We believe that the law should require consideration of any steps taken to determine if a sexual partner consents but that such steps should not require asking the partner if he or she consents.

Unlike the minor change suggested above to ‘steps’, a more extreme amendment to s 61HE(4)(a) would be akin to the Tasmanian provision, namely:

*‘A mistaken belief by the accused as to the existence of consent is not honest and reasonable if 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.’<sup>48</sup>*

Adhering to our preliminary submission, we caution against this more extreme change and against adding a requirement that the accused person ask the victim whether they consent before reasonable grounds for a belief in the presence of consent may be established. We agree with Andrew Dyer’s preliminary submission that such a change would make the offence of sexual assault one of absolute liability where the defendant had not asked the victim if they consented.<sup>49</sup> This would be an unprecedented step for such a serious offence and would have the potential to result in unjust convictions.<sup>50</sup>

As discussed in our preliminary submission, Victoria has amended the definition of consent to accord with an affirmative standard, yet its provision relating to knowledge of consent accords with the current NSW provision. To introduce a requirement that a defendant satisfy the tribunal of fact of the possibility that they asked the complainant whether they consent does not accord with an understanding of human sexual relations, and consequently could result in unfairness to accused persons. Innumerable instances of consensual sexual intercourse occur in the absence of words, and are not problematic.<sup>51</sup>

In addition, we are aware that some commenters believe that such an amendment would serve as a tool for educating the public about respectful sexual relations. As discussed earlier in this final submission, while the criminal law is increasingly used to educate the public about community values – drink driving and non-fatal domestic violence are two examples – there is evidence that it is not an effective tool, particularly for offences that are impulsive or that occur in circumstances of high emotion.<sup>52</sup>

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<sup>48</sup> *Criminal Code Act 1924* (Tas) s 14A(1)(c).

<sup>49</sup> Andrew Dyer, Preliminary Submission PC050, 9.

<sup>50</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission* PC065 (2018), 5.

<sup>51</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission* PC065 (2018), 5.

<sup>52</sup> Mirko Bagaric and Richard Edney summarise the relevant empirical evidence in *Sentencing in Australia* (Lawbook Co, 4<sup>th</sup> ed, 2017) 181-209, see especially 187 and 197; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission* PC065 (2018), 5.

**Question 5.10: Considering other matters**

- (1) Should the law require a fact finder to consider other matters when making findings about the accused’s knowledge? If so, why? If not, why not?**
- (2) If so, what should these other matters be?**

As the Consultation Paper notes, other than the accused’s self-induced intoxication, fact finders can consider other matters as part of “all the circumstances of the case” – there is no limit on what matters that they can take into account.

While we see the argument of McNamara and colleagues,<sup>53</sup> we believe that amending the law to direct juries to take into account specific matters (such as the effect of the accused’s conduct on the victim), would require additional research to ensure it was likely to assist juries in their decision-making. Without such evidence, such an amendment may not assist in realising more just outcomes for all parties than the current situation.

**Question 5.11: Excluding the accused’s self-induced intoxication**

- (1) Should a fact finder be required to exclude the accused’s self-induced intoxication from consideration when making findings about knowledge? If so, why? If not, why not?**
- (1) Should the legislation provide detail on when the accused’s intoxication can be regarded as self-induced? If so, what details should be included?**

As outlined in the Consultation Paper (5.98) the ‘exclusion of self-induced intoxication reflects the general rule in s 428D(a) of the Crimes Act’. For both statutory consistency and policy reasons, self-induced intoxication should continue to be excluded from the circumstances regarded in s 61HE(4).

**Question 5.12: Excluding other matters**

- (1) Should the legislation direct a fact finder to exclude other matters from consideration when making findings about the accused’s knowledge? If so, what matters should be excluded?**
- (2) Is there another way to exclude certain considerations when making findings about the accused’s knowledge? If so, what form could this take?**

We believe that it is too difficult to specify aspects of the factual circumstances that need to be excluded on the basis of irrelevance. We believe that this should be left to community standards as presented by the jury.

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<sup>53</sup> L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, Preliminary Submission PCO85 (2018), 4.



### **Question 5.13: A single mental element**

- (1) Should all three forms of knowledge be retained? If so, why? If not, why not?**
- (2) If not, what should be the mental element for sexual assault offences?**

We believe that the breakdown of the mental element into the three forms of knowledge is appropriate and ought to be retained.

### **Question 5.14: Knowledge of consent under a mistaken belief**

**Does the law regarding knowledge of consent under a mistaken belief need to be clarified? If so, how should it be clarified?**

If consent is negated under a s 61HE(6) mistaken belief, then under s 61HE(7), the knowledge element of the offence is satisfied if the accused knows the person consents to the sexual activity under such a mistaken belief.

However, the Consultation Paper (5.124-5.127) raises the issue of whether actual knowledge would be required or whether any of the three elements would be sufficient. Julia Quilter's Preliminary Submission notes that the High Court in *Gillard v R* [2014] held there must be actual knowledge of the circumstance of a position of trust in order for a similar ACT law to apply.<sup>54</sup>

If the same reasoning applied here, the extended meaning of knowledge in s 61HE(3) would be lost for cases of mistaken belief.

Historically, the scope of mistaken belief has been narrowly defined and there is space for this protection for victims to be expanded.

### **Question Six: Issues related to s 61HA**

#### **Question 6.1: Upcoming amendments**

- (1) What are the benefits of the new s 61HE applying to other sexual offences?**
- (2) What are the problems with the new s 61HE applying to other sexual offences?**
- (3) Do you support applying the legislative definition of consent and the knowledge element to the new offences? If so, why? If not, why not?**

The benefits of the new s 61HE applying to other offences is clarity in the law.

Before the reforms in 2018, s 61HA applied to sexual assault, aggravated sexual assault and aggravated sexual assault in company, as well as attempts to commit these. The new s 61HE applies to these offences as well as the new offences of sexual touching (replaces indecent assault), sexual act (replaces act of indecency) and the aggravated versions of these.

Prior to the amendments, indecent assault and acts of indecency, and their aggravated equivalents, used the common law definition of consent and required different mental

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<sup>54</sup> *Gillard v R* [2014] HCA 16, referenced in Julia Quilter's Preliminary Submission (PCO92 11-12)



elements to s 61HA. This could be confusing when the accused was charged with an indecent assault/act of indecency as well as a sexual assault. The amendments simplify the law and apply the s 61(3)(c) ‘no reasonable grounds for belief’ to additional offences.

**Question 6.3: Jury directions on consent**

**Are the current jury directions on consent in the NSW Criminal Trial Courts Bench Book clear and adequate? If not, how could they be improved?**

Given the judicial errors made manifest in the various *Lazarus* proceedings, clarification of judicial directions is certainly required.

**Question 6.4: Jury directions on other related matters**

**Should jury directions about consent deal with other related matters in addition to those that they currently deal with? If so, what matters should they deal with?**

As the Consultation Paper considers (6.31), jury directions could be used to combat ‘rape myths’. The response below to Question 6.6 elaborates why myths about sexual assault are harmful and should be displaced or mitigated in some way. Both expert evidence and jury directions on the issue would be useful. Jury directions in England and Wales can cover issues such as the complainant’s intoxication, clothing, or behaviour in court, as well as the relevance of previous sexual activity.<sup>55</sup>

**Question 6.5: Legislated jury directions**

- (1) Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed?**
- (2) What are the benefits of legislated jury directions on consent and/or other related matters?**
- (3) What are the disadvantages of legislated jury directions on consent and/or other related matters?**

No, jury directions on consent and other related matters should not be set out in legislation. This would restrict the options to amend the directions in the usual manner and treat directions on consent in sexual assault differently from all other jury directions. In addition, such a move would run the substantial risk that such directions would be politicised which would be an undesirable development.

**Question 6.6: Amendments to expert evidence law**

- (1) Is the law on expert evidence sufficiently clear about the use of expert evidence about the behavioural responses of people who experience sexual assault? If so, why? If not, why not?**
- (2) Should the law expressly provide for the introduction of expert evidence on the behavioural responses of people who experience sexual assault? If so, why? If not, why not?**

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<sup>55</sup> Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018) ch20-1 [8](1)(d), example 6; [8](3)(a) example 8; [8](3)(b) example 9; [8](3)(c), example 12, quoted in the Consultation Paper, 6.33-6.37.



As we mentioned in our preliminary submission, one factor that caused the prosecution to fail in the *Lazarus* case was the judge's analysis of the actions of the complainant.

'At trial the complainant was not asked to explain why she agreed to stay, why she agreed to turn and face the fence, why she did not pull her undies up the second time the accused pulled them down and why she took no other action to leave...'<sup>56</sup>

This portion of the judgment suggests a need for judges and prosecutors, and other criminal justice decision-makers to be trained in the psychological and behavioural responses of victims of sexual assault and in particular regarding why some victims may seemingly acquiesce and submit, or 'freeze' during sexual assault.

The failure to elicit relevant evidence that could have explained and contextualised the complainant's behaviour in the *Lazarus* case, indicates the need for judicial notice of, or expert evidence to be led on the underlying dynamics of sexual violence and how victims of sexual assault may behave during, or following such assault. The trier of fact must be furnished with all relevant evidence that will assist them to understand that the behaviour of the complainant in the case before them was in fact a result of 'freezing' or similar response, and not because the complainant was consenting.

#### Relevance and use of research on behavioural responses of victims to sexual assault

In sexual assault trials the focus often shifts from the conduct of the accused to the conduct of the complainant.<sup>57</sup> Sexual assault cases which often lack eye witnesses and other corroborating evidence typically involve 'word against word', and therefore the perceived credibility and consistency of the complainant is likely to influence verdicts.<sup>58</sup> Inferences will depend on the expectations and beliefs held by the court and jurors of how sexual assault usually occurs and how victims typically respond.<sup>59</sup> Research suggests that these assumptions are very often incorrect or incomplete, and these misbeliefs or misunderstandings form a crime schema that the trier of fact uses to interpret evidence and inform fact-finding, and make attributions of blame.<sup>60</sup> Furthermore, defence lawyers often perpetuate rape myths, whilst prosecutors and judges generally insufficiently challenge these.<sup>61</sup>

Research indicates that victims of sexual assault may variously respond to such victimisation/violence including by 'freezing'.<sup>62</sup> Evidence also suggests that victims are

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<sup>56</sup> *R v Lazarus*, 33.

<sup>57</sup> Annie Cossins, 'Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England' (2013) 17 *The International Journal of Evidence & Proof* 74, 79-81.

<sup>58</sup> *Ibid* 82.

<sup>59</sup> Kerri L Pickel and Rachel H Gentry, 'Mock jurors' expectations regarding the psychological harm experienced by rape victims as a function of rape prototypicality (2017) 23(3) *Psychology, Crime & Law* 254.

<sup>60</sup> Cossins (n 33) 87, 95-97; Pickel and Gentry (n 35) 256.

<sup>61</sup> Jennifer Temkin, Jacqueline M Gray, and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2018) 13(2) *Feminist Criminology* 205, 222; Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) *Feminist Criminology* 298, 317.

<sup>62</sup> Fiona Mason and Zoe Lodrick, 'Psychological consequences of sexual assault' (2013) 27 *Best Practice & Research Clinical Obstetrics and Gynaecology* 27, 29; Jessica Woodhams, Clive R



often afraid that struggle or resistance will lead to their injury or death, and/or are affected by a ‘paralyzing effect of fear’ which inhibits their ability to shout, move or flee.<sup>63</sup> Where the perpetrator is an intimate partner, there are further reasons why resistance may not occur, including feeling a duty to submit, a desire to protect children, a knowledge from past experience that resistance was futile, or a lack of preparedness psychologically or physically to fight.<sup>64</sup>

However, there is a prevailing belief in the community that non-consenting participants in sexual activity will typically resist, object to, or fight against such activity, with the misapprehension that non-resistance to sexual advances is ‘closely tied’ with consent and sexual willingness.<sup>65</sup> Ellison and Munro in their research studied mock juries in mini-trial scenarios and found that there was an ‘unshakeable’ commitment to the belief that victims would normally respond to a sexual attack with physical struggle, or that a ‘genuine’ freeze reaction would be accompanied by internal or vagina trauma due to rigidified pelvic muscles.<sup>66</sup> These findings are consistent with other research studies showing that a complainant’s lack of physical resistance to a sexual attack undermines the perceived validity of their complaint, and that resistance is a ‘key concern’ in a jury’s decision-making.<sup>67</sup>

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Hollin, Ray Bull and Claire Cooke, ‘Behavior Displayed by Female Victims During Rapes Committed by Lone and Multiple Perpetrators’ (2011) 18(3) *Psychology, Public Policy, and Law* 415, 433, 443-4; Sarah E Ullman, ‘A 10-Year Update Of “Review and Critique of Empirical Studies of Rape Avoidance”’ (2007) 34(3) *Criminal Justice and Behavior* 411, 413; Andy Feist, Jane Ashe, Jane Lawrence, Duncan McPhee and Rachel Wilson, ‘Investigating and detecting recorded offences of rape’ (Home Office Online Report 18/07, 2007) 20-1.

<sup>63</sup> J Temkin, J M Gray and J Barrett, “Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study” (2018) 13 *Feminist Criminology* 205, 211; A Moller, H P Sondergaard and L Helstrom, “Tonic Immobility During Sexual Assault – A Common Reaction Predicting Post Traumatic Stress Disorder and Severe Depression” (2017) 96 *Acta Obstetrica Et Gynecologica Scandinavica* 932, 934.

<sup>64</sup> Ullman (n 38) 419.

<sup>65</sup> Benjamin Hine and Anthony Murphy, ‘The impact of victim-perpetrator relationship, reputation and initial point of resistance on officers' responsibility and authenticity ratings towards hypothetical rape cases’ (2017) 49 *Journal of Criminal Justice* 1, 4.

<sup>66</sup> Louise Ellison and Vanessa E Munro, ‘Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility’ (2009a) 49(2) *The British Journal of Criminology* 202, 206-207.

<sup>67</sup> Regina A Schuller, Blake M McKimmie, Barbara M Masser and Marc A Klippenstine, ‘Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes’ (2010) 13(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 759, 776; Sokratis Dinos, Nina Burrowes, Karen Hammond and Christina Cunliffe, ‘A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision-making?’ (2015) 43 *International Journal of Law, Crime and Justice* 36, 46; Blake M McKimmie, Barbara M Masser and Renata Bongiorno, ‘What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant are Perceived’ (2014) 29(12) *Journal of Interpersonal Violence* 2273, 2295-6.





*The use of expert evidence on the responses of victims of sexual assault*

The effect of expert evidence on juror perceptions of sexual violence is equivocal.<sup>68</sup> Nevertheless, expert evidence and judicial directions on rape myths may also serve other purposes, including public education, and de-stigmatisation.<sup>69</sup>

Although statements of opinion are generally inadmissible in trials, s 79 of the *Uniform Evidence Acts* makes provision for expert opinion where such will enable the trier of fact to draw inferences not otherwise apparent to them. In NSW provision is explicitly made regarding the admissibility of evidence pertaining to ‘the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences’ (79(2)(b)(ii)), but not pertaining to the behaviour of sexual assault victims more generally. Section 79(2)(b)(ii) provides a means through which ‘counterintuitive’ evidence can be presented to the court, and is thus a vehicle for educating jurors and neutralising or counteracting possible misconceptions regarding the behavioural responses of victims which might otherwise bias juror decision-making.<sup>70</sup>

As we mentioned in our Preliminary Submission, the potential utility of amending the evidence legislation to specifically address admissibility of expert evidence related to the behavioural responses of victims of sexual assault generally should be carefully considered by the Law Reform Commission. This would harmonise the use of expert evidence across all cases of sexual assault/violence in NSW irrespective of the complainant’s age or circumstances of the alleged assault/s.

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<sup>68</sup> Louise Ellison and Vanessa E Munro, ‘Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009b) 49 *The British Journal of Criminology* 363, 372-374.

<sup>69</sup> Jennifer Temkin, “‘And Always Keep A-hold of Nurse, for Fear of Finding Something Worse’”: Challenging Rape Myths in the Courtroom’ (2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 710, 732-3.

<sup>70</sup> Holly Hill, ‘Rape Myths and the Use of Expert Psychological Evidence’ (2014) 45(3) *Victoria University of Wellington Law Review* 471, 477.