



**New South Wales
Law Reform Commission**

**Consent in relation to
sexual offences**

Draft proposals

October 2019
www.lawreform.justice.nsw.gov.au



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Make a submission

We seek your response to our draft proposals. To tell us your views you can send your submission by:

Email: nsw-lrc@justice.nsw.gov.au

Post: GPO Box 31, Sydney NSW 2001

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email.

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About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:
www.lawreform.justice.nsw.gov.au

Table of contents

Make a submission	iii
Use of submissions and confidentiality	iii
About the NSW Law Reform Commission	iii
Participants	vi
Commissioners	vi
Law Reform and Sentencing Council Secretariat	vi
Terms of reference	vii
1. Introduction	1
This paper	1
Our review so far	1
Next steps	2
2. Summary of our proposals	3
Changes to structure and language	3
New interpretive principles	3
Clarifying the meaning of “consent”	3
A list of circumstances in which a person “does not consent”	4
Clarifying the law on knowledge of consent	4
New jury directions on consent and sexual offending	5
“Sexual intercourse”, “sexual touching” and “sexual act”	5
3. Changes to the structure and language of s 61HE	6
A new subdivision	6
Certain expressions should be replaced	6
4. How to interpret and apply the new sections	7
New interpretive principles	7
What the subdivision covers	8
5. The meaning of “consent”	9
Free and voluntary agreement at the time of the activity	9
Consent can be withdrawn at any time	9
Absence of resistance does not, of itself, equate to consent	10
Consent to a particular sexual activity	10
Consent to other sexual activity	11
Consent to sexual activity being performed in a particular way	11
6. When a person “does not consent”	12
A single list of circumstances in which there is no consent	12
Section 61HE treats some circumstances differently	12
We support a single list	12
Circumstances in which there is no consent	12
The person does not do or say anything to communicate consent	13
The person does not have the capacity to consent	13
The person is incapable of consenting due to intoxication	14
The person is asleep or unconscious	14

The person participates because of force, fear, coercion, blackmail or intimidation	15
The person, or another person, is unlawfully detained	16
The person is overborne by the abuse of a position of authority or trust	16
The person is mistaken	17
The person is fraudulently induced to participate	18
7. Knowledge of consent	20
When the accused person “knows” there is no consent	20
A simple and clear opening paragraph.....	20
Minor changes to “actual” knowledge.....	20
No changes to “recklessness”	21
Clarifying the “no reasonable grounds” test.....	21
What fact finders must, and must not, consider	22
When the requirement to consider “all the circumstances” applies	22
Fact finders should consider “all the circumstances”.....	22
Fact finders should consider what the person did to ascertain consent.....	23
Fact finders should not take into account the person’s self-induced intoxication	23
Knowledge of a negating circumstance	23
8. Jury directions on consent	25
New jury directions on common misconceptions.....	25
General direction: Jurors should examine their assumptions.....	26
Directions dealing with specific misconceptions.....	27
Clarifying existing directions	29
9. Sexual intercourse, sexual touching and sexual act.....	30
Recognising surgically constructed body parts	30
Amending the meaning of sexual intercourse	30
Amending the meanings of sexual touching and sexual act.....	31
New references to “continuation”	31
Gender-neutral language	31
Appendix A: Current Section 61HE, <i>Crimes Act 1900</i> (NSW).....	33
Appendix B: Draft amendments to the <i>Crimes Act 1900</i> (NSW).....	35
Appendix C: Draft amendments to the <i>Criminal Procedure Act 1986</i> (NSW).....	39

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Terms of reference

Pursuant to s 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is asked to review and report on consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the Crimes Act 1900 (NSW).

In undertaking this review, the Commission should have regard to:

1. Whether s 61HA should be amended, including how the section could be simplified or modernised;
2. All relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system;
3. Sexual assault research and expert opinion;
4. The impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia, and internationally, on the content and application of s 61HA; and
5. Any other matters that the NSW Law Reform Commission considers relevant.

[Received 3 May 2018]

1. Introduction

This paper

- 1.1 In May 2018, the NSW Attorney General asked us to review and report on the law of consent and knowledge of consent in relation to sexual offences. This law is currently contained in s 61HE (formerly s 61HA) of the *Crimes Act 1900* (NSW) (“*Crimes Act*”). We have set out s 61HE in full at Appendix A.
- 1.2 This paper presents our draft proposals for change.
- 1.3 We understand that the law of consent is highly complex and controversial. Because of this, we have decided, before preparing our final recommendations, to publish our draft proposals and invite responses.
- 1.4 The paper briefly outlines our draft proposals. It does not review all the options that we have considered. Our final report will explain our views on these options in more detail.
- 1.5 Appendices B and C contain our draft proposed amendments to the *Crimes Act* and the *Criminal Procedure Act 1986* (NSW). We have prepared these drafts in consultation with the NSW Parliamentary Counsel’s Office.

Our review so far

- 1.6 This review has attracted a high level of public interest, reflecting strong community concern about the issue of consent.
- 1.7 We have conducted an extensive process of research and consultation. We received:
 - 110 preliminary submissions in response to our terms of reference
 - 36 submissions in response to our Consultation Paper (released in October 2018), and
 - over 1800 responses to a public, online survey.¹
- 1.8 Between February and August 2019, we consulted with a wide range of people and groups. These included judges, prosecutors, defence lawyers, community legal centres, advocacy groups, police representatives, health professionals, community organisations and academics. Consultations took place in metropolitan and regional NSW, as well as in Victoria and Tasmania.
- 1.9 We thank everyone who has taken the time to write or speak to us. We especially thank the people who have experienced sexual assault who shared their stories with us.

1. Our website has a selection of preliminary submissions and submissions, as well as our Consultation Paper:
www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Consent.aspx.

Next steps

- 1.10 We seek your views on our draft proposals by 18 November 2019. We are particularly interested to hear about the practical effect of our proposals, and whether you think they will achieve what we intend them to achieve.
- 1.11 Once we have considered your views on these proposals, we will write our final report with recommendations to the Attorney General. The report will explain our recommendations in detail.

2. Summary of our proposals

Changes to structure and language

- 2.1 We propose changes to the structure and language of the relevant provisions of the *Crimes Act 1900* (NSW). These include:
- splitting the existing s 61HE into several sections, housed within a new subdivision, to make the law easier to read, and
 - replacing certain expressions with simple, modern and inclusive alternatives.

New interpretive principles

- 2.2 We propose that the following principles should govern the interpretation and application of the new subdivision:
- every person has a fundamental right to choose whether or not to participate in a sexual activity
 - a person's consent should not be presumed, and
 - sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement.

Clarifying the meaning of “consent”

- 2.3 Section 61HE(2) provides that a person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity. Section 61HE contains some complex provisions that explain how the question of consent is to be approached.
- 2.4 We do not propose that the meaning of “consent” be changed. We do propose that the law should explicitly provide that:
- consent must be present at the time of the sexual activity
 - a person may withdraw consent, by words or conduct, at any time before or during the sexual activity
 - a lack of physical or verbal resistance does not itself mean that there is consent
 - consent to a particular sexual activity does not, of itself, mean there is consent to any other sexual activity
 - consent to a sexual activity with a person at one time does not, of itself, mean there is consent to the activity at another time
 - consent to a sexual activity with one person does not, of itself, mean there is consent to sexual activity with any other person, and
 - consent to a sexual activity being performed in a particular way does not, of itself, mean there is consent to the activity being performed in a different way.

A list of circumstances in which a person “does not consent”

- 2.5 The law should state a single, non-exhaustive list of circumstances in which a person “does not consent” to a sexual activity.

The list should provide that a person does not consent if the person:

- does not do or say anything to communicate consent
- does not have the capacity to consent
- is so affected by alcohol or another drug as to be incapable of consenting
- is asleep or unconscious
- participates because:
 - of force, fear of force, or fear of harm to themselves, another person, an animal or property, regardless of when the force or conduct giving rise to the fear occurs
 - of coercion, blackmail or intimidation
 - the person, or another person, is unlawfully detained, or
 - the person is overborne by the abuse of a position of authority or trust
- participates because the person is mistaken about:
 - the identity of the other person
 - the nature of the sexual activity, or
 - the purpose of the sexual activity (including about whether the sexual activity is for health, hygienic or cosmetic purposes), or
- is fraudulently induced to participate in the sexual activity.

- 2.6 Some of these circumstances already appear in s 61HE, but we propose changes to the way some of them are expressed. Others would be new.

Clarifying the law on knowledge of consent

- 2.7 The law should continue to require prosecutors to prove, beyond reasonable doubt, that the accused person knew that the complainant did not consent. Section 61HE(3) currently states three circumstances in which a person “knows” that the other person does not consent.

- 2.8 We propose that the tests for “knowledge” should be simplified and clarified. The accused person should be “taken to know” that the complainant does not consent if:

- the accused person actually knows that the complainant does not consent
- the accused person is reckless as to whether the complainant consents, or

- any belief the accused person has, or may have, that the complainant consents “is not reasonable in the circumstances” (replacing the “no reasonable grounds” test currently in s 61HE(3)(c)).
- 2.9 We also propose that the existing requirement to consider “any steps” taken by the accused person to ascertain consent (currently s 61HE(4)(a)) should be replaced. Fact finders (judges or jurors) should instead be required to consider:
- whether the accused person said or did anything to ascertain if the complainant consented, and
 - if so, what the accused person said or did.

New jury directions on consent and sexual offending

- 2.10 The *Criminal Procedure Act 1986* (NSW) (“*Criminal Procedure Act*”) should provide for jury directions to avoid common misconceptions about consent and sexual offending causing injustice or misunderstanding. The directions should be available in trials involving offences to which s 61HE currently applies.
- 2.11 The proposed directions could help guide juries when they consider:
- whether the complainant did not consent, and
 - whether the accused person knew the complainant did not consent.
- 2.12 We also propose reforms to the existing statutory jury directions about lack of, or delay in, complaint and differences in a complainant’s account of an alleged sexual offence. The *Criminal Procedure Act* should state that judges may give these directions at any time and more than once during a trial.

“Sexual intercourse”, “sexual touching” and “sexual act”

- 2.13 We propose reforms to make the definitions of “sexual intercourse”, “sexual touching” and “sexual act” more inclusive and clear. Our proposed reforms would involve:
- extending the definition of sexual intercourse to cover:
 - the penetration of the genitalia of any person, and
 - the touching of any part of the genitalia or anus of a person with the mouth or tongue of another person
 - clarifying that any reference to a body part in these definitions also includes a reference to a surgically constructed body part, and
 - clarifying that a person who withdraws consent to sexual touching or a sexual act should not be treated as consenting if these actions continue after consent is withdrawn.

3. Changes to the structure and language of s 61HE

- 3.1 Our terms of reference require us to consider whether s 61HE could be simplified or modernised. We received submissions that the section:
- has a structure that is difficult to follow, and
 - uses confusing and outdated language in parts.
- 3.2 To address these concerns, we propose that the existing section be restructured and certain expressions used within it be replaced.

A new subdivision

- 3.3 We propose that the existing s 61HE be split into several sections. These sections would sit within a new subdivision of the *Crimes Act*.
- 3.4 Our draft subdivision groups the law dealing with consent, the circumstances in which a person does not consent, and knowledge of non-consent, into distinct sections. We think this will make the law easier to follow.

Certain expressions should be replaced

- 3.5 We also propose more modern and inclusive alternatives for certain expressions currently used in s 61HE.
- 3.6 For example, s 61HE(3) and s 61HE(4) use the expression “alleged victim”. Our draft does not use this expression, as research has indicated that some people who have experienced sexual assault are uncomfortable being characterised as “victims”.
- 3.7 Nor do we use the expression “negation of consent” to describe our proposed list of circumstances in which there is no consent. We think it is clearer to say that a person does not consent when one, or more, of the listed circumstances exists.
- 3.8 Submissions also suggest that s 61HE is confusing when it says that “a person does not consent ... if the person *consents* to the sexual activity” because of a listed circumstance.¹ This is because the person has not legally consented, by definition. We think the law would be better expressed by providing that “a person does not consent ... if the person *participates* in the sexual activity” because of a listed circumstance.

1. See, eg, *Crimes Act 1900* (NSW) s 61HE(5)(c).

4. How to interpret and apply the new sections

New interpretive principles

Proposal 4.1: Interpretive principles

Crimes Act 1900 (NSW)

Draft s 61HF Principles to be used in interpreting and applying Subdivision

Regard must be had to the following principles when interpreting or applying this Subdivision—

- (a) every person has a fundamental right to choose whether or not to participate in a sexual activity,
- (b) a person's consent to a sexual activity should not be presumed,
- (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

- 4.1 We propose a statement of principles to govern the interpretation and application of the new subdivision.
- 4.2 The purpose of this statement is to:
 - recognise the objectives behind the communicative model of consent, which underpins the existing s 61HE and which we seek to strengthen with our proposed reforms
 - guide the interpretation and application of the new subdivision at all stages of the criminal justice process (and not only during trials), and
 - provide a firm foundation for community education initiatives about consent.
- 4.3 Principle (a) is adapted from s 37A(a) of the *Crimes Act 1958* (Vic). Principles (b) and (c) are based on elements of the communicative model of consent, as recognised in academic literature and in our proposed reforms.
- 4.4 Our proposal also builds on the recommendations of other law reform bodies.¹

1. See, eg, Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [9.48]–[9.50], rec 193, rec 194; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2, [25.184]–[25.203], rec 25-8, rec 25-9.

What the subdivision covers

Proposal 4.2: Application of subdivision and definitions

Crimes Act 1900 (NSW)

Draft s 61HG Application of Subdivision

- (1) This Subdivision sets out—
- (a) the circumstances in which a person consents or does not consent to a sexual activity, and
 - (b) the circumstances in which a person knows or is taken to know that another person does not consent to a sexual activity.
- (2) This Subdivision applies to offences, or attempts to commit offences, against sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.

Draft 61HH Definitions

In this Subdivision—

consent has the same meaning as in section 61HI.

sexual activity means sexual intercourse, sexual touching or a sexual act.

4.5 Our draft contains two further preliminary sections:

- draft s 61HG explains what the subdivision does and the offences it applies to, and
- draft s 61HH adopts the existing definition of “sexual activity” in s 61HE(11) and refers to the definition of consent contained in draft s 61HI.

5. The meaning of “consent”

Free and voluntary agreement at the time of the activity

Proposal 5.1: The meaning of consent

Crimes Act 1900 (NSW)

Draft s 61H1(1)

- (1) A person **consents** to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.

- 5.1 Section 61HE(2) currently provides that a person consents to a sexual activity if the person freely and voluntarily agrees to it. This definition is generally well regarded and understood, and we propose that it be retained.
- 5.2 Our draft s 61HI(1) reflects this existing definition. However, our draft also states that consent must be present at the time of the sexual activity. This is consistent with the common law.¹

Consent can be withdrawn at any time

Proposal 5.2: Withdrawal of consent

Crimes Act 1900 (NSW)

Draft s 61HI(2)

- (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.

- 5.3 We propose a new subsection to clarify that a person can withdraw consent at any time before or during the sexual activity. This reflects the common law² and the reference to “continuation” in the definition of “sexual intercourse”³ (discussed in Chapter 9).
- 5.4 This section would also recognise that the withdrawal of consent must be communicated. The reference to withdrawal of consent “by words or conduct” would not require any specific form of words or actions. A person may, for example, indicate withdrawal of consent with body language even if consent was previously given verbally.

1. *R v Aiken* [2005] NSWCCA 328, 63 NSWLR 719 [12] (Studdert J) quoting *Question of Law Reserved on Acquittal (No 1 of 1993)* (1993) 59 SASR 214, 220 (King CJ).

2. *R v Aiken* [2005] NSWCCA 328, 63 NSWLR 719 [12] (Studdert J) quoting *Question of Law Reserved on Acquittal (No 1 of 1993)* (1993) 59 SASR 214, 220 (King CJ).

3. *Crimes Act 1900 (NSW)* s 61HA(d).

Absence of resistance does not, of itself, equate to consent

Proposal 5.3: Absence of resistance

Crimes Act 1900 (NSW)

Draft s 61HI(3)

- (3) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.

- 5.5 Section 61HE(9) currently provides that a person is not to be regarded as consenting to a sexual activity only because there was no physical resistance. This recognises that an absence of physical resistance does not, of itself, equal consent.
- 5.6 We propose that the law should also state that a person does not consent only because there was no verbal resistance. This would address concerns, raised during consultations, that the law does not fully address the common misconception that submission or passivity may be treated as consent.

Consent to a particular sexual activity

Proposal 5.4: Consent to a particular sexual activity

Crimes Act 1900 (NSW)

Draft s 61HI(4)

- (4) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

- 5.7 We propose a new subsection to address situations in which a person consents to a particular sexual activity, but not to the type of activity that occurs.
- 5.8 Some submissions express concern that the current definition of consent does not adequately address the situation in which a person's consent can be limited to a particular type of sexual activity. In such a case, sexual activity of a type different from that which was consented to is outside the scope of the consent. To address this, we propose that the law provide that the fact a person consents to a certain activity (for example, vaginal intercourse) does not itself mean that the person consents to another activity (for example, anal intercourse).

Consent to other sexual activity

Proposal 5.5: Consent to other sexual activity

Crimes Act 1900 (NSW)

Draft s 61HI(5)

- (5) A person who consents to a sexual activity with a person on an occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—
- (a) that person on another occasion or
 - (b) any other person on that or any other occasion.

- 5.9 We propose a new subsection to recognise that:
- consent to a sexual activity with a person at one time does not, of itself, mean there is consent to the activity at another time, and
 - consent to a sexual activity with one person does not, of itself, mean there is consent to sexual activity with any other person.
- 5.10 This is intended to address the possible misconception that a person who consented to other sexual activity with the accused person, or to sexual activity with another person, is more likely to consent to the sexual activity in question.

Consent to sexual activity being performed in a particular way

Proposal 5.6: Consent to sexual activity performed in a particular manner

Crimes Act 1900 (NSW)

Draft s 61HI(6)

- (6) A person who consents to a sexual activity being performed in a particular manner is not, by reason only of that fact, to be taken to consent to the sexual activity being performed in another manner.
- Note.** For example, a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.

- 5.11 Sometimes a person will agree to participate in a sexual activity to be performed in a particular way. In that case, sexual activity performed in a different way is outside the scope of the consent. To address this, we propose that the law provide that it should not be assumed, in this situation, that the person consents to the activity being performed in a different way.
- 5.12 A note to our draft s 61HI(6) includes an example of when this issue may arise. A person might consent to a sexual activity to be performed with the use of a device to prevent a sexually transmitted infection. Sexual activity *without* the use of the device would be outside the scope of the consent.
- 5.13 We included this note in our draft because there are concerns that the law may not cover this scenario currently.

6. When a person “does not consent”

A single list of circumstances in which there is no consent

Section 61HE treats some circumstances differently

- 6.1 Currently, sections 61HE(5) and (6) set out eight circumstances in which a person does not consent. If one of these circumstances exists, a person, by definition, does not consent to a sexual activity.
- 6.2 Section 61HE(8) includes three circumstances in which it “may” be established that a person does not consent. The existence of any one or more of these circumstances does not necessarily mean that there is no consent. The prosecution must still prove the absence of consent. However, these circumstances can help guide fact finders in determining whether there was no consent.
- 6.3 These lists are not exhaustive (see s 61HE(10)). This means that there may be other situations in which the prosecution can establish that the complainant did not consent.

We support a single list

- 6.4 We believe that there should continue to be a non-exhaustive list of specific circumstances in which a person “does not” consent to a sexual activity. This approach has widespread support.
- 6.5 We do not propose a list of circumstances in which it “may” be established that a person does not consent. This is because:
- the current approach of distinguishing between circumstances is unnecessarily complex and confusing
 - no other Australian state or territory law has such a list
 - s 61HE(8) has limited legal effect, as the prosecution still needs to prove that the complainant did not consent, and
 - there were many submissions that the circumstances in s 61HE(8) should be treated as circumstances in which a person *does not* consent.
- 6.6 We propose a single list of circumstances in which a person does not consent. The circumstances currently listed in s 61HE(8) should be merged into this list. However, as explained below, we propose changes to the way these circumstances are expressed.

Circumstances in which there is no consent

- 6.7 Our draft s 61HJ lists the following circumstances in which a person “does not” consent.

The person does not do or say anything to communicate consent

Proposal 6.1: Non-communication of consent

Crimes Act 1900 (NSW)

Draft s 61HJ(1)(a)

- (1) A person does not consent to a sexual activity if—
- (a) the person does not do or say anything to communicate consent, ...

- 6.8 We propose that the law provide that a person who does not do or say anything to communicate consent does not, in law, consent to a sexual activity. That is, without communication of consent, there is no consent. This is consistent with the law in Tasmania and Victoria.¹
- 6.9 Our draft s 61HJ(1)(a) reflects the communicative model of consent. Consent is not just an internal state of mind, but a communicated state of mind. Consent must be given by one person to another.
- 6.10 Our draft s 61HJ(1)(a) would also recognise, for example, that a person who “freezes” out of fear and is unable to communicate does not consent.

The person does not have the capacity to consent

Proposal 6.2: Incapacity – generally

Crimes Act 1900 (NSW)

Draft s 61HJ(1)(b)

- (1) A person does not consent to a sexual activity if—
- (b) the person does not have the capacity to consent, ...

- 6.11 We propose that the law should recognise that a person who does not have the capacity to consent does not, in law, consent. Our draft s 61HJ(1)(b) is similar to the existing s 61HE(5)(a), but we propose one change.
- 6.12 Section 61HE(5)(a) expressly covers a person who is incapable of consenting “because of age or cognitive incapacity”. We do not believe that it is necessary to refer to these two circumstances in our draft s 61HJ(1)(b). This is because it is clear “cognitive capacity” falls within “incapacity”. The reference to “age” may create confusion with the child sexual offences (in which there is no requirement to prove an absence of consent).

1. *Criminal Code* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l).

The person is incapable of consenting due to intoxication

Proposal 6.3: Incapacity – intoxication

Crimes Act 1900 (NSW)

Draft s 61HJ(1)(c)

- (1) A person does not consent to a sexual activity if—
- (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, ...

- 6.13 Under the current s 61HE(8)(a), it “may” be established that a person does not consent to a sexual activity if the person consents while substantially intoxicated.
- 6.14 The current standard of “substantially intoxicated” is controversial. Submissions suggest that it is very difficult to assess what “substantial” intoxication is. At trials, reliance may be placed on non-scientific and possibly incorrect lay opinions about the effects of alcohol.
- 6.15 It is difficult to create a test that resolves this issue completely. However, we propose that the law should recognise that a person does not consent if so affected by alcohol or another drug as to be incapable of consenting. This more appropriately directs attention to the complainant’s *capacity* to consent, rather than to whether their level of intoxication is substantial.
- 6.16 Our draft s 61HJ(1)(c) adopts the test used in Victoria and the Northern Territory (“NT”),² which received support during our consultations.

The person is asleep or unconscious

Proposal 6.4: Asleep or unconscious

Crimes Act 1900 (NSW)

Draft s 61HJ(1)(d)

- (1) A person does not consent to a sexual activity if—
- (d) the person is asleep or unconscious, ...

- 6.17 Under the current s 61HE(5)(b), a person who does not have the opportunity to consent because the person is asleep or unconscious does not consent.
- 6.18 Our draft s 61HJ(1)(d) does not include the expression “does not have the opportunity to consent”. It has been suggested that the expression means a person can consent in advance to sexual activity occurring later when the person is asleep or unconscious.³
- 6.19 However, a person who is asleep or unconscious is vulnerable. For instance, the person cannot:
- withdraw or modify consent previously given, or

2. *Crimes Act 1958* (Vic) s 36(2)(e); *Criminal Code* (NT) s 192(2)(c).

3. *WO v DPP (NSW)* [2009] NSWCCA 275 [70]–[71] (Basten JA).

- respond to a change in circumstances (for example, if a third person becomes involved in the sexual activity or if the activity is different to what was anticipated in advance).
- 6.20 As discussed in Chapter 5, our draft recognises that:
- consent must be present at the time the sexual activity occurs, and
 - a person can withdraw consent at any time.
- 6.21 For these reasons, we have not included the expression “does not have the opportunity to consent” in our draft s 61HJ(1)(d).
- 6.22 Our proposed language is consistent with the law in most other Australian states and territories, and our approach to the issue of “advance consent” reflects Canadian law.⁴

The person participates because of force, fear, coercion, blackmail or intimidation

Proposal 6.5: Force, fear, coercion, blackmail or intimidation

Crimes Act 1900 (NSW)

Draft s 61HJ(1)(e)(i), s 61HJ(1)(e)(ii)

- (1) A person does not consent to a sexual activity if—
- (e) the person participates in the sexual activity—
 - (i) because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs, or
 - (ii) because of coercion, blackmail or intimidation occurring at any time, ...

- 6.23 Under the current s 61HE(5)(c), a person who consents because of threats of force or terror does not consent. Under s 61HE(8)(b), it “may” be established that a person who consents because of intimidatory or coercive conduct or other threat not involving a threat of force does not consent.
- 6.24 Some submissions express concern that this is too narrow, including because it does not capture other forms of violence; for example, family violence.
- 6.25 We propose that the law should provide that a person who participates in a sexual activity because of:
- force or fear of force
 - fear of harm, or
 - coercion, blackmail or intimidation
- does not, in law, consent.

4. *Criminal Code (NT) s 192(2)(c); Criminal Law Consolidation Act 1935 (SA) s 46(3)(c); Criminal Code (Tas) s 2A(2)(h); Crimes Act 1958 (Vic) s 36(2)(d); Criminal Code (Canada) s 273.1(1.1), s 273.1(2)(a.1). See also R v JA [2011] 2 SCR 440.*

Consent in relation to sexual offences: Draft proposals

- 6.26 Our draft s 61HJ(1)(e)(i) refers to conduct directed towards the complainant, “another person, an animal or property”. This could cover a wide range of abusive behaviours, which often occur in the context of family violence.
- 6.27 Draft s 61HJ(1)(e)(i) and s 61HJ(1)(e)(ii) also recognise that the conduct giving rise to the fear of force or harm, or the coercion, blackmail or intimidation, may have occurred at any time. This may cover long-term patterns of abuse.
- 6.28 This proposed reform is based on the law in the NT and Victoria,⁵ for which we heard considerable support.

The person, or another person, is unlawfully detained

Proposal 6.6: Unlawful detention
<p style="text-align: center;"><i>Crimes Act 1900 (NSW)</i></p> <p>Draft s 61HJ(1)(e)(iii)</p> <p>(1) A person does not consent to a sexual activity if—</p> <p style="padding-left: 2em;">(e) the person participates in the sexual activity—</p> <p style="padding-left: 4em;">(iii) because the person or another person is unlawfully detained ...</p>

- 6.29 Under the current s 61HE(5)(d), a person who consents to sexual activity because the person is unlawfully detained does not consent.
- 6.30 Our proposed s 61HJ(1)(e)(iii) would extend the law that so that a person who participates in a sexual activity because another person is unlawfully detained does not, in law, consent. This is consistent with Tasmanian law.⁶
- 6.31 Among other things, this may cover situations involving family violence. For instance, a person may participate in a sexual activity because their child is unlawfully detained.

The person is overborne by the abuse of a position of authority or trust

Proposal 6.7: Abuse of authority or trust
<p style="text-align: center;"><i>Crimes Act 1900 (NSW)</i></p> <p>Draft s 61HJ(1)(e)(iv)</p> <p>(1) A person does not consent to a sexual activity if—</p> <p style="padding-left: 2em;">(e) the person participates in the sexual activity—</p> <p style="padding-left: 4em;">(iv) because the person is overborne by the abuse of a position of authority or trust ...</p>

- 6.32 Under the current s 61HE(8)(c), it “may” be established that a person who consents to a sexual activity because of the abuse of a position of authority or trust does not consent.

5. *Criminal Code* (NT) s 192(2)(a); *Crimes Act 1958* (Vic) s 36(2)(a)–(b).

6. *Criminal Code* (Tas) s 2A(2)(d).

- 6.33 We propose that the law provide that a person who participates in a sexual activity because the person is overborne by the abuse of a position of authority or trust does not, in law, consent.
- 6.34 The word “overborne” clarifies when draft s 61HJ(1)(e)(iv) should apply. The section would not cover *all* situations in which a position of authority or trust is abused. It would only cover situations in which the abuse of trust or authority is such as to deprive the complainant of the ability to agree freely and voluntarily.
- 6.35 This is a stricter test than the current s 61HE(8)(c). This is appropriate, as it would convert the circumstance from one in which it *may* be established that the person did not consent to one in which the person does not, in law, consent.

The person is mistaken

Proposal 6.8: Mistakes

Crimes Act 1900 (NSW)

Draft s 61HJ(1)(f)

- (1) A person does not consent to a sexual activity if—
- (f) the person participates in the sexual activity because the person is mistaken about—
 - (i) the identity of the other person, or
 - (ii) the nature of the sexual activity, or
 - (iii) the purpose of the sexual activity (including about whether the sexual activity is for health, hygienic or cosmetic purposes), ...

- 6.36 Under the current s 61HE(6), a person who consents to a sexual activity with another person under:
- a mistaken belief as to the identity of the other person
 - a mistaken belief that they are married to each other
 - a mistaken belief that the sexual activity is for health or hygienic purposes, or
 - any other mistaken belief about the nature of the activity induced by fraudulent means
- does not consent.
- 6.37 Our draft s 61HJ(1)(f) refers to mistakes about:
- the other person’s identity
 - the nature of the sexual activity, and
 - the purpose of the sexual activity.
- 6.38 We propose to deal with the issue of fraud separately. We also consider that mistaken beliefs as to marriage are better dealt with as a form of “fraud” (see below).

Consent in relation to sexual offences: Draft proposals

- 6.39 Our draft uses the expression “the person participates ... *because the person is mistaken about*” instead of “*under any of the following mistaken beliefs*” (used in s 61HE(6)). This would mean that the person’s mistake would need to be a reason (but not necessarily the only reason) for participating in the sexual activity. Draft s 61HJ(1)(f) would not apply where the mistake does not influence the person’s decision to participate.
- 6.40 The prosecution would still have to prove the accused person knew there was no consent. This may be achieved by proving the accused person knew of the mistake.

Mistake: identity

- 6.41 Like the existing s 61HE(6)(a), our draft s 61HJ(1)(f)(i) provides that a person does not, in law, consent to a sexual activity with another person if mistaken about the identity of that person.
- 6.42 This would apply when a person mistakenly believes the sexual activity is with one person, but it is in fact with a different person. Submissions suggest that it should not apply to mistakes about the other person’s attributes or characteristics, such as their age, occupation or biological sex.

Mistake: nature of the activity

- 6.43 Draft s 61HJ(1)(f)(ii) provides that a person does not, in law, consent to sexual activity if mistaken about the nature of the activity.
- 6.44 This is similar to current s 61HE(6)(d), except that our proposal would not require prosecutors to show that the mistake was “induced by fraudulent means”.

Mistake: purpose of the activity

- 6.45 Draft s 61HJ(1)(f)(iii) provides that a person does not, in law, consent to sexual activity if participating because of *any* mistake about the purpose of a sexual activity.
- 6.46 This differs from the current s 61HE(6)(c), which refers only to mistakes about the activity being for health or hygienic purposes.
- 6.47 Our draft section includes examples of the kind of mistakes we should cover. This includes mistakes “about whether the activity is for health, hygienic or cosmetic purposes”. The reference to “cosmetic purposes” reflects the fact that cosmetic procedures involving intimate areas are increasingly common.

The person is fraudulently induced to participate

Proposal 6.9: Fraudulent inducement
<p style="text-align: center;"><i>Crimes Act 1900 (NSW)</i></p> <p>Draft s 61HJ(1)(g)</p> <p>(1) A person does not consent to a sexual activity if—</p> <p style="padding-left: 2em;">(g) the person is fraudulently induced to participate in the sexual activity.</p>

Consent in relation to sexual offences: Draft proposals

- 6.48 We propose that the law should provide that a person who is fraudulently induced to participate in sexual activity does not, in law, consent to sexual activity.
- 6.49 This would address a gap in the law. Currently, s 61HE only refers to fraudulently induced mistaken beliefs about the *nature* of the sexual activity. The laws of the Australian Capital Territory, Tasmania, Western Australia, and Canada take a broader approach to “fraud”.⁷
- 6.50 A person who is induced by fraud, of any kind, to participate in a sexual activity, cannot be said to have agreed freely and voluntarily to do so. Our proposal is intended to cover any circumstance in which participation is dishonestly procured by a false representation or upon a false pretence, known by the maker to be false when it was made.
- 6.51 This may include, for example:
- where the accused person represents to the complainant that they are married, when the accused knows that they are not, or
 - where the accused person dishonestly represents that the accused person will pay the complainant for the sexual activity, not intending to do so.

7. *Crimes Act 1900* (ACT) s 67(1)(g); *Criminal Code* (Tas) s 2A(2)(f); *Criminal Code* (WA) s 319(2)(a); *Criminal Code* (Canada) s 265(3)(c).

7. Knowledge of consent

- 7.1 Prosecutors currently need to prove, beyond reasonable doubt, that the accused person knew that the complainant did not consent to the sexual activity.¹ Under the current s 61HE(3) of the *Crimes Act*, the accused person “knows” that there is no consent if the accused person:
- knows the complainant does not consent
 - is reckless as to whether the complainant consents, or
 - has no reasonable grounds for believing the complainant consents.
- 7.2 We believe the law should continue to require prosecutors to prove that the accused person knew that the complainant did not consent. We propose reforms to:
- simplify and modernise the language currently used in s 61HE(3), and
 - clarify how certain tests should apply.

When the accused person “knows” there is no consent

Proposal 7.1: Knowledge about consent

Crimes Act 1900 (NSW)

Draft s 61HK(1)

- (1) A person is taken to know that another person does not consent to a sexual activity if—
- (a) the person actually knows the other person does not consent to the sexual activity, or
 - (b) the person is reckless as to whether the other person consents to the sexual activity, or
 - (c) any belief that the person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

A simple and clear opening paragraph

- 7.3 The opening paragraph to our draft s 61HK(1):
- is shorter and simpler than the opening paragraph in the current s 61HE(3), and
 - uses the expression “taken to know”, to recognise that the subsection covers actual and deemed forms of knowledge.

Minor changes to “actual” knowledge

- 7.4 Our draft does not propose changes to the substance of s 61HE(3)(a). However, our draft uses the expression “actually knows” instead of “knows”. This is to reflect common usage and distinguish between the forms of knowledge.

1. *Crimes Act 1900* (NSW) s 61I–61JA, s 61KC–61KF.

No changes to “recklessness”

- 7.5 During consultations, we heard that the concept of “recklessness” in s 61HE(3)(b) is well-developed and understood. We do not believe it should be changed.

Clarifying the “no reasonable grounds” test

The current law

- 7.6 Under s 61HE(3)(c), a person who has “no reasonable grounds for believing” that the other person consents is taken to know that the other person did not consent.
- 7.7 This “no reasonable grounds” test does not require fact finders to ask “what a reasonable person might have concluded about consent”.² Instead, fact finders should ask:

what the accused himself might have believed in all the circumstances in which he found himself and then test that belief by asking whether there might have been reasonable grounds for it.³

The law may not be working as intended

- 7.8 The “no reasonable grounds” test commenced in 2008. Before then, an accused person could be acquitted if the accused honestly, but incorrectly, believed the complainant consented – even if this belief was unreasonable.⁴ The “no reasonable grounds” test was designed to address that situation.
- 7.9 During consultations, concerns were expressed that the test:
- is potentially too narrow, especially if the presence of *any* reasonable ground for a belief can lead to acquittal
 - is confusing and difficult for fact finders to understand, and
 - allows misconceptions about consent to influence the way fact finders decide if there are reasonable grounds for a belief in consent.

We propose a new test

- 7.10 Our draft s 61HK(1)(c) contains the following test: “any belief that the person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances”.
- 7.11 In proposing this test, we do not seek to change the law significantly. In particular, we do not intend that a “reasonable person” standard be introduced.
- 7.12 Instead, the proposed reform aims:
- to encourage fact finders to assess the reasonableness of a belief holistically, in light of all relevant circumstances. Fact finders should not focus narrowly on whether there was *any* possible reasonable ground for a belief in consent.

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

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

4. This is known as the *Morgan* principle: *DPP v Morgan* [1976] AC 182.

- to clarify that the test applies where the accused person “might have believed” there was consent, so that the prosecution would not have to prove that the accused person held an “honest belief” in consent before the test can apply.
- 7.13 We also propose new jury directions to address misconceptions about consent (see Chapter 8). These new jury directions may guide jurors as they assess whether it was not reasonable, in the circumstances, for the accused person to believe that the complainant consented.

What fact finders must, and must not, consider

Proposal 7.2: What fact finders must, and must not, consider

Crimes Act 1900 (NSW)

Draft s 61HK(2)

- (2) For the purposes of making any finding under this section, the trier of fact—
- (a) must have regard to all the circumstances of the case, including whether the accused person said or did anything to ascertain if the other person consented to the sexual activity, and if so, what the person said or did, and
 - (b) must not have regard to any self-induced intoxication of the accused person.

When the requirement to consider “all the circumstances” applies

- 7.14 Section 61HE(4) currently requires fact finders to consider “all the circumstances of the case”. Submissions suggest there is some confusion about when this requirement applies and the forms of knowledge to which it applies.
- 7.15 The opening paragraph of our draft s 61HK(2) clarifies that the requirement applies for the purposes of making any finding under draft s 61HK. This means the requirement:
- only applies when fact finders make findings about whether the accused person knew the complainant did not consent, and
 - applies regardless of the form of “knowledge” relied upon by the prosecution.

Fact finders should consider “all the circumstances”

- 7.16 During consultations, concerns were expressed about the broad requirement to consider “all the circumstances of the case”. These concerns included that it could allow misconceptions and assumptions about sexual conduct to influence fact finders.
- 7.17 We believe that flexible and targeted jury directions are the most appropriate way to address these concerns. The jury directions proposed in Chapter 8 may play an important role in guiding jurors about which circumstances are relevant, and which are irrelevant, in a particular case.

Fact finders should consider what the person did to ascertain consent

- 7.18 Section 61HE(4)(a) currently requires fact finders to consider “any steps taken by the person to ascertain whether the alleged victim consents”.
- 7.19 This is an important part of the communicative model of consent. It directs attention to what, if anything, the accused person did to find out whether the complainant consented.
- 7.20 However, many submissions suggest that the word “steps” has been interpreted too broadly. The Court of Criminal Appeal has said that a “step” can include the accused person’s internal thought processes, such as the accused’s reasoning in response to what they hear, observe or perceive.⁵
- 7.21 During consultations, concerns were expressed that the Court’s interpretation does not reflect the need for active steps to be taken to ascertain consent. Submissions said that fact finders should consider the “external” or “physical or verbal” steps taken by the accused person.
- 7.22 To address this, our draft proposes that fact finders be required to consider:
- whether the accused person said or did anything to ascertain if the complainant consented, and
 - if so, what the accused person said or did.
- 7.23 Under our proposed s 61HK(2)(a), fact finders would still be able to consider the accused person’s reasoning process as part of the circumstances of the case. However, they would be *required* to consider whether the accused person said or did anything to find out if the complainant consented. They should also assess if the steps taken were sufficient.
- 7.24 We do not propose that the law *require* a person to take any such steps. However, a failure to take steps (or adequate steps) may be an important consideration in many cases.

Fact finders should not take into account the person’s self-induced intoxication

- 7.25 Fact finders are currently not permitted to take into account the accused person’s self-induced intoxication when deciding whether the accused knew that the complainant did not consent (s 61HE(4)(b)). This important principle is consistent with other sections of the *Crimes Act*.⁶ We do not believe it should be changed.

Knowledge of a negating circumstance

- 7.26 Section 61HE(7) currently provides that an accused person knows that the complainant does not consent to the sexual activity if the accused knows that the complainant consented under one of the mistaken beliefs listed in s 61HE(6). However, there is no similar provision where the accused person knows of the

5. *R v Lazarus* [2017] NSWCCA 279 [146]–[147] (Bellew J).

6. *Crimes Act 1900* (NSW) s 428D(a).

Consent in relation to sexual offences: Draft proposals

existence of any of the other “circumstances negating consent” in s 61HE(5), possibly because it was considered clear that an accused person who knew of a negating circumstance knew there was no consent.

- 7.27 We do not propose to recommend any equivalent to s 61HE(7). This is because there would be a direct relationship between the definition of consent and all the circumstances in which a person does not consent referred to in the proposed list.
- 7.28 If any of the listed circumstances exist, the complainant does not consent. Our present view is that if a person “knows”⁷ that any of these listed circumstances exist, by definition the person knows that the other person does not consent. It is not necessary to state this in a distinct provision.

7. In any of the three forms of knowledge referred in our draft s 61HK(1).

8. Jury directions on consent

New jury directions on common misconceptions

- 8.1 We propose new jury directions to apply in trials involving offences to which s 61HE currently applies.¹ These directions concern common misconceptions about consent and sexual offending.
- 8.2 Research shows that misconceptions exist in the general community² and that they may affect how jurors make decisions in a trial.³ Similar concerns were raised during our consultations.
- 8.3 Jury directions can play an important role in addressing these misconceptions or assumptions. They can also guide jurors as they consider whether the prosecution has proved that:
- the complainant did not consent, and
 - the accused person knew that the complainant did not consent.
- 8.4 Some other Australian states and territories, and other countries, already have jury directions on similar topics.⁴
- 8.5 We propose that the new directions be legislated. This would clearly authorise judges to direct jurors on these issues.
- 8.6 Our proposed directions also build on existing directions in NSW legislation, which deal with differences in a complainant's account and a lack of, or delayed, complaint.⁵
- 8.7 We support a flexible process. We propose only one mandatory direction, expressed in general language. The other directions would only be given in certain circumstances (outlined below).

1. *Crimes Act 1900* (NSW) s 61I–61JA, s 61KC–61KF.

2. See, eg, K Webster and others, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey* (NCAS), Research Report 03/2018 (Australian National Research Organisation for Women's Safety) 48–54, 84, 89–91.

3. See, eg, the discussion in New Zealand Law Commission, *The Second Review of the Evidence Act 2006*, Report 142 (2019) ch 12.

4. See, eg, *Criminal Code* (NT) s 192A; *Evidence Act 1929* (SA) s 34N; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C; *Jury Directions Act 2015* (Vic) s 46; UK, Judicial College, *The Crown Court Compendium Part I: Jury Directions and Trial Management and Summing Up* (July 2019, amended 1 August 2019) ch 20 [20-1].

5. *Criminal Procedure Act 1986* (NSW) s 293A, s 294.

General direction: Jurors should examine their assumptions

Proposal 8.1: A mandatory direction

Criminal Procedure Act 1986 (NSW)

Draft s 292(2)–(5)

- (2) In a trial to which this section applies, the judge must—
- (a) give the direction in subsection (5), ...
- (3) It is not necessary that a particular form of words be used in giving a direction in this section.
- (4) A judge may, as the judge sees fit—
- (a) give a direction in this section at any time, and
 - (b) give the same direction on more than one occasion during a trial.
- (5) **Assumptions about consent**
- Direction—
- The jury must carefully examine any assumptions that the jury may have about—
- (a) non-consensual sexual activity and the people who experience it, and
 - (b) the circumstances in which people consent to a sexual activity.

- 8.8 We propose a new statutory direction that requires judges to tell jurors to examine their assumptions about sexual offending and consent carefully. We propose that this direction appear in the *Criminal Procedure Act*.
- 8.9 Judges already tell jurors to base their decisions on the evidence and the law. However, we consider that jurors in sexual offence trials should be told specifically to examine their assumptions about consent and sexual offending.
- 8.10 This is because sexual offences are unique in the way they attract misconceptions and assumptions. Jurors need to be aware of their own assumptions so they can interpret the evidence and apply the law correctly.
- 8.11 We do not propose that judges be required to use a particular form of words when giving such a direction. This is intended to enable judges to tailor the directions to the facts. Our proposal may also avoid appeals on the ground that the judge did not use the exact words in the legislation.
- 8.12 Judges would be able to give and repeat the direction at any suitable time during a trial. This is important, as research indicates:
- directions given earlier in a trial can have more impact than those given at the end,⁶ and
 - repeating jury directions at different times during the trial can help jurors understand them.⁷

6. See, eg, E Henderson and K Duncanson, "A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?" (2016) 39 *UNSW Law Journal* 750, 778.

7. See, eg, M Weinberg and others, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (2012) [1.44] citing J A Tanford, "The Law and Psychology of Jury Instructions" (1990) 69 *Nebraska Law Review* 71, 84–85.

Directions dealing with specific misconceptions

- 8.13 We also propose jury directions to address other, specific misconceptions about consent. As these misconceptions will not be relevant in every case, these directions should not be mandatory.

When such a direction must be given

Proposal 8.2: Procedure for directions on specific misconceptions

Criminal Procedure Act 1986 (NSW)

Draft s 292(2)–(4)

- (2) In a trial to which this section applies, the judge must—
- (b) give any one or more of the directions in subsections (6)–(11)—
 - (i) if there is a good reason to give the direction, or
 - (ii) if requested to give the direction by a party to the proceedings, unless there is a good reason not to give the direction.
- (3) It is not necessary that a particular form of words be used in giving a direction in this section.
- (4) A judge may, as the judge sees fit—
- (a) give a direction in this section at any time, and
 - (b) give the same direction on more than one occasion during a trial.

- 8.14 Our proposed procedure would enable the prosecution or the defence to ask a judge to give one or more of the jury directions set out below. We propose that a judge must give the requested direction unless there is a good reason not to do so.
- 8.15 This is similar to the process adopted in Victoria.⁸ It is meant to ensure that the judge only gives directions that are relevant to the case, as identified by the party making the request.
- 8.16 We also propose that a judge must give a direction, without a request, if there is a good reason for doing so. This would cover situations where, for example, a party does not make a request, even though the direction is relevant to the case.
- 8.17 Our proposal would clarify that judges are able to give and repeat the direction at any suitable time during the trial.

8. *Jury Directions Act 2015 (Vic)* s 14–16.

What the new directions should cover

Proposal 8.3: Directions on specific misconceptions

Criminal Procedure Act 1986 (NSW)

Draft s 292(6)–(11)

(6) Circumstances in which non-consensual sexual activity occurs

Direction—

Non-consensual sexual activity can occur—

- (a) in many different circumstances, and
- (b) between different kinds of people including people who know each other.

(7) Responses to non-consensual activity

Direction—

- (a) there is no typical or normal response to non-consensual sexual activity, and
- (b) people can respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
- (c) the jury must avoid making assessments based on preconceived ideas about how people should respond to non-consensual sexual activity.

(8) Lack of physical injury, violence or threats

Direction—

- (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
- (b) the absence of injury or violence, or threats of injury or violence, does not, of itself, mean that a person is not telling the truth about an alleged sexual offence.

(9) Responses to giving evidence

Direction—

- (a) some people may show obvious signs of emotion and distress when giving evidence in court about an alleged sexual offence, but others may not, and
- (b) the presence or absence of emotion or distress is not, of itself, a reliable indicator of whether or not a person is telling the truth.

(10) Behaviour and appearance of complainant

Direction—

None of the following is, of itself, a reliable indicator that a person consents to a sexual activity—

- (a) the person's clothing or appearance,
- (b) the consumption by the person of alcohol or any other drug,
- (c) the person's presence in a particular location.

(11) Family violence

Direction—

A person may participate in sexual activity because of fear of harm in circumstances of domestic and family violence—

- (a) including where there has been an ongoing pattern of coercive and controlling behaviour, and
- (b) whether or not there was a threat of harm immediately before or during the sexual activity.

- 8.18 The proposed directions are intended to address specific misconceptions that can arise in sexual offence cases. We have selected the topics for the directions based on our research and consultations. We have also been guided by the directions used in some other Australian states and territories, and other countries.⁹
- 8.19 The directions are worded in a positive way, and state the correct position rather than the misconception. This is meant to avoid reinforcing the misconception in jurors' minds.
- 8.20 Judges would not have to use any particular form of words when giving the directions. This is intended to enable judges to tailor the direction to the facts. It may also help to avoid appeals.

Clarifying existing directions

Proposal 8.4: Amendments to existing directions

Criminal Procedure Act 1986 (NSW)

Draft s 293A(2A) Direction may be given by Judge if differences in complainant's account

(2A) A judge may, as the judge sees fit—

- (a) give a direction in this section at any time, and
- (b) give the same direction on more than one occasion during a trial.

Draft s 294(2A) Directions to be given by Judge in relation to lack of complaint in certain sexual offence proceedings

(2A) A judge may, as the judge sees fit—

- (a) give a direction in this section at any time, and
- (b) give the same direction on more than one occasion during a trial.

- 8.21 Sections 293A and 294 of the *Criminal Procedure Act* contain important statutory warnings and directions that apply to sexual offence trials.
- 8.22 The *Criminal Procedure Act* does not stipulate when judges should give these directions. While judges can give the directions early in a trial, they often give the directions towards the end of a trial.
- 8.23 We propose that the law should expressly permit judges to give and repeat these directions at any suitable time during a trial. This could encourage judges to use this power more often. It may also improve the effectiveness of these directions.
- 8.24 We also propose that the “warnings” in s 293A and s 294 be renamed “directions”. This is to be consistent with our proposed new jury directions (see above).

9. See, eg, *Criminal Code* (NT) s 192A; *Evidence Act 1929* (SA) s 34N; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C; *Jury Directions Act 2015* (Vic) s 46; UK, Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (July 2019, amended 1 August 2019) ch 20 [20-1].

9. Sexual intercourse, sexual touching and sexual act

- 9.1 Section 61HE currently applies to the offences of sexual assault, sexual touching and sexual act, and their aggravated offences.¹ We do not propose that this be changed.
- 9.2 However, we propose changes to the definitions of sexual intercourse, sexual touching and sexual act.

Recognising surgically constructed body parts

Proposal 9.1: Definitions

Crimes Act 1900 (NSW)

Draft s 61H(4) Definitions

(4) A reference in this Division to a part of the body includes a surgically constructed part of the body.

- 9.3 Currently, the definition of sexual intercourse includes the penetration of a surgically constructed vagina (s 61HA(a)).
- 9.4 We propose reforms to recognise that any reference to a body part in the definitions of sexual intercourse, sexual touching and sexual act includes a reference to a surgically constructed body part.²

Amending the meaning of sexual intercourse

Proposal 9.2: Meaning of sexual intercourse

Crimes Act 1900 (NSW)

Draft 61HA Meaning of “sexual intercourse”

For the purposes of this Division, **sexual intercourse** means—

- (a) the penetration to any extent of the genitalia or anus of a person by—
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or
- (b) the touching of any part of the genitalia or anus of a person with the mouth or tongue of another person, or
- (c) the continuation of sexual intercourse as defined in paragraph (a) or (b).

- 9.5 We propose reforms to make the definition of sexual intercourse clearer and more inclusive. Our draft s 61HA proposes reforms to this definition to cover:

1. *Crimes Act 1900 (NSW)* s 61HE(1).

2. We note that our draft proposes to apply this definition across *Crimes Act 1900 (NSW)* div 10. This may also require amendments to s 80A.

Consent in relation to sexual offences: Draft proposals

- the penetration of the genitalia of any person (not only of a “female person”, as s 61HA(a) currently states), and
- the touching of any part of the genitalia or anus of a person with the mouth or tongue of another person (this would replace the current s 61HA(b) and s 61HA(c), which refer to the introduction of a penis into a person’s mouth and to “cunnilingus” respectively).

These are not currently covered in the definition of sexual intercourse.

Amending the meanings of sexual touching and sexual act

New references to “continuation”

Proposal 9.3: Add references to continuation

Crimes Act 1900 (NSW)

Draft s 61HB(1A) Meaning of “sexual touching”

(1A) The continuation of sexual touching as defined in subsection (1) is also **sexual touching** for the purposes of this Division.

Draft s 61HC(1A) Meaning of “sexual act”

(1A) The continuation of a sexual act as defined in subsection (1) is also a **sexual act** for the purposes of this Division.

- 9.6 We propose that the definitions of sexual touching and sexual act be amended to include the “continuation” of sexual touching or of a sexual act. The definition of sexual intercourse already does something similar (s 61HA(d)).
- 9.7 This reform would mean that a person who withdraws consent to sexual touching or a sexual act would not be treated as consenting if these activities continue. It would reinforce our draft s 61HI(2), which clarifies that a person may withdraw consent, by words or conduct, to a sexual activity at any time before or during the activity.

Gender-neutral language

Proposal 9.4: Gender-neutral language

Crimes Act 1900 (NSW)

Draft s 61HB(2)(a) Meaning of “sexual touching”

(2) The matters to be taken into account in deciding whether a reasonable person would consider touching to be sexual include—

- (a) whether the area of the body touched or doing the touching is the person’s genital area, anal area or breasts, whether or not the breasts are sexually developed, ...

Draft s 61HC(2)(a) Meaning of “sexual act”

(2) The matters to be taken into account in deciding whether a reasonable person would consider an act to be sexual include—

- (a) whether the area of the body involved in the act is a person’s genital area, anal area or breasts, whether or not the breasts are sexually developed, ...

- 9.8 We propose a reform to make the definitions of sexual touching and sexual act more gender-neutral. This would involve removing the current references to the breasts of a “female person, or transgender or intersex person identifying as female” in s 61HB(2)(a) and s 61HC(2)(a).

Crimes Act 1900 (NSW)

61HE Consent in relation to sexual offences

(1) **Offences to which section applies**

This section applies for the purposes of the offences, or attempts to commit the offences, under sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.

(2) **Meaning of “consent”**

A person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity.

(3) **Knowledge about consent**

A person who without the consent of the other person (the alleged victim) engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if—

- (a) the person knows that the alleged victim does not consent to the sexual activity, or
- (b) the person is reckless as to whether the alleged victim consents to the sexual activity, or
- (c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.

(4) 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 steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
- (b) not including any self-induced intoxication of the person.

(5) **Negation of consent**

A person does not consent to a sexual activity—

- (a) if the person does not have the capacity to consent to the sexual activity, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent to the sexual activity because the person is unconscious or asleep, or
- (c) if the person consents to the sexual activity because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- (d) if the person consents to the sexual activity because the person is unlawfully detained.

(6) A person who consents to a sexual activity with or from another person under any of the following mistaken beliefs does not consent to the sexual activity—

- (a) a mistaken belief as to the identity of the other person,
 - (b) a mistaken belief that the other person is married to the person,
 - (c) a mistaken belief that the sexual activity is for health or hygienic purposes,
 - (d) any other mistaken belief about the nature of the activity induced by fraudulent means.
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Appendix A

- (7) For the purposes of subsection (3), the other person knows that the person does not consent to the sexual activity if the other person knows the person consents to the sexual activity under such a mistaken belief.
- (8) The grounds on which it may be established that a person does not consent to a sexual activity include—
- (a) if the person consents to the sexual activity while substantially intoxicated by alcohol or any drug, or
 - (b) if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
 - (c) if the person consents to the sexual activity because of the abuse of a position of authority or trust.
- (9) A person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity.
- (10) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.
- (11) In this section—
- sexual activity* means sexual intercourse, sexual touching or a sexual act.

Subdivision 1 Interpretation

61A–61G(Repealed)

61H Definitions

- (1) In this Division—
cognitive impairment—see section 61HD.
sexual act—see section 61HC.
sexual intercourse—see section 61HA.
sexual touching—see section 61HB.

(1A)(Repealed)

- (2) For the purposes of this Division, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person.
- (3) For the purposes of this Act, a person who incites another person to carry out sexual touching or a sexual act, as referred to in a provision of Subdivision 3, 4, 6, 7 or 11, is taken to commit an offence on the other person.
- (4) A reference in this Division to a part of the body includes a surgically constructed part of the body.

61HA Meaning of “sexual intercourse”

For the purposes of this Division, *sexual intercourse* means—

- (a) the penetration to any extent of the genitalia or anus of a person by—
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person,except where the penetration is carried out for proper medical purposes, or
- (b) the touching of any part of the genitalia or anus of a person with the mouth or tongue of another person, or
- (c) the continuation of sexual intercourse as defined in paragraph (a) or (b).

61HB Meaning of “sexual touching”

- (1) For the purposes of this Division, *sexual touching* means a person touching another person—
 - (a) with any part of the body or with anything else, or
 - (b) through anything, including anything worn by the person doing the touching or by the person being touched,in circumstances where a reasonable person would consider the touching to be sexual.
- (1A) The continuation of sexual touching as defined in subsection (1) is also *sexual touching* for the purposes of this Division.
- (2) The matters to be taken into account in deciding whether a reasonable person would consider touching to be sexual include—
 - (a) whether the area of the body touched or doing the touching is the person’s genital area, anal area or breasts, whether or not the breasts are sexually developed, or
 - (b) whether the person doing the touching does so for the purpose of obtaining sexual arousal or sexual gratification, or

Appendix B

- (c) whether any other aspect of the touching (including the circumstances in which it is done) makes it sexual.
- (3) Touching done for genuine medical or hygienic purposes is not sexual touching.

61HC Meaning of “sexual act”

- (1) For the purposes of this Division, *sexual act* means an act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual.
- (1A) The continuation of a sexual act as defined in subsection (1) is also a *sexual act* for the purposes of this Division.
- (2) The matters to be taken into account in deciding whether a reasonable person would consider an act to be sexual include—
 - (a) whether the area of the body involved in the act is a person’s genital area, anal area or breasts, whether or not the breasts are sexually developed, or
 - (b) whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification, or
 - (c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual.
- (3) An act carried out for genuine medical or hygienic purposes is not a sexual act.

61HD Meaning of “cognitive impairment”

For the purposes of this Division, a person has a *cognitive impairment* if the person has—

- (a) an intellectual disability, or
- (b) a developmental disorder (including an autistic spectrum disorder), or
- (c) a neurological disorder, or
- (d) dementia, or
- (e) a severe mental illness, or
- (f) a brain injury,

that results in the person requiring supervision or social habilitation in connection with daily life activities.

61HE(Repealed)

Subdivision 1A Consent and knowledge about consent

61HF Principles to be used in interpreting and applying Subdivision

Regard must be had to the following principles when interpreting or applying this Subdivision—

- (a) every person has a fundamental right to choose whether or not to participate in a sexual activity,
- (b) a person’s consent to a sexual activity should not be presumed,
- (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

61HG Application of Subdivision

- (1) This Subdivision sets out—
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Appendix B

- (a) the circumstances in which a person consents or does not consent to a sexual activity, and
 - (b) the circumstances in which a person knows or is taken to know that another person does not consent to a sexual activity.
- (2) This Subdivision applies to offences, or attempts to commit offences, against sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.

61HH Definitions

In this Subdivision—

consent has the same meaning as in section 61HI.

sexual activity means sexual intercourse, sexual touching or a sexual act.

61HI Consent generally

- (1) A person *consents* to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
- (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.
- (3) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
- (4) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.
- (5) A person who consents to a sexual activity with a person on an occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—
 - (a) that person on another occasion or
 - (b) any other person on that or any other occasion.
- (6) A person who consents to a sexual activity being performed in a particular manner is not, by reason only of that fact, to be taken to consent to the sexual activity being performed in another manner.

Note. For example, a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.

61HJ Circumstances in which there is no consent

- (1) A person does not consent to a sexual activity if—
 - (a) the person does not do or say anything to communicate consent, or
 - (b) the person does not have the capacity to consent, or
 - (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
 - (d) the person is asleep or unconscious, or
 - (e) the person participates in the sexual activity—
 - (i) because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs, or
 - (ii) because of coercion, blackmail or intimidation occurring at any time, or
 - (iii) because the person or another person is unlawfully detained, or
 - (iv) because the person is overborne by the abuse of a position of authority or trust, or

Appendix B

- (f) the person participates in the sexual activity because the person is mistaken about—
 - (i) the identity of the other person, or
 - (ii) the nature of the sexual activity, or
 - (iii) the purpose of the sexual activity (including about whether the sexual activity is for health, hygienic or cosmetic purposes), or
 - (g) the person is fraudulently induced to participate in the sexual activity.
- (2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.

61HK Knowledge about consent

- (1) A person is taken to know that another person does not consent to a sexual activity if—
- (a) the person actually knows the other person does not consent to the sexual activity, or
 - (b) the person is reckless as to whether the other person consents to the sexual activity, or
 - (c) any belief that the person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.
- (2) For the purposes of making any finding under this section, the trier of fact—
- (a) must have regard to all the circumstances of the case, including whether the accused person said or did anything to ascertain if the other person consented to the sexual activity, and if so, what the person said or did, and
 - (b) must not have regard to any self-induced intoxication of the accused person.

Subdivision 3 Directions to jury

292 Directions in relation to consent

- (1) This section applies to a trial of a person for an offence, or attempt to commit an offence, against section 61I, 61J, 61JA, 61KC, 61KD, 61KE or 61KF of the *Crimes Act 1900*.
 - (2) In a trial to which this section applies, the judge must—
 - (a) give the direction in subsection (5), and
 - (b) give any one or more of the directions in subsections (6)–(11)—
 - (i) if there is a good reason to give the direction, or
 - (ii) if requested to give the direction by a party to the proceedings, unless there is a good reason not to give the direction.
 - (3) It is not necessary that a particular form of words be used in giving a direction in this section.
 - (4) A judge may, as the judge sees fit—
 - (a) give a direction in this section at any time, and
 - (b) give the same direction on more than one occasion during a trial.
 - (5) **Assumptions about consent**
Direction—
The jury must carefully examine any assumptions that the jury may have about—
 - (a) non-consensual sexual activity and the people who experience it, and
 - (b) the circumstances in which people consent to a sexual activity.
 - (6) **Circumstances in which non-consensual sexual activity occurs**
Direction—
Non-consensual sexual activity can occur—
 - (a) in many different circumstances, and
 - (b) between different kinds of people including people who know each other.
 - (7) **Responses to non-consensual activity**
Direction—
 - (a) there is no typical or normal response to non-consensual sexual activity, and
 - (b) people can respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
 - (c) the jury must avoid making assessments based on preconceived ideas about how people should respond to non-consensual sexual activity.
 - (8) **Lack of physical injury, violence or threats**
Direction—
 - (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
 - (b) the absence of injury or violence, or threats of injury or violence, does not, of itself, mean that a person is not telling the truth about an alleged sexual offence.
 - (9) **Responses to giving evidence**
Direction—
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Appendix C

- (a) some people may show obvious signs of emotion and distress when giving evidence in court about an alleged sexual offence, but others may not, and
- (b) the presence or absence of emotion or distress is not, of itself, a reliable indicator of whether or not a person is telling the truth.

(10) **Behaviour and appearance of complainant**

Direction—

None of the following is, of itself, a reliable indicator that a person consents to a sexual activity—

- (a) the person's clothing or appearance,
- (b) the consumption by the person of alcohol or any other drug,
- (c) the person's presence in a particular location.

(11) **Family violence**

Direction—

A person may participate in sexual activity because of fear of harm in circumstances of domestic and family violence—

- (a) including where there has been an ongoing pattern of coercive and controlling behaviour, and
- (b) whether or not there was a threat of harm immediately before or during the sexual activity.

293A Direction may be given by Judge if differences in complainant's account

- (1) This section applies if, on the trial of a person for a prescribed sexual offence, the Judge, after hearing submissions from the prosecution and the accused person, considers that there is evidence that suggests a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability.
- (2) In circumstances to which this section applies, the Judge may direct the jury—
 - (a) that experience shows—
 - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time, and
 - (ii) trauma may affect people differently, including affecting how they recall events, and
 - (iii) it is common for there to be differences in accounts of a sexual offence, and
 - (iv) both truthful and untruthful accounts of a sexual offence may contain differences, and
 - (b) that it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.
- (2A) A judge may, as the judge sees fit—
 - (a) give a direction in this section at any time, and
 - (b) give the same direction on more than one occasion during a trial.
- (3) In this section—

difference in an account includes—

 - (a) a gap in the account, and
 - (b) an inconsistency in the account, and

Appendix C

- (c) a difference between the account and another account.

294 Directions to be given by Judge in relation to lack of complaint in certain sexual offence proceedings

- (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest—
 - (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or
 - (b) delay by that person in making any such complaint.
- (2) In circumstances to which this section applies, the Judge—
 - (a) must direct the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
 - (b) must direct the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and
 - (c) must not direct the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a direction.
- (2A) A judge may, as the judge sees fit—
 - (a) give a direction in this section at any time, and
 - (b) give the same direction on more than one occasion during a trial.
- (3)–(5)(Repealed)