



issues backgrounder

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NSW Parliamentary Research Service

Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021

The first half of 2021 saw widespread media coverage and discussion of the prevalence of sexual violence, various sexual assault allegations and the meaning of consent. It has been suggested that the “unprecedented national attention on sexual assault and gender issues” drove a sharp and uncharacteristic increase in the number of sexual assault notifications received by NSW Police in March 2021 ([Fitzgerald](#), p 8). On 25 May 2021, NSW Attorney General, the Hon Mark Speakman MP, [announced](#) that reforms would be made to sexual consent laws in NSW, with NSW to adopt an affirmative model of consent. On 20 October 2021, the Attorney General introduced the [Crimes Legislation Amendment \(Sexual Consent Reforms\) Bill 2021](#) into the Legislative Assembly. The Attorney General’s [media release](#) stated:

“If you want to have sex with someone, then you need to do or say something to find out if they want to have sex with you too – under our reforms, it’s that simple.

...

An accused’s belief that consent existed will not be reasonable in the circumstances unless the accused said or did anything – within a reasonable time before or at the time of the sexual activity – to find out whether the other person consents to the sexual activity. This requirement will not apply to an accused person who had a cognitive or mental health impairment that caused them not to say or do anything to ascertain consent.

“This affirmative model of consent is not onerous. It does not require a written or video agreement or a script, or stifle spontaneity, as some have suggested,” Mr Speakman said.

This issues backgrounder provides a brief overview of the current law in NSW in relation to sexual consent. Some background to the May 2021 NSW Government announcement is discussed, including the NSW Law Reform Commission’s September 2020 report, [Consent in relation to sexual offences](#). Also included is an overview of significant provisions of the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021*. The legislation in other states and territories is briefly outlined. Key commentary on the concept of consent in relation to sexual offences is listed at the end of this paper, with hyperlinks provided to the full text.

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1 NEW SOUTH WALES

1.1 Sexual offences

Division 10 of Part 3 of the [Crimes Act 1900 \(NSW\)](#) sets out the various sexual offences against adults and children. Sections 61I to 61K detail the following offences:

- [sexual assault](#) (liable to imprisonment for 14 years);

- [aggravated sexual assault](#) (liable to imprisonment for 20 years);
- [aggravated sexual assault in company](#) (liable to imprisonment for life); and
- [assault with intent to have sexual intercourse](#) (liable to imprisonment for 20 years).

Offences that are specifically concerned with sexual touching, sexual acts or sexual assaults involving children are set out in the latter parts of Division 10 of Part 3 of the *Crimes Act*.

1.2 Elements of sexual assault

The offence of sexual assault (section 61I) states:

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

The elements of the offence of sexual assault in NSW are accordingly:

- i. sexual intercourse;
- ii. a lack of consent; and
- iii. knowledge of the absence of consent.

These elements must be proved beyond reasonable doubt.

1.3 Consent – section 61HE *Crimes Act 1900* (NSW)

[Section 61HE](#) defines consent in relation to a number of sexual offences. Under the current definition, consent is present if the person “freely and voluntarily agrees to the sexual activity”. Section 61HE also sets out the circumstances in which a person is said to know that a person does not consent, including if they are reckless as to consent or if they have no reasonable grounds for believing the alleged victim consented. Further, section 61HE sets out a number of factors that negate consent, for example, the person is unconscious or asleep.

Section 61HE states:

61HE Consent in relation to sexual offences

- (1) **Offences to which section applies** This section applies for the purposes of the offences, or attempts to commit the offences, under sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.
- (2) **Meaning of “consent”** A person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity.
- (3) **Knowledge about consent** A person who without the consent of the other person (the alleged victim) engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if—
 - (a) the person knows that the alleged victim does not consent to the sexual activity, or
 - (b) the person is reckless as to whether the alleged victim consents to the sexual activity, or
 - (c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.

- (4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case—
- (a) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
 - (b) not including any self-induced intoxication of the person.
- (5) **Negation of consent** A person does not consent to a sexual activity—
- (a) if the person does not have the capacity to consent to the sexual activity, including because of age or cognitive incapacity, or
 - (b) if the person does not have the opportunity to consent to the sexual activity because the person is unconscious or asleep, or
 - (c) if the person consents to the sexual activity because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
 - (d) if the person consents to the sexual activity because the person is unlawfully detained.
- (6) A person who consents to a sexual activity with or from another person under any of the following mistaken beliefs does not consent to the sexual activity—
- (a) a mistaken belief as to the identity of the other person,
 - (b) a mistaken belief that the other person is married to the person,
 - (c) a mistaken belief that the sexual activity is for health or hygienic purposes,
 - (d) any other mistaken belief about the nature of the activity induced by fraudulent means.
- (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.

The [Crimes Amendment \(Consent – Sexual Assault Offences\) Act 2007](#) amended the *Crimes Act 1900* to insert section 61HA (now s61HE) into the Act. This reform provided the statutory definition of consent and was influenced by the recommendations of the Criminal Justice Sexual Offences Task Force report (2006) (J Hatzistergos MLC, Attorney General and Minister for Justice, [Hansard \(LC\)](#), 7 November 2007, p 3584).

1.4 R v Lazarus: 2015 to 2017

In NSW, the [Lazarus](#) case was the subject of much publicity and commentary, particularly in relation to the issue of consent as it applies to sexual offences.¹ The outcome of the case led to the review of consent law by the NSW Law Reform Commission, which was followed by the NSW Attorney General's announcement that the laws around consent would be reformed.

Luke Lazarus was accused of sexually assaulting Saxon Mullins in an alley behind a nightclub in Kings Cross in May 2013.² It resulted in two trials and two appeals between 2015 and 2017. The case centred on the issue of consent, notably whether or not the accused knew that the complainant did not consent.

Lazarus was initially found guilty and sentenced to imprisonment for five years (with a non-parole period of three years). However, in April 2016, the decision was overturned on [appeal](#) as the Court of Criminal Appeal [found](#) that the trial judge had erred in the instructions given to the jury concerning whether the appellant knew of the complainant's lack of consent. A new trial was ordered.

In the second trial, the judge found that Lazarus was not guilty. Whilst the judge found that the complainant did not consent, it was held that Lazarus had no reasonable basis for believing she was not consenting. In the subsequent [appeal](#), the Court of Criminal Appeal considered whether the trial judge erred in failing to have regard to any steps taken by Lazarus to ascertain consent before making a finding about knowledge of consent. In November 2017, the Court of Criminal Appeal [found](#) that the judge had erred but that Lazarus would not be retried, as it deemed that it would be oppressive and unfair for him to endure a third trial.

The trials and appeals were the subject of much media and academic commentary, including the "[I am that girl](#)" episode on the ABC's Four Corners on 7 May 2018.

1.5 NSW Law Reform Commission report

The NSW Law Reform Commission (NSWLRC) was [asked](#) in May 2018 to review and report on consent and knowledge of consent in relation to sexual assault offences, as dealt with in what was then section 61HA of the *Crimes Act 1900* (NSW) (now [section 61HE](#)). This review was in [response](#) to the outcome of the Lazarus case.

The NSWLRC's September 2020 report, [Consent in relation to sexual offences](#), made [44 recommendations](#) in relation to:

- structure and language;
- the meaning of consent;

¹ K Calderwood, [Luke Lazarus case highlights the need to change our conversation about sexual consent](#), ABC News, 6 May 2017; K Hoerr, [Luke Lazarus will not face third trial over alleged Kings Cross nightclub rape](#), ABC News, 27 November 2017; S Crawford, [Luke Lazarus: Appeal against Soho nightclub rape acquittal dismissed](#), *Daily Telegraph*, 27 November 2017.

² [R v Lazarus](#) [2017] NSWCCA 279; [Lazarus v R](#) [2016] NSWCCA 52.

- when a person does not consent;
- knowledge of non-consent;
- jury directions and expert evidence;
- the meanings of 'sexual intercourse', 'sexual touching' and 'sexual act'; and
- implementing and monitoring the reforms.

This included [recommendation 4.1\(b\)](#) which suggested that section 61HE be split into distinct sections dealing with:

- a. the meaning of consent;
- b. the circumstances in which a person does not consent; and
- c. knowledge of non-consent.

[Recommendation 4.3](#) specified that:

The *Crimes Act* should state that an objective of the new Subdivision is to recognise the following principles of the communicative model of consent:

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

The NSWLRC referred to Tasmanian and Victorian legislation which provides that consent is not present unless it has been communicated or indicated and suggested that a similar approach be adopted in NSW ([para 6.25](#)). [Recommendation 6.2](#) accordingly stated:

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person does not say or do anything to communicate consent.

The NSWLRC argued that this would reinforce the communicative model of consent that is currently the basis for the law in NSW ([para 6.27](#)).

The NSWLRC had considered, as part of its review process, whether NSW law should require a person to take steps to ascertain consent, noting that affirmative consent is not currently required by section 61HE of the *Crimes Act 1900*. The notion of affirmative consent is a standard of consent founded on positive terms which requires that ([Burgin](#), p 302):

...a person demonstrates willingness to engage in a sexual act either verbally or through their actions... The onus is on the initiator of sex to take steps to ensure that the other party(ies) is consenting... Consent is ongoing and performative... To ascertain consent, the individual seeking to engage in sexual acts with another must obtain clear, expressed indications of consent before engaging in the act(s). Failure to do so, may suggest that the sexual act(s) was not consensual.

Proponents of affirmative consent models [argue](#) that affirmative consent helps counter “rape myths”, and reduces reliance on force and resistance narratives. However, others are [concerned](#) that it may lead to absolute liability in relation to serious criminal offences.

Table 1 contains the arguments for and against an affirmative consent standard that were acknowledged by the NSWLRC. The NSWLRC also recognised the existence of some uncertainties in relation to it:

Table 1: Arguments for and against an affirmative consent standard

In support	Against	Uncertainties
Clearer than the current definition of consent	Too prescriptive, unrealistic, impractical or invasive	Some believe it should be a social rather than a legal standard
Addresses the need for consent to be ongoing and allow a person to withdraw their consent	Broadens the criminal law	Some believe the law already contains an affirmative consent standard
Helps shift the focus of argument at trial away from examining the complainant’s behaviour and towards examining what the accused person did	Detrimental to both accused persons and complainants	
Assists prosecutions of sexual assault	Reverses the onus of proof	
Dispels rape myths and victim blaming attitudes	Encourages false accusations of sexual assault	
Facilitates cultural change	Has no positive, practical impact	

Source: NSW Law Reform Commission, [Consent in relation to sexual offences](#), Report 148, September 2020, p 222.

The NSWLRC stopped short of recommending an affirmative consent model, concluding that “the existing approach, with amendments, is preferable to enacting a requirement to take steps” ([para 7.111](#)). The NSWLRC argued that:

There should be no change to the definition of consent to sexual activity as free and voluntary agreement to the sexual activity given at the time the activity occurs. The *Crimes Act* should recognise other aspects of consent, including the right to withdraw consent, and address certain misconceptions about consent ([p 55](#)).

1.6 NSW Government announcement – 25 May 2021

On 25 May 2021, NSW Attorney General, the Hon Mark Speakman MP, [announced](#) that reforms would be made to sexual consent laws in NSW. He stated that NSW

would subsequently utilise an affirmative model of consent to address issues that have arisen in sexual offence trials, and identified the key reforms as stipulating that:

- a. a person does not consent to sexual activity unless they said or did something to communicate consent; and
- b. an accused person's belief in consent will not be reasonable in the circumstances unless they said or did something to ascertain consent.

This announcement was in response to the recommendations of the NSWLRC in its September 2020 report – [Consent in relation to sexual offences](#). The NSW Government stated that it supported, at least in principle, all of the NSWLRC's recommendations, but went further by “clarifying that an accused person's belief in consent will not be reasonable in the circumstances unless they said or did something to ascertain consent”.

The response to this announcement was mixed. Andrew Dyer, the Director of the Sydney Institute of Criminology, [called](#) it “populist and objectionable” arguing that it comes close to “transforming serious offences into crimes of absolute liability” and represents “a serious departure from fundamental criminal law principles”. He argued that a preferable approach would be to require judges in sexual assault trials to instruct juries to take into account the accused's failure to take steps to ascertain whether or not the complainant consented. The Bar Association also issued a [statement](#) voicing its concerns that the reforms would result in significant injustice, arguing that many consensual sexual relations would potentially be criminalised. In contrast, a group of 23 senior barristers in NSW, including the former Commonwealth Solicitor-General, issued their own [statement](#) arguing that the reforms proposed by Mr Speakman were sound in principle and did not reverse the onus of proof requiring the prosecution to prove each element of the offence of sexual assault. The proposed reforms also received support from a number of sexual assault survivor and advocacy groups, including [Rape and Sexual Assault Research and Advocacy](#).

1.7 Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021

The [Crimes Legislation Amendment \(Sexual Consent Reforms\) Bill 2021](#) was introduced into the NSW Parliament on 20 October 2021. As noted in the accompanying [media release](#), the Bill is part of a suite of reforms providing:

- clarification that a person does not consent unless, at the time of the sexual activity, they freely and voluntarily agree to the sexual activity;
- five new jury directions available for judges to give at trial to address common misconceptions about sexual assault and behavioural responses and to ensure the evidence of complainants is assessed fairly;
- targeted education programs for judges, legal practitioners and police;
- a research project to improve our understanding of victim-survivor experiences with the criminal justice process; and
- community awareness campaigns that will build on the success of #MakeNoDoubt.

Amongst other things, the Bill proposes to introduce an affirmative consent requirement in the *Crimes Act 1900* to stipulate that an accused's belief that consent existed will not be reasonable in the circumstances unless the accused said or did anything to find out whether the other person consents to the sexual activity. In his [Second Reading speech](#), the Attorney General, the Hon Mark Speakman MP stated:

Affirmative consent in this context means that the accused person must have sought consent by saying or doing something in order to have a reasonable belief that the other person consented. The onus remains on the Crown to prove each element of the sexual offence beyond reasonable doubt. In this bill, affirmative consent does not reverse this onus or abrogate an accused's right to silence. When a belief in consent is raised as a fact in issue, the reasonable belief test will be engaged, and the Crown must prove beyond reasonable doubt that the accused had no reasonable belief in consent. This may include evidence that the accused did not say or do anything to find out if the other person was consenting. It may also require the jury to assess whether any actions taken by the accused were sufficient so as to constitute a reasonable belief in consent in all of the circumstances.

The NSW Government [argues](#) that by doing so:

This strengthens the affirmative model of consent and addresses issues and grey areas that have arisen in sexual offence trials over whether an accused's belief that consent existed was actually reasonable. This will also better recognise the common "freeze" response where a person freezes in fear and can't communicate their lack of consent.

The Bill intends to omit section 61HE of the *Crimes Act 1900* and insert [Part 3, Division 10, Subdivision 1A](#) into the Act. Proposed section 61HF sets out the objective of Subdivision 1A, which is to recognise that:

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

[Proposed section 61HI](#) sets out a number of general principles in relation to consent:

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

Circumstances in which consent does not exist, including if a person does not say or do anything to communicate consent, are set out in [proposed section 61HJ](#).

The issue of knowledge about consent is dealt with in [proposed section 61HK](#), with proposed section 61HK(2) introducing the requirement for affirmative consent. It states (emphasis added):

- (1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if—
 - (a) the accused person actually knows the other person does not consent to the sexual activity, or
 - (b) the accused person is reckless as to whether the other person consents to the sexual activity, or
 - (c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.
- (2) **Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.**
- (3) Subsection (2) does not apply if the accused person shows that—
 - (a) the accused person had at the time of the sexual activity—
 - (i) a cognitive impairment within the meaning of section 23A(8) and (9), or
 - (ii) a mental health impairment, and
 - (b) the impairment was a cause of the accused person not saying or doing anything.
- (4) The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.
- (5) For the purposes of making any finding under this section, the trier of fact—
 - (a) must consider all the circumstances of the case, including what, if anything, the accused person said or did, and
 - (b) must not consider any self-induced intoxication of the accused person.

The reforms made by the Bill are to be reviewed after five years: [proposed section 583](#).

The Bill also amends the [Criminal Procedure Act 1986](#) by inserting jury directions in relation to consent ([proposed sections 292 to 292E](#)). These are designed to address [common misconceptions](#) about consent and clarify that:

- sexual assault can occur in many different situations, including between acquaintances or people who are married or in a relationship;
- sexual offences aren't always accompanied by violence, threats or physical injuries;

- there is no normal or typical response to being sexually assaulted, and juries must not rely on preconceived ideas about how people respond to a sexual assault;
- trauma may affect people differently, which means some people may show signs of emotional distress when giving evidence and some may not; and
- it should not be assumed that a person consented because of their behaviour, such as the way a person is dressed or the fact that they have consumed alcohol or drugs.

2 AUSTRALIAN JURISDICTIONS: CONSENT LAWS

This section provides a brief overview of the law as it applies to consent in relation to sexual offences in the Australian states and territories. It should be noted that there are differences in terminology between the jurisdictions, with some using the term rape, whilst others refer to sexual assault, and some use both terms but in reference to different offences.

For a comparative table of the relevant legislation in the various jurisdictions see: Queensland Law Reform Commission, [Review of consent laws and the excuse of mistake of fact](#), Report No 78, June 2020, [Appendix C](#).

2.1 Queensland

Chapter 32 of [The Criminal Code](#) (Qld) contains the relevant provisions on rape and sexual assault. Consent is defined in [section 348](#) and must be “freely and voluntarily given by a person with the cognitive capacity to give consent”. Some circumstances in which consent is not present are specified.

[Section 348A](#) provides for a mistake of fact defence in relation to consent, namely that a person charged with an offence “did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act”. Regard may be given to anything said or done by the person to ascertain whether the other person consented.

The Queensland Parliament recently considered the issue of consent, passing [reforms to its consent law](#) on 25 March 2021. Changes included statutory clarification that:

- silence doesn’t amount to consent;
- consent once given can be withdrawn; and
- the self-intoxication of a defendant cannot be relied upon to show they were mistaken about whether or not consent was given.

The reforms implemented [five recommendations](#) made by the Queensland Law Reform Commission in its June 2020 report, [Review of consent laws and the excuse of mistake of fact](#).

2.2 South Australia

The law as it relates to rape and other sexual offences is set out in Division 11 of the [Criminal Law Consolidation Act 1935](#) (SA). [Section 46](#) requires consent to sexual activity to be freely and voluntarily given, and [section 47](#) sets out the circumstances in which a person is considered to be recklessly indifferent to the consent of another.

2.3 Tasmania

References are often made to the model of consent that operates in Tasmania. The Tasmanian criminal law includes a reasonable steps requirement that limits the availability of the mistake of fact excuse (see sections 14 and 14A of the [Criminal Code](#) (Tas)). Section 2A of the [Criminal Code](#) (Tas) defines consent as free agreement. Section 2A(2) provides that a person does not freely agree to an act if the person:

- (a) does not say or do anything to communicate consent; or
- (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or
- (c) agrees or submits because of a threat of any kind against him or her or against another person; or
- (d) agrees or submits because he or she or another person is unlawfully detained; or
- (e) agrees or submits because he or she is overborne by the nature or position of another person; or
- (f) agrees or submits because of the fraud of the accused; or
- (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or
- (h) 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; or
- (i) is unable to understand the nature of the act.

Section 14A of the [Criminal Code](#) (Tas) is concerned with mistake as to consent in certain sexual offences, including rape. 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”.

2.4 Victoria

[Section 36](#) of the [Crimes Act 1958](#) (Vic) defines consent as “free agreement”. Section 36(2) sets out examples of circumstances in which a person does not consent, including where the person does not say or do anything to indicate consent. [Section 36A](#) provides that any steps a person took to ascertain consent may be considered when determining whether or not a person has a reasonable belief in consent. [Section 36B](#) is concerned with the effect of intoxication on reasonable belief.

The Victorian Law Reform Commission is currently conducting a [review](#) on improving the response of the justice system to sexual offences. It was due to report on 20 September 2021 (the report has been delivered to the Attorney General but has yet to be tabled in the Victorian Parliament). [Issues Paper C, Defining sexual offences](#) discusses the communicative consent model that currently applies in Victoria (p 4). Holding an honest but mistaken belief that the other person was consenting is [not a defence](#) in Victoria.

2.5 Western Australia

Chapter XXXI of [The Criminal Code](#) (WA) is concerned with sexual offences. [Section 319\(2\)](#) defines consent:

- (a) consent means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;
- (b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;
- (c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.

[Section 325](#) provides for an offence of sexual penetration without consent:

- (1) A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.

A mistake of fact defence exists that allows the accused to argue they had an honest and reasonable but mistaken belief as to consent ([section 24](#)).

2.6 Australian Capital Territory

Part 3 of the [Crimes Act 1900](#) (ACT) sets out the provisions relating to sexual offences. Consent is dealt with in section 67 which states some of the grounds on which consent is negated. Section 67 also provides that a person who does not offer actual physical resistance shall not for that reason only be regarded as having consented to sexual intercourse.

The ACT is currently [considering](#) whether it amends the *Crimes Act* to introduce a communicative model of consent.

2.7 Northern Territory

Section 192 of the [Criminal Code Act 1983](#) (NT) sets out the offence of sexual intercourse and gross indecency without consent. Consent is defined as free and voluntary agreement. Section 192(2) notes the circumstances in which a person is considered not to have consented, for example, the person is asleep. A person will be guilty of an offence if the person has sexual intercourse with another without their consent and either knew or was reckless as to the lack of consent. Not giving any thought to whether the other person is consenting is considered to be reckless.

3 KEY SOURCES AND COMMENTARY

3.1 NSW Government

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Women NSW, [NSW Sexual Assault Strategy 2018-2021](#). The NSW Government, in collaboration with the community, universities and peak bodies, has conducted a “[Make no doubt](#)” campaign about sexual assault, as part of the [NSW Sexual Assault Strategy 2018-2021](#).

3.2 NSW Parliament

NSW Greens, [Greens welcome affirmative consent reform](#), *Media release*, 25 May 2021.

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Sexual consent, [Hansard \(Legislative Assembly\)](#), 5 May 2021.

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Consent education, [Hansard \(Legislative Council\)](#), 16 March 2021.

3.3 Reports

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NSW Law Reform Commission, [Consent in relation to sexual offences](#), Report 148, September 2020.

Victoria Law Reform Commission, [Defining Sexual Offences](#), Issues paper C, 2020.

3.4 Media articles

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