

29 June 2018

Commissioner  
NSW Law Reform Commission  
GPO Box 31  
Sydney NSW 2001

*By email: nsw-lrc@justice.nsw.gov.au*

Dear Commissioner,

**Consent in relation to sexual assault offences**

We write this submission in our capacity as academics at the Faculty of Law, University of Technology Sydney. We welcome the opportunity to submit to the inquiry into consent and knowledge of consent in sexual assault offences in NSW. In this submission we focus on the mens rea provisions for sexual assault set out in s 61HA(3) of the *Crimes Act 1900* (NSW), especially paragraphs (c) and (d) of that sub-section.

Yours sincerely

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Encls.

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# Submission

## Introduction

On 27 November 2017, the NSW Court of Criminal Appeal (NSWCCA) dismissed the Crown's appeal against the acquittal of Luke Lazarus for sexual assault (Appeal 2). As is well known, Lazarus was acquitted by Tupman J (sitting alone) following his retrial for sexual assault committed in May 2013. This retrial followed the NSWCCA's decision in February 2016 quashing his conviction by jury on the basis of a misdirection as to the meaning of s 61HA(3)(c) (Appeal 1).

In Appeal 2, however, the NSWCCA concluded that Tupman J had misdirected herself by failing to consider the provisions under s 61HA(3)(d). While this would have been grounds for another retrial, the NSWCCA concluded that:

an order for a re-trial would bring about a conclusion of the kind referred to by the Court in *Thomas* (No. 3), namely that it would give rise to oppression and unfairness. It follows that a consideration of all the relevant factors weighs in favour of this Court exercising its discretion not to order that the respondent be tried for a third time.<sup>1</sup>

On 7 May 2018, *Four Corners* reported on the case including interviews with the complainant, a friend with her on the evening of the sexual assault and her sister.<sup>2</sup> The political response was immediate, the NSW Attorney-General Mark Speakman referring the matter to the NSW Law Reform Commission. The Terms of Reference ask the Commission '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).'<sup>3</sup>

The NSW Attorney-General noted that the victim had 'been humiliated in an alleyway at the age of 18, she's had to tell her traumatic story in court, she's had to face two trials, two appeals,

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<sup>1</sup> *R v Lazarus* [2017] NSWCCA 27, [168] (Bellew J with whom Hoeben, CL and Davies J agreed).

<sup>2</sup> *I Am That Girl* (Australian Broadcasting Corporation, 2018) <<http://www.abc.net.au/4corners/i-am-that-girl/9736126>>.

<sup>3</sup> NSW Law Reform Commission, *Consent in Relation to Sexual Assault Offences: Terms of Reference* <[http://www.lawreform.justice.nsw.gov.au:80/Pages/lrc/lrc\\_current\\_projects/Consent/TOR.aspx](http://www.lawreform.justice.nsw.gov.au:80/Pages/lrc/lrc_current_projects/Consent/TOR.aspx)>.

and still, no final outcome ... From her viewpoint, the whole process has been, I imagine, just a huge disappointment.’<sup>4</sup> The Attorney-General added: ‘What this shows is that there’s a real question about whether our law in New South Wales is clear enough, is certain enough, is fair enough. That’s why I’ve asked the Law Reform Commission to look at the whole question of consent in sexual assault trials.’<sup>5</sup>

From the numerous trials and appeals in *Lazarus* it can be concluded that errors were made. But this is unsurprising given what appears to be a lack of clarity surrounding the interpretation of ss 61HA(3)(c) and (d)

In order to address this overarching issue, we divide our submission into the following parts. First, we provide some background to the debate concerning the interpretation of s 61HA(3)(c). Second, we consider the alternative ways that s 61HA(3)(c) has been, and may be interpreted, and how this proves a source of confusion. Third, we address the issue of how the evidential and legal burden operates for ss 61HA(3)(c) and (d). Finally, we consider whether other jurisdictions in Australia and overseas (for example Canada) may have a preferable approach to that of NSW.

### **Background to the 2007 amendments**

In November 2007, the *Crimes Amendment (Consent – Sexual Assault Offences) Act* (NSW) was passed (‘the 2007 amendments’). This Act made significant changes to provisions regarding both the conduct and fault elements of the crime of sexual assault under s 61I. Reforms included an overarching definition of consent as where the person ‘freely and voluntarily agrees to the sexual intercourse’,<sup>6</sup> alongside specific instances in which consent is or may be negated (such as where the person is asleep, unconscious or substantially intoxicated).<sup>7</sup>

In addition, the 2007 amendments retained the mens rea states of:

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<sup>4</sup> Lucy Carter and Louise Milligan, ‘NSW Attorney-General Calls for Review of Sexual Consent Laws Following Four Corners Program’ *ABC News* (online), 8 May 2018 <<http://www.abc.net.au/news/2018-05-08/nsw-attorney-general-calls-for-review-of-sexual-consent-laws/9734988>>.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Crimes Act 1900* (NSW) s 61HA(2).

<sup>7</sup> *Ibid* ss 61HA(4)–(7).

- a) the person knows that the other person does not consent to the sexual intercourse [knowledge];
- b) the person is reckless as to whether the other person consents to the sexual intercourse [which encapsulates reckless advertence and reckless inadvertence];<sup>8</sup>

but added a third aspect to the mental states that could constitute knowledge of non-consent for the purposes of sexual assault, namely:

- c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

Section 61HA(3)(d) further provided that the trier of fact (i.e. a jury or a judge disposing of a matter without a jury) must 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, but, not including any self-induced intoxication of the person (s 61HA(3)(e)).

Section 61HA(3)(c), read in conjunction with s 61HA(3)(d), was intended to override the ‘defence’ deriving from the House of Lords case of *DPP v Morgan* [1976] AC 182, whereby an accused’s honest (even if objectively unreasonable)<sup>9</sup> belief that the complainant had consented to sexual intercourse negated an accused’s intent to commit non-consensual sexual intercourse. Then NSW Attorney-General John Hatzistergos contended that the ‘Morgan defence’ did not ‘adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct’.<sup>10</sup> Or, as Rolfes has argued, if the defendant can rely on their honest, albeit unreasonable, mistaken belief that the victim was consenting, the more ‘insensitive, boorish, or self-delusional the male, the more likely that an acquittal will ensue’.<sup>11</sup> In addition, the Victorian Law Reform Commission found that the Morgan Defence undermined the communicative model for sexual relations and does not adequately protect sexual autonomy.<sup>12</sup>

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<sup>8</sup> See *R v Banditt* [2004] NSWCCA 208; *R v Kitchener* (1993) 29 NSWLR 696.

<sup>9</sup> Ibid. Lord Hailsham stated: ‘Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held’.

<sup>10</sup> New South Wales, *Parliamentary Debates*, 7 November 2007 3585 <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-39144>> (John Hatzistergos).

<sup>11</sup> Brian Rolfes, ‘The Golden Thread of Criminal Law —Moral Culpability and Sexual Assault’ 61 *Saskatchewan Law Review* 87, 88.

<sup>12</sup> Victorian Law Reform Commission, ‘Sexual Offences’ (Final Report, 2004) <[http://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Sexual\\_Offences\\_Final\\_Report.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Sexual_Offences_Final_Report.pdf)>.

## **Academic consideration of ss 61HA(3)(c) and (d)**

Very soon after the 2007 amendments, Dobinson and Townsley made the following observations:

In the Discussion Paper, it was further noted that the concept of recklessness in other jurisdictions ‘has either been removed or ameliorated by placing the onus on the accused to take reasonable steps to determine whether in fact consent has been given’. However, no other Australian jurisdiction, Canada, the United Kingdom or New Zealand have included both recklessness and an objective test in the one provision defining sexual assault or rape. Either they have excluded recklessness and included a requirement for reasonableness, or have included recklessness and have a separate section dealing with the objective requirement.<sup>13</sup>

Dobinson and Townsley went on to argue that s 61HA(3)(c) had introduced an object fault element albeit in conjunction with a subjective question as to an accused’s initial belief. With regard to the objective fault element Dobinson and Townsley questioned whether this created a negligence standard.<sup>14</sup> Further to this, they also suggested that s 61HA(3)(c), read in conjunction with s 61HA(3)(d), ‘inadvertently captures reckless indifference but alters the test that establishes this state of mind. The consequence of this interpretation is that the legal standard of reckless indifference is now redundant.’<sup>15</sup>

In 2016, Monaghan and Mason noted that the enactment of ss 61HA(3)(c) and (d) introduced reforms that were both novel and controversial, ‘raising difficult questions about how to interpret the amended law, whether it affected the pre-existing ways of satisfying the mental element, and what language ought to be used regarding the mental element in sexual assault.’<sup>16</sup> For them, such difficult questions remained. Monaghan and Mason considered that nine years on from the amendments, it was ‘worth asking: in light of the persistent problems in the criminal justice response to sexual assaults, and in light of the purposes of the legislation, how should we understand s 61HA(3)(c)?’

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<sup>13</sup> Ian Dobinson and Lesley Townsley, ‘Sexual Assault Law Reform in New South Wales: Issues of Consent and Objective Fault’ 32(3) *Criminal Law Journal* 152, 161.

<sup>14</sup> *Ibid* 162.

<sup>15</sup> *Ibid* 161.

<sup>16</sup> James Monaghan and Gail Mason, ‘Reasonable Reform: Understanding the Knowledge of Consent Provision in Section 61HA(3)(c) of the Crimes Act 1900 (NSW)’ (2018) 40(5) *Criminal Law Journal* 246, 247.

For Monaghan and Mason there were three interpretive options for s 61HA(3)(c). These were:

**Option 1:** Is the trier of fact convinced beyond reasonable doubt that, in all the circumstances of the case, the person had no reasonable grounds for believing that the other person was consenting? If yes, then the mental element is satisfied – the accused person is taken to know that the other person was not consenting.

**Option 2:** Did the defendant hold a belief that the complainant was consenting? If no, the mental element of the offence is made out, and the inquiry ends. If yes, was that belief based on reasonable grounds?

**Option 3:** Did the defendant hold a belief that the complainant was consenting? If no, the inquiry into the defendant’s mental state under s 61HA(3)(c) ends – but it ends because a finding of guilt based on s 61HA(3)(c) is foreclosed (rather than because the mental element has been made out). If yes, was that belief based on reasonable grounds?<sup>17</sup>

Ultimately, they concluded that Option 3 best represented ‘the state of the law as it currently stands.’<sup>18</sup> A reason given for this was that ‘[r]eading s 61HA(3)(c) as a two-step hybrid test provides a clear interpretation of the provision that realises the legislative intention of criminalizing *Morgan*-type cases, retains a commitment to the principle of *mens rea*, and leaves the law of recklessness unchanged, at least for now’.<sup>19</sup> Monaghan and Mason disagreed with the Dobinson and Townsley’s suggestions that reckless inadvertence had been made redundant and that a negligence standard had been introduced by s 61HA(3)(c) and (d). For Monaghan and Mason, ss 61HA(3)(c) and (d) introduced ‘some kind of constructive knowledge’ where ‘a defendant who (in all the circumstances of the case) has no reasonable grounds for a belief is taken to know that the other person does not consent to intercourse. But how a trier of fact ought to go about constructing a defendant’s knowledge is open to interpretation.’<sup>20</sup>

Whether the law required reform was not a consideration in their analysis. This is unfortunate because the very premise of their analysis is that s 61HA(3)(c) creates an additional and novel

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<sup>17</sup> Ibid 259.

<sup>18</sup> Ibid 261. They also contended that ‘the Bench Book should be amended in terms that reflect that reading of the legislation. Directions by trial judges that have followed the Bench Book in its current form should be recognised as subtly but importantly incorrect.’

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 249.

fault element for the offence of sexual assault, in addition, that is, to an accused knowing that the victim did not consent (s 61HA(3)(a)) or being reckless (s 61HA(3)(b), either advertently or inadvertently. They are not alone here; this is also reflected in the NSW Bench Book.

### **The NSW Bench Book's approach**

While Monaghan and Mason disagree with the Bench Book's apparent preference for their Option 2, it is significant to note the case law's regular adherence to it in terms of the directions as to knowledge.<sup>21</sup> It is worthwhile quoting the Bench Book's approach as it relates to ss 61HA(3)(a) and (c).

#### **3. Knowledge**

The Crown must prove to you, beyond reasonable doubt that [the accused] knew that [the complainant] did not consent.

It is [the accused's] actual knowledge of the lack of consent with which you are concerned. You might therefore ask how the Crown can prove that [the accused] knew that [the complainant] did not consent without an admission from [the accused] to that effect. The Crown asks you to infer or conclude from other facts that it has set out to prove, that [the accused] must have known and that [he/she] did indeed know that [the complainant] was not consenting [deal with the relevant evidence].

In a situation where [the complainant] does not in fact consent, [the accused's] state of mind at the time of the act of intercourse might be that [he/she] actually knew that [the complainant] was not consenting. That is a guilty state of mind for this offence. If the Crown satisfies you beyond reasonable doubt that this was the state of mind of [the accused] at the time of the act of intercourse, then the third element of the charge has been made out.

On the other hand, you may decide on the basis of the evidence led in the trial [*or if applicable and relied on by the accused*] that [he/she] might have believed [*the complainant*] was consenting to intercourse with [*him/her*]. Whether that belief

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<sup>21</sup> See, eg, *AM v The Queen* [2011] NSWCCA 237; *O'Sullivan v R*; *Flanders v R*; *Tohu v R & NRH v R* [2012] NSWCCA 45; *R v Lazarus* [2016] NSWCCA 52.



amounts to a guilty state of mind depends upon whether [*the accused*] honestly held it and, if so, whether the Crown has proved beyond reasonable doubt that there were no reasonable grounds for [*the accused*] to believe that [*the complainant*] consented. Therefore, the Crown must prove beyond reasonable doubt one of two facts before you can find the accused guilty, either:

**(a) that [*the accused*] did not honestly believe that [*the complainant*] was consenting, or**

**(b) even if [*he/she*] did have an honest belief in consent, there were no reasonable grounds for believing that [*the complainant*] consented to the sexual intercourse.**

It is for the Crown to prove that [*the accused*] had a guilty mind. It must eliminate any reasonable possibility that [*the accused*] did honestly believe on reasonable grounds that [*the complainant*] was consenting. Unless you find beyond reasonable doubt that the Crown has eliminated any such reasonable possibility, then you would have to find that this third element of the offence is not made out, and return a verdict of ‘not guilty’ of this charge [*refer to relevant arguments by the parties*].

In determining whether the Crown has proved that [*the accused*] actually knew that [*the complainant*] was not consenting to intercourse with [*him/her*] you must take into account what steps were actually taken by [*the accused*] to ascertain whether [*the complainant*] was consenting to intercourse. [See s 61HA(3)(d) *Crimes Act* 1900.]<sup>22</sup>

The Bench Book goes on to provide the following suggested direction where the Crown relies upon **recklessness** under s 61HA(3)(b) to prove the accused knew the complainant was not consenting:

I have already indicated that the Crown can prove [*the accused*] had a guilty state of mind in one of two ways:

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<sup>22</sup> NSW Judicial Commission, *Criminal Trial Courts Bench Book: Sexual Intercourse without Consent* (July 2016) <[https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual\\_intercourse\\_without\\_consent.html](https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual_intercourse_without_consent.html)>.

- either [*the accused*] actually knew that [*the complainant*] was not consenting, or
- even if [*the accused*] believed at the time that [*the complainant*] consented, [*the accused*] had no reasonable grounds for believing that [*the complainant*] consented to the sexual intercourse.

The Crown can also prove [*the accused's*] guilty state of mind if it proves that [*he/she*] was reckless as to whether [*the complainant*] consented to the sexual intercourse. If [*the accused*] was reckless, it is the law that [*the accused*] will be taken to know that [*the complainant*] did not consent to the sexual intercourse. [See s 61HA(3)(b) *Crimes Act 1900*.]

To establish that [*the accused*] was acting recklessly, the Crown must prove, beyond reasonable doubt, either:

- (a) [*the accused's*] state of mind was such that [*he/she*] simply failed to consider whether or not [*the complainant*] was consenting at all, and just went ahead with the act of sexual intercourse, even though the risk that [*the complainant*] was not consenting would have been obvious to someone with [*the accused's*] mental capacity if they had turned [*his/her*] mind to it, or
- (b) [*the accused's*] state of mind was such that [*he/she*] realised the possibility that [*the complainant*] was not consenting but went ahead regardless of whether [*he/she*] was consenting or not.

[This is a wholly subjective test. This has been referred to as advertent recklessness.]<sup>23</sup>

Our initial observation of the above directions is that a consideration of honest but mistaken belief under s 61HA(3)(c) follows on from actual knowledge under s 61HA(3)(a). This is then followed by a reference to the two types of recklessness under s 61HA(3)(b). Apart from the Bench Book's obvious departure from the alphabetical order in the legislation, it is unclear as to how this order of considerations is meant to arise in terms of an actual case; specifically, why should s 61HA(3)(c) be considered before s 61HA(3)(b)? Further, why should ss

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<sup>23</sup> Ibid.

61HA(3)(a) and (c) be considered together, while s 61HA(3)(b) is considered in isolation? It is convenient to use *Lazarus* here to demonstrate how s 61HA(3) should apply and how it appeared to be applied in that case.

From the facts of *Lazarus*, it is apparent that there was a lack of evidence to suggest that he actually knew the victim was not consenting. As such, recklessness under s 61HA(3)(b) became relevant. For reasons not obvious on the facts, this was not pursued by the prosecution even though arguably *Lazarus* ‘(a)...failed to consider whether or not [*the complainant*] was consenting at all, and just went ahead with the act of sexual intercourse, even though the risk that [*the complainant*] was not consenting would have been obvious to someone with [*the accused’s*] mental capacity if they had turned [*his/her*] mind to it, or (b) [*Lazarus*] realised the possibility that [*the complainant*] was not consenting but went ahead regardless of whether [*he/she*] was consenting or not.’

Ultimately, the focus for the prosecution in *Lazarus* was s 61HA(3)(c); there is a real question as to whether there was undue focus on s 61HA(3)(c) and insufficient consideration of s 61HA(3)(b). We return to this issue below.

### **The current interpretation of s 61HA(3)(c)**

As Monaghan and Mason note, the Bench Book suggests that s 61HA(3)(c) involves two stages. The first involves a question: Did the accused honestly but mistakenly believe that the victim was consenting? If the answer to this first question is ‘no’ (i.e. the prosecution proves beyond reasonable doubt that the accused did not honestly believe that the complainant was consenting), then according to the Bench Book, the accused is liable under s 61HA(3)(c). Monaghan and Mason disagree with the Bench Book’s position in this regard (and we would similarly disagree), stating that a negative response to question one merely negates the relevance of s 61HA(3)(c). The implication of a ‘no’ answer to this first question *should be* that the prosecution must still prove that the accused either knew (s 61HA(3)(a)) or was reckless (s 61HA(3)(b)) as to the fact that the victim was not consenting. The Bench Book, however, appears to assume that by answering this first question in the negative, knowledge of non-consent, and therefore mens rea, is automatically proven.

Monaghan and Mason do agree with the Bench Book where the answer to the first question (Did the accused honestly but mistakenly believe that the victim was consenting?) is ‘yes’. In such a circumstance, the second question arises: Was the belief based on reasonable grounds? If the answer is ‘no’, then Monaghan and Mason are in agreement with the Bench Book in that the accused is then liable. As already noted, however, Monaghan and Mason see this as a form of constructive knowledge.

When introducing s 61HA(3)(c) in 2007, the Government stated that this would be an ‘objective fault test’ so that a person will be ‘taken to know’ the complainant is not consenting where the person ‘has no reasonable grounds for believing that the other person consents to the sexual act.’<sup>24</sup> The Government also stated that ss 61HA(3)(c) and (d) would ensure:

a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.<sup>25</sup>

In this regard, s 61HA(3)(c) can be said to create a form of constructive knowledge, on the basis that the accused held an honest belief that they should not have so held. The Opposition (Liberal/National Coalition at that time) responded that s 61HA(3)(c) ‘effectively creates a new crime of *negligent* sexual assault’.<sup>26</sup>

Interestingly, Monaghan and Mason argue that s 61HA(3)(c) does not create a negligent fault element. This appears at odds, however, with their interpretation of s 61HA(3)(c) as giving rise to a form of constructive knowledge. In this regard, an accused is said to have knowledge where there are no reasonable grounds for their honest belief. Culpability accordingly arises on the basis that the accused held an honest belief that they should not have so held. Drawing on the *Nydam* test for criminal negligence (there considered in the context of negligent manslaughter) the accused’s holding of the mistaken belief therefore ‘involved such a great falling short of the standard of care which a reasonable [person] would have exercised and which involved

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<sup>24</sup> New South Wales, *Parliamentary Debates*, 14 November 2007 4181 <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-80134>>.

<sup>25</sup> New South Wales, *Parliamentary Debates*, 7 November 2007 3585 <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-39144>>.

<sup>26</sup> New South Wales, *Parliamentary Debates*, 14 November 2007 4175 (Greg Smith). New South Wales, *Parliamentary Debates*, 14 November 2007 4175 (Greg Smith).

such a high risk [of sexual intercourse without consent] that the doing of the act merited criminal punishment.’<sup>27</sup>

Read in conjunction with s 61HA(3)(d), a person’s failure to take any or appropriate steps to ascertain consent reinforces the conclusion as to a great falling short of the standard of care. On the current wording of ss 61HA(3)(c) and (d), we cannot see how there can be any alternative interpretation to this.

As such, s 61HA(3) must be interpreted as giving rise to three types of fault. A logical reading of the current provisions would be as follows:

- i) the accused had actual knowledge that the victim was not consenting (s 61HA(3)(a)); or
- ii) the accused was aware of the possibility that the victim was not consenting, but went ahead regardless (advertent recklessness) (s 61HA(3)(b)); or
- iii) the accused failed to consider whether the victim was consenting, and went ahead with the act of sexual intercourse, even though the risk that the victim was not consenting would have been obvious to someone with the accused’s mental capacity if they had turned their mind to it (inadvertent recklessness) (s 61HA(3)(b)); or
- iv) the accused had an honest belief that the victim was consenting but no reasonable grounds for that belief (s 61HA(3)(c)).

In addition, s 61HA(3)(d), must be considered in relation to (i) – (iv).

If this is the clear intention of the current provisions, and the consensus is to continue with this interpretation, then we would only add that there needs to be some legislative reform, as well as amendment to the directions provided by the Bench Book, to make this and the interrelationship between the paragraphs clearer.

A contrary view, which we would recommend – and which would also require legislative reform – is that the fault element for a serious crime such as sexual assault should maintain a traditional approach to intention and recklessness. As such, the potential inclusion of a

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<sup>27</sup> *R v Nydam* [1977] VR 430.

negligence fault element should be avoided. The provisions and structure of s 61HA(3) currently fail to achieve this. In this regard, and in line with other jurisdictions, what we propose is a reworking of ss 61HA(3)(c) and (d) within the context of recklessness.

### **A belief based on no reasonable grounds as a form of recklessness**

We have a concern that following the introduction of s 61HA(3)(c), the prosecution and judiciary have, in some cases, paid insufficient regard to the concept of ‘reckless inadvertence’; placed too much emphasis on s 61HA(3)(c); and been confused as to how the concepts of intention, recklessness and ‘honest belief ... but no reasonable grounds’ interrelate. Significantly, this was foreshadowed at the time of the amendments, Shadow Attorney-General Greg Smith stating:

The problem is that negligence is being mixed in with the subjective standards of actual intention or recklessness. It is hard enough at the moment with intention and recklessness mixed together. ‘Recklessness’ can mean that it is not given any thought; one just proceeds willy-nilly with the act without giving a moment's thought to whether a woman is consenting, or the person might have some doubt about it but goes ahead anyway. That is an example of two types of recklessness. When that is mixed up with intention it causes confusion. Including that a person has no reasonable grounds for believing that the other person has consented creates a very confusing summing-up.<sup>28</sup>

This submission argues that the offender who has no reasonable grounds for believing that the victim was consenting (s 61HA(3)(c)) given the circumstances and lack of steps taken to ascertain consent (s 61HA(3)(d)), will in most cases be reckless. What s 61HA(3)(c) currently contemplates, as supported by both the Bench Book and Monaghan and Mason, is a person who honestly believes that the victim is consenting but is negligent in holding such beliefs. If this is proven then such a person is held to have known that the victim was not consenting even though it has been established that they, in fact, did not know this. Such an interpretation is problematic, to say the least.

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<sup>28</sup> New South Wales, *Parliamentary Debates*, 14 November 2007 4175 (Greg Smith).

We argue that the preferred approach is that the person who is proven to have no reasonable grounds for holding their belief, likely combined with a lack of appropriate steps to ascertain whether the victim was consenting, is reckless in holding such a belief. As with the concept of recklessness inadvertence, the conclusion is that they should have known that the complainant was not consenting; or as with the concept of reckless advertence, an accused who formed a mistaken belief as to the victim's consent where consent is at all ambiguous would have turned their mind to the possibility that the accused might not be consenting. To conclude otherwise would be for the criminal law on sexual assault to recognise the potential existence of an accused who holds honest but irrational beliefs.

The facts of *Lazarus* again provide an example of how this might work. In terms of Lazarus's own testimony, he did turn his mind to whether the victim was consenting but concluded that she was. His judgement may have been clouded by alcohol but this is excluded under s 61HA(3)(e). In assessing the reasonable grounds for his belief, there was evidence that consent was ambiguous. Specifically, it was noted that there was no positive affirmative consent. Additionally, the victim stated that she wanted to go back to her friend and she had pulled her stockings and underwear up when he initially pulled them down. Such evidence, as concluded at both trials and on appeal, proved the actus reus of non-consent. As noted above, the NSWCCA in Appeal 2 concluded that Tupman J gave no consideration to s 61(3)(d) and as such any steps taken by Lazarus to ascertain whether the victim was consenting to the sexual intercourse. [REDACTED]

Such a conclusion is strengthened by the analysis of Vandervort with reference to the Canadian *Criminal Code*. Vandervort argues that where any individual asserts a belief that the other party is a willing participant, but 'who knows that communication of consent (that is, voluntary agreement, by words or conduct) is *ambiguous*',<sup>29</sup> then the defendant 'can hardly be said to lack awareness (in the absence of incapacity) of that fact.'<sup>30</sup> In other words, in a number of

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<sup>29</sup> Lucinda Vandervort, 'Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault' (2004) 42 *Osgoode Hall Law Journal* 625, 643.

<sup>30</sup> *Ibid.*

cases where an accused says that they believed that the complainant consented where consent was ambiguous, there will be a strong case that the accused actually turned their mind to the possibility that the complainant did not consent (*recklessly advertence*). Likewise, Vandervort argues that an ‘individual who perseveres without inquiry’ who is aware of reason to suspect that consent was not freely and voluntarily communicated is ‘liable to be convicted on grounds of wilful blindness’<sup>31</sup> (*reckless inadvertence*).

In sum, a person who is proven to have no reasonable grounds for holding their mistaken belief that the other person was consenting, where there is a lack of steps to ascertain whether the person was consenting, is likely to satisfy the mens rea element of recklessness.

### **The interpretation of ‘no reasonable grounds’**

The phrase ‘no reasonable grounds’ may itself be a source of confusion. For example, what if the accused had just one or two reasonable grounds for believing that the complainant was consenting, but the other grounds are unreasonable? How is a trier of fact to evaluate such a situation? This problem can again be illustrated via the facts and determination of legal issues in *Lazarus*. When considering any ‘reasonable grounds’ for Lazarus’s mistaken belief that the complainant was consenting to sexual intercourse, Tupman J apparently took into account evidence of a witness for the defence, who stated that she had ‘had anal sex with guys knowing them just that night’. Judge Tupman stated that this witness’s evidence gave ‘objective insight into contemporary morality’.<sup>32</sup> Her Honour also took into account the fact that the complainant had gotten on all fours and arched her back after Lazarus told her to do so as a ground which ‘made him *think* that she was trying to assist him to penetrate her vagina’ (emphasis added). Judge Tupman also considered the complainant’s ‘pushing back towards him and forward’ as indicating to Lazarus that she consented to sexual intercourse.<sup>33</sup> And yet, as noted above, other facts clearly showed that the complainant did not consent.

With these facts in mind, it is problematic if the phrase ‘no reasonable grounds’ is taken as indicating that as long as the defendant had *just one* reasonable ground for their mistaken belief,

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<sup>31</sup> Ibid.

<sup>32</sup> *R v Lazarus* (Unreported, District Court of NSW, Tupman J, 4 May 2017) 67, 72.

<sup>33</sup> Ibid 37.



even in the face of many unreasonable grounds, this will suffice to suggest a reasonable possibility that the ‘mental state’ in s 61HA(3)(c) is not made out. An alternative position would be that the trier of fact must evaluate whether any reasonable grounds relied upon by the defendant to demonstrate their belief that the other person was consenting are so outweighed by grounds demonstrating otherwise to render any ground relied upon by the defendant unreasonable. To remedy this issue, an alternative phrasing to s 61HA(3)(c), is that: ‘the accused had an unreasonable belief that the victim was consenting’. Alternatively, there could be a positive requirement that where a defendant asserts that they honestly believed the complainant was consenting, that belief must have been based on reasonable grounds/reasonable. In any case, it is worth noting Berliner’s warning that ‘by treating a mistake of consent as reasonable unless there is overwhelming evidence to the contrary’ courts and defendants may be able to ‘use the reasonable belief defense to effectively reinstate the resistance requirement’ (i.e. the requirement that a complainant must have physically resisted to the sexual intercourse to indicate non-consent).<sup>34</sup>

### **Do ss 61HA(3)(c) and (d) protect victims against distorted views about sexual conduct?**

Due to the gaps and ambiguities in ss 61HA(3)(c) and (d), they do not in their current form and in the absence of any clear judicial directions or legislative notes adequately protect victims against ‘distorted views about appropriate sexual conduct’, nor do these provisions adequately ‘endorse the communicative model for sexual relations.’ Dobinson and Townsley contended in 2008 that ‘the policy’ of ss 61HA(3)(c) and (d) read together was clear, namely: ‘it is no longer acceptable for a person not to have turned his or her mind to the issue of consent. There must be objectively reasonable grounds on which the person’s belief in consent is formed, ergo, they must take positive steps to ascertain consent.’ Unfortunately, however, ss 61HA(3)(c) and (d) have not always been interpreted to fulfil this policy. In *Lazarus* for example, Tupman J appeared to focus on instances of ‘submission’ by the complainant as providing reasonable grounds for the defendant’s belief that she had consented. These facts included that the complainant did not pull up her underwear the second time that Lazarus had pulled them down, and her ‘getting onto all fours and arching her back as requested’.<sup>35</sup> Thus the judge appeared

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<sup>34</sup> Dana Berliner, ‘Rethinking the Reasonable Belief Defense to Rape Note’ (1990) 100 *Yale Law Journal* 2687, 2702.

<sup>35</sup> *R v Lazarus* (Unreported, District Court of NSW, Tupman J, 4 May 2017) 36.

to place an onus on the complainant to positively indicate her lack of consent, as opposed to placing the onus on the accused to take positive steps to ascertain affirmative consent.

On this issue, we note that s 61HA(3)(d) mandates that a decision-maker consider ‘any steps taken by the person to ascertain whether the other person consents to the sexual intercourse’ when determining whether the mental element for sexual intercourse is present. However, s 61HA(3)(d) does not stipulate that an accused ‘*must* take steps to ascertain whether the other person consents to the sexual intercourse’. In contrast, the Canadian Criminal Code provides that an accused cannot assert as a ‘defence’ that they ‘believed that the complainant consented to the activity’ where ‘(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting’. In other words, the Canadian Criminal Code provides that where no reasonable steps were taken to discover whether consent was real and voluntary, an accused cannot rely on an honest but mistaken belief that the victim was consenting.

### **An evidential burden of proof**

There is a pertinent question as to what burden and standard of proof should operate when an accused asserts an honest belief that the complainant consented to sexual intercourse (s 61HA(3)(c)). This question has not yet been the subject of adequate judicial inquiry in the context of the NSW provisions. It is currently assumed that the prosecution must establish to the criminal standard of beyond reasonable doubt that i) the accused did not have a genuine belief and, ii) that there were no reasonable grounds for that belief, and there is no reference to any evidential burden borne by the accused. The Bench Book, while unclear, appears to suggest this and this was also the approach taken by the District Court in *Lazarus*.<sup>36</sup>

The contrary view, which we espouse, is that an accused should bear an evidential burden to suggest a reasonable possibility of both i) and ii), and then the burden shifts back to the prosecution to disprove s 61HA(3)(c) beyond reasonable doubt. At common law there is a clear precedent for this in terms of the mens rea element of claim of right for larceny and the actus reus element of voluntariness. Under the offence of larceny in NSW (s 117 of the *Crimes Act*

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<sup>36</sup> *R v Lazarus* (Unreported, District Court of NSW, Tupman J, 4 May 2017).

1900), an accused who asserts a claim of right to the taking of the property of another bears an evidential burden to raise this as a reasonable possibility.<sup>37</sup> This is confirmed in the Bench Book where it says that '(ix) It is for the Crown to negative a claim of right where it is sufficiently raised on the evidence, to the satisfaction of the jury.'<sup>38</sup>

There is also common law authority in support of this proposition with regard to where an accused raised an honest belief that the complainant was consenting as a 'defence' to sexual assault. In *R v Tolson*, the accused bore the evidential burden of establishing whether evidence of belief on reasonable grounds is sufficient to justify the defence being put to the jury. If the court ruled that the evidential burden had been satisfied by the accused, the Crown assumed the probative burden to satisfy the jury that the defendant in fact either had no such belief or had no reasonable grounds for entertaining it.<sup>39</sup>

### **Other possible models/approaches**

From an Australian perspective, the current approach in South Australia provides an example of how recklessness can encompass a belief based on unreasonable grounds. Under s 48 of the *Criminal Law Consolidation Act 1935* (SA), a person is guilty of rape where 'the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be). Reckless indifference is defined under s 47, so that a person is 'recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act', if he or she:

- (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
- (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or

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<sup>37</sup> *R v Fuge* (2001) 123 A Crim R 310 at 314–315.

<sup>38</sup> NSW Judicial Commission, *Criminal Trial Courts Bench Book - Offences: Larceny* (March 2005) [5–770] <<https://www.judcom.nsw.gov.au/publications/benchbks/criminal/larceny.html>>.

<sup>39</sup> *R v Tolson* (1889) 23 QBD 168; discussed in *DPP v Morgan* [1976] AC 182.

- (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

As argued above, the person who forms a belief that the victim is consenting where the circumstances of the consent are ambiguous must have logically also given thought to and therefore been aware of the possibility of non-consent. As such a failure to take reasonable steps to ascertain whether there was consent, or whether it had been withdrawn, constitutes recklessness. If a person was found to have not given thought to it in either way, or has refused to turn their mind to the possibility of non-consent, then surely s47(c) applies, this being the equivalent of reckless inadvertence under s 61HA(3)(b).

The approach taken in Canada also provides some potential guidance. This is also significant because the 2007 amendments were to a large extent based on the Canadian model.

The Canadian provisions regarding the mental elements for sexual assault are arguably more coherent than those under s 61HA(3). In this regard, s 273.2 of the Canadian Criminal Code provides:

It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
- (i) self-induced intoxication, or
  - (ii) recklessness or wilful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

It is arguable that this provision better achieves the policy objective of ensuring that persons must turn their mind to the issue of consent, and in circumstances where consent is ambiguous, they must take positive steps to ascertain consent. We also note the Tasmanian approach to the definition of consent being that consent does not exist if the other person 'does not say or do anything to communicate consent'. Drawing from this, and so as to adopt an affirmative consent model, the *mens rea* in s 61HA(3) could be amended so that an accused would be barred from arguing that they mistakenly believed that the complainant was consenting in

circumstances where the complainant did not say or do anything to communicate affirmative consent.

## **Conclusion**

In sum, the mens rea elements for sexual assault in s 61HA(3) require clarification. In addition, the provisions and the Bench Book should be revised to require that a person must take positive steps to ensure that the other person is consenting to sexual intercourse when faced with any ambiguous signals, and that a person cannot rely on a mistaken belief that the victim was consenting in the absence of the other person's affirmative consent. There is also a strong case for placing the evidential burden on the accused to suggest a reasonable possibility that they had an honest belief that the other person was consenting based on reasonable grounds, and if satisfied, the probative burden shifts back to the prosecution to disprove such beyond reasonable doubt.