

31 January 2019

Acting Justice C Simpson  
Commissioner  
NSW Law Reform Commission  
nsw-lrc@justice.nsw.gov.au

Dear Judge,

My name is Rachael Burgin and I am a PhD candidate in Criminology at Monash University, under the supervision of Associate Professor Asher Flynn and Professor Jude McCulloch. My research examines sexual consent law and how it translates into legal practice. My research is informed by an analysis of 15 rape trial transcripts of cases heard in the County Court of Victoria between 2008 and 2015.

I welcome the opportunity to respond to the Consultation Paper concerning consent in relation to sexual offences. I advocate that the law in New South Wales (NSW) retain a consent-based approach to sexual assault. This submission raises two key concerns for consideration in any future reform in this space; (1) the ongoing reliance on narratives of force and resistance, and (2) ‘implied consent’ narratives. These concerns emerged as key issues in my recent doctoral study of how affirmative consent functions in rape trials in Victoria. The study drew on 15 rape trial transcripts from the County Court of Victoria in order to trace how this standard of sexual consent has translated into legal practice. The findings of this research will assist the Commission in future reform efforts, considering the Commission’s stated reliance on Victorian legislation as a potential ‘model’ for NSW sexual assault law.

### **Affirmative Consent**

The meaning of consent as currently legislated in NSW does not adequately enshrine a standard of affirmative or communicative consent into law. The extant law in NSW law determines that ‘a person “consents” to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse’ (s 61HA(2) *Crimes Act 1990* (NSW)). This is reflective of the definition of consent in most other Australian jurisdictions (see s 36 *Crimes Act 1958* (Vic); s 2A(1) *Criminal Code* (TAS); s 62HA *Crimes Act 1900* (NSW); s 46(2) *Criminal Law Consolidation Act 1935* (SA); s 192 *Criminal Code* (NT); s 348 *Criminal Code* (Qld); s 319(2) *Criminal Code* (WA)).

The use of agreeance as a central tenant here is important because it ensures that there are specific parameters for the consent (Vandervort, 2012). This should ensure that a defendant cannot rely on the notion of ‘blanket consent’ to support a defence of belief in consent. That is, the defendant will not be able to assume that consent to one act, is consent to other acts. In other words, there are parameters around what is being consented to (for example, penile-vaginal penetration, intercourse with a condom, and so on). Yet, it cannot be said that this protection functions in practice. I turn to this point in more detail in the section below (negation of consent).

I argue that NSW should enshrine a communicative or affirmative standard of sexual consent into sexual assault and consent law. In theory, such a standard requires all parties to a sexual

act to actively demonstrate consent through actions and/or words (Pineau, 1989). I noted in my submission to the Terms of Reference that this standard of sexual consent has the ‘potential to re-educate the broader community on the importance of negotiating consent’ (Flynn and Henry, 2012; 172). Submission to the act is not enough to assume consent. Instead, consent is performative under this standard. This is in contrast to old understandings of sexual consent where the requirement was on women to ‘fight off’ or resist the attack (and thus, non-consent was performative). This standard is in line with community values and expectations.

## **Problems and Possibilities in the Victorian Experience**

### *Force and Resistance*

A standard of sexual consent based on active and ongoing communication (such as that of an affirmative approach) should curb the reliance in rape trials on evidence of force and resistance. Yet, my work reveals that despite this standard existing in the extant law in Victoria, such narratives endure.

I have elsewhere traced the problematic roots of force and resistance in rape law within historic legal and social contexts (Burgin, 2018; see also, Quilter, 2015). I will refrain from exploring this in exhaustive detail here, opting instead for a brief review. The historical context provides important understandings of the ways that these narratives endure. One such point can be made in the argument that force and resistance became central to the rape trial in response to ‘concern over false allegations of rape [which have] long dominated the legal and social landscape as it relates to rape’ (Burgin, 2018; 4; Brownmiller, 1975). This also supported the onerous evidentiary standards, unique to rape law, that warned against convicting on women’s ‘uncorroborated’ evidence alone (see Brownmiller, 1975; Gavey, 2005; Cossins, 2010). The supposed danger was of course, that allegations of rape are easily made and difficult to defend against. Yet, evidence proves that this is far from true, reporting rates and prosecutions are consistently low (ABS, 2017).

The social context has mirrored this reliance on an interplay between force and resistance. ‘Rape myths’ (Burt, 1980) have informed what is deemed to be ‘real rape’ (Estrich, 1987), and by extension, what constitutes ‘normative’ or appropriate sexual practice (Powell et al., 2013). In this context, dominant (hetero)sexual scripts construct men as active sexual actors, and women as passive, reluctant participants to sex (Gavey, 2005). This alleged passivity has constructed the notion that women offer ‘token resistance’ to sex (Muehlenhard and McCoy, 1991), thus normalising ‘resistance, coercion and social pressure within sociocultural heterosexual scripts’ (Burgin, 2018; 6). Resultantly, sexual ‘coercion of women by men is positively eroticised’ (Naffine, 1994; 101).

As noted, these narratives should be interrupted by an affirmative standard of consent. This may be true, but it also requires careful and considered reform. Specifically, I argue that the law must place a positive obligation on sexual actors to ‘take steps’ to ascertain consent to sex. Though Victoria has been looked to in the Consultation Paper as an example of affirmative consent, the current law in Victoria *fails* to proscribe this positive obligation on a person seeking sex, to take steps to ensure the other person(s) is consenting. This destabilises the effectiveness of provisions and directions which state that a person does not need to resist an attack. I will explain this below. I rely on the Victorian example as evidence of the ways that this problem has emerged in practice. I also refer to NSW and the *Lazarus* case to explore the parallels in the NSW context. I ultimately argue that the experience in Victoria

should be heeded in reform efforts in NSW. There is considerable risk that reform based on the Victorian approach will simply replicate the problems emerging in Victoria.

Victoria and NSW both include directions and provisions at law to prevent the reliance on victim resistance in the determination of whether consent existed. However, these provisions are undermined by the fault elements of the crime, which in both jurisdictions, fail to uphold an affirmative standard. The table below demonstrates the comparable legislative approaches in the two jurisdictions.

|                          | <b>Victoria</b>   | <b>NSW</b>  |
|--------------------------|---|---|
| Meaning of consent       | <p>‘free agreement’</p> <p>Section 36(1) <i>Crimes Act 1958</i> (Vic)</p>   | <p>‘A person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse’</p> <p>Section 61HA(2) <i>Crimes Act 1900</i> (NSW)</p>  |
| Consent is negated if... | <p>‘the person submits because of force or the fear of force to that person or someone else’</p> <p>Section 36(2)(a) <i>Crimes Act 1958</i> (Vic)</p>   | <p>‘if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person)’</p> <p>‘A person who does not offer actual physical resistance to sexual intercourse is not, by reasons only of that fact, to be regarded as consenting to the sexual intercourse’.</p> <p>Respectively, section 61HA(2) and section (7) <i>Crimes Act 1900</i> (NSW)</p> |
| Jury directions          | <p>‘counsel may request...that the trial judge inform the jury that experience shows that–</p> <p>(i) ...</p> <p>(ii) people who do not consent to a sexual act may not be physically injured or subjected to violence, or threatened with physical injury or violence; or</p> <p>(d) ...</p> <p>(i) people may react differently to a sexual act to which they did not consent and that there is no typical, proper or normal response; and</p> <p>(ii) people who do not consent to a sexual act may not protest or physically resist</p> | <p>‘...Consent can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways, such as the offering of resistance although this is not necessary as the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse’</p>             |

|  |  |   |
|--|--|---|
|  | the act.’<br><br>Section 46(3)(c) <i>Jury Directions Act</i><br>2015 (Vic) | NSW <i>Criminal Trial Courts Bench</i><br><i>Book</i> |
|--|--|---|

As the table shows, in Victoria, rape law stipulates that evidence of victim resistance or injury is not required in order to prove that the rape took place. Yet, I have argued elsewhere (Burgin, 2018; Burgin and Flynn, *under review*) that this is considerably undermined by the fault element to the crime of rape (comparable to NSW sexual assault). Specifically, in Victoria, the fault element is satisfied when the prosecution prove that the defendant had no ‘reasonable belief’ in consent. Reasonable belief is defined in section 36A of the *Crimes Act 1958* (Vic) as:

- (1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.
- (2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents...

This definition of reasonable belief does not place limits on the defence putting forward, nor the jury considering, evidence of (a lack of) resistance or injury as part of the ‘circumstances’ of the supposed reasonable belief. In addition, there is no obligation on a person to take steps to ascertain the consent of another person. This is ensured by the inclusion of the phrase ‘without limiting’. Accordingly, the provisions designed to protect against this type of questioning are undermined by the definition of ‘reasonable belief’ which allows accused persons to use a victim’s non-resistance to argue they believed she was consenting.

My research of the Victorian experience (see Burgin, 2018) demonstrates that in a rape trial, narratives of force and resistance continue to be drawn on by the defence in constructing a narrative of consent, or of reasonable belief in consent. This was achieved in three key ways: (1) the expectation that women ‘perform’ active resistance, (2) questioning the validity of resistance evidence, and (3) evidence of injury. These narratives relied on problematic rape myths including the myth that ‘rape is impossible because it is easily avoided by the woman’s resistance’ (Schwendinger and Schwendinger, 1974: 19). In addition, it was common among the dataset used in the study (and indeed it is common beyond this sample), for physicians to give evidence at trial regarding the complainant’s injury *or lack of injury*.

In one case from the study, the judge instructed the jury mid-trial on the notion of resistance, because the prosecution had objected to the questions asked of the victim by the defence regarding whether she had ‘said no’ to the perpetrator. Though the judge noted that there was no requirement on the woman to ‘say no’, after a break, the judge gave the following direction to the jury:

So, “the complainant did not protest or physically resist the accused, the complainant did not sustain psychical injury.” However, these are relevant facts for you to consider. *You must consider the action or lack of action of the complainant*, together with all the surrounding circumstances in order to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not consent. (Judge A p.157, emphasis added)

Here, the judge has determined that resistance (or ‘action or lack of action’) is relevant in the determination of whether the woman was consenting. This statement also establishes that resistance is a part of the circumstances, and thus can be considered in relation to a defence of reasonable belief, should they find that there was no consent. This is problematic, because it fails to challenge the myth that women will ‘fight back’, despite considerable evidence that ‘freezing’ is a common response to rape. These cumulative effect of this legislation works to undermine an affirmative consent standard. I explore other examples in more detail in Burgin (2018).

### *‘Implied Consent’*

The definition of reasonable belief discussed above also has other implications. As noted, this definition places no requirement or obligation on a person to take active steps to determine whether the other person is consenting. Accordingly, there is no requirement at law for a person to ensure that the other person is consenting to the act (Burgin and Flynn, *under review*). Flynn and I have argued that this definition of reasonable belief also allows defendants to rely on women’s mundane and common behaviour to support a ‘reasonable’ belief in consent. Yet, reasonableness under this approach relies on a male perspective of ‘reasonableness’ that aligns with socialised constructions of women as hyper-sexual (though, without innate sexuality of their own), and women’s behaviour is systematically reconstructed as implying consent to sex within the context of a rape trial (Burgin and Flynn, *under review*). This endorses rape myths, such as that women want to be raped or ‘ask for it’ by dressing certain ways, or for giving ‘mixed messages’. Yet, an assertion that ‘messages’ were ‘mixed’ should be considered an admission of guilt at law, since the defendant is confirming he acted on his own selection of the woman’s behaviour (Burgin, 2018). This should undermine any claim of ‘reasonable’ belief and indicate that the defendant knew or was aware that the woman might not have been consenting. In these circumstances, the defendant should be found guilty of the offence. Examples of the mobilisation of narratives of implied consent are explored in a forthcoming paper (Burgin and Flynn, *under review*).

I discuss the implications of these findings on the NSW experience in the section below, in relation to the questions posed by the Commission.

### **Summary of Recommendations and Responses to Questions**

The discussion of the Victorian experience above highlights some concerning trends in rape trials that must be considered in the current law reform efforts of NSW. Here, I will draw on the discussion above to summarise my recommendations and responses to the questions posed in the Consultation Paper.

*Question 3.2: Should NSW retain a consent-based approach? Should NSW adopt an affirmative consent standard? How should this be framed?*

NSW should prioritise a consent-based approach to sexual assault law, and more specifically, this approach should endorse an affirmative standard of sexual consent. This is in line with community expectations. In order to adequately legislate this standard of consent, it must form the basis of all sexual assault legislation, not only through the definition of consent, but also through the definitions in relation to knowledge of consent and jury directions. I will refer to this in the questions below.

*Question 4.1: Should NSW law continue to list circumstances that negate consent or may negate consent? Should the lists of circumstances that negate consent or may negate consent, be changed?*

There is some criticism of the inclusion of a list of consent-negating circumstances (or potential consent-negating circumstances) such as legislated in NSW (and other jurisdictions). Quilter (*Preliminary Submission PCO47*) raised the issues well in her preliminary submission. I support the critique posed by Quilter. However, I would be hesitant to recommend the removal of the list of circumstances because there is a risk that the rape myths that are directly challenged within this list may be relied on by juries as they determine (with less guidance that would come with the removal of the list) whether consent was 'freely' given and 'voluntary'. More research is required to understand how juries use and rely on the list of consent-negating circumstances in rape cases. Until this is better understood, I recommend retaining this list of circumstances in which a person cannot or may not consent.

Quilter raises the point that 'substantial intoxication' (s 61HA(6) *Crimes Act 1900* (NSW)) remains undefined in legislation, and common trial practice is for juries to be instructed to rely on their 'common sense' interpretation of intoxication (Quilter et al., 2016). As Seear (2017) has argued, defence counsel often act as 'quasi-expert' in relation to intoxication. Whether this is a problem with the law in relation to rape, or with legal practice is unclear. Seear and Fraser (2016) have argued that these 'knowledges' or 'legal "truths" about addiction are...shaped by legal strategy' (Seear, 2017; 189). The implications of these 'legal truths' as Seear (2017) calls them, are wide-reaching, and in the context of a sexual offence trial, likely has implications for victim-survivors and on case outcomes. Yet, whether this will be circumvented by the removal of the consent-negating circumstances cannot be assumed. I urge caution in legislative change in this space.

*Question 5.1: Actual knowledge and recklessness*

*Question 5.3: A 'reasonable belief' test*

*Question 5.4: Legislative guidance on 'reasonable grounds'*

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

The current approach to knowledge about consent in NSW is potentially confusing for jurors. This submission recommends that section 61HA(3) of the *Crimes Act 1900* (NSW) be replaced with: 'A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if they did not *reasonably believe* and *took no reasonable steps* in the circumstances to ascertain whether the other person was consenting'.

This approach would simplify the elements of the offence and proscribe a positive obligation on the initiator of sex to take reasonable steps to determine whether the other person consents to the act. This would proscribe a standard of responsible sexual citizenship that would mobilise the educative function of the law, thus potentially contributing to the prevention of sexual offending.

The inclusion of the reasonable steps is important as it resolves any confusion about how the 'reasonable belief' can be formed. This works to (as highlighted by Monaghan and Mason in their submission) more clearly assert that the belief is not to be based on the problematic notion of 'implied consent' which (re)constructs women's behaviour as flirtatious. This is

important given the findings of my research into Victorian rape trials (where steps are *not* obligation, such as is the case in NSW today), that demonstrate that trial strategy continues to be built around these narratives. It would also address the issue of the reliance on force and resistance as indicating consent.

The inclusion of the ‘take steps’ provision would provide the guidance on reasonable grounds and redirect discussion to how the accused sought consent from a potential sexual partner. It is not yet clear whether there would need to be a specific requirement to require the accused to provide evidence at trial of the reasonableness of their belief in consent. As others argued in their submissions, there is a case that there be some evidentiary burden on an accused in this regard. I refer to those submissions, particularly Cossins’ on this matter. However, I add that this can be achieved more easily, and with less substantial reform, in other ways. Specifically, the inclusion of the ‘take steps’ provision into the fault element *should* work to inform police questioning of accused persons. These recorded interviews are often played in court where the case proceeds to trial. The accused person would then retain their right to give, or not give, evidence in court, but the steps they took to ascertain consent will be presented as evidence before the court for the jury to consider in their deliberations. I am about to commence research examining these potential changes in the Victorian context, building on my work in the court context.

#### *Question 5.6: ‘Negligent’ sexual assault*

NSW should not adopt a lesser offence of negligent sexual assault. If a person holds no reasonable belief in consent, then they should be held culpable for the offence of sexual assault. A mistaken and unreasonable belief in consent and a failure to take steps to determine whether the other person consents are serious forms of sexual offending and should not be mitigated. The Law Reform Commission of Ireland raised important potential problems with a separate and lesser offence which are summarised in the Consultation Paper.

#### *Question 5.7: ‘No reasonable grounds’ and other forms of knowledge*

#### *Question 5.8: Defining steps*

#### *Question 5.9: Steps to ascertain consent*

#### *Question 5.10: Considering other matters*

Question 5.7 is avoided by adopting the approach described above in relation to questions 5.1 – 5.5. The law should require a person to take steps to determine whether the other person consents. Further, the law should define steps to be a positive action, such as actions or words. This definition is reflective of affirmative consent, and it – and should be – expected of all sexual participants. Failure to do this equates with a lack of consideration of whether or not the other person consents.

I support the proposal put forward in the submission of McNamara et al., namely that the ‘circumstances’ of include ‘the effect that any behaviour of the accused may have had on the behaviour of the victim at the relevant time’ (McNamara et al, *Preliminary Submission*, 4). This would reflect the realities of the social context in which men and women interact. As McGregor (1996;178) has argued, ‘being isolated, without transportations, with someone you hardly know, who is physically more powerful than you are, possible someone who is in a role of authority, all could contribute to feeling threatened and thereby being “forced” into sex’. Munro (2008; 925) has similarly argued that the law fails to recognise ‘the complex ways in which entrenched power disparities, material inequalities, relational dynamics, and

socio-sexual norms operate to construct and constrain...women's ability to say 'no'. The inclusion of this provision would not introduce a standard that is too divergent from the current law. It would, however, considerably strengthen the existing approaches. Instead, this simply redirects attention to the notion of 'free' and 'voluntary' agreement to sex, as consent is defined in NSW law.

I thank you for the opportunity to raise these further issues in relation to consent in NSW. Please see the reference list below. I am available to respond to any further queries that arise from this submission or to speak further on my research.

Sincerely,

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