This is a submission to the NSW Law Reform Commission's inquiry concerning consent in relation to sexual offences law. I have been doing research and publishing in areas relevant to this Inquiry since my book *Voices of the Survivors* (Spinifex 1994) to the present.

Bio

Professor Patricia Easteal AM, academic, author, advocate and activist, is a member of the School of Law and Justice at the University of Canberra and will be Emeritus Professor there from July 2018. She has published 18 books and over 180 journal articles and book chapters. Her research earned her the title of ACT Australian of the Year in 2010 and an Australian Honour 'for service to the community, education and the law through promoting awareness and understanding of violence against women, discrimination and access to justice for minority groups'. She was also finalist in the Australian Human Rights awards in 2012. In addition, her work as an educator earned Professor Easteal the *Australian Learning and Teaching Council Award for Teaching Excellence* (2008) and the *Carrick Institute Citation for Outstanding Contributions to Student Learning* (2007) for effective research-led learning approaches that engage law students in independent and critical inquiry into the complex ties between law, society and access to justice.

I would call your attention to a book by Simon Bronitt and me due to be published later in 2018, which has three chapters directly relevant to issues of consent and other chapters peripherally related to the terms of your Inquiry.

Simon Bronitt and **Patricia Easteal** (2018) *Rape Law in Context: Contesting the Scales of Injustice*. Under contract with Federation Press, Sydney.

I have divided the submission into six parts and have copied and pasted germane extracts from previous publications into each section. First I examine the cultural 'big picture' since it is my strong opinion that laws and law reform cannot be looked at in isolation to the culture. Terms such as 'reasonable' are translated through unconscious bias imbued lenses. In section II I turn to consent and see how this legal and social construct also must be examined within the bigger picture. Part III I include some published writing concerning mens rea and consent. Part IV consists of relevant sections from a co-authored article about the potential problematic areas of 61HA(3) of the *Crimes Act 1900* (NSW). Part V includes extracts from an article I co-authored which analysed the media presentation of the Luke Lazarus case. The final section (VI) drawn from my 2014 book with Anna Carline makes some general recommendations concerning sexual assault law reform.

I Big Picture: Holistic Analysis

Before looking at consent, we must look at the broader cultural context that can help us to understand how interpretation of constructs such as reasonable is problematic.

Patricia Easteal (ed) (1998) *Balancing the Scales: Rape, Law Reform and Australian Culture*, Federation Press, Sydney (p X).

> Neither the law nor attempts to reform it exist in isolation. They correlate with and contribute to a myriad of cultural structures, processes and institutions including gender roles and gender stratification. Picture a flower in which all the parts—the petals, the stamen, the ovules—represent the interacting parts of a complex system. The central part of the flower is the component of the system which one wants to investigate; in this case, rape law reform. The petals represent the various institutions or structures which affect it and are affected by it, such as the substantive law, legal culture, family, religion, political institutions, language and economic structures. Other parts of the flower symbolise the many different value and belief systems with one representing attitudes about sex and male and female sexuality and another the mythology and attitudes about rape. All the pieces are inter-connected with a complex feedback system. Thus, the sexual division of labour and the relative status of women to men and our legal system are each perceived as by-products of other parts which in turn contribute to yet more parts, including the construction and implementation of sexual assault law reform.

Patricia Easteal (2001) *Less than Equal: Women and the Australian Legal System*, Butterworths, Sydney (p 13).

> In subsequent chapters, we will be looking at the role of language in numerous contexts, such as domestic violence, rape and the persistence of masculine epistemology (words, taxonomies and interpretation of concepts) and a masculine style of verbal and non-verbal communication. Even when the language overtly neutralises gender, <u>the interpretation of legal standards like 'reasonable' and 'relevance' may continue to be gendered.</u> Although the terminology shifted from 'man' to 'person' (at least for a brief period), the change may have masked a persistence of a male standard of 'reasonable' and 'ordinary'.

Patricia Easteal (ed) (2010) *Women and the Law in Australia*, LexisNexis, Sydney (p 16).

> The result is that the assumptions of those with power prevail, producing systemic disadvantages to women and members of other minority groups.
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> There is a plethora of ways in which such biases permeate social institutions, including, of course, the various ones that

constitute the criminal justice system. Law must, like the other parts of the culture, be understood in its historical context and within 'the political, social and economic conditions, which have given it form and shape'. If we look at the parts of society as inter-linking (as we did for division of labour in Figure 1), we do see that our 'public' institutions continue to be dominated by males and we further comprehend that there are gender differences in personality traits and roles. It is evident that law may, in fact, not reflect women's experiences—instead seeing and treating women 'the way men see and treat women', which has been described as irrational, illogical, emotional and erratic. A male style of cognition seems to permeate the 'voice' of the law with its emphasis upon abstract rules instead of connectedness. In this way and others mentioned next, the law has been described aptly as speaking 'to men while it alienates and excludes women'.

Thus the socioeconomic separation of the public and private spheres is also, as expected, present in the legal system with a traditional reluctance of the players to get involved in what is seen as the private domain of the home and a dichotomy between 'real' criminal assault and what are private 'goings-ons' between a couple.

Additionally, we see other masculine values and ethos in the substance and process of law and among legal practitioners and players as expected within the cultural 'scenery'. For instance, <u>the legal landscape is dotted with legal concept signposts of objectivity, reasonableness, relevance and the ordinary.</u>

> Built upon tradition, and as gleaned from these pages, conservative and resistant to change, there are numerous ubiquitous legal concepts that have achieved a status of immunity from intervention ... At the core of the paradigm is the liberalist construct of the autonomous and rational individual. It is a male. And not just any bloke but an able-bodied (as defined by his peers) Anglo, middle class and certainly 'straight' type of fellow. Law's alleged objectivity and 'reasonable' or 'ordinary' person are embodied in that autonomous individual. With all of those supposed levellers on hand, the criminal justice playing field is constructed as a veritable flat terrain with equal access to justice for all.

However, the landscape is undulating and far from level, creating obvious obstacles in accessing justice for women. <u>Take 'relevance' for example. The concept of relevance does not exist in a legal vacuum; it is itself shaped by the discriminatory and stereotypical reasoning embedded in the substantive law.</u>

Anna Carline and Patricia Easteal (2014) *Domestic and Sexual Violence Against Women – Law Reform and Society: Shades of Grey.* Routledge, London (p 28).

> Gendered ideas and constructs therefore may continue to affect judges' and jurors' thinking unconsciously, especially in their interpretation of nebulous terms like 'relevance' and concepts such as 'reasonable'. Accordingly, in looking at medical negligence, Hum states that 'the reasonable person test, although seemingly gender neutral, has also long since been criticized because of its inherent application of male norms that exclude women'.
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> The legal test for harassment in the *Sex Discrimination Act 1984* (Cth) s 28 and in Australian state and territory equivalent laws is another example of how 'reasonable person' can be very open to diverse interpretation:
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> > Many commentators … argue that the reasonableness standard is itself gendered; that it is male experiences, views and perspectives that are embodied in the notion of reasonableness and how it is applied.
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> Determining reasonableness is about assessing whether the behaviour being complained about was sexual and unwelcome and whether the complainant was in fact humiliated and if so, the degree of distress experienced. It is often the identity, history and behavior of the complainant that is put in the spotlight and evaluated. An Australian study found that some judicial officers considered the complainant's sexual history or their engaging in sexual jokes as pertinent in determining whether behaviour was unwelcome and/or caused distress.
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> Such potential (biased) underlying subjectivity in what are often considered to be objective tests and/or neutral terms is emblematic of the indeterminacy of the law.

II About Consent

Before looking at the specific provision, it is important to understand how consent must be understood holistically.

I copy and paste from Chapter 8 in Anna Carline and **Patricia Easteal** (2014) *Domestic and Sexual Violence Against Women – Law Reform and Society: Shades of Grey.* Routledge, London (pp 155-167). This section looks at issues that can arise with consent provisions that are drafted using indeterminate language and interpreted through a dominant lens/perspective.

> **Myths, Stereotypes and Consent**
> Overwhelmingly, although not universally,[1] the pivotal element of the rape/sexual assault definition is the complainant's lack of

[1] See in particular the variety of approaches adopted amongst American States, explored in J.F. Decker and P.G. Baroni, 'Criminal Law: "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and

consent. Establishing that the sexual intercourse occurred without the complainant's consent is a major hurdle for the prosecution, particularly in non-stranger rape cases, which represent the majority of cases. The burden of proof means that the complainant is effectively treated as consenting unless the prosecution can prove otherwise beyond reasonable doubt, producing a significant focus on the complainant's mental state.[2] The prosecution must prove two elements: the physical - that the woman did not consent; and the mental - that the accused was aware that the complainant was not consenting, or might not be consenting, did not care about consent or had no reasonable grounds to believe in consent (depending on the jurisdiction). The focus of the trial then is on the physical element of consent with complicated judicial directions.[3] It is not surprising that an Australian mock jury study found jurors having trouble understanding the concept of consent, debating how consent is defined and when it should be assessed.[4] This too is no doubt in part a consequence of the beliefs that people continue to have about male and female sexuality and about what constitutes a *genuine* rape - a *true* negation of consent.

There is a view of female sexuality that women enjoy being 'coerced' or persuaded to engage in sexual intercourse. Therefore, the art of 'seduction' allows for any reservations on the part of the woman to be rightfully overcome by the persistence of the man. Women have been (and continue to be) expected to say 'no', and resist, struggle and incur other injuries as a consequence: 'because of the pervasiveness of [these] assumptions about "normal" heterosexual intercourse, it is little wonder that the law has traditionally presumed that a woman consents to sexual penetration unless she in some way strongly resists her assailant'.[5] Accordingly, in law, physical inaction was traditionally viewed by the courts as signalling consent; and conversely, 'the easiest way to show lack of consent is through signs of physical resistance'.[6] This has, however, now changed in the substantive law, if not in actual practice.

In England and Wales, the *Sexual Offences Act 2003* introduced a statutory definition of consent. Section 74 states: 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'. Significantly, a complainant is under no legal obligation to expressly signal her *non*-consent.[7] The Home Office at the time surmised that this definition was 'clear and unambiguous' and a

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Sexual Offence Assault Law', *Journal of Criminal Law and Criminology* 101(4), 2011, 1081-1169.

[2] Home Office, *Setting the Boundaries: Reforming the Law of Sexual Offences*, 2000, p. 23.

[3] P. Easteal and C. Feerick, 'Sexual Assault by Male Partners: Is the License Still Valid?', *Flinders Journal of Law Reform* 8(2), 2005, 185-207.

[4] N. Taylor and J. Joudo, *The Impact of Pre-recorded Video and Closed-circuit Television Testimony on Jury Decision-Making*, Research and Public Policy Series No. 68, Canberra: Australian Institute of Criminology, 2005.

[5] B. McSherry, 'Constructing Lack of Consent', in P. Easteal (ed.), *Balancing the Scales: Rape, Law Reform and Australian Culture*, Sydney: Federation Press, 1998, 26-40, p. 30.

[6] Ibid, pp. 35, 29.

[7] *R v H* [2007] EWCA Crim 2056.

significant improvement on the previous common law.[8] However, research with mock jurors clearly demonstrates that the definition is not readily comprehended.[9] As noted by Temkin and Ashworth, the words 'freedom' and 'capacity' 'raise philosophical issues of such complexity as to be ill-suited to the needs of criminal justice',[10] and barristers working in the field of rape commented that while the definition was perfectly explicable from a lawyer's perspective they doubted the extent to which it was comprehensible to jury members.[11]

In contrast, it was suggested that the main advantage of a statutory definition was that it reduced the likelihood of unnecessary appeals due to judicial 'ad libbing and anecdotal comparisons'.[12] Barristers also noted that a definition of consent was of little use in a case in which the complainant and the accused gave 'completely different versions about what happened in the privacy of a room somewhere',[13] a factor which tends to be pivotal in 'acquaintance rape' cases. While this opinion may appear unsurprising, the need to develop a definition of consent was premised, partially, on the increased reporting of acquaintance rape cases. It therefore seems problematic that in such cases the statutory definition is considered minimally useful. Moreover, in a review of the handling of rape cases, it was noted that the rationale behind the legal changes to the definition of consent *(and also the mens rea of rape, discussed below) was*:

> to move from the underlying presumption that victims are likely to be lying or were somehow negligent in letting rape happen towards a standpoint that sex without consent is rape and all other factors about a person making a complaint of rape are irrelevant to that central fact.[14]

However, studies of mock juries in England and Wales demonstrates that the reforms to the wording of the offence have not had this

[8] Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, 2002, p. 16.
[9] E. Finch and V. Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room', *Legal Studies* 26(3), 2006, 303-320.
[10] J. Temkin and A. Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent', *Criminal Law Review*, 2004 (May), 328-346, p. 336.
[11] A. Carline and C. Gunby, 'Barristers' Perspectives on Rape and the Sexual Offences Act 2003', *Criminal Law and Justice Weekly* 174(31), 2010, 472-474; C. Gunby, A. Carline and C. Beynon, 'Alcohol-related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and its Impact on Practice', *Journal of Criminal Law* 74(6), 2010, 579-600; A. Carline and C. Gunby, '"How an Ordinary Jury Makes Sense of it is a Mystery". Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003', *Liverpool Law Review* 32(3), 2011, 237-250.
[12] 'Barrister 11', as cited in Carline and Gunby, 'How an Ordinary Jury', above n 23, p. 241.
[13] Ibid.
[14] Baroness Stern, *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales*, London: Government Equalities Office and the Home Office, 2010, pp. 13-14.

impact, and stereotypes remain influential.[15] Women are frequently judged and considered to be blameworthy due to their behaviour, including the perception that they are responsible for being raped if they voluntarily got into bed with a man.[16] Moreover, 'some complain of the tendency to lecture women on what they should and should not do rather than making it clear to men that sex without consent is rape'.[17] This approach can be seen to maintain and perpetuate a victim blaming culture.

The ongoing concern regarding the seemingly entrenched nature of stereotypical opinions and their impact upon rape cases has led to the recent development, in England and Wales, of detailed model jury directions. These directions cover a range of 'mistaken assumptions' relating to factors such as the complainant's dress, the lack of violence, the ability to recall the events consistently, and the victim's demeanour in the courtroom.[18] The need to introduce such directions gives weight to the concerns that the substantive changes to the law of rape have failed to ensure justice. The extent to which such directions will, however, be influential in challenging stereotypes remains to be seen. Moreover, the opinion of counsel is that additional directions will only serve to further confuse a jury.[19]

Vitiating Consent

In most jurisdictions the law now explicitly sets out circumstances in which consent will be deemed to be absent.[20] With regards to Australia, Heath notes that reform has:

> expanded and clarified circumstances which vitiate consent through non-exhaustive lists of contexts in which consent is *not* legally recognised. … Every state and territory includes the use of force and threats of violence or force as vitiating consent. Some also include threats against third parties; intimidation, threats against property, threats of public humiliation, disgrace, or harassment; non-violent but 'intimidatory or coercive threats'; or 'threats of any kind'. Fear, intimidation or helplessness are included in every jurisdiction except Western Australia. Various forms

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[15] E. Finch and V. Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Finding of A Pilot Study', *British Journal of Criminology* 45(1), 2005, 25-38; L. Ellison and V. Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility', *British Journal of Criminology* 49(2), 2009, 202-219; E. Ellison and V. Munro, 'Of "Normal Sex" and "Real Rape": Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberations', *Social and Legal Studies* 18(3), 2009, 1-22.

[16] Opinion Matters, *Wake Up To Rape Research Summary Report*, Prepared for the Havens (Sexual Assault Referral Centres), 2010, p. 9.

[17] Stern, above n 26, p. 33.

[18] Judicial Studies Board, *The Crown Court Bench Book: Directing the Jury*, 2010, pp. 353-362.

[19] Carline and Gunby, 'Barristers' Perspectives'; Carline and Gunby, 'How an Ordinary Jury'**.**

[20] In Australia: *Crimes Act 1900* (ACT) s 67; *Crimes Act 1900* (NSW) s 61HA(6); *Criminal Code Act* (NT) sch 1 s 192(2); *Criminal Code* (Qld) s 348(2); *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Criminal Code Act 1924* (Tas) sch 1 s 2A; *Crimes Act 1958* (Vic) s 36; *Criminal Code* (WA) s 319(2).

> of fraud or mistake as well as abuse of authority or trust are recognised as vitiating consent in most jurisdictions. Unlawful detention vitiates consent in all jurisdictions except Queensland and Western Australia. Conditions which affect consciousness—ranging from being asleep, unconscious or intoxicated—are recognised as vitiating factors in all jurisdictions.[21]

In England and Wales, the *Sexual Offences Act 2003* brought the law more or less in line with Australia (and also Canada), by introducing a range of 'presumptions' regarding the absence of consent and the defendant's belief in consent. Section 75 details six circumstances under which it will be presumed that a) the complainant did not consent and b) the accused did not reasonably believe in consent. The list of circumstances include situations in which the violence or threats of violence had been used; the complainant was unlawfully detained, asleep or unconscious; and also cases involving surreptitious intoxication, whether via drinks or drugs. As originally drafted, the provision was to place a persuasive burden on the defendant, thus requiring him to convince the jury on the balance of probabilities that the complainant did consent and/or his belief in consent was reasonable. However, such a provision was met with opposition during the reform process and fears were expressed that it would potentially contravene the presumption of innocence, as secured under the *European Convention on Human Rights* art 6.[22] Consequently, the provision places an evidential burden on the defendant and the trial judge will decide not only whether a presumption has been triggered, but also whether the defendant has raised sufficient evidence in rebuttal. Commentators have surmised that little evidence would be necessary in order for a defendant to convince the judge that the presumption had been rebutted[23] and interviews with barristers support this contention.[24] Nevertheless, the Court of Appeal in *R v Cirrarelli* has made it clear that evidence beyond 'fanciful or speculative' is required to discharge the burden.[25] Research, however, suggests that the presumptions are not being utilized to their full extent and that significant confusion exists amongst practitioners as to their operation.[26] Consequently, the impact s 75 will have upon a trial may be significantly reduced compared to that which was originally proposed.

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[21] M. Heath, 'Women and Criminal Law: Rape', in P. Easteal (ed.), *Women and the Law in Australia*, Sydney: LexisNexis, 2010, 88-108, p. 97 (emphasis in original).
[22] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). See Temkin and Ashworth, above n 22, pp. 334-335.
[23] E. Finch and V. Munro, 'The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited', *Criminal Law Review*, 2004 (October), 789-802.
[24] Carline and Gunby, 'How an Ordinary Jury', above n 23; Gunby, Carline and Beynon, above n 23.
[25] [2011] EWCA 2665, [18].
[26] Carline and Gunby, 'How an Ordinary Jury', above n 23; Gunby, Carline and Beynon, above n 23.

Section 76 of the *Sexual Offences Act 2003* introduced conclusive presumptions; thus if the prosecution prove that the relevant circumstances existed, consent will be presumed to be absent and the jury directed to convict. Due to the severity of the section, the circumstances encompassed are very narrow. Under s 76 a presumption will only be trigged in two situations: a) the defendant intentionally deceived the complainant as to the nature and purpose of the act; or b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating someone personally known to the complainant. To a large extent, this reflects the previous common law approach to deception and consent, although historically impersonation was limited to pretending to be the complainant's husband or a fiancée. The restricted definition of 'nature and purpose' was confirmed by the Court of Appeal in *R v Jheeta*,[27] in which the court held that a deception was limited to misconceptions regarding the physical act that was taking place, thus following older cases such as *R v Flattery*[28] and *R v Williams*,[29] as opposed to the use of 'common garden lies' to persuade the complainant to agree to engage in sexual intercourse.

However, significant differences between Australia and England/Wales remain. In Australia not only are the circumstances listed as non-exhaustive, but also the lack of consent is conclusively determined if certain grounds are established, such as if the defendant used violent threats or terror, or unlawfully detained the complainant.[30] The Australian approach is stricter and also potentially wider ranging, and arguably this is the better approach. In England/Wales the law seems to have taken a step backwards. Previously if the complainant was unconscious at the time of the sexual intercourse, her lack of consent was established.[31] In such a case, under s 75 a defendant could technically argue that consent was present. Although, it appears clear that being unconscious will fall foul of s 74, as the complainant will lack the freedom and capacity to consent.[32] Despite these differences, however, a defendant in Australia is entitled to argue that he held a reasonable belief in consent (discussed further below). Hence, the Australian vitiation provisions fall somewhere in between the evidential presumptions in s 75 and the conclusive presumptions contained in *Sexual Offences Act 2003* s 76.

Intoxication and Consent

One issue in particular which has caused significant consternation are those cases in which the complainant was extremely, but voluntarily,

[27] [2007] EWCA Crim 1699. For a heated debated regarding the scope of s 76 and whether other forms of deception should be able to negate consent, see J. Herring, 'Mistaken Sex', *Criminal Law Review*, 2005 (July), 511-524; H. Gross, 'Rape, Moralism and Human Rights', *Criminal Law Review*, 2007 (March), 220-227; J. Herring, 'Human Rights and Rape: A Reply to Hyam Gross', *Criminal Law Review*, 2007 (March), 228-231.
[28] [1877] 2 QBD 410.
[29] [1923] 1 KB 340.
[30] For further detail see Heath, 'Women and Criminal Law', above n 33, and n 32 for the relevant consent provisions.
[31] *R v Larter* [1995] Crim LR 78; *R v Maloney* [1998] Crim LR 834.
[32] *R v Kamki* [2013] EWCA Crim 2335.

intoxicated and therefore potentially no longer retained the capacity to consent. As Heath has commented:

> intoxication has historically represented a particularly contentious limit on capacity to consent. In the past, case law suggested a complainant had to be 'insensible' through intoxication to be incapable of consent. The language of the reformed law suggests a different standard. Standards of free agreement and free and voluntary consent raise the implication that something short of unconsciousness may render the complainant incapable of consent. Some jurisdictions suggest that consent will not be present if the intoxicated person is incapable of freely and voluntarily agreeing to sex or unable to form a rational opinion about consent because of alcohol or drug use.[33]

With respect to the complainant's intoxication in NSW, for instance, the 2007 amendments in that State made clear that 'substantial intoxication' of the complainant is a ground 'on which it may be established that a person does not consent'.[34]

In England and Wales, the Court of Appeal considered the issue in *R v Bree*.[35] The appellant was initially convicted for rape after engaging in sexual intercourse with a complainant who was voluntarily intoxicated. His conviction was quashed, however, due to the trial judge's inadequate jury directions, on the basis that 'the jury should have been given some assistance with the meaning of capacity'.[36] The court stated that 'a drunken consent is still a consent', and that under s 74 the issue is whether the complainant 'has temporarily lost her capacity to choose whether to have intercourse'.[37] If this is so, she is not consenting. The court further commented that 'capacity to consent may evaporate well before a complainant becomes unconscious',[38] but emphasized that such an issue is 'fact-specific' and noted that people react differently to alcohol and an individual's tolerance is by no means consistent.[39]

In 2006 the Office of Criminal Justice Reform led a consultation to consider, amongst other matters, whether or not the s 75 presumptions should also encompass cases in which the complainant was voluntarily intoxicated. One third of the respondents agreed that s 75(2)(d) should be reformed to read: 'Where a person was asleep, unconscious or too affected by alcohol or drugs to give free agreement'. However, the Home Office decided against this

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[33] Heath, 'Women and Criminal Law', above n 33, p. 97.
[34] *Crimes Amendment (Consent - Sexual Assault Offences) Act 2007* (NSW) s 3, reflected in *Crimes Act 1900* (NSW) s 61HA(6)(a). This legislative reform is discussed fully in T. Dwyer, P. Easteal and A. Hopkins, 'Did She Consent? Law and the Media in New South Wales', *Alternative Law Journal* 17(4), 2012, 249-253.
[35] [2007] 2 Cr App R 13, [39].
[36] Ibid.
[37] Ibid, [32].
[38] Ibid, [34].
[39] Ibid, [35].

approach due to the fear of 'mischievous accusations'.[40] The myth of false allegations being commonplace has become a truth, with research indicating that people believe women are more likely to lie about being raped when they have been drinking.[41] Significantly, however, such beliefs are not substantiated by statistics.[42]
It is for the jury to decide whether the complainant was, due to her voluntary intoxication, incapable of consenting. However, research indicates that jurors tend to draw upon problematic stereotypes regarding appropriate female behaviour, especially in cases involving voluntary intoxication.[43] People tend to hold a female responsible if the rape/sexual assault occurred when she was voluntarily intoxicated. Therefore, jurors may be reluctant to find a defendant guilty, even if the facts seem to indicate that the complainant had lost the capacity to consent.[44]

Passivity Versus Activity: The Move Towards a Positive Consent Standard

Whilst the letter of the law no longer requires complainants to actively demonstrate their *lack* of consent, some Australian jurisdictions like Victoria and Tasmania have gone a step further and have moved toward a positive consent standard with a definition of 'free agreement' that makes it clear that if 'a person did not say or do anything to indicate free agreement … [it] is enough to show that the act took place without that person's free agreement'.[45] Such reform was intended to protect sexual autonomy by countering the community (and jury) beliefs that passivity could constitute consent.[46] According to Heath, however, free agreement definitions 'do little to explain consent and do not explain what might make agreement "free"'.[47]

A study of the implementation of the 1991 Victorian amendments identified six trials out of 27 in which there was a failure to direct juries that 'saying and doing nothing' ought not to be construed as an indication of consent in circumstances where this direction may have

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[40] Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims - Justice for Victims of Rape: Responses to Consultation*, 2007, p. 12.
[41] Opinion Matters, above n 28; E. Finch and V. Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Finding of A Pilot Study', *British Journal of Criminology* 45(1), 2005, 25-38; E. Finch and V. Munro, 'The Demon Drink and the Demonised Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants', *Social and Legal Studies* 16(4), 2007, 591-614.
[42] See the discussion in P. Rumney, 'False Allegations of Rape', *Cambridge Law Journal* 65(1), 2004, 128-158.
[43] Finch and Munro, 'The Demon Drink', above n 53.
[44] Ibid. See also Opinion Matters, above n 28, p. 9.
[45] *Crimes Act 1958* (Vic) s 37AAA(d). Also see *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a). Note that those participating in sexual activity are required to exercise a reasonable standard of care to ensure that consent is obtained: *Crimes Act 1900* (NSW) ss 61HA(3)(c)-(d). This implies that consent be actively communicated, though there is no requirement that this be verbal.

[46] Model Criminal Code Officers Committee, *Model Criminal Code: Sexual Offences Against the Person*, 1999, p. 265.
[47] Heath, 'Women and Criminal Law', above n 33, p 96.

been relevant.[48] More recent research found too that some judges were not advising jurors about the factors that could vitiate or negate consent and/or were adding commentary to their directions, which was sometimes not in synch with the aims of the sections.[49] An example would be a judge advocating blanket consent or implied consent by advising jurors that consent can be given at a time prior to the act. Therefore, in their 2004 report, the Victorian Law Reform Commission recommended additional changes to these statutes, such as deleting the word 'normally' from what was then s 37(1)(a). Accordingly, in 2007, the *Crimes Act 1958* (VIC) was amended to further define consent. This round of changes resulted in a mandatory jury direction stating that 'the fact that a person did not say or do anything to indicate free agreement to a sexual act … is enough to show that the act took place without their free agreement'.[50]

Similarly, in Canada, consent is defined as 'voluntary agreement',[51] and the move towards an affirmative consent standard was advanced in *R v Ewanchuk*,[52] with the Supreme Court's rejection of the defence of implied consent.[53] Nevertheless, as discussed by Gotell,[54] this move towards a 'yes means yes' model, does not necessarily promote feminist arguments relating to sexual autonomy and the harmful nature of coerced sex. Rather, judgments indicate the influence of a neoliberal governmentality, which is concerned with risk management and responsibilization. Whilst this may involve a reformulation of the good/bad victim dichotomy, which places less emphasis upon 'chastity and sexual propriety',[55] it nevertheless leads to the judgment and rejection of complainants who are perceived as having engaged in 'risky behaviour'. Consequently, 'the new "ideal" and valorized victim is a responsible, security conscious, crime-preventing, subject who acts to minimize her own risk'.[56] Whilst an affirmative consent model may be 'capable of providing enhanced legal recognition of women's sexual autonomy',[57] judgments of appropriate female behaviour may still endure.

Consent-Plus Model

An alternative approach, as developed by Munro,[58] is to adopt a 'consent-plus' model, under which 'something more than

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[48] M. Heenan and H. McKelvie, *Rape Law Reform Evaluation Project*, Report No 2: *The Crimes (Rape) Act 1991: An Evaluation Project*, Melbourne: Department of Justice, 1998, p. 298.
[49] Victorian Law Reform Commission, *The Sexual Offences: Final Report*, 2004.
[50] *Crimes Act 1958* (Vic) s 37AAA(d).
[51] *Criminal Code*, RSC 1985, c C-46, ss 273.1(1)-(2).
[52] [1991] 1 SCR 330.
[53] See further R. Ruparelia, 'Does No "No" Mean Reasonable Doubt? Assessing the Impact of Ewanchuk on Determination of Consent', *Canadian Woman Studies* 25(1/2), 2006, 167-172.
[54] L. Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women', *Akron Law Review* 41(4), 2008, 865-898.
[55] Ibid, p. 868
[56] Ibid, p. 879.
[57] Ibid, p. 872.
[58] See V. Munro, 'Concerning Consent: Standards of Permissibility in Sexual Relations', *Oxford Journal of Legal Studies* 25(2), 2005, 335-352; V. Munro,

“consensual minimalism” - that is a mere token of acquiescence or affirmation in the absence of force or deception - is required to render sexual contact permissible’.[59] Accordingly, ‘a token of consent must be accompanied … by a critical endorsement of a reciprocal benefit (be it emotional, relational, physical, or even material), which accrues as a result of engaging in sexual intercourse’.[60] As such, consent-plus recognizes ‘the influence of external pressures on personal self-determination’,[61] without at the same time constructing female consent to (hetero)sexual activity as a product of ‘false consciousness’.[62] Consequently, under a consent-plus model, a ‘yes’ is not taken at face value, but rather is contextualized and scrutinized, and may potentially go further than affirmative consent approaches in protecting and promoting women’s sexual autonomy.

Interestingly, as Munro notes, the definition of consent in England and Wales, with its references to choice, freedom and capacity, does lend itself to the application of a more expansive consent-plus model. She does identify though that there has been a ‘judicial reluctance … to flesh out the contours’ of *Sexual Offences Act 2003* s 74 in a manner which would ‘require jurors to abandon their typically minimalist baseline’.[63] Herein we can perhaps see a call for judges to ‘remember the future’. An ethical approach which recognizes the suffering of women and that the (ongoing) legitimation of sexual abuse requires judges to abandon their reticence and move towards engaging more productively with the legislative terms.

Two recent cases suggest, perhaps, a willingness within the High Court to further analyse the terms. Both decisions involved cases dealing with the procedural side of the system, as opposed to appeals against conviction. In *Assange v Swedish Prosecution Authority*,[64] the appellant unsuccessfully challenged a European Arrest Warrant. One of the grounds for his appeal was that the conduct alleged - that he had proceeded to have sexual intercourse with a woman without the use of a condom, after she had made it clear that the use of such was a prerequisite to her consent - would not amount to an offence in England and Wales. Whilst the High Court agreed that his conduct did not amount to a s 76 deception, limited as that section is to the ‘nature and the purpose of the act’, it was nevertheless held to be relevant in relation to s 74. Drawing upon Smith and Hogan, the court commented: ‘the deception in relation to the use of a condom would “be very likely to be held to remove any purported agreement

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‘Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy’, *Akron Law Review* 41(4), 2008, 923-956; V. Munro, ‘From Consent to Coercion: Evaluating International and Domestic Frameworks for the Criminalization or Rape’, in C. McGlynn and V. Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives*, Abingdon: Routledge, 2010, 17-29.

[59] Munro, ‘From Consent to Coercion’, above n 70, p. 22.

[60] Ibid.

[61] Munro, ‘Constructing Consent’, above n 70, p. 947.

[62] Ibid, p. 955.

[63] Ibid, p. 954.

[64] [2011] EWHC 2849.

by the complainant under s.74"'.[65] Similarly, in *R v Director of Public Prosecutions*,[66] a woman initiated a judicial review against the refusal of the Director of Public Prosecutions ('DPP') to prosecute her ex-partner for rape. Of particular note was an incident in which, against the explicit request of the applicant, the intervener declined to withdraw from the act of intercourse prior to ejaculation. The High Court notes: 'What *Assange* underlines is that "choice" is crucial to the issue of "consent"', and that due to his actions, the applicant 'was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based'.[67]

Rogers criticizes the approach adopted in *Assange,* on the basis that the only deceptions that should be relevant are those that fall within s 76.[68] It is not, however, clear why this should be the case. Whilst perhaps it is understandable that s 76 is narrowly construed, given that it is a conclusive presumption, why should the same apply to the general definition of consent in s 74? How can it be a matter of no relevance if a man engages in intercourse without a condom or ejaculates, in express contravention of a woman's wishes? Whilst Rogers argues that such issues are not relevant to sexual autonomy, but rather relate to concerns about sexual health and/or pregnancy, it is difficult to see how they can be so easily separated. If we are to take seriously a woman's sexual autonomy and her right to refuse to engage in sexual encounters which fail to offer a reciprocal benefit, these two decisions are a step in the right direction.

III About Mens Rea and Consent

From Anna Carline and Patricia Easteal (2014) *Domestic and Sexual Violence Against Women – Law Reform and Society: Shades of Grey.* Routledge, London (pp 167-170).

From Objective Recklessness to Strict Liability: Shades of Grey in the Mens Rea of Rape/Sexual Assault

The mens rea of rape is another area which has caused feminists consternation over the years. This was due in particular to the House of Lords' decision in *Director of Public Prosecutions v Morgan,*[69] which adopted a subjective test regarding the defendant's belief in consent. To this end, the prosecution had to prove beyond reasonable doubt that the defendant did not have an *honest* belief in consent. However, even if this *honest* belief was objectively unreasonable, the defendant still could avoid a conviction. Thus, under the *Morgan* test, the principle question for the jury in relation to this element was, 'What was in the mind of the accused?'. As the law of rape has been reformed over the years, a steady move away from this subjective test has emerged. In NSW, for example, it was argued that 'the law should ensure that a reasonable standard of care is taken to ascertain whether a person is consenting before embarking on what could be

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[65] Ibid, [89].
[66] [2013] EWHC 945.
[67] Ibid, [26].
[68] J. Rogers, 'The Effect of "Deception" in the Sexual Offences Act 2003', *Archbold Review* 4, 2013, 7-9.
[69] [1976] AC 182.

potentially damaging behaviour'.[70] Accordingly, if the prosecution proves there was no consent (physical element), even if the accused holds a belief in consent, the defendant may still be convicted if this belief is *unreasonable* under *Crimes Act 1900* (NSW) s 61HA(3)(c). This is an 'objective fault test'. Therefore, a defendant with an intellectual disability (not sufficient to give the person a mental illness defence) who engages in intercourse with a belief in consent, that no reasonable person could have held, could be found guilty. Similarly, during the reform process in England and Wales, a move away from the subjective test was promoted, amongst fears that 'proving that some defendants did not truly have an 'honest belief' in consent contributes in some part to the low rate of convictions'.[71] Under *Sexual Offences Act 2003* s 1(3), any belief in consent must now be reasonable. Moreover, the law places a level of responsibility on the defendant to ensure that the complainant was consenting, as the jury is entitled to take into account 'any steps A has taken to ascertain whether B consents'.[72]

When questioned with regards to the reformulated mens rea in England and Wales, barristers expressed opinions decisively in favour of the move away from the subjective test, echoing the perception that the honest belief approach problematically fostered injustice. Likewise, the move towards examining the behaviour of the defendant and requiring him to take appropriate steps was supported by counsel:

> I think it requires positive actions by a defendant and it's effectively saying, well, were you really paying attention to what this other person was doing? … I think that is quite important because what it is doing is saying that sex is to do with two individuals. And you can't focus on one, the person who is making the complaint; you've got to focus on the other as well.[73]

Nevertheless, the definition has been critiqued on the basis that it requires a jury to take into account 'all the circumstances' when determining whether the belief was reasonable.[74] One concern is that this contextualisation may problematically permit a jury to take into account stereotypical and sexist views regarding appropriate female behaviour when determining whether a defendant's belief was reasonable.[75] In *R v B*[76] the Court of Appeal held a delusional psychotic illness was not of relevance when assessing whether a belief in consent was reasonable, which was to be judged against objective standards.[77] The court commented that this was not to say that the 'personalities or abilities or the defendant' would never be

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[70] New South Wales Attorney General, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, 2007, p. 25.
[71] Home Office, *Protecting the Public*, above n 20, p. 17.
[72] *Sexual Offences Act 2003* s 1(2).
[73] Barrister 12, as cited in Carline and Gunby, 'How an Ordinary Jury', above n 23, p. 247.
[74] Temkin and Ashworth, above n 22.
[75] Ibid, p. 342.
[76] [2013] EWCA Crim 3.
[77] Ibid, [40].

taken into account,[78] for example a case in which a person of 'less than ordinary intelligence' is unable to read 'subtle social signals' or 'behavioural cues'.[79] In such a situation, beliefs 'might be judged by a jury not to be unreasonable on their particular facts'.[80] Hence, a level of discretion to direct the jury to take into account a defendant's characteristics remains. Furthermore, this contextualisation contained in s 1(3) appears to enable jurors to place undue emphasis upon the complainant's activity in the time frame prior to the sexual encounter. This has included drawing problematic inferences from behaviour such as flirting or inviting a person back for coffee after drinks.[81] The complainant's behaviour, therefore, remains the key focus during the trial as opposed to a more detailed analysis of whether the defendant adequately ensured she was consenting.
It is noteworthy, however, that the *Morgan* subjective test has not been universally rejected; for example it is still in force in Victoria. This is, perhaps, surprising given the adoption of the 'free agreement' definition of consent and the correlating recognition that silence cannot be taken to indicate consent in that State. It was recognized during the 2004 review of the law that the application of a subjective test was incompatible with the 'free agreement' definition, as it 'does nothing to discourage the *assumption* of consent in ambiguous situations'.[82]

At the other end of the spectrum, however, many of the code states appear to go beyond the imposition of an objective reasonableness test as they do not *per se* require the prosecution to prove that the defendant did not believe in consent: rape is an offence of strict liability as the prosecution only has to prove sexual intercourse without consent.[83] In these jurisdictions though, it is not the case that rape is an *absolute* liability offence as the defendant is still permitted to raise a defence that he made an honest and reasonable mistake as to consent: reasonableness in this context would require that the accused had turned his mind to the issue, usually by taking steps to ascertain consent, and had some basis for his belief. Moreover, he does not have a persuasive burden placed upon him. Rather there only needs to be some evidence that he held a mistaken belief in consent. In such a situation the burden is in fact placed on the prosecution to prove beyond reasonable doubt that the defendant did not indeed hold a reasonable belief in consent. Whilst, prima facie, this approach appears to be quite radical, especially in contrast to the *Morgan* test, the prosecution in many cases will still be required to prove legal fault.

Whilst the mens rea for rape has been the subject of heated debate both in Australia and England and Wales, the extent to which it is a

[78] Ibid, [41].
[79] Ibid.
[80] Ibid.
[81] Ellison and Munro, 'Reacting to Rape', above n 27. See also the discussion in Munro, 'Constructing Consent', above n 70, pp. 945-946.
[82] Victorian Law Reform Commission, above n 61, p. 412 (emphasis in original).
[83] See, eg, *Criminal Code Compilation Act 1913* (WA) App B s 325, where neither recklessness nor intent are included in the definition of sexual assault without consent.

decisive factor in rape cases is, however, debateable. Most defence lawyers rely upon arguing that there was consent, as it is a dangerous strategy for defence to argue mistaken belief. As a consequence, the key issue, especially in acquaintance rape cases, was that the sexual intercourse was consensual, and defences of mistaken belief are therefore relatively rare.

IV About Section 61HA(3) of the *Crimes Act 1900* (NSW)

Section 61HA(3) states that 'a person knows that the other person is not consenting to the sexual intercourse if the person had no reasonable grounds to believe the person is consenting.' I copy and paste a few particularly relevant pages from Tahlia Dwyer, **Patricia Easteal** and Anthony Hopkins (2012) Did She Consent? Law and the Media in New South Wales. *Alternative Law Journal* 17(4): 249–253.

> Research suggests that decisions about consent and guilt are formed outside the courtroom; preconceived attitudes are brought into the courtroom and ultimately impact on the decision-making process.[84] Determining whether the sexual act is consensual often comes down to a 'he said,' 'she said' debate.[85] With sexual assault allegations that involve alcohol consumption by either the complainant or the perpetrator, this may be even more pronounced.[86] Decision makers may rely upon pre-existing beliefs about consent and guilt shaped by perceptions about gender, alcohol consumption and sexuality such as the view that when a woman voluntarily becomes intoxicated and acts in a flirtatious or sexually promiscuous manner, she has thereby consented to any sexual activity that follows. She is seen to bear responsibility for what happens and the issue of consent becomes shrouded in victim-blame.[87]
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> Whilst data suggests that alcohol consumption does increase the likelihood of a female being sexually assaulted,[88] constructing it as a risk factor can inadvertently suggest that if the woman wasn't drunk she wouldn't have been raped. This risk perspective 'makes it possible to present female drinking

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[84] Natalie Taylor 'Juror Attitudes and Biases in Sexual Assault Cases' (2007) *Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, Canberra,* 3; Jessica Kennedy, Patricia Easteal and Caroline Taylor, 'Rape Mythology and the Criminal Justice System: A Pilot study of Sexual Assault Sentencing in Victoria' (2009) 10 *ACSSA Aware* 13,14.
[85] Office of the Director of Public Prosecutions & Australian Federal Police, 'Responding to Sexual Assault, the Challenge of Change' (2005) *Canberra Office of the Director of Public Prosecutions* 180.
The authors' 'gendered' language reflects our focus on the male perpetrator female victim paradigm.
[86] Taylor, above n 1, 3.
[87] Emily Finch & Vanessa E. Munro 'The Demon Drink And The Demonized Woman: Socio-Sexual Stereotypes And Responsibility Attribution Intoxicants'(2007)16(4) *Social & Legal Studies* 591,593.
[88] Antonia Abbey, 'Acquaintance Rape and Alcohol Consumption on College Campuses; How Are They Linked?' (1991) 39 *American Journal of College Health* 165, 166; Alan Berkowitz, 'College Men as perpetrators of Acquaintance Rape and Sexual Assault: A review of Recent Research'(1992) 40 *Journal of American College Health* 175, 181.

as the problem, perpetuate female blame beliefs, and trivialise rape while appearing non discriminatory'[89]. Moreover, it shifts the focus from the perpetrator and the steps he took, or failed to take, to ensure that he had sexual intercourse with consent.

The New South Wales Government, by more clearly defining consent and the relationship with alcohol in the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*, hoped to not only transform the way the legal system dealt with sexual assault, but further, to change how consent was defined in the community with public discourse about sexual assault shifting from a text replete with victim-blaming myths to a narrative that reflects the realities of sexual assault.[90] The NSW Attorney General, John Hatzistergos stated that the amendments were 'aimed at bringing about a cultural shift in the way sexual offences are investigated and prosecuted, and the attitudes of key participants within the criminal justice system.'[91] Of particular relevance to this paper was the specific inclusion of substantial intoxication as a basis for establishing that a person does not consent, and the removal of the potential for an accused to seek acquittal on the basis that they held an honest but unreasonable belief in the complainant's consent. The amendments focus attention on the alleged perpetrator and the reasonableness of the steps they took to ascertain whether consent was being freely and voluntarily given.

In the following paper we look at these provisions to better understand their potential to remove blame for rape from the victim, particularly an intoxicated victim. We then examine a sample of New South Wales print media to see whether these outdated views about sexual assault, alcohol and victim responsibility, although rejected by the legislature, continue to feature in this medium. Our rationale for focusing on the media: 'The national conversation about consent' is 'carried out in newspapers, online forums and TV panel shows, and informed by school sex education and public anti-violence campaigns.'[92] This 'national conversation', at least in theory, plays a crucial role in the success of any law reform by contributing to community perceptions about sexual assault. We are interested, therefore, in whether there is harmony or discord between the media reportage and the legislative amendments. And, in particular, we are interested in whether, in circumstances where a complainant was intoxicated, the 'conversation' is about steps taken by the alleged perpetrator to ascertain consent or about the risks taken by the complainant.

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[89] 54, A 'Too Drunk To Say No' (2010) 10(1) *Feminist Media Studies* 19,30.
[90] New South Wales*, Parliamentary Debates,* Legislative Counsel, 7 November 2007, 3584 (The Hon. John Hatzistergos).
[91] Ibid.
[92] Emily Maguire, 'It Takes Two', *Sydney Morning Herald* (Sydney) 20 November 2010.

The Legislative Changes to Consent

Prior to the 2007 amendments New South Wales, through its legislation, largely adopted the common law approach to guilt in sexual assault cases as established in *DPP v Morgan.*[93] The conviction of an accused depended on the prosecution being able to prove that the accused was aware, or at least aware of the risk, that the complainant was not consenting. Or alternatively, that the accused had simply not turned his mind to the issue of consent at all. [94] Where an accused honestly believed that the complainant was consenting, no matter how unreasonable this belief, he was entitled to be acquitted. It did not matter if this belief was a result of unjustified assumptions made by the accused about the complainant's consent, based on her intoxication, previous behaviour or otherwise. It did not matter if this belief was a result of the accused's own intoxication and his consequent inability to comprehend the unwillingness of the complainant. It did not matter if the accused took no steps to ascertain consent. The ultimate question for the jury was: did the accused genuinely hold a belief that the complainant was consenting? If so, or if there was a reasonable possibility that he held this belief, then he was not guilty. The reasonableness of his belief could only be taken into account to determine whether the accused actually held the asserted belief in consent.[95] This test was subjective in the sense that it was concerned with the state of mind of the accused,[96] not with holding the accused to any minimum socially accepted standard of sexual behaviour or communication with respect to consent.

It has been argued that such a subjective test 'allows men to adhere to outdated notions about sexual behaviour and female sexuality '[97] (such as the perception that women drinking alcohol are more sexually available and sexually promiscuous than a woman who has a glass of coke, for example).[98] Further, attitudes that distort the fundamental premise of consent, such as 'She didn't say no, so I thought she wanted it,' or 'She came home to my place, so I thought she wanted to

[93] [1976] AC 182; see, generally, *Banditt v R* (2005) 224 CLR 262 (Gummow, Hayne and Heydon JJ).
[94] *Banditt v R* (2005) 224 CLR 262, 269-270, 276 (Gummow, Hayne and Heydon JJ) accepting the respondent's submission and approving the trial judge's directions to the jury.
[95] That said, the unreasonableness of an asserted belief in the surrounding circumstances may well be the clearest indication of the actual state of mind of the accused: *Banditt v R* (2005) 224 CLR 262,276 (Gummow, Hayne and Heydon JJ).
[96] *Banditt v R* (2005) 224 CLR 262, 276 (Gummow, Hayne and Heydon JJ).
[97] Bernadette McSherry, 'Constructung Lack of Consent' in Easteal, P (ed), *Balancing the Scales: Rape, Law Reform & Australian Culture* (Federation Press 1998) 26, 39.
[98] W.H. George et al, 'Alcohol Expectancies and Post drinking Sexual Inferences about Women' (1995) 25 *Journal Applied Social Psychology* 164.

have sex,' still exist in our society.[99] Alleged offenders who held these genuine, but distorted beliefs about what constituted consent were able to assert their innocence, even in the face of proof that consent was not in fact given.[100]

To remedy this, the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* introduced an objective test to ensure that the law is able to 'adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct'.[101] Following the amendments an honest belief in consent is no longer sufficient to justify acquittal. An honest belief must be based on grounds which would be considered reasonable by community standards.[102] Section 61HA(3) provides that a person knows that the other person is not consenting to the sexual intercourse if the person had no reasonable grounds to believe the person is consenting. Further the amendments provide that when determining whether the person had reasonable grounds to believe consent had been given, the judge or jury must consider all the circumstances of the case, 'not including any self induced intoxication of the person'.[103] And, whilst what constitutes 'reasonable grounds' is a matter for a jury or judge, the amendments require that the trier of fact 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'. [104]

It is acknowledged that the introduction of an objective standard, requiring that an accused's belief in consent be in some way reasonable, did not break new ground in Australia. In particular a number of code states require that a mistaken belief as to consent be both honest and reasonable.[105] However, the focus here is on the New South Wales amendments and the reportage that followed.

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[99] Emily Finch & Vanessa E. Munro, 'The Demon Drink And The Demonized Woman: Socio-Sexual Stereotypes And Responsibility Attribution Intoxicants' (2007) 16(4) *Social & Legal Studies* 591, 593.

[100] Ibid; see also, *R v Wozniak* (1977) 16 SASR 67 (Bray CJ) for an early application of *DPP v Morgan* [1976] AC 182 and at 73 as to the point that that it is the belief in consent "[n]o matter how it is arrived at" that is determinative.

[101] New South Wales*, Parliamentary Debates,* Legislative Counsel, 7 November 2007, 3584 (The Hon. John Hatzistergos).

[102] *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007 (*NSW) s 61HA(6).

[103] *Crimes Amendment (Consent – Sexual Assault Offences) Act* 2007 (NSW) s 61HA(3)(e).

[104] *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) s 61(HA)(3)(d).

[105] *Criminal Code* (Qld) ss 24, 348; *Criminal Code* (WA) ss 24, 319(2); *Criminal Code* (Tas) ss 2A, 14; cf *Criminal Law Consolidation Act 1935* (SA) ss 47, 48; *Criminal Code* (NT) s 192(3); *Crimes Act 1900* (ACT) s54, *Crimes Act 1958* (Vic) s 38 where an honest belief in consent still negates guilt. But note s37AA *Crimes Act 1958* (Vic) which requires an explicit direction to the jury to consider the reasonableness of a belief in the determination of whether it was in fact held.

In effect, the law in New South Wales now requires those participating in sexual activity to exercise a reasonable standard of care to ensure that consent is obtained.[106] Requiring consideration of steps taken to ascertain consent necessarily implies that consent be actively communicated, though there is no requirement that this be verbal.[107]

We would note though that the requirement for a judge or jury to take into account 'all the circumstances of the case', whilst necessary, might well continue to permit stereotypical views about sexual assault to be considered. Each decision maker may determine what factors they themselves believe to be important.[108] As just mentioned, section 61(HA)(3)(d) does aim to ensure that jurors and judges do not use evidence of male perpetrators' intoxication to determine if they had reasonable grounds for their belief;[109] however, this contextualization could potentially enable jurors to place undue emphasis upon the complainant's behaviour in the time-frame prior to the sexual encounter.

Leaving aside the question of the state of mind of an accused, proof of guilt following the amendments continues to require that the prosecution prove that the complainant did not in fact consent. With respect to the complainant's intoxication, the amendments make clear that 'substantial intoxication' of the complainant is a ground 'on which it may be established that a person does not consent'.[110] Whilst no parameters are set for determining what level of intoxication will negate consent, it is apparent that the legislature intended this to be a matter for judge and jury to closely consider. Moreover, the complainant's level of intoxication will impact on the question of whether the accused had reasonable grounds for his belief that she was consenting.

Conclusion

Alcohol related sexual assault, mythology and consent provisions are all undoubtedly linked by assumptions about gender, sexuality and alcohol. Attitudes about risk,

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[106] *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) s 61(HA).

[107] L.A Remick,'Read Her Lips: An Argument for a Verbal Consent Standard in Rape' (1993) 141 *University of Pennsylvania Law Review* 1103, 51.

[108] Jennifer Temkin & Andrew Ashworth 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent', (2004)1(May) *Crim LR* 328, 342.

[109] *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) s 61(HA)(3)(d). Research suggests that in the past, evidence that the male perpetrator was intoxicated whilst the alleged sexual assault occurred was '*regarded as a mitigating circumstance warranting at least some clemency in judging his behaviour'*: K Stormo, A Lang, & Q Strizke, 'Attributions about Acquaintance Rape: The Role of Alcohol and Individual Differences'(1997) 27(4) *Journal of Applied Social Psychology* 279, 303.

[110] *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) s 61(HA)(6)(a).

responsibility and blame all feed into our legal system, and undeniably shape legal outcomes. [111] We have identified a discord between the legislative focus and print media narrative on sexual assault and consent. Legislation now emphasises the necessity for men to take steps to ensure they have sexual intercourse with consent whilst this emphasis is largely absent in the print media. Disturbingly, news reportage continues to at least occasionally put the emphasis in their stories on women and risk. Although both the Fairfax and the News Limited newspapers regular and guest opinion piece columnists largely reject the attitudes, which the *Crimes Amendment (Consent—Sexual Assault Offences) Act* (NSW) 2007 sought to reject, the underlying message of risk, identified in news articles, is concerning. The constant repetition of the link 'between female binge drinking and vulnerability to rape'[112] in these articles, allows the 'risk' message to be reinforced. The message is gendered and focused on the behaviour of the female rather than the male. There is a disconnect between legislative reforms intended spotlight the steps taken by alleged offenders, and the media risk message which continues to train the spotlight onto the victims' behaviour. Focusing on the victim and by making statements like men being 'full of testosterone' contribute to the old justification men cannot help themselves because of their basic biology, the 'potency' of this hormone and the catalytic actions of the women. Thus, long ago values, which we hoped were now archaic, still influence the debate on women's behaviour and men's lack of culpability in the twenty-first century.

Perhaps part of this 'disconnect' between the amendments and media portrayal can be attributed to the absence of a government-funded education program aimed at informing the community of the new definition of consent. Whilst the intention and purpose of the reforms was to change cultural attitudes, written law alone cannot do this.[113] The New South Wales legislative changes might have benefitted from a campaign like one run in Scotland. 'Not Ever' outlined the 'free agreement' requirement for consent and went on to discuss the prejudicial attitudes which the law aimed to reject.[114] One particular poster in this campaign sought to reject that idea that the idea that women who have been drinking are in some way responsible if they are raped or sexually assaulted. The poster included:

Drinking is not a crime. Rape is.

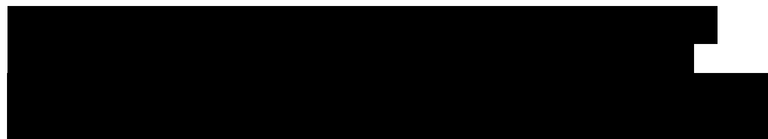
[111] Easteal, P, *Balancing the Scales: Rape, Law Reform & Australian Culture* (Federation Press 1998) 11.
[112] Meyer, above n, 54, 28.
[113] Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (2010) [24.95]
[114] Rape Crisis Scotland, 'Not Ever' (May 2010) <http://www notever.co.uk/>

No matter how drunk, no matter what she is wearing, no matter if you have already kissed – sex without consent is rape.
If there is any question over whether a woman has drunk too much to give consent, assume she hasn't given it.
Responsibility for rape will always lie with the rapist.

Sentiments like these reflect legislative reforms concerning consent and reinforce their message. They are conducive to the promotion of a general attitude within the community that sexual intercourse is fundamentally about the clear communication of consent. Here in Australia, the national conversation about sexual assault and consent will remain impoverished until the legislative intent is similarly reflected in the print media. Legislation alone is not enough to remove the barrier of myths and misconceptions which surround sexual assault cases. For law reform like the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* to be effective, there must also be a change in the cultural attitudes about rape, as reflected and projected through the media.

V About Luke Lazarus' Case

Michelle Dunne Breen, **Patricia Easteal**, Kate Georgina Sutherland, Cathy Vaughan (2017) Exploring Australian Journalism Discursive Practices in Reporting Rape: The Pitiful Predator and the Silent Victim. *Discourse and Communication*, DOI: 10.1177/1750481317697858. We attach the full article and copy and paste a few relevant paragraphs below.



VI Conclusion – Law Reform

From Anna Carline and Patricia Easteal (2014) *Domestic and Sexual Violence Against Women – Law Reform and Society: Shades of Grey.* Routledge, London (pp 253-254).

Law Reform Interpretation: Unwritten Social Sub-texts and Grey Laws

All of these positive initiatives and the substantive legal provisions function within a larger social context, as described in Chapters 1 and 2. As noted in the latter, at the societal level, there appears to be an unconscious gendered filtering of 'reality', which can militate against successful translation of legal remedies.

> Feminism has a theory of power: sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. … Each sex has its role, but their stakes and power are not equal. If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective.[115]

The existence of unwritten social sub-texts has been evident in our findings concerning women as defendants in intimate homicide matters, as victim witnesses of family violence, rape and stalking, and as parties in family law matters. Legal gatekeepers' educational and occupational sub-cultures often act to reinforce these gender biased beliefs and (mis)understandings about violence.[116] As a consequence, in civil and criminal remedies, police, prosecutors, magistrates and judges may invoke stereotypes in applying the law. Accordingly, research with mock jurors in England and Wales demonstrates that the reforms to the wording of the offence of rape have not affected the influence of stereotypical thinking.[117]

The English/Welsh and Australian laws we have examined in this book are riddled with indeterminate concepts like 'reasonableness', culminating in an indeterminate meaning of the sum of the parts. In the context of rape laws, consent and negation of consent are obvious examples. What is considered an 'improper' question is open to subjective assessment, as is the question of who is the 'vulnerable' or the 'special' rape victim witness. 'Unacceptable risk', 'apprehension' or 'fear', 'adverse impact', 'best interest', 'arduousness', 'reasonable grounds' and 'inequitable to disregard'

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[115] C. MacKinnon, *Toward a Feminist Theory of State*, Boston: Harvard University Press, 1989, pp. 113-114.

[116] There is heterogeneity by individual gatekeepers in response to these sorts of myths and in measurement of credibility and gender sensitive understanding. See, eg, P. Easteal and K. Judd, '"She Said, He Said": Credibility and Sexual Harassment Cases in Australia', *Women's Studies International Forum* 31(5), 2008, 336-344.

[117] See, eg: E. Finch and V. Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants', *Social and Legal Studies* 16(4), 2007, 591-614; E. Finch and V. Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room', *Legal Studies* 26(3), 2006, 303-320.

> are all terms in family law open to interpretation. That interpretation is of course very much affected by mediators', lawyers' and judicial officers' capacity to 'walk in the shoes' of the victim; whether they believe violence has taken place; and their perception of its seriousness…

> Minimizing may correlate with beliefs that reduce offenders' culpability and deflect, at least in part, the responsibility for the violence to the victims. Myths about false reporting/allegations, provocation and credibility **of victims are evident both in family violence and sexual assault.** An example: in England/Wales, sentence for a breach of an order can be reduced if there is perceived provocation by the victim. Further, corroboration warnings are still given in sexual assault trials in jurisdictions around the world. A Madonna/Whore dichotomy continues both in the perception of women who kill a violent partner and in construction of the *good* rape victim. The latter affects attrition and the outcome of arrests, prosecutions and sentencing.

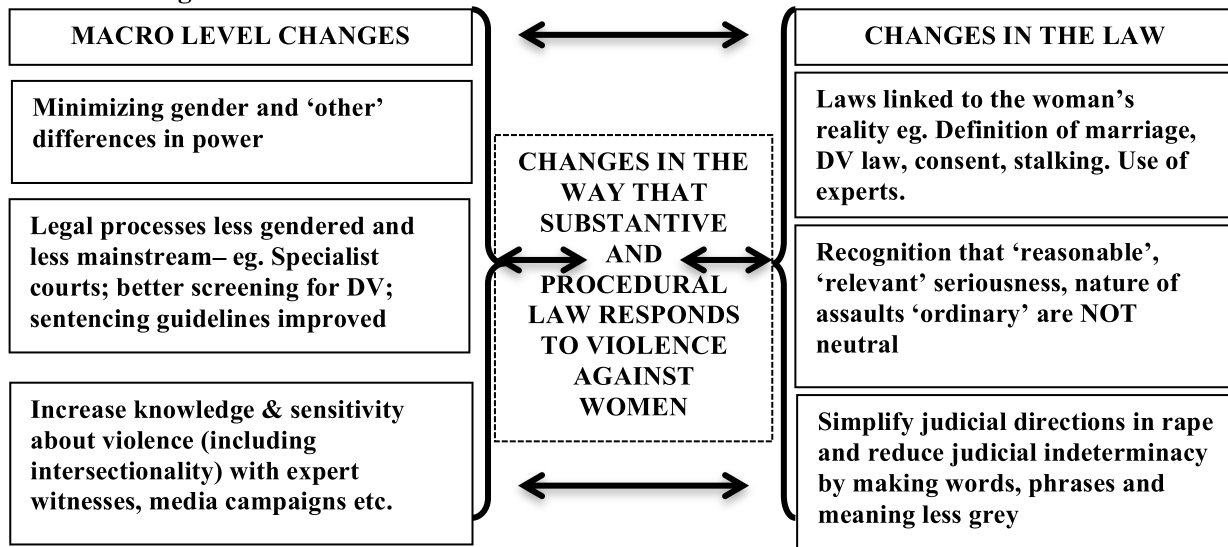
From Anna Carline and Patricia Easteal (2014) *Domestic and Sexual Violence Against Women – Law Reform and Society: Shades of Grey.* Routledge, London (p 256-262).

> Our comparative analysis thus indicates that the state's legal response to violence against women needs more work. From a holistic perspective (see Figure 1), we do recognize though that law is only a cog in the societal wheel and, as we have seen, its ability to effect change is therefore limited by society's institutions and values.

> changing the words on statutory pages alone will never be sufficient to overcome the competing, powerful, though unwritten social and legal sub-text which continues to be revealed in struggles over rape law reform.[118]

[118] M. Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape', in P. Easteal (ed.), *Balancing the Scales: Rape, Law Reform and Australian Culture*, Sydney: Federation Press, 1998, 13-25, p. 25.

Figure 1: An Holistic Model for Changing the Legal Responses to Violence Against Women



To address and improve the legal response to violence against women it is not just the laws that need to be reconceptualized and in some cases redrafted, but the cultural landscape requires a major redesign too. In fact, to remove or alter the gender bias in interpretation of law, the culture itself must become less gender biased. It is not only the gatekeepers and the legislators who need to better understand and to reconceptualize domestic violence and sexual assault but the community as a whole.

Some redrafting may be necessary. For example, reformulated provisions need to reflect an understanding that a purely 'objective' standard is inadequate in today's society. Our research has shown however that a purely 'subjective' test is also potentially misinformed and prejudiced. One possibility then would be legislative wording that reflects a two-tiered test with both objective and subjective components.

Additionally, wherever possible, added specifications could reduce the indeterminacy of the law and the possibility for ambiguity and (mis)interpretation. In Australian sexual harassment legislation, for example, the focus is on the individual's perception of the experience rather than the intention behind it. As we have seen, intention remains an important element in other types of crimes against women, such as rape - where the perpetrator can argue 'mistaken belief'.

Another example of possible legislative reform relates to the notion of consent in the law of rape and sexual assault. As we noted in Chapters 8 and 10, (mis)understandings concerning consent play a pivotal role in rape/sexual assault cases:

> [consent] creates difficulties for the jury (in interpreting its meaning), for the victim (in focusing the trial on her behaviour) and for the Crown (in endeavouring to overcome the stereotyped notions of consenting sexual relations from which the jury is likely to derive its interpretation of consent).[119]

Vitiation of consent could be defined more broadly with partner rape to include the type of intimidation that can be generated in a (violent) domestic relationship or a separate offence could be enacted for marital rape. Sexual assault provisions could be amended to include that consent is simply not relevant when actual bodily harm is involved. In cases of assault and even indecent assault, the courts do affirm that view.

As an alternative to defining, or redefining, consent, attention has been given to the development of offences in which the notion of consent is not so pivotal.[120] Such an approach, for example, has been adopted by some of those jurisdictions that operate a gradation scheme.[121] For instance, the law in Michigan outlines three degrees of sexual conduct offences and in none of these is the complainant's lack of consent mentioned. Rather, the law stipulates that in certain circumstances sexual activity is an offence, such as if the defendant is armed with a weapon, causes personal injury, or uses force or coercion.[122] The focus is on violence and rape/sexual assault is accordingly acknowledged to be a crime of violence. The prosecution, however, do not have to prove the absence of consent and the focus is on the conduct of the defendant, as opposed to the complainant. The presence of consent can be raised by the defence though,[123] hence the difficulties and 'shades of grey' regarding what amounts to consent may still impact upon the legal proceedings, and we can see how a space is provided for the resurrection of 'old norms'.[124] Moreover, disquiet has been expressed that gradation schemes such as Michigan fail to acknowledge that non-consensual sexual activity is in and of itself a harm, which should be criminalized. Whilst this may be remedied with the inclusion of an offence of non-consensual sexual conduct, as is the case in NSW,[125] this brings us full circle with how to deal with the problematic of consent.

It may well be, however, that there would be little practitioner support in England and Wales to develop the offences of rape and sexual assault 'without consent'. When questioned whether they

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[119] Criminal Law and Penal Methods Reform Committee of South Australia, *Rape and Other Sexual Offences*, Special Report, 1976*,* p. 24. See also J. Temkin, *Rape and the Legal Process*, Oxford: Oxford University Press, 2002, p. 166.
[120] See, eg, V. Tadros, 'Rape without Consent', *Oxford Journal of Legal Studies* 26(3), 2006, 515-543.
[121] See Temkin, above n 44, pp. 166-172.
[122] Mich Comp Laws § 750-520b(1) (1974). See ibid, p. 163.
[123] Temkin, above n 44, p. 172.
[124] Nourse, above n 22, p. 952.
[125] *Crimes Act 1990* (NSW) s 61(D).

could imagine reformulating the offence of rape in a manner which did not rely so heavily on consent, counsel invariably answered 'no'.[126] Whilst barristers recognized that consent was difficult to define, reconceptualising rape in a manner which moved away from focusing upon the complainant's lack of consent was considered illogical. For example, one barrister asserted: 'But I mean that's what rape is, isn't it?'; and another queried: 'well, what are you left with?'.[127] Thus, feminist law reformers frequently face a difficult struggle in order to unsettle and disrupt legal constructs which are often problematically assumed to embody common-sense and gender-neutral ways of being.

Reinterpreting Existing Laws

Laws already on the books and current practices can be made more suitable with recognition that gender, violence, and other specific life history variables are potential obstacles in accessing 'justice'.[128] Interpretation of any of these legal provisions must be underpinned with a better understanding of the victims' reality of domestic violence and rape. Expert witnesses can prove invaluable in helping decision-makers to provide this understanding.[129] Through showing the court exactly how an action or inaction which intuitively seems alien, does in fact fit within someone else's reality, the expert can redefine the following (and more) from the 'multi-faceted shoes of the accused',[130] and of the victim: *reasonable* or *ordinary* behaviour; *relevant* or *irrelevant* evidence; *proper* and *improper* questions; and (negation of) consent.

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[126] A. Carline and C. Gunby, '"How an Ordinary Jury Makes Sense of it is a Mystery". Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003', *Liverpool Law Review* 32(3), 2011, 237-250.
[127] Ibid, p. 242.
[128] Post-egalitarian feminists reject equality as the only goal of feminist legal theory and call for a more explicit focus on diversity. See M. Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, New York: Routledge, 1995.
[129] One example of a lack of understanding of both is eligibility for refugee status as a victim of domestic or sexual violence. See Australian Law Reform Commission, *Family Violence and Commonwealth Laws - Immigration Law*, Issues Paper 37, 2011, p. 95: 'Historically, applicants whose asylum claims are based on family violence have faced difficulties meeting the definition of a refugee in art 1A(2) of the Refugees Convention, both internationally, and in Australia'.
[130] P. Papathanasiou and P. Easteal, '"The Ordinary Person" in Provocation Law: Is the "Objective" Standard Objective?', *Current Issues in Criminal Justice* 10(3), 1999, 53-73, p. 64.