



**New South Wales
Law Reform Commission**

**Consultation
paper**

21

Consent in relation to sexual offences

October 2018
www.lawreform.justice.nsw.gov.au



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CP 21 Consent in relation to sexual offences

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This Consultation Paper was revised on 8 March 2019 to reflect a change to the acknowledged author of Preliminary Submission PCO68.

Make a submission

We seek your responses to this Consultation Paper. To tell us your views you can send your submission by:

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

Post: GPO Box 31, Sydney NSW 2001

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

If you have questions about the process please email.

The closing date for submissions is **Friday 1 February 2019**.

Instead of a formal submission, you may prefer to complete a brief survey that covers the main issues raised in the Consultation Paper:
<https://www.surveymonkey.com/r/C62SJSF>

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

For more information about us, and our processes, see our website:
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Terms of reference

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

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

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

[Received 3 May 2018]

Questions

3. The meaning of consent

Question 3.1: Alternatives to a consent-based approach

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

Question 3.2: The meaning of consent

- (1) Is the NSW definition of consent clear and adequate?
- (2) What are the benefits, if any, of the NSW definition?
- (3) What problems, if any, arise from the NSW definition?
- (4) What are the potential benefits of adopting an affirmative consent standard?
- (5) What are the potential problems with adopting an affirmative consent standard?
- (6) If NSW was to adopt an affirmative consent standard, how should it be framed?
- (7) Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?
- (8) Do you have any other ideas about how the definition of consent should be framed?

4. Negation of consent

Question 4.1: Negation of consent

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

5. Knowledge about consent

Question 5.1: Actual knowledge and recklessness

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

Question 5.2: The “no reasonable grounds” test

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

Question 5.3: A “reasonable belief” test

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

Question 5.4: Legislative guidance on “reasonable grounds”

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

Question 5.5: Evidence of the accused’s belief

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

Question 5.6: “Negligent” sexual assault

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

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

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

Question 5.8: Defining “steps”

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

Question 5.9: Steps to ascertain consent

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

Question 5.10: Considering other matters

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

Question 5.11: Excluding the accused's self-induced intoxication

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

Question 5.12: Excluding other matters

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

Question 5.13: A single mental element

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

Question 5.14: Knowledge of consent under a mistaken belief

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

Question 5.15: Other issues about the mental element

Are there any other issues about the mental element of sexual assault offences that you wish to raise?

6. Issues related to s 61HA

Question 6.1: Upcoming amendments

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

Question 6.2: Language and structure

- (1) Should changes be made to the language and/or structure of s 61HA (and the new s 61HE)? If so, what changes should be made?
- (2) Should the definition of “sexual intercourse” be amended? If so, how should sexual intercourse be defined?

Question 6.3: Jury directions on consent

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

Question 6.4: Jury directions on other related matters

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

Question 6.5: Legislated jury directions

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

Question 6.6: Amendments to expert evidence law

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

1. Introduction

In brief

The Attorney General has asked us to review the law of consent in relation to sexual offences. Recent developments, such as the *Lazarus* case, have raised questions about whether the law is meeting its objectives. We seek your views about whether the law of consent should change.

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- 1.1 The NSW Law Reform Commission is an independent statutory body. We provide independent, expert law reform advice to the Government on matters referred to us by the NSW Attorney General.
- 1.2 On 3 May 2018, the Attorney General asked us to review the law of consent and knowledge of consent in relation to sexual offences. These are contained in s 61HA of the *Crimes Act 1900* (NSW) (“*Crimes Act*”). Our terms of reference are available at page ix.
- 1.3 In this Consultation Paper, we look at the elements of s 61HA and invite your views on whether the law needs to change.

Introduction to s 61HA

- 1.4 Consent is an integral part of sexual assault law in NSW. For a person accused of sexual assault to be found guilty, the prosecution must prove three “elements” beyond a reasonable doubt:
- the accused engaged in sexual intercourse with another person
 - the person did not consent to the sexual intercourse, and
 - the accused knew the person did not consent.¹
- 1.5 Section 61HA of the *Crimes Act* deals with the second and third elements. The section provides:

61HA Consent in relation to sexual assault offences

(1) Offences to which section applies

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

(2) Meaning of consent

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

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

(3) Knowledge about consent

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:

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

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

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) not including any self-induced intoxication of the person.

(4) Negation of consent

A person does not consent to sexual intercourse:

- (a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
- (c) 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), or
- (d) if the person consents to the sexual intercourse because the person is unlawfully detained.

(5) A person who consents to sexual intercourse with another person:

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

does not consent to the sexual intercourse. For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.

(6) The grounds on which it may be established that a person does not consent to sexual intercourse include:

- (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or
- (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
- (c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

(7) 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.

(8) This section does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

1.6 In summary, s 61HA covers:

- the meaning of consent
- the circumstances in which a person does not consent or may not consent to sexual intercourse, and
- the circumstances in which the accused can be taken to know the other person does not consent.

1.7 Section 61HA applies to the offences of sexual assault, aggravated sexual assault, and aggravated sexual assault in company, and attempts to commit these

offences.² In June 2018, Parliament passed an Act that will replace the existing s 61HA with a new section (s 61HE). The amendments will not significantly change the elements of consent and knowledge of consent. However, they will apply these elements to the new offences of sexual touching, aggravated sexual touching, sexual act and aggravated sexual act.³ These new offences will replace the existing offences of indecent assault, act of indecency, and their aggravated versions.

- 1.8 At the time of writing, these amendments have not commenced. We will therefore refer to the current section (s 61HA) throughout this Paper. We consider the amendments in further detail in Chapter 6.

Background to the review

- 1.9 When NSW introduced s 61HA in 2007, the aim was to bring about a cultural shift in the way the community and key participants in the criminal justice system respond to people who have experienced sexual assault. At the time, the Attorney General, relying on the findings of an Australian Institute of Criminology study of juror attitudes and biases in sexual assault cases,⁴ observed:

[S]ome members of the community still hold the view that women often say “no” when they mean “yes”, that women who are raped often ask for it, and that rape results from men not being able to control their need for sex and responsibility for rape is therefore removed. This [amendment] reflects the views of the greater majority of the community of New South Wales who strongly reject those outdated views.⁵

- 1.10 However, recent developments have led some people to question whether the law is meeting its objectives.
- 1.11 In particular, community concern over the *Lazarus* case⁶ led the Attorney General to ask us to review the law of consent. In this case, the complainant said the accused sexually assaulted her in an alleyway behind a nightclub in Sydney’s Kings Cross. The complainant detailed her experiences publicly in an interview with ABC’s *Four Corners* program.⁷
- 1.12 The case involved a trial, a retrial and two appeals⁸ over 5 years. It centred on the issues of consent and the accused’s knowledge of whether the complainant consented. In two trials, the judges incorrectly applied the law on knowledge. The Court of Criminal Appeal ultimately decided not to order a third trial, believing it would be unfair and oppressive to the accused. There has been a lot of criticism

2. *Crimes Act 1900* (NSW) s 61HA(1).

3. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HE (not in force).

4. N Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, Trends and Issues in Crime and Criminal Justice No 344 (Australian Institute of Criminology, 2007) 5–6.

5. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW)).

6. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279.

7. “I Am That Girl”, 7 May 2018, 8.30pm, *ABC Four Corners* <www.abc.net.au/4corners/i-am-that-girl/9736126> (retrieved 11 October 2018).

8. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279.

- about the *Lazarus* case and the authors of a number of preliminary submissions say that it shows the law must change.⁹
- 1.13 Some have called for a new approach to consent. They believe the law should recognise a person’s consent only when it is communicated clearly through their words or actions. Some think that Tasmania and Victoria provide models for reform that NSW should consider.¹⁰
- 1.14 The issue goes beyond one case. Our review is occurring at a time when discussions about sexual assault and harassment are becoming increasingly prominent in public discussion, both in Australia and overseas. As one preliminary submission to our review states, the international #MeToo movement has “brought the issues of sexual violence and consent to the forefront”.¹¹ People all over the world have come forward, sharing their personal stories and supporting the movement.¹²
- 1.15 The traction that the movement has gained shows that “the concern with what constitutes consent is real and far-reaching”.¹³ One preliminary submission says the movement is “indicative of attitudes to consent to sex in 2018”, and that s 61HA needs to change to reflect these “enlightened community views” on consent.¹⁴
- 1.16 Our review also occurs against the backdrop of a commitment by the NSW Government to prevent, and better address, instances of sexual assault within the state. In July, for example, the Government released its first sexual assault strategy. The strategy aims to improve the existing services for people who experience sexual assault, raise community awareness of sexual violence, and improve prevention and education measures in families and the wider community.¹⁵

Scope of the review

- 1.17 Sexual assault is a complex problem that cannot be addressed solely by reforming the law.¹⁶ The authors of many preliminary submissions acknowledge that social and cultural understandings of consent and sexual assault need to change¹⁷ and that there are limits to what law reform can achieve.¹⁸

9. See, eg, Inner City Legal Centre, *Preliminary Submission PCO44*, 2, 3, 4; Feminist Legal Clinic, *Preliminary Submission PCO53*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 11–14; S Mullins, *Preliminary Submission PCO97*, 1.

10. See, eg, Feminist Legal Clinic, *Preliminary Submission PCO53*, 3; Australian Queer Students Network, *Preliminary Submission PCO56*, 8; R4Respect, *Preliminary Submission PCO60*, 3; Women’s Electoral Lobby, *Preliminary Submission PCO71*, 4; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCO83*, 3; Domestic Violence NSW, *Preliminary Submission PCO91*, 5, 10.

11. M Otlowski, *Preliminary Submission PCO45*, 31.

12. L Manikonda and others, “Twitter for Sparking a Movement, Reddit for Sharing the Moment: #metoo through the Lens of Social Media” (2018) arXiv:1803.080222 [cs.SI].

13. M Faruqi, *Preliminary Submission PCO93*, 2.

14. C Evans, *Preliminary Submission PCO17*, 1.

15. NSW Government, *NSW Sexual Assault Strategy 2018–2021* (2018) 4.

16. M Heath, *The Law and Sexual Offences Against Adults in Australia*, Issues No 4 (Australian Centre for the Study of Sexual Assault, 2005) 3. See also J Stubbs, “Sexual assault, criminal justice and law and order” (2003) 14 *Women Against Violence* 14.

17. See, eg, M Otlowski, *Preliminary Submission PCO45*, 36; B Moroney, *Preliminary Submission PCO48*, 1; Community Legal Centres NSW, *Preliminary Submission PCO58*, 7; White Ribbon

- 1.18 Many argue that any law reform must be accompanied by broad community education about the law of consent and the realities of sexual assault.¹⁹ In light of the low conviction and high attrition rates for sexual assault offences, submissions also point to many problems with the way the criminal justice system deals with sexual assault complaints. They make various recommendations for change.
- 1.19 Some argue, for example, that complainants need to be better supported in the justice system;²⁰ that criminal justice processes need to be improved;²¹ and that police, prosecutors, lawyers and judges need to have a better understanding of sexual assault.²² Some suggest that restorative justice processes should be used²³ or that NSW should set up specialist sexual assault courts with expert staff and judges.²⁴
- 1.20 These issues are important and interrelated, and holistic responses from government and the wider community are required to address them. However, our review has a specific focus: whether the approach to consent in the law should be reformulated. While we may discuss some of these broader issues during our review, we are conscious that we are limited by our terms of reference.

Our process

- 1.21 To help us identify issues and concerns relevant to the review, we invited preliminary submissions on our terms of reference. We received 110 such submissions. These have helped inform this Paper. We have published a selection of them on our website: www.lawreform.justice.nsw.gov.au.
- 1.22 In this Paper, we invite further comment on specific issues concerning s 61HA and related issues.
- 1.23 Once we have considered submissions to this Paper, we will meet with a range of people and organisations with experience and expertise in issues relating to sexual

Australia, *Preliminary Submission PCO79*, 2; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCO83*, 3.

18. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 18; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCO83*, 3. See also P Eastal, *Preliminary Submission PCO24*, 22.
19. See, eg, Inner City Legal Centre, *Preliminary Submission PCO44*, 5; Young Women's Advisory Group, *Preliminary Submission PCO67*, 1; Confidential, *Preliminary Submission PCO98*, 3.
20. E Montoya Zorrilla, *Preliminary Submission PCO68*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 28; University of Newcastle Women's Collective, *Preliminary Submission PCO94*, 5–6.
21. See, eg, M Dobbie, *Preliminary Submission PCO75*, 2; Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 3; J Moylan, *Preliminary Submission PCO87*, 1; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 26.
22. Inner City Legal Centre, *Preliminary Submission PCO44* [17]–[19]; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 9; Australia's National Research Organisation for Women's Safety, *Preliminary Submission PCO105* [5]–[7].
23. Inner City Legal Centre, *Preliminary Submission PCO44* [16]; NSW Bar Association, *Preliminary Submission PCO47*, 6; Domestic Violence NSW, *Preliminary Submission PCO91*, 5; University of Newcastle Women's Collective, *Preliminary Submission PCO94*, 13.
24. C Goosen, *Preliminary Submission PCO26*, 1; E Montoya Zorrilla, *Preliminary Submission PCO68*, 2; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Preliminary Submission PCO78*, 3; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 20–32; Domestic Violence NSW, *Preliminary Submission PCO91*, 5; Australia's National Research Organisation for Women's Safety, *Preliminary Submission PCO105* [7].

assault and the criminal justice system. We propose to engage with judicial officers in Victoria and Tasmania, where an “affirmative consent” standard applies.²⁵ Our final report will be informed by these meetings, all the submissions we receive, and our independent research.

- 1.24 All public documents produced as part of our review will be on our website. Follow us on Facebook (www.facebook.com/NSWLawReform) and Twitter (@NSWLawReform) for further information and updates.

Key terms in this Paper

- 1.25 Below are some of the key terms we use in this Paper:

- **Accused:** a person charged to stand trial in a court for allegedly committing a criminal offence. Other words for accused are “defendant” and “alleged offender”.
- **Acquittal:** a finding by a judge, jury or appeal court that a person is not guilty of an offence.
- **Appeal:** a challenge to a decision of a court in a higher court.
- **Complainant:** a person who alleges the accused has committed a crime against them.
- **Conviction:** a finding that a person accused of committing a criminal offence is guilty of that offence.
- **Fact finder:** a person or people who have the duty in a criminal case to decide the facts. In most District or Supreme Court cases, the fact finder is a jury. Some cases are conducted by a judge without a jury, in which case the fact finder is the judge. These are known as “judge-alone trials”. Another expression for fact finder is “trier of fact”.
- **Prosecution:** the representatives of the state who conduct criminal proceedings against a person accused of committing a crime. The term may also refer to the process by which a person is tried for a criminal offence. Another expression for the prosecution is “the Crown”.
- **Person who has experienced sexual assault:** a person who has been sexually assaulted, sometimes referred to as a “victim” or “survivor” of sexual assault. We use these terms only when quoting from other sources. We acknowledge that some people prefer the term “victim” to the term “survivor”, others prefer “survivor” to “victim”, and some do not like either term.
- **Trial:** a process where an issue of fact or law is determined in a court.

Chapter outline

- 1.26 In **Chapter 2 – Background and context**, we place the law of consent in its historical, legal and policy context, including contemporary debates about the

25. For a discussion of affirmative consent, see [3.36]–[3.38].

meaning of consent. We also highlight the principles of criminal law that underpin s 61HA and general perspectives on the law from preliminary submissions.

- 1.27 In **Chapter 3 – The meaning of consent**, we review the legal definition of consent in NSW and views from preliminary submissions on the adequacy of this definition. We also consider the “affirmative consent” model and invite comment on possible options for reforming the NSW definition.
- 1.28 In **Chapter 4 – Negation of consent**, we consider the circumstances that will negate consent, and those circumstances that *may* negate consent. We consider whether any circumstances should be added to the law or any existing circumstances removed.
- 1.29 In **Chapter 5 – Knowledge about consent**, we review the requirement for the prosecution to prove the accused knew the complainant did not consent. The prosecution needs to prove the accused actually knew the complainant did not consent, was reckless about consent or had no reasonable grounds for believing the complainant consented.
- 1.30 In **Chapter 6 – Issues related to s 61HA**, we consider some other issues raised by preliminary submissions that relate to the operation of s 61HA. These include upcoming amendments to the law, the language and structure of the section, jury directions, and the use of expert evidence about how people respond to sexual assault.

2. Background and context

In brief

This Chapter places the law of consent in its historical, legal and policy context, including contemporary debates about the meaning of consent. It also highlights the principles of criminal law that underpin s 61HA and general perspectives on the law from preliminary submissions.

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- 2.1 NSW Parliament enacted s 61HA of the *Crimes Act 1900* (NSW) (“*Crimes Act*”) in 2007 (“2007 reforms”).¹ The section commenced operation on 1 January 2008.
- 2.2 Section 61HA was the product of evolving public attitudes towards sexual assault. These have prompted significant changes to the law in NSW over the past four decades.
- 2.3 Despite these changes, it is widely acknowledged that people who have experienced sexual assault continue to face difficulties throughout the criminal justice system. Sexual assault convictions remain difficult to obtain. In the wake of the *Lazarus* case² and the #MeToo movement, there have been calls for significant

1. *Crimes Act 1900* (NSW) s 61HA, inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

2. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279.

reform of both s 61HA and the criminal justice system's treatment of sexual assault cases more broadly.

- 2.4 In this Chapter, we outline the features of s 61HA and place the section in its historical, legal and policy context.

Criminal law principles that underpin s 61HA

- 2.5 Fundamental principles and processes support the entire criminal justice system. They inform how the system deals with all offences, including sexual offences. They are often the reason why it can be difficult to prosecute sexual assault successfully.
- 2.6 Below, we explain some of the key principles and processes that underpin s 61HA. We refer to these concepts throughout this Consultation Paper.

Key elements of a criminal offence

- 2.7 Serious criminal offences usually consist of:
- a physical element (“actus reus” or “guilty act”), and
 - a mental element (“mens rea” or “guilty mind”).
- 2.8 To prove the offence, the prosecution must prove both of these elements beyond reasonable doubt.
- 2.9 This means it is not enough, in most cases, for the prosecution to prove the accused committed the act in question. The prosecution must generally also prove the accused had the relevant state of mind at the time they committed the act. Depending on the offence, the prosecution might, for example, need to show the accused intended a particular harm, was reckless about the risk of a consequence or knew about a certain circumstance.³
- 2.10 A fundamental principle of the criminal law is that a person should not be convicted for committing a “guilty act” without also having a “guilty mind”.⁴ The rationale is that it is unjust to convict and punish someone for a criminal offence unless, for example, they were aware of the circumstances that made their conduct criminal.⁵

The adversarial model of justice

- 2.11 The Australian criminal justice system is adversarial. This means the prosecution and defence act as adversaries or opponents, and present alternative accounts of a case. The prosecution represents the state because criminal offences are treated

3. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press 6th ed, 2015) [3.4.4.1]–[3.4.5.1].

4. Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Final Report 129 (2015) [10.1]; D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) [3.1.1].

5. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) [3.4.5].

as a harm against the state, rather than against the person who experiences the harm.⁶

- 2.12 In an adversarial system, the defence tests the prosecution’s case; for example, by identifying inconsistencies in a witness’ story and raising questions about their credibility. The particular impact these processes can have on sexual assault complainants is well established and has been widely written about.⁷ We discuss the experience of complainants during sexual assault trials below.⁸

Trial by judge and jury

- 2.13 In NSW, trials for serious offences typically involve a judge and a jury. In a jury trial, the jury must determine whether the accused is guilty or not guilty. In doing so, it must decide questions of fact (such as whether a person consented to the sexual activity). Juries do not give reasons for their decisions.⁹
- 2.14 The judge makes decisions about questions of law, such as which legal principles are relevant, and ensures that trial procedures are followed. Judges also give instructions to juries and must decide what sentence to give the accused if the jury finds them guilty.

Trial by judge alone

- 2.15 A judge may try a case alone in some circumstances. Either the prosecution or the accused can apply for a judge-alone trial. If both parties agree, the court must allow the application. The court must not order a judge-alone trial if the accused does not agree. If the prosecution does not agree, the court can still order such a trial if it is in the interests of justice.¹⁰
- 2.16 In a judge-only trial, the judge deals with questions of both fact and law. The judge determines whether the accused is guilty or not guilty, and must provide reasons for their decision.¹¹

Procedural fairness

- 2.17 In criminal matters, the prosecution is responsible for proving the accused’s guilt. Several important rules and obligations aim to ensure that criminal trials are fair to the accused:
- the accused is presumed innocent until proven guilty¹²
 - the prosecution bears the burden of proving the accused’s guilt,¹³ and
 - the standard of proof the prosecution must meet is “beyond reasonable doubt”.¹⁴

6. B Fileborn, *Sexual Assault Laws in Australia*, ACSSA Resource Sheet (Australian Centre for the Study of Sexual Assault, 2011) 2.

7. For a recent example see B Lee, *Eggshell Skull* (Allen and Unwin, 2018).

8. [2.85]–[2.91].

9. *Jury Act 1977* (NSW) s 68B(1).

10. *Criminal Procedure Act 1986* (NSW) s 132.

11. *Criminal Procedure Act 1986* (NSW) s 133(2).

12. *Woolmington v DPP* [1935] AC 462.

13. *Woolmington v DPP* [1935] AC 462.

- 2.18 As an accused is entitled to the presumption of innocence, and the burden of proof is on the prosecution, the prosecution cannot require an accused to give evidence.¹⁵
- 2.19 Because the standard of proof is “beyond reasonable doubt”, the fact finder (the jury or, if it is a judge-only trial, the judge) must not find the accused guilty if they have a reasonable doubt about the version of events and the evidence the prosecution has presented.¹⁶ As the Victorian Law Reform Commission observes, “it is vital to ensure that any conviction is based on reliable evidence”. This is important in sexual assault trials because “[c]onviction for a sexual offence has serious consequences for a defendant, which may include a lengthy prison sentence and life-long stigma”.¹⁷
- 2.20 While this is true, the prosecution can face unique difficulties in proving sexual assault beyond reasonable doubt. Since sexual assaults often occur in private, corroborating evidence can be limited. This represents one of the acknowledged challenges for the criminal justice system: how it balances procedural fairness with the needs of complainants, who have a personal interest in the outcome of a trial. There is a further need to consider the broader community, which also has an interest in convicting offenders.¹⁸

Overview of s 61HA

Origins

- 2.21 Section 61HA was introduced after an extensive review of sexual offences by the NSW Criminal Justice Sexual Offences Taskforce (“Taskforce”). The NSW Attorney General established the Taskforce in December 2004 to examine issues surrounding sexual assault and the prosecution of sexual assault offences. The Taskforce was to advise “on ways to improve the responsiveness of the criminal justice system to victims of sexual assault, whilst ensuring that an accused person receives a fair trial”.¹⁹
- 2.22 The Taskforce included representatives of people who had experienced sexual assault, as well as members from the legal profession, the judiciary, the courts, police, corrective services, health, community services and academics.²⁰ The Taskforce report, released in 2005, made 70 recommendations for reform.²¹

14. *Brown v R* (1913) 17 CLR 570, 584–586, 594–596.

15. *Evidence Act 1995* (NSW) s 12, s 17.

16. B Fileborn, *Sexual Assault Laws in Australia*, ACSSA Resource Sheet (Australian Centre for the Study of Sexual Assault, 2011) 5.

17. Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [1.9].

18. Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [1.10].

19. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) iii.

20. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW)).

21. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 1–7.

- 2.23 Due to the complexity and significance of the issues in the Taskforce report, the NSW Attorney General's Department conducted further consultations. In 2007, the Department invited comment on a discussion paper, which included a draft bill.²²
- 2.24 Section 61HA came into force on 1 January 2008.²³

Offences to which s 61HA applies

- 2.25 Section 61HA(1) applies to the offences of sexual assault, aggravated sexual assault and aggravated sexual assault in company, as well as attempts to commit these offences.²⁴

Sexual assault offences

- 2.26 Sexual assault has two physical elements. The prosecution must prove that sexual intercourse occurred and that the complainant did not consent to the sexual intercourse.²⁵ "Sexual intercourse" includes:

- the penetration of the vagina or anus of any person by any part of the body of another person or an object manipulated by another person
- oral to body contact (fellatio or cunnilingus), and
- the continuation of any of these acts.²⁶

- 2.27 The mental element is "knowledge" – the prosecution must prove the accused knew the complainant did not consent to the sexual intercourse.²⁷

- 2.28 Two sexual assault offences involve extra physical elements and, therefore, attract higher penalties:

- **aggravated sexual assault**, where the sexual assault is "aggravated" by a particular circumstance; for example, the accused intentionally or recklessly inflicted or threatened to inflict actual bodily harm on the person or a person nearby; or the person is under 16 years of age or has a serious physical disability or cognitive impairment,²⁸ and
- **aggravated sexual assault in company**, where the extra elements are that the accused committed the sexual assault in company with others and the accused intentionally or recklessly inflicted or threatened to inflict actual bodily harm on the person or a person nearby, or deprived the person of their liberty.²⁹

22. NSW, Attorney General's Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007).

23. *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW), sch 1 [1].

24. *Crimes Act 1900* (NSW) s 61HA(1).

25. *Crimes Act 1900* (NSW) s 61I.

26. *Crimes Act 1900* (NSW) s 61H(1).

27. *Crimes Act 1900* (NSW) s 61I.

28. *Crimes Act 1900* (NSW) s 61J.

29. *Crimes Act 1900* (NSW) s 61JA.

Other sexual offences

- 2.29 The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (“CSA Act”) will replace the current s 61HA with a new s 61HE. A major change is that the new section will apply to a wider range of offences, including the new offences of sexual touching and sexual acts.³⁰ At the time of writing, these amendments have not commenced. We consider these upcoming changes in Chapter 6.

The basic framework of s 61HA

- 2.30 Section 61HA defines key elements of the sexual assault offences. In summary, the section covers:
- the meaning of “consent”
 - a list of circumstances in which a person does not consent or may not consent to sexual intercourse (that is, circumstances that “negate” consent), and
 - the circumstances in which the accused can be taken to “know” the other person does not consent.

Meaning of consent

- 2.31 Section 61HA(2) defines consent as a free and voluntary agreement to sexual intercourse. The legislation also clarifies that a person who does not offer actual physical resistance to sexual intercourse is not, by reason of this fact alone, to be regarded as consenting.³¹ We consider the meaning of consent in Chapter 3.
- 2.32 Before the 2007 reforms, the common law supplied the definition of consent. We discuss the evolution of this concept below.³²

Negation of consent

- 2.33 Section 61HA(4)–(5) sets out a non-exhaustive list of circumstances that negate consent to sexual intercourse.
- 2.34 The *Crimes Act* has included a list of circumstances that negate consent since 1981.³³ The 2007 reforms expanded this list and also added circumstances that “may” negate consent.
- 2.35 Section 61HA(6) lists the circumstances in which a person “may” be found not to consent. These circumstances do not automatically negate consent. Rather, they indicate factors that might be relevant to the question of whether there was consent. The prosecution must still prove the person did not consent to the sexual intercourse.
- 2.36 We consider the law on negation in Chapter 4.

30. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HE (not in force).

31. *Crimes Act 1900* (NSW) s 61HA(7).

32. [2.41]–[2.64].

33. *Crimes Act 1900* (NSW) s 61D, inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1(4).

Knowledge about consent

- 2.37 The prosecution must prove the accused knew the person did not consent to the sexual intercourse.³⁴ According to s 61HA(3), the accused “knows” that a person did not consent if they:
- actually knew the person did not consent
 - were reckless about whether the person consented, or
 - had no reasonable grounds for believing the person consented.
- 2.38 When making findings about the accused’s knowledge, fact finders must consider all the circumstances of the case. This includes any steps the accused took to ascertain consent. However, fact finders are not to consider the self-induced intoxication of the accused.³⁵
- 2.39 The 2007 reforms added the “no reasonable grounds” test. Previously, the prosecution had to prove either that the accused knew the person did not consent or was reckless as to whether the person consented.³⁶ An accused could not be found guilty if they honestly believed the complainant consented — even if their belief was unreasonable.³⁷ The Attorney General argued this did not adequately protect people who have experienced sexual assault when the accused had genuine but distorted views about appropriate sexual conduct.³⁸
- 2.40 We consider the law on “knowledge” in Chapter 5.

Approaches to consent reflected by s 61HA

- 2.41 Section 61HA reflects important shifts in the way the law approaches sexual assault. This includes the acceptance of a consent-based approach to sexual assault offences and the movement towards a communicative model of consent.

A consent-based approach to sexual assault offences

- 2.42 “Consent” is a fundamental part of the law of sexual assault in NSW. The prosecution must prove the complainant did not consent to sexual intercourse and the accused knew they did not consent.
- 2.43 Historically, the law placed greater emphasis on the presence (or absence) of violence. Until 1981, the offence of rape was referred to in s 63 of the *Crimes Act*, which stated:

Whoever commits the crime of rape shall be liable to penal servitude for life.

The consent of the woman, if obtained by threats or terror, shall be no defence to a charge under this section.

34. *Crimes Act 1900* (NSW) s 61I.

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

36. *Crimes Act 1900* (NSW) s 61R(1), repealed by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [2].

37. *Director of Public Prosecutions v Morgan* [1976] AC 182, 237.

38. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (second reading speech for the *Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007* (NSW)).

- 2.44 At common law, rape meant “carnal knowledge of a woman against her will”.³⁹ “Carnal knowledge” meant penile-vaginal penetration, with s 62 (now repealed) providing that “carnal knowledge” was “deemed complete upon proof of penetration only”.
- 2.45 Consent obtained by threats or terror was no defence to a charge of rape.⁴⁰ However, in practice, the prosecution needed to prove that the rape was “against the woman’s will”.⁴¹ At trial, there was a significant focus on whether the accused used force and if the complainant resisted physically.⁴²
- 2.46 The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) (“1981 reforms”) abolished the offence of rape⁴³ and replaced it with a graded series of sexual assault offences in gender-neutral terms, each attracting different penalties. Adopting the term “sexual assault” was an attempt to emphasise the offence as a crime of violence, reduce the focus on consent and shift the emphasis away from the sexual element.⁴⁴ In addition, “sexual intercourse” was defined to cover a broad range of sexual acts, including penetration by an object and parts of the body other than the penis.
- 2.47 The sexual assault offences were ranked from category 1 to category 3 according to the seriousness of the circumstances of the assault. Category 1 attracted the highest penalty:
- **sexual assault category 1:** inflicting grievously bodily harm with intent to have sexual intercourse
 - **sexual assault category 2:** inflicting or threatening to inflict actual bodily harm with intent to have sexual intercourse
 - **sexual assault category 3:** sexual intercourse without consent, covering situations where no objective evidence of violence existed.⁴⁵
- 2.48 The prosecution was not required to prove absence of consent in the first two categories of sexual assault — only that the accused inflicted the relevant harm with the intention of having sexual intercourse.⁴⁶ For the third category of sexual assault, the prosecution had to prove the other person did not consent and the accused knew of, or was reckless about, that fact.⁴⁷ With the first two categories attracting

39. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) [8.2.3].

40. *Crimes Act 1900* (NSW) s 63, amended by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1(5).

41. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) [8.2.3].

42. J Quilter, “Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform” (2011) 35 *Australian Feminist Law Journal* 23, 29, 37–38.

43. *Crimes Act 1900* (NSW) s 63, amended by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1(5).

44. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) [8.1].

45. *Crimes Act 1900* (NSW) s 61B, s 61C, s 61D, repealed by *Crimes (Amendment) Act 1989* (NSW) sch 1(2). The fourth category, in s 61E, dealt with indecent assaults.

46. *Crimes Act 1900* (NSW) s 61B, s 61C, inserted by *Crimes (Amendment) Act 1989* (NSW) sch 1(2).

47. *Crimes Act 1900* (NSW) s 61D(1)–(2), inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1(4).

harsher penalties, the implication was that nonviolent sexual assault was objectively less serious.⁴⁸

- 2.49 Although the 1981 reforms sought to de-emphasise consent, and focus on the “violence” of sexual assault, an evaluation by the NSW Bureau of Crime Statistics and Research (“BOCSAR”) found very few cases involved objective evidence of violence. Therefore, the most commonly charged offence was category 3 sexual assault.⁴⁹ BOCSAR concluded that “any re-structuring of sexual assault offences” was unlikely to “ever get too far away from the question or issue of consent”.⁵⁰
- 2.50 The *Crimes (Amendment) Act 1989* (NSW) (“1989 reforms”) replaced the different categories of sexual assault with one basic offence of sexual assault. The reforms also introduced aggravated versions of this basic offence and the offence of assault with intent to have sexual intercourse.⁵¹
- 2.51 The 1989 reforms reinstated consent as the crucial element for distinguishing between lawful and unlawful sexual activity. The prosecution had to prove the person did not consent even in cases of aggravated sexual assault, for example, in circumstances where actual bodily harm was inflicted.⁵²
- 2.52 The 2007 reforms consolidated this approach. The absence of consent, and the accused’s knowledge about the absence of consent, are integral elements of the offences of sexual assault, aggravated sexual assault and aggravated sexual assault in company.⁵³

A communicative model of consent

- 2.53 Section 61HA also reflects changes in the way the criminal law conceptualises consent. The law has moved from a “passive” to a “communicative” or “positive” model of consent.⁵⁴
- 2.54 Historically, the common law adopted a “passive” model of consent.⁵⁵ As discussed above, rape was understood as an offence committed against a person’s will. It was assumed that someone would actively resist if they did not consent, resulting in physical injury.⁵⁶ The prosecution could then use the physical injury to demonstrate

48. S Bronitt, “The Direction of Rape Law in Australia: Toward a Positive Consent Standard” (1995) 18 *Criminal Law Journal* 249, 249.

49. R Bonney, *Crimes (Sexual Assault) Amendment Act 1981: Monitoring and Evaluation*, Interim Report No 2 (NSW Bureau of Crime Statistics and Research, 1985) 9, 23, 40, 43.

50. R Bonney, *Crimes (Sexual Assault) Amendment Act 1981: Monitoring and Evaluation*, Interim Report No 1 (NSW Bureau of Crime Statistics and Research, 1985) 43.

51. *Crimes Act 1900* (NSW) s 61I, s 61J, s 61K, inserted by *Crimes (Amendment) Act 1989* (NSW) sch 1 [3].

52. *Crimes Act 1900* (NSW) s 61J(2)(a).

53. *Crimes Act 1900* (NSW) s 61I, s 61J(1), s 61JA(1)(a).

54. J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 97–98. See also J Quilter, “From *Raptus* to Rape: A History of the ‘Requirements’ of Resistance and Injury” (2015) 2 *Law and History* 89, 91–92.

55. See, eg, A Powell, “Sexual Pressure and Young People’s Negotiation of Consent” (2007) 14 *ACSSA Newsletter: Aware* 9.

56. B Fileborn, *Sexual Assault Laws in Australia*, ACSSA Resource Sheet (Australian Centre for the Study of Sexual Assault, 2011) 7.

- they did not consent. However, this approach ignored the fact that the majority of people who experience sexual assault do not sustain additional physical injury.⁵⁷
- 2.55 The passive model also assumed a person who did not physically resist a sexual advance was consenting. The difficulty with this assumption was that it treated someone who “froze” out of fear or complied to avoid further injury as if they consented.⁵⁸
- 2.56 The law around consent began to change during in the 1980s. The 1981 reforms introduced three specific types of mistaken beliefs that may negate consent. The 1981 reforms also added that a person is not to be regarded as consenting simply because they do not physically resist. This removed any question of a “legal necessity” for the prosecution to prove that the person “fought back or offered physical resistance” and confirmed “mere submission is not consent”.⁵⁹
- 2.57 However, Parliament did not introduce a legislative definition of consent in the 1981 or 1989 reforms. When directing juries about the meaning of consent, judges relied on the common law. In the 1990s, NSW courts began to apply the understanding that “[c]onsent for the purposes of NSW law ... means consent freely and voluntarily given”.⁶⁰
- 2.58 Parliament enacted a statutory definition of consent as part of the 2007 reforms. As discussed above, s 61HA(2) defines consent as free and voluntary agreement to sexual intercourse.
- 2.59 Instead of a passive model, the 2007 reforms arguably reflect a “communicative” or “positive” model of consent.⁶¹ As Quilter explains, the communicative model of consent:
- embodies an expectation that persons communicate and agree to sexual intercourse, in contrast to the old common law position that required the complainant to demonstrate non-consent largely through physical resistance and/or physical injuries.⁶²
- 2.60 The positive or communicative model assumes that people will actively display their willingness to participate in sexual activity. Submission to sexual advances does not alone demonstrate consent. Nor is it enough to simply assume someone has consented. Instead, everyone should ensure their partner consents to the sexual activity.

57. B Cook, F David and A Grant, *Sexual Violence in Australia*, Research and Public Policy Series No 36 (Australian Institute of Criminology, 2001); D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Australian Institute of Criminology, 2003).

58. B Fileborn, *Sexual Assault Laws in Australia*, ACSSA Resource Sheet (Australian Centre for the Study of Sexual Assault, 2011) 8.

59. G D Woods, Department of Attorney-General and of Justice, *Sexual Assault Law Reforms in New South Wales* (1981) 18.

60. *R v Clark* (Unreported, NSWCCA, 17 April 1998) 9 (Simpson J). But see *R v Mueller* [2005] NSWCCA 47, 62 NSWLR 476 [2] (Hunt AJA), [35]–[37] (Studdert J), [132]–[136] (Hulme J).

61. J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 97, 98; J Quilter, “From *Raptus* to Rape: A History of the ‘Requirements’ of Resistance and Injury” (2015) 2 *Law and History* 89, 91–92.

62. J Quilter, *Preliminary Submission PCO92*, 4.

- 2.61 Under this model, sexual assault is an offence against a person’s agency. For sexual activity to be consensual, there must be free agreement between the parties involved, with no coercion, force or intimidation of any kind.
- 2.62 In addition to the definition of consent, several other aspects of s 61HA reflect this communicative approach. These include recognising that a person’s failure to offer physical resistance is not enough to demonstrate consent and the list of circumstances in which consent is, or may be, negated.⁶³ The listed circumstances make it impossible for the complainant to engage in autonomous decision-making.⁶⁴
- 2.63 The mental element of “knowledge” also arguably includes a communicative aspect. Fact finders must have regard to all the circumstances of the case when making findings about knowledge. In particular, fact finders must consider any steps the accused took to work out if the complainant consented. Some commentators believe this reflects the communicative ideal.⁶⁵
- 2.64 In summary, s 61HA built on previous reforms to consolidate a consent-based approach to sexual assault. Its definition of consent, and other features, arguably incorporate and promote communicative principles. However, many commentators (including some of those who made preliminary submissions) question whether the law is operating as intended.

Is the law operating as intended?

- 2.65 In 2007, the NSW Attorney General explained that the Government aimed to achieve a “cultural shift” in the way the community and the criminal justice system responds to people who have experienced sexual assault.⁶⁶ In particular, the Government sought to “ensure that the criminal law and the processes of criminal justice do not compound the harm suffered by victims of sexual assault”.⁶⁷
- 2.66 The Government hoped the 2007 reforms would:
- reduce the number of sexual assault offences being committed
 - improve the reporting rates for sexual assault incidents
 - lead to the successful prosecution of sexual assault matters
 - clarify the law, especially for jurors who must apply it
 - increase public confidence in the legal process, and

63. *Crimes Act 1900* (NSW) s 61HA(4)–(7). See also J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 98; J Quilter, “From *Raptus* to Rape: A History of the ‘Requirements’ of Resistance and Injury” (2015) 2 *Law and History* 89, 91.

64. J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 98.

65. See, eg, J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 97, 98, 101.

66. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW)).

67. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3908–3909.

- educate the community about “the reasonable standards that should be adopted in this area”.⁶⁸
- 2.67 In a 2013 review of the law, the NSW Department of Justice concluded the policy objectives of s 61HA remained valid. The Department found the amendments were still “firmly supported” by representatives of people who have experienced sexual assault.⁶⁹ As only a limited number of appeals had raised issues about the definition of consent, the Department concluded the definition “is understood and is working in NSW’s courts”.⁷⁰
- 2.68 Five years on, some authors of preliminary submissions continue to support the law in principle.⁷¹ Some believe it does not require further reform as it “strikes the right balance” between the rights of the accused and the interests of complainants and the community.⁷²
- 2.69 However, others believe the law has not met its objectives. In particular, some argue NSW must amend the law to “crystallise” the ideal of communicative consent from policy into practice.⁷³ We also heard that people who have experienced sexual assault continue to face considerable difficulties when they seek justice.
- 2.70 Recent commentary on s 61HA has centred on the controversial *Lazarus* case.⁷⁴ In this section, we give an overview of this case. We also summarise what we have heard about how the criminal justice system deals with sexual assault offences. We will return to these issues throughout this Paper.

The *Lazarus* case

- 2.71 The *Lazarus* case involved two trials and two appeals, which took place between 2015 and 2017.⁷⁵
- 2.72 The complainant said the accused sexually assaulted her in an alleyway behind a nightclub in Sydney’s Kings Cross.⁷⁶ A jury convicted the accused and the trial judge sentenced him to five years’ imprisonment with a non-parole period of three years. The accused successfully appealed to the Court of Criminal Appeal (“CCA”) on the ground that the trial judge had misdirected the jury about s 61HA(3)(c) (which deals with the “no reasonable grounds” test for knowledge).⁷⁷

68. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3908–3909.

69. NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013) 5.

70. NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013) 18.

71. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 6, 11; J Quilter, *Preliminary Submission PCO92*, 4.

72. Law Society of NSW, *Preliminary Submission PCO73*, 1. See also A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 2; Office of the Director of Public Prosecutions, *Preliminary Submission PCO100*, 5.

73. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 5; Women’s Legal Service NSW, *Preliminary Submission PCO61*, 2.

74. See, eg, J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96.

75. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279.

76. *R v Lazarus* [2017] NSWCCA 279 [11]–[31].

77. *Lazarus v R* [2016] NSWCCA 52 [6].

- 2.73 The CCA held the trial judge had incorrectly instructed the jury on how to determine if the prosecution had proven there were “no reasonable grounds” for the accused’s belief about consent.⁷⁸ We return to this issue in Chapter 5. The CCA set aside the accused’s conviction and ordered a retrial.⁷⁹
- 2.74 The retrial was conducted as a judge-alone trial.⁸⁰ The judge acquitted the accused in May 2017. The judge concluded “the complainant, in her own mind, did not consent to the anal sexual intercourse that occurred”.⁸¹ However, her Honour found the accused formed a “genuine belief”, on reasonable grounds, that the complainant consented. Her Honour observed the complainant “did not say ‘stop’ or ‘no’” and “did not take any physical action to move away from the intercourse or attempted intercourse”.⁸²
- 2.75 The Director of Public Prosecutions lodged an appeal. In November 2017, the CCA found the trial judge made an error by failing to consider any steps taken by the accused to find out whether the complainant consented, as required by s 61HA(3)(d). The CCA set aside the trial judge’s decision to acquit the accused, but it did not order another retrial. The CCA decided it would be oppressive and unfair in the circumstances to put the accused through the expense and worry of a third trial.⁸³
- 2.76 Many authors of preliminary submissions criticise the outcome of the *Lazarus* case and believe it shows the law must change.⁸⁴ Some argue NSW should strengthen the definition of consent to require affirmative indications of consent. Others believe any law reform efforts should focus on the mental element of knowledge.⁸⁵ Another view is that the prolonged process of trials and appeals in this case shows the law is confusing and needs to be clarified.⁸⁶
- 2.77 Others question whether the *Lazarus* case justifies any significant changes to the law.⁸⁷

Experiences with the law of sexual assault

- 2.78 To many commentators, the *Lazarus* case also reflects a much wider issue. That is, complainants still face serious challenges when navigating criminal justice processes.

78. *Lazarus v R* [2016] NSWCCA 52 [156].

79. *Lazarus v R* [2016] NSWCCA 52 [159].

80. See [2.15]–[2.16].

81. *R v Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017) 70.

82. *R v Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017) 73.

83. *R v Lazarus* [2017] NSWCCA 279 [163], [168].

84. See, eg, T Kitley, *Preliminary Submission PCO13*, 1; S Love, *Preliminary Submission PCO14*, 1; A Turnbull, *Preliminary Submission PCO35*, 1; L Horgan, *Preliminary Submission PCO41*, 1; Inner City Legal Centre, *Preliminary Submission PCO44*, 2-4; B Moroney, *Preliminary Submission PCO48*, 2; Feminist Legal Clinic Inc, *Preliminary Submission PCO53*, 2; Confidential, *Preliminary Submission PCO57*; R Burgin, *Preliminary Submission PCO72*, 4–5; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 11–14; M Faruqi, *Preliminary Submission PCO93*, 1.

85. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See also B Attard, *Preliminary Submission PCO70*, 3.

86. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 9; A Cossins, *Preliminary Submission PCO33*, 20, 38.

87. See, eg, A Dyer, *Preliminary Submission PCO50* [3]–[4]; A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 1.

- 2.79 As mentioned, the Government hoped the 2007 reforms would improve the way the criminal justice system responds to people who have experienced sexual assault. However, considerable problems persist. These include:
- significant levels of under-reporting and high attrition rates when matters are reported
 - difficulties experienced by complainants during trials, and
 - the potential for misconceptions and assumptions about sexual assault to influence the application of s 61HA.

Under-reporting and high attrition rates

- 2.80 The authors of several preliminary submissions express concern about the under-reporting of sexual offences.⁸⁸ In its 2016 Personal Safety Survey, the Australian Bureau of Statistics found that 86.8% (553,900) of Australian women sexually assaulted by a male, in the last 10 years, did not report the most recent incident to police.⁸⁹
- 2.81 Some observe that certain individuals and groups experience greater barriers than others to reporting sexual assault. This includes people from culturally and linguistically diverse backgrounds;⁹⁰ people with disability;⁹¹ Aboriginal people and Torres Strait Islanders;⁹² and lesbian, gay, bisexual, queer, transgender, intersex and asexual (“LGBTQIA+”) people.⁹³
- 2.82 In addition, few complaints are investigated and/or proceed to trial. An even smaller percentage of cases result in conviction, as sexual assault matters have low rates of guilty pleas and high rates of acquittal.⁹⁴ This is known as the “attrition” process.
- 2.83 The authors of some preliminary submissions suggest that law reform could improve this situation. The Police Association of NSW acknowledges “these trends are caused by a multitude of factors, and will not be addressed by reform of s 61HA alone”. However, the Association argues a “better conception of consent”, and a

88. See, eg, T Olsen, *Preliminary Submission PCO32*, 1; Australian Lawyers Alliance, *Preliminary Submission PCO74*, 6–7; M Faruqi, *Preliminary Submission PCO93*, 2.; I, *Preliminary Submission PCO21*, 4–5; B Attard, *Preliminary Submission PCO70*, 4; Women’s Electoral Lobby, *Preliminary Submission PCO71*, 2; J Quilter, *Preliminary Submission PCO92*, 12.

89. Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (2017) Cat No 4906.0 <www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0> (retrieved 12 September 2018).

90. University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 6; Australia’s National Research Organisation for Women’s Safety, *Preliminary Submission PCO105*, 4–5.

91. People with Disability Australia, *Preliminary Submission PCO104*, 2; Australia’s National Research Organisation for Women’s Safety, *Preliminary Submission PCO105*, 5.

92. University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 8; Australia’s National Research Organisation for Women’s Safety, *Preliminary Submission PCO105*, 4.

93. Australian Queer Students Network, *Preliminary Submission PCO56*, 4; Australia’s National Research Organisation for Women’s Safety, *Preliminary Submission PCO105*, 6.

94. NSW Bureau of Crime Statistics and Research, “The progress of sexual offences through the NSW Criminal Justice System, 2017” (2017) <www.bocsar.nsw.gov.au/Documents/2017-sexualattributiondiagrams.pdf> (retrieved 11 October 2018); J Fitzgerald, *The Attrition of Sexual Offences from the New South Wales Criminal Justice System* (NSW Bureau of Crime Statistics and Research, 2006).

requirement to seek consent actively, would have a “profound and positive impact” on addressing the attrition of sexual assault cases.⁹⁵

- 2.84 Another view is that NSW requires both new legislation and changes in social attitudes “to restore confidence in the justice system, so more victims of sexual assault feel confident to come forward and report the crime”.⁹⁶

The treatment of complainants during trials

- 2.85 In recent years, NSW has introduced law and policy reforms to address some of the challenges that complainants face at trial. For instance, complainants in sexual assault trials can give evidence by closed-circuit television and with the assistance of a support person.⁹⁷ In some courthouses, therapy dogs are available to provide support.⁹⁸ In the District Court of NSW, there is a separate case list and a court practice note for sexual assault matters to ensure matters are managed closely and in a timely way. To avoid unnecessary anxiety for the complainant, the practice note requires they are told as soon as possible when they will be required to give evidence.⁹⁹

- 2.86 Other reforms include:

- restrictions on cross-examination about sexual history¹⁰⁰
- the prohibition of cross-examination of a complainant by a self-represented accused¹⁰¹
- changes to the instructions given by judges to the jury (for example, juries are no longer warned that it is “dangerous” to convict on the basis of a complainant’s uncorroborated evidence),¹⁰² and
- non-publication of the identities of complainants without their permission.¹⁰³

- 2.87 However, complainants still face significant obstacles at trial. We have heard that complainants often feel their behaviour is interrogated, when the focus should be on the accused’s actions.¹⁰⁴

- 2.88 As sexual assaults usually occur in private, it can be difficult for the prosecution to prove beyond reasonable doubt that a sexual assault occurred. Eyewitnesses are unlikely to be present and there is rarely any other corroborating evidence, such as physical injury.¹⁰⁵

95. Police Association of NSW, *Preliminary Submission PC084*, 2–3.

96. M Faruqi, *Preliminary Submission PC093*, 2.

97. *Criminal Procedure Act 1986* (NSW) s 294B(3), s 294C.

98. NSW Government, “Therapy Dogs to Offer Support at NSW Courthouses” (12 July 2018) <www.nsw.gov.au/news-and-events/news/therapy-dogs-to-offer-support-at-nsw-courthouses> (retrieved 11 October 2018).

99. District Court of NSW, *Criminal Practice Note 6 – Sexual Assault Case List*, 27 April 2007 [5].

100. *Criminal Procedure Act 1986* (NSW) s 293.

101. *Criminal Procedure Act 1986* (NSW) s 294A.

102. *Criminal Procedure Act 1986* (NSW) s 294AA.

103. *Crimes Act 1900* (NSW) s 578A(2), s 578A(2), s 578A(4)(b).

104. B Attard, *Preliminary Submission PC070*, 4; P Harries, *Preliminary Submission PC090*, 4. See also Police Association of NSW, *Preliminary Submission PC084*, 3.

105. Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [1.12].

- 2.89 As an accused can choose not to give evidence in court, a successful prosecution will often turn on the complainant's character and credibility.¹⁰⁶ One of the key strategies for the defence is often to challenge the credibility of the complainant, such that cross-examination may therefore take on a personal dimension not seen in other criminal trials.¹⁰⁷
- 2.90 The authors of several preliminary submissions acknowledge that trials can have a negative effect on complainants.¹⁰⁸ Giving evidence about intimate matters, and being cross-examined, can be "challenging", "distressing" and "traumatising" for complainants.¹⁰⁹ Some complainants describe the criminal trial process as a "second rape", as their behaviour and character is analysed throughout the trial.¹¹⁰
- 2.91 The Police Association of NSW observes that a complainant "will have her behaviour at the time of the assault, and throughout her adult life, scrutinised and questioned, with the aim of discrediting her legitimate belief she was assaulted".¹¹¹ The Police Association believes that "what is really put on trial is the reliability of the victim, not the criminality of the accused".¹¹²

The influence of "rape myths"

- 2.92 The authors of several preliminary submissions express concern about the influence that misconceptions and incorrect assumptions about sexual assault have in the criminal justice process.¹¹³ These are often known as "rape myths".¹¹⁴
- 2.93 Rape myths include unsubstantiated beliefs about what constitutes "real rape".¹¹⁵ This includes the view that rape always involves a random attack by a stranger, in an isolated but still public location, and involves the use of force or physical

106. N Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, Trends and Issues in Crime and Criminal Justice No 344 (Australian Institute of Criminology, 2007) 1.

107. Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) [24.74].

108. See, eg, I, *Preliminary Submission PCO21*, 5; End Rape on Campus, *Preliminary Submission PCO63*, 1–2; B Attard, *Preliminary Submission PCO70*, 4; P Harries, *Preliminary Submission PCO90*, 5; Domestic Violence NSW, *Preliminary Submission PCO91*, 7; Feminist Legal Clinic, *Preliminary Submission PCO53*, 2; P Rush and A Young, *Preliminary Submission PCO59*, 13; J Moylan, *Preliminary Submission PCO87*, 1.

109. Domestic Violence NSW, *Preliminary Submission PCO91*, 7.

110. See, eg, L Madigan and N C Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* (Maxwell Macmillan, 1991). See also D Brereton, "How Different are Rape Trials? A Comparison of Cross-Examination of Complainants in Rape and Assault Trials" (1997) 37 *British Journal of Criminology* 242.

111. Police Association of NSW, *Preliminary Submission PCO84*, 3.

112. Police Association of NSW, *Preliminary Submission PCO84*, 3. See also Feminist Legal Clinic, *Preliminary Submission PCO53*, 2.

113. See, eg, I, *Preliminary Submission PCO21*, 5; Women's Legal Service, *Preliminary Submission PCO61*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 33–35; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 12. See also Community Legal Centres NSW, *Preliminary Submission PCO58*, 11; Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 2.

114. See, eg, J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart, 2008) 34–36; S Dinos and others, "A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?" (2015) 43 *International Journal of Law, Crime and Justice* 36, 37.

115. S Estrich, *Real Rape* (Harvard University Press, 1987). See also Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 21, 34.

- injury.¹¹⁶ Research does not support this. For example, in the 2012 Personal Safety Survey, approximately 16% of women (aged 18 and over) had experienced sexual offences by a known person, compared to 5% by a stranger.¹¹⁷ Nevertheless, false beliefs about what constitutes “real rape” can affect how people perceive sexual assaults that do not fit their preconceptions.
- 2.94 Other stereotypes are that a “real rape victim” will always:
- offer physical and/or verbal resistance to the sexual assault
 - report sexual assault immediately, and
 - show distress when reporting sexual assault or when appearing in court.¹¹⁸
- 2.95 Research does not support these views either. In particular, it is well-documented that people who experience sexual assault often “freeze” and remain unresponsive.¹¹⁹ They may be afraid that struggle or resistance will lead to injury or death, or experience the “paralyzing effect of fear” that prevents them from moving or speaking.¹²⁰ The “freeze response” to sexual assault, and whether it is sufficiently acknowledged by the law, has been a significant part of the commentary in response to the *Lazarus* case.¹²¹
- 2.96 The authors of some preliminary submissions also detail “victim-blaming” attitudes that shift responsibility from the offender to the person who experienced the assault. This includes the view that women “provoke” rape by dressing or acting in a certain way, and/or by consuming alcohol or drugs.¹²² Some identify rape myths that apply to particular complainants, such as sex workers and Indigenous women.¹²³ However, research suggests that sexual assault is not caused by the person who

116. See, eg, L Ellison and V E Munro, “A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study” (2010) 13 *New Criminal Law Review* 781, 783, 789; Australian Institute of Family Studies, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 5–7.

117. Australian Bureau of Statistics, *Personal Safety, Australia, 2012* (2013) Cat No 4906.0 <www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0> (retrieved 11 October 2018).

118. See, eg, Australian Institute of Family Studies, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 7, 12, 13. See also Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 2; Police Association of NSW, *Preliminary Submission PCO84*, 4.

119. See, eg, End Rape on Campus Australia, *Connecting the Dots: Understanding Sexual Assault in University Communities*, Submission to the Australian Human Rights Commission’s “University Sexual Assault and Harassment” Project (2017) 7–8.

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

121. See, eg, “I Am That Girl”, 7 May, 8.30pm, *ABC Four Corners* <www.abc.net.au/4corners/i-am-that-girl/9736126> (retrieved 11 October 2018).

122. See, eg, I, *Preliminary Submission PCO21*, 1; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 6, 13. See also N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (nbresearch, 2013) 6.

123. Sex Workers Outreach Project, *Preliminary Submission PCO103*, 6; Wirringa Baiya Aboriginal Women’s Legal Centre, *Preliminary Submission PCO78*, 2.

- experiences it. Rather, perpetrators make deliberate choices and employ “situationally targeted” strategies to secure sexual interaction with the person.¹²⁴
- 2.97 Such misunderstandings and stereotypes can affect whether someone reports an assault and, if they do, whether the offender is charged or prosecuted.¹²⁵ Rape myths may also emerge during a trial, undermining the communicative principles behind s 61HA.
- 2.98 In particular, rape myths can arise as part of the defence strategy. For instance, a recent United Kingdom (“UK”) study found that defence lawyers often take advantage of the myth that rape always involves an attack by a stranger, by emphasising the pre-existing relationship between the parties, however tenuous. They may also emphasise the absence of injuries or resistance, and the failure of the complainant to report the alleged assault immediately. If the complainant was intoxicated at the time of the alleged assault, defence lawyers may use this to discredit them.¹²⁶
- 2.99 The UK study found prosecutors and judges rarely challenge the use of rape myths by defence lawyers.¹²⁷ A Tasmanian study found prosecutors may also draw upon traditional ideas about female sexuality and assumptions about how people react to sexual assault when arguing their case.¹²⁸
- 2.100 The authors of several preliminary submissions say that rape myths can influence fact finders when they make decisions about key issues in sexual assault trials.¹²⁹ It is difficult to know what has influenced the outcome of a particular jury trial, as juries are not required to give reasons for their decisions. However, studies involving mock trials in Australia and the UK have found jurors rely heavily on their own experiences, attitudes and expectations.¹³⁰
- 2.101 This includes assumptions about how a person who experiences sexual assault should behave. For instance, in one study, jurors believed a “freeze response” undermined the complainant’s credibility, especially if the complainant knew the

124. H Clark and A Quadara, *Insights into Sexual Assault Perpetration: Giving Voice to Victim/Survivors’ Knowledge*, Research Report No 18 (Australian Institutes of Family Studies, 2010) xi, 53.

125. See, eg, J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart, 2008) 13; N Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, Trends and Issues in Crime and Criminal Justice No 344 (Australian Institute of Criminology, 2007) 1.

126. J Temkin, J M Gray and J Barrett, “Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study” (2018) 13 *Feminist Criminology* 205, 212–213.

127. J Temkin, J M Gray and J Barrett, “Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study” (2018) 13 *Feminist Criminology* 205, 218. See also H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) iii.

128. H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 130.

129. See, eg, A Cossins, *Preliminary Submission PCO33*, 3; Women’s Legal Service, *Preliminary Submission PCO61*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 12.

130. N Taylor and J Joudo, *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*, Research and Public Policy Series No 68 (Australian Institute of Criminology, 2005) 57, 67; L Ellison and V E Munro, “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *British Journal of Criminology* 202, 214; L Ellison and V E Munro, “Better the Devil you Know? ‘Real Rape’ Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations” (2013) 17 *International Journal of Evidence and Proof* 299, 321.

alleged offender previously.¹³¹ In another study, the mock jurors believed that “acquaintance rape” generally arises because of “miscommunication” and thought that women are responsible for avoiding such miscommunication.¹³²

- 2.102 Due to the potential influence of rape myths on jurors, some people believe judge-alone trials are preferable.¹³³ However, others observe that misconceptions and assumptions about sexual assault can also influence judges. This is apparent, some argue, in the reasons given by judges for their decisions in two recent judge-alone trials — including the *Lazarus* case.¹³⁴
- 2.103 Some people argue that rape myths affect the operation of s 61HA such that the 2007 reforms have not lived up to their promise.¹³⁵ For instance, as we discuss in Chapter 5, an accused may successfully argue the complainant’s lack of resistance gave them reasonable grounds for assuming consent.¹³⁶

In summary

- 2.104 The law on sexual assault has undergone significant changes in the past 40 years. NSW law now has a consent-based approach to sexual assault offences, which reflects communicative principles.
- 2.105 However, it is apparent that many people believe the objectives behind s 61HA have not been realised. This may be due to wider cultural factors, which legislative change alone cannot address. Nevertheless, there may be scope for targeted reforms to improve the operation of s 61HA.
- 2.106 In the following Chapters, we review the components of s 61HA and invite comment on options for reform. We begin by considering one of the central parts of the 2007 reforms: the legislative definition of consent.

131. L Ellison and V E Munro, “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *British Journal of Criminology* 202, 207.

132. L Ellison and V E Munro, “A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Jury Study” (2010) 13 *New Criminal Law Review* 781, 792.

133. B Attard, *Preliminary Submission PCO70*, 8; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 8.

134. A Cossins, *Preliminary Submission PCO33*, 33–34, 36; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 12.

135. See, eg, Women’s Legal Service NSW, *Preliminary Submission PCO61*, 2. See also Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 6.

136. University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 4.

3. The meaning of consent

In brief

Consent plays a central role in the law of sexual assault. We review the legal definition of consent in NSW. We also consider the “affirmative consent” standard and invite comment on possible options for reforming the NSW definition.

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- 3.1 Consent plays a central role in the law of sexual assault. Absence of consent is part of the actus reus or physical element of the sexual assault offences. The absence of a person’s consent makes sexual intercourse with that person an offence.
- 3.2 Section 61HA(2) of the *Crimes Act 1900* (NSW) (“*Crimes Act*”) defines consent as follows:
- A person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.
- 3.3 Section 61HA(7) confirms 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”.
- 3.4 This definition is the subject of extensive debate in the media and in preliminary submissions to this review. Some preliminary submissions suggest the definition does not go far enough and propose reforms to require people to secure the

“affirmative” consent of their sexual partner. Others have cautioned against introducing such reforms, with some warning of far-reaching consequences.

- 3.5 In this Chapter, we review the legal definition of consent in NSW. We also discuss and invite comment on possible options for reform.

Overview of NSW law

- 3.6 As discussed in Chapter 2, NSW takes a consent-based approach to the sexual assault offences.
- 3.7 Under s 61HA(2) of the *Crimes Act*, a person consents to sexual intercourse if the person “freely and voluntarily agrees to the intercourse”. Section 61HA(2) is accompanied by a list of circumstances that automatically negate consent, such as threats of force or terror, as well as circumstances that *may* negate consent, such as intimidating conduct.¹ We discuss these circumstances in Chapter 4.
- 3.8 The suggested jury direction in the NSW *Criminal Trial Courts Bench Book* (“Bench Book”) is that “consent can be given verbally, or expressed by actions”.² Consent obtained after persuasion is still consent, provided that it is ultimately given freely and voluntarily.³
- 3.9 Judges can also instruct juries that a person does not have to use words to communicate that they do not consent. People can communicate non-consent in other ways, including through resistance.⁴ However, the law in NSW does not *require* evidence of physical resistance to establish non-consent, as s 61HA(7) provides that a lack of resistance does not, by itself, indicate consent.
- 3.10 The NSW definition of consent reflects a “positive” or “communicative” model of consent. This model assumes that people will freely agree to sexual intercourse and actively display their willingness to participate. Accordingly, submission to a person’s sexual advances does not alone demonstrate consent.⁵
- 3.11 The positive consent model seeks to reverse the burden on the complainant to resist the sexual advance.⁶ The use of the word “agreement” emphasises that consent should be seen as a positive state of mind, and something to be sought and communicated, rather than assumed.⁷

1. *Crimes Act 1900* (NSW) s 61HA(4)–(5), (6).

2. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566].

3. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566]. See also *R v Holman* [1970] WAR 2, 6.

4. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566].

5. See discussion at [2.58]–[2.64].

6. A Powell and others, “Meanings of ‘Sex’ and ‘Consent’: The Persistence of Rape Myths in Victorian Rape Law” (2013) 22 *Griffith Law Review* 456, 462.

7. Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999) 43. See also J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96.

Perspectives on the NSW definition of consent

Support for the NSW definition

- 3.12 Some preliminary submissions support retaining the existing definition of consent as free and voluntary agreement.⁸ They observe that the NSW definition aligns with the definition recommended by the Model Criminal Code Officers Committee in 1999,⁹ and with the definitions used in other Australian states and territories.¹⁰ Except for the Australian Capital Territory (“ACT”), every other state and territory has a statutory definition of consent based on:
- free agreement¹¹
 - free and voluntary agreement,¹² or
 - consent freely and voluntarily given.¹³
- 3.13 There is also support for the principle in s 61HA(7) that a lack of resistance from the complainant does not equate to consent.¹⁴ Quilter observes that this shift away from a requirement to demonstrate physical resistance was at the “heart” of the move to the positive model of consent.¹⁵

Criticism of the NSW definition

- 3.14 The NSW definition of consent has been criticised on several key grounds, including:
- the definition is unclear and insufficient
 - the definition does not clearly endorse a positive or communicative standard
 - there is an undue focus on the conduct of the complainant, rather than the accused, and
 - the application of the definition is influenced by “rape myths”.

8. K Burton, *Preliminary Submission PC076*, 1; J Quilter, *Preliminary Submission PC092*, 4.
 9. Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999) 43.
 10. K Burton, *Preliminary Submission PC076*, 1; J Quilter, *Preliminary Submission PC092*, 4; Office of the Director of Public Prosecutions, *Preliminary Submission PC0100*, 3.
 11. *Criminal Code* (Tas) s 2A(1); *Crimes Act 1958* (Vic) s 36(1).
 12. *Criminal Code* (NT) s 192(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2).
 13. *Criminal Code* (Qld) s 348(1); *Criminal Code* (WA) s 319(2)(a).
 14. See, eg, K Burton, *Preliminary Submission PC076*, 1; J Quilter, *Preliminary Submission PC092*, 4; M Faruqi, *Preliminary Submission PC093*, 1; University of Newcastle Women’s Collective, *Preliminary Submission PC094*, 3, 13. See also Rape and Domestic Violence Services Australia, *Preliminary Submission PC088*, 11.
 15. J Quilter, *Preliminary Submission PC092*, 4–5. See Chapter 2 for the history of this movement.

The definition is unclear and insufficient

- 3.15 Some people believe the NSW definition of consent is unclear.¹⁶ Some argue that definitions of consent based on “free agreement” do not properly define consent,¹⁷ as different people may come to different conclusions about how free agreement operates.¹⁸
- 3.16 Cossins argues that, without explicit and detailed legislative guidance, any legal standard of consent based on the notion of free and voluntary agreement will vary for different fact finders.¹⁹ The NSW Bar Association says that the word “freely” is problematic, and that “[f]reedom of choice’ is an ambiguous concept”. It believes that “[c]rimes of sexual assault should be confined to cases where sexual choice is non-existent”.²⁰
- 3.17 Another argument is that the NSW definition does not fully address the “specific nature of consent”.²¹ One preliminary submission argues that individuals who consent to a particular kind of sexual intercourse do not necessarily consent to all kinds.²² In their view, consent should be defined as “free and voluntary agreement to a particular kind of sexual intercourse”.²³ Scotland provides an example of this approach. There, the law states that “[c]onsent to conduct does not of itself imply consent to any other conduct”.²⁴

The definition does not clearly endorse a communicative standard

- 3.18 There is a view that the NSW definition does not clearly endorse the positive or communicative model of consent.²⁵ As such, some believe it does not meet its policy objective.²⁶
- 3.19 The authors of one preliminary submission argue that the NSW law does not comprehensively communicate the meaning of positive consent. They say that having a list of circumstances in which consent is (or may be) negated makes non-consensual sexual intercourse the focus of s 61HA. They suggest that the law should “detail the presence of consent – that is, a positive and mutual agreement on having sexual intercourse between the parties”.²⁷

16. See, eg, M Tennant, *Preliminary Submission PCO11*, 1; NSW Bar Association, *Preliminary Submission PCO47*, 2; University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 4.

17. M Heath, “Women and Criminal Law: Rape” in P Eastal (ed) *Women and the Law in Australia* (LexisNexis, 2010) 96.

18. See, eg, A Gruber, “Consent Confusion” (2016) 38 *Cardozo Law Review* 415, 417–418.

19. A Cossins, *Preliminary Submission PCO33*, 39–40.

20. NSW Bar Association, *Preliminary Submission PCO47*, 2.

21. C Stone, *Preliminary Submission PCO95*, 3. See also T Mohr, *Preliminary Submission PCO66*, 1; R Burgin, *Preliminary Submission PCO72*, 3.

22. C Stone, *Preliminary Submission PCO95*, 3. See also Coffs Harbour Sexual Assault Service, Mid North Coast Local Health District, *Preliminary Submission PCO82*, 2.

23. C Stone, *Preliminary Submission PCO95*, 3.

24. *Sexual Offences (Scotland) Act 2009* (Scot) s 15(2).

25. Rule of Law Institute of Australia, *Preliminary Submission PCO55*, 2–4; End Rape on Campus, *Preliminary Submission PCO63*, 1; St Catherine’s School Legal Studies students, *Preliminary Submission PCO69*, 1; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 10.

26. Women’s Legal Service, *Preliminary Submission PCO61*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 5.

27. St Catherine’s School Legal Studies students, *Preliminary Submission PCO69*, 1.

- 3.20 The Rule of Law Institute of Australia (“RULIA”) also believes there should be a “clear statement in the legislation regarding positive communication of consent”. RULIA notes that the jury direction in the *Bench Book* states that consent “can be given verbally or expressed by actions”. RULIA suggests that “[t]his legal position should be included in s 61HA, as a clear statement of the law, so that it is evident and easily found”.²⁸
- 3.21 Rape and Domestic Violence Services Australia (“RDVSA”) submits that while the ideal of communicative consent is reflected in the term “free and voluntary agreement”,²⁹ to achieve a communicative standard, “the notion of consent must be redefined as an act of communication rather than a state of mind”.³⁰
- 3.22 RDVSA also believes that s 61HA(7), which 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”, has failed in practice to implement the ideal of communicative consent:
- [T]he provision fails to emphasise the need for a positive act of communicated consent. Instead, by specifically eliminating lack of *physical resistance* as an indicator of consent, the provision implies that lack of *verbal resistance* may in fact be sufficient to establish consent.³¹
- 3.23 RDVSA argues that s 61HA has therefore “failed to fully displace the presumption that submission equates to consent”.³²

The definition focuses attention unduly on the complainant’s conduct

- 3.24 Some submissions argue that, even with a positive definition of consent, the focus of sexual assault trials remains unduly on the conduct of complainants.³³ The definition of consent could be part of the problem.
- 3.25 As the prosecution must prove beyond reasonable doubt that the complainant did not “freely and voluntarily agree to the sexual intercourse”, Cossins argues that a fact finder “must consider the behaviour and words of the complainant at the time of the sexual intercourse”. Without a formula for deciding how much verbal or physical behaviour amounts to non-consent, she believes fact finders are invited to assess subjectively whether the complainant’s conduct was sufficient.³⁴
- 3.26 Mason and Monaghan agree that decisions about consent involve “extensive scrutiny” of the complainant’s behaviour and whether they “effectively communicated any lack of consent”.³⁵

28. Rule of Law Institute of Australia, *Preliminary Submission PCO55*, 3–4.

29. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 11.

30. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 10.

31. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 14 (emphasis in original).

32. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 14.

33. See, eg, A Dyer, *Preliminary Submission PCO50* [14]; Feminist Legal Clinic, *Preliminary Submission PCO53*, 2; Coffs Harbour Sexual Assault Service, *Preliminary Submission PCO82*, 1; Police Association of NSW, *Preliminary Submission PCO84*, 3.

34. A Cossins, *Preliminary Submission PCO33*, 9.

35. G Mason and J Monaghan, *Preliminary Submission PCO40* [6].

The application of the definition is influenced by “rape myths”

- 3.27 The authors of several preliminary submissions argue that “rape myths” influence the way the definition of consent is applied.³⁶ As discussed in Chapter 2, rape myths are stereotypical views about what constitutes “real rape”, and how “real victims” behave, which often conflict with the reality of sexual assault.³⁷ Cossins observes “[t]here is no legislative restriction that prevents rape myths and victim-blaming attitudes from being taken into account by fact finders”.³⁸
- 3.28 A common rape myth is that “real rape” involves a violent attack by an unknown perpetrator. The authors of some submissions note the difficulty of proving non-consent where the complainant and the accused were previously known to each other.³⁹ The Northern Sydney Sexual Assault Service submits that evidence of a prior relationship, or even a recent acquaintance, is “explored in court and used to demonstrate implicit consent to a sexual act” by the complainant.⁴⁰
- 3.29 Another well-known rape myth is that a “real victim” will “fight back” or voice their opposition to the sexual assault.⁴¹ However, many submissions identify that a common response of people who experience sexual assault is to “freeze” and remain unresponsive.⁴² Some submissions note it can be difficult to prove non-consent when the complainant did not actively resist.⁴³ People might think the complainant either consented or did not make it clear to the accused that they did not consent.⁴⁴ Many submissions argue that prosecutors, judges and juries need to understand the freeze response better.⁴⁵

36. See, eg, Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 2; Wirringa Baiya Aboriginal Women’s Legal Centre, *Preliminary Submission PCO78*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 12; Women’s Legal Service NSW, *Preliminary Submission PCO61*, 2; B Attard, *Preliminary Submission PCO70*, 7, 8.

37. See discussion at [2.92]-[2.103].

38. A Cossins, *Preliminary Submission PCO33*, 3.

39. See, eg, M Otlowski, *Preliminary Submission PCO45*, 20–21; Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 1; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 8.

40. Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 1.

41. See, eg, L Ellison and V E Munro, “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *British Journal of Criminology* 202.

42. See, eg, M Otlowski, *Preliminary Submission PCO45*, 10; Community Legal Centres NSW, *Preliminary Submission PCO58*, 5–6; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 7–8; Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 2–3; Coffs Harbour Sexual Assault Service, Mid North Coast Local Health District, *Preliminary Submission PCO82*, 1; Police Association of NSW, *Preliminary Submission PCO84*, 4; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 21–22; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 7.

43. See, eg, Community Legal Centres NSW, *Preliminary Submission PCO58*, 5.

44. Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 2; Coffs Harbour Sexual Assault Service, Mid North Coast Local Health District, *Preliminary Submission PCO82*, 1. See also A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 8; B Attard, *Preliminary Submission PCO70*, 8; Police Association of NSW, *Preliminary Submission PCO84*, 4.

45. See, eg, C Goosen, *Preliminary Submission PCO26*, 1; M Dobbie, *Preliminary Submission PCO75*, 2; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 6; Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 2–3; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 12.

Possible reform option: alternatives to consent

- 3.30 There is some suggestion that “consent” should not have such a central role in sexual assault law.
- 3.31 Rush and Young argue that the “physical element” of sexual offences should simply require “proof of injury and the accused’s causative relation to the occurrence of the injury”. Such injury could include physical injury, injury to a person’s “mental wellbeing”, and “adverse economic consequences”.⁴⁶ Rush and Young say that “[d]efining injury seems a simpler and clearer task than defining consent (as agreement) or knowledge about such consent”.⁴⁷
- 3.32 The approach taken in Michigan also appears to “de-prioritise” consent.⁴⁸ While Rush and Young’s approach focuses on the *consequences* of the sexual assault, the law in Michigan concentrates on the *circumstances* in which the sexual assault occurred. The prosecution must prove that the sexual penetration took place in circumstances of force or coercion, instead of “without consent”. Where the assault was committed by an armed offender or in the course of the commission of a felony, the prosecution does not have to prove there were additional coercive circumstances.⁴⁹
- 3.33 Some commentators have criticised the Michigan model and other similar approaches for disregarding the “uniquely degrading nature” of non-consensual sexual intercourse.⁵⁰ They argue that non-consensual sexual interaction “is in and of itself a harm ... which should be criminalised”.⁵¹
- 3.34 Even without any reference to consent in the statute, the Michigan model reportedly has not reduced the emphasis on consent in practice. It is still open for the accused to raise consent as a defence.⁵² The defence has been successful even in cases involving significant violence.⁵³ As discussed in Chapter 2, NSW repealed a similar scheme because sexual assault trials remained focused on the issue of consent.⁵⁴
- 3.35 Several European countries have recently moved away from a definition of rape or sexual assault based on force, and adopted a consent-based definition. The *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* obliges signatory states to criminalise all non-consensual acts of

46. P Rush and A Young, *Preliminary Submission PCO59*, 3, 11–12.

47. P Rush and A Young, *Preliminary Submission PCO59*, 3.

48. H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 78.

49. *Michigan Penal Code 1931* § 750.520a–750.520l.

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

51. A Carline and P Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women: Law Reform and Society* (Routledge, 2014) 261.

52. Model Criminal Code Officers Committee, *Chapter 5: Sexual Offences Against the Person*, Report (1999) 25.

53. H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 73.

54. See discussion at [2.46]–[2.51]. See also Model Criminal Code Officers Committee, *Chapter 5: Sexual Offences Against the Person*, Report (1999) 27.

a sexual nature.⁵⁵ Many European states have ratified this Convention. Countries such as Iceland and Sweden now have consent-based definitions.⁵⁶

Question 3.1: Alternatives to a consent-based approach

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

Possible reform option: the “affirmative consent” standard

- 3.36 One reform option might be to introduce an “affirmative” standard of consent. Under this standard, consent is defined “to require an affirmative expression of willingness” from each person involved in the sexual activity.⁵⁷ In addition, a person must obtain the clearly expressed consent of their partner before engaging in sexual activity.⁵⁸ Failure to do so may indicate that the act was not consensual.⁵⁹
- 3.37 While this is similar to the positive consent model used in NSW, there are some differences. Under the affirmative consent model, the law recognises a person’s consent *only* where it is communicated through their words or actions. In addition, people are specifically required to find out whether their sexual partner consents to the sexual activity.
- 3.38 Tasmania, Victoria, some states in the United States (“US”) and some European countries have adopted various affirmative consent standards.

Examples of affirmative consent standards

Tasmania

- 3.39 Section 2A(1) of the Tasmanian *Criminal Code* defines consent as “free agreement”.⁶⁰ Further, s 2A(2)(a) provides that a person does not freely agree to an act if they do not say or do anything to communicate consent.⁶¹
- 3.40 The purpose of s 2A(2)(a) was to shift the trial focus away from the need to provide evidence of injury or violence to establish non-consent.⁶² Instead, the prosecution

55. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS No 210 (entered into force 1 August 2014) art 36.

56. *Criminal Code 1940* (Iceland) art 194; *The Swedish Penal Code* (1962) ch 6 s 1.

57. D Tuerkheimer, “Affirmative Consent” (2016) 13 *Ohio State Journal of Criminal Law* 441, 441.

58. A Flynn and N Henry, “Disputing Consent: The Role of Jury Directions in Victoria” (2012) 24 *Current Issues in Criminal Justice* 167, 172.

59. L Pineau, “Date Rape: A Feminist Analysis” (1989) 8 *Law and Philosophy* 217, 239.

60. *Criminal Code* (Tas) s 2A(1).

61. *Criminal Code* (Tas) s 2A(2)(a).

62. H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 25.

can establish an absence of consent by providing evidence that the person did nothing to communicate consent.⁶³

- 3.41 An accused will not be able to argue that they mistakenly believed that consent existed if they did not take reasonable steps to work out if the person consented.⁶⁴ We discuss this issue in Chapter 5.

Victoria

- 3.42 Section 36 of the *Crimes Act 1958* (Vic) defines consent as “free agreement”. Under s 36(2)(l), consent is negated where “the person does not say or do anything to indicate consent to the act”.⁶⁵ This section reflects a mandatory jury direction that previously applied in Victoria.⁶⁶ Juries were required to be informed that:

[T]he 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 that person’s free agreement.⁶⁷

- 3.43 Now, judges can inform juries that “a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act”.⁶⁸ Additionally, juries can be told that evidence of an absence of protest, physical resistance or physical injury is not enough to prove consent.⁶⁹ This is similar to s 61HA(7) in NSW.

United States

- 3.44 In some states in the US, the definition of consent in criminal legislation reflects an affirmative consent standard. For instance, in Washington State, consent is defined as “actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact”.⁷⁰ In Vermont, consent means “words or actions by a person indicating a voluntary agreement to engage in a sexual act”.⁷¹ However, other states still require some express verbal or physical resistance from the complainant as proof of non-consent.⁷²
- 3.45 The concept of affirmative consent has spread more rapidly in the context of tertiary education.⁷³ In several US states, government funding for colleges and universities is conditional on these institutions adopting an affirmative consent standard in their sexual assault policies. In September 2014, California enacted legislation requiring

63. *Criminal Code* (Tas) s 2A(2)(a). See also H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 24.

64. *Criminal Code* (Tas) s 14A(1)(c).

65. *Crimes Act 1958* (Vic) s 36(2)(l).

66. G Mason and J Monaghan, *Preliminary Submission PCO40* [7].

67. *Crimes Act 1958* (Vic) s 37AAA(d), repealed by *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 7(3).

68. *Jury Directions Act 2015* (Vic) s 46(3)(a).

69. *Jury Directions Act 2015* (Vic) s 46(3)(c)(ii), s 46(3)(d)(ii).

70. *Revised Code of Washington* § 9A.44.010(7) definition of “consent”.

71. *Vermont Statutes* Title 13, ch 72 § 3251(3) definition of “consent”.

72. See, eg, *Idaho Statutes* § 18-6101(4); *Louisiana Revised Statutes* § 14:42(1).

73. J Witmer-Rich, “Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear” (2016) 49 *Texas Tech Law Review* 57, 60.

that colleges and universities adopt an affirmative consent policy. California's *Education Code* defines "affirmative consent" as:

[A]ffirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.⁷⁴

- 3.46 In October 2014, New York State enacted legislation requiring that all public and private tertiary institutions adopt the following definition of "affirmative consent":

Affirmative consent is a knowing, voluntary and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.⁷⁵

Europe

- 3.47 In many European countries, the essential element of rape or sexual assault is not an absence of consent. Instead, there must be some form of violence or coercion, or a threat of violence.⁷⁶ However, some European countries have recently changed their laws to define rape in terms of consent, and have adopted an affirmative consent definition.
- 3.48 In Iceland, as of March 2018, a person is guilty of rape if they have sexual intercourse or other sexual relations with a person without their consent. Consent is present if it is "voluntarily expressed", and is not present if violence, threats or other unlawful coercion is used.⁷⁷
- 3.49 In Sweden, as of 1 July 2018, a person is guilty of rape if they have sexual intercourse with another person who is "not participating voluntarily". In determining whether a person's participation was voluntary, consideration should be given to whether willingness has been expressed through words, actions or in another way.⁷⁸

Perspectives on affirmative consent

- 3.50 Many preliminary submissions support an affirmative consent standard.⁷⁹ However, opinions diverge on what this standard should look like. Some believe that NSW law

74. *Education Code* (California) § 67386(1) definition of "affirmative consent".

75. *Education Law* (New York) § 6441(1) definition of "affirmative consent".

76. See, eg, *Criminal Code 2009* (Czech Republic) s 185; *Criminal Code 2005* (Denmark) s 216–217.

77. *Criminal Code 1940* (Iceland) art 194.

78. *The Swedish Penal Code* (1962) ch 6 s 1.

79. See, eg, D Clark, *Preliminary Submission PCO10*, 1; G Welsby, *Preliminary Submission PCO15*, 1; C Evans, *Preliminary Submission PCO17*, 1; A Thomas, *Preliminary Submission PCO34*, 1; A Turnbull, *Preliminary Submission PCO35*, 1; L Horgan, *Preliminary Submission PCO41*, 1;

should require verbal indications of consent,⁸⁰ whereas others suggest that non-verbal indications should also be sufficient.⁸¹

- 3.51 The authors of some submissions believe that NSW should also require people to communicate their agreement to sexual activity.⁸² Some also argue that people should take “reasonable steps” to ascertain whether their sexual partner consents.⁸³
- 3.52 Many support the approach in Tasmania and Victoria where, by definition, a person does not consent if the person does not say or do anything to communicate their consent.⁸⁴ One submission says legislation should state that there “may” be no consent if the person does not say or do anything to indicate consent.⁸⁵
- 3.53 The arguments in favour of an affirmative consent standard include that it may:
- facilitate a cultural shift and encourage people to seek consent actively
 - reduce any undue focus on complainants during sexual assault trials, and
 - provide better guidance for fact finders in determining whether the complainant consented.
- 3.54 Arguments against an affirmative standard include that it:
- is unclear and would unduly broaden the criminal law
 - is onerous for the accused

T Quinlivan-Scurr, *Preliminary Submission PC042*, 2, 3; B H, *Preliminary Submission PC043*, 1; Inner City Legal Centre, *Preliminary Submission PC044*, 3, 4; B Moroney, *Preliminary Submission PC048*, 2; B Smith, *Preliminary Submission PC051*, 1; Feminist Legal Clinic, *Preliminary Submission PC053*, 2; Australian Queer Students Network, *Preliminary Submission PC056*, 7; Community Legal Centres NSW, Community Legal Centres NSW, *Preliminary Submission PC058*, 3, 5–7; R4Respect, *Preliminary Submission PC060*, 3; End Rape on Campus, *Preliminary Submission PC063*, 1; Equality Rights Alliance, Young Women’s Advisory Group, *Preliminary Submission PC067*, 1; E Montoya Zorrilla, *Preliminary Submission PC068*, 1; St Catherine’s School Legal Studies students, *Preliminary Submission PC069*, 1; B Attard, *Preliminary Submission PC070*, 2–3; Women’s Electoral Lobby, *Preliminary Submission PC071*, 3–4; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Preliminary Submission PC078*, 2; Police Association of NSW, *Preliminary Submission PC084*, 4; J Moylan, *Preliminary Submission PC087*; Domestic Violence NSW, *Preliminary Submission PC091*, 5, 10–11; University of Newcastle Women’s Collective, *Preliminary Submission PC094*, 2, 4–5; S Mullins, *Preliminary Submission PC097*, 1.

80. See, eg, G Kidd, *Preliminary Submission PC02*, 1; T Kitley, *Preliminary Submission PC013*, 1; I, *Preliminary Submission PC021*, 2; T Olsen, *Preliminary Submission PC032*, 1, 2, 3; D Crowe, *Preliminary Submission PC039*, 1; T Mohr, *Preliminary Submission PC066*, 1.

81. See, eg, M Tennant, *Preliminary Submission PC011*, 1; Rule of Law Institute of Australia, *Preliminary Submission PC055*, 4; L Coughlin, *Preliminary Submission PC064*, 1; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PC083*, 3; Rape and Domestic Violence Services Australia, *Preliminary Submission PC088*, 14–15.

82. See, eg, Rule of Law Institute of Australia, *Preliminary Submission PC055*, 4–5; Rape and Domestic Violence Services Australia, *Preliminary Submission PC088*, 15; C Stone, *Preliminary Submission PC095*, 2.

83. See, eg, Australian Queer Students Network, *Preliminary Submission PC056*, 7; University of Newcastle Women’s Collective, *Preliminary Submission PC094*, 5.

84. See, eg, Feminist Legal Clinic, *Preliminary Submission PC053*, 3; Australian Queer Students Network, *Preliminary Submission PC056*, 8; R4Respect, *Preliminary Submission PC060*, 3; Women’s Electoral Lobby, *Preliminary Submission PC071*, 4; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PC083*, 3; Domestic Violence NSW, *Preliminary Submission PC091*, 5, 10. See also A Cossins, *Preliminary Submission PC033*, 43–44.

85. Rape and Domestic Violence Services Australia, *Preliminary Submission PC088*, 16.

- would retain the undue focus on the conduct of complainants during sexual assault trials, and
- would not reduce the influence of “rape myths”.

Would an affirmative standard encourage people to seek consent actively?

- 3.55 Several preliminary submissions argue that an affirmative consent standard would help facilitate a cultural shift around consent.⁸⁶ Some say such a standard would encourage people to seek consent actively.⁸⁷ They believe that this aligns with modern understandings and expectations about consent.⁸⁸
- 3.56 For example, one submission believes that a definition of consent based on the Tasmanian standard would “promote a healthier sexual culture”.⁸⁹ The University of Technology Sydney argues that a consent standard similar to that in Tasmania or Victoria “would be an important step in creating greater clarity in the community about what constitutes consent – specifically that an active verbal indication of consent is necessary before engaging in sexual activity”.⁹⁰
- 3.57 However, others doubt a change to the definition of consent would be enough to achieve this cultural shift.⁹¹
- 3.58 For instance, some people think that a new definition of consent may not change the outcome of trials unless other aspects of the law are reformed as well. In particular, it is not enough for the prosecution to prove the complainant did not consent – the prosecution must also prove the accused knew about the absence of consent.⁹² Therefore, some people argue any proposed reform should focus on the law about “knowledge”.⁹³ We discuss this in Chapter 5.
- 3.59 Others question whether law reform is an effective way of generating cultural change around consent.⁹⁴ Loughnan and co-authors observe:

86. See, eg, L Horgan, *Preliminary Submission PCO41*, 1; C Stone, *Preliminary Submission PCO95*, 3; S Mullins, *Preliminary Submission PCO97*, 1.

87. L Horgan, *Preliminary Submission PCO41*, 1; B Moroney, *Preliminary Submission PCO48*, 2; St Catherine’s School Legal Studies students, *Preliminary Submission PCO69*, 1; B Attard, *Preliminary Submission PCO70*, 2; M Dobbie, *Preliminary Submission PCO75*, 3; Police Association of NSW, *Preliminary Submission PCO84*, 2; University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 4.

88. G Mason and J Monaghan, *Preliminary Submission PCO40* [10]; B Attard, *Preliminary Submission PCO70*, 1, 2; Women’s Electoral Lobby, *Preliminary Submission PCO71*, 3; Police Association of NSW, *Preliminary Submission PCO84*, 4; Coffs Harbour Sexual Assault Service, Mid North Coast Local Health District, *Preliminary Submission PCO82*, 2. See also M Dobbie, *Preliminary Submission PCO75*, 2.

89. E Montoya Zorrilla, *Preliminary Submission PCO68*, 2.

90. University of Technology Sydney, *Preliminary Submission PCO80*, 3.

91. See, eg, G Mason and J Monaghan, *Preliminary Submission PCO40* [11]; A Dyer, *Preliminary Submission PCO50* [20].

92. *Crimes Act 1900* (NSW) s 611. See also A Dyer, *Preliminary Submission PCO50* [20].

93. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See also B Attard, *Preliminary Submission PCO70*, 3.

94. M Otlowski, *Preliminary Submission PCO45*, 9; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See also B Moroney, *Preliminary Submission PCO48*, 1; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCO83*, 3.

While the criminal law is increasingly used to educate the public about community values, there is evidence that it is not an effective tool, particularly for offences that are impulsive or that occur in circumstances of high emotion.⁹⁵

- 3.60 Similarly, Otlowski contends “affirmative consent reforms in Australia, including Tasmania, have proved to be relatively ineffective as a catalyst for changing attitudes and beliefs in society”.⁹⁶
- 3.61 Some believe that providing community education and generating discussion about consent would be a more effective way to facilitate cultural change.⁹⁷

Would an affirmative standard reduce undue focus on complainants?

- 3.62 Some supporters of an affirmative consent standard argue that it would reduce the undue focus in sexual assault trials on the complainant’s behaviour and on whether they clearly indicated non-consent.⁹⁸ Instead, trials would focus on whether the accused received an affirmative signal of consent.⁹⁹
- 3.63 However, others argue that an affirmative consent standard is unlikely to have this effect.¹⁰⁰ This is because fact finders will scrutinise a complainant’s conduct to determine whether they said or did anything to communicate consent.¹⁰¹
- 3.64 The Australian Lawyers Alliance (“ALA”) believes the Tasmanian consent standard creates a “heightened risk” that complainants will be extensively cross-examined about their sexual history and about how they have “communicated” consent previously.¹⁰² As “there is no normative or standardised way in which notions such as ‘consent’ are communicated or understood”, the ALA argues this issue is “likely to be the subject of detailed cross-examination within a sexual assault trial”.¹⁰³
- 3.65 Dyer argues that an affirmative consent standard could be particularly problematic if a complainant’s conduct was equivocal or ambiguous. In his view, the Victorian and Tasmanian standards require fact finders “to focus minutely on the complainant’s conduct, with a view to determining whether s/he performed that conduct for the purpose of indicating/communicating her/his consent”. Dyer believes these standards are “inconsistent” with any movement towards placing greater emphasis

95. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5.

96. M Otlowski, *Preliminary Submission PCO45*, 31.

97. M Otlowski, *Preliminary Submission PCO45*, 32–36, 37; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5; University of Technology Sydney, *Preliminary Submission PCO80*, 4; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCO83*, 3. See also M Faruqi, *Preliminary Submission PCO93*, 2.

98. See, eg, G Mason and J Monaghan, *Preliminary Submission PCO40*, 3; R4Respect, *Preliminary Submission PCO60*, 3.

99. J Witmer-Rich, “Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear” (2016) 49 *Texas Tech Law Review* 57, 74.

100. Australian Lawyers Alliance, *Preliminary Submission PCO74*, 8; G Mason and J Monaghan, *Preliminary Submission PCO40*, 3; A Dyer, *Preliminary Submission PCO50* [11]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4; P N S Rumney, “The Review of Sex Offences and Rape Law Reform: Another False Dawn?” (2001) 64 *Modern Law Review* 890, 900–901.

101. G Mason and J Monaghan, *Preliminary Submission PCO40*, 3; A Dyer, *Preliminary Submission PCO50* [14]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4; Australian Lawyers Alliance, *Preliminary Submission PCO74*, 5.

102. Australian Lawyers Alliance, *Preliminary Submission PCO74*, 5.

103. Australian Lawyers Alliance, *Preliminary Submission PCO74*, 5.

on the accused's conduct and on their obligation to ensure their sexual partner consents.¹⁰⁴

Would an affirmative standard provide better guidance for fact finders?

- 3.66 One argument in support of an affirmative standard is that it would assist fact finders in determining whether the complainant consented.¹⁰⁵ Mason and Monaghan believe that a standard similar to those in Victoria or Tasmania may provide better guidance to juries by clarifying that “passive acquiescence or physical inactivity does not equate with consent”.¹⁰⁶
- 3.67 However, Dyer queries the usefulness of the Tasmanian and Victorian consent standards. Juries in NSW can already be told that the complainant's lack of physical resistance does not necessarily mean they consent.¹⁰⁷
- 3.68 Dyer also believes a requirement to consider whether the complainant communicated their consent distracts fact finders from the “real inquiry”: whether the complainant freely and voluntarily agreed to the sexual intercourse. In determining whether the purpose of the complainant's conduct was to communicate consent, fact finders would consider the same evidence as they already do when deciding issues about consent. In his view, legislation similar to that in Tasmania or Victoria would “add nothing”.¹⁰⁸

Would an affirmative standard unduly broaden the criminal law?

- 3.69 Some opponents argue that an affirmative consent standard is unclear, as people do not communicate consent in a uniform or standardised way.¹⁰⁹ Some are concerned that such a standard would unduly broaden the criminal law, deeming a lot of sexual activity sexual assault.¹¹⁰
- 3.70 The ALA says the Tasmanian consent standard, where there is no consent if the person “does not say or do anything to communicate consent”, creates “a confusing and ambiguous test”. This is “open to different interpretation and modes of communication”.¹¹¹ They are concerned that this standard would mean people are “not entitled to infer from the circumstances in which they find themselves that the other party to a consensual encounter is in fact consenting to the sexual acts”.¹¹²
- 3.71 The NSW Bar Association is similarly concerned and argues that the standard confuses the question of “free agreement” with the issue of “communication of

104. A Dyer, *Preliminary Submission PC050* [14].

105. See, eg, G Mason and J Monaghan, *Preliminary Submission PC040* [10].

106. G Mason and J Monaghan, *Preliminary Submission PC040* [10]. See also A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC065*, 4.

107. A Dyer, *Preliminary Submission PC050* [18].

108. A Dyer, *Preliminary Submission PC050* [15].

109. NSW Bar Association, *Preliminary Submission PC047*, 2; Australian Lawyers Alliance, *Preliminary Submission PC074*, 5.

110. D Tuerkheimer, “Affirmative Consent” (2016) 13 *Ohio State Journal of Criminal Law* 441, 444–446.

111. Australian Lawyers Alliance, *Preliminary Submission PC074*, 5. See also NSW Bar Association, *Preliminary Submission PC047*, 2.

112. Australian Lawyers Alliance, *Preliminary Submission PC074*, 5.

consent”. It says that there may be “free agreement” whether or not the complainant communicates that state of mind, and regardless of how they communicate it.¹¹³

- 3.72 Critics also argue that an affirmative consent standard does not reflect how people behave in intimate sexual encounters.¹¹⁴ Loughnan and co-authors observe that “[i]nnumerable instances of consensual sexual intercourse occur in the absence of words, and such instances are not morally problematic”. They argue that changing the definition of consent “to eliminate the possibility of consent where a complainant had said or done nothing to indicate consent” could lead to injustice.¹¹⁵

Would an affirmative standard be onerous for the accused?

- 3.73 A further argument is that requiring an accused to establish they received a clear indication of consent is too onerous.¹¹⁶ Some think it would effectively shift the “burden of proof” from the prosecution to the accused.¹¹⁷
- 3.74 However, others argue that any perceived unfairness for the accused is not a sufficient reason for resisting reform. They contend that the current law has failed to protect people who have experienced sexual assault and an affirmative consent standard is warranted.¹¹⁸ The Police Association of NSW observes:

People in NSW now expect the criminal justice system to meet the needs of these victims of sexual assault. Changing the provisions defining consent and establishing a person’s obligations to obtain consent is a necessary part of that expectation.¹¹⁹

Would an affirmative standard dispel rape myths?

- 3.75 Some supporters of an affirmative consent standard argue that it would deter fact finders from falling back on rape myths when they decide key issues at trial.¹²⁰ Mason and Monaghan suggest that, “[i]n clarifying that consent requires positive affirmation, such a change may go some way towards minimising the impact of outdated or ‘victim-blaming’ views amongst the jury”.¹²¹
- 3.76 However, some research suggests that rape myths continue to influence sexual assault trials in Victorian and Tasmania. Researchers have found that prosecutors

113. NSW Bar Association, *Preliminary Submission PCO47*, 2.

114. H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 27. See also M Tennant, *Preliminary Submission PCO11*, 1; M Sweetheart, *Preliminary Submission PCO101*, 1.

115. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5.

116. S Croskery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614, 635–636.

117. B Attard, *Preliminary Submission PCO70*, 7.

118. B Attard, *Preliminary Submission PCO70*, 2; Police Association of NSW, *Preliminary Submission PCO84*, 4.

119. Police Association of NSW, *Preliminary Submission PCO84*, 4.

120. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 12; B Attard, *Preliminary Submission PCO70*, 7; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 8; S Croskery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614, 635.

121. G Mason and J Monaghan, *Preliminary Submission PCO40* [8].

and defence lawyers continue to rely on rape stereotypes in arguing their case before the jury.¹²²

- 3.77 Cockburn’s analysis of Tasmanian sexual assault trials between December 2004 and October 2008 found that prosecutors still relied on “traditional” views when arguing non-consent. In most of the cases Cockburn analysed, prosecutors did not emphasise the absence of clearly communicated consent. Instead, they relied on evidence of clear resistance, and/or threats or use of force, to prove non-consent. Prosecutors only argued that consent was not present because the person did not did not *communicate* consent in cases where the person was either asleep or grossly intoxicated at the time of the alleged assault.¹²³ These are traditional categories of incapacity and, as such, it can be questioned whether the affirmative consent standard has led to a significant change.
- 3.78 This research suggests that the success of any change to the definition of consent may depend, at least in part, on the willingness or otherwise of lawyers and judges to embrace it.

Possible reform option: recognising other aspects of consent

Withdrawal of consent

- 3.79 Some preliminary submissions say the NSW definition of consent should explicitly address the withdrawal or revocation of consent.¹²⁴ One author argues that consent is an ongoing process under a communicative model and the law should reflect this.¹²⁵
- 3.80 In NSW, the definition of sexual intercourse already includes the “continuation” of sexual intercourse.¹²⁶ This implies that consent is relevant to all stages of sexual activity. The continuation of sexual intercourse without consent can constitute sexual assault.¹²⁷ However, some believe the law should clearly state that a person can withdraw their consent at any time.¹²⁸
- 3.81 Another way of dealing with this issue could be to extend the list of negating circumstances in s 61HA(4)–(6). We discuss this option in Chapter 4.

122. A Powell and others, “Meanings of ‘Sex’ and ‘Consent’: The Persistence of Rape Myths in Victorian Rape Law” (2013) 22 *Griffith Law Review* 456, 467; H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 129, 130.

123. H M Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 129.

124. I, *Preliminary Submission PCO21*, 4; D Crowe, *Preliminary Submission PCO39*, 1; T Quinlivan-Scurr, *Preliminary Submission PCO42*, 2, 4; M Goldstein, *Preliminary Submission PCO46*, 1; L Coughlin, *Preliminary Submission PCO64*, 1; M Dobbie, *Preliminary Submission PCO75*, 2; M Faruqi, *Preliminary Submission PCO93*, 1; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 7.

125. M Goldstein, *Preliminary Submission PCO46*, 2.

126. *Crimes Act 1900* (NSW) s 61H(1)(d) definition of “continuation of sexual intercourse”.

127. T Bennett, “Consent Interruptus: Rape Law and Cases of Initial Consent” (2017) 19 *Flinders Law Journal* 145, 157. See also *R v Tolmie* (1995) 37 NSWLR 660, 672.

128. T Quinlivan-Scurr, *Preliminary Submission PCO42*, 4; B Smith, *Preliminary Submission PCO51*, 1; M Dobbie, *Preliminary Submission PCO75*, 2; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 7.

Consent conditional on the use of contraception

- 3.82 Some have suggested the NSW definition of consent should address cases where a person's consent is conditional on the use of contraception.¹²⁹ One submission argues that the use of contraception is one of the “essential elements” of consent for many people. This is due to the role of contraception in preventing sexually transmitted diseases and unwanted pregnancies.¹³⁰ The author argues that the definition of consent should specifically state that consent to sexual intercourse protected by contraception is not consent to unprotected sexual intercourse.¹³¹
- 3.83 Another way of dealing with this issue could be to extend the list of negating circumstances in s 61HA(4)–(6). We discuss this option in Chapter 4.

Question 3.2: The meaning of consent

- (1) Is the NSW definition of consent clear and adequate?
- (2) What are the benefits, if any, of the NSW definition?
- (3) What problems, if any, arise from the NSW definition?
- (4) What are the potential benefits of adopting an affirmative consent standard?
- (5) What are the potential problems with adopting an affirmative consent standard?
- (6) If NSW was to adopt an affirmative consent standard, how should it be framed?
- (7) Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?
- (8) Do you have any other ideas about how the definition of consent should be framed?

129. C Stone, *Preliminary Submission PCO95*, 3; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 9.

130. C Stone, *Preliminary Submission PCO95*, 1, 4.

131. C Stone, *Preliminary Submission PCO95*, 3. See also Sex Workers Outreach Project, *Preliminary Submission PCO103*, 9.

4. Negation of consent

In brief

Section 61HA of the *Crimes Act 1900* (NSW) includes a non-exhaustive list of circumstances that will negate consent to sexual intercourse. The section also lists circumstances in which it *may* be established that a person did not consent. In this Chapter, we consider the general operation of the negating circumstances, including whether any additional circumstances should be added or existing ones removed.

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- 4.1 Section 61HA of the *Crimes Act 1900* (“*Crimes Act*”) contains a list of circumstances in which consent, by definition, does not exist. In other words, consent is “negated”. The section also lists some circumstances in which it *may* be established that a person does not consent.¹ These circumstances do not automatically negate consent – the prosecution still needs to prove the person did not consent. However, these circumstances might be relevant to the question of whether consent exists.
- 4.2 These lists are not exhaustive.² That is, the lists do not limit the grounds on which it may be established that a person does not consent.
- 4.3 This Chapter considers each of the circumstances listed in s 61HA that automatically negate consent, as well as those that *may* negate consent. It also considers the general operation of the negating circumstances, including whether

1. *Crimes Act 1900* (NSW) s 61HA(6).

2. *Crimes Act 1900* (NSW) s 61HA(8).

the section should include any additional circumstances or whether any existing ones should be removed.

Circumstances that negate consent

- 4.4 Before the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) (“2007 reforms”), the *Crimes Act* provided that consent was negated where the person consented:
- under a mistaken belief about the identity of the other person
 - under a mistaken belief that the other person is married to them
 - under a mistaken belief that the sexual intercourse is for medical or hygienic purposes, or
 - as a result of threats or terror.³
- 4.5 The 2007 reforms extended the list of circumstances that negate consent.⁴ This was in response to the recommendations of the Criminal Offences Sexual Assault Taskforce (“Taskforce”).⁵
- 4.6 Now, s 61HA(4)–(5) set out a non-exhaustive list of circumstances that negate consent to sexual intercourse. By definition, a person does not consent to sexual intercourse if they:
- do not have the capacity to consent, including because of age or cognitive incapacity
 - do not have the opportunity to consent because they are unconscious or asleep
 - consent because of threats of force or terror (whether the threats are against, or the terror is instilled in, them or any other person)
 - consent because they are unlawfully detained
 - consent under a mistaken belief about the identity of the other person
 - consent under a mistaken belief that the other person is married to them, or
 - consent under a mistaken belief that the sexual intercourse is for health or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means).⁶
- 4.7 If the sexual intercourse occurred in one of these circumstances, the accused cannot argue successfully that there was consent.

3. *Crimes Act 1900* (NSW) s 61R(2)(a)(i), s 61R(2)(a)(ii), s 61R(2)(a1), s 61R(2)(c), repealed by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [2].

4. *Crimes Act 1900* (NSW) s 61HA(4)–(5), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

5. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) rec 11–13.

6. *Crimes Act 1900* (NSW) s 61HA(4)–(5).

- 4.8 By listing the circumstances that negate consent, the law in NSW takes an approach that is consistent with other Australian states and territories. Most state and territory consent laws include as negating factors: the use of force; threats of violence or force; conditions that affect consciousness (for example, being asleep, unconscious or intoxicated); fear, intimidation or helplessness; fraud or mistake; abuse of authority or trust; and unlawful detention.⁷ There is, however, significant variation in scope and approach. For a detailed comparison of the law in Australian states and territories, see the table at Appendix D.
- 4.9 Below, we consider each of the listed circumstances that negate consent in NSW.

Incapacity

- 4.10 A person does not consent to sexual intercourse if they do not have the capacity to consent, including because of age or cognitive incapacity.⁸
- 4.11 Cognitive incapacity is intended to refer “either to an inability to understand the sexual nature or quality of the act or an inability to understand the nature and effect of the consent”.⁹
- 4.12 This circumstance was introduced by the 2007 reforms. It reflects one of two alternatives proposed by the Taskforce.¹⁰ The other proposed approach defined “lack of consent” in the following terms:
- Definition of lack of consent**
A person does not consent to sexual intercourse if the person:
- (a) does not have the capacity to agree to the sexual intercourse, or
 - (b) has that capacity but does not have the freedom to choose whether to have the sexual intercourse, or
 - (c) has that capacity and freedom but does not agree to the sexual intercourse.¹¹
- 4.13 The 2007 draft bill, which the Attorney General’s Department (“Department”) released for comment, contained the above proposal.¹² Ultimately, it was not adopted.

7. *Criminal Code 1924* (Tas) s 2A(b)–(i); *Criminal Code 1899* (Qld) s 348(2)(a)–(f); *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Criminal Code* (NT) s 192(2); *Crimes Act 1900* (ACT) s 67(1)(a)–(j); *Criminal Code* (WA) s 319(2)(a); *Crimes Act 1958* (Vic) s 36(2)(a)–(h).

8. *Crimes Act 1900* (NSW) s 61HA(4)(a).

9. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3586 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007). Note: the law defines “cognitive impairment” but not “cognitive incapacity”: see *Crimes Act 1900* (NSW) s 61H(1A).

10. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) rec 11.

11. “A Bill for Crimes Amendment (Consent – Sexual Assault Offences Bill) 2007” sch 1 cl 4 in NSW, Attorney General’s Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) appendix 3. This was based on the *Sexual Offences Act 2003* (UK) s 74.

12. “A Bill for Crimes Amendment (Consent – Sexual Assault Offences Bill) 2007” sch 1 cl 4 in NSW, Attorney General’s Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) appendix 3.

- 4.14 In Queensland, the element of incapacity is included in the definition of consent. Consent is defined to mean “consent freely and voluntarily given by a person with the cognitive capacity to give the consent”.¹³ However, like NSW, most Australian states and territories include it as a circumstance that negates consent.¹⁴

Unconscious or asleep

- 4.15 A person does not consent to sexual intercourse if they do not have the opportunity to consent because they are unconscious or asleep.¹⁵
- 4.16 These circumstances were introduced by the 2007 reforms. However, the Taskforce did not recommend this approach. The Taskforce report said:

[A]s consent cannot be given when someone is unconscious or asleep, it would be inaccurate to include this as a matter that “vitiates” [or negates] consent. The list of vitiating circumstances is based on the premise that the “consent” given is not a real consent at all. It would therefore seem to be more accurate to say in legislation that “consent cannot be present if a person is asleep or unconscious”, if this was considered necessary.¹⁶

- 4.17 In the United Kingdom (“UK”), a “complainant is taken not to have consented where the complainant was asleep or otherwise unconscious at the time of the relevant act”.¹⁷ The Model Criminal Code and legislation in Tasmania, South Australia (“SA”), the Northern Territory (“NT”) and Victoria also provide that consent is negated if the person was asleep or unconscious.¹⁸

Threats of force or terror

- 4.18 A person does not consent to sexual intercourse if they consent because of threats of force or terror (whether the threats are against, or the terror is instilled in, them or any other person).¹⁹ This negating circumstance has long been a part of the law in NSW.²⁰
- 4.19 The laws of Queensland, SA, the Australian Capital Territory (“ACT”), Tasmania and Western Australia (“WA”) all provide that threats will negate consent.²¹ In Victoria, procuring a sexual act by threat or fraud are separate offences with a lower penalty than rape.²²

13. *Criminal Code* (Qld) s 348(1).

14. *Criminal Code* (Tas) s 2A(2)(i); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(f); *Criminal Code* (NT) s 192(2)(d); *Crimes Act 1958* (Vic) s 36(2)(e)–(f); *Crimes Act 1900* (ACT) s 67(1)(i).

15. *Crimes Act 1900* (NSW) s 61HA(4)(b).

16. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 37.

17. *Sexual Offences Act 2003* (UK) s 75(2)(d).

18. Australia, Parliamentary Counsel's Committee, *Model Criminal Code* (2009) cl 5.2.3(2)(c); *Criminal Code* (Tas) s 2A(2)(h); *Criminal Law Consolidation Act 1935* (SA) s 46a(3)(c); *Criminal Code* (NT) s 192(2)(c); *Crimes Act 1958* (Vic) s 36(2)(d).

19. *Crimes Act 1900* (NSW) s 61HA(4)(c).

20. A Stephen and A Oliver, *Criminal Law Manual: Comprising the Criminal Law Amendment Act of 1883 with an Introduction, Commentary, and Index* (1883) 19.

21. *Criminal Code* (Tas) s 2A(2)(c); *Criminal Code* (Qld) s 348(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a); *Crimes Act 1900* (ACT) s 67(1)(b)–(c); *Criminal Code* (WA) s 319(2)(a).

22. *Crimes Act 1958* (Vic) s 44–45.

- 4.20 The authors of some preliminary submissions say that this negating circumstance is not broad enough. Some argue it should extend to *implied* threats of force.²³ South Australia's consent laws make explicit that implied threats of force will negate consent.²⁴
- 4.21 Another view is this negating circumstance should be broad enough to include incidents of blackmail, for example, where a person threatens to post intimate images on social media.²⁵ Arguably, this constitutes intimidating or coercive conduct, which *may* negate consent under s 61HA(6)(b) (see below at [4.44]–[4.50]).

Unlawful detention

- 4.22 A person does not consent to sexual intercourse if they consent because they are unlawfully detained.²⁶
- 4.23 This circumstance was introduced by the 2007 reforms.²⁷ The Taskforce observed:
- Arguably, the fact that someone is unlawfully detained may already be covered by s 61R(2)(c) [which provided that consent is negated if someone submits to sexual intercourse as a result of threats or terror], as the person may submit to intercourse as a result of terror arising from detention. However, if this is only arguable, consideration should be given to including this as an additional factor.²⁸
- 4.24 The NSW Director of Public Prosecutions submitted to the Taskforce that this negating circumstance should only arise if the unlawful detention was caused by the accused person.²⁹ Ultimately, this limitation was not included in the legislation.
- 4.25 The Model Criminal Code and the consent laws of Tasmania, SA, the NT, the ACT, Victoria and the UK all provide that consent is negated if the person is unlawfully detained.³⁰ None of these laws specify that the person must have been detained by the accused for the negating circumstance to arise. In the UK, consent is negated where “the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act”.³¹ In Tasmania, consent is negated if the complainant *or another person* is unlawfully detained.³²

23. R4Respect, *Preliminary Submission PCO60*, 3.

24. *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a).

25. Confidential, *Preliminary Submission PCO108*.

26. *Crimes Act 1900* (NSW) s 61HA(4)(d).

27. *Crimes Act 1900* (NSW) s 61HA(4)(d), inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1.

28. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 37.

29. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 37.

30. Australia, Parliamentary Counsel's Committee, *Model Criminal Code* (2009) cl 5.2.3(2)(b); *Sexual Offences Act 2003* (UK) s 75(2)(c); *Criminal Code* (Tas) s 2A(2)(d); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b); *Criminal Code* (NT) s 192(2)(b); *Crimes Act 1900* (ACT) s 67(1)(j); *Crimes Act 1958* (Vic) s 36(2)(c).

31. *Sexual Offences Act 2003* (UK) s 75(2)(c).

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

Mistaken belief

- 4.26 The laws in most Australian states and territories deal with consent that occurs under a mistaken belief.³³ In NSW, a person does not consent to sexual intercourse if they consent under a mistaken belief:
- about the identity of the other person
 - that the other person is married to them, or
 - that the sexual intercourse is for health or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means).³⁴
- 4.27 Most Australian states and territories have equivalent laws about mistaken identity.³⁵
- 4.28 The author of one preliminary submission criticises the use of the word “married” in because it “only values one type of relationship within which consensual sexual intercourse may occur”.³⁶ The author argues that substituting “married” with “partner” may not resolve this issue, as “partner” would not capture all of the possible scenarios in which there might be a mistaken identity.³⁷
- 4.29 A form of “mistaken belief” concerning health or hygiene was introduced in 1992.³⁸ This responded to a Victorian decision in which a radiographer who performed vaginal examinations on patients, for no real medical purpose, was found not guilty of rape.³⁹ The law was amended in 2014 to change the original expression “medical or hygienic purposes” to “health or hygienic purposes”.⁴⁰ The section now applies to “all health procedures, not just those carried out by medical practitioners”.⁴¹
- 4.30 If a complainant consents because of one of these mistaken beliefs, they are treated by the law as if they did not consent. If the accused knew the complainant consented in these circumstances, the law treats them as if they knew the complainant did not consent.⁴² We discuss this issue in Chapter 5.

33. For the details of the mistaken belief categories in other Australian states and territories, see the table at Appendix D.

34. *Crimes Act 1900* (NSW) s 61HA(5).

35. *Criminal Code* (Tas) s 2A(2)(f)–(g); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g); *Criminal Code* (NT) s 192(2)(e); *Crimes Act 1900* (ACT) s 67(1)(f)–(g); *Crimes Act 1958* (Vic) s 36(2)(i).

36. K Burton, *Preliminary Submission PC076*, 2.

37. K Burton, *Preliminary Submission PC076*, 2.

38. *Crimes Act 1900* (NSW) s 61R(2)(a1), inserted by *Criminal Legislation (Amendment) Act 1992* (NSW) sch 1(4)(a).

39. *R v Mobilio* [1991] 1 VR 339.

40. *Crimes Act 1900* (NSW) s 61HA(5)(c) amended by *Crimes Legislation Amendment Act 2014* (NSW) sch 1.1 [2].

41. NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013) 25–26.

42. *Crimes Act 1900* (NSW) s 61HA(5).

Circumstances that may negate consent

- 4.31 The 2007 reforms identified some situations in which it *may* be established that a person does not consent to sexual intercourse.⁴³ This includes if the person has sexual intercourse:
- while substantially intoxicated by alcohol or any drug
 - because of intimidating or coercive conduct, or other threat, that does not involve a threat of force, or
 - because of the abuse of a position of authority or trust.⁴⁴
- 4.32 This list provides “further guidance to juries when determining those factors that may be relevant to the question of consent” but is “not intended in any way to reverse the onus of proof”.⁴⁵
- 4.33 These factors do not automatically negate consent. The prosecution still needs to prove that the complainant did not consent.
- 4.34 The NSW *Criminal Trial Courts Bench Book* recommends that judges give the following direction to juries:
- It does not follow simply because you find [one of the grounds in s 61HA(6)] proved that you should be satisfied beyond reasonable doubt that the complainant did not consent, but it is a relevant fact that you should consider in deciding whether the Crown [prosecution] has proved this element of the offence as it must do so before you can convict the accused.⁴⁶
- 4.35 Quilter does not support this list of circumstances that may negate consent. She believes “at best the factors are symbolic; at worst, they may impact negatively on the complainant and the Crown case”.⁴⁷

Intoxication

- 4.36 Before the 2007 reforms, the common law required a complainant to be “insensible” or unconscious through intoxication before being considered incapable of consenting.⁴⁸
- 4.37 The 2007 reforms provided that the prosecution may establish that a person does not consent if the person had sexual intercourse while substantially intoxicated by

43. *Crimes Act 1900* (NSW) s 61HA(6)–(8), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

44. *Crimes Act 1900* (NSW) s 61HA(6)(a)–(c).

45. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3586 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007).

46. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566].

47. J Quilter, *Preliminary Submission PCO92*, 6.

48. M Heath, “Women and Criminal Law: Rape” in P Eastal (ed), *Women and the Law in Australia* (LexisNexis, 2010) 97.

alcohol or any drug.⁴⁹ This appears to recognise that “capacity to consent may evaporate well before a complainant becomes unconscious”.⁵⁰

4.38 The reform was enacted to make it easier for the prosecution to prove non-consent in situations where the complainant is substantially intoxicated. However, the NSW Office of the Director of Public Prosecutions submits: “issues remain in relation to proving a lack of consent where a complainant is affected by drugs or alcohol”.⁵¹ Evidence of complainant intoxication in rape trials is associated with a significantly lower conviction rate than cases in which the complainant is sober.⁵² Research indicates that juror belief in “rape myths”⁵³ influences whether rape complainants are blamed for sexual violence,⁵⁴ as rape myths about intoxicated women imply that they are to blame for rape or are looking for sex.⁵⁵ This might explain why cases with heavily intoxicated complainants can result in an acquittal.⁵⁶

4.39 When introducing the amendments, the Attorney General said that s 61HA(6)(a):

serves as a reminder that just because a person is drunk does not mean that they may be assumed to be the target of non-consensual sex, as a small minority of the community may still think is the case.⁵⁷

4.40 Both the Taskforce report and the Department’s discussion paper suggest this was not listed as a factor that automatically negates consent because the effect of alcohol or drugs on a person’s ability to consent will differ in each case:

No doubt there will be circumstances where a person is so intoxicated as to be unable to consent. Expert evidence may be called on this issue to give the jury a further understanding of the complainant’s inability to comprehend. However, a person may be “affected” by alcohol or drugs, but still be aware and capable of voluntarily consenting. As such, it does not seem appropriate to include this as a circumstance, which if present, automatically negates consent. Legislating in this manner would appear to create an inflexible rule, unable to respond to particular individuals, in certain circumstances.⁵⁸

4.41 The law in most other Australian states and territories provides that a certain level of intoxication will automatically negate consent (rather than *may* negate consent). In Victoria, consent is negated where “the person is so affected by alcohol or another drug as to be incapable of consenting to the act” or “incapable of withdrawing

49. *Crimes Act 1900* (NSW) s 61HA(6)(a).

50. *R v Bree* [2007] 2 Cr App R 13, 167.

51. Office of the Director of Public Prosecutions, *Preliminary Submission PCO100*, 5.

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

53. For a discussion of the effect of myths about sexual assault, see [2.92]–[2.103].

54. A Grubb and E Turner “Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming” (2012) 17 *Aggression and Violent Behavior* 443.

55. S McMahon and G L Farmer, “An updated measure for assessing subtle rape Myths” (2011) 35 *Social Work Research* 71, 74.

56. S Croskery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614, 615.

57. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3907.

58. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 37; NSW, Attorney General’s Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) 15.

consent to the act”.⁵⁹ The laws the NT and SA are worded similarly.⁶⁰ Tasmanian law provides that consent is negated where the person is “so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required”.⁶¹ In the ACT, consent is negated if it is caused “by the effect of intoxicating liquor, a drug or an anaesthetic”.⁶²

4.42 The authors of a number of preliminary submissions criticise s 61HA(6)(a). Their reasons for doing so include:

- **It is not clear what “substantial intoxication” means.**⁶³ In the absence of a precise definition, witnesses, complainants and defendants tend to self-assess their level of intoxication in vague and colloquial terms.⁶⁴ Judges also use vague language and call on juries to apply their “common sense” or “common knowledge of the effects of alcohol (and other drugs) and the relationship to complex legal questions”.⁶⁵

Some people suggest that the law should use medical guidelines to establish “substantial intoxication”.⁶⁶ The author of one submission suggests the issue is complicated by the fact that individuals experience intoxication from different levels of alcohol and drug consumption.⁶⁷ Cossins submits that the word “substantial” should be removed altogether from s 61HA(6)(a).⁶⁸

- **Juries might think consent is always negated by intoxication.** The way that s 61HA(6)(a) is framed may lead jury members, without proper direction, to presume that consent is negated whenever the complainant is intoxicated.⁶⁹
- **The prosecution must still prove no consent.** Even if the prosecution proves that the person had sexual intercourse while substantially intoxicated, it must still prove that the complainant did not consent. Therefore, s 61HA(6)(a) has little role to play over and above the key definition of consent as free and voluntary agreement.⁷⁰

4.43 Quilter also identifies that the law may suggest a double standard. While the complainant’s self-induced intoxication may negate consent, fact finders are not to consider the accused’s self-induced intoxication when deciding whether they knew the complainant did not consent.⁷¹ Even if this is a reasonable policy position, the jury may see it as unfair that intoxication can be taken into account in relation to the

59. *Crimes Act 1958* (Vic) s 36(2)(e)–(f).

60. *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code* (NT) s 192(2)(c).

61. *Criminal Code* (Tas) s 2A(2)(h).

62. *Crimes Act 1900* (ACT) s 67(1)(e).

63. B Attard, *Preliminary Submission PCO70*, 3; J Quilter, *Preliminary Submission PCO92*, 6.

64. J Quilter and L McNamara, “The Meaning of ‘Intoxication’ in Australian Criminal Cases: Origins and Operation” (2018) 21 *New Criminal Law Review* 170, 182, 183.

65. J Quilter and L McNamara, “The Meaning of ‘Intoxication’ in Australian Criminal Cases: Origins and Operation” (2018) 21 *New Criminal Law Review* 170, 183; J Quilter, *Preliminary Submission PCO92*, 6. See also S Croskery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614.

66. C Goosen, *Preliminary Submission PCO26*, 1; A Cossins, *Preliminary Submission PCO33*, 10.

67. B Attard, *Preliminary Submission PCO70*, 3. See also, M J Dry and others “Dose-Related Effects of Alcohol on Cognitive Functioning” (2012) 7 *PLoS ONE* e50977.

68. A Cossins, *Preliminary Submission PCO33*, 45.

69. NSW Bar Association, *Preliminary Submission PCO47*, 2.

70. J Quilter, *Preliminary Submission PCO92*, 6.

71. J Quilter, *Preliminary Submission PCO92*, 12.

complainant's capacity to consent but intoxication does not remove the accused's responsibility for the offence.⁷²

Intimidating or coercive conduct or other threat not involving a threat of force

- 4.44 It may be established that a person does not consent if they had sexual intercourse because of intimidating or coercive conduct, or other threat, that does not involve a threat of force.⁷³
- 4.45 The *Crimes Act* distinguishes between threats of violence, which will negate consent, and nonviolent threats, which *may* negate consent.⁷⁴ The distinction was intended to recognise that people may be able to exercise a greater degree of choice in nonviolent situations. While there may be cases where the effect of a nonviolent threat is to force the complainant to submit to sexual intercourse, this will always be a matter of degree based on the circumstances of the case.⁷⁵
- 4.46 When the Taskforce reported in 2005, it was an offence for a person to procure sexual intercourse through nonviolent threats or coercive conduct, if in the circumstances the complainant could not reasonably be expected to resist.⁷⁶ The offence carried a maximum penalty of six years imprisonment (a lesser penalty than that for sexual assault). The prosecution had to prove the accused had to know that the complainant submitted to the intercourse because of the nonviolent threat.
- 4.47 The Taskforce said “[t]he most difficult hurdle in bringing a prosecution [under this offence] is proving beyond a reasonable doubt that the complainant could not reasonably resist. ... Not surprisingly, this [offence] has not been widely utilised.”⁷⁷ It therefore recommended:
- introducing nonviolent threats as a factor that *may* negate consent, to cover behaviours such as extortion and threats to humiliate, and
 - repealing the lesser offence.⁷⁸

Both recommendations were adopted.

- 4.48 NSW is the only Australian state or territory that treats violent and nonviolent threats differently. In the ACT, a threat to use extortion against the person or another person negates consent,⁷⁹ as will a threat to publicly humiliate, disgrace, or physically or mentally harass the person or another person.⁸⁰ In SA, a threat to

72. J Quilter, *Preliminary Submission PCO92*, 12.

73. *Crimes Act 1900* (NSW) s 61HA(6)(b).

74. *Crimes Act 1900* (NSW) s 61HA(4)(c), s 61HA(6)(b).

75. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 38.

76. *Crimes Act 1900* (NSW) s 65A(2), repealed by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [3].

77. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 38.

78. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 38–39.

79. *Crimes Act 1900* (ACT) s 67(1)(c).

80. *Crimes Act 1900* (ACT) s 67(1)(d).

“degrade, humiliate, disgrace or harass” negates consent.⁸¹ Intimidation negates consent in Queensland and WA.⁸² In Victoria, fear of force “or harm of any type” to the person, someone else or an animal negates consent.⁸³

- 4.49 The Australian Queer Students’ Network (“AQSN”) submits that NSW law should be expanded to include “manipulative or coercive conduct” or a “history of such coercion or threats” as factors that may negate consent. The AQSN argues this would better reflect the ongoing nature of abusive relationships and family violence, to which lesbian, gay, bisexual, transgender, intersex, queer and asexual (“LGBTQIA+”) people can be particularly vulnerable.⁸⁴
- 4.50 The AQSN further submits that the law should cover
- the coercion of sexual acts in exchange for access to money, freedom, children, space, affection and medication
 - the threat of “outing” someone as an LGBTQIA+ person, as someone of HIV+ status or as a sex worker, and
 - the threat of limiting access to specific medications or medical assistance (such as hormones for gender affirmation or treatment for HIV).⁸⁵

Arguably, the section is already broad enough to cover these circumstances. However, it may be desirable to expressly include these (or other) factors.

Abuse of a position of authority or trust

- 4.51 It may be established that a person does not consent if they have sexual intercourse because of the abuse of a position of authority or trust.⁸⁶ A person is under the authority of another person if they are “in the care, or under the supervision or authority, of the other person”.⁸⁷
- 4.52 For some offences in NSW, consent is not a defence if the accused person held a position of trust or authority in relation to the complainant. This includes when an accused has sexual intercourse with someone who has a cognitive impairment and the accused is responsible for the care of that person,⁸⁸ and when an accused has sexual intercourse with someone aged 16–18 who is under their special care.⁸⁹ In addition, the fact that the accused was in a position of trust or authority in relation to the other person is an aggravating factor for NSW offences, which may give rise to a higher penalty.⁹⁰
- 4.53 The recognition that consent may be negated by an abuse of a position of authority or trust has a similar protective purpose. Its inclusion in the list of grounds that *may*

81. *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(ii).

82. *Criminal Code* (Qld) s 348(2)(b); *Criminal Code* (WA) s 319(2)(a).

83. *Crimes Act 1958* (Vic) s 36(2)(b).

84. Australian Queer Students Network, *Preliminary Submission PCO56*, 7.

85. Australian Queer Students Network, *Preliminary Submission PCO56*, 7–8.

86. *Crimes Act 1900* (NSW) s 61HA(6)(c).

87. *Crimes Act 1900* (NSW) s 61H(2).

88. *Crimes Act 1900* (NSW) s 66F.

89. *Crimes Act 1900* (NSW) s 73.

90. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

negate consent, rather than those that *will* negate consent, was intended to recognise that such abuse can occur in a broad range of relationship types. In explaining its approach, the Taskforce said:

Sexual intercourse within the context of certain professional relationships, such as doctor-patient, may be deemed unethical, however, this does not necessarily mean it should be criminal. Careful consideration needs to be given to the precise circumstance in which intercourse took place, and whether the abuse of trust was such as to eliminate the complainant's capacity to freely choose.

One can certainly envisage circumstances where consent may not be considered to be free and voluntary due to an abuse of the relationship, for example, a treating psychiatrist who withholds medication unless a person submits to sexual intercourse. However, there are real problems with including this as a condition, which automatically negates consent.⁹¹

- 4.54 The laws in the ACT, Queensland and Tasmania are similar to NSW, except that consent is negated if the specified conditions are met. In the ACT, consent is negated if caused “by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person”.⁹² In Queensland, consent is not freely and voluntarily given if obtained “by exercise of authority”.⁹³ In Tasmania, a person does not freely agree to an act if the person “agrees or submits because he or she is overborne by the nature or position of another person”.⁹⁴

Other potential grounds not listed in s 61HA

- 4.55 Preliminary submissions suggest circumstances that could be added to the list of circumstances that negate consent.

Fear

- 4.56 The Wirringa Baiya Aboriginal Women's Legal Centre argues that s 61HA does not adequately contemplate situations involving ongoing domestic violence. A person can have “a general fear to say no to sexual activity in a relationship where regular control, threats, physical abuse and intimidation are utilised to instil and maintain ongoing fear”.⁹⁵ The Centre recommends that consent should be negated when a person submits to sexual activity because of “fear of harm of any type to the victim, or another person, pet or damage to property”.⁹⁶
- 4.57 NSW does not explicitly set out “fear” as a factor that negates consent, but it does provide that intimidating or coercive conduct *may* negate consent.⁹⁷ The laws in other Australian states and territories expressly provide that fear of harm and/or

91. Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 39.

92. *Crimes Act 1900* (ACT) s 67(1)(h).

93. *Criminal Code* (Qld) s 348(2)(d).

94. *Criminal Code* (Tas) s 2A(2)(e).

95. Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Preliminary Submission PCO78*, 2.

96. Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Preliminary Submission PCO78*, 2. See also Australian Queer Student Network, *Preliminary Submission PCO56*, 8.

97. *Crimes Act 1900* (NSW) s 61HA(6)(b).

force negates consent.⁹⁸ The Model Criminal Code provides that fear of force to the person or someone else negates consent.⁹⁹ In Tasmania, the fear must be “reasonable”¹⁰⁰ in order to negate consent.

Acts of violence or force

- 4.58 The infliction of violence or force is a circumstance that negates consent in every other state or territory in Australia.¹⁰¹ In NSW, the infliction of violence or force is not listed as a factor that negates consent; however, it is arguably implied in the requirement that the person “freely and voluntarily agrees”.
- 4.59 The Sex Workers Outreach Project submits that the law needs to clarify that acts of violence invalidate ongoing consent.¹⁰² Australia’s National Research Organisation for Women’s Safety submits the law should state that domestic and intimate partner violence negates consent.¹⁰³
- 4.60 NSW sexual assault law only expressly refers to acts of violence in relation to the elements of an aggravated offence. If the alleged offender “intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby”, then they are charged with aggravated sexual assault.¹⁰⁴ This offence carries a maximum penalty of 20 years imprisonment, whereas sexual assault alone carries a maximum penalty of 14 years.¹⁰⁵

Fraudulent misrepresentation

- 4.61 As discussed, a person does not consent to sexual intercourse if they consent under a mistaken belief:
- about the identity of the other person
 - that the other person is married to them, or
 - that the sexual intercourse is for health or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means).¹⁰⁶
- 4.62 In this formulation, NSW limits “any other mistaken belief” to a belief about “the nature of the act”. Other states and territories do not limit the nature of the belief that the fraud produces. For example, in WA, consent is negated if obtained by “deceit, or any fraudulent means”.¹⁰⁷ In the ACT, consent is negated “by a

98. *Criminal Code* (Tas) s 2A(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Criminal Code* (NT) s 192(2)(a); *Criminal Code* (Qld) s 348(2)(c); *Crimes Act 1958* (Vic) s 36(2)(a).

99. Australia, Parliamentary Counsel’s Committee, *Model Criminal Code* (2009) cl 5.2.3(2)(a).

100. *Criminal Code* (Tas) s 2A(2)(b).

101. *Criminal Code* (Tas) s 2A(2)(b); *Criminal Code* (Qld) s 348(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Criminal Code* (NT) s 192(2)(a); *Crimes Act 1900* (ACT) s 67(1)(a); *Criminal Code* (WA) s 319(2)(a); *Crimes Act 1958* (Vic) s 36(2)(a).

102. Sex Workers Outreach Project, *Preliminary Submission PCO103*, 7.

103. Australia’s National Research Organisation for Women’s Safety, *Preliminary Submission PCO105*, 2.

104. *Crimes Act 1900* (NSW) s 61J(2)(a).

105. *Crimes Act 1900* (NSW) s 61I.

106. *Crimes Act 1900* (NSW) s 61HA(5).

107. *Criminal Code* (WA) s 319(2)(a).

fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person”.¹⁰⁸ In the NT, a “false representation as to the nature or purpose of the act”¹⁰⁹ will negate consent.

- 4.63 This raises the question of whether the fraud should be limited to the “nature of the act”. The Taskforce said in its report:

[T]he term “fraud” is very broad and the possibilities of misrepresentation are endless; ranging from a lie as to marital status, background, job, sexual prowess, declarations of love, or failure to make payment for sexual services. Should a failure to disclose any factor, or any significant factor that may influence a person’s decision to engage in sexual conduct, mean that no true consent was given? It may be argued that had the complainant known the truth, he or she would not have consented, but does this mean the other person should be liable for the offence of sexual assault?¹¹⁰

- 4.64 In relation to the question of identity fraud, another question is whether consent should be negated where the complainant believed, wrongly, that the accused had a particular gender identity. A number of recent judgments in the UK have found that consent can be negated in such circumstances.¹¹¹ On the other hand, Sharpe argues that liability for sexual assault is inappropriate where the accused represented to the complainant that they were of a particular gender, and genuinely identified as such. Sharpe says that, in these circumstances, it may be said “there is no deception regarding gender identity because the gender identity claims transgender people make are authentic”.¹¹²

Failure to disclose HIV/AIDS positive status

- 4.65 A subcategory of fraudulent misrepresentation, considered by the Taskforce, relates to a person’s failure to disclose their HIV/AIDS positive status. After considering the Canadian case law¹¹³ and policy issues, most of the Taskforce thought that sexual assault law is an inappropriate vehicle to deal with this type of fraudulent conduct.¹¹⁴
- 4.66 In 2007, the *Crimes Act* was amended so that the offence of inflicting grievous bodily harm now includes “causing a person to contract a grievous bodily disease”.¹¹⁵ The law in NSW also requires a person who knows they have certain diseases and sexually transmissible conditions to take reasonable precautions against spreading the disease or condition.¹¹⁶
- 4.67 Failure to disclose HIV/AIDS positive status is not a specific negating circumstance in the consent laws of any Australian state or territory. The issue raises questions

108. *Crimes Act 1900* (ACT) s 67(1)(g).

109. *Criminal Code* (NT) s 192(2)(g).

110. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 41.

111. See, eg, *R v McNally* [2013] EWCA Crim 1051; *R v Barker* [2012] EWCA Crim 1593; *R v Newland* (Unreported, Chester Crown Court, Dutton J, 12 November 2015).

112. A Sharpe, *Sexual Intimacy and Gender Identity “Fraud”: Reframing the Legal and Ethical Debate* (Routledge, 2018) 88.

113. See, eg, *R v Cuerrier* [1998] 2 SCR 371; *R v Williams* [2003] 2 SCR 134.

114. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 41.

115. *Crimes Act 1900* (NSW) s 4 definition of “grievous bodily harm”, inserted by *Crimes Amendment Act 2007* (NSW) sch 1 [1].

116. *Public Health Act 2010* (NSW) s 79.

including whether such a law would discourage people from undertaking appropriate health checks and talking openly about HIV, and whether it would apply if someone were unaware of their HIV/AIDS positive status.

Inequality

- 4.68 Cossins notes that the list of circumstances in which consent will or may be negated do not take into account the range of unequal relationships in which a person may submit to sexual intercourse. She suggests s 61HA(6) should recognise that consent *may* be negated by:

the fact that a person was in a position of inequality with respect to another person, as a result of economic, social, cultural and/or religious reasons, or as a result of being groomed for sex.¹¹⁷

- 4.69 No other Australian state or territory currently has such a law. Tasmania arguably comes close by providing that a person does not freely agree to an act if the person “agrees or submits because he or she is overborne by the nature or position of another person”.¹¹⁸

Non-consensual removal of a condom

- 4.70 A number of submissions refer to recent public discussion about the practice of removing a condom without the knowledge or consent of the other party. This is commonly known as “stealthing”.¹¹⁹ The authors of these submissions say that consent should be invalidated when a person lies about using contraception or removes the contraceptive device.¹²⁰

- 4.71 The Sex Workers Outreach Project (“SWOP”) reports “condom removal is usually done surreptitiously, and is often only discovered after sexual intercourse has occurred”.¹²¹ Burgin submits:

Data detailing the extent of the practice of “stealthing” is limited, but academic and public narrative sharing (by complainants and by those who admit to committing the act) indicate that it is not uncommon. Recent academic work also argues that “offenders and their defenders justify their actions as a natural male instinct – and natural male right”. Accordingly, action must be taken to reinforce the law’s protection of sexual autonomy – the right to participate in a sexual act or not, and the right to determine the nature of the sexual act.¹²²

117. A Cossins, *Preliminary Submission PCO33*, 45.

118. *Criminal Code (Tas)* s 2A(2)(e).

119. R Burgin, *Preliminary Submission PCO72*, 3; C Stone, *Preliminary Submission PCO95*, 2; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 5, 10.

120. R Burgin, *Preliminary Submission PCO72*, 3; University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 13; C Stone, *Preliminary Submission PCO95*, 4; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 9.

121. Sex Workers Outreach Project, *Preliminary Submission PCO103*, 9.

122. R Burgin, *Preliminary Submission PCO72*, 3 (citations omitted).

- 4.72 Brodsky remarks that stealthing “exposes victims to physical risks of pregnancy and disease and, interviews make clear, is experienced by many as a grave violation of dignity and autonomy”.¹²³
- 4.73 Burgin also submits that someone cannot “freely agree” to sexual intercourse when the other person removes a condom without their knowledge. In her view, the non-consensual removal of a condom should be listed as a negating factor in s 61HA.¹²⁴ SWOP agrees, and submits that the practice of deliberately breaking or rupturing a condom is also a form of stealthing. SWOP recommends that “s 61HA should specifically include as a factor that negates consent the non-consensual removal or deliberate damage of a condom”.¹²⁵
- 4.74 Stealthing is not a specific negating factor in the consent laws of any Australian state or territory. Arguably, it is covered by other negating circumstances that are more broadly worded. For example, in the ACT, consent is negated “by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person”.¹²⁶ This would likely cover such a scenario.¹²⁷

Where a person does not do or say anything to indicate consent

- 4.75 As discussed in Chapter 3, Tasmania’s consent laws state that a person does not freely agree to an act if the person “does not say or do anything to communicate consent”.¹²⁸ Victoria’s laws similarly provide that circumstances in which a person does not consent to an act include where “the person does not say or do anything to indicate consent to the act”.¹²⁹
- 4.76 Section 61HA does not include such a ground. The authors of some preliminary submissions suggest that it should.¹³⁰
- 4.77 Cossins submits that the law should take into account that fact finders are not educated about the freeze response and the effects of inebriation on behaviour.¹³¹ A related view is that the law should try to take into account “the feelings of fear, fright and a freeze may prevail leading to inaction by the victim”.¹³²
- 4.78 Cossins suggests including the following in the list of factors that negate consent:

The fact that a person froze, or was unable to respond to a sexual act, or did not say or do anything to indicate free agreement in response to a sexual act is enough to show that the act took place without that person’s consent.¹³³

123. A Brodsky, “‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal” (2017) 32 *Columbia Journal of Gender and Law* 183, 183, 185.

124. R Burgin, *Preliminary Submission PC072*, 3.

125. Sex Workers Outreach Project, *Preliminary Submission PC0103*, 10.

126. *Crimes Act 1900* (ACT) s 67(1)(g).

127. C Stone, *Preliminary Submission PC095*, 4–6.

128. *Criminal Code* (Tas) s 2A(2)(a).

129. *Crimes Act 1958* (Vic) s 36(2)(l).

130. See, eg, Confidential, *Preliminary Submission PC042*; Australian Queer Students Network, *Preliminary Submission PC056*, 8; Rape and Domestic Violence Services Australia, *Preliminary Submission PC088*, 16.

131. A Cossins, *Preliminary Submission PC033*, 44.

132. Confidential, *Preliminary Submission PC057*.

133. A Cossins, *Preliminary Submission PC033*, 44.

- 4.79 One question is whether such a reform would be best framed as a factor that negates consent or whether the definition of consent should be amended to require a clear indication of consent.¹³⁴

Withdrawal of consent

- 4.80 Victoria introduced amendments in 2016 to provide that consent is negated where a person, having consented, “later withdraws consent to the act taking place or continuing”.¹³⁵ Some preliminary submissions support this approach.¹³⁶
- 4.81 Similar laws appear elsewhere. In the NT, the judge must direct the jury that a person is not to be regarded as having consented only because the person had consented on that occasion or on an earlier occasion.¹³⁷ In SA, the definition of rape includes that the offender continues to engage in sexual intercourse with a person who “has withdrawn consent to the sexual intercourse”.¹³⁸
- 4.82 In Scotland, the law states that consent may be withdrawn at any time before or during the conduct. If the conduct takes place or continues, then it is done so “without consent”.¹³⁹

Criticism of listing factors that negate consent

- 4.83 The majority of preliminary submissions do not oppose a list of circumstances that negate or may negate consent. Burton argues that a non-exhaustive list “provides decision makers with a framework to enable both consistency in common cases and flexibility in unusual cases”.¹⁴⁰
- 4.84 However, the authors of some submissions criticise such lists. Quilter argues that listing these circumstances complicates the law and diverts attention from the question of whether there was free and voluntary consent to the relevant act.¹⁴¹ The NSW Bar Association says that the negating circumstances “serve no useful purpose and are potentially misleading”.¹⁴²
- 4.85 All Australian states and territories, and a range of other countries, list factors that negate consent.¹⁴³ However, there may be other ways to frame consent laws.

134. For discussion about the meaning of consent, see Chapter 3.

135. *Crimes Act 1958* (Vic) s 36(2)(m).

136. D Crowe, *Preliminary Submission PCO39*, 1; M Goldstein, *Preliminary Submission PCO46*, 1.

137. *Criminal Code* (NT) s 192A(c).

138. *Criminal Law Consolidation Act 1935* (SA) s 48(1)(b).

139. *Sexual Offences (Scotland) Act 2009* (Scot) s 15(3)–(4).

140. K Burton, *Preliminary Submission PCO76*, 2–3, citing J Crowe, “Fraud and Consent in Australian Rape Law” (2014) 38 *Criminal Law Journal* 236, 247.

141. J Quilter, *Preliminary Submission PCO92*, 5.

142. NSW Bar Association, *Preliminary Submission PCO47*, 2.

143. See, eg, *Criminal Code* (Canada) s 153(3); *Crimes Act 1961* (NZ) s 128A; *Sexual Offences Act 2003* (UK) s 75; *Sexual Offences (Scotland) Act 2009* (Scot) s 13.

- 4.87 Another possible option is to remove the factors that *may* negate consent or reframe them as factors that *will* negate consent. Removing this list could simplify the law. On the other hand, it may be that the lists serve their intended purpose – as a useful indicator of the types of considerations relevant to the question of consent.

Question 4.1: Negation of consent

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

5. Knowledge about consent

In brief

The prosecution must prove the accused knew the complainant did not consent. The prosecution can do this by proving either the accused actually knew the complainant did not consent, was reckless about consent or had no reasonable grounds for believing the complainant consented. We review the law about the accused’s “knowledge”.

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- 5.1 As discussed in Chapter 2, serious criminal offences usually consist of a physical element (*actus reus*) and a mental element (*mens rea*). The mental element of the sexual assault offences is “knowledge” (as defined in s 61HA(3)). The prosecution must prove beyond reasonable doubt that the accused knew the complainant did not consent to sexual intercourse.¹
- 5.2 According to s 61HA(3) of the *Crimes Act 1900* (NSW) (“*Crimes Act*”), an accused “knows” about the absence of consent if they:
- actually knew the complainant did not consent²
 - were reckless as to whether the complaint consented,³ or

1. *Crimes Act 1900* (NSW) s 61I.
2. *Crimes Act 1900* (NSW) s 61HA(3)(a).
3. *Crimes Act 1900* (NSW) s 61HA(3)(b).

- had no reasonable grounds for believing that the complainant consented.⁴

The law also treats an accused as if they “knew” the complainant did not consent if the complainant’s consent was based on one of the mistaken beliefs listed in s 61HA(5). In this situation, the complainant’s consent is negated. We review the law on negation in Chapter 4.

- 5.3 Recently, the question of whether NSW needs to change the legislative definition of consent has generated a significant amount of public debate. However, the interpretation and operation of the “knowledge” element is also highly controversial. This Chapter reviews the law on knowledge in NSW and invites comment on a range of reforms suggested in preliminary submissions.

Overview of s 61HA(3)

- 5.4 Section 61HA(3) of the *Crimes Act 1900* (NSW) (“*Crimes Act*”) sets out the mental element for the sexual assault offences. This subsection states:

(3) Knowledge about consent

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:

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

- 5.5 The section also sets out matters that fact finders (be they a judge or a jury) must consider when making determinations about the accused’s “knowledge”:

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

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) not including any self-induced intoxication of the person.

- 5.6 The “no reasonable grounds” test was added to the mental element for sexual assault as part of the changes made by the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) (“2007 reforms”).⁵

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

5. *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

Actual knowledge and recklessness

- 5.7 The first two types of knowledge referred to in s 61HA(3) can be expressed as “actual knowledge” and “recklessness”. Determining whether the accused actually knew the complainant did not consent, or was reckless as to whether the complainant consented, involves the application of a “completely subjective” test. It requires “an assessment of what was going on in the mind of the accused person”.⁶
- 5.8 We received comparatively few preliminary submissions on these two forms of knowledge. However, one issue submissions raise is whether the legislation should define recklessness.
- 5.9 While s 61HA(3) does not define the term “reckless”, the common law recognises two categories of recklessness. The NSW *Criminal Trial Courts Bench Book* (“*Bench Book*”) explains that the prosecution must prove either:
- the accused simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the 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 their mind to it, or
 - the accused realised the possibility that the complainant was not consenting but went ahead regardless of whether the complainant consented or not.⁷
- 5.10 This first category is known as “inadvertent recklessness”. The second is known as “advertent recklessness”.
- 5.11 There are mixed views on whether the word “reckless” should be defined in legislation. The NSW Criminal Justice Sexual Offences Taskforce (“Taskforce”) recommended against this in 2005.⁸ It referred to Justice Callinan’s observation that attempts to define this expression will lead to “unnecessary uncertainty” and are “likely to be futile”.⁹
- 5.12 However, McNamara and co-authors submit that s 61HA(3)(b) should define “reckless”. This is because the courts have recognised two discrete meanings of this word. They suggest the model direction from the *Bench Book* (mentioned above) “offers a useful formulation” for such an amendment.¹⁰
- 5.13 In contrast, the NSW Bar Association believes the law on recklessness is problematic. The Association argues that recklessness “should involve a comparable level of criminal culpability or moral blameworthiness” to actual knowledge if the two are to be treated alike. The Association doubts if advertent recklessness is as culpable as actual knowledge. It also considers it inappropriate

6. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 42.

7. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566]. See *R v Tolmie* (1995) 37 NSWLR 660, 672; *R v Mitton* [2002] NSWCCA 124, 132 A Crim R 123 [28]; *Banditt v R* [2005] HCA 80, 224 CLR 262, 274–276.

8. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) rec 15.

9. *Banditt v R* [2005] HCA 80, 224 CLR 262 [108].

10. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 2.

to impose liability for situations involving true inadvertence. Overall, the Association questions whether either form of recklessness is correct in law.¹¹

- 5.14 Instead, the Bar Association recommends amending s 61HA(3)(b) to read: “the person is indifferent as to lack of consent by the other person to the sexual intercourse”. This would capture a person who intended “to proceed even if it were known that consent was absent”. Among its reasons in support of this reform, the Association argues “[a] state of mind of indifference to lack of consent is much closer to knowledge of lack of consent than merely taking a risk that consent is absent”.¹²
- 5.15 The possibility of replacing “recklessness” with “indifference” was raised during the processes that led to the 2007 reforms.¹³ Ultimately, Parliament did not enact an “indifference” standard.

Question 5.1: Actual knowledge and recklessness

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

“No reasonable grounds” for belief in consent

- 5.16 An accused can also be taken to know about the absence of consent if they have “no reasonable grounds” for believing there was consent. The “no reasonable grounds” test was controversial when enacted. Recent judicial interpretation of the test have since raised further questions. Of the three forms of knowledge, “no reasonable grounds” attracted the most comment in preliminary submissions.

Overview of the test

History

- 5.17 Before the 2007 reforms, the common law “honest, but mistaken belief” test applied. An accused could be acquitted if they honestly, but incorrectly, believed the

11. NSW Bar Association, *Preliminary Submission PCO47*, 3–4.

12. NSW Bar Association, *Preliminary Submission PCO47*, 4.

13. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 44–45; NSW, Attorney General’s Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) 23–25.

- complainant consented. This could occur even if the accused’s belief was unreasonable.¹⁴
- 5.18 The Taskforce considered whether NSW should overturn the test. There was significant debate over whether NSW should instead adopt an “objective” test.¹⁵
- 5.19 As the Taskforce observed, the “honest, but mistaken belief” test was “a completely subjective, and not an objective test, requiring an assessment of what was going on in the mind of the accused”.¹⁶
- 5.20 In contrast, a purely objective test might require a fact finder (whether a judge or jury) to consider what a hypothetical “reasonable person” would think. If the fact finder determines a reasonable person “would have also believed that the complainant was consenting”, the accused could be acquitted.¹⁷ If not, the accused could be found guilty.
- 5.21 Participants in the Taskforce process held mixed views on whether NSW should replace the “honest, but mistaken belief” test. While there was “considerable support” for introducing an objective fault element, some participants supported the existing test.¹⁸ In particular, they opposed the idea that the law might punish a person “who did not believe that what they were doing was wrong” but whose “belief did not accord to a standard of reasonableness determined by the community”.¹⁹ The Taskforce recommended the issue should be given further consideration.²⁰
- 5.22 The NSW Government decided to address the “honest, but mistaken belief” test in the 2007 reforms. The Attorney General described it as an “outdated” test, which reflected “archaic views about sexual activity” and failed “to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour”.²¹ Section 61HA(3)(c) was introduced in response to these concerns.
- 5.23 Section 61HA(3)(c) deems an accused to know about the absence of consent if they had “no reasonable grounds for believing” the complainant consented.²² As with the other forms of knowledge, fact finders must have regard to “all the circumstances of the case” when determining whether the accused had no

14. See G D Woods, *Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Act* (Department of the Attorney-General and Justice, 1981) 16–17; Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 45–47. This is known as the *Morgan* test: *Director of Public Prosecutions v Morgan* [1976] AC 182.

15. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 45–51.

16. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 42.

17. Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Issues Paper 15 (2018) [1.35].

18. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 47.

19. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 46.

20. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) rec 14.

21. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW)).

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

reasonable grounds for their belief. This includes any steps taken by the accused to ascertain consent and excludes any self-induced intoxication of the accused.²³

5.24 When introducing this reform, the Attorney General explained:

An accused will no longer be simply able to say they had an honest belief that there was consent, no matter how outrageous that belief might be. Belief will also have to be reasonable according to objective standards in the community.²⁴

5.25 The “no reasonable grounds” test remained controversial during the 2013 statutory review of s 61HA.²⁵ However, no changes were made to the mental element.

Recent judicial statements

5.26 The Court of Criminal Appeal (“CCA”) has since held that s 61HA(3) does not apply a purely objective standard. In the first *Lazarus* trial, the judge directed the jury to consider whether the accused’s belief in the complainant’s consent was “a reasonable one”.²⁶ However, the CCA held this direction was incorrect.²⁷

5.27 Justice Fullerton accepted that the test has objective elements “in the sense that ... the grounds which might lead to a belief of consent must be objectively reasonable”. However, the test does not require a fact finder to consider “what a reasonable person might have concluded about consent”.²⁸

5.28 Instead, the relevant issues are:

- whether the accused believed the complainant was consenting, and
- if so, whether the accused had reasonable grounds for this belief.²⁹

5.29 This test can be described as a “hybrid” of subjective and objective elements.³⁰ Cossins explains:

fact-finders must consider what the defendant, himself, actually believed in all the circumstances and decide whether the accused had reasonable grounds for his belief. ...the test is partly subjective and partly objective because fact-finders must put themselves in the shoes of the defendant and decide whether the complainant’s lack of consent would have been obvious to someone with the mental capacity of the defendant in those circumstances.³¹

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

24. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3907.

25. NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013).

26. *Lazarus v R* [2016] NSWCCA 52 [145].

27. *Lazarus v R* [2016] NSWCCA 52 [156].

28. *Lazarus v R* [2016] NSWCCA 52 [156]. See also *O’Sullivan v R* [2012] NSWCCA 45 [125]–[126].

29. *Lazarus v R* [2016] NSWCCA 52 [156].

30. J Monaghan and G Mason, “Reasonable Reform: Understanding the Knowledge of Consent Provision in section 61HA(3)(c) of the Crimes Act 1900 (NSW)” (2016) 40 *Criminal Law Journal* 246, 259; G Mason and J Monaghan, *Preliminary Submission PCO40*, 4–5 (footnote 11); R Burgin, *Preliminary Submission PCO72*, 4.

31. A Cossins, *Preliminary Submission PCO33*, 28.

Perspectives on the test

5.30 Preliminary submissions generally express support for both the principles behind the NSW test and its potential to support a communicative model of consent.³² For instance, the Law Society of NSW believes the law allows fact finders to apply standards that “reflect the reasonable views of contemporary society and which promote respect and communication in relation to the issue of consent”.³³ It also considers the section strikes the right balance between the complainant and the accused.³⁴

5.31 However, others believe the test has not realised its potential and think it should be amended. In particular, some argue the CCA’s interpretation does not reflect Parliament’s purpose in enacting the reforms.³⁵

5.32 One criticism is that the test, as interpreted by the CCA, is confusing and difficult to apply.³⁶ For instance, Cossins observes the test:

may be confusing for a fact-finder which cannot consider whether the defendant’s belief was a reasonable belief in the sense of asking what a reasonable person might have believed about the complainant’s consent.³⁷

Similarly, Mason and Monaghan believe the test requires a fact finder to undertake a “convoluted analysis”.³⁸

5.33 There is also a view that the test is unreasonably hard for the prosecution to satisfy.³⁹ To reiterate, the prosecution must prove beyond reasonable doubt the accused had “no reasonable grounds” for believing the complainant consented.⁴⁰ In the first *Lazarus* appeal, Justice Fullerton observed:

In many ... contested cases, perhaps all, there might be a reasonable possibility of the existence of reasonable grounds for believing (mistakenly) that the complainant consented and other reasonable grounds suggesting otherwise.⁴¹

5.34 The model jury direction in the NSW *Bench Book* states the prosecution

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 [prosecution] has eliminated any such

32. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 11–12; G Mason and J Monaghan, *Preliminary Submission PCO40* [15]–[24].

33. Law Society of NSW, *Preliminary Submission PCO73*, 1.

34. Law Society of NSW, *Preliminary Submission PCO73*, 1.

35. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 11; G Mason and J Monaghan, *Preliminary Submission PCO40* [21]; L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3–4.

36. See, eg, K Burton, *Preliminary Submission PCO76* [10]; Inner City Legal Centre, *Preliminary Submission PCO44*, 1; A Cossins, *Preliminary Submission PCO33*, 28, 38; G Mason and J Monaghan, *Preliminary Submission PCO40* [22]; R Burgin, *Preliminary Submission PCO72*, 4.

37. A Cossins, *Preliminary Submission PCO33*, 28.

38. G Mason and J Monaghan, *Preliminary Submission PCO40* [22].

39. B Attard, *Preliminary Submission PCO70*, 1–2, 3; K Burton, *Preliminary Submission PCO76* [10]; L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3.

40. *Crimes Act 1900* (NSW) s 61HA(3)(c) (emphasis added).

41. *Lazarus v R* [2016] NSWCCA 52 [156].

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.⁴²

- 5.35 Arguably, this means the presence of any reasonable ground for the accused’s belief is enough to result in an acquittal – even if there is also “considerable evidence that the mistake was an unreasonable one”.⁴³ As such, some contend the test is “significantly narrower than had previously been appreciated”.⁴⁴
- 5.36 While many support retaining the test, with amendments, some members of the legal profession continue to oppose the test. As we consider below, they suggest it should be either repealed or amended significantly.⁴⁵
- 5.37 Below, we consider some reform options that reflect this range of views.

Question 5.2: The “no reasonable grounds” test

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

Should there be a “no reasonable belief” test?

- 5.38 One option for reform is to replace the narrow “no reasonable grounds” test with a “reasonable belief” test, as is used elsewhere.
- 5.39 For instance, laws in Victoria, England and Wales, and Northern Ireland require the prosecution to prove the accused did not “reasonably believe” the complainant consented.⁴⁶ In Scotland, the relevant question is whether penetration occurred “without any reasonable belief” in consent.⁴⁷
- 5.40 In Victoria, the jury can be directed that they “must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent”.⁴⁸
- 5.41 The authors of some preliminary submissions propose various versions of a “reasonable belief” test.⁴⁹ For instance, McNamara (and co-authors) and Quilter

42. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566].

43. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3.

44. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3. See also J Quilter, *Preliminary Submission PCO92*, 10; E Methven and I Dobinson, *Preliminary Submission PCO77*, 16–17.

45. See, eg, NSW Bar Association, *Preliminary Submission PCO47*, 5.

46. *Crimes Act 1958* (Vic) s 38(1)(c); *Sexual Offences Act 2003* (UK) s 1(1)(c); *Sexual Offences (Northern Ireland) Order 2008* art 5(1)(c).

47. *Sexual Offences (Scotland) Act 2009* (Scot) s 1(1)(b).

48. *Jury Directions Act 2015* (Vic) s 47(3)(d).

49. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88* 15; L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3; J Quilter, *Preliminary Submission PCO92*, 10; G Mason and J Monaghan, *Preliminary Submission PCO40* [23].

propose replacing s 61HA(3)(c) with the following test: “the person’s belief in consent was not reasonable in all the circumstances”.⁵⁰

- 5.42 Methven and Dobinson propose the following test: “the accused had an unreasonable belief that the victim was consenting”. As an alternative, they propose that any belief in consent asserted by an accused must be “based on reasonable grounds” or be “reasonable”.⁵¹
- 5.43 Mason and Monaghan explain that a “reasonable belief” test would require a fact finder to ask:
- whether the accused believed the complainant was consenting, and
 - whether that belief was reasonable, considering all the circumstances of the case and any steps the accused took.⁵²
- 5.44 The proposed test would focus on the accused’s state of mind.⁵³ However, it would be a subjective/objective hybrid: it would require fact finders to assess the accused’s “subjective belief against an objective standard”.⁵⁴
- 5.45 Supporters of this reform argue that, compared to the current test, it would:
- be simpler and clearer⁵⁵
 - set “a higher standard for sexual responsibility” while focusing attention “more directly on the requirement to act reasonably in sexual interactions”,⁵⁶ and
 - better reflect the purpose of the 2007 reforms, that is, to extend criminal liability “to those who hold an honest but unreasonable belief in consent”.⁵⁷
- 5.46 However, Dyer doubts a “reasonable belief” test would be more stringent than the current law. Nor would it simplify the law, in his view. Instead, the reform would require juries to determine essentially the same matters as they do currently. Under either approach, the jury must ask whether it was reasonable for the accused to believe the complainant consented.⁵⁸

Question 5.3: A “reasonable belief” test

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

50. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3; J Quilter, *Preliminary Submission PCO92*, 10.

51. E Methven and I Dobinson, *Preliminary Submission PCO77*, 17.

52. G Mason and J Monaghan, *Preliminary Submission PCO40* [23].

53. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 4.

54. G Mason and J Monaghan, *Preliminary Submission PCO40* [23].

55. G Mason and J Monaghan, *Preliminary Submission PCO40* [23]–[24].

56. G Mason and J Monaghan, *Preliminary Submission PCO40* [24].

57. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 4. See also J Quilter, *Preliminary Submission PCO92*, 10.

58. A Dyer, *Preliminary Submission PCO50* [36]–[41].

Should there be legislative guidance on “reasonableness”?

- 5.47 As discussed in Chapter 2, many preliminary submissions express the view that there is an undue focus on the behaviour of complainants in sexual assault trials. Some argue the “no reasonable grounds” test is part of this problem.
- 5.48 The CCA has remarked that “[t]he grounds for a particular belief [in consent] must ... be things known to the accused at the time of the conduct forming the basis of the charges”. It can arise from any number of circumstances present at the time, including any prior sexual relationship between the complainant and the accused.⁵⁹
- 5.49 In the first *Lazarus* appeal, Justice Adams observed the law “does not require that the reasonable grounds must be caused by a complainant’s actions but simply that they be present”.⁶⁰ To Monaghan and Mason, this reflects the view that “the focus of the reasonable grounds requirement is not meant to be the complainant’s actions; when read with s 61HA(3)(d), it is clearly meant to be the steps a defendant takes”.⁶¹
- 5.50 However, some authors of preliminary submissions express concern that s 61HA(3) allows assumptions and stereotypes about sex, sexuality, race and gender to emerge in court. This can include consideration of whether the complainant’s words or actions (or absence thereof), and possibly their level of intoxication, gave the accused a “reasonable” ground for believing consent was present.⁶²
- 5.51 As discussed in Chapter 3, a complainant’s failure to “offer actual physical resistance” is not enough to demonstrate consent.⁶³ Despite this, some authors of preliminary submissions are concerned that an accused may argue the complainant’s lack of resistance provided a “reasonable ground” for their belief in consent. Attard, for instance, observes:
- defendants can argue that a victim’s lack of fighting, lack of a verbal “no” or “stop” and the fact that they remained in the situation, is evidence that they could not have known that the victim was not consenting.⁶⁴
- 5.52 Others highlight the lack of legislative guidance about what a “reasonable ground” is. They consider this problematic, as views on what is reasonable can vary. Fact finders may apply their own criteria, potentially relying on rape myths and cultural assumptions, when assessing the basis for the accused’s belief.⁶⁵
- 5.53 One way of addressing this concern could be to clarify what can, and cannot, amount to reasonable grounds for belief in consent. For instance, Cossins believes the law should recognise the complainant’s style of dress; consumption of alcohol or

59. *Greenhalgh v R* [2017] NSWCCA 94 [36].

60. *Lazarus v R* [2016] NSWCCA 52 [6].

61. J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 100.

62. See, eg, University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 4; G Mason and J Monaghan, *Preliminary Submission PCO40* [20]; Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 1; A Cossins, *Preliminary Submission PCO33*, 14.

63. *Crimes Act 1900* (NSW) s 61HA(7).

64. B Attard, *Preliminary Submission PCO70*, 5.

65. A Cossins, *Preliminary Submission PCO33*, 14, 15; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 12; B Attard, *Preliminary Submission PCO70*, 2.

drugs; silence or lack of physical resistance are insufficient to amount to reasonable grounds.⁶⁶

- 5.54 Other options include requiring an accused to demonstrate the steps they took to determine consent. The law could also direct fact finders to exclude some matters from consideration. We consider these options at [5.105]–[5.115], below.

Question 5.4: Legislative guidance on “reasonable grounds”

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

Should the accused be required to provide evidence that their belief was “reasonable”?

- 5.55 In NSW, the “no reasonable grounds” test is part of the mental element of the sexual assault offences. To reiterate, the prosecution must prove the accused knew the complainant did not consent. One way the prosecution can do this is by proving the accused had no reasonable grounds for their belief in consent.

- 5.56 A different approach could involve removing the mental element from the definition of the offence. The prosecution would need to prove non-consensual intercourse. The accused may then be allowed to argue as a defence that they held an honest and reasonable, but mistaken, belief that the complainant consented.⁶⁷

- 5.57 Before they can raise this defence, the accused could be required to satisfy the judge that there is enough evidence to support their asserted reasonable belief. The law might, for example, require the accused to show they took steps to work out if the complainant consented.⁶⁸ If they can provide such evidence, the accused could use the defence, and the prosecution would then have to disprove the defence beyond a reasonable doubt.

- 5.58 Cossins suggests a “rebuttable presumption” could be introduced, as follows:

[I]f a fact-finder decides beyond reasonable doubt that the complainant did not consent, the defendant is guilty ... *unless* the fact-finder is satisfied that the defendant had a belief in consent, based on reasonable grounds, as a result of the steps he took to ascertain the complainant’s state of mind. This would impose an evidentiary threshold before a decision could be made that a defendant’s belief was based on reasonable grounds which, in turn, may require the defendant to satisfy an evidential onus about the steps he took to ascertain consent.⁶⁹

- 5.59 Methven and Dobinson also believe there is a “strong case” for placing an evidential burden on the accused. Under their proposal, the accused would need to suggest a reasonable possibility that:

66. A Cossins, *Preliminary Submission PCO33*, 41, 44.

67. See, eg, *Criminal Code* (Qld) s 24, s 349; *Criminal Code* (WA) s 24, s 325.

68. *Criminal Code* (Canada) s 273.2(b); *Criminal Code* (Tas) s 14A(1)(c).

69. A Cossins, *Preliminary Submission PCO33*, 43–44.

- they had an honest belief that the other person was consenting, and
- this belief was based on reasonable grounds.

If the accused satisfies this burden, the prosecution would then need to disprove these matters beyond reasonable doubt.⁷⁰

Question 5.5: Evidence of the accused's belief

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

Should there be a lesser offence for "negligent" sexual assault?

- 5.60 Another possible reform option addresses a different concern about the "no reasonable grounds" test: that people with an honest belief in consent are not as culpable as those who either know about the absence of consent or are reckless about it.⁷¹
- 5.61 This option involves the creation of a new, separate offence with a lower maximum penalty. The offences would be distinguished by the applicable mental element. For instance, the mental elements of actual knowledge and recklessness might apply to one offence. A separate offence might cover situations involving a mistaken but unreasonable belief in consent or, potentially, a failure to take reasonable steps to ascertain consent.⁷²
- 5.62 For instance, Sweden has recently created a "negligent rape" offence, with a maximum penalty of four years imprisonment. According to the Swedish Government, the offence covers situations such as "when a person should be aware of the risk that the other person is not participating voluntarily but still engages in a sexual act with that person".⁷³
- 5.63 Overall, the NSW Bar Association "considers that a person should not be liable to conviction for a sexual assault in circumstances where he or she honestly believes that there is consent".⁷⁴ However, it would support a lesser offence if NSW decides to retain an objective element.⁷⁵
- 5.64 The Association's reasons for supporting a separate offence include:

70. E Methven and I Dobinson, *Preliminary Submission PCO77*, 18, 21.

71. NSW Bar Association, *Preliminary Submission PCO47*, 5.

72. As proposed by S Odgers during the Taskforce process: Attorney General's Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 50.

73. See Ministry of Justice, Government Offices of Sweden, "Consent – the Basic Requirement of New Sexual Offences Legislation" (Fact Sheet, December 2017) 1 <www.government.se/information-material/2018/04/consent--the-basic-requirement-of-new-sexual-offences-legislation/> (retrieved 10 October 2018).

74. NSW Bar Association, *Preliminary Submission PCO47*, 5.

75. NSW Bar Association, *Preliminary Submission PCO47*, 6.

- it is unjust to subject someone who honestly believed there was consent, but had no reasonable grounds for this belief, to the same maximum penalty as someone who either knows about the absence of consent or is indifferent to it
 - the basis on which a jury finds the accused lacked knowledge of consent will not be clear to a sentencing judge, who may determine a sentence based on “a significantly more culpable basis than found by the jury”
 - other areas of the law deal with the negligent infliction of harm separately and apply lower maximum penalties to offences involving negligence, so there is no justification for adopting a different approach for sexual offences, and
 - this distinction would allow for “a more coherent approach” to the issue of self-induced intoxication (discussed at [5.97]–[5.104], below).⁷⁶
- 5.65 The idea of a separate, lesser offence was raised during the Taskforce process and again during consultations on the 2007 draft bill.⁷⁷ The NSW Government did not adopt this proposal because “it sends the message that some rape is not serious”. The Government believed “all sexual assault is serious and should have the same penalties”.⁷⁸
- 5.66 In his preliminary submission to our review, Dyer questions the proposal to include a separate offence. Dyer argues that the current test “is likely only to catch those offenders who exhibit a sufficient degree of culpability to warrant being convicted of sexual assault”. A jury will convict only if satisfied the accused had no reasonable grounds for their mistaken belief. The issue is not whether a reasonable person would have held such a belief.⁷⁹
- 5.67 The Law Reform Commission of Ireland suggests a lesser offence could have unintended consequences. It might, for instance, lead prosecutors to pursue the lesser offence because they believe actual knowledge or recklessness are harder to prove. This could mean “only the clearest (likely, the most violent) rape cases are prosecuted as rape, and the cases where there is little physical evidence of non-consent are tried as the lesser offence”.⁸⁰ In addition, a lesser offence might not increase the number convictions overall if difficulties with the reasonableness standard persist.⁸¹

Question 5.6: “Negligent” sexual assault

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

76. NSW Bar Association, *Preliminary Submission PCO47*, 5, 6.

77. Attorney General’s Department of NSW, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 50–51; NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3883.

78. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3885.

79. A Dyer, *Preliminary Submission PCO50* [34].

80. Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Issues Paper 15 (2018) [4.09].

81. Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Issues Paper 15 (2018) [4.11].

Should the “no reasonable grounds” test remain?

- 5.68 A further perspective is that the “no reasonable grounds” test could be removed, with traditional mens rea standards (such as recklessness) applying instead.
- 5.69 Methven and Dobinson consider insufficient attention has been paid to the concept of “reckless inadvertence”, with too much emphasis paid to the “no reasonable grounds test”. They believe recklessness could cover many cases involving unreasonable belief.⁸² For instance, the South Australian definition of “reckless indifference” includes situations in which the accused:
- 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.⁸³
- Methven and Dobinson argue this would cover situations where an accused forms a belief about consent, in ambiguous circumstances, without taking reasonable steps to determine if their partner consents.⁸⁴
- 5.70 The “no reasonable grounds” test may also require review if NSW were to move away from a consent-based system. As discussed in Chapter 3, Rush and Young recommend a significant departure from the existing law. Their model does not require the prosecution to prove the complainant did not consent. Instead, their model focuses on the injury experienced by the complainant.⁸⁵
- 5.71 Rush and Young propose the prosecution be required to prove either the accused intended to cause harm or was reckless as to causing harm. Proving this would require examination of the accused’s acts and behaviour. They do not support “an offence which regards negligence as a sufficient mental element for the crime of rape” and consider the “honest belief issue has no relevance” to their model.⁸⁶

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

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

The requirement to consider all the circumstances of the case

- 5.72 When determining whether an accused “knew” about the absence of consent, a fact finder must “have regard to all the circumstances of the case”. In doing so, they must consider any steps taken by the accused “to ascertain whether the other

82. E Methven and I Dobinson, *Preliminary Submission PC077*, 14.

83. *Criminal Law Consolidation Act 1935* (SA) s 47(b).

84. E Methven and I Dobinson, *Preliminary Submission PC077*, 19–20.

85. P Rush and A Young, *Preliminary Submission PC059* [8].

86. P Rush and A Young, *Preliminary Submission PC059* [18].

person consents to the sexual intercourse”.⁸⁷ However, they cannot consider the accused’s self-induced intoxication.⁸⁸

- 5.73 In its 2007 draft bill, the NSW Government proposed to require fact finders to only consider the circumstances of the case “[i]n determining whether a person has reasonable grounds to believe that another person consents to having sexual intercourse”.⁸⁹ However, s 61HA(3) applies this requirement to all three forms of knowledge.⁹⁰
- 5.74 Preliminary submissions focus largely on the interaction between the requirement and the “no reasonable grounds” test. This likely reflects the legal issues in the *Lazarus* case (see Chapter 2 at [2.71]–[2.77]). Below, we invite comment on what a fact finder should be required to consider when they make findings about knowledge.

Matters that must be considered: any steps taken to ascertain consent

- 5.75 As discussed in Chapter 3, some commentators believe the requirement to consider any steps taken by the accused to ascertain consent reflects a communicative model of consent. The requirement may also help focus a fact finder’s attention “more squarely on the actions and omissions of the accused, rather than just those of the complainant”.⁹¹
- 5.76 However, preliminary submissions identify difficulties concerning the definition of “steps” and the absence of a specific requirement to take steps.

What is a “step”?

- 5.77 Section 61HA(3) does not define the word “steps”. The task of interpreting this word has been left to the courts. In the second *Lazarus* appeal, Justice Bellew remarked:

[A] “step” for the purposes of s 61HA(3)(d) must involve the taking of some positive act. However, for that purpose a positive act does not necessarily have to be a physical one. A positive act, and thus a “step” for the purposes of the section, extends to include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.⁹²

- 5.78 Several authors of preliminary submissions suggest reform is needed to clarify the meaning of “steps”. There is some support for amending s 61HA to expressly include Justice Bellew’s remarks.⁹³ However, others question the comment that a step need not be physical.
- 5.79 Mason and Monaghan observe that, under Justice Bellew’s interpretation,

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

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

89. “A Bill for Crimes Amendment (Consent – Sexual Assault Offences Bill) 2007” sch 1 cl 4 in NSW, Attorney General’s Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) appendix 3.

90. See *Lazarus v R* [2016] NSWCCA 52 [130]; Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566].

91. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See also G Mason and J Monaghan, *Preliminary Submission PCO40* [17].

92. *R v Lazarus* [2017] NSWCCA 279 [147].

93. NSW Department of Family and Community Services, *Preliminary Submission PCO49*, 1.

a step need be nothing more than a subjective state of mind. It appears to be unnecessary for the accused to make a verbal or other mode of inquiry (such as a gesture) to positively determine consent.⁹⁴

They argue this interpretation of “step” does not fulfil the objective of making “liability for sexual assault less dependent on distorted views about sex and more reflective of community expectations”.⁹⁵ Others similarly believe this interpretation is inconsistent with the objective of encouraging people to communicate about consent and to take reasonable care to ascertain consent.⁹⁶

- 5.80 The authors of some preliminary submissions believe the law should provide that a “step” requires more than an internal thought process.⁹⁷ For instance, the legislation could require fact finders to consider “any physical or verbal” steps taken by the accused. This may direct their attention to whether the accused asked or took other active measures to determine whether the complainant consented.⁹⁸
- 5.81 Rape and Domestic Violence Services Australia (“RDVSA”) suggests replacing the expression “any steps” with “reasonable steps”. This could “signal to the fact-finder that in the vast majority of cases, it will be reasonable for the defendant to take at least some steps to find out whether the other person consent[s]”.⁹⁹

Question 5.8: Defining “steps”

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

Should people be required to take steps to ascertain consent?

- 5.82 A further issue raised by preliminary submissions is whether s 61HA should expressly require people to take steps to determine whether their sexual partner consents.¹⁰⁰
- 5.83 While fact finders must consider any steps taken by the accused, a failure to take such steps may be more relevant in some cases than in others. RDVSA is concerned a fact finder may consider the absence of steps “as altogether irrelevant” in some situations.¹⁰¹ For instance, Justice Beazley observed:

94. G Mason and J Monaghan, *Preliminary Submission PCO40* [19]. See also A Dyer, *Preliminary Submission PCO50* [24].

95. G Mason and J Monaghan, *Preliminary Submission PCO40* [19].

96. See, eg, A Dyer, *Preliminary Submission PCO50* [5], [26]; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 14.

97. See, eg, G Mason and J Monaghan, *Preliminary Submission PCO40* [19]; A Dyer, *Preliminary Submission PCO50* [28]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4–5; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 14.

98. A Dyer, *Preliminary Submission PCO50* [5], [28]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4–5.

99. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 15–16.

100. See, eg, Feminist Legal Clinic Inc, *Preliminary Submission PCO53*, 3; University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 5 (rec 1); E Methven and I Dobinson, *Preliminary Submission PCO77*, 18; R Burgin, *Preliminary Submission PCO72*, 1, 5–8.

101. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 13.

[I]f the accused and complainant are in an ongoing relationship, the failure to take steps to ascertain consent may not be surprising and so may not be of any or much assistance in the fact finding task ... If the accused and complainant are in a relationship of service provider and client, the failure to take steps to ascertain consent may be and would likely be very relevant to the question of the accused person's knowledge. There are many factual situations in between these two, some much more nuanced than others.¹⁰²

- 5.84 Tasmania and Canada provide examples of how a requirement to take steps might operate. Under their laws, an accused may seek to raise their mistaken belief in consent as a defence. The accused's ability to rely on this defence depends on whether they took reasonable steps to ascertain consent.¹⁰³
- 5.85 In Tasmania, the law states that "a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused ... did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act".¹⁰⁴
- 5.86 In Canada, the accused's mistaken belief in consent cannot be used as a defence if the accused "did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting".¹⁰⁵
- 5.87 It may also be possible to introduce such a requirement without linking it to the accused's ability to raise a defence. The prosecution could still be required to prove the accused had no reasonable grounds for their belief (or, as some suggest, no reasonable belief). However, the law could clarify that the accused's belief will not be considered reasonable if they did not take steps to determine consent.
- 5.88 For instance, RDVSA proposes the following:
- A person does not reasonably believe that the other person consents where
- a) the other person did not say or do anything to indicate consent; and
 - b) they took no steps to find out whether the other person was consenting.¹⁰⁶
- 5.89 RDVSA explains their proposal:
- recognises that in every circumstance that a complainant does not provide a clear, positive and unequivocal indication of consent, the defendant has an obligation to take at least some step to find out whether the other person consents. Where the defendant fails to take any such steps, they cannot have reasonable grounds for a belief in consent.¹⁰⁷
- 5.90 A requirement to take steps could support a communicative (or even affirmative) model of consent.¹⁰⁸ It may also emphasise that the accused must "point to their own actions which they took to determine whether the other party(s) was

102. *R v XHR* [2012] NSWCCA 247 [62].

103. *Criminal Code* (Tas) s 14A(1)(c); *Criminal Code* (Canada) s 273.2(b).

104. *Criminal Code* (Tas) s 14A(1)(c).

105. *Criminal Code* (Canada) s 273.2(b).

106. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 16. See also E Methven and I Dobinson, *Preliminary Submission PCO77*, 20–21.

107. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 16.

108. E Methven and I Dobinson, *Preliminary Submission PCO77*, 20. For a discussion of affirmative consent, see [3.36]–[3.38].

consenting, not simply the complainant's actions which they believed indicated consent".¹⁰⁹

- 5.91 However, not all agree with these proposed reforms. Loughnan and co-authors "caution strongly" against adopting something similar to the Tasmanian model. They argue this would create an "absolute liability" offence, which would "have the potential to result in unjust convictions".¹¹⁰
- 5.92 To clarify, a person may be found guilty of an absolute liability offence if they have done something (or failed to do something, as the case may be), regardless of their state of mind or intention. It is well-recognised that it is harsh, and goes against fundamental criminal law principles, to hold a person criminally responsible for acts committed without any criminal intention or fault on their part.¹¹¹
- 5.93 Loughnan and co-authors also contend the reform would "not accord with an understanding of human sexual relations" as "[i]nnumerable instances of consensual sexual intercourse occur in the absence of words, and such instances are not morally problematic".¹¹²

Question 5.9: Steps to ascertain consent

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

Should other matters be considered?

- 5.94 Aside from the accused's self-induced intoxication, fact finders can consider other matters as part of "all the circumstances of the case". Section 61HA(3) does not limit the matters that they can take into account.
- 5.95 However, it may be desirable to specify other matters that a fact finder should consider. For instance, McNamara and co-authors propose making reference to "the effect that any behaviour of the accused may have had on the behaviour of the victim at the relevant time".¹¹³
- 5.96 This reform, they submit, would ensure a fact finder considers how the accused's demeanour (for instance, their aggression) influenced the complainant's conduct. This may be particularly important where the accused relies upon the complainant's behaviour to address the prosecution's argument about knowledge.¹¹⁴

109. R Burgin, *Preliminary Submission PC072*, 8.

110. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC065*, 5.

111. See, eg, D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) [3.1.3.1], [3.4.5.2].

112. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC065*, 5.

113. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PC085*, 4.

114. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PC085*, 4.

Question 5.10: Considering other matters

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

Matters that cannot be considered: self-induced intoxication

- 5.97 Section 61HA(3)(e) directs fact finders to exclude any self-induced intoxication of the accused when making findings about knowledge.¹¹⁵ This means the accused cannot use self-induced intoxication as an excuse to claim they were unaware the complainant did not consent. Referring to a similar law in Victoria, the Victorian Department of Justice and Regulation observed “this approach reflects a basic policy decision that self-induced intoxication should not be allowed to lower the standards of acceptable conduct”.¹¹⁶
- 5.98 The exclusion of self-induced intoxication also reflects the general rule in s 428D(a) of the *Crimes Act*. This provides that self-induced intoxication is not to be considered when making findings about mens rea for offences in NSW (aside from offences of specific intent).¹¹⁷
- 5.99 When introducing the 2007 reforms, the Attorney General acknowledged this section “simply replicates” the general rule but observed:
- It serves as an important reminder that self-induced intoxication cannot be taken into account in relation to the mens rea for these sexual assault offences. It also clarifies what is meant by “all the circumstances of the case” in the section.¹¹⁸
- However, there is a view that it replicates s 428D(a) unnecessarily.¹¹⁹
- 5.100 Only a few preliminary submissions commented on this subsection directly. RDVSA agrees with it.¹²⁰ However, Quilter observes it may be difficult for jurors to understand and apply, as they are permitted to take the complainant's intoxication into account. She questions whether this helps to address assumptions about the blameworthiness of intoxicated complainants (discussed further in Chapter 4).¹²¹
- 5.101 The NSW Bar Association is more critical. It considers the direction to disregard the self-induced intoxication makes “no sense at all” in relation to subjective fault elements – such as the accused's actual knowledge of the absence of consent. While it believes the direction may make more sense in relation to an objective fault element, the Association disagrees with imposing liability “when the accused

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

116. Victoria, Department of Justice and Regulation, Criminal Law Review, *Victoria's New Sexual Offence Laws: An Introduction* (2015) 17.

117. For an offence of specific intent, a key element of the offence is an intention to cause a specific result or consequence: *Crimes Act 1900* (NSW) s 428B. Sexual assault is not an offence of specific intent.

118. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3586 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW)).

119. J Quilter, *Preliminary Submission PCO92*, 12.

120. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 15.

121. J Quilter, *Preliminary Submission PCO92*, 12.

actually believes that consent is present, even if one reason for that mistaken belief is self-induced intoxication”.¹²²

- 5.102 If NSW were to retain the specific requirement to exclude self-induced intoxication, there may be ways of clarifying its application. For instance, the legislation might identify when intoxication can be regarded as self-induced. Victorian legislation specifies that intoxication is self-induced unless it came about:
- (a) involuntarily
 - (b) because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force
 - (c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or
 - (ca) from the use of a medicinal cannabis product in accordance with a patient medicinal cannabis access authorisation; or
 - (d) from the use of a drug for which no prescription is required (other than a medicinal cannabis product) and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.¹²³
- 5.103 Intoxication will also be regarded as self-induced in Victoria if the person using a drug (in the circumstances listed at (c) to (d) above) “knew, or had reason to believe, ... that the drug would significantly impair the person's judgment or control”.¹²⁴
- 5.104 Setting out such matters could potentially guide fact finders as they undertake the difficult task of assessing knowledge in cases involving intoxication. However, it could be argued this detail could create inflexibility and further complicate this task.

Question 5.11: Excluding the accused's self-induced intoxication

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

Should other matters be excluded from consideration?

- 5.105 The requirement to consider all the circumstances of the case means that a fact finder should consider issues relating to knowledge in context. This could help address concerns that an objective test leads to injustice for people who cannot meet a “reasonable person” standard due to personal characteristics (such as a cognitive impairment).¹²⁵

122. NSW Bar Association, *Preliminary Submission PCO47*, 6.

123. *Crimes Act 1958* (Vic) s 322T(5).

124. *Crimes Act 1958* (Vic) s 322T(6).

125. See, eg, NSW Bar Association, *Preliminary Submission PCO47*, 5.

- 5.106 The broad reference to “all the circumstances” may have other consequences. For instance, it could invite a fact finder to scrutinise the complainant’s behaviour.¹²⁶ A fact finder might also give weight to the personal biases, values and opinions that informed an accused person’s belief about consent. If so, the Scottish Law Commission observes this approach may not differ significantly from the old “honest, but mistaken belief” test.¹²⁷
- 5.107 The law could address this by excluding other matters from consideration. The Australian Queer Students Network suggests the accused’s “personal opinions, values and general social and educational development” should not be considered. The Network considers this may exclude an accused person relying on “outdated or hateful views about sexuality, sex and gender”.¹²⁸
- 5.108 The NSW Attorney General’s Department included a similar proposal in its 2007 draft bill.¹²⁹ According to Cossins, this was designed “to remind the fact-finder that the defendant’s belief had to be based on objectively reasonable grounds”.¹³⁰
- 5.109 Parliament did not enact this proposal. Some commentators questioned this omission, as they believed the proposal may have helped challenge stereotypes about consent.¹³¹
- 5.110 Victoria provides another possible reform option. In Victoria, “[w]hether or not a person reasonably believes that another person is consenting to an act depends on the circumstances”.¹³² Notably, the Victorian legislation does not refer to “all the circumstances”, as the NSW legislation does.¹³³
- 5.111 Victoria also has legislated jury directions that explain how the jury should apply the “reasonable belief” test. The prosecution or defence may ask the trial judge to direct the jury that:
- (i) a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
 - (ii) a belief in consent based on a combination of matters including such a general assumption is not a reasonable belief to the extent that it is based on such an assumption¹³⁴

126. J Temkin and A Ashworth, “The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent” (2004) *Criminal Law Review* 328, 342.

127. Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report 209 (2007) [3.77].

128. Australian Queer Students Network, *Preliminary Submission PCO56*, 5.

129. “A Bill for Crimes Amendment (Consent – Sexual Assault Offences Bill) 2007” sch 1 cl 4 in NSW, Attorney General’s Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) appendix 3.

130. A Cossins, *Preliminary Submission PCO33*, 17.

131. S Banks, “An Honest but Mistaken Belief in London Legislation? Consent, Controversy and Sexual Offence Reform in New South Wales” (2008) 42 *The Law Teacher* 228, 233; I Dobinson and L Townsley “Sexual Assault Law Reform in New South Wales: Issues of Consent and Objective Fault” (2008) 32 *Criminal Law Journal* 152, 165.

132. *Crimes Act 1958* (Vic) s 36A.

133. *Crimes Act 1958* (Vic) s 36A. See also Victoria, Department of Justice and Regulation, Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction* (2015) 14.

134. *Jury Directions Act 2015* (Vic) s 47(3)(c).

- 5.112 Another direction that may be given in Victoria is that “the jury may take into account any personal attribute, characteristic or circumstance of the accused” when determining whether the accused had a reasonable belief in consent.¹³⁵
- 5.113 However, a “good reason” for the judge to refuse to give this direction is that the personal attribute, characteristic or circumstance:
- (a) did not affect, or is not likely to have affected, the accused's perception or understanding of the objective circumstances; or
 - (b) was something that the accused was able to control; or
 - (c) was a subjective value, wish or bias held by the accused, whether or not that value, wish or bias was informed by any particular culture, religion or other influence.¹³⁶
- 5.114 We discuss legislated jury directions in more detail in Chapter 6.
- 5.115 Another option may be to remove the requirement to consider the circumstances of the case. For instance, as proposed by the Scottish Law Commission, the Scottish “reasonable belief” test does not include this requirement.¹³⁷ Instead “regard is to be had to whether the person took any steps to ascertain whether there was consent ... and if so, to what those steps were”.¹³⁸ However, some may believe it is important to require a fact finder to consider other relevant factors.

Question 5.12: Excluding other matters

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

Should the three forms of knowledge be retained?

- 5.116 Some preliminary submissions question whether the mens rea element for sexual assault offences should retain all three forms of “knowledge”.

Should there be a single mental element?

- 5.117 Some preliminary submissions propose a single mental element. However, views differ on what this element should be.
- 5.118 One option could be to remove references to actual knowledge and recklessness, but include a “reasonable grounds” or “reasonable belief” test in some form.¹³⁹

135. *Jury Directions Act 2015* (Vic) s 47(3)(e).

136. *Jury Directions Act 2015* (Vic) s 47(4).

137. Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report 209 (2007) [3.77].

138. *Sexual Offences (Scotland) Act 2009* (Scot) s 16.

139. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PC088*, 15.

Victoria, England and Wales, Scotland, Northern Ireland and New Zealand provide examples of this approach.¹⁴⁰

5.119 In explaining the decision to adopt a single element, the Victorian Department of Justice observed that proving actual knowledge “is one way of establishing [an accused] does not have a reasonable belief in consent”. This meant it was unnecessary to include knowledge in the fault element.¹⁴¹

5.120 Another proposal involves applying an affirmative consent standard directly. One submission recommends the following:

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 the other person does not say or do anything to communicate consent.¹⁴²

5.121 However, Dyer warns against such a reform as it:

- may lead to injustice in situations where the accused may have reasonable grounds for their mistaken belief in consent (for instance, cases involving people who fail to ask the questions due to personal, cognitive characteristics), and
- would effectively convert sexual assault into an absolute liability offence.¹⁴³

Question 5.13: A single mental element

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

Knowledge of consent under a mistaken belief

5.122 An accused can be treated as if they knew the complainant did not consent in another, specific set of circumstances. As discussed in Chapter 4, a person is treated as if they did not consent if they agreed to sexual intercourse under a mistaken belief:

- as to the identity of the accused
- that they are married to the accused, or
- that the sexual intercourse is for health or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means).¹⁴⁴

In other words, their consent is “negated”.

140. *Crimes Act 1958* (Vic) s 38(1)(c); *Sexual Offences Act 2003* (UK) s 1(1)(c); *Sexual Offences (Scotland) Act 2009* (Scot) s 1(1)(b); *Sexual Offences (Northern Ireland) Order 2008* (UK) art 5(1)(c); *Crimes Act 1961* (NZ) s 128(2)(b).

141. Victoria, Department of Justice and Regulation, *Criminal Law Review, Victoria’s New Sexual Offence Laws: An Introduction* (2015) 6.

142. E Montoya Zorrilla, *Preliminary Submission PCO68*, 2.

143. A Dyer, *Preliminary Submission PCO50* [20]–[23].

144. *Crimes Act 1900* (NSW) s 61HA(5).

- 5.123 If the accused knows the person consented under these circumstances, the accused is deemed to have known the person did not consent.¹⁴⁵
- 5.124 However, Quilter argues it is uncertain whether the prosecution has to prove the accused *actually* knew the complainant consented under a mistaken belief or if the other forms of knowledge (recklessness and no reasonable grounds) can apply.¹⁴⁶
- 5.125 In *Gillard v R*,¹⁴⁷ the High Court of Australia examined a similar law that exists in the Australian Capital Territory. There, consent is negated where there is an abuse of a position of trust. If the accused knows the complainant agreed to sexual intercourse in this situation, they are treated as if they knew the complainant did not consent.¹⁴⁸
- 5.126 An issue in this case was whether the prosecution had to prove the accused knew about the abuse of trust or if it was enough to show the accused was reckless as to the existence of this circumstance. The High Court held there must be actual knowledge of the circumstance, not just recklessness.¹⁴⁹
- 5.127 Quilter observes that if this reasoning was applied in NSW, the prosecution would need to prove the accused actually knew the complainant's consent was based on a mistaken belief. The prosecution would not be able to rely on the other forms of knowledge. Quilter recommends reform to clarify that the extended meaning of knowledge in s 61HA(3) applies.¹⁵⁰

Question 5.14: Knowledge of consent under a mistaken belief

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

Question 5.15: Other issues about the mental element

Are there any other issues about the mental element of sexual assault offences that you wish to raise?

145. *Crimes Act 1900* (NSW) s 61HA(5).

146. J Quilter, *Preliminary Submission PCO92*, 11–12.

147. *Gillard v R* [2014] HCA 16.

148. *Crimes Act 1900* (ACT) s 67(1)(h), s 67(3).

149. *Gillard v R* [2014] HCA 16 [28].

150. J Quilter, *Preliminary Submission PCO92*, 11–12.

6. Issues related to s 61HA

In brief

We consider some issues relating to the operation of s 61HA of the *Crimes Act 1900* (NSW) that we have not already discussed. These include upcoming amendments to the section, the language and structure of the section, jury directions, and the use of expert evidence about how people respond to sexual assault.

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- 6.1 In this Chapter, we consider some issues raised in preliminary submissions about the operation of s 61HA of the *Crimes Act 1900* (NSW) (“*Crimes Act*”) that we have not already discussed. These include the upcoming amendments to the section, the language and structure of the section, and directions that judges give to juries about the law of consent and knowledge of consent. We also consider the use of expert evidence about the common behavioural responses of people who experience sexual assault.

Upcoming amendments

- 6.2 The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) (“*CSA Act*”) will replace the current s 61HA with s 61HE.¹ A major change is that the definition of consent and the law on knowledge will apply to a wider range of sexual offences than the current s 61HA. The current law and the amendments are set out in Appendices B and C.

Current application of s 61HA

- 6.3 Section 61HA applies to sexual assault, aggravated sexual assault and aggravated sexual assault in company, as well as attempts to commit these offences.² The

1. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6] (not in force).
2. *Crimes Act 1900* (NSW) s 61HA(1). The elements of these offences are set out in: *Crimes Act 1900* (NSW) s 61I, s 61J, s 61JA.

criminal law treats these forms of sexual assault as the most serious type of sexual offending.³ The maximum penalties for these offences reflect this:

- 14 years' imprisonment for sexual assault
- 20 years' imprisonment for aggravated sexual assault, and
- imprisonment for life for aggravated sexual assault in company.⁴

Future application of s 61HE

6.4 In addition to the offences to which s 61HA applies, the new s 61HE will apply to the new offences of sexual touching, sexual act and the aggravated versions of these offences.⁵

The new offences

6.5 The new offences will replace the offences of indecent assault, act of indecency and their aggravated versions:

Existing offences		New offences	
Indecent assault	s 61L	Sexual touching	s 61KC
Aggravated indecent assault	s 61M	Aggravated sexual touching	s 61KD
Act of indecency	s 61N	Sexual act	s 61KE
Aggravated act of indecency	s 61O	Aggravated sexual act	s 61KF

6.6 Like indecent assault and acts of indecency, sexual touching and sexual acts will be treated as less serious than the sexual assault offences. The offences are “aggravated” if certain circumstances are also present, including where the complainant has a serious physical disability or cognitive impairment.⁶

6.7 The proposed definition of “sexual touching” includes touching another person (with any part of the body or something else, or through something, including clothing) in circumstances where a “reasonable person” would consider the touching to be sexual.⁷ The offence occurs where the accused, without the consent of the other person, and knowing that the person does not consent:

- sexually touches the person
- incites the person to sexually touch the accused or a third person, or

3. Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999) 54–55.

4. *Crimes Act 1900* (NSW) s 61I–61JA.

5. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HE (not in force).

6. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [7], inserting *Crimes Act 1900* (NSW) s 61KC, s 61KD, s 61KE, s 61KF (not in force).

7. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HC(1) (not in force).

- incites a third person to touch the person sexually.⁸
- 6.8 Conviction for sexual touching will attract a maximum penalty of five years' imprisonment, with seven years for the aggravated version of the offence.⁹
- 6.9 A "sexual act" is an act carried out in circumstances where a "reasonable person" would consider the act to be sexual.¹⁰ The offence occurs if the accused, without the person's consent, and knowing that the person does not consent:
- carries out a sexual act with or towards the person
 - incites the person to carry out a sexual act with or towards the accused or a third person, or
 - incites a third person to carry out a sexual act with or towards the person.¹¹
- 6.10 Conviction for a sexual act will attract a maximum penalty of 18 months' imprisonment, with three years for the aggravated version.¹²
- 6.11 The matters to be taken into account in deciding whether a reasonable person would consider touching or an act to be sexual include:
- whether the area of the body touched or involved in the act is a person's genital or anal area, or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts (whether or not the breasts are sexually developed), or
 - whether the person doing the touching or carrying out the act does so to obtain sexual arousal or gratification, or
 - whether any other aspect of the touching or the act (including the circumstances in which it is carried out) makes it sexual.¹³
- 6.12 Touching or an act done for genuine medical or hygienic purposes is not sexual touching or a sexual act.¹⁴

Perspectives on the application of s 61HE

- 6.13 Currently the common law definition of consent ("conscious and voluntary permission") applies to indecent assault, act of indecency and their aggravated

8. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [7], inserting *Crimes Act 1900* (NSW) s 61KC (not in force).

9. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [7], inserting *Crimes Act 1900* (NSW) s 61KC, s 61KD (not in force).

10. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HC(1) (not in force).

11. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [7], inserting *Crimes Act 1900* (NSW) s 61KE (not in force).

12. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [7], inserting *Crimes Act 1900* (NSW) s 61KE, s 61KF (not in force).

13. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HB(2), s 61HC(2) (not in force).

14. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HB(3), s 61HC(3) (not in force).

versions.¹⁵ In cases where, for example, the accused is charged with both indecent assault and sexual assault, the judge must give the jury different directions about the different standards of consent.

- 6.14 The authors of some submissions argue that this can be confusing. They support applying the legislative definition of consent to these offences.¹⁶
- 6.15 The amendments also cover the mental element for these offences. Under the common law, the mental elements of the existing offences require actual knowledge of non-consent or recklessness as to consent.¹⁷ An accused can avoid liability for indecent assault or an act of indecency if they honestly believed the complainant was consenting, even if there are no reasonable grounds for this belief.¹⁸
- 6.16 Section 61HE will apply the “no reasonable grounds for belief” test (currently in s 61HA(3)(c)) to the new offences. Some preliminary submissions support this.¹⁹ For example, the author of one submission believes the common law standard has the potential to absolve an accused from liability even where their belief in consent results from outdated or prejudiced views.²⁰

Question 6.1: Upcoming amendments

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

Language and structure

- 6.17 Some preliminary submissions propose changes to improve the structure of s 61HA or to clarify some of its expressions.
- 6.18 The author of one submission argues that s 61HA has too many subsections, repeats itself and is confusing.²¹ For example, the author says it is unclear whether the reference in s 61HA(3)(e) to “self-induced intoxication of the person” refers to the intoxication of the accused or the complainant.²²

15. See Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-660].

16. Australian Queer Students Network, *Preliminary Submission PC056*, 4, 5–6; Community Legal Centres NSW, *Preliminary Submission PC058*, 4. See also B Moroney, *Preliminary Submission PC048*, 2; B Smith, *Preliminary Submission PC051*, 1; J Quilter, *Preliminary Submission PC092*, 2.

17. *R v Bonora* (1994) 35 NSWLR 74, 80; *R v Kuckailis* [2001] NSWCCA 333 [18].

18. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-660].

19. See, eg, Australian Queer Students Network, *Preliminary Submission PC056*, 6; J Quilter, *Preliminary Submission PC092*, 2.

20. Australian Queer Students Network, *Preliminary Submission PC056*, 6.

21. K Burton, *Preliminary Submission PC076*, 1.

22. K Burton, *Preliminary Submission PC076*, 2.

- 6.19 Another submission suggests improving the structure and language of the part that deals with the knowledge element. In order to avoid the section’s awkward repetition, and to distinguish more clearly between the actual and constructive forms of knowledge, the author suggests the following rewrite:
- A person who has sexual intercourse with another person without the consent of the other person is **taken to know** that the other person does not consent to the sexual intercourse if:
- (a) the person **actually** knows that the other person does not consent to sexual intercourse.²³
- 6.20 Another suggestion is to reorder the subsections. This could involve, for example, placing the list of circumstances that negate consent before the subsection that deals with knowledge about consent. This way the actus reus elements are all addressed first, followed by the mens rea element.²⁴
- 6.21 Quilter observes the amendments will split the subsection that currently deals with knowledge about consent into two. One subsection (s 61HE(3)) will address the knowledge requirement, while the other (s 61HE(4)) will contain the requirement for fact finders to consider all circumstances of the case (we discuss this law in Chapter 5).²⁵ Arguably, it will no longer be clear if this requirement applies only when fact finders make determinations about knowledge. Quilter recommends that this issue be clarified.²⁶
- 6.22 We also received a proposal to amend the definition of “sexual intercourse”. Section 61H(1)(a) defines “sexual intercourse” as “sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person”. This definition will continue to apply after this item of the CSA Act commences.²⁷
- 6.23 This definition could exclude cases involving people who are not female but who have a vagina. It could also exclude the penetration of other varieties of genitalia, including those of people with intersex variations. It also does not cover the specific instance of the penetration of a penis.²⁸
- 6.24 One way of addressing this could be to remove any mention of “vagina” or “female person” and instead use the phrase “penetration of the genitalia or anus of a person”.²⁹

Question 6.2: Language and structure

- (1) Should changes be made to the language and/or structure of s 61HA (and the new s 61HE)? If so, what changes should be made?

23. G Mason and J Monahan, *Preliminary Submission PCO40*, 4 (emphasis in original).
 24. J Quilter, *Preliminary Submission PCO92*, 10.
 25. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HE(3), s 61HE(4) (not in force).
 26. J Quilter, *Preliminary Submission PCO92*, 2–3.
 27. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6], inserting *Crimes Act 1900* (NSW) s 61HA(a) (not in force).
 28. Australian Queer Students Network, *Preliminary Submission PCO56*, 3.
 29. Australian Queer Students Network, *Preliminary Submission PCO56*, 3.

(2) Should the definition of “sexual intercourse” be amended? If so, how should sexual intercourse be defined?

Jury directions

- 6.25 Jury directions are the instructions a judge gives to the jury about the relevant law and how they should use or assess the evidence in the trial.³⁰
- 6.26 In NSW, the *Criminal Trial Courts Bench Book* (“*Bench Book*”) sets out a number of suggested directions for judges to give to juries about the law of consent and knowledge of consent. These are set out in full at Appendix E. The directions in the *Bench Book* are guidelines only.³¹
- 6.27 The *Bench Book* directions concerning consent deal with:
- the meaning of consent
 - the circumstances in which a person does not consent or may not consent to sexual intercourse
 - the circumstances in which the accused can be taken to know the other person does not consent, and
 - the relevance of the accused’s self-induced intoxication when making findings about knowledge.³²
- 6.28 The authors of several preliminary submissions argue for changes to the jury directions on consent.³³ Some believe they are too complex and need to be simplified.³⁴ One submission questions the accuracy of the directions.³⁵ However, another submission argues that the limited number of appeals on jury directions in NSW shows the directions given by judges are generally appropriate.³⁶

Question 6.3: Jury directions on consent

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

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30. Victoria, Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (2015) ii, x.
31. *Ith v R* [2012] NSWCCA 70 [48].
32. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (at CTC 52, July 2016) [5-1566].
33. See, eg, Inner City Legal Centre, *Preliminary Submission PCO 44*, 4–5; Australian Queer Student Network, *Preliminary Submission PCO 56*, 5, 6; A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5; B Attard, *Preliminary Submission PCO70*, 7–8; Law Society of New South Wales, *Preliminary Submission PCO73*, 2; E Methven and I Dobinson, *Preliminary Submission PCO77*, 8–17.
34. B Attard, *Preliminary Submission PCO70*, 7–8; Law Society of New South Wales, *Preliminary Submission PCO73*, 2; E Methven and I Dobinson, *Preliminary Submission PCO77*, 8–17; A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5.
35. E Methven and I Dobinson, *Preliminary Submission PCO77*, 13–14.
36. A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 11.

Jury direction topics

- 6.29 The jury directions in Victoria, South Australia (“SA”), the Northern Territory (“NT”) and the Australian Capital Territory (“ACT”) cover matters such as:
- the meaning of consent³⁷
 - the relevance of matters such as the complainant’s lack of verbal or physical resistance, their lack of injury, and/or their consent to previous or different sexual activity, when making findings about consent³⁸
 - the circumstances in which a person is taken not to have consented³⁹
 - withdrawal of consent⁴⁰
 - knowledge of consent,⁴¹ and
 - the relevance of the accused’s intoxication when making findings about knowledge.⁴²
- 6.30 Some preliminary submissions propose that, as well as the matters already dealt with, jury directions in NSW should deal with other matters relating to consent. We outline some of the suggestions below.

Directions to combat “rape myths”

- 6.31 Some submissions suggest that jury directions could be used to combat myths about sexual assault and how people respond to it.
- 6.32 A persistent myth is that a “real victim” will offer physical and/or verbal resistance to the sexual assault.⁴³ To combat this assumption, model directions could explain that people respond differently to sexual assault.⁴⁴ In Victoria, the judge may inform the jury that experience shows:
- (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
 - (ii) people who do not consent to a sexual act may not protest or physically resist the act...

Example

The person may freeze and not do or say anything.⁴⁵

37. *Jury Directions Act 2015* (Vic) s 46(3)(a).

38. *Jury Directions Act 2015* (Vic) s 46(3)(c)–(e); *Criminal Code* (NT) s 192A; *Evidence Act 1929* (SA) s 34N; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 72.

39. *Jury Directions Act 2015* (Vic) s 46(4).

40. *Jury Directions Act 2015* (Vic) s 46(3)(b).

41. *Jury Directions Act 2015* (Vic) s 47.

42. *Jury Directions Act 2015* (Vic) s 47(3)(b).

43. Australian Institute of Family Studies, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 6–7. See discussion at [2.94]–[2.95]

44. Office of the Director of Public Prosecutions, *Preliminary Submission PCO100*, 4.

45. *Jury Directions Act 2015* (Vic) s 46(3)(d).

- 6.33 In England and Wales, the *Crown Court Compendium* suggests the following jury direction where the accused did not use or threaten force, and the complainant did not resist and/or sustain physical injury:

[I]t is important for you to recognise that just because D [the accused] did not use or threaten to use any force on V [the complainant], and V did nothing to prevent D from having sexual intercourse with him/her and was not injured, this does not mean that V consented to what took place or that what V said happened cannot be true.

Experience has shown that different people may respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event. But others may be unable to protest or physically resist, through fear or personality.⁴⁶

- 6.34 In SA, Victoria, the ACT and the NT, legislated jury directions similarly make it clear that a lack of violence, physical injuries and/or resistance does not necessarily mean the person was consenting.⁴⁷

- 6.35 Another common myth is that people “provoke” rape by dressing or acting in a certain way, and/or by consuming alcohol or drugs.⁴⁸ In England and Wales, judges can give the following direction where clothing worn by the complainant was said to be revealing or provocative:

You must not assume that V [the complainant] was looking to have sex or willing to have sex if the opportunity presented itself because of the way V was dressed. Just because someone dresses in revealing clothing it does not mean that they are inviting or willing to have sex. It also does not mean that someone else who sees that person and interacts with them could reasonably believe that that person would consent to sex simply because of the way they are dressed.⁴⁹

- 6.36 Judges in England and Wales can also give the following direction where the complainant was intoxicated:

You must not assume that because V [the complainant] was drunk he/she must have wanted sex. People do go out at night and get drunk, sometimes for no reason at all. It would be wrong to leap to the conclusion that just because a person is drunk they must be out looking for, or willing to have, sex. It would also be wrong to leap to the conclusion that someone else who sees and interacts with that person could reasonably believe that person would consent to sex.⁵⁰

- 6.37 Another myth is that “real victims” will show distress when appearing in court. In England and Wales, judges can instruct the jury that:

46. Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018) ch 20-1 [8](3)(e), example 12.

47. *Evidence Act 1929* (SA) s 34N(1)(b)–(c); *Jury Directions Act 2015* (Vic) s 46(3)(c)–(d); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 72(a)–(c); *Criminal Code* (NT) s 192A(a)–(b).

48. See, eg, I, *Preliminary Submission PCO21*, 1; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 6, 13. See also N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (nbresearch, 2013) 6.

49. Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018) ch 20-1 [8](3)(a), example 8.

50. Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018) ch 20-1 [8](3)(b), example 9.

[I]t would be wrong to assume that the way V [the complainant] gave evidence is an indication of whether or not it is true.

This is because experience has shown that people react to situations and cope with them in different ways. Sometimes when people have to speak about an experience like this, they will show obvious signs of emotion and distress. But it is also the case that other people in the same situation will show no emotion at all. The presence or absence of emotion or distress when giving evidence is not a reliable indication of whether the person is telling the truth or not.⁵¹

Directions about previous or different consensual activity

6.38 The authors of some submissions argue that a person who consents to one kind of sexual activity does not necessarily consent to all kinds of sexual activity, and that the law does not clearly address this.⁵² A model jury direction could assist in relevant cases.

6.39 In Victoria, SA, the ACT and the NT, judges can direct juries that the complainant's consent to a previous or different sexual act is not enough to establish consent to the sexual act in question.⁵³ In England and Wales, judges can give the following jury direction where there was previous sexual activity between the complainant and defendant:

It is agreed that V [the complainant] and D [the accused] knew one another and that they have had sexual intercourse on a number of previous occasions. It is important to recognise that just because V had consensual sexual intercourse with D on other occasions, this does not mean that V must have consented to sexual intercourse with D on this occasion. It also does not mean that this would have given D grounds for reasonably believing that V consented to sexual intercourse on this occasion. A person who has freely chosen to have sexual activity with another person in the past does not, as a result, give general consent to sexual intercourse with that person on any other occasion. Each occasion is specific. A person may want to have sex with someone on one occasion, but at another time that person may not want to have sex with that same person and will not consent to it.⁵⁴

6.40 In addition, judges in England and Wales can give the following jury direction where there was some consensual activity on the occasion of the alleged offence:

It is for the prosecution to prove that V [the complainant] did not consent to sexual intercourse with D [the accused], and you must decide this issue by looking at all the evidence. When you do so it is important that you recognise that just because V let D into his/her home and willingly engaged in kissing D, this does not mean that V must have wanted to go on to have sexual intercourse and must have consented to it. A person who engages in sexual activity is entitled to choose how far that activity goes. And that person is also entitled to say "No" if the other person tries to go further. The fact that V willingly

51. Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018) ch 20-1 [8](1)(d), example 6.

52. C Stone, *Preliminary Submission PC095*, 3. See also T Mohr, *Preliminary Submission PC066*, 1; R Burgin, *Preliminary Submission PC072*, 3.

53. *Jury Directions Act 2015* (Vic) s 46(3)(e); *Evidence Act 1929* (SA) s 34N(1)(d); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 72(d); *Criminal Code* (NT) s 192A(c).

54. Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018) ch 20-1 [8](3)(c), example 10.

engaged in kissing D does not mean that V must have wanted to have sexual intercourse with D.⁵⁵

Directions about withdrawal of consent

- 6.41 The authors of several submissions argue that the law in NSW does not clearly address withdrawal or revocation of consent.⁵⁶
- 6.42 In Victoria, judges can inform the jury that “where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place”.⁵⁷

Question 6.4: Jury directions on other related matters

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

Legislated jury directions

- 6.43 A related issue is whether mandatory or suggested jury directions should be set out in legislation.
- 6.44 In England and Wales, as in NSW, suggested jury directions are set out in a guiding document.⁵⁸ In SA, the NT and the ACT, mandatory jury directions are set out in legislation.⁵⁹ In Victoria, the prosecution or defence can request that the judge give particular directions to the jury.
- 6.45 If requested, a judge in Victoria must give the direction unless there are good reasons for not doing so. Even without a request, a judge may give the direction if there are “substantial and compelling reasons for doing so”.⁶⁰
- 6.46 Legislated jury directions might be a way to ensure that judges give consistent directions. A disadvantage is that formal statutory amendment would be required to update the directions. Currently the Judicial Commission of the NSW Criminal Trial Courts Bench Book Committee can update the *Bench Book* in response to appellate decisions or legislative change.
- 6.47 The NSW approach also allows judges to frame their own directions. They will not fall into an error of law merely because they have modified or failed to use the suggested direction.⁶¹

55. Judicial College, *The Crown Court Compendium Part I; Jury and Trial Management and Summing Up* (June 2018) ch 20-1 [8](3)(d), example 11.

56. See, eg, T Quinlivan-Scurr, *Preliminary Submission PCO42*, 1; M Goldstein, *Preliminary Submission PCO46*, 1; L Coughlin, *Preliminary Submission PCO64*, 1; T Mohr, *Preliminary Submission PCO66*, 1; M Faruqi, *Preliminary Submission PCO93*, 1; Sex Workers Outreach Project, *Preliminary Submission PCO103*, 7. See also discussion at [3.79]–[3.80].

57. *Jury Directions Act 2015* (Vic) s 46(3)(b).

58. Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018).

59. *Evidence Act 1929* (SA) s 34N(2); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 72; *Criminal Code* (NT) s 192A.

60. *Jury Directions Act 2015* (Vic) s 46–47.

61. *Ith v R* [2012] NSWCCA 70 [48].

- 6.48 NSW legislation already contains some important statutory warnings and directions about sexual assault. Where there has been no complaint about the alleged offence or a delay in complaining, s 294 of the *Criminal Procedure Act 1986* (NSW) requires the judge to warn the jury that this does not necessarily indicate that the allegation is false. The judge must also tell the jury that there may be good reasons why a person who experiences sexual assault may hesitate in making, or refrain from making, a complaint.⁶²
- 6.49 The judge must not warn the jury that a delay in complaining is relevant to the complainant's credibility, unless there is sufficient evidence to justify such a warning.⁶³
- 6.50 A new section of the CSA Act, not yet in force, will allow a judge to warn the jury if there are differences in the complainant's account of a sexual offence that may be relevant to their truthfulness or reliability. A "difference" in a complainant's account includes a gap or inconsistency in the account, or a difference between their account and another account.⁶⁴ It will not be mandatory for a judge to issue this warning.
- 6.51 Under the new section, a judge will be able to tell the jury that experience shows:
- people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time
 - trauma may affect people differently, including how they recall events
 - it is common for there to be differences in accounts of a sexual offence, and
 - both truthful and untruthful accounts of a sexual offence may contain differences.⁶⁵
- 6.52 The judge can also tell the jury that it is up to them to decide whether any differences in the complainant's account are important in assessing the complainant's truthfulness or reliability.⁶⁶

Question 6.5: Legislated jury directions

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

62. *Criminal Procedure Act 1986* (NSW) s 294(1), s 294(2)(a)–(b).

63. *Criminal Procedure Act 1986* (NSW) s 294(2)(c).

64. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 4 [10], inserting *Criminal Procedure Act 1986* (NSW) s 293A (not in force).

65. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 4 [10], inserting *Criminal Procedure Act 1986* (NSW) s 293A(2) (not in force).

66. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 4 [10], inserting *Criminal Procedure Act 1986* (NSW) s 293A(2)(b) (not in force).

Expert evidence law

- 6.53 Throughout this Paper, we have noted concerns that “rape myths” can undermine the operation of s 61HA. Fact finders may believe these myths and apply them when they consider whether the complainant consented and, if not, whether the accused knew there was no consent.
- 6.54 One prominent rape myth is that a “real victim” will fight back. As we discussed in Chapter 2, a common response of people who experience sexual assault is to freeze. We have considered proposals to address this issue, including changes to the meaning of consent or the knowledge element, and changes to jury directions. Another option might be to use expert evidence to address this misconception.
- 6.55 The *Evidence Act 1995* (NSW) (“*Evidence Act*”) provides for the introduction of expert evidence where it is relevant to an issue at trial. The expert must have specialised knowledge based on their training, study or experience. Their opinion must be based on this knowledge.⁶⁷ Arguably, this rule already allows expert evidence about the “freeze response” and other common behavioural responses to be used in sexual assault trials where, for example, an issue at trial is whether a person’s lack of resistance meant they were consenting.
- 6.56 However, it might be desirable for the law to state clearly that this type of evidence can be introduced. For instance, the *Evidence Act* expressly allows expert opinion evidence on the impact of sexual abuse on children, and their behaviour during and following the abuse.⁶⁸ The *Evidence Act* could be amended to apply a similar model to cases involving sexual offences more generally.⁶⁹

Question 6.6: Amendments to expert evidence law

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

67. *Evidence Act 1995* (NSW) s 79, s 108C.

68. *Evidence Act 1995* (NSW) s 79(2), s 108C(2).

69. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 10.

Appendix A: Preliminary submissions

PCO01	Paul Recher (8 May 2018)
PCO02	Garrie Kidd (8 May 2018)
PCO03	Marigold Hayler (8 May 2018)
PCO04	Alan Keogh (8 May 2018)
PCO05	David Adams (9 May 2018)
PCO06	Richard Mahony (9 May 2018)
PCO07	B (9 May 2018)
PCO08	John Homan (9 May 2018)
PCO09	Margaret Leslie (9 May 2018)
PCO10	David Clark (10 May 2018)
PCO11	Mark Tennant (10 May 2018)
PCO12	Liz Peter (10 May 2018)
PCO13	Tony Kitley (11 May 2018)
PCO14	Sophie Love (11 May 2018)
PCO15	Gregory Welsby (11 May 2018)
PCO16	Michael Booth (11 May 2018)
PCO17	Chris Evans (12 May 2018)
PCO18	Rachel Pines (13 May 2018)
PCO19	Bern Brent (14 May 2018)
PCO20	Robyn Venn (14 May 2018)
PCO21	I (18 May 2018)
PCO22	Helene Thomas (20 May 2018)
PCO23	Ron Hedgcock (21 May 2018)
PCO24	Professor Patricia Easteal AM (28 May 2018)
PCO25	Confidential (30 May 2018)
PCO26	Caroline Goosen (30 May 2018)
PCO27	Jane Guilfoyle (2 June 2018)
PCO28	Kath Lucas (4 June 2018)
PCO29	Teresa Kiernan (7 June 2018)
PCO30	Confidential (16 June 2018)
PCO31	Moin Kazi (17 June 2018)
PCO32	Tanja Olsen (18 June 2018)
PCO33	Professor Annie Cossins (19 June 2018)
PCO34	Ashwin Thomas (20 June 2018)
PCO35	Alexander Turnbull (20 June 2018)
PCO36	Toby O'Hara (20 June 2018)
PCO37	Mark Bosch (21 June 2018)
PCO38	Eugene Lubarsky (21 June 2018)
PCO39	Dean Crowe (21 June 2018)
PCO40	Professor Gail Mason and James Monaghan (21 June 2018)
PCO41	Llewellyn Horgan (21 June 2018)
PCO42	Tyr Quinlivan-Scurr (21 June 2018)

- PCO43** B H (22 June 2018)
- PCO44** Inner City Legal Centre (22 June 2018)
- PCO45** Monica Otlowski (22 June 2018)
- PCO46** Mercurius Goldstein (23 June 2018)
- PCO47** NSW Bar Association (25 June 2018)
- PCO48** Benjamin Moroney (25 June 2018)
- PCO49** NSW Department of Family and Community Services (26 June 2018)
- PCO50** Andrew Dyer (26 June 2018)
- PCO51** Dr Byron Smith (27 June 2018)
- PCO52** Adam Wood (27 June 2018)
- PCO53** Feminist Legal Clinic Inc (27 June 2018)
- PCO54** Bridget Harilaou (27 June 2018)
- PCO55** Rule of Law Institute of Australia (27 June 2018)
- PCO56** Australian Queer Students Network (27 June 2018)
- PCO57** Confidential (28 June 2018)
- PCO58** Community Legal Centres NSW (28 June 2018)
- PCO59** Associate Professor Peter D Rush and Professor Alison Young (28 June 2018)
- PCO60** R4Respect (28 June 2018)
- PCO61** Women's Legal Service NSW (28 June 2018)
- PCO62** Wagga Women's Health Centre Inc (28 June 2018)
- PCO63** End Rape on Campus Australia (28 June 2018)
- PCO64** Lory Coughlin (28 June 2018)
- PCO65** Professor Arlie Loughnan, Dr Caroline McKay, Dr Tanya Mitchell and Associate Professor Rita Shackel (28 June 2018)
- PCO66** Tony Mohr (28 June 2018)
- PCO67** Equality Rights Alliance, Young Women's Advisory Group (28 June 2018)
- PCO68** Edwin Montoya Zorrilla (28 June 2018)
- PCO69** St Catherine's School Legal Studies students (29 June 2018)
- PCO70** Brianna Attard (29 June 2018)
- PCO71** Women's Electoral Lobby (29 June 2018)
- PCO72** Rachael Burgin (29 June 2018)
- PCO73** Law Society of NSW (29 June 2018)
- PCO74** Australian Lawyers Alliance (29 June 2018)
- PCO75** Dr Mary Dobbie (29 June 2018)
- PCO76** Associate Professor Kelley Burton (29 June 2018)
- PCO77** Elyse Methven and Ian Dobinson (29 June 2018)
- PCO78** Wirringa Baiya Aboriginal Women's Legal Centre Inc (29 June 2018)
- PCO79** White Ribbon Australia (29 June 2018)
- PCO80** University of Technology Sydney (29 June 2018)
- PCO81** Northern Sydney Sexual Assault Service (29 June 2018)
- PCO82** Coffs Harbour Sexual Assault Service, Mid North Coast Local Health District (29 June 2018)
- PCO83** NSW Young Lawyers Criminal Law Committee (29 June 2018)
- PCO84** Police Association of NSW (29 June 2018)

- PCO85** Professor Luke McNamara, Professor Julie Stubbs, Dr Bianca Fileborn, Helen Gibbon, Melanie Schwartz and Professor Alex Steel (29 June 2018)
- PCO86** Confidential (29 June 2018)
- PCO87** Jonathan Moylan (29 June 2018)
- PCO88** Rape and Domestic Violence Services Australia (29 June 2018)
- PCO89** Margaret Bamford (29 June 2018)
- PCO90** Pia Harries (29 June 2018)
- PCO91** Domestic Violence NSW (29 June 2018)
- PCO92** Dr Julia Quilter (29 June 2018)
- PCO93** Dr Mehreen Faruqi (29 June 2018)
- PCO94** The University of Newcastle Women's Collective (29 June 2018)
- PCO95** Carina Stone (29 June 2018)
- PCO96** Legal Aid NSW (29 June 2018)
- PCO97** Saxon Mullins (2 July 2018)
- PCO98** Confidential (3 July 2018)
- PCO99** Confidential (6 & 12 July 2018)
- PCO100** Office of the Director of Public Prosecutions (9 July 2018)
- PCO101** Melissa Sweetheart (10 July 2018)
- PCO102** No to Violence (12 July 2018)
- PCO103** Sex Workers Outreach Project (12 July 2018)
- PCO104** People with Disability Australia (13 July 2018)
- PCO105** Australia's National Research Organisation for Women's Safety (13 July 2018)
- PCO106** Confidential (21 July 2018)
- PCO107** Alan Pert (24 July 2018)
- PCO108** Confidential (25 July 2018)
- PCO109** Confidential (15 August 2018)
- PCO110** Women Lawyers Association of NSW (15 October 2018)

Appendix B:

Crimes Act 1900 (NSW) s 61HA

61HA Consent in relation to sexual assault offences

(1) Offences to which section applies

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

(2) Meaning of consent

A person **consents** to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.

(3) Knowledge about consent

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:

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

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

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) not including any self-induced intoxication of the person.

(4) Negation of consent

A person does not consent to sexual intercourse:

- (a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
- (c) 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), or
- (d) if the person consents to the sexual intercourse because the person is unlawfully detained.

- (5) A person who consents to sexual intercourse with another person:
- (a) under a mistaken belief as to the identity of the other person, or
 - (b) under a mistaken belief that the other person is married to the person, or
 - (c) under a mistaken belief that the sexual intercourse is for health or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means),
- does not consent to the sexual intercourse. For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.
- (6) The grounds on which it may be established that a person does not consent to sexual intercourse include:
- (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or
 - (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
 - (c) if the person has sexual intercourse because of the abuse of a position of authority or trust.
- (7) 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.
- (8) This section does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

Appendix C:

Crimes Act 1900 (NSW) s 61HE

61HE Consent in relation to sexual offences (enacted but not in force)

(1) Offences to which this section applies

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

(2) Meaning of “consent”

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

(3) Knowledge about consent

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

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

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

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

(5) Negation of consent

A person does not consent to a sexual activity:

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

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

Appendix D: Circumstances that negate consent in Australia

Circumstances that negate consent	ACT Crimes Act 1900	NSW Crimes Act 1900	NT Criminal Code	QLD Criminal Code	SA Criminal Law Cons. Act 1935	TAS Criminal Code	VIC Crimes Act 1958	WA Criminal Code
Force	Infliction of violence or force on the person, or on a third person who is present or nearby s 67(1)(a)		Force to himself or herself or another person s 192(2)(a)	By force s 348(2)(a)	Application of force s 46(3)(a)(i)	Force to him or her or to another person; if a person suffers grievous bodily harm as a result of, or in connection with a crime, it is evidence of the lack of consent unless the contrary is shown s 2A(2)(b) and (3)	Force, whether to that person or someone else s 36(2)(a)	Force s 319(2)(a)

Circumstances that negate consent	ACT Crimes Act 1900	NSW Crimes Act 1900	NT Criminal Code	QLD Criminal Code	SA Criminal Law Cons. Act 1935	TAS Criminal Code	VIC Crimes Act 1958	WA Criminal Code
Threats	Threat to inflict violence or force on the person, or on a third person who is present or nearby; threat to inflict violence or force on, or to use extortion against, the person or another person; threat to publically humiliate or disgrace, or to physically or mentally harass, the person or another person s 67(1)(b)-(d)	Threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person) s 61HA(4)(c)		By threat s 348(2)(b)	Express or implied threat of the application of force; express or implied threat to degrade, humiliate, disgrace, or harass the person or some other person s 46(3)(a)(i)-(ii)	Threat of any kind to him or her or to another person s 2A(2)(c)		Threat s 319(2)(a)
Fear/Intimidation		Consent <u>may</u> be negated by intimidatory or coercive conduct, or other threat that not involve the use of force s 61HA(6)(b)	Fear of force, or fear of harm of any type, to himself or herself or another person. s 192(2)(a)	By intimidation: by fear of bodily harm s 348(2)(b)-(c)	Fear of the application of force to the person or to some other person s 46(3)(a)(i)	Reasonable fear of force to him or her or to another person s 2A(2)(b)	Fear of force, whether to that person or someone else, or fear of harm of any type, whether to that person or someone else or an animal s 36(2)(a)-(b)	Intimidation s 319(2)(a)

Circumstances that negate consent	ACT Crimes Act 1900	NSW Crimes Act 1900	NT Criminal Code	QLD Criminal Code	SA Criminal Law Cons. Act 1935	TAS Criminal Code	VIC Crimes Act 1958	WA Criminal Code
<p>Circumstances affecting consciousness: Alcohol, Drugs, Intoxication, Unconsciousness, Sleep, Helplessness</p>	<p>If consent is caused by the effects of intoxicating liquor, a drug or an anaesthetic; the complainant's physical helplessness s 67(1)(e) and (i)</p>	<p>The person does not have the opportunity to consent because the person is unconscious or asleep; consent <u>may</u> be negated where the person is substantially intoxicated by alcohol or any drug s 61HA(4)(a) and (6)(a)</p>	<p>The person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing s 192(2)(c)</p>		<p>The activity occurs while the person is asleep or unconscious; the activity occurs while the person is intoxicated (by alcohol, any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity s 46(3)(d)</p>	<p>The person is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required s 2A(2)(h)</p>	<p>The person is asleep or unconscious; the person is so affected by alcohol or another drug as to be incapable of consenting to the act or withdrawing consent to the act s 36(2)(d)-(f)</p>	
<p>Fraud and deceit (generally)</p>	<p>A fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person s 67(1)(g)</p>							<p>Deceit or any fraudulent means s 319(2)(a)</p>

Circumstances that negate consent	ACT Crimes Act 1900	NSW Crimes Act 1900	NT Criminal Code	QLD Criminal Code	SA Criminal Law Cons. Act 1935	TAS Criminal Code	VIC Crimes Act 1958	WA Criminal Code
<p>Fraud or mistake about the nature or purpose of the act</p>		<p>Mistaken belief about the nature of the act induced by fraudulent means s 61HA(5)(c)</p>	<p>Mistaken about the sexual nature of the act; false representation as to the nature or purpose of the act s 192(2)(e) and (g)</p>	<p>By false and fraudulent representations about the nature or purpose of the act s 348(2)(e)</p>	<p>Mistaken about the nature of the activity s 348(3)(h)</p>	<p>Reasonably mistaken about the nature or purpose of the act s 2A(2)(g)</p>	<p>Mistaken about the sexual nature of the act; if the act involves an animal, the person mistakenly believes the act is for veterinary, agricultural, or scientific research purposes s 36(2)(h) and (k)</p>	
<p>Fraud or mistake about medical or hygiene purposes</p>		<p>Mistaken belief that the sexual intercourse is for health or hygienic purposes s 61HA(5)(c)</p>	<p>Mistakenly believes that the act is for medical or hygienic purposes s 192(2)(f)</p>		<p>The legislation provides an example: the mistaken belief that the activity is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene s 46(3)(h)</p>		<p>Mistakenly believes that the act is for medical or hygienic purposes s 36(2)(l)</p>	

Circumstances that negate consent	ACT Crimes Act 1900	NSW Crimes Act 1900	NT Criminal Code	QLD Criminal Code	SA Criminal Law Cons. Act 1935	TAS Criminal Code	VIC Crimes Act 1958	WA Criminal Code
Fraud or mistake as to identity	Mistaken belief as to the identity of that other person s 67(1)(f)	Mistaken belief as to the identity of the other person; mistaken belief that the other person is married to the person s 61HA(5)(a)-(b)	Mistaken about the identity of the other person s 192(2)(e)	Mistaken belief induced by the accused person that the accused person was the person's sexual partner s 348(2)(f)	Mistaken belief as to the identity of the person s 46(3)(g)	Reasonably mistaken about the identity of the accused s 2A(2)(g)	Mistaken about the identity of any other person involved in the act s 36(2)(f)	
Inability to understand the act	Mental incapacity to understand the nature of the act to which the consent is given s 67(1)(i)	The person does not have the capacity to consent to sexual intercourse including because of age or cognitive incapacity s 61HA(4)(a)	Incapable of understanding the sexual nature of the act s 192(2)(d)	Consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent s 348(1)	The activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that they are incapable of freely and voluntarily agreeing; unable to understand the nature of the activity s 46(3)(e)-(f)	Unable to understand the nature of the act s 2A(2)(f)	Incapable of understanding the sexual nature of the act s 36(2)(g)	

Circumstances that negate consent	ACT Crimes Act 1900	NSW Crimes Act 1900	NT Criminal Code	QLD Criminal Code	SA Criminal Law Cons. Act 1935	TAS Criminal Code	VIC Crimes Act 1958	WA Criminal Code
Unlawful detention	Unlawful detention of the person s 67(1)(i)	The person is unlawfully detained s 61HA(4)(d)	The person submits because he or she is unlawfully detained s 192(2)(b)		The person is unlawfully detained at the time of the activity s 46(3)(b)	He or she or another person is unlawfully detained s 2 A(2)(d)	Unlawfully detained s 36(2)(c)	
Abuse of authority or trust	Abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person s 67(1)(h)	Consent <u>may</u> be negated if the person has sexual intercourse because of the abuse of a position of authority or trust s 61HA(6)(c)		By exercise of authority s 3 48(2)(d)		He or she is overborne by the nature or position of another person s 2A(2)(e)		
Significance of physical resistance	A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse. s 67(2)	A person who does not offer actual physical resistance is not, by reason only of that fact, to be regarded as consenting s 61HA(7)	<u>Jury direction:</u> A person is not regarded to have consented only because the person did not physically protest or resist s 192A					Failure to offer physical resistance does not of itself constitute consent to the act s 319(2)(b)

CP 21 Consent in relation to sexual offences

Circumstances that negate consent	ACT Crimes Act 1900	NSW Crimes Act 1900	NT Criminal Code	QLD Criminal Code	SA Criminal Law Cons. Act 1935	TAS Criminal Code	VIC Crimes Act 1958	WA Criminal Code
Consent not communicated						Does not say or do anything to communicate consent s 2 A(2)(a)	The person does not say or do anything to indicate consent s 36(2)(l)	
Consent withdrawn					He or she engages, or continues to engage, in sexual intercourse with another person who has withdrawn consent to the sexual intercourse. s 48(1)(b)		Having given consent to the act, the person later withdraws consent to the act taking place or continuing s 36(2)(m)	

Appendix E:

Bench Book direction for sexual intercourse without consent

[5-1566] Suggested direction — sexual intercourse without consent (s 61I) where the offence was allegedly committed on and after 1 January 2008

The accused is charged with sexual intercourse without consent knowing that the complainant was not consenting.

The Crown alleges [*read the relevant portion of the indictment*].

[*If the accused is charged with aggravated sexual assault under s 61J refer to the additional direction for circumstances of aggravation at [5-1570] after dealing with the s 61I ingredients.*]

The Crown must prove beyond reasonable doubt:

1. that, at the time and place alleged, the accused had sexual intercourse with [*the complainant*]
2. without [*the complainant's*] consent
3. knowing that [*the complainant*] did not consent.

I will explain each of these three elements of the charge in turn.

1. Sexual intercourse

[...]

2. Consent

The accused does not have to prove that [*the complainant*] consented; it is for the Crown to prove beyond reasonable doubt that [*she/he*] did not. What then, is meant by consent?

A person consents to sexual intercourse if [*she/he*] freely and voluntarily agrees to have sexual intercourse with another person. That 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 ... [see s 61HA(7) *Crimes Act 1900*]. Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.

[If applicable]

The law provides that a person does not consent to sexual intercourse:

- *if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or*
- *if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or*
- *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), or*
- *if the person consents to the sexual intercourse because the person is unlawfully detained [see s 61HA(4) Crimes Act 1900 and s 61HA(5) for other situations where there is no consent].]*

[Further if applicable

In considering whether the Crown has proved beyond reasonable doubt that [the complainant] did not consent you may have regard to the following matters if you have found them proved on the evidence before you:

- *that the complainant had sexual intercourse while substantially intoxicated by alcohol or any drug, or*
- *that the complainant had sexual intercourse because of intimidatory or coercive conduct, or other threat, even though that conduct does not involve a threat of force, or*
- *if the complainant had sexual intercourse because of the abuse of a position of authority or trust.*

It does not follow simply because you find that fact proved that you should be satisfied beyond reasonable doubt that the complainant did not consent, but it is a relevant fact that you should consider in deciding whether the Crown has proved this element of the offence as it must do so before you can convict the accused.]

If the Crown fails to prove that the complainant was not consenting, the accused is “not guilty” of this charge.

If you are satisfied beyond reasonable doubt that the accused did have sexual intercourse with *[the complainant]*, and also that *[she/he]* did not consent, then you must go on to consider the third element, namely, whether the accused knew that *[she/he]* was not consenting.

[In sexual assault cases it is unnecessary and unhelpful to direct the jury about elements of consent not relevant to the issues in the case: R v Mueller (2005) 62 NSWLR 476 at [3]–[4] and [42].]

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 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*.]

[*Deal with relevant evidence.*]

[If applicable — where the Crown relies upon recklessness under s 61HA(3)(b) to prove the accused knew the complainant was not consenting — see commentary in para 4 at [5-1565] above.]

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

- 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.*]

[*Deal with relevant evidence.*]

[If applicable — use of intoxication of accused]

But in considering what [*the accused*] did in this regard you cannot take into account the fact that [*he/she*] was intoxicated where that intoxication is the result of the voluntary ingestion of alcohol or non-prescribed drugs.]

Source: Judicial Commission of NSW, Criminal Trial Courts Bench Book (2017) [5-1566].



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