

Consent in relation to sexual offences

148

New South Wales
Law Reform Commission

REPORT

September 2020



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Law Reform Commission**

**Report
148**

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Contact details

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001 Australia

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

Internet: www.lawreform.justice.nsw.gov.au

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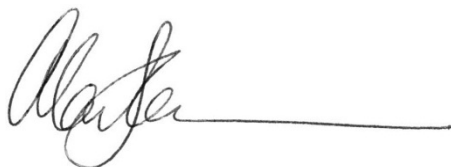
Hon M Speakman SC MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney

Consent in relation to sexual offences

We make this report – Report 148: *Consent in relation to sexual offences* – pursuant to the reference to this Commission received on 3 May 2018.

Yours sincerely

A handwritten signature in black ink, appearing to read "Alan Cameron", followed by a long horizontal line.

Alan Cameron AO

Chairperson

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Participants

Commissioners

The Hon Acting Justice Carolyn Simpson AO (Lead Commissioner)

The Hon Justice Paul Brereton AM, RFD (Deputy Chairperson)

Mr Alan Cameron AO (Chairperson)

Law Reform and Sentencing Council Secretariat

Ms Kathryn Birtwistle, Policy Officer

Ms Erin Gough, Policy Manager

Mr James Hall, Graduate Policy Officer

Ms Arizona Hart, Policy Officer

Dr Jackie Hartley, Senior Policy Officer

Mr Dominic Keenan, Graduate Policy Officer

Ms Anna Williams, Research Support Librarian

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]

Recommendations

4. Structure and language

Recommendation 4.1: A new subdivision

- (a) A new Subdivision on the law of consent and knowledge about consent should be inserted in Part 3, Division 10 of the *Crimes Act*.
- (b) The new Subdivision should group the law dealing with the meaning of consent, the circumstances in which a person does not consent, and knowledge of non-consent, into distinct sections.
- (c) The sections on the meaning of consent and the circumstances in which a person does not consent should appear before the section on knowledge of non-consent.

Recommendation 4.2: Application of the new Subdivision

The new Subdivision should apply to the offences, and attempts to commit the offences, of sexual assault, sexual touching, sexual act and their aggravated versions.

Recommendation 4.3: Objectives of the new Subdivision

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.

Recommendation 4.4: Language of the new Subdivision

- (a) The language used in s 61HE, and related sections, of the *Crimes Act* should be modern, inclusive, clear and consistent.
- (b) The expressions “alleged victim” and “alleged offender” should be replaced with alternative expressions throughout Part 3, Division 10 of the *Crimes Act*.

5. The meaning of consent

Recommendation 5.1: Consent should continue to be defined as free and voluntary agreement

The *Crimes Act* should continue to provide that a person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity.

Recommendation 5.2: Consent must be present at the time of the sexual activity

The definition of consent should provide that free and voluntary agreement to a sexual activity must exist at the time of the sexual activity.

Recommendation 5.3: Withdrawal of consent

The *Crimes Act* should provide that:

- (a) a person may, by words or conduct, withdraw consent to a sexual activity at any time before or during the sexual activity, and
- (b) sexual activity that occurs after consent has been withdrawn occurs without consent.

Recommendation 5.4: Absence of physical or verbal resistance

The *Crimes Act* should provide that 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.

Recommendation 5.5: Consent to a particular sexual activity

The *Crimes Act* should provide that 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.

For example, a person who consents to sexual activity using a condom is not to be taken, by reason only of that fact, to consent to sexual activity without using a condom.

Recommendation 5.6: Consent to sexual activity on one occasion, or with one person, is not consent to sexual activity on another occasion or with another person

The *Crimes Act* should provide that 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 any other occasion.

6. When a person does not consent

Recommendation 6.1: The list of circumstances should be simplified and modernised

- (1) The *Crimes Act* should contain a list of circumstances in which a person does not consent to sexual activity.
- (2) The list of circumstances should be non-exhaustive.
- (3) The *Crimes Act* should not include a list of circumstances in which it “may be established” that a person does not consent to sexual activity.
- (4) In the list of circumstances in which a person does not consent to sexual activity:
 - (a) the concept of “negation” should not be used

- (b) the word “consents” should only be used in the context of defining when a person does or does not consent, and
- (c) in all other circumstances, the term “participates” should be used.

Recommendation 6.2: The person does not say or do anything to communicate consent

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.

Recommendation 6.3: The person does not have the capacity to consent

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person does not have the capacity to consent to the sexual activity.

Recommendation 6.4: The person is incapable of consenting due to intoxication

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity.

Recommendation 6.5: The person is unconscious or asleep

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person is unconscious or asleep.

Recommendation 6.6: The person participates because of force, fear, coercion, blackmail or intimidation

The *Crimes Act* should provide that a person does not consent to a sexual activity if:

- (a) the person participates in the sexual activity because of force, fear of force or fear of harm of any kind to the person, another person, an animal or property, regardless of:
 - (i) when the force or the conduct giving rise to the fear occurs, or
 - (ii) whether it occurs in a single instance or as part of an ongoing pattern, or
- (b) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of:
 - (i) when the coercion, blackmail or intimidation occurs, or
 - (ii) whether it occurs in a single instance or as part of an ongoing pattern.

Recommendation 6.7: The person, or another person, is unlawfully detained

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person participates in the sexual activity because the person or another person is unlawfully detained.

Recommendation 6.8: The person is overborne by abuse of a relationship of authority, trust or dependence

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence.

Recommendation 6.9: The person is mistaken

The *Crimes Act* should provide that a person does not consent to a sexual activity if:

- (a) the person participates in the sexual activity because the person is mistaken about:
 - (i) the nature of the sexual activity, or
 - (ii) the purpose of the sexual activity (including about whether the sexual activity is for health, hygiene or cosmetic purposes), or
- (b) the person participates in the sexual activity with another person because the person is mistaken:
 - (i) about the identity of the other person, or
 - (ii) that the person is married to the other person.

Recommendation 6.10: The person participates because of a fraudulent inducement

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person participates in the sexual activity because of a fraudulent inducement.

7. Knowledge of non-consent

Recommendation 7.1: The mental element of knowledge of non-consent

The *Crimes Act* should continue to recognise three states of mind by which the accused person's knowledge of the absence of consent may be proved.

Recommendation 7.2: The introductory words of s 61HE(3)

- (1) Unnecessary words should be removed from the introductory words to s 61HE(3) of the *Crimes Act*.
- (2) The introductory words should explain that an accused person is "taken to know" that the complainant does not consent if any of the three states of mind in s 61HE(3)(a)–(c) of the *Crimes Act* exist.

Recommendation 7.3: "Actual knowledge" and "reckless"

- (1) “Actual knowledge” and “recklessness” should remain part of the mental element of knowledge of non-consent.
- (2) The reference to “knows” in s 61HE(3)(a) should be replaced with “actually knows”.
- (3) “Recklessness” should not be defined in the legislation.
- (4) A test of “indifference” should not replace “recklessness”.

Recommendation 7.4: A hybrid subjective / objective test

A hybrid subjective / objective test should remain one of the three forms of knowledge.

Recommendation 7.5: The “no reasonable grounds” test should be amended

The “no reasonable grounds” test in s 61HE(3)(c) of the *Crimes Act* should be replaced with the following test:

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

Recommendation 7.6: Negligent sexual assault

There should not be a separate, lesser, offence of negligent sexual assault

Recommendation 7.7: Matters that fact finders must, and must not, consider

For the purposes of making any finding in relation to the mental element of knowledge of non-consent, the trier of fact:

- (a) must have regard to all the circumstances of the case, including whether the accused person said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person consented to the sexual activity, and if so, what the accused person said or did, and
- (b) must not have regard to any self-induced intoxication of the accused person.

8. Jury directions and expert evidence

Recommendation 8.1: New statutory directions in relation to consent

- (1) NSW should introduce new directions to address common misconceptions about consensual and non-consensual sexual activity.
- (2) The directions should apply in trials for offences to which s 61HE of the *Crimes Act 1900* (NSW) currently applies.

Recommendation 8.2: Procedure for the directions

The *Criminal Procedure Act* should provide that, in a trial for an offence to which s 61HE of the *Crimes Act* currently applies, a judge:

- (a) must give one or more of the new directions:
 - (i) if there is a good reason to give the direction, or
 - (ii) if requested to give the direction by a party to the proceedings, unless there is a good reason not to give the direction
- (b) is not required to use a particular form of words in giving the direction, and
- (c) may, as the judge sees fit—
 - (i) give the direction at any time during a trial, and
 - (ii) give the same direction on more than one occasion during a trial.

Recommendation 8.3: Direction on the circumstances in which non-consensual sexual activity occurs

The *Criminal Procedure Act* should include a direction stating that non-consensual sexual activity can occur:

- (a) in many different circumstances, and
- (b) between different kinds of people including:
 - (i) people who know one another, or
 - (ii) people who are married to one another, or
 - (iii) people who are in an established relationship with one another.

Recommendation 8.4: Direction on responses to non-consensual sexual activity

The *Criminal Procedure Act* should include a direction stating that:

- (a) there is no typical or normal response to non-consensual sexual activity, and
- (b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
- (c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

Recommendation 8.5: Direction about a lack of physical injury, violence or threats

The *Criminal Procedure Act* should include a direction stating that:

- (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
- (b) the absence of injury or violence, or threats of injury or violence, does not mean that a person is not telling the truth about an alleged sexual offence.

Recommendation 8.6: Direction on responses to giving evidence

The *Criminal Procedure Act* should include a direction stating that:

- (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and
- (b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

Recommendation 8.7: Direction on behaviour and appearance of a complainant

The *Criminal Procedure Act* should include a direction stating that it should not be assumed that a person consented to a sexual activity because the person:

- (a) wore particular clothing or had a particular appearance, or
- (b) consumed alcohol or any other drug, or
- (c) was present in a particular location.

Recommendation 8.8: Amendments to existing directions

- (1) Section 293A of the *Criminal Procedure Act* should be amended to provide that a judge may:
 - (a) give the direction in this section at any time during a trial, and
 - (b) give the direction in this section on more than one occasion during a trial.
- (2) Section 294 of the *Criminal Procedure Act* should be amended to provide that a judge may:
 - (a) give the direction in this section at any time during a trial, and
 - (b) give the direction in this section on more than one occasion during a trial.

9. The meanings of “sexual intercourse”, “sexual touching” and “sexual act”

Recommendation 9.1: Recognising surgically constructed parts of the body

The *Crimes Act* should provide that it is not relevant for the purposes of Part 3, Division 10 whether a part of the body referred to in the Division is surgically constructed or not.

Recommendation 9.2: The definition of “sexual intercourse”

“Sexual intercourse” should be defined in s 61HA of the *Crimes Act* as:

- (a) the penetration to any extent of the genitalia or anus of a person by:
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person,
 except where the penetration is carried out for proper medical purposes, or
- (b) the introduction of any part of the genitalia of a person into the mouth of another person, or

- (c) the stimulation of the female genitalia with the mouth or tongue, or
- (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

Recommendation 9.3: Oral contact with the genitalia or anus

Consideration should be given as to whether the definition of “sexual intercourse” in s 61HA of the *Crimes Act* should include the touching or stimulation of any genitalia or the anus with the mouth or tongue.

Recommendation 9.4: The continuation of sexual touching and a sexual act

The definitions of “sexual touching” and “sexual act” in s 61HB and s 61HC of the *Crimes Act* should be amended to clarify that the definitions include the continuation of sexual touching or a sexual act, respectively.

Recommendation 9.5: Gender-neutral language

The definitions of “sexual touching” and “sexual act” in s 61HB and s 61HC of the *Crimes Act* should be amended to:

- (a) remove references to the breasts of a “female person, or transgender or intersex person identifying as female”, and
- (b) clarify that “breasts” includes the breasts of any person regardless of the person’s gender or sex.

10. Implementing and monitoring the reforms

Recommendation 10.1: Statutory review

- (1) A new section should be inserted into the *Crimes Act* requiring the Minister to undertake a review of s 61H, s 61HA, s 61HB, s 61HC and s 61HE (or any sections that are enacted in response to this Report to replace the existing s 61HE).
- (2) A new section should be inserted into the *Criminal Procedure Act* requiring the Minister to undertake a review of s 292 (or any section that is enacted in response to this Report that contains jury directions in relation to consent), s 293, s 293A, s 294 and s 294AA.
- (3) These reviews should:
 - (a) determine whether the policy objectives of these provisions remain valid and whether the terms of these provisions remain appropriate for securing those objectives
 - (b) be conducted as soon as possible after each five year period after the date of commencement of the amending Act enacted in response to our Report, and
 - (c) be tabled in each House of Parliament within 12 months after the review is required to be undertaken.
- (4) The review referred to at (2) should consider the relationship between any other reforms which are enacted in response to this Report and s 293 of

the *Criminal Procedure Act*, including recommended s 61HJ(1)(a) of the *Crimes Act*.

Recommendation 10.2: Education about the reforms

- (1) The NSW Department of Communities and Justice should fund the design and delivery of a targeted education program to accompany any reforms resulting from this Report.
- (2) The education program should be available, at a minimum, to judges, prosecutors, criminal defence lawyers and police.
- (3) The education program should include information about the nature and intended effect of the reforms, as well as research about trends and themes in sexual offending.

Recommendation 10.3: Research into complainant experiences

The NSW Department of Communities and Justice should fund research about the experiences of complainants of sexual offences in the NSW criminal justice system.

Recommendation 10.4: Education within the broader community

Government initiatives directed to educating the broader community about consent and sexual activity should be reviewed to ensure that they incorporate, and are consistent with, the reforms arising from this Report.

1. Introduction

In brief

This Report recommends changes to the NSW law of consent in relation to sexual offences. It is the result of extensive research and consultation over two years. This Chapter describes the scope of the review and situates it within the history of sexual offence law reform and broader public debate. It includes an overview of our key recommendations. It also explains our review process and outlines the content of the Report.

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- 1.1 The NSW Law Reform Commission is an independent statutory body which provides independent, expert law reform advice to the government on matters referred by the Attorney General.

Terms of reference

- 1.2 On 3 May 2018 the Attorney General asked the Commission to review and report on consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the *Crimes Act 1900* (NSW) ("*Crimes Act*") (now s 61HE). In undertaking the review, the Commission was to 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.

- 1.3 This is the final Report of that review. Changes to the *Crimes Act* and the *Criminal Procedure Act 1986* (NSW) ("*Criminal Procedure Act*") are recommended.¹ The Report includes draft legislation that reflects our recommendations, developed in consultation with the NSW Parliamentary Counsel's Office.
- 1.4 These recommended reforms are intended to simplify and modernise the law, clarify its objectives, and set clear standards for consensual sexual activity. The recommendations are founded on some fundamental principles. Those principles are that:
- every person has a right to choose whether or not to participate in sexual activity
 - consent should never be presumed (including in matrimonial or other ongoing relationships), and
 - consensual sexual activity involves ongoing and mutual communication, decision-making and agreement between participants.
- 1.5 These principles should be made explicit in the *Crimes Act* and should underpin any reforms to the law of consent.

Legislative history

- 1.6 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. Its role 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".²
- 1.7 The Taskforce included representatives of people who had experienced sexual assault, the legal profession, the judiciary, the courts, police, corrective services, health services, community services and academics.³ The Taskforce report, released in 2005, made 70 recommendations for reform.⁴
- 1.8 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.⁵
- 1.9 Section 61HA commenced operation on 1 January 2008. It applied to sexual assault offences.
- 1.10 At that time, the *Crimes Act* prescribed three offences of sexual assault. Section 61I provided:

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1. See Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900; Appendix D, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Criminal Procedure Act 1986.
 2. NSW, Attorney General's Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) iii.
 3. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584 (J Hatzistergos, Attorney General and Minister for Justice).
 4. NSW, Attorney General's Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 1–7.
 5. NSW, Attorney General's Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault: Discussion Paper* (2007).

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.

- 1.11 Section 61J created an aggravated form of the offence for which a maximum penalty of imprisonment for 20 years was prescribed. "Circumstances of aggravation" were defined in s 61J(2). Section 61JA created a further aggravated form of the offence (that the offence was committed in company) for which a maximum penalty of imprisonment for life was prescribed.
- 1.12 The elements common to all of these offences were:
- sexual intercourse by one person with another person
 - the absence of consent by the other person to the sexual intercourse, and
 - knowledge by the first person that the other person did not consent to the sexual intercourse.
- 1.13 "Sexual intercourse" was defined in s 61H(1). It meant:
- (a) 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 by:
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person,
 except where the penetration is carried out for proper medical purposes, or
 - (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
 - (c) cunnilingus, or
 - (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).
- 1.14 Section 61HA (to which the terms of reference were specifically directed) was expressed to apply to offences or attempts to commit offences against s 61I, s 61J and s 61JA. Section 61HA(2) defined consent to sexual intercourse as free and voluntary agreement to the sexual intercourse. Section 61HA(3) explained what was meant by knowledge of the absence of consent. A person knows that the other person does not consent if the person:
- knows that the other person does not consent
 - is reckless as to whether the other person consents, or
 - has no reasonable grounds for believing that the other person consents.
- 1.15 Section 61HA(4) and (5) specified circumstances in which a person did not consent to sexual intercourse. Section 61HA(6) specified circumstances in which it "may be established" that the person did not consent to the sexual intercourse. Section 61HA(7) stated:

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.

- 1.16 Section 61HA(8) specified that the circumstances in which it “may be established” that a person does not consent to sexual intercourse were not limited to those stated in s 61HA.
- 1.17 The full text of the former s 61HA can be found at Appendix A.
- 1.18 Other provisions of the *Crimes Act* also created offences of a sexual nature. These included s 61L (indecent assault), s 61M (aggravated indecent assault), s 61N (act of indecency), s 61O (aggravated act of indecency), and s 61P (attempts to commit offences against these sections). Section 61HA did *not* apply to these offences.
- 1.19 That s 61HA did not apply to these offences was apt to create some confusion in some criminal trials, notably where an accused was charged with a mix of offences to which s 61HA did apply, and others to which s 61HA did not apply.⁶
- 1.20 On 1 December 2018, during the course of our review, substantial amendments were made to the *Crimes Act* by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW). Sections 61L to 61P were omitted. Section 61H(1) (containing the definition of “sexual intercourse”) was omitted and re-enacted as a new s 61HA. New offences of sexual touching and sexual act (and aggravated versions thereof) were created (s 61KC–s 61KF). Sexual touching and sexual act were defined, respectively, in s 61HB and s 61HC.⁷ Each of the new offences involved conduct carried out to or towards another person intentionally and without the consent of the other person.
- 1.21 The previous s 61HA was omitted. It was substantially re-enacted as s 61HE. It is expressed in s 61HE(1) to apply to offences, and attempts to commit offences, against s 61I, s 61J and s 61JA (all of which remain unchanged), and to s 61KC, s 61KD, s 61KE and s 61KF. We refer to these, collectively, as “the sexual offences”. By that we do not intend to imply that they are the only sexual offences. There are, for example, a range of sexual offences to which s 61HE does not apply, because consent is not an element in these offences.⁸
- 1.22 Although the legislation has changed since the Attorney General’s reference, and the “s 61HA” which we were asked to review is not the s 61HA that appears in the current legislation, we interpret our task to be to “review and report on consent and knowledge of consent in relation to” the sexual offences to which the present s 61HE applies. The range of offences involved is wider than it was at the time of the reference, but the focus being on the manner in which consent to sexual activity is dealt with, the inquiry is not significantly, if at all, broadened. The provisions of s 61HE are not materially different from those of the former s 61HA, and can be found at Appendix B.

6. See *Holt v R* [2019] NSWCCA 50 [62]–[69].

7. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [3]–[8].

8. *Crimes Act 1900* (NSW) s 66A–66D, s 80AE(1).

Background to our review

- 1.23 The former s 61HA (now s 61HE) commenced operation on 1 January 2008, with the stated aim of shifting the way the community and key participants in the criminal justice system respond to people who have experienced sexual assault. Relying on the findings of an Australian Institute of Criminology study of juror attitudes and biases in sexual assault cases,⁹ the then Attorney General observed that:
- [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.¹⁰
- 1.24 Recent developments have led to questions as to whether the amendment has met its objectives.
- 1.25 The Attorney General’s reference in 2018 was prompted by community concern over the *Lazarus* case.¹¹ In that case, the complainant (Saxon Mullins) alleged that Luke Lazarus sexually assaulted her in an alleyway behind a nightclub in Sydney’s Kings Cross.¹² Ms Mullins detailed her experiences publicly in an interview on the Australian Broadcasting Corporation’s *Four Corners* program (see Chapter 3).¹³
- 1.26 The case involved a trial, a retrial and two appeals over five years.¹⁴ It centred on the issues of consent and Mr Lazarus’s knowledge that Ms Mullins did not consent. In two trials, the judges incorrectly applied the law on knowledge. The Court of Criminal Appeal ultimately decided not to order a third trial, on the ground that it would be unfair and oppressive to Mr Lazarus. Much criticism followed the *Lazarus* case. Many thought the case shows that the law must change.¹⁵
- 1.27 This review goes beyond one case. It has taken place at a time when discussions about sexual assault and harassment have become prominent in public discussion, both in Australia and overseas. The international #MeToo movement has brought the issues of sexual violence and consent to the forefront of public debate.¹⁶ People all over the world have come forward, sharing personal stories and supporting the

9. 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).

10. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584, 3585 (J Hatzistergos, Attorney General and Minister for Justice).

11. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, NSWDC, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378.

12. *Crimes Act 1900* (NSW) s 578A prohibits publication of the identities of complainants of certain sexual offences unless certain exceptions apply, including where the complainant has consented to publication. Ms Mullins’ name has been used with permission.

13. “I Am That Girl”, *ABC Four Corners* (7 May 2018) <www.abc.net.au/4corners/i-am-that-girl/9736126> (retrieved 17 September 2020).

14. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, NSWDC, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378.

15. See, eg, Inner City Legal Centre, *Preliminary Submission PCO44* [5], [8], [11]–[12]; Feminist Legal Clinic, *Preliminary Submission PCO53*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88* [6.7], [6.13]–[6.18]; S Mullins, *Preliminary Submission PCO97*, 1.

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

movement.¹⁷ The traction that the movement has gained shows that “the concern with what constitutes consent is real and far-reaching”.¹⁸

- 1.28 Concern about issues of consent is not confined to NSW. Numerous law reform bodies in other parts of Australia and overseas have recently examined their own laws of consent. In 2018, the Australian Capital Territory (“ACT”) Parliament’s Standing Committee on Justice and Community Safety held an inquiry into the Crimes (Consent) Amendment Bill 2018 (ACT). This Private Member’s Bill was designed to define consent “in line with modern community standards and reflective of innovations in the law”.¹⁹ The ACT Government has decided to await the findings of this review before developing or enacting changes to the law of consent.²⁰
- 1.29 The Queensland Law Reform Commission has conducted a review into “Queensland’s laws relating to consent and the excuse of mistake of fact”.²¹ The report was released publicly on 31 July 2020.²² In January 2020, the Australian Human Rights Commission released the results of its national inquiry into sexual harassment in Australian workplaces.²³
- 1.30 The Victorian Law Reform Commission (“VLRC”) is also reviewing Victoria’s laws relating to rape, sexual assault and associated adult offences. The Victorian Attorney General has asked the VLRC to “identify opportunities to embed and build upon previous reforms, identify the barriers to reporting and resolving sexual offences, and make recommendations to improve the justice system’s response”. The VLRC is to provide its final report by 31 August 2021.²⁴
- 1.31 Much has also happened internationally. In 2019, the findings of major reviews into the law of sexual offences were released in Northern Ireland, Ireland and Hong Kong.²⁵ In March 2020, Professor Elisabeth McDonald published the results of her four-year research project into trial processes in adult rape cases in New Zealand.²⁶
- 1.32 These developments are likely to have significant implications for law reform worldwide.

17. 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].

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

19. Explanatory Statement, Crimes (Consent) Amendment Bill 2018 (ACT) 2.

20. Legislative Assembly for the Australian Capital Territory, *Government Response to the Standing Committee on Justice and Community Safety Report on Inquiry into the Crimes (Consent) Amendment Bill 2018* (2019) 5.

21. Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report 78 (2020) appendix A.

22. Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report 78 (2020).

23. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020).

24. Victorian Law Reform Commission, “Improving the Response of the Justice System to Sexual Offences: Terms of Reference” <www.lawreform.vic.gov.au/projects/improving-response-justice-system-sexual-offences/tor> (retrieved 17 September 2020).

25. J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019); Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Report 122 (2019); Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences*, Report (2019).

26. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

Scope of our review

- 1.33 In accordance with the terms of reference (as explained above), recommendations to reform s 61HE are the major focus of this Report. Some recommendations for reform of associated legislation are also made.
- 1.34 The key recommended changes include simplification and modernisation of the structure and language of s 61HE, statements of principles in the legislation to explain the purpose of the law of consent, clarification of the meaning of consent and the law with respect to knowledge of non-consent, and modification of the list of circumstances in which the law provides that a person does not consent.
- 1.35 This Report also includes recommendations with respect to other parts of the law that directly relate to the issue of consent in relation to sexual activity. These include recommendations to:
- introduce new jury directions about consent to the *Criminal Procedure Act*
 - amend existing directions in the *Criminal Procedure Act* to reinforce that judges may give and repeat them at any time
 - make the definitions of sexual intercourse, sexual touching and sexual act more inclusive and clear
 - provide for a statutory review of enacted recommendations every five years, and
 - educate judges, lawyers and police about any changes to the law of consent arising from this Report.
- 1.36 Sexual offending is a complex problem. It cannot be addressed solely by reforming the law.²⁷ Sexual assault offences have low conviction and high attrition rates, and there are numerous reasons for this.²⁸ We have heard, for example, that criminal justice processes need to be improved and that complainants need to be better supported through the system.²⁹ We have also heard that police, prosecutors, lawyers and judges need to have a better understanding of sexual offending and the

27. See M Heath, *The Law and Sexual Offences Against Adults in Australia*, Issues No 4 (Australian Centre for the Study of Sexual Assault, 2005) 3; J Stubbs, "Sexual Assault, Criminal Justice and Law and Order" (2003) 14 *Women Against Violence* 14–15.

28. See [2.7]–[2.43].

29. See, eg, Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 3; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88* [7.3]; University of Newcastle Women's Collective, *Preliminary Submission PCO94*, 5–9; Positive Life NSW, *Submission CO10*, 3; Australia's National Research Organisation for Women's Safety, *Submission CO20*, 2–3; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO23*, 5–6; Community Legal Centres NSW, *Submission CO25*, 16–17; Domestic Violence NSW, *Submission CO29*, 8–9; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission CO30*, 10; Western NSW Community Legal Centre Inc and Western Women's Legal Support, *Submission CO34*, 5–6; Rape and Domestic Violence Services Australia, *Submission CO28* [6]–[7], [17], [195].

experience of complainants.³⁰ Most importantly, social and cultural understandings of consensual and non-consensual sexual activity need to change.³¹

- 1.37 These issues are important and interrelated. Holistic responses from government and the wider community are required to address them. We note that this review has occurred against the backdrop of a commitment by the NSW Government to prevent, and better address, instances of sexual assault. In 2018 the NSW Government published the *NSW Sexual Assault Strategy 2018–2021* with the stated aim of improving the existing services for people who experience sexual assault, raise community awareness of it, and improve prevention and education measures in families and the wider community.³²
- 1.38 The focus of this review is more specific: whether the approach to consent in the law should be reformulated. While we acknowledge the broader issues and intend for this Report to provide an impetus and basis for consent education, we are limited by our terms of reference in what we can recommend.

Our process

- 1.39 This Report is the product of extensive research and consultations with a wide range of people and groups.
- 1.40 We thank everyone who has taken the time to write or speak to us. We especially thank the people who have experienced sexual assault who shared their stories with us.
- 1.41 A full list of the submissions received and the consultations held can be found in the appendices to this Report. A selection of these submissions is available on our website: www.lawreform.justice.nsw.gov.au.

Preliminary submissions and consultations

- 1.42 To help us to identify issues relevant to the review, we began by inviting preliminary submissions from members of the community and key organisations and agencies. We received 110 preliminary submissions, representing an unprecedented level of engagement at the preliminary stage of a review. We held meetings with some of the key agencies and organisations with knowledge of the law of consent and its practical effect.

30. See, eg, Inner City Legal Centre, *Preliminary Submission PCO44* [19]; Australia's National Research Organisation for Women's Safety, *Preliminary Submission PCO105* [5]–[7]. See also Women's Legal Service NSW, *Submission CO27* [14.29]–[14.30]; Domestic Violence NSW, *Submission CO29*, 9.

31. See, eg, M Otlowski, *Preliminary Submission PCO45*, 36; B Moroney, *Preliminary Submission PCO48*, 1; White Ribbon Australia, *Preliminary Submission PCO79*, 2; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PCO83*, 3; Community Legal Centres NSW, *Submission CO25*, 17; Women's Legal Service NSW, *Submission CO27* [9].

32. NSW Government, *NSW Sexual Assault Strategy 2018–2021* (2018) 5.

Consultation Paper

- 1.43 In October 2018 we released a Consultation Paper which examined the elements of s 61HA (as it then was) and invited views on whether the law needs to change.³³ We received 36 submissions in response to the Consultation Paper, largely from legal agencies and advocacy groups.

Online survey

- 1.44 In order to encourage people who otherwise might not participate in a law reform process to have their say about the law of consent, in October 2018 we published an online survey using SurveyMonkey. Respondents accessed the survey through Facebook, Twitter, our website or our mailing list.
- 1.45 The survey consisted of 14 non-compulsory questions, divided into key topics. Some questions asked for an open-ended response, while others asked the respondent to answer “yes” or “no” or to tick responses they agreed with from a list of options. All questions gave respondents the option to explain their answers. To ensure people felt comfortable with sharing their views, we did not require respondents to disclose personal details.
- 1.46 This approach offered members of the public a quick and easy way to participate in the review. They could share their ideas without having to prepare a formal submission or engage with the more technical and legally complex questions raised in the Consultation Paper.
- 1.47 The number of responses was significantly larger than we have ever received to a Commission survey. In total, 3858 people accessed the survey. About half of the participants (1904 people) completed at least one substantive question. Just under a third of participants (1078 people) completed all the substantive questions.
- 1.48 We have included some of the survey results, as well as extracts from some individual responses, in this Report. A thematic summary of the responses to our survey can be found at Appendix E.

Face-to-face consultations

- 1.49 Between February and December 2019, we consulted with a wide range of groups and individuals. These included judges, prosecutors, defence lawyers, community legal centres, advocacy groups, police representatives, health professionals, community organisations and academics.
- 1.50 Consultations took place in metropolitan and regional NSW, as well as in Victoria and Tasmania. During the interstate visits, we spoke to legal experts about the approaches to consent in those States, and what they perceived to be the benefits and disadvantages of these approaches.

Our research

- 1.51 We conducted significant research into legislation, case law and law reform reports from NSW, other Australian states and territories, and internationally. We also

33. NSW Law Reform Commission, *Consent in Relation to Sexual Offences*, Consultation Paper 21 (2018).

undertook an extensive review of academic literature on issues relating to consent and sexual offending. A Bibliography is available on our website.

- 1.52 As many researchers acknowledge, it is difficult to conduct research into trial processes.³⁴ Complete trial transcripts (including the trial judge's summing up) can be difficult to obtain. When available, they are time-consuming to analyse in a thorough and systematic way. We were unable to undertake a comprehensive examination of trial transcripts within the scope of this review.
- 1.53 To obtain a sense of the themes and issues raised in sexual assault trials, we reviewed a sample of transcripts of 16 trials conducted in the District Court in 2017–2018. The trials involved at least one charge of sexual assault (although some involved multiple charges, including related offences such as aggravated sexual assault). The sample included a mixture of:
- trials resulting in guilty and not guilty verdicts
 - jury and judge-alone trials, and
 - trials heard in central Sydney, suburban Sydney and regional courts.
- 1.54 We also reviewed a sample of reasons for judgment issued by judges in 12 judge-alone trials. This research has informed our review and we refer to relevant transcripts and judgments in various chapters of this Report.
- 1.55 We are grateful for the assistance of the Courts, Tribunals and Service Delivery division of the NSW Department of Communities and Justice for its assistance in sourcing these transcripts and reasons.

Release of our draft proposals

- 1.56 We released Draft Proposals in October 2019 and invited public responses.³⁵ Given the complex and controversial nature of consent law, this allowed people to consider the detail of our proposed changes and to provide feedback before we finalised our recommendations. We particularly encouraged views about the practical effect of the proposals and whether they would achieve what we intended them to achieve. We received 51 submissions in response. We have taken these responses into account in preparing our final recommendations.

Chapter outline

- 1.57 The Report is organised as follows.
- 1.58 In **Chapter 2 – Sexual offences: trends and themes**, we examine data indicating that sexual offences are reported, charged, prosecuted and convicted at lower rates than other offences. Complainants who become involved in the criminal justice process report poor experiences. Certain groups experience sexual offending disproportionately to other groups. These trends and themes provide context for the review.

34. See [10.40].

35. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019).

- 1.59 In **Chapter 3 – The law of consent in NSW**, we set out a brief history of NSW’s legislative approach to the sexual offences. We explore the role of consent in the formulation of the sexual offences. Finally, we describe recent debates about the concept of consent and consider whether the law is operating as intended.
- 1.60 In **Chapter 4 – Structure and language**, we recommend that a new Subdivision on the law of consent should be created and inserted into Part 3, Division 10 of the *Crimes Act*. This Subdivision should group the law dealing with consent, the circumstances in which a person does not consent, and knowledge of non-consent into distinct sections. The Subdivision should apply to the offences to which s 61HE of the *Crimes Act* currently applies. The Subdivision should expressly recognise core principles of the communicative model of consent. The language of the Subdivision should be modern, consistent and inclusive.
- 1.61 In **Chapter 5 – The meaning of consent**, we recommend that there should be no change to the definition of consent to sexual activity as free and voluntary agreement to the sexual activity 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.
- 1.62 In **Chapter 6 – When a person does not consent**, we recommend that the law should continue to list circumstances in which a person does not consent to sexual activity, but should no longer list circumstances in which it “may be established” that a person does not consent. Many of the existing circumstances in which a person does not consent should be amended, and some new circumstances should be added.
- 1.63 In **Chapter 7 – Knowledge of non-consent**, we recommend that the *Crimes Act* should continue to specify three states of mind by which the accused person’s knowledge of the absence of consent may be proved. To clarify and simplify the law, we recommend amendments to the existing test concerning “no reasonable grounds for believing” that the complainant consents, and to the requirement for fact finders to consider any steps taken by the accused person to ascertain consent.
- 1.64 In **Chapter 8 – Jury directions and expert evidence**, we recommend that the *Criminal Procedure Act* should make provision for directions that address certain misconceptions about consensual and non-consensual sexual activity. These directions should only be given where the circumstances require and should be tailored to the evidence in the trial. No particular form of words should be prescribed, and trial judges should be able to give and repeat the directions at any time in the trial. It should be made clear that trial judges may give and repeat directions about delay in complaint, and differences in a complainant’s account, for which provision is already made, at any time.
- 1.65 In **Chapter 9 – The offences to which section 61HE applies**, we recommend that the definitions of sexual intercourse, sexual touching and sexual act should be made more inclusive, clear, and refer to the continuation of the intercourse, touching or act.
- 1.66 In **Chapter 10 – Implementation and monitoring**, we recommend that certain sections of the *Crimes Act* and the *Criminal Procedure Act* should be subject to regular review, to ensure that any changes to the law are operating as intended. So that the reforms can achieve their full impact, an education campaign should accompany their enactment. In the longer term, there must be broader research and community education about consent, sexual activity and the law.

2. Sexual offences: trends and themes

In brief

Sexual offences are reported, charged, prosecuted and convicted at lower rates than other offences. Complainants who become involved in the criminal justice process report poor experiences. Certain groups experience sexual offending disproportionately to other groups. These trends and themes provide the context for this review.

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- 2.1 The terms of reference require us to have regard, inter alia, to “all relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system”. This Chapter examines data on the reporting, charging, prosecution and conviction of sexual offending, and some of the key trends and themes that emerge from it. We look at the high attrition that occurs as allegations of sexual offences move through the criminal justice system and the reasons for this.
- 2.2 While the focus of our review is the law of consent, it is important to understand the wider environment within which this law operates. As one submission observes, “it is impossible to address [the law of consent] in isolation and without reference to underlying structural and systematic issues that further isolate and disempower victim-survivors of sexual assault”.¹
- 2.3 Four features of the statistics presented in this Chapter must be explained. First, since it is generally accepted that sexual offences are significantly under-reported,

1. Western NSW Community Legal Centre Inc and Western Women’s Legal Support, *Submission CO34*, 2.

the data only depicts a small proportion of non-consensual sexual incidents that occur in NSW.²

- 2.4 Second, there are gaps and limitations in the data that is available. For example, there is insufficient information about the outcomes of sexual assault reports made to police in NSW.³ There is also limited research about rates and experiences of non-consensual sexual activity among subgroups of the Australian population, including lesbian, gay, bisexual, queer, transgender, intersex and asexual (“LGBTQIA+”) people and people from culturally and linguistically diverse backgrounds.⁴
- 2.5 Third, this Chapter presents data collected by a number of agencies, including the Australian Bureau of Statistics (“ABS”) and the NSW Bureau of Crime Statistics and Research (“BOCSAR”). These organisations sometimes use the same terms to describe different types of conduct. For example, the BOCSAR data quoted in this Chapter refer to data about specific offences in the *Crimes Act*, including sexual assault,⁵ aggravated sexual assault,⁶ sexual touching⁷ and sexual act.⁸ However, the ABS data about “sexual assault” quoted in this Chapter generally refer to a wider range of non-consensual sexual activity that may not necessarily reflect specific offences.⁹
- 2.6 Fourth, the sexual act and sexual touching offences have only been in force since December 2018. The conclusions to be drawn from the data on attrition rates for these offences are therefore limited.

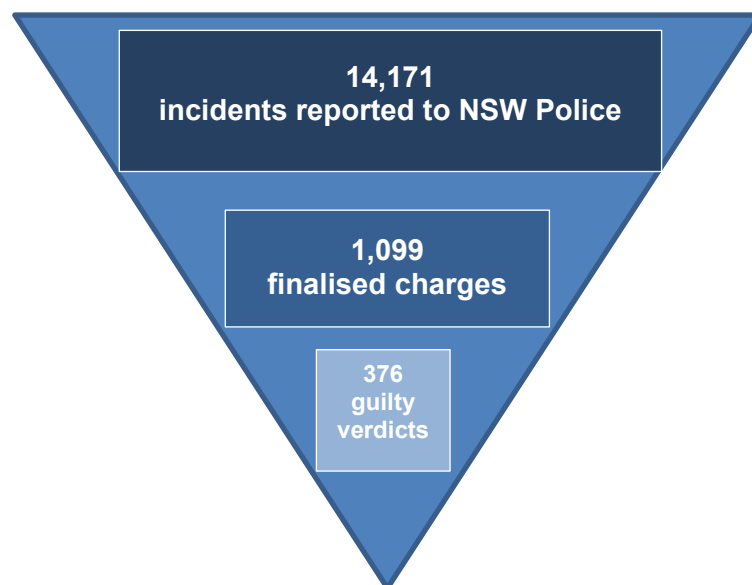
The under-reporting and high attrition rates of sexual offences

Despite decades of legislative reform, sexual offences remain under-reported, under-prosecuted and under-convicted.¹⁰

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2. See, eg, Elizabeth Evatt Community Legal Centre, *Submission CO24*, 3; Community Legal Centres NSW, *Submission CO25*, 16; Rape and Domestic Violence Services Australia, *Submission CO28* [12].
 3. See [2.18].
 4. See, eg, P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 36–44; T Mitra-Kahn, C Newbigin and S Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women*, State of Knowledge Paper, Landscapes Issues DD01 (ANROWS, 2016) 18–31.
 5. In this Chapter, all references to “sexual assault” refer to offences against *Crimes Act 1900* (NSW) s 61I.
 6. In this Chapter, all references to “aggravated sexual assault” refer to offences against *Crimes Act 1900* (NSW) s 61J (aggravated sexual assault) and s 61JA (aggravated sexual assault in company).
 7. In this Chapter, all references to “sexual touching” refer to offences against *Crimes Act 1900* (NSW) s 61KC (sexual touching) and s 61KD (aggravated sexual touching).
 8. In this Chapter, all references to “sexual act” refer to offences against *Crimes Act 1900* (NSW) s 61KE (sexual act) and s 61KF (aggravated sexual act).
 9. Australian Bureau of Statistics, *Crime Victimisation, Australia, 2018–2019* (catalogue no 4530.0, 18 February 2020) Glossary (definition of “sexual assault”); Australian Bureau of Statistics, *Personal Safety: Australia 2016* (catalogue no 4906.0, 8 November 2017) Glossary (definition of “sexual assault”); Australian Bureau of Statistics, *Recorded Crime – Victims, Australia, 2019* (catalogue no 4510.0, 8 July 2020) Glossary (definition of “sexual assault”).
 10. Rape and Domestic Violence Services Australia, *Submission CO28* [12] (footnotes omitted).

- 2.7 Prosecution of a complaint of non-consensual sexual activity may be abandoned, stopped or withdrawn at any stage of the criminal process, from the time of first report to police up to final adjudication in a court.
- 2.8 In this part of the Chapter, we explain how only a small proportion of alleged incidents of sexual offending result in conviction. Sexual offences are reported, charged, prosecuted and convicted at lower rates than other offences.¹¹ Offences drop out of the criminal justice system at each step of the process. This process is known as “attrition”. The result is that only a small proportion of allegations of sexual offences ever result in a final adjudication.
- 2.9 We should not be understood to be saying that every allegation of sexual offending should result in a conviction. Nevertheless, these figures give cause for concern.

Figure 2.1: Alleged sexual assaults and aggravated sexual assaults in NSW, July 2018 – June 2019



Source: NSW Bureau of Crime Statistics and Research¹²

Sexual offences are under-reported

- 2.10 The ABS estimates that almost one in five Australian women and one in 20 Australian men have experienced sexual assault since the age of 15.¹³ In one study

11. See, eg, K Daly and B Bouhours, “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries” (2010) 39 *Crime and Justice* 565, 565; F T Nitschke, B M McKimmie and E J Vanman, “A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants: Does Complainant Distress Influence Credibility?” (2019) 145 *Psychological Bulletin* 953, 953.

12. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680); NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 to June 2019: Number of Persons of Interest for Selected Offences under the Crimes Act 1900* (20-18679).

13. Australian Bureau of Statistics, *Personal Safety: Australia 2016*, Summary (catalogue no 4906.0, 8 November 2017).

from 2017, 1.6% of Australian women and 0.6% of Australian men had experienced sexual assault in the last 12 months.¹⁴

2.11 The ABS recently estimated that, between July 2018 and June 2019, only 28% of Australians aged 18 years and over who experienced sexual assault reported the incident to police.¹⁵ Some advocates and researchers suggest the rate is even lower than this.¹⁶

2.12 The number of sexual assaults recorded by police in NSW has increased every year between 2011 and 2019.¹⁷ It is difficult to know if this is because more sexual offences are being committed, or more are being reported or both.¹⁸ Some researchers argue that it is more likely due to a range of factors, such as:

increased openness of discussion of sexual assault, changes in social perception, improvements in services provision, community education campaigns, improved police training and the mandatory reporting of child sexual assault.¹⁹

2.13 A range of reasons may explain non-reporting of an alleged offence, including uncertainty about whether the conduct constituted an offence, poor recollection (because of intoxication, drug use, or that the person was asleep), fear of reprisals, concern about reactions of others, conflict about reporting an alleged offender known to the person, and scepticism about the criminal justice process. There may be others.

Sexual offences are under-charged and under-prosecuted

2.14 Of the alleged sexual offences that are reported to police each year, very few result in charges, and even fewer result in court proceedings.²⁰

2.15 As the table below shows, between July 2018 and June 2019, the NSW Police Force (“NSW Police”) recorded 14,994 incidents of alleged sexual assault, aggravated sexual assault, sexual touching or sexual act. However, in the same year, only 1207 charges for these offences were finalised. This represents 8% of the number of reported incidents.

14. Australian Bureau of Statistics, *Personal Safety: Australia 2016* (catalogue no 4906.0, 8 November 2017) Table 1.1.

15. Australian Bureau of Statistics, *Crime Victimisation, Australia, 2018–2019*, Summary (catalogue no 4530.0, 18 February 2020).

16. Elizabeth Evatt Community Legal Centre, *Submission CO24*, 3, citing L Kelly, *Routes to (in)Justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases* (Child and Woman Abuse Studies Unit, University of London, 2001) 16; K Daly and B Bouhours, “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries” (2010) 39 *Crime and Justice* 565, 568, 572, 609; C Butt, “Invisible Crime: About the Data” (4 December 2019) *The Sydney Morning Herald* <www.smh.com.au/national/invisible-crime-about-the-data-20190807-p52eo8.html> (retrieved 17 September 2020).

17. Australian Bureau of Statistics, *Recorded Crime – Victims, Australia, 2019* (catalogue no 4510.0, 9 July 2020) Table 6.

18. Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) 51.

19. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.2.1].

20. See, eg, K Daly and B Bouhours, “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries” (2010) 39 *Crime and Justice* 565, 609.

- 2.16 Similarly, in 2018–2019, NSW Police identified 15,654 persons of interest for these offences. In the same year, only 511 people faced a finalised charge. This represents 3% of the number of persons of interest.²¹

Table 2.1: Charging rates for sexual offences in NSW, July 2018 – June 2019

Offence	Number of incidents recorded by NSW Police	Number of finalised charges	Number of persons of interest recorded by NSW Police	Number of defendants with a finalised charge
Total	14,994	1,207	15,654	511
Sexual assault	5,294	539	5,395	201
Aggravated sexual assault	8,877	560	9,434	222
Sexual touching and aggravated sexual touching	629	74	631	62
Sexual act and aggravated sexual act	194	34	194	26

Source: NSW Bureau of Crime Statistics and Research²²

- 2.17 In 2018, 7% of sexual assaults reported to police in NSW led to legal action being taken. Of the rest:
- 69% were recorded as being “unsolved”
 - 18% led to no legal action being taken, and
 - 6% were recorded as “unfounded”.²³
- 2.18 It has been reported that NSW Police did not record the reasons why some of the sexual assault allegations made in 2018 did not lead to legal action. It is the only

21. NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics July 2018 to June 2019: Number of Persons of Interest for Selected Offences under the Crimes Act 1900* (20-18679); NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680); NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 to June 2019: Number of Defendants with a Finalised Charge and a Proven Charge* (20-18706).

22. NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics July 2018 to June 2019: Number of Persons of Interest for Selected Offences under the Crimes Act 1900* (20-18679); NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680); NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 to June 2019: Number of Defendants with a Finalised Charge and a Proven Charge* (20-18706).

23. I Ting, N Scott and A Palmer, “Rough Justice: How Police are Failing Survivors of Sexual Assault” (3 February 2020) *ABC News* <www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364> (retrieved 17 September 2020).

state or territory police force in Australia that does not keep this data.²⁴ This makes it difficult to get a full picture of the experiences of reporting alleged offences. For example, we do not know:

- how many allegations do not lead to legal action because the allegation is withdrawn by the complainant, and
- how many allegations do not lead to legal action because the police decide not to investigate or the prosecuting authorities decide not to proceed with charges.

2.19 In light of this, some commentators have called for NSW Police to instigate better data collection processes.²⁵

2.20 Research suggests a range of reasons why police may not prosecute following a reported sexual offence. They include:

- the alleged offender cannot be identified or located
- the police or prosecution do not believe there is enough evidence to prosecute a case, and/or
- witnesses to the offence are unwilling to make statements or give evidence in court.²⁶

2.21 The Office of the Director of Public Prosecutions (NSW) must consider a range of factors before determining to proceed with a prosecution, including:

- whether the evidence is capable of establishing each element of the offence
- whether there is a reasonable prospect of conviction by a reasonable jury
- the likely length and expense of a trial
- any mitigating or aggravating circumstances, and
- the attitude of a material witness to a prosecution.²⁷

2.22 In NSW, there are no specific guidelines referable to decisions to prosecute sexual offences.²⁸ Such guidelines exist elsewhere, including in New Zealand and the United Kingdom ("UK").²⁹

24. I Ting, N Scott and A Palmer, "Rough Justice: How Police are Failing Survivors of Sexual Assault" (3 February 2020) *ABC News* <www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364> (retrieved 17 September 2020).

25. I Ting, N Scott and A Palmer, "Rough Justice: How Police are Failing Survivors of Sexual Assault" (3 February 2020) *ABC News* <www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364> (retrieved 17 September 2020).

26. K Daly and B Bouhours, "Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries" (2010) 39 *Crime and Justice* 565, 609. See also 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, 283.

27. NSW, Office of the Director of Public Prosecutions, *ODPP Prosecution Guidelines* (2007) Guideline 4 <www.odpp.nsw.gov.au/prosecution-guidelines-0> (retrieved 17 September 2020).

28. Information provided by the Office of the Director of Public Prosecutions (24 January 2020).

29. New Zealand, Crown Law, *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (2019); United Kingdom, Crown Prosecution Service, "Rape and Sexual Offences: Chapter 2:

- 2.23 Even if the police and prosecution consider the complainant to be credible and recognise the incident as an offence, they might decide not to prosecute a case because they think a conviction is unlikely.³⁰ This might be because they consider that a judge or jury is unlikely to be persuaded beyond reasonable doubt, or for other reasons. In such situations, they may wish to avoid exposing the complainant to the potentially traumatising experience of giving evidence at trial if the case will not lead to a conviction.³¹
- 2.24 Some commentators argue that in making the decision whether to proceed with a prosecution, decision-makers can be influenced by misconceptions and assumptions about sexual assault.³² In one American study, researchers found that police officers were less likely to prosecute cases that involved “problematic victims” (such as sex workers or people who were intoxicated at the time of the alleged offence) because they believed jury convictions would be less likely in these cases.³³
- 2.25 While there may be a statistical basis for this, it also means that these complainants are not always provided the opportunity to put their version of what happened before a court. These decisions may therefore reinforce problematic beliefs about “deserving” and “undeserving” complainants, and entrench systemic inequalities among these groups.

Sexual offence charges are withdrawn more than other offences

- 2.26 Sexual assault charges are more likely to be withdrawn by the police or the prosecution than charges for other serious offences. This means that an investigation or prosecution commences, but is stopped before the alleged offender goes to trial or before a verdict is given. In sexual offence cases, a common reason for withdrawing charges is that the complainant decides to cease participation in an investigation, prosecution or trial.
- 2.27 NSW Police do not record data on what proportion of reports to police are later withdrawn by complainants during the investigation stage. The statistics in all the other Australian states and territories suggest that the withdrawal rate for sexual assault allegations at this stage is significant. In 2018, the proportion of sexual

Sexual Offences Act 2003: Principal Offences, and Sexual Offences Act 1956: Most Commonly Charged Offences” (9 July 2020) <www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-sexual-offences-act-2003-principal-offences-and> (retrieved 17 September 2020).

30. Women’s Domestic Violence Court Advocacy Services NSW Inc, *Submission CO30*, 6.

31. NSW Law Reform Commission, Consent Review Survey, Response #2484 (Qu 5).

32. See, eg, E O’Neal and B Hayes, “‘A Rape is a Rape, Regardless of What the Victim Was Doing at the Time’: Detective Views on How ‘Problematic’ Victims Affect Sexual Assault Case Processing” (2020) 45 *Criminal Justice Review* 26, 26–27, 37–39; I Ting, N Scott and A Palmer, “Rough Justice: How Police are Failing Survivors of Sexual Assault” (3 February 2020) *ABC News* <www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364> (retrieved 17 September 2020).

33. E O’Neal and B Hayes, “‘A Rape is a Rape, Regardless of What the Victim Was Doing at the Time’: Detective Views on How ‘Problematic’ Victims Affect Sexual Assault Case Processing” (2020) 45 *Criminal Justice Review* 26, 33–36, 37–39. See also B F Vik and others, “Is Police Investigation of Rape Biased by Characteristics of Victims?” (2020) 2 *Forensic Science International: Synergy* 98, 99.

assault allegations that were withdrawn ranged from 9% (Tasmania) to 29% (Western Australia).³⁴

- 2.28 Data is available in NSW on charges that are withdrawn during the prosecution stage. Between July 2018 and June 2019, 1099 individual charges of sexual assault or aggravated sexual assault were finalised.³⁵ Of these charges, 21% (230 out of 1099 charges) were withdrawn by the prosecution.
- 2.29 This rate was similar for sexual touching and sexual act offences, with 16% (12 out of 74) and 18% (6 out of 34) of charges withdrawn, respectively.³⁶
- 2.30 Of all defendants who appeared before NSW courts for all offences, 4% had all their charges withdrawn in the same period.³⁷ This means the withdrawal rate for sexual assault is almost five times higher than the average withdrawal rate for all offences.
- 2.31 There are many reasons why an allegation of a sexual offence may be withdrawn. Some of these reasons are the same as those explaining why alleged offences may not be reported, or why reporting may be delayed. Shame, fear of the alleged offender, and reluctance to go through the criminal justice system are some reasons. Some cases are withdrawn after a trial has started if the complainant decides not to proceed.³⁸ This may occur if the complainant finds giving evidence too distressing.³⁹

Charges for sexual offences result in a lower proportion of convictions than charges for other offences

- 2.32 Sexual assault charges are less likely to result in a “guilty” finding than other serious offences.
- 2.33 Between July 2018 and June 2019 in NSW, 423 defendants were charged with 1099 individual charges of sexual assault or aggravated sexual assault.⁴⁰ Of these

34. I Ting, N Scott and A Palmer, “Rough Justice: How Police are Failing Survivors of Sexual Assault” (3 February 2020) ABC News <www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364> (retrieved 17 September 2020).

35. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680). This includes offences against *Crimes Act 1900* (NSW) s 61I, s 61J, s 61JA.

36. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680).

37. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics July 2014 to June 2019* (2020) Table 3.

38. Office of the Director of Public Prosecutions NSW, “Main Steps in the Prosecution of a Serious Crime” (2020) <www.odpp.nsw.gov.au/main-steps-prosecution-serious-crime> (retrieved 17 September 2020).

39. K Daly, *Conventional and Innovative Justice Responses to Sexual Violence*, Issues No 12 (Australian Centre for the Study of Sexual Assault, 2011) 6. See also N Precel, R Dexter and E Marsh, “Invisible Crime: Are We Failing Victims of Sexual Violence?” (13 September 2019) *The Sydney Morning Herald* <www.smh.com.au/interactive/2019/are-we-failing-victims-of-sexual-violence-v-2/> (retrieved 17 September 2020).

40. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 to June 2019: Number of Defendants with a Finalised Charge and a Proven Charge* (20-18706); NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680). This includes offences against *Crimes Act 1900* (NSW) s 61I, s 61J, s 61JA.

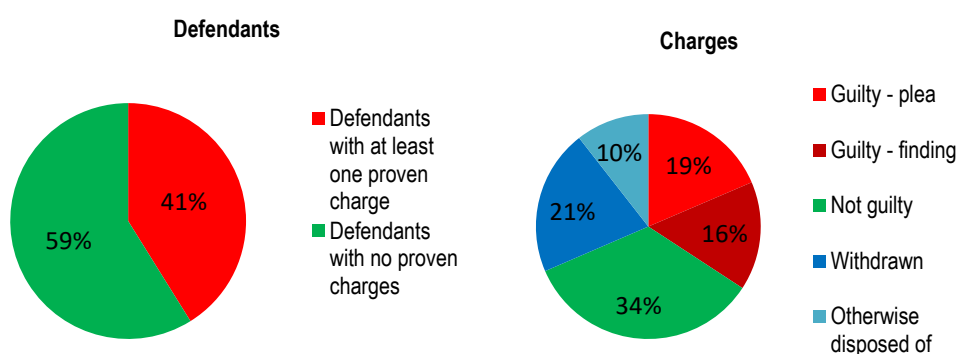
423 defendants, 174 (41%) were found guilty of at least one offence (this is called having a “proven charge”).

2.34 Further, of these 1099 charges:

- 376 (34%) had a “guilty” verdict (this is called being “proven”)
- 377 (35%) had a “not guilty” verdict, and
- 346 (31%) were otherwise disposed of or withdrawn.⁴¹

2.35 These statistics are demonstrated in the charts below:

Figure 2.2: Sexual assault and aggravated sexual assault charges before NSW courts, July 2018 – June 2019



Source: NSW Bureau of Crime Statistics and Research⁴²

2.36 The conviction rates for these offences are significantly lower than those for other serious offences in the same year. This is demonstrated in the Table below:

41. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680).

42. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 to June 2019: Number of Defendants with a Finalised Charge and a Proven Charge* (20-18706); NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680).

Table 2.2: “Proven” rates for sexual offence charges, July 2018 — June 2019

Offence	Percentage of charges that were proven	Percentage of defendants with at least one proven charge
Sexual assault and aggravated sexual assault	44%	56%
Murder	51%	47%
Manslaughter	78%	77%
Assault	62%	72%
Robbery	62%	68%

Source: NSW Bureau of Crime Statistics and Research⁴³

- 2.37 The percentage of charges of sexual touching and sexual act offences that were proven between July 2018 and June 2019 was higher than for sexual assault offences (58% and 68%, respectively).⁴⁴ The number of defendants with at least one proven charge for these offences was also higher (61% for sexual touching and 73% for a sexual act).⁴⁵
- 2.38 There are many possible reasons why conviction rates for sexual assault are lower than for other offences. In sexual offence trials, there is sometimes no physical evidence.⁴⁶ Often the only eyewitnesses to the alleged offence are the accused person and the complainant. As accused persons may choose not to give evidence, cases can rest heavily on the evidence of the complainant.⁴⁷
- 2.39 If the jury has any reasonable doubt about the honesty or reliability of the complainant’s evidence, there should not be a conviction. Such doubt may result from distress or shame displayed by the complainant, or by deficiencies in the complainant’s memory about the alleged offence. These responses are common, given the “exceptionally difficult” experience of giving evidence in a sexual offence trial.⁴⁸

43. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics July 2014 to June 2019* (2020).

44. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018–2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault* (ap20-18680).

45. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 to June 2019: Number of Defendants with a Finalised Charge and a Proven Charge* (20-18706).

46. See, eg, N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, 2013) 7.

47. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO23*, 3.

48. P Tidmarsh, M Powell and E Darwinkel, “‘Whole Story’: A New Framework for Conducting Investigative Interviews about Sexual Assault” (2012) 4 *Journal of Investigative Interviewing: Research and Practice* 33, 33–34.

Misconceptions about sexual offences may affect conviction rates

- 2.40 Some suggest that the low conviction rates can be explained by stereotypical assumptions and common misconceptions about sexual behaviour, sexual relations and sexual offending. That such assumptions and misconceptions exist is supported by research. In 2017 Australia's National Research Organisation for Women's Safety conducted a survey into Australians' attitudes to violence against women and gender equality. Similar surveys had been conducted in 1995, 2009 and 2013. The results of the 2017 survey were published, with comparative tables from the previous surveys. The 2017 results showed positive change in knowledge and attitudes over those years. Nevertheless, the research exposed that some concerning misconceptions persist among a minority of respondents.⁴⁹
- 2.41 These misconceptions are worth addressing here because they can affect the perception of consent to sexual activity and, therefore the outcome of criminal proceedings, and decisions whether to prosecute when a complaint of sexual assault is made.
- 2.42 Contrary to some lingering misconceptions:
- the majority of sexual assaults are committed by a person known to the complainant (partner, friend, acquaintance or colleague) and in a residential location⁵⁰
 - false allegations of sexual assault are not common⁵¹
 - many (but not all) sexual assaults do not follow physical violence but follow psychological coercion or intimidation⁵²
 - sexual assaults do not always result in physical injuries to the complainant, and of those that do, the injuries tend to be minor⁵³

49. K Webster and others, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 3 (Australian National Research Organisation for Women's Safety, 2018) 5–9, 48–54, 84, 89–91.

50. Australian Bureau of Statistics, *Personal Safety: Australia 2016* (catalogue no 4906.0, 8 November 2017) Table 5.1; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 11.

51. See, eg, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 9; K Webster and others, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 3 (Australian National Research Organisation for Women's Safety, 2018) 50.

52. See, eg, K Webster and others, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 3 (Australian National Research Organisation for Women's Safety, 2018) 54, citing D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Australian Institute of Criminology, 2003) 30; N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, 2013) 6.

53. See, eg, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 6; K Webster and others, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 3 (Australian National Research Organisation for Women's Safety, 2018) 54, citing D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Australian Institute of Criminology, 2003) 30;

- many people who experience sexual assault do not physically or verbally resist;⁵⁴ a common and recognised response to a traumatic situation, including sexual assault, is to “freeze”,⁵⁵ and
- many people who experience sexual assault do not immediately report the event.⁵⁶

2.43 Further, the low conviction rate may also be in part due to misunderstandings about or non-acceptance of the following propositions:

- consumption of alcohol or drugs cannot be taken to be an indication of consent to sexual activity⁵⁷
- consent to one form of sexual activity is not an indication of consent to another form of sexual activity⁵⁸
- consent to sexual activity on one occasion is not an indication of consent to sexual activity on another occasion⁵⁹
- consent to sexual activity with one person is not an indication of consent to sexual activity with another person,⁶⁰ and
- adopting a particular style of dress or conduct is not an indication of consent to sexual activity.⁶¹

R R Zilkens and others, “Sexual Assault and General Body Injuries: A Detailed Cross-Sectional Australian Study of 1163 Women” (2017) 279 *Forensic Science International* 112, 115.

- 54. See, eg, N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, 2013) 5, 18–19; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 7; E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 283.
- 55. See, eg, 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, 932.
- 56. See, eg, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 4; Royal Commission into Institutional Responses to Child Sexual Abuse: *Criminal Justice Report*, Parts VII–X and Appendices (2017) 110–111.
- 57. See, eg, M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(b), example 9.
- 58. See, eg, N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, 2013) 20; M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(d), example 11.
- 59. See, eg, *McGrory v R* [2018] NSWCCA 226 [53]; M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(c), example 10.
- 60. See, eg, *R v Burton* [2013] NSWCCA 335, 237 A Crim R 238 [70].
- 61. See, eg, M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(a), example 8.

Complainant experiences of the criminal justice system are poor

2.44 Many submissions to this review raise concerns about the experiences of complainants of sexual offences in the criminal justice system. These concerns influence the data presented in this Chapter in complex and interrelated ways. For example, a negative experience of the criminal justice system may lead to a complainant's reluctance to report another alleged sexual offence.⁶² Experiencing distress at trial can also impede "the ability of a complainant to give the best evidence" and therefore limit "the amount of relevant and reliable information available to the jury".⁶³

2.45 Negative perceptions of the criminal justice system may also deter people who experience sexual offending from reporting an alleged crime.⁶⁴ For example, one survey respondent says:

Having been in a situation where I was sexually assaulted without being able to give consent ... I never even went to the police because I knew there was no point. It would've led to more trauma, dealing with certain stigmas and opinions, defence lawyers in court beating you down and humiliating you in front of an entire court room of people and having to constantly worry about coming out with no conviction against the perpetrator and the whole ordeal being a big waste of time.⁶⁵

2.46 Another respondent says:

[M]ost victims I know, including myself, barely consider reporting as the chances of prosecution and even subsequent conviction are so low that the re-traumatisation is not worth it and the system rarely is a deterrent for perpetrators.⁶⁶

Some complainants have poor experiences reporting offences

2.47 Many submissions raise concerns about the experiences people have when reporting an alleged offence to the police. We have heard that some people reporting offences have:

- been disbelieved
- had their experiences trivialised
- been re-traumatised by having to tell their story numerous times
- not been informed of available supports, and/or

62. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 8; Western NSW Community Legal Centre Inc and Western Women's Legal Support, *Submission CO34*, 5.

63. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 40.

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

65. NSW Law Reform Commission, Consent Review Survey, Response #434 (Qu 4).

66. NSW Law Reform Commission, Consent Review Survey, Response #480 (Qu 4).

- not been informed of how the investigation will proceed.⁶⁷
- 2.48 This can be a particular issue in situations where a person reports an alleged sexual offence committed by a partner, as misconceptions about the nature of sexual assault in domestic violence situations exist and may influence the outcome of any proceedings.⁶⁸
- 2.49 There are also concerns about the ability of particular groups to access police services. For example:
- people with disability may face barriers in reporting offences as their experiences may be disbelieved or minimised⁶⁹
 - geographical isolation, small communities and a lack of facilities (among other issues) can make it challenging for complainants from rural, regional and remote areas to report alleged offences and participate in the criminal justice system⁷⁰
 - sex workers may experience discrimination in the community and from service providers, and stereotypes regarding the nature of sex work may deter them from reporting an alleged offence,⁷¹ and
 - Indigenous women or women from culturally and linguistically diverse backgrounds may face cultural and language barriers to reporting offences, particularly where they cannot access translators or culturally appropriate support services.⁷²

Some complainants have poor experiences at trials

- 2.50 Another key issue raised by submissions is the experience of sexual offence complainants at trials.⁷³ As we discuss above, the evidence of the complainant is usually central to a sexual offence case. One of the key strategies for the defence is

67. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 6; Women's Legal Service NSW, *Submission CO27* [88]–[90]; Domestic Violence NSW, *Submission CO29*, 8; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission CO30*, 7, 11. See also G Bath, "I Started to Doubt Myself.' If Sophie is Ever the Victim of Sexual Assault Again, She Won't be Reporting It", *MamaMia* (3 October 2019) <www.mamamia.com.au/reporting-rape-in-australia/> (retrieved 17 September 2020).

68. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 6; Australia's National Research Organisation for Women's Safety, *Submission CO20*, 4; Women's Legal Service NSW, *Submission CO27* [88].

69. People with Disability Australia, *Preliminary Submission PCO104*, 2; Australia's National Research Organisation for Women's Safety, *Submission CO20*, 6.

70. Community Legal Centres NSW, *Submission CO25*, 16; Western NSW Community Legal Centre Inc and Western Women's Legal Support, *Submission CO34*, 2, 5–6.

71. P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 43.

72. T Mitra-Kahn, C Newbiggin and S Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women*, State of Knowledge Paper, Landscapes Issues DD01 (ANROWS, 2016) 24–25; Western NSW Community Legal Centre Inc and Western Women's Legal Support, *Submission CO34*, 4. See also K Nguyen, "Sexual Assault Victims in Ethnically Diverse Suburbs Face 'Tremendous Hurdles' in Coming Forward" (1 February 2020) *ABC News* <www.abc.net.au/news/2020-02-01/nsw-police-struggle-with-traumatised-sexual-assault-victims/11909384> (retrieved 17 September 2020).

73. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 7–8; Western NSW Community Legal Centre Inc and Western Women's Legal Support, *Submission CO34*, 5; Law Society of NSW, *Submission CO76*, 2.

therefore to challenge the credibility of the complainant. This means cross-examination may take on a personal dimension not always seen in other criminal trials.⁷⁴

- 2.51 Giving evidence about intimate matters, and being cross-examined, can be “challenging”, “distressing” and “traumatising” for complainants.⁷⁵ Some complainants describe this process as a “second rape”.⁷⁶
- 2.52 In 1996, a study of sexual assault proceedings in the NSW District Court found that:

[M]uch of the complainant’s credit that is tested in a sexual assault trial is unrelated to her powers of observation and veracity. Her manner of dress, her perceived reaction to the crime and her lifestyle seem to be unfairly deemed relevant to the determination of the defendant’s guilt or innocence. The complainant often has the experience of being forced or bullied into proving herself innocent.⁷⁷
- 2.53 Evidence suggests that this finding still holds today. For example, one respondent to our survey says:

My experience in court was completely humiliating and insulting and should be reviewed alongside the legislation.⁷⁸
- 2.54 The experience of giving evidence at trial can be particularly traumatic for complainants if prosecutors, defence lawyers or judges rely on, or try to persuade the jury of, stereotypical assumptions about sexual offending.⁷⁹
- 2.55 Recent law and policy reforms address some of the challenges that complainants face at trial. These include:
 - restrictions on cross-examination of complainants about sexual history⁸⁰
 - the prohibition of cross-examination of a complainant by a self-represented accused⁸¹
 - the prohibition of the publication of the identities of complainants without their permission⁸²

74. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) [24.74].

75. Domestic Violence NSW, *Preliminary Submission PCO91*, 7. See also N Funnell and others, “Survivors Speak: How the Criminal Justice System Responds to Sexual Violence” (2019) 31 *Bond Law Review* 21, 39–41.

76. See, eg, J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [66], [8.58]; E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 23.

77. NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) 149 (emphasis in original).

78. NSW Law Reform Commission, Consent Review Survey, Response #3767 (Qu 4).

79. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 40.

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

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

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

- procedures allowing complainants to give evidence by closed-circuit television and with the help of a support person⁸³
 - therapy dogs in courts,⁸⁴ and
 - a separate case list in the District Court of NSW and a court practice note for sexual assault matters to ensure matters are managed efficiently and in a timely way, and to minimise uncertainty and anxiety for complainants.⁸⁵
- 2.56 However, some suggest that more fundamental reforms are needed to reduce the trauma of giving evidence in a sexual offence trial. One suggestion was that further consideration be given to introducing judge-alone trials, specialist courts or restorative justice processes for sexual offence cases.⁸⁶

Some groups disproportionately experience sexual offences

- 2.57 While sexual offending affects all sectors of the Australian community, some groups are disproportionately affected.

Women and girls

- 2.58 Women and girls are far more likely to experience sexual offences than men and boys, although men and boys can, and do, experience them too.⁸⁷ According to the ABS, 8810 women were recorded by NSW Police as having experienced a sexual assault in 2019, compared to 2173 men.⁸⁸

Young people

- 2.59 Young people experience high rates of sexual offending.⁸⁹ In NSW, young women aged 15–19 experienced the highest rates of sexual assault across all demographic groups in 2019.⁹⁰

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

84. 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 17 September 2020).

85. District Court of NSW, *Criminal Practice Note 6: Sexual Assault Case List*, 27 April 2007.

86. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, rec 15, 39–40; Australia’s National Research Organisation for Women’s Safety, *Submission CO20*, 3; Community Legal Centres NSW, *Submission CO25*, 18–20; Rape and Domestic Violence Services Australia, *Submission CO28* [195], [234]; Domestic Violence NSW, *Submission CO29*, 9; Women’s Domestic Violence Court Advocacy Services NSW, *Submission CO30*, 10; Corrective Services NSW, Victims Support Unit, *Submission CO31*, 1; M Nittis and C Andrighetto, *Submission CO35*, 3.

87. See, eg, Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2019) 8, 16–17; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 14.

88. Australian Bureau of Statistics, *Recorded Crime – Victims, Australia, 2019* (catalogue no 4510.0, 9 July 2020) Table 7.

89. See, eg, K Daly and B Bouhours, “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries” (2010) 39 *Crime and Justice* 565, 572; P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 39.

Women with disability

- 2.60 Women with disability experience disproportionately high rates of sexual assault.⁹¹ Women with intellectual disability are particularly vulnerable.⁹² Australia's National Research Organisation for Women's Safety estimates that about 90% of Australian women with intellectual disability have experienced sexual abuse.⁹³

Aboriginal and Torres Strait Islander women

- 2.61 Aboriginal and Torres Strait Islander women experience disproportionate rates of sexual assault.⁹⁴ According to the ABS, in 2019, the sexual assault victimisation rate for Aboriginal and Torres Strait Islander people in NSW was around three times higher than that for non-indigenous people.⁹⁵

Sex workers

- 2.62 Sex workers have a higher risk of experiencing sexual assault at work than other professionals.⁹⁶ Street based sex workers are particularly vulnerable.⁹⁷

Women living in rural and regional areas

- 2.63 While research on rural and regional communities is limited, it suggests that women in these communities may be at higher risk of all forms of violence, including sexual assault.⁹⁸

90. Australian Bureau of Statistics, *Recorded Crime – Victims, Australia, 2019* (catalogue no 4510.0, 9 July 2020) Table 7.

91. See, eg, Australia's National Research Organisation for Women's Safety, *Submission CO20*, 2, 6–7; Women's Safety NSW, *Submission CO74*, 8; T Mitra-Kahn, C Newbigin and S Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women*, State of Knowledge Paper, Landscapes Issues DD01 (ANROWS, 2016) 26–27; Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2019) 94.

92. P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 38.

93. J Maher and others, *Women, Disability and Violence: Barriers to Accessing Justice: Final Report*, Horizons 2 (ANROWS, 2018) 27, citing VicHealth, *Preventing Violence against Women in Australia*, Research Summary (2011) 5.

94. Australia's National Research Organisation for Women's Safety, *Submission CO20*, 2, 5–6.

95. Australian Bureau of Statistics, *Recorded Crime – Victims, Australia, 2019* (catalogue no 4510.0, 9 July 2020) Table 16.

96. P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 43. See also A Quadara, *Sex Workers and Sexual Assault in Australia: Prevalence, Risk and Safety*, Issues No 8 (Australian Centre for the Study of Sexual Assault, 2008) 8. We note that there is very limited data on this issue, but that which exists indicates there are high victimisation rates among this group.

97. P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 43, citing J Prior, P Hubbard and P Birch, "Sex Worker Victimization, Modes of Working, and Location in New South Wales, Australia: A Geography of Victimization" (2013) 50 *Journal of Sex Research* 574, 574.

98. P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 41. See also Australia's National Research Organisation for Women's Safety, *Submission CO20*, 2;

- 2.64 In NSW, the highest rates of sexual assault and other sexual offences over the 12 months to March 2020 were in the Far West and Orana and New England and North West regions. The lowest rates were in the Greater Sydney region.⁹⁹

Transgender and gender diverse people

- 2.65 Transgender and gender diverse people, particularly those who are assigned female at birth, experience high rates of sexual assault.¹⁰⁰ According to a recent national study, transgender and gender diverse people “reported rates of sexual violence or coercion nearly four times higher than found in the general Australian public”.¹⁰¹
- 2.66 There is limited and conflicting research on the prevalence of sexual offences among other groups of LGBTQIA+ people in Australia.¹⁰²

Women from culturally and linguistically diverse backgrounds

- 2.67 Women from culturally and linguistically diverse backgrounds may be more likely to experience sexual assault.¹⁰³ However, there are well-documented challenges in gathering accurate data among these groups, and there are conflicting findings among studies that have been done.¹⁰⁴

How the statistics have informed this review

- 2.68 Between July 2018 and June 2019, the number of sexual assaults proven in a NSW court represented less than 3% of all those reported to the police. Assuming that only 28% of alleged sexual assaults are reported – which is a generous estimate¹⁰⁵ – the number of those proven drops to less than 1% of all alleged sexual assaults. This demonstrates the size of the problem of attrition.
- 2.69 The statistics discussed in this Chapter demonstrate significant issues with responses of the NSW criminal justice system to allegations of sexual offending. Some of the challenges are cultural, such as the influence of misconceptions and

99. NSW Bureau of Crime Statistics and Research, *New South Wales Recorded Crime Statistics: Quarterly Update March 2020* (2020) 22.

100. See, eg, P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 43; D Callander and others, *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings* (Kirby Institute, 2019) 10.

101. D Callander and others, *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings* (Kirby Institute, 2019) 10.

102. See, eg, T Mitra-Kahn, C Newbigin and S Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women*, State of Knowledge Paper, Landscapes Issues DD01 (ANROWS, 2016) 29.

103. Australia's National Research Organisation for Women's Safety, *Submission CO20*, 2.

104. P Cox, *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation*, State of Knowledge Paper, Landscapes Issue 13 (ANROWS, 2015) 37–38; T Mitra-Kahn, C Newbigin and S Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women*, State of Knowledge Paper, Landscapes Issues DD01 (ANROWS, 2016) 22.

105. See [2.11].

assumptions about sexual assault. However, others relate to the legal and procedural framework (for example, the potentially distressing nature of cross-examination of complainants on issues relating to consent).

- 2.70 The statistics raise questions about what matters require reform in NSW. Some of the problems we have mentioned may require changes that address misconceptions about sexual assault, such as education initiatives (see Chapter 10). Some may require changes to the wider criminal justice system, which is beyond the scope of this review. However, there is also a need to consider the ways in which specific legal standards – including the law of consent – contribute to the outcomes described in this Chapter. We have kept this in mind over the course of our review.

3. The law of consent in NSW

In brief

This Chapter sets out a brief history of NSW’s legislative approach to sexual offences. It explores the role of consent in the formulation of sexual offences. Finally, it describes recent debates about the concept of consent and considers whether the law is operating as intended.

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- 3.1 “Consent” is a fundamental part of the law of sexual offences in NSW. The prosecution must prove that the complainant did not consent to the sexual activity and that the accused person knew that there was no consent.
- 3.2 While consent has long been part of the law of sexual offences, the way the law approaches consent has changed over time. In recent years, the law has moved towards a communicative model of consent. However, some argue that the law is not operating as intended and that the objectives behind it have not been realised.

Some historical context

- 3.3 Before 1981, in NSW the offence of rape was as prescribed 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.
- 3.4 At common law, rape meant “carnal knowledge of a woman against her will”.¹ “Carnal knowledge” meant penile-vaginal penetration. This meant that other forms of non-consensual sexual intercourse did not constitute rape, but could constitute other offences, such as indecent assault. It also meant that only men could commit the offence of rape and only women could experience it.²

1. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.2.3].

2. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.2.3].

- 3.5 Section 62 (now repealed) provided that “carnal knowledge” was “deemed complete upon proof of penetration only”. A woman who consented to “carnal knowledge” could not revoke her consent “until after the carnal knowledge had ceased”.³ In other words, a person who had initially consented to sexual intercourse could not withdraw this consent.
- 3.6 Prior to 1981, consent obtained by threats or terror was not a defence to a charge of rape.⁴ However, the prosecution needed to prove that the rape was “against the woman’s will”.⁵ This led to a significant focus in trials on whether the complainant resisted physically and whether the complainant sustained physical injuries.⁶

The 1981 reforms

- 3.7 The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) (“1981 reforms”) abolished the offence of rape and replaced it with a graded series of sexual assault offences in gender-neutral terms, each attracting a different penalty.⁷ The term “sexual assault” was adopted as an attempt to emphasise the offence as a crime of violence, reduce the focus on consent and shift the emphasis away from the sexual aspect.⁸
- 3.8 “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. The definition also included the “continuation” of sexual intercourse. This meant sexual intercourse that continued after a person had withdrawn consent could constitute sexual assault, provided the accused person also had the required mental state.⁹
- 3.9 Sexual assault offences were ranked from category 1 to category 4 according to the seriousness of the circumstances of the assault. Category 1 attracted the highest penalty:
- **sexual assault category 1:** inflicting grievous 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

3. K J Arenson, “The Chaotic State of the Law of Rape in Victoria: A Mandate for Reform” (2014) 78 *Journal of Criminal Law* 326, 327.

4. *Crimes Act 1900* (NSW) s 63, as substituted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (5).

5. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.2.3].

6. See, eg, 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.

7. *Crimes Act 1900* (NSW) s 63, as substituted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (5); *Crimes Act 1900* (NSW) s 61B–61E, as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

8. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.1].

9. See *R v Tolmie* (1995) 37 NSWLR 660, 672.

- **sexual assault category 4:** indecent assault.¹⁰
- 3.10 The prosecution was not required to prove absence of consent in the first two categories of sexual assault; only that the accused person inflicted the relevant harm with the intention of having sexual intercourse.¹¹ For the third category of sexual assault, the prosecution had to prove that the complainant did not consent to the sexual intercourse and that the accused person knew of, or was reckless about, that fact.¹²
- 3.11 The fourth category covered the non-penetrative sexual offence of indecent assault.¹³ It substantially reproduced the existing law.¹⁴ The prosecution had to prove that the accused person:
- assaulted the complainant, and
 - at the time of, or immediately before or after, the assault, committed an act of indecency on or in the presence of the complainant.¹⁵
- 3.12 The first two categories of sexual assault attracted the harshest penalties. This meant the “focal point for punishment” was “the physical harm caused, not the sexual intercourse”.¹⁶
- 3.13 As well as introducing a new structure for sexual offences, the 1981 reforms also made changes to the law of consent. The legislation provided that a person “shall be deemed not to consent to the sexual intercourse” if the person consents while under a mistaken belief:
- as to the identity of the other person, or
 - that the other person is married to the person.¹⁷
- 3.14 Legislation also recognised that a person is not to be regarded as consenting:
- if the person submits to sexual intercourse as a result of threats or terror, or
 - by reason only of the fact that the person does not offer actual physical resistance to sexual intercourse.¹⁸

10. *Crimes Act 1900* (NSW) s 61B–61E, as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

11. *Crimes Act 1900* (NSW) s 61B–61C, as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

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

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

14. G D Woods, *Sexual Assault Law Reforms in New South Wales* (Department of Attorney-General and of Justice, 1981) 20.

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

16. M Q Wallace, “The Changing Nature of Rape: The New South Wales (Sexual Offences) Amendment Act 1981” (1984) 19 *Australian Journal of Social Issues* 79, 81.

17. *Crimes Act 1900* (NSW) s 61D(3)(a), as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

18. *Crimes Act 1900* (NSW) s 61D(3)(b)–(c), as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

The 1989 reforms

- 3.15 Amendments made in 1989 by the *Crimes (Amendment) Act 1989* (NSW) (“1989 reforms”) replaced the first three categories of sexual assault with one “basic” offence of sexual assault. The reforms also introduced an aggravated version of this basic offence. Both offences required the prosecution to prove that:
- the complainant did not consent to the sexual intercourse, and
 - the accused person knew that the complainant did not consent.¹⁹
- 3.16 The reforms also introduced the offence of assault with intent to have sexual intercourse.²⁰ The current law has largely the same structure.²¹
- 3.17 Sexual assault category 4 was separated into two offences: indecent assault and act of indecency. The reforms also introduced aggravated versions of these offences.²²

The 2007 reforms

- 3.18 Further amendments were made in 2007 by the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) (“2007 reforms”), following the work of the Taskforce described in Chapter 1. Those reforms consolidated the focus on consent in s 61HA (now s 61HE). The reforms:
- introduced a statutory definition of consent²³
 - expanded the list of circumstances in which a person does not consent²⁴
 - expanded the mental element, to include the test of “no reasonable grounds” for a belief in consent,²⁵ and
 - introduced a requirement for fact finders, in determining the accused person’s mental state, to consider any steps taken by the accused person to ascertain whether the complainant was consenting.²⁶

19. *Crimes Act 1900* (NSW) s 61I–61J, as inserted by *Crimes (Amendment) Act 1989* (NSW) sch 1 (3).

20. *Crimes Act 1900* (NSW) s 61K, as inserted by *Crimes (Amendment) Act 1989* (NSW) sch 1 (3).

21. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.2.4].

22. *Crimes Act 1900* (NSW) s 61L–61O, as inserted by *Crimes (Amendment) Act 1989* (NSW) sch 1 (3), later repealed by *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [7].

23. *Crimes Act 1900* (NSW) s 61HA(2), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

24. *Crimes Act 1900* (NSW) s 61R(2), repealed by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [2]; *Crimes Act 1900* (NSW) s 61HA(4)–(6), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

25. *Crimes Act 1900* (NSW) s 61R(1), repealed by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [2]; *Crimes Act 1900* (NSW) s 61HA(3)(c), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

26. *Crimes Act 1900* (NSW) s 61HA(3)(d), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

The model of consent in NSW

- 3.19 As the above legislative history demonstrates, consent is central to the operation of the sexual offences. In NSW, the law can be said to have moved towards a communicative model of consent.

Views differ on “consent”

- 3.20 Sexual autonomy underpins the focus of the law on consent. Sexual autonomy includes both the autonomy to:
- determine the sexual activities in which to participate, and
 - refuse to engage in sexual activity at any time and for any reason.²⁷
- 3.21 Reliance on the concept of consent has attracted criticism. One argument is that consent is too ambiguous to sit at the heart of a criminal offence.²⁸ As Mason and Monaghan observe, “[t]here is no consensus on its meaning or on where to draw the line between consent and mere submission”.²⁹
- 3.22 Another argument is that “asymmetry” or inequality is “built into the concept of consent”.³⁰ Proponents of this argument contend that the concept of consent presupposes that one party to a sexual activity plays an active role by initiating sexual activity and that the other party plays a passive or subordinate role, by giving or refusing consent.³¹ On this view, consent is not something that is mutually negotiated. By giving consent, “you license someone else to do something *to* you, not *with* you”.³²
- 3.23 Strong concerns have been expressed about the way in which the concept of consent is applied. A key concern is that it leads to significant focus during trials on the behaviour and conduct of the complainant.³³ Criminal trials in which consent or absence thereof is an issue necessarily and inevitably involve examination of the complainant’s conduct and state of mind at the time of the alleged sexual offence. Concern has been expressed that this encourages the tendency to “put the victim on trial”.³⁴

27. See, eg, D A Dripps, “Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent” (1992) 92 *Columbia Law Review* 1780, 1785; T Hornle, “Rape as Non-Consensual Sex” in A Muller and P Schaber (ed) *The Routledge Handbook of the Ethics of Consent* (2018) 235, 236–237.

28. V Tadros, “Rape Without Consent” (2006) 26 *Oxford Journal of Legal Studies* 515, 521–522.

29. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus Cases*” (2019) 31 *Current Issues in Criminal Justice* 24, 35–36.

30. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus Cases*” (2019) 31 *Current Issues in Criminal Justice* 24, 36. See also V Tadros, “No Consent: A Historical Critique of the Actus Reus of Rape” (1999) 3 *Edinburgh Law Review* 317, 333.

31. See, eg, N Lacey, “Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and the Criminal Law” (1998) 11 *Canadian Journal of Law and Jurisprudence* 47, 60.

32. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus Cases*” (2019) 31 *Current Issues in Criminal Justice* 24, 36 (emphasis in original).

33. See, eg, V Tadros, “Rape Without Consent” (2006) 26 *Oxford Journal of Legal Studies* 515, 517. See also M Heath, *The Law and Sexual Offences Against Adults in Australia*, Issues No 4 (Australian Centre for the Study of Sexual Assault, 2005) 22.

34. V Tadros, “Rape Without Consent” (2006) 26 *Oxford Journal of Legal Studies* 515, 517.

- 3.24 In response to such concerns, others have argued that the concept of consent should be reformed, rather than abandoned. Some suggest that emphasising the interactive or communicative nature of sexual activity in the law of consent could help to overcome or minimise some of these problems.³⁵ Our terms of reference assume that the absence of consent will continue to be a central feature of sexual offence law in NSW.

Towards a “communicative” model of consent

- 3.25 The communicative model of consent emphasises that consent to sexual activity cannot be assumed. Instead, consent should be communicated by one person to another. A person who initiates the sexual activity is expected to ensure that the other person consents before going ahead.³⁶
- 3.26 The model also regards consent as a continuous process of mutual decision-making that occurs throughout a sexual activity.³⁷ This recognises that sexual activity involves multiple and ongoing decisions. Consenting to one kind of sexual activity does not imply consent to anything else. Consent can change or be revoked.³⁸
- 3.27 The communicative model is underpinned by principles of autonomy and responsibility. Autonomy under this model means:
- being able to make your words and actions mean what you intend – to be respected as someone whose “yes” means “yes”, whose “no” means “no”, and crucially, whose “no” does not mean “yes”.³⁹
- 3.28 Responsibility means taking steps to ensure that the other person consents before engaging in a sexual activity.⁴⁰
- 3.29 Over time, the law in NSW has moved towards a communicative model of consent. The 1981 reforms added that a person is not to be regarded as consenting simply because of a lack of physical resistance.⁴¹ This change disposed of any concept that the prosecution needed to prove that the person “fought back or offered physical resistance”, and confirmed that “mere submission is not consent”.⁴²

35. See, eg, Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report 209 (2007) [2.25]; S Cowan, “‘Freedom and Capacity to Make a Choice’: A Feminist Analysis of Consent in the Criminal Law of Rape” in V E Munro and C Stychin (ed) *Sexuality and the Law: Feminist Engagements* (Routledge, 2007) 53; V E Munro, “Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy” (2008) 41 *Akron Law Review* 923, 941.

36. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases” (2019) 31 *Current Issues in Criminal Justice* 24, 26.

37. See, eg, L Pineau, “Date Rape: A Feminist Analysis” (1989) 8 *Law and Philosophy* 217, 236–237.

38. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases” (2019) 31 *Current Issues in Criminal Justice* 24, 26.

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

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

41. *Crimes Act 1900* (NSW) s 61D(3)(d), as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

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

- 3.30 In the 1990s, NSW courts began to suggest in some cases that consent must be “freely and voluntarily given”.⁴³
- 3.31 The 2007 reforms further moved the law towards a communicative model of consent. Key features of the current law are said to be based on the communicative model. This includes:
- consent is defined as free and voluntary agreement to a sexual activity,⁴⁴ which emphasises that consent is a positive state of mind and something to be sought and communicated, not assumed⁴⁵
 - a person who does not offer physical resistance is not, by reason only of that fact, to be regarded as consenting⁴⁶
 - the list of circumstances in which it is, or may be, established that there is no consent recognises that there are certain circumstances in which a person is unable to engage in autonomous decision-making,⁴⁷ and
 - fact finders must consider any steps the accused person took to ascertain whether the complainant consented.⁴⁸
- 3.32 In summary, several features of s 61HE (as it now is) incorporate and promote communicative principles.

Is the law operating as intended?

- 3.33 Despite these changes, there are still some concerns about the operation of the law of consent. Some ask if it is operating as intended.

Objectives behind the 2007 reforms

- 3.34 The NSW Attorney General explained at the time that the Government aimed to achieve a “cultural shift” in the way the community and the criminal justice system respond to people who have experienced sexual assault.⁴⁹ 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”.⁵⁰
- 3.35 The Government hoped that the 2007 reforms would:

43. See, eg, *R v Clark* (Unreported, NSWCCA, 17 April 1998) 9. But see *R v Mueller* [2005] NSWCCA 47, 62 NSWLR 476 [2] (Hunt AJA), [33]–[37] (Studdert J), [132]–[136] (Hulme J).

44. *Crimes Act 1900* (NSW) s 61HE(2).

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

46. *Crimes Act 1900* (NSW) s 61HE(9).

47. J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 98. See *Crimes Act 1900* (NSW) s 61HE(5)–(6), s 61HE(8).

48. *Crimes Act 1900* (NSW) s 61HE(4)(a).

49. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584 (J Hatzistergos, Attorney General and Minister for Justice).

50. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3880, 3908–3909 (J Hatzistergos, Attorney General and Minister for Justice).

- reduce the number of sexual assault offences being committed
 - improve the reporting rates for sexual assault matters
 - 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
 - educate the community about “the reasonable standards that should be adopted in this area”.⁵¹
- 3.36 In a 2013 review of the 2007 reforms, the NSW Department of Justice concluded that the policy objectives behind the reforms remained valid. The Department found that the amendments were still “firmly supported” by representatives of people who had experienced sexual assault.⁵² As only a limited number of appeals had raised issues about the definition of consent, the Department concluded that the definition was well-understood and “working in NSW’s courts”.⁵³
- 3.37 Several years on, submissions to this review continue to support the law in principle.⁵⁴ Some believe that it does not require further reform as it “strikes the right balance” between the rights of the accused person and the interests of complainants and the community.⁵⁵
- 3.38 However, others believe that the law has not met its objectives. In particular, some submissions argue that NSW must amend the law to “crystallise” the ideal of communicative consent from policy into practice.⁵⁶
- 3.39 Recent commentary on s 61HE has centred on the controversial *Lazarus* case.⁵⁷ We turn now to give an overview of this case.

The Lazarus case

- 3.40 The *Lazarus* case involved two trials and two appeals which took place between 2015 and 2017.⁵⁸
- 3.41 The complainant, Saxon Mullins, said that Luke Lazarus sexually assaulted her in an alleyway behind a nightclub in Sydney’s Kings Cross.⁵⁹ Mr Lazarus’s case was

51. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3880, 3907–3909 (J Hatzistergos, Attorney General and Minister for Justice).

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

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

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

55. See, eg, Law Society of NSW, *Submission CO18*, 2.

56. Rape and Domestic Violence Services Australia, *Submission CO28* [5]. See also Women’s Legal Service NSW, *Preliminary Submission PCO61*, 2.

57. See, eg, J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96; A Cossins, “Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent” (2019) 42 *UNSW Law Journal* 462.

58. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, NSWDC, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378.

that the sexual intercourse was consensual.⁶⁰ The first trial (by jury) resulted in conviction and Mr Lazarus was sentenced to imprisonment for five years with a non-parole period of three years. Mr Lazarus appealed to the NSW Court of Criminal Appeal (“CCA”) on the ground that the trial judge had misdirected the jury about s 61HA(3)(c) (which dealt with the “no reasonable grounds” test for knowledge).⁶¹

- 3.42 The CCA held that the trial judge had incorrectly instructed the jury on how to determine whether the prosecution had proven that Mr Lazarus had “no reasonable grounds for believing” that Ms Mullins consented.⁶² The CCA set aside the conviction and ordered a retrial.⁶³
- 3.43 The second trial, in May 2017, was conducted as a judge-alone trial and resulted in acquittal. The judge concluded that the complainant, in her own mind, did not consent to the sexual intercourse that had admittedly taken place.⁶⁴ However, her Honour found that Mr Lazarus had formed a “genuine belief”, on reasonable grounds, that Ms Mullins consented. Her Honour observed that the Ms Mullins “did not say ‘stop’ or ‘no’” and “did not take any physical action to move away from the intercourse or attempted intercourse”.⁶⁵
- 3.44 The Director of Public Prosecutions appealed. In November 2017, the CCA found that the second trial judge erred by failing to consider, as required by s 61HA(3)(d), any steps taken by Mr Lazarus to ascertain whether Ms Mullins consented. Notwithstanding the error, the CCA did not order another retrial and dismissed the appeal, holding that it would be oppressive and unfair in the circumstances to put Mr Lazarus through the expense and worry of a third trial.⁶⁶
- 3.45 Many argue that the *Lazarus* case highlights significant issues within the law of consent and the way it is applied in practice.⁶⁷ These include questions about:
 - what constitutes consent to sexual activity (for example, whether and how it should be communicated).⁶⁸ We consider the issue of communication of consent in Chapters 5 and 6;⁶⁹
 - whether and, if so, how the law should address the “freeze” response to non-consensual sexual activity.⁷⁰ In the *Lazarus* case, Ms Mullins said that she “froze” during the sexual intercourse;⁷¹

59. See *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378 [11]–[31].

60. See *Lazarus v R* [2016] NSWCCA 52 [70]; *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378 [32].

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

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

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

64. *R v Lazarus* (Unreported, NSWDC, Tupman DCJ, 4 May 2017) 70.

65. *R v Lazarus* (Unreported, NSWDC, Tupman DCJ, 4 May 2017) 73.

66. *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378 [163], [168].

67. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 3–4; L Coates, *Submission CO16*, 7; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO23*, 2.

68. See, eg, G Welsby, *Preliminary Submission PCO15*, 1; L Horgan, *Preliminary Submission PCO41*, 1; Feminist Legal Clinic, *Preliminary Submission PCO53*, 2. See also A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 3–4.

69. See [5.30]–[5.34], [6.25]–[6.57].

70. See, eg, A Cossins, *Preliminary Submission PCO33*, 38.

- whether an intoxicated person is able to give consent and, if not, how to determine the impact of intoxication on a person's ability to consent.⁷² In the *Lazarus* case, evidence was led at trial that Ms Mullins consumed between 10 and 16 standard drinks.⁷³ One of the issues in the case was whether there was a lack of consent due to substantial intoxication;⁷⁴
 - whether the mental element is too difficult to prove or apply, especially in relation to the "no reasonable grounds" test.⁷⁵ We discuss this issue in Chapter 7;⁷⁶
 - what constitutes a "step" for ascertaining whether another person consents to a sexual activity.⁷⁷ In the second *Lazarus* appeal, the CCA determined that a "step" need not be physical and could involve the accused person's internal thought processes.⁷⁸ We discuss this further in Chapter 7;⁷⁹ and
 - how the communicative model of consent is being applied. Some consider that the trials focused excessively on Ms Mullins' behaviour and insufficient attention was paid to what Mr Lazarus did to ascertain consent.⁸⁰
- 3.46 Others question whether the *Lazarus* case justifies any significant changes to the law.⁸¹
- 3.47 We discuss the issues raised by the *Lazarus* case throughout this Report. However, the questions posed by s 61HE are bigger than one case alone. In this Report, we consider each aspect of the law of consent and whether the time has come for further reform.

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71. "I Am That Girl", *ABC Four Corners* (7 May 2018) <www.abc.net.au/4corners/i-am-that-girl/9736126> (retrieved 17 September 2020).
72. See, eg, A Cossins, *Preliminary Submission PCO33*, 22–23; A Cossins, "Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent" (2019) 42 *UNSW Law Journal* 462, 481–485.
73. *Lazarus v R* [2016] NSWCCA 52 [40], [42].
74. See *Lazarus v R* [2016] NSWCCA 52 [29]–[30], [114]–[115]; *R v Lazarus* (Unreported, NSWDC, Tupman DCJ, 4 May 2017) 9–10, 21, 51–54.
75. See, eg, L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 1–2; Office of the Director of Public Prosecutions, *Submission CO14*, 5. See also Inner City Legal Centre, *Preliminary Submission PCO44* [8].
76. See [7.63]–[7.80].
77. See, eg, A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4; G Mason and J Monaghan, *Preliminary Submission PCO40* [18]–[19]; R Burgin, *Preliminary Submission PCO72*, 6–8; A Dyer, *Submission CO02* [86]; L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 2; Rape and Domestic Violence Services Australia, *Submission CO28* [218].
78. See *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378 [147] (Bellew J, Hoeben CJ agreeing at [1] and Davies J agreeing at [4]).
79. See [7.153]–[7.164].
80. R Burgin, *Preliminary Submission PCO72*, 6–7; G Mason and J Monaghan, "Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases" (2019) 31 *Current Issues in Criminal Justice* 24, 32–34; A Cossins, "Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent" (2019) 42 *UNSW Law Journal* 462, 489–491.
81. See, eg, A Dyer, *Preliminary Submission PCO50* [3]–[4]; A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 1; Law Society of NSW, *Submission CO18*, 3.

In summary

- 3.48 The law on sexual offences in NSW has undergone significant changes in the past 40 years. Consent is now defined in a way that reflects communicative principles.
- 3.49 Some argue that s 61HE of the *Crimes Act* is not operating as intended and that the objectives behind it have not been realised.
- 3.50 In the following Chapters, we recommend reforms to the law of consent and knowledge of non-consent. We begin in Chapter 4 by recommending that s 61HE is restructured as a new Subdivision of the Crimes Act which includes a statement of objectives clearly reflecting the communicative model of consent.

4. Structure and language

In brief

A new Subdivision on the law of consent should be created and inserted into Part 3, Division 10 of the *Crimes Act*. This Subdivision should group the law dealing with consent, the circumstances in which a person does not consent, and knowledge of non-consent, into distinct sections. The Subdivision should apply to the offences to which s 61HE of the *Crimes Act* currently applies. The Subdivision should expressly recognise core principles of the communicative model of consent. The language of the Subdivision should be modern, consistent and inclusive.

There should be a new Subdivision on the law of consent	45
The new Subdivision should apply to the “sexual offences”	46
Communicative consent principles should be recognised	47
The statement should guide the interpretation of the Subdivision	48
People have the right to choose whether or not to engage in sexual activity	50
Consent is not to be presumed	50
Consent involves ongoing and mutual communication, decision-making and free and voluntary agreement.....	51
A more general list of objectives or principles should not be included	51
It is not necessary to list other fundamental criminal law principles	52
The language of the Subdivision should be modern and clear.....	52
In summary	53

- 4.1 This Chapter recommends changes to the structure and language of the existing s 61HE of the *Crimes Act*. The changes are intended to create a more logical structure, to make the language more modern and inclusive, and to link the law of consent clearly to the communicative model of consent.

There should be a new Subdivision on the law of consent

Recommendation 4.1: A new subdivision

- (a) A new Subdivision on the law of consent and knowledge about consent should be inserted in Part 3, Division 10 of the *Crimes Act*.
- (b) The new Subdivision should group the law dealing with the meaning of consent, the circumstances in which a person does not consent, and knowledge of non-consent, into distinct sections.
- (c) The sections on the meaning of consent and the circumstances in which a person does not consent should appear before the section on knowledge of non-consent.

- 4.2 We recommend that s 61HE be split into distinct sections, which would sit within a new Subdivision in Part 3, Division 10 of the *Crimes Act*.¹ Among other things, this new Subdivision would deal with the law on:
- the meaning of consent
 - the circumstances in which a person does not consent, and
 - knowledge of non-consent.
- 4.3 It should do so in that order. This would address concerns that, in its current structure, s 61HE is too long, confusing and difficult to follow.² Some submissions argue that the order of the section is not logical because the subsections dealing with consent appear both before and after the subsections on knowledge of non-consent. Some suggest that the subsections on consent should be grouped together and located before the subsection on knowledge.³
- 4.4 We originally proposed this restructure in our Draft Proposals.⁴ We received support for it, with submissions considering that it makes the law simpler, less confusing, and easier to understand.⁵
- 4.5 It is our view that this restructure would improve the legislation without changing the substance of the law.⁶

The new Subdivision should apply to the “sexual offences”

Recommendation 4.2: Application of the new Subdivision

The new Subdivision should apply to the offences, and attempts to commit the offences, of sexual assault, sexual touching, sexual act and their aggravated versions.

- 4.6 The recommended new Subdivision (recommended Subdivision 1A) begins with recommended s 61HF, which sets out an objective of the Subdivision. The recommended new Subdivision also contains an “application” provision that clearly explains what the Subdivision does and the offences to which it applies (recommended s 61HG).
- 4.7 Recommended s 61HG(1) states that the Subdivision applies to offences, or attempts to commit offences, against s 61I, s 61J, s 61JA, s 61KC, s 61KD, s 61KE

1. See Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

2. See, eg, K Burton, *Preliminary Submission PCO76* [1]; Rape and Domestic Violence Services Australia, *Submission CO28* [240]; Legal Aid NSW, *Submission CO33*, 12.

3. See, eg, J Quilter, *Preliminary Submission PCO92*, 10; A Dyer, *Submission CO02* [98]; J Quilter, *Submission CO07*, 5; Law Society of NSW, *Submission CO18*, 10; Rape and Domestic Violence Services Australia, *Submission CO28* [240]; Legal Aid NSW, *Submission CO33*, 12.

4. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) [3.3]–[3.4].

5. NSW Bar Association, *Submission CO47* [5]; Domestic Violence NSW, *Submission CO60*, 4; Rape and Domestic Violence Services Australia, *Submission CO65* [7.2]–[7.3]; Women’s Safety NSW, *Submission CO74*, 4.

6. See, eg, A Dyer, *Submission CO02* [98].

and s 61KF of the *Crimes Act*. These are the offences of sexual assault, sexual touching and sexual act, and their aggravated versions. Section 61HE now applies to these offences, thus obviating the problem of different tests applying to related sexual offences, a problem that had previously existed.⁷ Many submissions support the way in which s 61HE now applies to these offences.⁸

- 4.8 Recommended s 61HG(2) explains that the Subdivision states the circumstances in which:
- a person consents or does not consent to a sexual activity, and
 - a person knows or is taken to know that another person does not consent to a sexual activity.⁹

Communicative consent principles should be recognised

Recommendation 4.3: Objectives of the new Subdivision

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.

- 4.9 Several aspects of the NSW approach to consent are based on, and implement, the communicative model of consent. In summary, this model recognises that consent:
- is a positive decision to participate in a sexual activity
 - should be sought and communicated, rather than presumed, and
 - is a continuous process of mutual decision-making.¹⁰
- 4.10 The new Subdivision should expressly recognise the principles that underpin the communicative model. While the objectives of the Subdivision could be explained in a second reading speech or explanatory note,¹¹ it is important that these principles

7 See [1.18]–[1.19]; *Holt v R* [2019] NSWCCA 50 [62]–[69].

8 Care Leavers Australasia Network, *Submission CO04*, 4; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 13–14; Office of the Director of Public Prosecutions, *Submission CO14*, 8; Women's Legal Service NSW, *Submission CO27* [21]; Rape and Domestic Violence Services Australia, *Submission CO28* [238]–[239].

9 "Sexual activity" refers to "sexual intercourse, sexual touching or a sexual act": *Crimes Act 1900* (NSW) s 61HE(11). See also recommended s 61HH: Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

10 See [3.25]–[3.26], [3.31], [5.15].

11 Legal Aid NSW, *Submission CO87*, 4.

be recognised in legislation. This could perform an important symbolic and educative role for the general community.¹²

- 4.11 Recognising these principles in legislation would affirm, in a prominent way, Parliament's commitment to them. It would also provide an accessible guide to interpreting the Subdivision. The principles would form part of the policy objectives to be considered in the statutory review that we recommend in Chapter 10. This can provide a benchmark against which to assess implementation.¹³
- 4.12 Legislative recognition of these principles may provide a firm foundation for community education initiatives about consent.¹⁴ We acknowledge, as do others, that a legislative statement of objectives may not alone be an effective educative tool.¹⁵ However, some community organisations already refer to the law when delivering consent education.¹⁶ It may be expected that this approach is common. A clear statement of principles in legislation would assist educators to explain the purpose of the law of consent and how it operates.
- 4.13 In our Draft Proposals, we invited comment on our proposed statement of "interpretive principles".¹⁷ Submissions generally support the concept and content of the proposed principles.¹⁸ Several submissions comment favourably on the educative potential of the proposed principles.¹⁹
- 4.14 Some express concern that the legal effect of our proposed statement was complicated and unclear.²⁰ We respond to these concerns below.

The statement should guide the interpretation of the Subdivision

- 4.15 In our Draft Proposals, we proposed that a new statement of principles should govern the interpretation and application of the new Subdivision.²¹ The proposed statement of principles began as follows:

Regard must be had to the following principles when interpreting or applying this Subdivision—

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12. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.199].
13. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.199].
14. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.199].
15. See, eg, Legal Aid NSW, *Submission CO87*, 4. See also Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.199].
16. Sydney Roundtable 4, *Consultation CO10*.
17. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) [4.1]–[4.4].
18. See, eg, Children's Court of NSW, *Submission CO55*, 1–2; Australia's National Research Organisation for Women's Safety, *Submission CO67*, 2; UNSW School of Social Sciences, *Submission CO69*, 2–3; Women's Safety NSW, *Submission CO74*, 4–5; Inner City Legal Centre, *Submission CO82*, 1; NSW Director of Public Prosecutions, *Submission CO85*, 1.
19. R Burgin and J Crowe, *Submission CO63*, 1; Women's Legal Service NSW, *Submission CO70* [9]; Rape and Domestic Violence Services Australia, *Submission CO65* [5.6], [8.1]; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 2; Community Legal Centres NSW, *Submission CO73*, 1; Legal Aid NSW, *Submission CO87*, 4.
20. Law Society of NSW, *Submission CO76*, 3; Legal Aid NSW, *Submission CO87*, 4.
21. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) [4.1]–[4.4].

- 4.16 This was intended to ensure that the proposed principles would guide the interpretation and application of the new Subdivision at all stages of the criminal justice process (and not just at trial).²²
- 4.17 Some submissions express concerns about the potential legal effect of the proposed interpretive principles. One view is that the principles would “add an unnecessary layer of complexity” to the law, which could lead to longer trials, greater cross-examination, additional jury directions, greater risk of legal error and more appeals.²³
- 4.18 Another view is that the interpretive principles should be reframed as “purposes” or “objectives” of the Subdivision, as this is a more commonly used and understood term.²⁴
- 4.19 We recommend that what we formerly called “interpretive principles” be enacted at the commencement of the new Subdivision as “objectives”. This approach would make it clear that an objective of the Subdivision is to recognise core principles of the communicative model of consent (see below).
- 4.20 Recommended s 61HF therefore states that an objective of the recommended new Subdivision 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.
- 4.21 This recognises the core principles of the communicative model of consent.²⁵
- 4.22 These principles have been described in general terms without specific reference to how they apply in the context of any particular type of relationships (such as an intimate partner relationship).²⁶ The importance of educating people about the prevalence, and seriousness, of sexual offending within established relationships may be acknowledged. Our preferred approach is to ensure that the principles are of general application. Jury directions should be used in relevant cases to explain that non-consensual sexual activity can occur between people within matrimonial or other established relationships.²⁷

22. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) [4.2].

23. Law Society of NSW, *Submission CO76*, 3. See also Legal Aid NSW, *Submission CO87*, 4.

24. Children’s Court of NSW, *Submission CO55*, 2; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4.

25. See [3.25]–[3.26], [5.15]; J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 97.

26. See, eg, Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 2–3.

27. See rec 8.3 [8.91], [8.97].

People have the right to choose whether or not to engage in sexual activity

- 4.23 The first principle is adapted from s 37A(a) of the *Crimes Act 1958* (Vic) (“Victorian *Crimes Act*”), which provides that an objective of the sexual offence provisions of that legislation is:

to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity

- 4.24 This principle recognises that people should be free to choose whether to engage in sexual activity (that is, to exercise sexual autonomy).²⁸ It also reflects the common view that recognising sexual autonomy and freedom of choice are the core objectives behind modern sexual offence laws.²⁹
- 4.25 There is one difference between our recommended expression of this principle and the expression used in the Draft Proposals. We originally proposed that the principle be expressed as a “fundamental right” (as in the Victorian *Crimes Act*).³⁰ However, the word “fundamental” could be considered unnecessary and ambiguous. For this reason, we omit this word from our recommendation.

Consent is not to be presumed

- 4.26 The second principle recognises that the consent of sexual partners should not be presumed. Instead, under the communicative model, consent should be communicated actively, including in established and ongoing relationships.³¹ The principle also promotes the value of responsibility. A communicative approach to consent shifts attention towards the question of whether a person “took adequate steps to ascertain consent”.³²
- 4.27 The principle reinforces several aspects of our recommended new Subdivision. For instance, recommended s 61HJ(1)(a) provides that a person who does not say or do anything to communicate consent does not consent. Also, we recommend that fact finders be required to consider whether the accused person said or did anything to ascertain the complainant’s consent, and if so, what the accused person said or did (recommended s 61HK(2)(a)).
- 4.28 In our Draft Proposals, we proposed that the principle be stated as consent “should not be presumed”.³³ We have amended this to “is not to be presumed”, as we consider this to be clearer and more direct.
- 4.29 We do not support the suggestion that the principle should instead say that “a person’s consent *or lack of consent* to sexual activity should not be presumed”.³⁴ This would be inconsistent with the recognition, in the existing s 61HE and in

28. See [3.20].

29. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.86]; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5 – Sexual Offences Against the Person*, Report (1999) 43.

30. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 4.1(a); *Crimes Act 1958* (Vic) s 37A(a).

31. See [3.25].

32. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases” (2019) 31 *Current Issues in Criminal Justice* 24, 26.

33. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 4.1(b).

34. NSW Bar Association, *Submission CO47* [7] (emphasis in original).

recommended s 61HJ, that a person does not consent in certain circumstances (see Chapter 6).

Consent involves ongoing and mutual communication, decision-making and free and voluntary agreement

- 4.30 The third principle reflects other core aspects of the communicative model of consent. It recognises that consent is a process of ongoing mutual communication and decision-making; and that agreement must be present throughout the sexual activity. Consent once given may be withdrawn at any time or its scope altered. Consent to one kind of sexual activity does not imply consent to any other activity.³⁵

A more general list of objectives or principles should not be included

- 4.31 Our statement of principles differs from the approach adopted in the Victorian *Crimes Act*, which includes two lists, setting out, respectively:
- the objectives of the sections of the *Crimes Act* that provide for sexual offences,³⁶ and
 - guiding principles (in the form of factual statements about the nature and incidence of sexual offending) that courts must consider when interpreting and applying these sections.³⁷
- 4.32 This approach was adopted following recommendations of the Victorian Law Reform Commission.³⁸ In 2010, the Australian Law Reform Commission (“ALRC”) and the NSW Law Reform Commission (“NSWLRC”) jointly recommended that all state and territory legislation dealing with sexual offences, criminal procedure or evidence should largely follow the Victorian approach.³⁹ Their recommended objectives for sexual offence provisions were the same as those in the Victorian *Crimes Act*.⁴⁰ However, they recommended additional guiding principles: acknowledgement that sexual violence constitutes family violence, and recognition of the vulnerability of certain groups.⁴¹
- 4.33 Some submissions suggest that a list of principles should include a version of the guiding principles contained in the Victorian *Crimes Act* or as recommended by the ALRC and NSWLRC.⁴²

35. See further [3.26], [5.52].

36. *Crimes Act 1958* (Vic) s 37A.

37. *Crimes Act 1958* (Vic) s 37B.

38. Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) rec 193, rec 194 [9.48]–[9.50].

39. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2, rec 25-8, rec 25-9.

40. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2, rec 25-8.

41. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2, rec 25-9 [25.202].

42. R Burgin and J Crowe, *Submission CO63*, 1–2; Women’s Legal Service NSW, *Submission CO70* [10]–[11].

- 4.34 After considering this approach, ultimately we have not adopted it. This is because we have aimed to develop a list of principles that specifically reinforces the communicative model of consent that underpins the NSW approach to consent and knowledge of non-consent.

It is not necessary to list other fundamental criminal law principles

- 4.35 Some submissions suggest that any statement of principles should acknowledge fundamental criminal law principles. These include the principles that the accused person is entitled to the presumption of innocence and to a fair trial, and that the prosecution bears the onus of proof.⁴³
- 4.36 We consider it unnecessary to include these principles in recommended s 61HF. These principles are fundamental to the criminal law generally and are not specific to the law of consent.

The language of the Subdivision should be modern and clear

Recommendation 4.4: Language of the new Subdivision

- (a) The language used in s 61HE, and related sections, of the *Crimes Act* should be modern, inclusive, clear and consistent.
- (b) The expressions “alleged victim” and “alleged offender” should be replaced with alternative expressions throughout Part 3, Division 10 of the *Crimes Act*.

- 4.37 Included in our terms of reference are the simplification and modernisation of s 61HE. Submissions generally acknowledge the need for simplification and modernisation of the law of consent.⁴⁴ As one submission observes, a core principle “of the rule of law [is] that the law should be accessible and easily understood”.⁴⁵ Others recognise that simple and clear legislative language is needed to help educate the community about consent.⁴⁶
- 4.38 In the following Chapters, we recommend amendments to specific parts of s 61HE to make the law of consent as clear and accessible as possible. We have not adopted changes suggested by submissions that would not, in our view, simplify the law in practice.
- 4.39 In addition to changes to specific provisions, we recommend the adoption of more inclusive and consistent alternatives for certain expressions currently used throughout Part 3, Division 10 of the *Crimes Act*.
- 4.40 The expression “alleged victim” should not be used. This is because some people who experience sexual assault do not want to be characterised as “victims”. As one

43. NSW Bar Association, *Submission CO47* [7]; Law Society of NSW, *Submission CO76*, 3.

44. See, eg, Rape and Domestic Violence Services Australia, *Submission CO28*, rec 29; Legal Aid NSW, *Submission CO33*, 3; NSW Bar Association, *Submission CO47* [5].

45. NSW Bar Association, *Submission CO47* [5].

46. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 4; Australia's National Research Organisation for Women's Safety, *Submission CO67*, 1; Legal Aid NSW, *Submission CO87*, 4.

submission observes, “although experiences of violence are often very significant in a person’s life, they nevertheless do not define that person”.⁴⁷

- 4.41 Alternative expressions, such as “complainant” or “another person”, should be used instead of “alleged victim” throughout Part 3, Division 10. We have taken this approach in recommended s 61HK, which concerns the law on knowledge of non-consent.⁴⁸ The changes should also be made in the sections that set out the elements of the sexual offences and elsewhere in this Division.⁴⁹ Some submissions specifically support this change.⁵⁰
- 4.42 For consistency, the expression “alleged offender” should be replaced by “accused person” wherever it appears in Part 3, Division 10.⁵¹ The expression “accused person” is simpler, clearer and already appears in the Division.⁵² Submissions also support this change.⁵³

In summary

- 4.43 It is important that laws are drafted in a way that encourages accurate comprehension and proper application. The current s 61HE has been criticised for being confusing and difficult to follow.
- 4.44 The length of the section is part of the difficulty, as is the fact that the physical and mental elements of the relevant offences are not set out discretely.
- 4.45 This Chapter recommends that s 61HE be split into distinct sections dealing with the meaning of consent, the circumstances in which a person does not consent, and knowledge of non-consent. These sections should appear in that order, within a new Subdivision. The new Subdivision should apply to the sexual offences to which s 61HE currently applies.
- 4.46 The Chapter also recommends that the *Crimes Act* state that an objective of the new Subdivision is to recognise key principles of the communicative model of consent. The statement would affirm Parliament’s commitment to these principles in a prominent way. It would provide an accessible guide to interpreting the new Subdivision. It would give a firm foundation for education initiatives about consent.
- 4.47 In the next Chapter, we make recommendations about the meaning of “consent” for the sexual assault, sexual touching and sexual act offences.

47. Rape and Domestic Violence Services Australia, *Submission CO65* [7.4].

48. Compare to *Crimes Act 1900* (NSW) s 61HE(3), s 61HE(4).

49. *Crimes Act 1900* (NSW) s 61J(2), s 61JA(1)(c), s 61KC, s 61KD, s 61KE, s 61KF, s 66C(5), s 66DE(2), s 80A(1), s 80AB(2)–(3), s 80AG.

50. See, eg, Rape and Domestic Violence Services Australia, *Submission CO65* [7.4]; Women’s Safety NSW, *Submission CO74*, 5.

51. *Crimes Act 1900* (NSW) s 61J(2), s 61KC, s 61KD, s 61KE, s 61KF, s 66C(5), s 66DE(2), s 80A(1).

52. *Crimes Act 1900* (NSW) s 80AG.

53. See, eg, A Dyer, *Submission CO53* [55]; Women’s Safety NSW, *Submission CO74*, 4.

5. The meaning of consent

In brief

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.

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- 5.1 In this Chapter, we recommend that a new s 61HI be inserted into the *Crimes Act*, as follows:¹

Table 5.1: Recommended s 61HI of the *Crimes Act 1900* (NSW)

61HI Consent generally

- (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 before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.
- (3) 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.

1. See Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

- (4) 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.

Note. For example, a person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

- (5) 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 any other occasion, or
 - (b) another person on that or any other occasion.

Consent should remain at the core of the sexual offences

- 5.2 There is no reason to depart from the longstanding position that the absence of consent is a common element of the sexual offences. There is widespread support for this approach,² which recognises that the core wrong involved in a sexual offence is the violation of sexual autonomy.³
- 5.3 Various criticisms have been made about the concept of consent and how it is applied in practice.⁴ In light of these criticisms, we considered some alternatives.
- 5.4 One proposed alternative is to focus on the consequences of a sexual offence. The physical element of a sexual offence would be the injury caused to the complainant by the accused person, rather than a lack of consent. This injury could be physical, psychological or even economic. The mental element would be the accused person's intention to cause harm, or recklessness as to causing injury, rather than knowledge of non-consent.⁵
- 5.5 Another proposed alternative is to focus on the circumstances in which a sexual offence occurred; for example, whether there was force.⁶
- 5.6 Many submissions opposed these alternatives for reasons including:
- a focus on force or injury obscures the wrong or harm involved in a sexual assault,⁷ and could minimise the “uniquely degrading nature” of non-consensual sexual activity⁸

2. Care Leavers Australasia Network, *Submission CO04*, 2; R Burgin, *Submission CO06*, 5; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 2; Victims of Crime Assistance League Inc NSW, *Submission CO11*, 2; Office of the Director of Public Prosecutions, *Submission CO14*, 3; Law Society of NSW, *Submission CO18*, 2; Children's Court of NSW, *Submission CO19*, 1; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 4; Community Legal Centres NSW, *Submission CO25*, 5; Rape and Domestic Violence Services Australia, *Submission CO28* [26]–[28]; NSW Bar Association, *Submission CO32*, 2.

3. See, eg, T Hörnle, “Rape as Non-Consensual Sex” in A Müller and P Schaber (ed) *The Routledge Handbook of the Ethics of Consent* (Routledge, 2018) 235, 236–237.

4. See [3.21]–[3.23].

5. P Rush and A Young, *Preliminary Submission PCO59*, 8, 11–12

6. *Michigan Penal Code*, 750 Michigan Compiled Laws (2020) § 750.520a–750.520e.

7. Rape and Domestic Violence Services Australia, *Submission CO28* [31], [38]. See also A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 2; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 4.

8. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 2 citing 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.

- not all sexual assaults involve additional force or result in injury⁹
 - a focus on injury may lead to “intrusive inquiries into the complainant’s injuries and mental health” and further traumatise complainants,¹⁰ and
 - these approaches are unlikely to displace the focus on consent in practice;¹¹ for example, it might still be argued that the accused person did not intend to cause injury, because the accused person believed that the complainant was consenting.¹²
- 5.7 We accept these submissions. Consent should remain the common element of the sexual offences.

The definition of consent

- 5.8 Until 2008, the *Crimes Act* did not contain a definition of “consent”. A definition was inserted following the review of sexual offences by the Taskforce and further consultations conducted by the NSW Attorney General’s Department, as described in Chapter 1.¹³

Overview of the current definition

- 5.9 Currently, s 61HE(2) (formerly s 61HA(2)) of the *Crimes Act* provides that:
- A person **consents** to a sexual activity if the person freely and voluntarily agrees to the sexual activity.
- 5.10 The majority of the Taskforce supported a statutory definition of consent. Those in favour of defining consent thought that it would:
- clearly articulate what amounts to consent, which could serve an educative function, and
 - ensure that standard jury directions are given at trials.¹⁴
- 5.11 In a 2013 review, the NSW Department of Justice concluded that the definition “is understood and is working in NSW’s courts”.¹⁵

9. NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 4; Rape and Domestic Violence Services Australia, *Submission CO28* [32].

10. A Cossins, *Submission CO17*, 1. See also Rape and Domestic Violence Services Australia, *Submission CO28* [33]; NSW Bar Association, *Submission CO32*, 2.

11. Rape and Domestic Violence Services Australia, *Submission CO28* [37].

12. A Dyer, *Submission CO02* [8].

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

14. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 34.

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

Perspectives on the current definition

- 5.12 Many submissions support the current definition of consent.¹⁶ Some submissions consider that the definition reflects a communicative model of consent.¹⁷ Others observe that it aligns with the definitions used in other Australian states and territories.¹⁸ During consultations, we found that the current definition is generally well regarded and understood.¹⁹
- 5.13 However, some argue that the definition:
- is vague or unclear²⁰
 - focuses attention on the complainant's conduct,²¹ and
 - allows misconceptions and assumptions about consensual and non-consensual sexual activity to influence trials.²²

Consent should continue to be defined as free and voluntary agreement

Recommendation 5.1: Consent should continue to be defined as free and voluntary agreement

The *Crimes Act* should continue to provide that a person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity.

- 5.14 We recommend that the law continue to define consent as requiring free and voluntary agreement (recommended s 61HI(1) of the *Crimes Act*). This aligns with the approach proposed in our Draft Proposals,²³ which received positive responses.²⁴

16. See, eg, A Dyer, *Submission CO02* [11]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 3; Women's Safety NSW, *Submission CO74*, 5; Law Society of NSW, *Submission CO76*, 3; NSW Director of Public Prosecutions, *Submission CO85*, 1; Legal Aid NSW, *Submission CO87*, 5.

17. J Quilter, *Preliminary Submission PCO92*, 4; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 3; Office of the Director of Public Prosecutions, *Submission CO14*, 3; Law Society of NSW, *Submission CO18*, 2; Legal Aid NSW, *Submission CO33*, 4; Law Society of NSW, *Submission CO76*, 3. See also Rape and Domestic Violence Services Australia, *Submission CO28* [71].

18. A Cossins, *Preliminary Submission PCO33*, 5–6; K Burton, *Preliminary Submission PCO76* [3]; J Quilter, *Preliminary Submission PCO92*, 4; Office of the Director of Public Prosecutions, *Preliminary Submission PCO100*, 3.

19. District Court of NSW Consultation 1, *Consultation CO03*; Legal Aid NSW Staff, *Consultation CO06*; Dubbo Roundtable, *Consultation CO12*.

20. See, eg, M Tennant, *Preliminary Submission PCO11*, 1; The University of Newcastle Women's Collective, *Preliminary Submission PCO94*, 4.

21. See, eg, A Cossins, *Preliminary Submission PCO33*, 9; G Mason and J Monaghan, *Preliminary Submission PCO40* [6]; Children's Court of NSW, *Submission CO19*, 2.

22. See, eg, B Attard, *Preliminary Submission PCO70*, 7; ACON, *Submission CO12*, 3.

23. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.1.

24. See, eg, A Dyer, *Submission CO53* [8]; Women's Safety NSW, *Submission CO74*, 5; Law Society of NSW, *Submission CO76*, 3; NSW Director of Public Prosecutions, *Submission CO85*, 1; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4; Legal Aid NSW, *Submission CO87*, 5.

The current definition reflects the communicative model of consent

- 5.15 The current definition reflects the communicative model of consent. The term “agreement” emphasises that consent is a positive state of mind. It is something to be sought and communicated, rather than assumed.²⁵ “Agreement” implies equality and mutuality between those who engage in sexual activity.²⁶
- 5.16 A definition of consent based on free and voluntary agreement makes clear that:
- absence of consent is not confined to situations involving the use of force or violence,²⁷ and
 - evidence of resistance and injury are not required to prove absence of consent.²⁸
- 5.17 This is reinforced by existing s 61HE(9), which provides that a lack of physical resistance is not, alone, evidence of consent.²⁹ We discuss this further below.

Our recommended changes will guide the application of the definition

- 5.18 To meet some concerns that the definition is unclear and open to different interpretations,³⁰ we recommend changes to guide fact finders in applying the definition. These are:
- recognising other aspects of consent in the law (see below)
 - reforms to the list of circumstances in which a person does not consent (see Chapter 6), and
 - jury directions that address specific misconceptions about consensual and non-consensual sexual activity (see Chapter 8).

The current definition aligns with the definitions used elsewhere

- 5.19 The current definition of consent aligns with the definitions of other Australian states and territories. Except for the ACT, every other Australian state and territory has a statutory definition of consent based on:
- free agreement³¹

25. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5 – Sexual Offences Against the Person*, Report (1999) 43; G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases” (2019) 31 *Current Issues in Criminal Justice* 24, 28.

26. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 35.

27. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5 – Sexual Offences Against the Person*, Report (1999) 43.

28. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.75].

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

30. See, eg, M Tennant, *Preliminary Submission PCO11*, 1; A Cossins, *Preliminary Submission PCO33*, 39–40; The University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 4; J Quilter, *Submission CO07*, 2; NSW Law Reform Commission, Consent Review Survey, Response #2124 (Qu 6), Response #3237 (Qu 6), Response #3700 (Qu 6).

31. *Criminal Code* (Tas) s 2A(1); *Crimes Act 1958* (Vic) s 36(1).

- free and voluntary agreement,³² or
 - consent freely and voluntarily given.³³
- 5.20 In 2012, the ALRC and NSWLRC recommended that all federal, state and territory sexual offence laws adopt a definition of consent based on free and voluntary agreement.³⁴ This was because the definition reflects the main objectives of modern sexual offence laws:
- protecting autonomy and freedom of choice, and
 - reinforcing communicative understandings of consent.³⁵
- 5.21 A similar definition is also used in some other countries.³⁶ For example, in Ireland, consent to a sexual act is defined as free and voluntary agreement to engage in that act.³⁷

The definition should specify that consent must be present at the time

Recommendation 5.2: Consent must be present at the time of the sexual activity

The definition of consent should provide that free and voluntary agreement to a sexual activity must exist at the time of the sexual activity.

- 5.22 We recommend that the definition of consent specify that free and voluntary agreement to a sexual activity must be at the time of the sexual activity (recommended s 61HI(1)). We originally proposed this in our Draft Proposals.³⁸ Submissions generally endorse it.³⁹ One submission observes that this addition would assist people to understand the consent definition, as well as serve a broader educative purpose.⁴⁰
- 5.23 Our recommendation reflects the common law position that the relevant time for consent is the time of the sexual activity.⁴¹ It takes a similar approach to legislation

32. *Criminal Code* (NT) s 192(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2).

33. *Criminal Code* (Qld) s 348(1); *Criminal Code* (WA) s 319(2)(a).

34. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2, rec 25-4.

35. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.86]. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5 – Sexual Offences Against the Person*, Report (1999) 43.

36. See, eg, *Criminal Code* (Canada) s 273.1(1); *Sexual Offences (Scotland) Act 2009* (Scot) s 12; *Sexual Offences Act 2003* (UK) s 74.

37. *Criminal Law (Rape) Amendment Act 1990* (Ireland) s 9(1), inserted by *Criminal Law (Sexual Offences) Act 2017* (Ireland) s 48.

38. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.1.

39. See, eg, A Dyer, *Submission CO53* [8]; R Burgin and J Crowe, *Submission CO63*, 2; Women's Safety NSW, *Submission CO74*, 5; NSW Director of Public Prosecutions, *Submission CO85*, 1.

40. NSW Director of Public Prosecutions, *Submission CO85*, 1.

41. *R v Aiken* [2005] NSWCCA 328, 63 NSWLR 719 [12]. See also *R v Shaw* [1996] 1 Qd R 641, 646.

in Canada, which provides that “[c]onsent must be present at the time the sexual activity in question takes place”.⁴²

- 5.24 Our recommendation also reflects a key principle of the communicative model: that consent is an ongoing process throughout sexual activity, rather than a form of permission granted at a single moment.⁴³ Consent can be changed or revoked. Therefore, consent must be assessed at the time that the sexual activity occurs. It cannot be presumed or implied because of a person’s behaviour before that activity.⁴⁴
- 5.25 We consider that it is important that this be spelled out in the *Crimes Act*. Some submissions observe that evidence about a complainant’s prior conduct is often adduced at trial to suggest that there was consent.⁴⁵ Consultations raised specific concerns that evidence of previous interactions on social media is sometimes used for this purpose.⁴⁶ In such cases, there is a risk of undue emphasis being placed on the complainant’s earlier conduct, distracting attention from whether the complainant was consenting at the time of the sexual activity.
- 5.26 In their analysis of Victorian rape trials between 2008 and 2015, Burgin and Flynn found that defence counsel often relied on the complainant’s unrelated behaviour before the sexual activity to construct a “narrative” of consent. This included such behaviour as walking near or sitting next to the accused person.⁴⁷
- 5.27 Mock jury research also suggests that some jurors regard certain behaviours as implying a willingness to engage in sexual activity. This includes such behaviours as inviting the accused person home and remaining in the accused person’s company for a prolonged period.⁴⁸ Even in situations where the complainant froze and was unresponsive during the sexual activity, many participants accepted that the accused person could have reasonably believed the complainant’s conduct before the activity indicated consent.⁴⁹
- 5.28 Some submissions oppose this reform.⁵⁰ There is concern that it would prevent consent being given in advance to sexual activity occurring later (for example, when the person is asleep). One submission suggests adding “before or at the time of the

42. *Criminal Code* (Canada) s 273.1(1.1).

43. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus Cases*” (2019) 31 *Current Issues in Criminal Justice* 24, 26.

44. R Burgin and A Flynn, “Women’s Behaviour as Implied Consent: Male ‘Reasonableness’ in Australian Rape Law”, *Criminology and Criminal Justice* (13 October 2019) <<https://doi.org/10.1177/1748895819880953>> 6.

45. Police Association of NSW, *Preliminary Submission PCO84*, 3; R Burgin and J Crowe, *Submission CO63*, 2.

46. Office of the Director of Public Prosecutions Staff, *Consultation CO22*.

47. R Burgin and A Flynn, “Women’s Behaviour as Implied Consent: Male ‘Reasonableness’ in Australian Rape Law”, *Criminology and Criminal Justice* (13 October 2019) <<https://doi.org/10.1177/1748895819880953>> 6. See also R Burgin and J Crowe, *Submission CO63*, 2.

48. L Ellison and V E Munro, “Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Juror Deliberations” (2009) 18 *Social and Legal Studies* 291, 295; 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, 791.

49. 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, 791.

50. NSW Bar Association, *Submission CO47* [8]–[9]; The Public Defenders, *Submission CO84*, 1–2.

sexual activity” to the definition, “to ensure that a person’s consent in advance of a sexual activity is recognised by the law”.⁵¹

- 5.29 Adoption of this suggestion would alter the current law on the timing of consent. The common law recognises that consent must exist at the time of the sexual activity. Our recommendation reflects this principle.

The definition should not include a communication requirement

- 5.30 Some submissions argue that the definition of consent should expressly require the complainant to communicate consent, for instance, through “words or actions” or “words or conduct”.⁵²
- 5.31 The submissions argue that the current definition does not clearly enshrine the communicative model.⁵³ They consider that it remains unclear whether consent must be positively communicated to be effective.⁵⁴ The submissions consider that including a communication requirement in the definition would clarify that active communication is an essential element of consent.⁵⁵
- 5.32 One submission observes that this approach may be simpler than that taken in Tasmania and Victoria.⁵⁶ There, the law defines consent as “free agreement” and provides that there is no consent where a person “does not say or do anything” to “communicate” or “indicate” consent.⁵⁷
- 5.33 The approach we recommend is instead to expand the existing lists of circumstances in which a person does not consent to include the circumstance that the person does not say or do anything to communicate consent.⁵⁸ If one of the listed circumstances is proven to exist, a person does not consent to the sexual activity.
- 5.34 This is the approach taken in Tasmania and Victoria. We discuss our recommended approach further in Chapter 6.⁵⁹

Other aspects of consent

- 5.35 We recommend that the law expressly recognise that:

51. NSW Bar Association, *Submission CO47* [9].

52. Rule of Law Institute of Australia, *Preliminary Submission PCO55*, 4; Rape and Domestic Violence Services Australia, *Submission CO28* [80]; Positive Life NSW, *Submission CO62*, 2; Community Legal Centres NSW, *Submission CO73*, 3.

53. R Burgin, *Submission CO06*, 1; Positive Life NSW, *Submission CO10*, 1; Community Legal Centres NSW, *Submission CO25*, 5; Rape and Domestic Violence Services Australia, *Submission CO28* [5]. See also Sex Workers Outreach Project, *Submission CO15*, 5.

54. NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 5; Elizabeth Evatt Community Legal Centre, *Submission CO24*, 8; Community Legal Services NSW, *Submission CO25*, 5; Rape and Domestic Violence Services Australia, *Submission CO28* [75].

55. Elizabeth Evatt Community Legal Centre, *Submission CO24*, 9; Community Legal Centres NSW, *Submission CO25*, 5; Rape and Domestic Violence Services Australia, *Submission CO28* [82].

56. NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 9.

57. *Criminal Code* (Tas) s 2A(1), s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(1), s 36(2)(l).

58. Rec 6.2.

59. See [6.25]–[6.57].

- a person may withdraw consent, by words or conduct, at any time before or during the sexual activity
 - a lack of physical or verbal resistance does not, of itself, mean there is consent
 - consent to a particular sexual activity does not, of itself, mean there is consent to any other sexual activity
 - consent to a sexual activity using a condom does not, of itself, mean there is consent to a sexual activity without using a condom
 - consent to a sexual activity with a person at one time does not, of itself, mean there is consent to the activity at another time, and
 - consent to a sexual activity with one person does not, of itself, mean there is consent to sexual activity with any other person (recommended s 61HI(2)–(5)).
- 5.36 These recommendations reflect key principles of the communicative model of consent. They are also intended to address certain misconceptions about consensual and non-consensual sexual activity.

Consent can be withdrawn at any time

Recommendation 5.3: Withdrawal of consent

The *Crimes Act* should provide that:

- (a) a person may, by words or conduct, withdraw consent to a sexual activity at any time before or during the sexual activity, and
- (b) sexual activity that occurs after consent has been withdrawn occurs without consent.

- 5.37 Sexual activity that continues after consent has been withdrawn is non-consensual, and is an offence provided that it is established that the accused person “knew” (in one of the ways defined) that consent had been withdrawn.⁶⁰ The *Crimes Act* should more clearly recognise that consent can be withdrawn at any time before or during sexual activity (recommended s 61HI(2)).
- 5.38 Some argue that the current law is sufficient.⁶¹ On this view, an express statement about consent withdrawal is unnecessary.⁶² Others suggest that the issue of consent withdrawal could be dealt with in jury directions.⁶³
- 5.39 We consider that it is important to clarify, alongside the definition of consent, that consent may be withdrawn at any time. As discussed above, the current law of

60. *R v Tolmie* (1995) 37 NSWLR 660, 672. See also *R v Aiken* [2005] NSWCCA 328, 63 NSWLR 719 [12] (Studdert J), quoting *Question of Law Reserved on Acquittal (No 1 of 1993)* (1993) 59 SASR 214, 220 (King CJ).

61. NSW Bar Association, *Submission CO32*, 22.

62. A Dyer, *Submission CO02* [104]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 5.

63. See, eg, Sex Workers Outreach Project, *Submission CO15*, 11; Law Society of NSW, *Submission CO18*, 4.

sexual offences aims to protect sexual autonomy and freedom of choice. These principles require that consent, once given, can be withdrawn.⁶⁴

- 5.40 Greater clarity in the law about consent withdrawal could also empower people who have experienced sexual offending to report the incident to police.
- 5.41 Our recommendation is similar to legislation in some other places. For example, legislation in Victoria provides that a person does not consent to a sexual act if the person, having consented, later withdraws consent to the act taking place or continuing.⁶⁵ In Scotland and Ireland, legislation expressly recognises that consent can be withdrawn at any time.⁶⁶
- 5.42 Many submissions, and several responses to our online survey, support adding a clear statement to the *Crimes Act* about consent withdrawal.⁶⁷ We originally proposed the language in recommended s 61HI(2) in our Draft Proposals.⁶⁸ Several submissions support it.⁶⁹
- 5.43 Some submissions oppose including the expression “by words or conduct” in recommended s 61HI(2) because this means that the withdrawal of consent must in some way be communicated. Some express concerns that this would require complainants to demonstrate a lack of consent.⁷⁰ One submission argues that this contradicts the communicative model of consent.⁷¹
- 5.44 Some submissions also question how this would operate in cases where a complainant consents initially, but “freezes” partway through the sexual activity.⁷² There is a concern that the law would not recognise that consent had been withdrawn in these circumstances.⁷³
- 5.45 We do not accept those submissions. Fairness dictates that, if consent has been freely and voluntarily given, its withdrawal should be communicated before a person acting on the consent that had been given could be convicted of a criminal offence. That is, in any event, inherent in the requirement that the prosecution prove that the person knew (in one of the ways defined) that the complainant did not consent.

64. Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Consultation Paper (2019) [106].

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

66. See, eg, *Sexual Offences (Scotland) Act 2009* (Scot) s 15(3); *Criminal Law (Rape) Amendment Act 1990* (Ireland) s 9(4), amended by *Criminal Law (Sexual Offences) Act 2017* (Ireland) s 48.

67. See, eg, B Smith, *Preliminary Submission PCO51*, 1; M Dobbie, *Preliminary Submission PCO75*, 2; M Faruqi, *Preliminary Submission PCO93*, 1; ACON, *Submission CO12*, 5, 7; Sex Workers Outreach Project, *Submission CO15*, 5; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 9; Elizabeth Evatt Community Legal Centre, *Submission CO24*, 10; Positive Life NSW, *Submission CO62*, 2; NSW Law Reform Commission, Consent Review Survey, Response #356 (Qu 6), Response #515 (Qu 5), Response #3216 (Qu 5, Qu 10), Response #3246 (Qu 5).

68. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.2.

69. See, eg, NSW Bar Association, *Submission CO47* [11]; ACON, *Submission CO61*, 1; Positive Life NSW, *Submission CO62*, 2; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 2; UNSW School of Social Sciences, *Submission CO69*, 3.

70. R Burgin and J Crowe, *Submission CO63*, 2–3; Australian Queer Students’ Network, *Submission CO72*, 3; Women’s Safety NSW, *Submission CO74*, 5.

71. R Burgin and J Crowe, *Submission CO63*, 2–3.

72. See, eg, A Dyer, *Submission CO53* [19]–[20]; R Burgin and J Crowe, *Submission CO63*, 3; Women’s Legal Service NSW, *Submission CO70* [13].

73. A Dyer, *Submission CO53* [20].

A lack of physical or verbal resistance does not imply consent

Recommendation 5.4: Absence of physical or verbal resistance

The *Crimes Act* should provide that 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.

- 5.46 The *Crimes Act* should provide that a person is not to be taken to consent only because the person did not offer physical *or verbal* resistance (recommended s 61HI(3)).
- 5.47 Section 61HE(9) of the *Crimes Act* currently recognises that a person is not to be taken to consent to a sexual activity only because of a lack of physical resistance. One submission supports extending this to include a reference to a lack of verbal resistance.⁷⁴ Our recommendation adopts this suggestion.
- 5.48 Recommended s 61HI(3) reflects a core principle of the communicative model of consent: that submission or a lack of resistance does not alone indicate consent.⁷⁵ It also:
- addresses a common misconception that a person who experiences non-consensual sexual activity will fight back or voice opposition to it,⁷⁶ and
 - recognises that it is not uncommon for a person to freeze out of fear, and not respond physical or verbally.⁷⁷
- 5.49 Recommended s 61HI(3) is similar to legislation in some other Australian states and territories, which refers to both physical and verbal resistance. The ACT, the Northern Territory (“NT”) and South Australia (“SA”) have mandatory jury directions that provide that a person is not to be regarded as consenting if the person did not protest or physically resist.⁷⁸ In Victoria, a judge may direct the jury that “people who do not consent to a sexual act may not protest or physically resist the act”.⁷⁹
- 5.50 We proposed the language in recommended s 61HI(3) in our Draft Proposals.⁸⁰ A wide range of submissions support it.⁸¹

74. Office of the Director of Public Prosecutions, *Submission CO14*, 4. See also Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 14.

75. B Fileborn, *Sexual Assault Laws in Australia*, ACSSA Resource Sheet No 1 (Australian Centre for the Study of Sexual Assault, 2011) 8.

76. See, eg, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 7.

77. UNSW School of Social Sciences, *Submission CO69*, 3; Women’s Safety NSW, *Submission CO74*, 5; NSW Director of Public Prosecutions, *Submission CO85*, 2.

78. *Evidence Act (Miscellaneous Provisions) 1991* (ACT) s 80C(b); *Criminal Code* (NT) s 192A(a); *Evidence Act 1929* (SA) s 34N(1)(b).

79. *Jury Directions Act 2015* (Vic) s 46(3)(d)(ii).

80. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.3.

81. NSW Bar Association, *Submission CO47* [12]; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 2; UNSW School of Social Sciences, *Submission CO69*, 3; Women’s Legal Service, *Submission CO70* [14]; Community Legal Centres NSW, *Submission CO73*, 3; Inner City Legal Centre, *Submission CO82*, 1–2; NSW Director of Public Prosecutions, *Submission CO85*, 1–2.

Consent to a particular sexual activity does not imply consent to a different sexual activity

Recommendation 5.5: Consent to a particular sexual activity

The *Crimes Act* should provide that 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.

For example, a person who consents to sexual activity using a condom is not to be taken, by reason only of that fact, to consent to sexual activity without using a condom.

- 5.51 The *Crimes Act* should recognise that a person who consents to a particular sexual activity (for example, vaginal sexual intercourse) is not, by reason only of this fact, to be taken to consent to another sexual activity (for example, anal sexual intercourse) (recommended s 61HI(4)).
- 5.52 Recommended s 61HI(4) challenges any assumption that “if a person consents to one thing, they are consenting to any sexual contact”.⁸² It also reflects the communicative model of consent, which recognises that there are multiple decisions to be made in sexual interactions. To agree to engage in one kind of sexual activity is not, in itself, an agreement to engage in anything more.⁸³
- 5.53 The definition of consent in the existing s 61HE(2) may already imply that consent is specific to a particular activity, as it refers to free and voluntary agreement to *the* sexual activity. This is arguably reinforced by the way “sexual intercourse” is defined to include various kinds of intercourse.⁸⁴
- 5.54 We consider it important that this be stated expressly in the *Crimes Act*. This may help communicate to fact finders that consent is a “dynamic concept” and “[c]onsent for one set of sexual activities does not automatically entail consent for another set of activities”.⁸⁵
- 5.55 It could also help to educate the community about consent, including those who are considering whether to make a complaint about a possible sexual assault. For instance, Rape and Domestic Violence Services Australia submits that it often has clients who are unsure whether the law would treat them as having consented to a particular sexual activity because they consented to a different one.⁸⁶
- 5.56 Recommended s 61HI(4) is similar to a mandatory jury direction in SA. A judge must direct the jury that a person is not to be regarded as having consented to a sexual activity merely because “the person freely and voluntarily agreed to sexual activity of a different kind with the defendant”.⁸⁷ It is also similar to the law in

82. C Parton, *Attitudes towards Violence against Women and Gender Equality among People in NSW: Summary Findings from the 2017 National Community Attitudes Survey (NCAS)* (ANROWS, 2019) 20.

83. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases” (2019) 31 *Current Issues in Criminal Justice* 24, 26. See also J Monaghan and G Mason, “Communicative Consent in New South Wales: Considering *Lazarus v R*” (2018) 43 *Alternative Law Journal* 96, 97.

84. See, eg, NSW Bar Association, *Submission CO32*, 4.

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

86. Rape and Domestic Violence Services Australia, *Submission CO65* [9.3].

87. *Evidence Act 1929* (SA) s 34N(1)(d)(i).

Scotland, which provides that “[c]onsent to conduct does not of itself imply consent to any other conduct”.⁸⁸

- 5.57 We originally proposed the language in recommended s 61HI(4) in our Draft Proposals.⁸⁹ Several submissions support it.⁹⁰ Some observe that it clarifies that consent must be an ongoing process throughout a sexual encounter, especially when different sexual activities are introduced,⁹¹ and cannot be assumed.⁹²
- 5.58 One submission argues that the proposal was too broad and may create problems in practice. For instance, multiple types of sexual activity could occur simultaneously (for example, sexual touching might occur at the same time as sexual intercourse). The sexual touching could be “inseparable” from the sexual intercourse. The submission suggests that our approach might mean that consent to sexual intercourse would not on its own constitute consent to sexual touching.⁹³
- 5.59 Recommended s 61HI(4) would not prevent a person from validly consenting to multiple types of sexual activity occurring concurrently. Instead, it would ensure that a person who consents to a particular sexual activity is not taken to consent to a different sexual activity.

Consent to sexual activity using a condom does not imply consent to sexual activity without using a condom

- 5.60 We recommend that a note be inserted into recommended s 61HI(4) to highlight a particular situation to which recommended s 61HI(4) is intended to apply. The note would provide:
- For example, a person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.
- 5.61 The note is intended to address the issue of “stealththing”.⁹⁴ This refers to the situation where a person consented to sexual activity on the basis that a condom would be used and the other person deliberately does not use, damages, or

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

89. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.4.

90. A Dyer, *Submission CO53* [8]; ACON, *Submission CO61*, 1; Rape and Domestic Violence Services Australia, *Submission CO65* [9.3]; UNSW School of Social Sciences, *Submission CO69*, 3; Women’s Safety NSW, *Submission CO74*, 6; Inner City Legal Centre, *Submission CO82*, 2.

91. ACON, *Submission CO61*, 1. See also Inner City Legal Centre, *Submission CO82*, 2.

92. Women’s Safety NSW, *Submission CO74*, 6.

93. NSW Bar Association, *Submission CO47* [13].

94. The term “stealththing” has been criticised. For example, some commentators argue that this term glamourises or minimises the issue. For this reason, some call this conduct “non-consensual condom removal”: see, eg, R L Latimer and others, “Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia” (2018) 13(12) *PLoS ONE* e0209779. However, we use the term “stealththing” in this Chapter for ease of reference, as it has wide public recognition.

removes the condom before or during the sexual activity, without the agreement of the other person.⁹⁵

Stealthing should be a criminal offence

- 5.62 There is limited research on the prevalence of stealthing in NSW. But submissions, media reports and research from other Australian states suggest that stealthing is a well-recognised practice.⁹⁶
- 5.63 Some studies describe the prevalence of “stealthing” and related tactics to resist condom usage. One recent study found that 32% of women and 19% of men who have sex with men who were questioned at a sexual health clinic in Melbourne reported having experienced stealthing.⁹⁷
- 5.64 There is broad acceptance in submissions and survey responses, supported by relevant academic literature⁹⁸ and in the media,⁹⁹ that where a person has agreed to sexual activity involving use of a condom, and the other person engages in “stealthing” so that the sexual activity is without the use of a condom, then that other person’s conduct should be a crime.¹⁰⁰
- 5.65 Some submissions, and many responses to our survey, consider stealthing as a type of “sexual assault” or “rape”.¹⁰¹ One survey response says:

I believe if a person removes a condom, pokes holes in a condom, or lies about using contraceptives, then the sex they have is no longer [consensual]. If a

95. A Brodsky, “‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal” (2017) 32 *Columbia Journal of Gender and Law* 183, 185; B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 217.

96. See, eg, UNSW School of Social Sciences, *Submission CO69*, 3; ACON, *Submission CO61*, 1; Inner City Legal Centre, *Submission CO82*, 3; R L Latimer and others, “Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia” (2018) 13(12) *PLoS ONE* e0209779, 11; B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 217–218; “Is this Rape? The Legal Grey-Area around Prosecuting ‘Stealthing’ in Australia”, *Triple J Hack* (2 May 2017) <www.abc.net.au/triplej/programs/hack/stealthing-and-the-law/8489348> (retrieved 17 September 2020).

97. R L Latimer and others, “Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia” (2018) 13(12) *PLoS ONE* e0209779, 11.

98. See, eg, A Brodsky, “‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal” (2017) 32 *Columbia Journal of Gender and Law* 183, 190–196; B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 231.

99. See, eg, “Is this Rape? The Legal Grey-Area around Prosecuting ‘Stealthing’ in Australia”, *Triple J Hack* (2 May 2017) <www.abc.net.au/triplej/programs/hack/stealthing-and-the-law/8489348> (retrieved 10 August 2020); M Wade, “‘Stealthing’ is Sexual Assault, and We Need to Talk About It,” *Star Observer* (28 February 2019) <www.starobserver.com.au/news/national-news/victoria-news/stealthing-is-a-form-of-sexual-assault-and-we-need-to-talk-about-it/178175> (retrieved 18 September 2020).

100. See, eg, P Easteal, *Preliminary Submission PCO24*, 14; M Nittis, *Submission CO51*, 2; ACON, *Submission CO61*, 1; Positive Life NSW, *Submission CO62*, 2; Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 3–4; UNSW School of Social Sciences, *Submission CO69*, 3; Australian Queer Students’ Network, *Submission CO72*, 2–3; Inner City Legal Centre, *Submission CO82*, 3; NSW Law Reform Commission, Consent Review Survey, Response #108 (Qu 4, Qu 6), Response #248 (Qu 5), Response #2726 (Qu 5), Response #3246 (Qu 10).

101. See, eg, Sex Workers Outreach Project, *Preliminary Submission PCO103*, 9–10; NSW Law Reform Commission, Consent Review Survey, Response #108 (Qu 4), Response #118 (Qu 10), Response #2188 (Qu 10), Response #2726 (Qu 5), Response #3,246 (Qu 10).

person consents to safe sex and unknowingly participated in unsafe sex, they have been sexually assaulted.¹⁰²

- 5.66 From a public health perspective, stealthing carries a significant risk of transmission of sexually transmitted infections (“STIs”). While other existing offences (such as “causing a person to contract a grievous bodily disease”,¹⁰³ and failing to take reasonable precautions against spreading a notifiable disease that is sexually transmissible¹⁰⁴) cover this to some extent, they do not cover most cases of stealthing.
- 5.67 This potential health consequence is not the only issue associated with stealthing. It may also cause psychological harm to a person on whom it is perpetrated, such as emotional stress, guilt and shame.¹⁰⁵
- 5.68 A core principle of modern law of sexual offences is that the violation of autonomy involved in non-consensual sexual activity is itself a harm that warrants criminal sanction – regardless of whether there is physical injury.¹⁰⁶ Stealthing takes an otherwise consensual sexual activity outside the scope of what has been consented to, namely sexual activity with a condom.¹⁰⁷ On this view, stealthing deprives the person of free and voluntary choice.¹⁰⁸ Merely criminalising a potential consequence of stealthing (STI transmission) does not address this broader harm.

There is debate over whether stealthing is already covered by s 61HE

- 5.69 There may be legal uncertainty about whether the existing s 61HE captures stealthing.¹⁰⁹ There have been no authoritative statements from NSW appellate courts about the relationship between condom use and consent. This uncertainty may affect decisions about whether to report, charge or prosecute a person for stealthing.¹¹⁰
- 5.70 One argument is that stealthing would fall within the existing circumstance that a person does not consent if mistaken about the “nature of the act” (s 61HE(5)(d)). However, as we discuss in Chapter 6, this circumstance has been given a narrow

102. NSW Law Reform Commission, Consent Review Survey, Response #118 (Qu 10).

103. *Crimes Act 1900* (NSW) s 4(1) definition of “grievous bodily harm”, s 33, s 35(1)–(2).

104. *Public Health Act 2010* (NSW) s 79(1).

105. See, eg, R L Latimer and others, “Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia” (2018) 13(12) *PLoS ONE* e0209779, 13; B Chessser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 218.

106. T Hörnle, “Rape as Non-Consensual Sex” in A Müller and P Schaber (ed) *The Routledge Handbook of the Ethics of Consent* (2018) 235, 235–236.

107. See, eg, A Brodsky, “‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal” (2017) 32 *Columbia Journal of Gender and Law* 183, 186–187.

108. See, eg, *Assange v Swedish Prosecution Authority* [2012] EWHC 2849 (Admin) [86], [89]; *R (F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581 [26]; *R v Hutchinson* [2014] 1 SCR 346 [76] (Abella and Modaver JJ); *R v Rivera* [2019] ONSC 3918 [24].

109. A Dyer, *Submission CO02* [26]–[29]; B Chessser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 227–230.

110. Office of the Director of Public Prosecutions Staff, *Consultation CO22: Sex Workers Outreach Project, Preliminary Submission PCO103*, 9.

operation, so as to refer only to a mistake about whether the act was of a sexual (as distinct from medical or other) nature.¹¹¹

- 5.71 A stronger argument is that, applying the definition of consent in s 61HE(2), a person who is subject to stealthing has not freely and voluntarily agreed to the sexual activity that in fact occurs. This approach has been adopted by courts in the UK.¹¹² In *Assange*, the court held:

It would plainly be open to a jury to hold that, if [the complainant] had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent.¹¹³

- 5.72 The alternative view is that the “sexual activity” for which the complainant’s free and voluntary agreement is required refers only to the physical act itself (for example, vaginal or anal sexual intercourse), and not the manner in which that act is performed (for example, with or without a condom).¹¹⁴ On that basis, a complainant who has consented to sexual intercourse, though stipulating that a condom must be used, nevertheless consents, even if a condom is surreptitiously not used by the other person.¹¹⁵

- 5.73 We recognise that doubt about the position may militate against the reporting, investigation and prosecution of stealthing cases, and for that reason agree that the matter should be resolved explicitly.

- 5.74 There are practical reasons for addressing stealthing expressly in the *Crimes Act*. In particular, it may:

- encourage people to report cases of stealthing to the police¹¹⁶
- assist police and prosecutors when deciding whether to investigate and prosecute cases involving stealthing,¹¹⁷ and
- assist community education initiatives aimed at preventing stealthing.¹¹⁸

Our preferred option for addressing stealthing

- 5.75 A range of options for addressing the issue has been considered. These include:

111. *R v Mobilio* [1991] 1 VR 339, 344. See also B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 225; A Dyer, “Mistakes That Negate Apparent Consent” (2019) 43 *Criminal Law Journal* 159, 169–173.

112. See, eg, *Assange v Swedish Prosecution Authority* [2012] EWHC 2849 (Admin) [86]; *R (F) v DPP (A)* [2013] EWHC 945 (Admin) [26]. See also *R v Hutchinson* [2014] 1 SCR 346 [76] (Abella and Modaver JJ); *R v Rivera* [2019] ONSC 3918 [24].

113. *Assange v Swedish Prosecution Authority* [2012] EWHC 2849 (Admin) [86].

114. See, eg, *R v Hutchinson* [2014] 1 SCR 346 [24] (McLachlin CJ, Rothstein, Cromwell and Wagner JJ); B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 223.

115. B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 223.

116. B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 219.

117. Office of the Director of Public Prosecutions Staff, *Consultation CO22*.

118. Sydney Roundtable 4, *Consultation CO10*.

- adding stealthing to the list of circumstances in which a person does not consent¹¹⁹
- providing that a person does not consent where the person participates because of a mistaken belief that the other person will wear a condom during the sexual activity,¹²⁰ and
- creating a separate offence for stealthing.¹²¹

5.76 We do not support these options because:

- we do not think the issue is one of mistake; it is of the scope of the consent, and
- in circumstances where English authority provides good reason for thinking that stealthing is already caught by the existing provisions, it is preferable simply to clarify that that is so, rather than to create a new offence.

5.77 Our preferred solution is to address stealthing by including sex with a condom as an example of a particular sexual activity to which a person may consent without consenting to any other sexual activity, under recommended s 61HI(4). This differs from our Draft Proposals, in which we proposed including stealthing as an example of when a person consents to sexual activity being performed in a particular manner (discussed below).¹²² The note to proposed s 61HI(6) provided:

Note. For example, a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.

5.78 As we discuss below, many submissions on the Draft Proposals criticised proposed s 61HI(6).¹²³ After further consideration, we do not recommend it. While submissions were generally positive about referring to stealthing in some form,¹²⁴ some argued that the law should address the issue more directly.¹²⁵

5.79 In our proposed s 61HI(6), we used the term, “a device that prevents transmission of sexually transmitted infections”. This was criticised by submissions as being

119. R Burgin, *Preliminary Submission PCO72*, 3; The University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, 13; C Stone, *Preliminary Submission PCO95*, 7; Positive Life NSW, *Submission CO10*, 2; Sex Workers Outreach Project, *Submission CO15*, 8; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 9–10; ACON, *Submission CO61*, 1; NSW Director of Public Prosecutions, *Submission CO85*, 2.

120. A Dyer, *Submission CO02* [29]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 5.

121. B Chesser and A Zahra, “Stealthing: A Criminal Offence?” (2019) 31 *Current Issues in Criminal Justice* 217, 231–232; *Penal Code* (Singapore) s 376H(1)(d).

122. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.6.

123. NSW Bar Association, *Submission CO47* [15]–[16]; M Nittis, *Submission CO51*, 2; Legal Aid NSW, *Submission CO87*, 5.

124. ACON, *Submission CO61*, 1; Positive Life NSW, *Submission CO62*, 2; Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 3–4; UNSW School of Social Sciences, *Submission CO69*, 3; Australian Queer Students’ Network, *Submission CO72*, 2–3; Inner City Legal Centre, *Submission CO82*, 3. See also B Lee, “Proposed Reforms to NSW Consent Law”, *The Saturday Paper* (ed 279, 16–22 November 2019).

125. ; NSW Bar Association, *Submission CO47* [16]; NSW Director of Public Prosecutions, *Submission CO85*, 2.

wordy or unclear.¹²⁶ Some also suggested that specifically mentioning “sexually transmitted infections” may increase stigmatisation of people with these infections.¹²⁷

- 5.80 The intent is to recognise that a person who consents to sexual activity using a condom does not thereby consent to sexual activity without the use of a condom. We therefore recommend using the expression “sexual activity using a condom” in the note to recommended s 61HI(4).
- 5.81 Our recommended approach best fits with our view that sexual activity without a condom falls outside the scope of a consent which is limited to sexual activity with a condom. It is broadly consistent with what we proposed in the Draft Proposals, but avoids the problems identified with that proposal. It clearly conveys that stealthing is criminal behaviour.

Consent on one occasion, or with one person, does not imply consent on another occasion, or with another person

Recommendation 5.6: Consent to sexual activity on one occasion, or with one person, is not consent to sexual activity on another occasion or with another person

The *Crimes Act* should provide that 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 any other occasion.

- 5.82 The *Crimes Act* should recognise that:
- consent to a sexual activity with a person on one occasion does not, of itself, imply there is consent to a sexual activity on another occasion, and
 - consent to a sexual activity with one person does not, of itself, imply there is consent to sexual activity with any other person (recommended s 61HI(5)).
- 5.83 Our recommendation would address any false assumptions that:
- a person who consents to sexual activity at one time will necessarily consent again in the future,¹²⁸ and
 - a person who engages in sexual activity with one person will, or is likely to, engage in sexual activity with another person.¹²⁹
- 5.84 Evidence of other consensual sexual activity on the part of a complainant is generally inadmissible under s 293(3) of the *Criminal Procedure Act*. This is

126. See, eg, NSW Director of Public Prosecutions, *Submission CO85*, 2.

127. Positive Life NSW, *Submission CO62*, 2; Australian Queer Students' Network, *Submission CO72*, 2–3.

128. See, eg, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 5.

129. See, eg, *R v Burton* [2013] NSWCCA 335, 237 A Crim R 238 [70].

intended to minimise the distress, humiliation and embarrassment experienced by complainants who testify at trial.¹³⁰ Such evidence may, however, be admitted if it falls within certain exceptions.¹³¹

- 5.85 There is a risk that evidence about the complainant's sexual experience or activity could reinforce certain misconceptions or assumptions that jury members may hold.¹³² For example, jurors could reason that a complainant who has had certain experiences might be the "kind of person" who is more likely to consent to the sexual activity in question.¹³³ Recommended s 61HI(5) is intended to deter jurors from reasoning in this way.
- 5.86 Recommended s 61HI(5) is similar to certain jury directions that are given in some Australian states and territories (the ACT, the NT and SA). In those places, provision is made for mandatory jury directions that a person is not to be regarded as consenting to a sexual activity only because the person consented to a sexual activity with the accused person, on that or another occasion, or with another person, on that or another occasion.¹³⁴ Recommended s 61HI(5) is proposed as a statutory formulation of the same principle.
- 5.87 Similarly, in Victoria, a judge may inform the jury that experience shows that people who do not consent to a sexual act with a particular person on one occasion may have, on one or more other occasions, engaged in or been involved in consensual sexual activity:
- with that person or another person, or
 - of the same kind or a different kind.¹³⁵
- 5.88 We originally proposed the language in recommended s 61HI(5) in our Draft Proposals.¹³⁶ Several submissions support it.¹³⁷ Some observe that it highlights that consent is required for every instance of sexual activity.¹³⁸

130. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [27.49]. See also *Adams v R* [2018] NSWCCA 303 [164], citing *GP v R* [2016] NSWCCA 150 [40].

131. See *Criminal Procedure Act 1986* (NSW) s 293(4), s 293(6).

132. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [27.39].

133. See, eg, *Bull v R* [2000] HCA 24, 201 CLR 443 [53]. See also B Fileborn, *Sexual Assault Laws in Australia*, ACSSA Resource Sheet No 1 (Australian Centre for the Study of Sexual Assault, 2011) 8–9.

134. *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C(d); *Criminal Code Act* (NT) s 192A(c); *Evidence Act 1929* (SA) s 34N(1)(d).

135. *Jury Directions Act 2015* (Vic) s 46(3)(e).

136. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.5.

137. NSW Bar Association, *Submission CO47* [14]; A Dyer, *Submission CO53* [8]; Women's Legal Service NSW, *Submission CO70* [15]; Community Legal Centres NSW, *Submission CO73*, 3; Women's Safety NSW, *Submission CO74*, 6; Inner City Legal Centre, *Submission CO82*, 2.

138. Women's Legal Service, *Submission CO70* [15]; Community Legal Centres NSW, *Submission CO73*, 3.

Consent to a sexual activity “being performed in a particular manner”

- 5.89 In our Draft Proposals, we proposed that the *Crimes Act* should address the situation where a person consents to a sexual activity being performed in a particular way, but the activity is performed in a different way. The proposed provision was:

A person who consents to a sexual activity being performed in a particular manner is not, by reason only of that fact, to be taken to consent to the sexual activity being performed in another manner.¹³⁹

- 5.90 A note to the proposed provision included an example of when this issue may arise:

For example, a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.¹⁴⁰

- 5.91 This note was intended to cover the issue of stealthing. As we discuss above, we now recommend that a note on stealthing be included in recommended s 61HI(4).
- 5.92 Some submissions support the proposed provision.¹⁴¹ However, others criticise it as ambiguous and too broad.¹⁴² A specific concern is that the expression “performed in a particular manner” could capture unintended situations, such as where a person consents to sexual activity being performed quickly, but it is performed slowly.¹⁴³
- 5.93 In response to these concerns, we do not recommend this proposed provision. We agree that it could conflict with one of the objectives behind our recommendations, which is to clarify and simplify the law.

In summary

- 5.94 The *Crimes Act* should continue to define consent as free and voluntary agreement to a sexual activity, but specify that this agreement must be present at the time the sexual activity occurs. The *Crimes Act* should recognise other aspects of consent, such as the right to withdraw consent.
- 5.95 These recommendations are intended to clarify the meaning of consent and guide its application. They should also guide fact finders in determining whether the accused person knew that the complainant did not consent, which is an issue that we consider in Chapter 7.

139. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.6

140. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 5.6.

141. See, eg, A Dyer, *Submission CO53* [8]; Women’s Safety NSW, *Submission CO74*, 6.

142. NSW Bar Association, *Submission CO47* [15]; M Nittis, *Submission CO51*, 2; The Public Defenders, *Submission CO84*, 2; Legal Aid NSW, *Submission CO87*, 5.

143. NSW Bar Association, *Submission CO47* [15].

- 5.96 In the next Chapter, we consider the statutory lists of circumstances in which a person does not consent, or in which it “may be established” that a person does not consent.

6. When a person does not consent

In brief

The law should continue to list circumstances in which a person does not consent to sexual activity, but should no longer list circumstances in which it “may be established” that a person does not consent. Many of the existing circumstances in which a person does not consent should be amended, and some new circumstances should be added.

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- 6.1 Section 61HE currently specifies certain circumstances in which a person does not consent to sexual activity. It also lists circumstances in which it “may be established” that a person does not consent.
- 6.2 In this Chapter, we recommend changes to these lists. First, we consider changes to the language and structure of the lists. We then detail what should be contained in a single, non-exhaustive list of circumstances in which a person does not consent. We consider the circumstances currently contained in s 61HE, as well as new circumstances that should be added.

The current law

- 6.3 Section 61HE(5) and (6) of the *Crimes Act* set out eight circumstances in which a person does not consent to sexual activity. If one of these circumstances exists, the complainant does not, by definition, consent. If the prosecution proves that one of the circumstances existed at the time of a sexual activity, it has proved that the complainant did not consent to that activity.
- 6.4 Section 61HE(8) sets out three circumstances in which it “may be established” that a person does not consent to a sexual activity. Proof of one of these circumstances does not necessarily prove the absence of consent. The prosecution must still prove the absence of consent (that is, a lack of free and voluntary agreement) on the facts.
- 6.5 The lists of circumstances currently contained in s 61HE(5), (6) and (8) are not exhaustive.¹ There may be other circumstances in which the prosecution can establish the absence of consent.
- 6.6 The list of circumstances in which a person does not consent was expanded in the 2007 reforms in response to the recommendations of the Taskforce.² Three more circumstances were added, providing that a person does not consent if the person:
- does not have the capacity to consent, including because of age or cognitive incapacity
 - does not have the opportunity to consent because the person is unconscious or asleep, and
 - consents to the sexual intercourse because the person is unlawfully detained.³

1. *Crimes Act 1900* (NSW) s 61HE(10).

2. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) rec 11, rec 13; *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1]. See Chapter 1 for more details about the Taskforce.

- 6.7 The 2007 reforms added a new list of circumstances in which it “may be established” that a person does not consent. The circumstances in this list were that the person consents:
- while substantially intoxicated by alcohol or any drug
 - because of intimidatory 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.⁴
- 6.8 The Taskforce was of the view that these factors *may* vitiate consent in some but not all cases, depending on the facts. It therefore considered that it would be inappropriate, and make the law inflexible, to include these in the list of circumstances in which it is conclusively proved that a person does not consent.⁵
- 6.9 By listing circumstances in which a person does not consent, the law in NSW is consistent with the law in other Australian states and territories, and in many other countries.⁶ There is, however, significant variation between these laws in scope and approach. NSW is the only Australian jurisdiction to include a list of circumstances in which it “may be established” that a person does not consent.

The law should list grounds where a person does not consent

- 6.10 The law should continue to list circumstances in which a person does not consent to sexual activity. Most submissions and responses to our survey support this approach.⁷
- 6.11 Arguably, it is not necessary for the law to list circumstances in which a person does not consent. This is because the *Crimes Act* contains a broad and flexible definition of consent. One submission argues that this definition (involving free and voluntary agreement) should be the main reference point at trial, whereas a list of circumstances may divert attention from this.⁸

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3. *Crimes Act 1900* (NSW) s 61HA(4), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1]. These circumstances are now found in s 61HE(5) of the *Crimes Act 1900* (NSW), although “sexual intercourse” was replaced with “sexual activity” in 2018: *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6].
 4. *Crimes Act 1900* (NSW) s 61HA(6), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1]. These circumstances are now found in s 61HE(8) of the *Crimes Act 1900* (NSW).
 5. See NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 37–39.
 6. See, eg, *Crimes Act 1900* (ACT) s 67(1); *Crimes Act 1961* (NZ) s 128A; *Crimes Act 1958* (Vic) s 36(2); *Criminal Code* (Canada) s 265(3), s 273.1(2); *Criminal Code* (NT) s 192(2); *Criminal Code* (Qld) s 348(2); *Criminal Code* (Tas) s 2A(2); *Criminal Code* (WA) s 319(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Sexual Offences Act 2003* (UK) s 75, s 76; *Sexual Offences (Northern Ireland) Order 2008* (UK) s 9, s 10; *Sexual Offences (Scotland) Act 2009* (Scot) s 13.
 7. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 5; ACON, *Submission CO12*, 3; Office of the Director of Public Prosecutions, *Submission CO14*, 4; Sex Workers Outreach Project, *Submission CO15*, 7; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10. In our survey, 93.52% of responses to Question 8 (1,443 out of 1,543 responses) agreed that the law should list some situations in which a person cannot consent.
 8. J Quilter, *Preliminary Submission PCO92*, 5.

- 6.12 We consider that such a list has merit. A legislated list of circumstances provides guidance about the meaning of consent.⁹ This is because it includes circumstances where there is:
- broad community acceptance that a person cannot consent, as defined, in a particular situation,¹⁰ and/or
 - legal uncertainty about whether the general definition covers a certain situation, but there are compelling public policy reasons for stating that a person does not consent in that situation.¹¹
- 6.13 Submissions and survey respondents argue that a list of circumstances in which a person does not consent:
- assists in interpreting the meaning of consent, by providing examples of when consent is *not* present¹²
 - makes some trials easier and quicker to prosecute¹³
 - encourages consistent outcomes in similar cases, while still allowing for flexibility in unusual cases¹⁴
 - makes it easier, in some cases, for the prosecution to prove the complainant did not consent¹⁵
 - validates the experiences of some complainants, by confirming that, in some circumstances, sexual activity is never consensual,¹⁶ and
 - educates the community about situations which are non-consensual.¹⁷

9. See, eg, A Dyer, *Submission CO02* [11], [18]; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 4–5; Community Legal Centres NSW, *Submission CO25*, 7; Rape and Domestic Violence Services Australia, *Submission CO28* [86]. See also Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ARLC Report 114, NSWLRC Report 128 (2010) vol 2 [25.87].

10. NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10. See also Victims of Crime Assistance League Inc NSW, *Submission CO11*, 5.

11. Criminal Law Review, *Review of Sexual Offences*, Consultation Paper (Department of Justice, Victoria, 2013) 22–23.

12. See, eg, NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 4–5. See also Tasmania, Law Reform Commission, *Report and Recommendations on Rape and Sexual Offences*, Report No 31 (1982) 16; 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) 85.

13. NSW Law Reform Commission, Consent Review Survey, Response #1350 (Qu 8), Response #3,087 (Qu 8).

14. See, eg, K Burton, *Preliminary Submission PC076* [9], citing J Crowe, “Fraud and Consent in Australian Rape Law” (2014) 38 *Criminal Law Journal* 236, 247; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10; Community Legal Centres NSW, *Submission CO25*, 7.

15. NSW Law Reform Commission, Consent Review Survey, Response #1322 (Qu 8), Response #2128 (Qu 8), Response #2223 (Qu 8), Response #2709 (Qu 8).

16. NSW Law Reform Commission, Consent Review Survey, Response #3242 (Qu 8).

17. NSW Law Reform Commission, Consent Review Survey, Response #1084 (Qu 8), Response #2304 (Qu 8).

The list of circumstances should be simplified and modernised

Recommendation 6.1: The list of circumstances should be simplified and modernised

- (1) The *Crimes Act* should contain a list of circumstances in which a person does not consent to sexual activity.
- (2) The list of circumstances should be non-exhaustive.
- (3) The *Crimes Act* should not include a list of circumstances in which it “may be established” that a person does not consent to sexual activity.
- (4) In the list of circumstances in which a person does not consent to sexual activity:
 - (a) the concept of “negation” should not be used
 - (b) the word “consents” should only be used in the context of defining when a person does or does not consent, and
 - (c) in all other circumstances, the term “participates” should be used.

There should be a single, non-exhaustive list

- 6.14 We recommend that the law contain a non-exhaustive list of circumstances in which “a person does not consent” (recommended s 61HJ of the *Crimes Act*).¹⁸ Many submissions support this approach.¹⁹
- 6.15 We do not recommend that the law continue to list circumstances in which it “may be established” that a person does not consent to a sexual activity (currently contained in s 61HE(8)). Many submissions criticise this list.²⁰ Reasons include:
 - having two types of circumstances (some in which a person does not consent, and some in which this only “may be established”) can be confusing, including to jurors²¹
 - because judges and juries are not required to find that a person does not consent if these circumstances exist, similar cases could lead to inconsistent (and potentially unjust) outcomes²²
 - prosecutors rarely refer to the circumstances in this list explicitly,²³ and

18. See Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

19. See, eg, A Dyer, *Submission CO53* [2]; Rape and Domestic Violence Services Australia, *Submission CO65* [10.2]; J Quilter and L McNamara, *Submission CO66*, 1–2; Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 1; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 2.

20. See, eg, Rape and Domestic Violence Services Australia, *Submission CO28* [98]–[99]; Domestic Violence NSW, *Submission CO29*, 6; NSW Bar Association, *Submission CO32*, 6–7; J Quilter and L McNamara, *Submission CO66*, 1–2. See also Community Legal Centres NSW, *Submission CO25*, 7.

21. Domestic Violence NSW, *Submission CO29*, 6; NSW Bar Association, *Submission CO32*, 6–7. See also Community Legal Centres NSW, *Submission CO25*, 6; Women’s Legal Service NSW, *Submission CO27* [32]; Rape and Domestic Violence Services Australia, *Submission CO28* [98].

22. See, eg, Domestic Violence NSW, *Submission CO29*, 6.

- the circumstances in this list should instead be recognised as circumstances in which a person does not consent.²⁴
- 6.16 Arguments in favour of retaining this list include that it guides police officers and prosecutors, clarifies the meaning of consent, and protects people who experience sexual offending.²⁵ These advantages also apply to a list of circumstances in which a person does not consent.
- 6.17 To be clear, we do not recommend removing the circumstances listed in s 61HE(8) from the law entirely. We recommend moving the circumstances currently in this list into the list of circumstances in which a person does not consent, with some modifications.²⁶
- 6.18 As we discuss above, these circumstances were included in s 61HE(8) because the Taskforce felt that they covered situations which may, but will not always, remove a person's capacity to agree freely and voluntarily to sexual activity. Submissions broadly agree that this is still true, at least in relation to current s 61HE(8)(a) and s 61HE(8)(c).²⁷ This is better dealt with by reframing these circumstances so that they require a higher threshold to apply, rather than treating them as circumstances in which it only "may be established" that a person does not consent. We discuss our approach in relation to the specific circumstances later in the Chapter.

The concept of "negation" should not be used

- 6.19 Currently, the subheading to s 61HE(5) refers to "negation of consent". We recommend removing any reference to the concept of "negation". Instead, the heading should refer to "circumstances in which there is no consent".
- 6.20 The term "negation" is misleading. If a circumstance in the list exists, a person does not consent *by definition*. It is not the case that an otherwise valid consent is negated.

The word "consents" should be replaced with "participates"

- 6.21 Current s 61HE(5), (6) and (8) use the word "consent" frequently and inconsistently. For example:
- a person *does not consent* to a sexual activity ... if the person *consents* to the sexual activity because of threats of force or terror,²⁸ and

23. The Public Defenders, *Consultation CO25*. This finding is also supported by a review of transcripts of recent District Court cases conducted by the Commission.

24. See, eg, A Dyer, *Submission CO02* [37]; Community Legal Centres NSW, *Submission CO25*, 8; Rape and Domestic Violence Services Australia, *Submission CO28* [98]; NSW Law Reform Commission, Consent Review Survey, Response #3216 (Qu 10).

25. NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10; NSW Law Reform Commission, Consent Review Survey, Response #36 (Qu 11), Response #590 (Qu 11), Response #690 (Qu 11), Response #1825 (Qu 11).

26. See rec 6.1, rec 6.4, rec 6.6, rec 6.8.

27. See, eg, A Dyer, *Submission CO02* [35]–[37]; Women's Legal Service NSW, *Submission CO70* [35].

28. *Crimes Act 1900* (NSW) s 61HE(5)(c) (emphasis added). In this example, the second "consents" is the one in issue.

- 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.²⁹
- 6.22 This is unclear and repetitive. The first use of the word “consent” in these examples wrongly suggests that the person *has* “consented”; the intent and effect of each provision is that, in the circumstances mentioned, participation in the sexual activity was non-consensual.³⁰
- 6.23 The word “consent” should only be used in its defined sense (that is, involving free and voluntary agreement). Alternative language used in other jurisdictions includes “allows”, “agrees”, “agrees or submits” or “submits or does not resist”.³¹ Some submissions prefer “submits”, as this captures sexual assaults that occur in the context of domestic and family violence.³²
- 6.24 We prefer the word “participates”, which encompasses situations, for example, in which a complainant:
- passively submits to sexual activity, and
 - more actively engages in a sexual activity, but does not legally consent to it (for example because the complainant is mistaken about the identity of the other person).

The person does not say or do anything to communicate consent

Recommendation 6.2: The person does not say or do anything to communicate consent

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.

- 6.25 Legislation in Tasmania and Victoria provides that a person does not consent if the person does not say or do anything to “communicate” (Tasmania) or “indicate” (Victoria) consent.³³ We recommend that the *Crimes Act* should adopt this approach (recommended s 61HJ(1)(a)).
- 6.26 This reform received considerable support throughout our review.³⁴ We explain the key reasons for our recommendation below.

29. *Crimes Act 1900* (NSW) s 61HE(6) (emphasis added). In this example, the first “consents” is the one in issue.

30. Rape and Domestic Violence Services Australia, *Submission CO28* [94]–[95]; Women’s Legal Service NSW, *Submission CO27* [42].

31. See, eg, *Crimes Act 1961* (NZ) s 128A(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a), (g); *Criminal Code* (Tas) s 2A(2)(b)–(f); *Sexual Offences (Scotland) Act 2009* (Scot) s 13(2)(b)–(e); *Criminal Code* (Canada) s 265(3).

32. See, eg, Community Legal Centres NSW, *Submission CO25*, 9; Women’s Legal Service NSW, *Submission CO27* [42]; Women’s Domestic Violence Court Advocacy Service NSW Inc, *Submission CO30*, 9.

33. *Criminal Code* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l).

34. See, eg, Elizabeth Evatt Community Legal Centre, *Submission CO24*, 9; UNSW School of Social Sciences, *Submission CO69*, 3; Women’s Legal Service NSW, *Submission CO70* [18]; NSW Director of Public Prosecutions, *Submission CO85*, 2; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4. See also R4Respect, *Preliminary Submission PCO60* [3.1.1]–

The reform would reinforce the communicative model of consent

- 6.27 Recommended s 61HJ(1)(a) reinforces the communicative model of consent, which already underpins the law of consent in NSW.³⁵ The definition of consent, based on free and voluntary agreement, implies that consent is something to be communicated rather than assumed.³⁶ Recommended s 61HJ(1)(a) confirms this by stating expressly that a person does not consent if the person does not communicate consent through words or actions.
- 6.28 Some submissions argue that consent is an internal state of mind and can exist without communication.³⁷ We consider that consent is not just a subjective state of mind or attitude (like “willingness”), but a communicated state of mind; that is, a permission that is given by one person to another.³⁸
- 6.29 Like those in Victoria and Tasmania (see above), courts in Ireland and Queensland have recently recognised that consent must be communicated. The Supreme Court of Ireland observed in 2016 that “consent is the active communication through words or physical gestures” that the person “agrees with or actively seeks sexual intercourse”.³⁹ In 2018, the Queensland Court of Appeal similarly held that “consent” must not only exist as a state of mind, but must also be given (for example, through words or actions).⁴⁰

The concept of “communication” is flexible and contextual

- 6.30 Our recommendation uses the expression “communicate consent” (as used in Tasmania) rather than “indicate consent” (as used in Victoria). We use this expression to acknowledge explicitly the influence of the communicative model of consent.
- 6.31 Our recommendation does not prescribe any particular form of communication. Recommended s 61HJ(1)(a) allows for the “diverse range of ways that people can and do communicate consent”.⁴¹ By using the broad expression “does not say or do anything to communicate consent”, we intend to recognise that communication can be verbal, non-verbal or both. There is no uniform or standard way to communicate consent.⁴²
- 6.32 This reflects the “practical reality” of how consent to sexual activity is communicated and negotiated.⁴³ For instance, research indicates that:

[3.1.2]; University of Technology Sydney, *Preliminary Submission PCO80*, 3; Community Legal Centres NSW, *Submission CO25*, 5; Domestic Violence NSW, *Submission CO29*, 5.

35. See [3.32]–[3.33], [5.15].

36. G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases” (2019) 31 *Current Issues in Criminal Justice* 24, 28.

37. NSW Bar Association, *Submission CO47* [18]; A Dyer, *Submission CO53* [10]. See also The Public Defenders, *Submission CO84*, 2.

38. Victoria, Department of Justice and Regulation, Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction* (2015) 12. See also P Crofts and others, *Waller and Williams Criminal Law: Text and Cases* (LexisNexis, 13th ed, 2016) 185.

39. *DPP v O’R* [2016] IESC 64 [36], 3 IR 322 [42].

40. *R v Makary* [2018] QCA 258, [2019] 2 Qd R 528 [49]–[50].

41. Rape and Domestic Violence Services Australia, *Submission CO28* [48].

42. See, eg, Australian Lawyers Alliance, *Submission CO44* [5].

43. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4.

- in general, non-verbal methods of communication are used more frequently than verbal methods,⁴⁴ and
 - verbal methods are used more often for sexual intercourse than for other sexual activities (such as sexual touching).⁴⁵
- 6.33 We also acknowledge that communication can be contextual. Certain behaviours may amount to a communication of consent in some circumstances, or with some people, but not others.⁴⁶ Therefore, in determining whether there was communication of consent in a particular case, fact finders must consider the specific factual circumstances. Recommended s 61HJ(1)(a) is intended to be flexible enough to enable this.
- 6.34 Regardless of the form of communication used, consent must have been communicated positively.

The reform will assist to address misconceptions about consent

The reform addresses the “freeze” response

- 6.35 The intention of recommended s 61HJ(1)(a) is to dispel certain misconceptions about sexual behaviour and consent. There is a long-standing misconception that a person who does not consent will usually, if not always, offer physical or verbal resistance.⁴⁷ This means that fact finders may look for evidence of resistance to be satisfied that a complainant did not consent.⁴⁸ As a result, there is concern that silence, or an absence of resistance, can be equated with consent.⁴⁹

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44. See, eg, M A Beres, “‘Spontaneous’ Sexual Consent: An Analysis of Sexual Consent Literature” (2007) 17 *Feminism and Psychology* 93, 104; M A Beres, E Herold and S B Maitland, “Sexual Consent Behaviors in Same-Sex Relationships” (2004) 33 *Archives of Sexual Behavior* 475, 476; C L Muehlenhard and others, “The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review” (2016) 53 *Journal of Sex Research* 457, 475.
45. See, eg, D S Hall, “Consent for Sexual Behavior in a College Student Population” (1998) 1 *Electronic Journal of Human Sexuality* 1, 11; M Willis and others, “Explicit Verbal Sexual Consent Communication: Effects of Gender, Relationship Status, and Type of Sexual Behavior” (2019) 31 *International Journal of Sexual Health* 60, 67.
46. M Willis and K N Jozkowski, “Sexual Precedent’s Effect on Sexual Consent Communication” (2019) 48 *Archives of Sexual Behavior* 1723, 1724 citing M A Beres, “‘Spontaneous’ Sexual Consent: An Analysis of Sexual Consent Literature” (2007) 17 *Feminism and Psychology* 93, 104–105, 106; T Humphreys, “Perceptions of Sexual Consent: The Impact of Relationship History and Gender” (2007) 44 *Journal of Sex Research* 307, 308; T P Humphreys and M M Brousseau, “The Sexual Consent Scale-Revised: Development, Reliability, and Preliminary Validity” (2010) 47 *Journal of Sex Research* 420, 420.
47. See, eg, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 7.
48. See, eg, D Berliner, “Rethinking the Reasonable Belief Defense to Rape” (1991) 100 *Yale Law Journal* 2687, 2697.
49. See, eg, ACON, *Submission CO12*, 3; A Cossins, “Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent” (2019) 42 *UNSW Law Journal* 462, 489, 498.

- 6.36 It is now well-recognised that a common reaction to sexual assault is to “freeze” and remain unresponsive.⁵⁰ Such a response does not provide a valid basis for an inference of consent.
- 6.37 Recommended s 61HJ(1)(a) is directed squarely at this issue. Its effect is that passivity or silence does *not* denote consent.⁵¹ In other words, evidence that shows that a person did not do or say anything to communicate consent will *not* prove that the person consented; rather, it will prove that the person did not consent.
- 6.38 This reform would complement existing s 61HE(9). As we discuss in Chapters 3 and 5, s 61HE(9) provides that a person is not to be regarded as consenting only because the person does not resist physically.⁵² Recommended s 61HJ(1)(a) takes this a step further by providing that a person *does not*, by definition, consent, where that person “does not positively communicate free agreement through their words or actions”.⁵³

The reform can assist decisions to report, charge and prosecute

- 6.39 Concern has been expressed that, under the current law, prosecutors may be reluctant to proceed with cases where the complainant was passive and did not say or do anything to indicate a lack of consent.⁵⁴ By stating that there is no consent where a person does not communicate consent, recommended s 61HJ(1)(a) could assist with decisions to charge and prosecute these cases.
- 6.40 The reform may also help empower people who believe they may have experienced sexual offending to report the incident to police. Presently, people who were silent or did not actively resist may decide not to report their experience. They might doubt whether their experience would be treated as non-consensual under the law. The recommended provision could help them identify their experience as non-consensual.⁵⁵

The reform can help change community attitudes

- 6.41 Recommended s 61HJ(1)(a) may help educate the community by stating expressly that consent is not present when a person freezes or otherwise does not communicate consent, and may help to facilitate a cultural shift around consent,⁵⁶ by promoting a standard of behaviour for sexual activity based on mutual communication.⁵⁷

50. See, eg, 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, 935; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 6–7.

51. Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [7.23]. See also G Mason and J Monaghan, *Preliminary Submission PCO40* [10]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4.

52. We recommend that this include a reference to verbal resistance: rec 5.4 [5.46]–[5.50].

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

54. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 4.

55. CASA House Staff Consultation 1, *Consultation CO23*.

56. See, eg, S Mullins, *Preliminary Submission PCO97*, 1; Office of the Director of Public Prosecutions, *Submission CO14*, 2; Sex Workers Outreach Project, *Submission CO15*, 5.

57. Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) [7.61]. See also NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 5.

- 6.42 Some submissions argue that the criminal law is an ineffective tool for changing attitudes and beliefs in society.⁵⁸ Some believe that greater education about consent is needed, rather than legal change.⁵⁹
- 6.43 We strongly agree that education is important, and that education about the reforms we propose will be essential. The criminal law is the basis for enforcing the minimum standards of behaviour that the community expects. We have concluded that the communication standard established by recommended s 61HJ(1)(a) meets community expectations. If implemented, it would provide the foundation for education initiatives.
- 6.44 During our consultations, we heard from educators who teach people about consent in different contexts, including in schools and universities. They said that stating in the legislation that consent requires communication could help to educate people about what constitutes consent.⁶⁰ Consent educators in Tasmania and Victoria draw upon the communication standard in the legislation to educate people about giving and seeking consent.⁶¹ This, it might be thought, is self-evident: those who teach about consent will start from legal concepts and definitions.

The reform is part of a larger suite of reforms

- 6.45 We recognise that recommended s 61HJ(1)(a) may not, of itself, prevent the emergence at trial of misconceptions. Research suggests that misconceptions and assumptions about consensual and non-consensual sexual activity continue to feature in trials in Victoria and Tasmania.⁶²
- 6.46 This is why recommended s 61HI is part of a larger package of reforms. To address misconceptions about consent, we recommend:
- additional subsections in recommended s 61HI of the *Crimes Act*, to clarify the meaning of consent⁶³
 - jury directions that address specific misconceptions that may arise in the context of the facts of a case, including in relation to the responses of people who experience sexual assault,⁶⁴ and
 - an education program to accompany the reforms.⁶⁵

58. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 5. See also Law Society of NSW, *Submission CO18*, 3.

59. See, eg, Law Society of NSW, *Submission CO18*, 3.

60. Sydney Roundtable 1, *Consultation CO07*; University of Technology Sydney, *Preliminary Submission PCO80*, 3.

61. Sexual Assault Support Service Staff, *Consultation CO20*; CASA House Staff Consultation 2, *Consultation CO24*.

62. See 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) 194–195; R Burgin, "Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform" (2019) 59 *British Journal of Criminology* 296, 311–312.

63. Rec 5.4–5.6.

64. Rec 8.3–8.7.

65. Rec 10.2.

Trials would focus on positive communication rather than resistance

- 6.47 A key concern about the current law is that it encourages excessive scrutiny of the complainant's conduct, and whether the complainant indicated a lack of consent.⁶⁶ One submission suggests that recommended s 61HJ(1)(a) could lessen this scrutiny.⁶⁷ Another suggests that it could reduce "any undue burden" on complainants to demonstrate an absence of consent through resistance.⁶⁸
- 6.48 Others argue that this reform will not reduce the scrutiny of the complainant at trial.⁶⁹ Indeed, some think this reform will increase it,⁷⁰ because fact finders would have to determine whether the complainant engaged in certain conduct to communicate consent.⁷¹ One submission argues that, in making this determination, fact finders would consider the same evidence as they already do when deciding issues about consent generally.⁷²
- 6.49 We think these views are misconceived. We recognise that recommended s 61HJ(1)(a) directs attention to the complainant's actions at the time of the alleged sexual offence. We do not consider that it would heighten the scrutiny of complainants at trial. Consultations that we undertook with practitioners and experts in Tasmania suggest that this has not occurred in practice.⁷³ Moreover, in a case where proof of the absence of consent on the part of the complainant is the central issue, scrutiny of what the complainant did or said is inevitable. The recommended provision shifts the focus of the inquiry at trial. The question is whether the complainant said or did anything to communicate consent, rather than whether the complainant resisted or otherwise demonstrated an absence of consent.
- 6.50 Some submissions express concern that recommended s 61HJ(1)(a) could potentially lead to cross-examination of the complainant about past consensual sexual activity, and how consent was communicated in these instances,⁷⁴ which could result in further trauma for complainants.⁷⁵ While s 293 of the *Criminal Procedure Act* generally prohibits questioning about a complainant's sexual experience, such evidence can be admissible if it falls within certain exceptions.⁷⁶
- 6.51 The potential for such cross-examination will be reduced by:

66. See, eg, A Cossins, *Preliminary Submission PCO33*, 9; G Mason and J Monaghan, *Preliminary Submission PCO40* [6]; Children's Court of NSW, *Submission CO19*, 2.

67. NSW Director of Public Prosecutions, *Submission CO85*, 2.

68. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4.

69. See, eg, NSW Bar Association, *Submission CO32*, 5; Legal Aid NSW, *Submission CO33*, 6; M Nittis and C Andrighetto, *Submission CO35*, 1.

70. See, eg, A Dyer, *Preliminary Submission PCO50* [3]; Australian Lawyers Alliance, *Preliminary Submission PCO74* [5]; Law Society of NSW, *Submission CO76*, 4.

71. A Dyer, *Preliminary Submission PCO50* [14]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 4; Law Society of NSW, *Submission CO18*, 3.

72. A Dyer, *Submission CO53* [13].

73. Tasmanian Legal Practitioners, *Consultation CO01*; Dr Helen Cockburn, *Consultation CO16*; Sexual Assault Support Service Staff, *Consultation CO20*.

74. Australian Lawyers Alliance, *Submission CO44* [6]; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4.

75. Australian Lawyers Alliance, *Submission CO44* [6].

76. See *Criminal Procedure Act 1986* (NSW) s 293(4), s 293(6). See also [5.84].

- recommended s 61HI(5), which states that consent to a sexual activity on one occasion does not, of itself, mean that there is consent to a sexual activity on another occasion,⁷⁷ and
 - a new jury direction in the *Criminal Procedure Act*, to explain that non-consensual sexual activity can occur between different kinds of people including people who know one another, people who are married to one another, or people who are in an established relationship with one another.⁷⁸
- 6.52 We recommend that s 293 be examined as part of a periodic statutory review of the reform package. This review should consider whether recommended s 61HJ(1)(a) has led to any unintended consequences related to the use of sexual experience evidence at trial.⁷⁹ We discuss this in Chapter 10.⁸⁰

The reform would not infringe the rights of accused persons

- 6.53 Concern has been expressed that including non-communication in the list of circumstances in which a person does not consent would shift the onus of proof away from the prosecution to the accused: that is, the accused would have to provide evidence that there was some communication of consent.⁸¹
- 6.54 The concern is misconceived. The prosecution would still be required to prove, beyond reasonable doubt, that the complainant did not say or do anything to communicate consent. It may be difficult for the prosecution to do this in some cases, such as where the complainant's conduct was ambiguous.
- 6.55 In determining whether the prosecution has met the onus of proof, the fact finder would consider what evidence there is of words or conduct communicating consent.⁸² The prosecution would have to prove that there were no such words or conduct. If evidence of the absence of such words or conduct was adduced, then it could be rebutted in various ways, and not necessarily by direct evidence of the accused. That is, the accused would not be required to testify.
- 6.56 Evidence of relevant words or conduct could be obtained in cross-examination of the complainant. Or it could be given, in chief or in cross-examination, by other prosecution witnesses. Defence counsel could draw attention to evidence led by the prosecution, to dispute the prosecution's argument that nothing was said or done.⁸³ This involves no substantive change to the current position so far as onus of proof is concerned.
- 6.57 Nor do we agree that this reform "risks disproportionately criminalising individuals who, due to relative youth, cognitive or mental impairment, may for example, misinterpret silence to mean consent".⁸⁴ As well as determining whether the evidence establishes the absence of consent, fact finders must also determine whether the accused *knew* there was no consent. In doing so, fact finders must

77. See rec 5.6 [5.82]–[5.88].

78. See rec 8.3 [8.91]–[8.97].

79. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4.

80. See [10.23]–[10.25].

81. Legal Aid NSW, *Submission CO33*, 6.

82. 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) 223.

83. Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) [7.79].

84. Law Society of NSW, *Submission CO18*, 4; Law Society of NSW, *Submission CO76*, 4.

consider all the circumstances of the case.⁸⁵ This can include anything that may affect the accused's ability to understand whether consent was present. We discuss the mental element of the sexual offences in Chapter 7.

The person does not have the capacity to consent

Recommendation 6.3: The person does not have the capacity to consent

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person does not have the capacity to consent to the sexual activity.

- 6.58 Under current law (s 61HE(5)(a)), a person does not consent to a sexual activity if the person does not have the capacity to consent to the activity, including because of age or cognitive incapacity.⁸⁶ Most other Australian states and territories have similar provisions.⁸⁷
- 6.59 The *Crimes Act* should continue to state that a person does not consent to a sexual activity if the person does not have the capacity to consent to that activity (recommended s 61HJ(1)(b)). There is general support for retaining this circumstance.⁸⁸ It is unnecessary to specify circumstances in which a person lacks capacity.
- 6.60 Our original proposal did not include the words "to the sexual activity" (which are currently contained in s 61HE(5)(a)).⁸⁹
- 6.61 We now think this expression should be included. As one submission in response to our Draft Proposals observes, the expression assists in explaining that the subsection does not mean that people who are cognitively impaired can *never* have the capacity to consent to sexual activity.⁹⁰ In many cases, capacity can fluctuate, so a person may have the capacity to consent to sexual activity at some times but not at others.⁹¹

The law should not define "capacity to consent"

- 6.62 The *Crimes Act* currently does not define "capacity to consent" or "cognitive incapacity".⁹² One submission proposes that "capacity to consent" should be

85. *Crimes Act 1900* (NSW) s 61HE(4). We recommend that the requirement to consider "all the circumstances of the case" should remain: rec 7.7 [7.132], [7.143]–[7.144].

86. *Crimes Act 1900* (NSW) s 61HE(5)(a).

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

88. NSW Bar Association, *Submission CO47* [19]; A Dyer, *Submission CO53* [9]; Law Society of NSW, *Submission CO76*, 5. In our survey, 97.94% of responses to Question 6 (1,524 out of 1,556 responses) said that the law should continue to provide that people cannot consent to sex if "they don't have the capacity to consent because of their age or cognitive incapacity".

89. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 6.2.

90. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 6–7.

91. See NSW Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145 (2018) [6.25]–[6.28].

92. Although it does define "cognitive impairment": *Crimes Act 1900* (NSW) s 61HD.

defined.⁹³ We do not agree. The common law provides adequate guidance on this phrase. A definition could unintentionally limit this circumstance.

6.63 Under the common law, a person has the capacity to consent if the person understands:

- the physical nature of the act occurring (for example, that the act involves penetration by a penis), and
- that the act has a sexual character.⁹⁴

6.64 This test has been incorporated into consent laws across Australia. It was also approved by the CCA before the 2007 reforms.⁹⁵

6.65 In introducing the 2007 reforms, the then Attorney General adopted the same concepts in explaining that:

Cognitive incapacity ...refers 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.⁹⁶

The references to “age” and “cognitive incapacity” should be removed

6.66 Currently, s 61HE(5)(a) identifies (by way of example, and without excluding others) two bases on which a person may lack capacity to consent to sexual activity: age or cognitive incapacity. Previously enacted as s 61HA(4)(a), this provision was introduced as part of the 2007 reforms.⁹⁷

6.67 The legislative materials do not explain why these circumstances were included when this provision was enacted.⁹⁸ One possibility is they were borrowed from a similar passage in the Explanatory Notes to the *Sexual Offences Act 2003* (UK).⁹⁹

6.68 We recommend removing the references to “age” and “cognitive incapacity”. These references are unnecessary, and their effect is unclear.

6.69 The reference to “age” is particularly confusing. Other offences in the *Crimes Act* cover circumstances where a complainant is under an age at which consent may be given.¹⁰⁰ They do not require the prosecution to prove that the complainant did not consent. Non-consent is not an element of these offences and consent is no defence.¹⁰¹

93. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 7.

94. *R v Morgan* (1970) VR 337, 341.

95. *R v Mueller* [2005] NSWCCA 47 [69]–[73], citing *R v Morgan* (1970) VR 337, 341.

96. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584, 3586 (J Hatzistergos, Attorney General and Minister for Justice).

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

98. Explanatory Note, *Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007* (NSW); NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584, 3586 (J Hatzistergos, Attorney General and Minister for Justice).

99. Explanatory Notes, *Sexual Offences Act 2003* (UK) [139].

100. *Crimes Act 1900* (NSW) s 66A–66DF.

101. *Crimes Act 1900* (NSW) s 80AE.

- 6.70 Non-consent, and knowledge of the absence of consent, *are* elements of the offences to which s 61HE applies. The purpose of the inclusion of “age” as a basis for incapacity to consent is unclear.
- 6.71 Before the 2007 reforms, it was clear that s 61I, s 61J and s 61JA required proof of the absence of consent, and knowledge of the absence of consent, even if the complainant was under 16.¹⁰² Such complainants were not deemed incapable of consenting.
- 6.72 There is some suggestion that the reforms changed the law, such that a person under 16 is necessarily incapable of consenting for the purposes of the offences to which s 61HE applies. This would also mean that an accused person who knows that the complainant is under 16 will therefore know that the complainant is not consenting.¹⁰³
- 6.73 If so, there would be little difference between the child sexual offences and the offences to which s 61HE applies (other than penalties).¹⁰⁴ It is not clear that Parliament intended this.
- 6.74 Capacity to consent is the controlling question, regardless of age. The reference to “age” in s 61HE(5)(a) should be removed to avoid confusion.
- 6.75 Some submissions oppose removing “cognitive incapacity” (but not “age”).¹⁰⁵ It is clear that “cognitive incapacity” is captured by the word “capacity”, so it is not necessary to refer to it specifically. The reference to “cognitive incapacity” should also be removed.

The person is incapable of consenting due to intoxication

Recommendation 6.4: The person is incapable of consenting due to intoxication

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity.

- 6.76 Currently, it “may be established” that a person does not consent to sexual activity if the person consents “while substantially intoxicated by alcohol or any drug”.¹⁰⁶
- 6.77 For the following reasons, we recommend that the law should recognise that a person *does not* consent if they are “so affected by alcohol or another drug as to be incapable of consenting to the sexual activity” (recommended s 61HJ(1)(c)).

102. *McGrath v R* [2010] NSWCCA 48, 199 A Crim R 527 [11] (Macfarlan JA).

103. See *R v MM* [2018] NSWDC 181 [297]–[298].

104. The maximum penalty for sexual intercourse with a child aged between 14–16 is 10 years’ imprisonment: *Crimes Act 1900* (NSW) s 66C(3). Where the child is aged between 10–14, the maximum penalty is 16 years’ imprisonment: *Crimes Act 1900* (NSW) s 66C(1). The maximum penalty for sexual intercourse without consent in circumstances of aggravation (being that the complainant is under 16 years) is 20 years’ imprisonment: *Crimes Act 1900* (NSW) s 61J(1), (2)(d).

105. NSW Director of Public Prosecutions, *Submission CO85*, 2; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 6.

106. *Crimes Act 1900* (NSW) s 61HE(8)(a).

Alcohol and drug use is a common feature of sexual offences

- 6.78 Alcohol and drug use is a common feature of sexual offences.¹⁰⁷ Research suggests that the complainant was intoxicated at the time of the assault in at least half, and up to three-quarters, of all sexual assault cases.¹⁰⁸ Given this, it is unsurprising that this is often a key issue.¹⁰⁹
- 6.79 Research suggests evidence of complainant intoxication in rape trials may be associated with a lower conviction rate than cases in which the complainant is sober.¹¹⁰ While the reasons for this are complex, they include:
- jurors are frequently told to use their common knowledge about intoxication to interpret this evidence, but there may be a wide gap between jurors' understandings of intoxication and what medical research shows,¹¹¹ and
 - a complainant who was intoxicated at the time of the assault may be viewed as less credible.¹¹²

A person does not consent when incapable due to intoxication

- 6.80 Consensual sex often takes place in a context where one or both participants have consumed alcohol or drugs. It would be absurd to suggest, and no submission did, that the law should regard all sexual activity involving a complainant who has consumed alcohol or drugs as non-consensual. The law should protect complainants who are intoxicated to the point that they cannot consent to sexual activity.

107. See, eg, L Wall and A Quadara, *Under the Influence? Considering the Role of Alcohol and Sexual Assault in Social Contexts*, Issues No 18 (Australian Centre for the Study of Sexual Assault, 2014) 1–2; J Quilter and L McNamara, “The Meaning of ‘Intoxication’ in Australian Criminal Cases: Origins and Operation” (2018) 21 *New Criminal Law Review* 170, 170.

108. A D Cowley, “‘Let’s Get Drunk and Have Sex’: The Complex Relationship of Alcohol, Gender, and Sexual Victimization” (2014) 29 *Journal of Interpersonal Violence* 1258, 1259; A Abbey and others, “Alcohol and Sexual Assault” (2001) 25 *Alcohol Research and Health* 43, 44; S Crockery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614, 615–616, citing S Triggs and others, *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Crime and Justice Research Centre, Victoria University of Wellington, 2009) 28.

109. F Nitschke and others, “Intoxicated but not Incapacitated: Are There Effective Methods to Assist Juries in Interpreting Evidence of Voluntary Complainant Intoxication in Cases of Rape?” (2018) *Journal of Interpersonal Violence* 2 (30 July 2018) <<https://doi.org/10.1177/0886260518790601>> 2.

110. 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) 288; S Crockery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614, 641; C Gunby, A Carline and C Beynon, “Alcohol-Related Rape Cases: Barristers’ Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice” (2010) 74 *Journal of Criminal Law* 579, 579–580.

111. See, eg, R Burgin, *Submission CO06*, 6; L McNamara and others, “Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects” (2017) 43 *Monash University Law Review* 148, 168.

112. L McNamara and others, “Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects” (2017) 43 *Monash University Law Review* 148, 166. See also S Crockery-Hewitt, “Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex” (2015) 26 *New Zealand Universities Law Review* 614, 616; C Gunby, A Carline and C Beynon, “Alcohol-Related Rape Cases: Barristers’ Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice” (2010) 74 *Journal of Criminal Law* 579, 590.

- 6.81 The current s 61HE(8)(a) does not achieve this. As we discuss above, s 61HE(8)(a) is considered to be confusing, is often ignored, and may lead to inconsistent outcomes.
- 6.82 Rather than it being a circumstance in which it “may be established” that there is no consent, we recommend that this issue be dealt with in the list of circumstances in which a person *does not* consent. There is widespread support for this approach.¹¹³ Arguments in favour include that it:
- may mitigate the influence of misconceptions around intoxication¹¹⁴
 - may have an educative effect, by emphasising the importance of ensuring that an intoxicated person is capable of consenting before engaging in sexual activity with them,¹¹⁵ and
 - will make NSW law consistent with the laws of other Australian states and territories.¹¹⁶

The test should be whether the person is “incapable” of consenting

- 6.83 There is considerable dissatisfaction with the test of “substantial intoxication” that currently appears in s 61HE(8)(a). Criticisms include that:
- it is unclear what “substantially intoxicated” means,¹¹⁷ and
 - the test encourages jurors to make inaccurate conclusions about the effects of alcohol or drug use on a complainant.¹¹⁸
- 6.84 In our view, these problems are largely caused by the fact that s 61HE(8)(a) focuses on the *level* of intoxication, rather than the *effect* of the consumption of alcohol and/or drugs on a person’s capacity to consent.
- 6.85 We recommend that the *Crimes Act* recognise that a person does not consent if the person is “so affected by alcohol or another drug as to be incapable of consenting to the sexual activity” (recommended s 61HJ(1)(c)). This is similar to the law in the NT and Victoria.¹¹⁹ There is significant support for this approach in submissions.¹²⁰

113. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 6; Office of the Director of Public Prosecutions, *Submission CO14*, 5; Law Society of NSW, *Submission CO18*, 5; Rape and Domestic Violence Services Australia, *Submission CO28* [101]–[102]; Legal Aid NSW, *Submission CO33*, 7–8.

114. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 6.

115. NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 11.

116. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 6; Community Legal Centres NSW, *Submission CO25*, 8. See also *Crimes Act 1900* (ACT) s 67(1)(e); *Crimes Act 1958* (Vic) s 36(2)(e)–(f); *Criminal Code* (NT) s 192(2)(c); *Criminal Code* (Tas) s 2A(2)(h); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d).

117. A Cossins, *Preliminary Submission CO33*, 10; District Court of NSW Consultation 1, *Consultation CO03*; Sydney Roundtable 1, *Consultation CO07*.

118. A Cossins, *Preliminary Submission CO33*, 10; Sydney Roundtable 4, *Consultation CO10*; L McNamara and others, “Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects” (2017) 43 *Monash University Law Review* 148, 168.

119. *Criminal Code* (NT) s 192(2)(c); *Crimes Act 1958* (Vic) s 36(2)(e)–(f).

120. See, eg, Office of the Director of Public Prosecutions, *Submission CO14*, 5; Law Society of NSW, *Submission CO18*, 5; Community Legal Centres NSW, *Submission CO25*, 8; Women’s Legal Service NSW, *Submission CO27* [35]; Legal Aid NSW, *Submission CO33*, 7–8.

- 6.86 Under recommended s 61HJ(1)(c), it would not be relevant that the complainant's intoxication was voluntary. The key issue is the effect of the intoxication on the complainant's capacity to consent, and not the circumstances in which the complainant came to be intoxicated.¹²¹
- 6.87 We do not consider it necessary to define "to be incapable", as one submission suggests.¹²² We consider the meaning of this to be sufficiently clear. It allows fact finders to determine whether a complainant is incapable of consenting as a question of fact, based on the evidence and circumstances of the case.
- 6.88 One submission suggests that the law should address the situation where a person initially consents to sexual activity, but then becomes so affected by alcohol or another drug as to be incapable of withdrawing their consent.¹²³ In our view, this situation is captured by the requirement that consent be present at the time of the sexual activity (recommended s 61HI(1)).

The person is unconscious or asleep

Recommendation 6.5: The person is unconscious or asleep

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person is unconscious or asleep.

- 6.89 Currently, a person does not consent to sexual activity if the person "does not have the opportunity to consent" because the person is unconscious or asleep.¹²⁴ In Australian states and territories except the ACT, Queensland and Western Australia ("WA"), the law provides that a person does not consent to sexual activity if the person is unconscious or asleep.¹²⁵
- 6.90 The law should continue to state that a person does not consent to sexual activity if the person is unconscious or asleep (recommended s 61HJ(1)(d)). Consultations demonstrated widespread support for this, in general.¹²⁶

The phrase "an opportunity to consent" should be removed

- 6.91 No Australian state or territory, other than NSW, qualifies equivalent circumstances by reference to "opportunity".

121. See, eg, S Croskery-Hewitt, "Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex" (2015) 26 *New Zealand Universities Law Review* 614, 625–627.

122. NSW Bar Association, *Submission CO47* [20]. See also J Quilter and L McNamara, *Submission CO66*, 2–3.

123. Women's Legal Service NSW, *Submission CO70* [21]. See also *Crimes Act 1958* (Vic) s 36(2)(f).

124. *Crimes Act 1900* (NSW) s 61HE(5)(b).

125. *Crimes Act 1958* (Vic) s 36(2)(d); *Criminal Code* (NT) s 192(2)(c); *Criminal Code* (Tas) s 2A(2)(h); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c).

126. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 5; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10; Rape and Domestic Violence Services Australia, *Submission CO28*, appendix A: "Redrafted consent provision". In our survey, 97.75% of responses to Question 9 (1,521 out of 1,556 responses) said that the law should continue to provide that people cannot consent to sex if "they are unconscious or asleep".

- 6.92 Before the 2007 reforms, the common law in NSW was that a person could not consent to sexual activity if the person was unconscious or asleep at the time of the activity.¹²⁷ The legislative materials do not reveal why the expression “opportunity to consent” was included when this subsection was added.¹²⁸
- 6.93 It has been suggested that this expression may mean that a person can consent to sexual activity occurring later when the person is asleep or unconscious.¹²⁹ For example, the NSW Court of Criminal Appeal has remarked:
- in the case of a stable relationship, the circumstances may allow for a factual finding that the partner had had an “opportunity to consent” whether or not she was asleep at the time sexual intercourse was attempted.¹³⁰
- 6.94 Some submissions and survey responses argue that a person should be able to consent in advance to sexual activity occurring later when the person is unconscious or asleep.¹³¹ This could include, for example, a situation where someone has asked another person to wake them up with a sexual act, or engages in erotic asphyxiation.
- 6.95 Some academic commentators also share this view. One author argues that if a sleeping person has willingly “consented” to sexual activity in advance, no harm has occurred, so this should be permitted.¹³² Some also argue that allowing consent to sexual activity to be given in advance of unconsciousness aligns with the principles of autonomy and freedom of choice, which underpin the law of sexual offences generally.¹³³
- 6.96 Our view is that the law should treat *all* sexual activity involving a person who is unconscious or asleep as non-consensual. Given this, recommended s 61HJ(1)(d) does not include the phrase “the person does not have the opportunity to consent”. Several submissions support this approach.¹³⁴
- 6.97 This is consistent with our approach to the timing of consent, which we discuss in the previous Chapter.¹³⁵
- 6.98 There are strong reasons for ensuring that the law treats all sexual activity involving an unconscious or asleep person as non-consensual. People who are unconscious

127. See, eg, *Dean v R* [2006] NSWCCA 341, 166 A Crim R 341 [32]; *R v Wiggins* [2001] NSWCCA 60 [17]; *DJB v R* [2007] NSWCCA 209 [70]; *R v Chant* (Unreported, NSWCCA, 12 June 1998) 19–20.

128. Explanatory Note, Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW); NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584, 3586 (J Hatzistergos, Attorney General and Minister for Justice).

129. P Jarvis, “The Timing of Consent” (2019) 5 *Criminal Law Review* 394, 402 (footnote 47).

130. *WO v DPP (NSW)* [2009] NSWCCA 275 [71].

131. NSW Bar Association, *Submission CO47* [22]–[23]; The Public Defenders, *Submission CO84*, 4; NSW Law Reform Commission, Consent Review Survey, Response #1466 (Qu 9), Response #3179 (Qu 9), Response #3477 (Qu 9), Response #3616 (Qu 9). See also A Dyer, *Submission CO02* [91]–[92].

132. J Sealy-Harrington, “Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent” (2014) 18 *Canadian Criminal Law Review* 119, 140.

133. *R v JA* [2011] 2 SCR 440 [72]–[73] (Binnie, LeBel and Fish JJ); J Sealy-Harrington, “Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent” (2014) 18 *Canadian Criminal Law Review* 119, 144–146.

134. See, eg, A Dyer, *Submission CO53* [9]; Law Society of NSW, *Submission CO76*, 5; NSW Director of Public Prosecutions, *Submission CO85*, 3.

135. See rec 5.2 [5.22]–[5.29].

or asleep are highly vulnerable.¹³⁶ The principles of autonomy and freedom of choice require that consent, once given, can be withdrawn.¹³⁷ A person who initially agrees to certain sexual acts occurring, is unaware of and unable to modify or withdraw consent in response to a change in circumstances.¹³⁸

- 6.99 The law in SA, Scotland and New Zealand specifically provides that a person cannot consent to sexual activity that occurs “while” they are unconscious or asleep.¹³⁹ Similarly, the law in England and Wales and in Northern Ireland presumes that a person cannot consent to sexual activity if they were asleep or unconscious “at the time” of the activity.¹⁴⁰ Recommended s 61HJ(1)(d) follows these approaches.

The person participates because of force, fear, coercion, blackmail or intimidation

Recommendation 6.6: The person participates because of force, fear, coercion, blackmail or intimidation

The *Crimes Act* should provide that a person does not consent to a sexual activity if:

- (a) the person participates in the sexual activity because of force, fear of force or fear of harm of any kind to the person, another person, an animal or property, regardless of:
 - (i) when the force or the conduct giving rise to the fear occurs, or
 - (ii) whether it occurs in a single instance or as part of an ongoing pattern, or
- (b) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of:
 - (i) when the coercion, blackmail or intimidation occurs, or
 - (ii) whether it occurs in a single instance or as part of an ongoing pattern.

- 6.100 Currently, a person who “consents” to (or participates in) sexual activity because of threats of force or terror does not legally consent (whether the threats are against,

136. See, eg, *R v JA* [2011] 2 SCR 440 [60] (McLachlan JA); L Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R v JA*” (2012) 24 *Canadian Journal of Women and the Law* 359, 381–382, 385; H Young, “*R v A (J)* and the Risks of Advance Consent to Unconscious Sex” (2010) 14 *Canadian Criminal Law Review* 273, 290–291.

137. Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Consultation Paper (2019) [106]; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report 78 (2020) [5.111].

138. See, eg, *R v JA* [2011] 2 SCR 440 [60] (McLachlan JA); E Craig, “Capacity to Consent to Sexual Risk” (2014) 17 *New Criminal Law Review* 103, 126; H Young, “*R v A (J)* and the Risks of Advance Consent to Unconscious Sex” (2010) 14 *Canadian Criminal Law Review* 273, 288–299.

139. *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c); *Sexual Offences (Scotland) Act 2009* (Scot) s 14(2); *Crimes Act 1961* (NZ) s 128A(3). See also *GW v HM Advocate* [2019] HCJAC 23 [29]; *R v S* [2015] NZHC 801 [12]–[15].

140. *Sexual Offences Act 2003* (UK) s 75(2)(d); *Sexual Offences (Northern Ireland) Order 2008* (UK) s 9(2)(d).

or the terror is instilled in, that person or any other person).¹⁴¹ It also “may be established” that a person who consents because of intimidatory or coercive conduct, or other threat not involving a threat of force, does not consent.¹⁴²

- 6.101 Laws in other Australian states and territories provide that a range of abusive conduct such as force, threats (both general and specific), fear and intimidation remove a person’s ability to consent.¹⁴³

“Threats” should be replaced with “fear”

- 6.102 Submissions make many criticisms of s 61HE(5)(c) and s 61HE(8)(b). These include:

- the reference to “threats” is too narrow, as many other types of behaviour such as harassment, financial abuse, emotional abuse, and family or domestic violence can remove a person’s ability “freely and voluntarily” to agree to a sexual activity¹⁴⁴ (we discuss “intimidatory or coercive conduct” below)
- the law should not distinguish between violent and non-violent threats,¹⁴⁵ and
- the term “terror” is outdated and sets an overly high threshold.¹⁴⁶

- 6.103 Recommended s 61HJ(1)(e) responds to these concerns. It states that a person does not consent to sexual activity if the person participates because of “fear of force” or “fear of harm of any kind”. Advantages of this approach are said to be that it:

- shifts the focus of the fact finder onto the effect on the complainant of such conduct¹⁴⁷
- does not limit the type of conduct that may make a sexual activity non-consensual; for example, it captures non-physical harm, caused by, for example, emotional or financial abuse,¹⁴⁸ and

141. *Crimes Act 1900* (NSW) s 61HE(5)(c).

142. *Crimes Act 1900* (NSW) s 61HE(8)(b).

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

144. See, eg, Feminist Legal Clinic Inc, *Submission CO08*, 2; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 6–7; Positive Life NSW, *Submission CO10*, 2; Victims of Crime Assistance League Inc NSW, *Submission CO11*, 5–6; ACON, *Submission CO12*, 5; Sex Workers Outreach Project, *Submission CO15*, 7; Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 4; NSW Law Reform Commission, Consent Review Survey, Response #2401 (Qu 10), Response #2570 (Qu 10), Response #3047 (Qu 10).

145. See, eg, A Dyer, *Submission CO02* [37]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 6; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10–11; Legal Aid NSW, *Submission CO33*, 8.

146. District Court of NSW Consultation 1, *Consultation CO03*.

147. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 17; Sydney Roundtable 1, *Consultation CO07*; Sydney Roundtable 3, *Consultation CO09*.

148. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 2; Women’s Legal Service NSW, *Submission CO70* [29]; Community Legal Centres NSW, *Submission CO73*, 3–4; Women’s Safety NSW, *Submission CO74*, 3.

- includes fear of force or harm to “another person, an animal or property”, which better captures situations that might occur in domestic and family violence contexts.¹⁴⁹
- 6.104 Recommended s 61HJ(1)(e) broadly adopts the law in the NT and Victoria.¹⁵⁰ Many submissions support this approach.¹⁵¹
- 6.105 Some submissions argue that this is too broad, as it could capture situations where the complainant’s fear is unjustified or unsubstantiated.¹⁵² For this reason, one option is to use the expression “reasonable” fear.¹⁵³ We do not recommend this because:
- this would require fact finders to determine the reasonableness of a complainant’s fear, when what matters is whether or not they participated because of fear¹⁵⁴
 - some complainants, particularly those experiencing domestic violence, may participate in sexual activity because of fear that may seem trivial or “unreasonable” on its face, but which is understandable in the broader context of a history of coercion and control,¹⁵⁵ and
 - in any event, the prosecution is still required to prove that the accused person knew the complainant participated “because of” fear, and this will be difficult in cases where the fear is in fact unjustified or unsubstantiated.

A person does not consent if there is coercion or intimidation

- 6.106 Currently, it “may be established” that a person does not consent to sexual activity if the person participates because of intimidatory or coercive conduct.¹⁵⁶
- 6.107 Some submissions and survey responses criticise the fact that these are only circumstances in which it “may be established” that a person does not consent.¹⁵⁷

149. Rape and Domestic Violence Services Australia, *Submission CO28* [104]–[105], [110]; Community Legal Centres NSW, *Submission CO25*, 9; Rape and Domestic Violence Services Australia Staff, *Consultation CO14*; E Alleyne and C Parfitt, “Adult-Perpetrated Animal Abuse: A Systematic Literature Review” (2019) 20 *Trauma, Violence and Abuse* 344, 344; C Fitzsimmons, “A Sickening Form of Coercion’: Push to Help the Animal Victims of Domestic Violence” (17 February 2020) *The Sydney Morning Herald* <www.smh.com.au/lifestyle/life-and-relationships/a-sickening-form-of-coercion-push-to-help-the-animal-victims-of-domestic-violence-20200207-p53yp0.html> (retrieved 17 September 2020).

150. *Criminal Code* (NT) s 192(2)(a); *Crimes Act 1959* (Vic) s 36(2)(b).

151. See, eg, Positive Life NSW, *Submission CO10*, 3; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO23*, 5; Community Legal Centres NSW, *Submission CO25*, 9; Women’s Legal Service NSW, *Submission CO27*, rec 5 [43]; Rape and Domestic Violence Services Australia, *Submission CO28*, rec 7 [108]–[110]. See also NSW Law Reform Commission, Consent Review Survey, Response #1984 (Qu 10), Response #2145 (Qu 10), Response #2182 (Qu 10), Response #2268 (Qu 10), Response #2,550 (Qu 10).

152. See, eg, NSW Bar Association, *Submission CO47* [26]–[27]; Law Society of NSW, *Submission CO76*, 5; Legal Aid NSW, *Submission CO87*, 6

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

154. Sydney Roundtable 1, *Consultation CO07*; Sydney Roundtable 3, *Consultation CO09*.

155. Sydney Roundtable 4, *Consultation CO10*.

156. *Crimes Act 1900* (NSW) s 61HE(8)(b) (emphasis added).

157. See, eg, A Dyer, *Submission CO02* [37]–[38]; Feminist Legal Clinic Inc, *Submission CO08*, 4; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10–11; NSW Law Reform Commission, Consent Review Survey, Response #951 (Qu 12), Response #1341 (Qu 12), Response #3216 (Qu 10).

Some argue that coercion and intimidation can be just as oppressive and influential as overt or violent threats or conduct.¹⁵⁸

- 6.108 To address this criticism, recommended s 61HJ(1)(f) states that a person does not consent if the person participates in a sexual activity because of coercion, blackmail, or intimidation. In our view, this is broad enough to cover a range of behaviours, including, for example verbal aggression, begging and nagging, physical persistence, social pressuring, and emotional manipulation.¹⁵⁹

“Force” should be added to the list of circumstances

- 6.109 Currently, s 61HE(5) states that a person does not consent to sexual activity if they consent because of “threats of force”, but it does not contain an equivalent provision to deal with a circumstance where a person consents because of force itself. NSW is the only Australian jurisdiction not to include force as a circumstance in which a person does not consent.¹⁶⁰ Many submissions, from a wide range of stakeholders, argue it should be included.¹⁶¹
- 6.110 To address this criticism, recommended s 61HJ(1)(e) states that a person does not consent if the person participates in a sexual activity because of force.

“Blackmail” should be added to the list of circumstances

- 6.111 Some suggest that “blackmail” should be added as a circumstance in which a person does not consent.¹⁶² While it could be argued this is unnecessary, as the word “coercion” should be broad enough to cover blackmail,¹⁶³ an express reference to blackmail would most clearly address community concern about this practice.
- 6.112 The expression “blackmail” can refer to a wide range of behaviours. For instance, some submissions and survey responses mention “revenge porn” as an example of blackmail.¹⁶⁴ This practice could include a person threatening to release naked photos of another person if the other person does not agree to sexual activity.

158. See, eg, Sydney Roundtable 2, *Consultation CO08*; NSW Law Reform Commission, Consent Review Survey, Response #941 (Qu 10), Response #1533 (Qu 10).

159. B L Forbis, “Sexual Coercion: The Role of Communication and Heteronormative Beliefs” (PhD Thesis, Western Michigan University, 2019) 3.

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

161. See, eg, Office of the Director of Public Prosecutions, *Submission CO14*, 4; Sex Workers Outreach Project, *Submission CO15*, 9; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10; Women’s Legal Service NSW, *Submission CO27* [39]–[41], [43]; Rape and Domestic Violence Services Australia, *Submission CO28*, rec 11 [120].

162. Sex Workers Outreach Project, *Submission CO15*, 7; Sydney Roundtable 2, *Consultation CO08*; NSW Law Reform Commission, Consent Review Survey, Response #142 (Qu 10), Response #583 (Qu 10), Response #1144 (Qu 10), Response #1408 (Qu 10), Response #2000 (Qu 10), Response #2182 (Qu 10), Response #2495 (Qu 10), Response #2618 (Qu 10), Response #3141 (Qu 10), Response #3242 (Qu 10).

163. A Dyer, *Submission CO53* [3], [31].

164. UNSW School of Social Sciences, *Submission CO69*, 3; NSW Law Reform Commission, Consent Review Survey, Response #2182 (Qu 10).

The conduct may have occurred at any time

- 6.113 Many submissions argue the current law fails to capture ongoing patterns of conduct.¹⁶⁵ It is said that because of this, the law fails to capture situations of domestic and family violence, which is often characterised by repeated patterns of threatening, coercive or abusive behaviour (rather than a single incident).¹⁶⁶
- 6.114 To address this concern:
- recommended s 61HJ(1)(e) states that a person does not consent to sexual activity if the person participates because of force, fear of force, or fear of harm of any kind, *regardless of when the force or the conduct giving rise to the fear occurs, or whether it occurs in a single instance or as part of an ongoing pattern*, and
 - recommended s 61HJ(1)(f) states that a person does not consent to sexual activity if the person participates because of coercion, blackmail or intimidation, *regardless of when the coercion, blackmail or intimidation occurs, or whether it occurs in a single instance or as part of an ongoing pattern*.
- 6.115 Some submissions argue that this would extend the law too far, by, for instance, including cases where there is a long delay between the harmful conduct and the sexual activity.¹⁶⁷ In such cases, the prosecution would still be required to prove that the person participated in the sexual activity *because* of the fear. If the fear of harm was the reason why the person participated, and was operative at the time, it should not matter when the conduct giving rise to this fear occurred.
- 6.116 This language of recommended s 61HJ(1)(e)–(f) is largely the same as our Draft Proposals.¹⁶⁸ Several submissions support that approach.¹⁶⁹
- 6.117 However, our Draft Proposals do not include the phrase “regardless of whether it involves a single instance or an ongoing pattern of conduct”. We added this following our decision not to recommend a jury direction, included in our Draft Proposals, about domestic and family violence.¹⁷⁰ This direction was:

A person may participate in sexual activity because of fear of harm in circumstances of domestic and family violence—

- (a) including where there has been an ongoing pattern of coercive and controlling behaviour, and

165. See, eg, Rape and Domestic Violence Services Australia, *Submission CO28* [106]; Domestic Violence NSW, *Submission CO29*, 6; Community Legal Centres NSW, *Submission CO25*, 9. See also Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [25.114].

166. See, eg, Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO23*, 4; Rape and Domestic Violence Services Australia, *Submission CO28* [106]; Domestic Violence NSW, *Submission CO29*, 6; Community Legal Centres NSW, *Submission CO25*, 9.

167. Law Society of NSW, *Submission CO76*, 5; Legal Aid NSW, *Submission CO87*, 6.

168. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 6.5.

169. See, eg, UNSW School of Social Sciences, *Submission CO69*, 3; Women’s Legal Service NSW, *Submission CO70* [31]; Community Legal Centres NSW, *Submission CO73*, 3; NSW Director of Public Prosecutions, *Submission CO85*, 3. See also A Dyer, *Submission CO53* [9].

170. See [8.140]–[8.144].

- (b) whether or not there was a threat of harm immediately before or during the sexual activity.¹⁷¹

6.118 The proposed direction was intended to prevent fact finders from interpreting recommended s 61HJ(1)(e)–(f) narrowly, by highlighting that these circumstances may arise in a context of domestic and family violence.¹⁷² In this context, it may be more likely that a person participates in sexual activity because:

- of a fear developed from an ongoing pattern of conduct, rather than a single instance, or
- the person has been subject to a pattern of coercion, blackmail or intimidation, rather than a single instance.¹⁷³

6.119 The proposed direction received a mixed response among submissions, which indicated that the intention behind our proposed direction was unclear.¹⁷⁴

6.120 After further consideration, we do not recommend this direction. However, we remain of the view that recommended s 61HJ(1)(e)–(f) should be interpreted widely, so that it captures patterns of harmful conduct (and not just discrete instances). For this reason, we recommend that the phrase “regardless of whether it occurs in a single instance or as part of an ongoing pattern” is included in the circumstances themselves.

The person, or another person, is unlawfully detained

Recommendation 6.7: The person, or another person, is unlawfully detained

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person participates in the sexual activity because the person or another person is unlawfully detained.

6.121 Currently, a person does not consent to sexual activity if the person consents because the person is unlawfully detained.¹⁷⁵ Other Australian jurisdictions except Queensland and WA have a similar provision.¹⁷⁶

6.122 Recommended s 61HJ(1)(g) largely replicates the existing approach. There is general support for this among submissions and survey responses.¹⁷⁷

171. See NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3.

172. See [8.143].

173. See, eg, Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO23*, 4; Community Legal Centres NSW, *Submission CO25*, 9; Rape and Domestic Violence Services Australia, *Submission CO28* [106]; Domestic Violence NSW, *Submission CO29*, 6.

174. See [8.144].

175. *Crimes Act 1900* (NSW) s 61HE(5)(d).

176. See, eg, *Crimes Act 1900* (ACT) s 67(1)(j); *Crimes Act 1958* (Vic) s 36(2)(c); *Criminal Code* (NT) s 192(2)(b); *Criminal Code* (Tas) s 2A(2)(d); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b).

177. See, eg, NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 10; Rape and Domestic Violence Services Australia, *Submission CO28*, appendix A: “Redrafted consent provision”; NSW Bar Association, *Submission CO47* [29]; NSW Director of Public Prosecutions,

- 6.123 We recommend extending the existing subsection to cover situations where a person participates in sexual activity because *another person* is unlawfully detained. The law in Tasmania contains a similar provision.¹⁷⁸
- 6.124 This would cover situations when, for example, somebody participates in a sexual activity because a family member (a child, for example) is unlawfully detained. This may provide further protection to people who experience domestic and family violence. Some submissions endorse this approach.¹⁷⁹

The person is overborne by abuse of a relationship of authority, trust or dependence

Recommendation 6.8: The person is overborne by abuse of a relationship of authority, trust or dependence

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence.

- 6.125 Currently, it “may be established” that a person does not consent to a sexual activity if the person consents because of the abuse of a position of authority or trust.¹⁸⁰ Other jurisdictions in Australian and overseas have similar provisions.¹⁸¹ In NSW, unlike those other places, it is one of the circumstances where it “may be established” – not one where it always operates.

A person does not consent where there is abuse

- 6.126 Abuse of authority or trust should be treated as a circumstance in which a person does not consent, rather than one in which non-consent merely “may be established”.¹⁸² An abuse of a relationship of authority, trust or dependence removes a person’s ability to make a free and voluntary decision about sexual activity.

Submission CO85, 3. In our survey, 95.89% of responses to Question 9 (1,492 out of 1,556 responses) said that the law should continue to provide that people cannot consent to sex if “they agreed to have sex because they were unlawfully detained”.

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

179. A Dyer, *Submission CO53* [9]; NSW Director of Public Prosecutions, *Submission CO85*, 3.

180. *Crimes Act 1900* (NSW) s 61HE(8)(c).

181. *Crimes Act 1900* (ACT) s 67(1)(h); *Criminal Code* (Qld) s 348(2)(d); *Criminal Code* (Tas) s 2A(2)(e); *Criminal Code* (Canada) s 273.1(2)(c).

182. See, eg, Care Leavers Australasia Network, *Submission CO04*, 3–4; Community Legal Centres NSW, *Submission CO25*, rec 3, 8; Western NSW Community Legal Centre Inc and Western Women’s Legal Support, *Submission CO34*, 2; District Court of NSW Consultation 1, *Consultation CO03*; NSW Law Reform Commission, Consent Review Survey, Response #200 (Qu 12), Response #350 (Qu 12), Response #364 (Qu 12), Response #568 (Qu 12), Response 576 (Qu 12), Response 651 (Qu 12), Response 1937 (Qu 12), Response 1152 (Qu 12), Response 1700 (Qu 12), Response #2161 (Qu 12), Response #3242 (Qu 12).

- 6.127 Our recommendation is consistent with the law elsewhere in Australia and in Canada, where this is recognised as a circumstance in which a person does not consent.¹⁸³
- 6.128 Recommended s 61HJ(1)(h) also expressly includes situations where a person is overborne by the abuse of a relationship of dependence. We added this in response to feedback on our Draft Proposals. Some submissions suggested that the law should specifically capture the abuse by a carer of a person with a disability.¹⁸⁴
- 6.129 An alternative option to recommended s 61HJ(1)(h) is to provide that a person does not consent if “the person was in the care, or under the supervision or authority, of the other person and as a result, was incapable of consenting to the sexual activity”.¹⁸⁵ We do not recommend this approach, as it could deem all people who are under the care, supervision or authority of another person to be incapable of consenting to sexual activity. Limiting the law to where the person is “overborne” (which we discuss below), avoids this overly wide effect.
- 6.130 We also do not recommend providing that a person does not consent if the person is “in a position of inequality with respect to another person”.¹⁸⁶ We consider that this is too broad and that the law should instead focus specifically on the situations identified in recommended s 61HJ(1)(h).

The person should be required to be “overborne”

- 6.131 Recommended s 61HJ(1)(h) only applies if the person participates because the person is “overborne” by the abuse of a relationship of authority, trust or dependence. The prosecution must prove this to establish that the person did not consent to the sexual activity. The current s 61HE(8)(c) does not contain this requirement.
- 6.132 While one submission suggests that requiring the complainant to be overborne makes the circumstance too difficult to prove,¹⁸⁷ a higher threshold than the current threshold is necessary. This is because recommended s 61HJ(1)(h) makes the abuse of a relationship or authority, trust or dependence a circumstance in which a person *does not* consent, rather than a circumstance in which it “may be established” that a person does not consent.
- 6.133 Some submissions also suggest the term “overborne” is not clear.¹⁸⁸ We believe the word is sufficiently well understood, and involves removing the ability freely and voluntarily to agree to engage in the sexual activity.

183. *Crimes Act 1900* (ACT) s 67(1)(h); *Criminal Code* (Qld) s 348(2)(d); *Criminal Code* (Tas) s 2A(2)(e); *Criminal Code* (Can) s 273.1(2)(c).

184. Rape and Domestic Violence Services Australia, *Submission CO65* [10.8]; Women’s Legal Service NSW, *Submission CO70* [33]–[34]. See also Women’s Safety NSW, *Submission CO74*, 8; NSW Law Reform Commission, Consent Review Survey, Response #1040 (Qu 9), Response #2484 (Qu 10), Response #2952 (Qu 10), Response #2393 (Qu 9).

185. Rape and Domestic Violence Services Australia, *Submission CO28*, rec 10 [116]–[119], appendix A: “Redrafted consent provision”.

186. A Cossins, “Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent” (2019) 42 *UNSW Law Journal* 462, 499. See also Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 2–3.

187. Women’s Safety NSW, *Submission CO74*, 8.

188. Women’s Legal Service, *Submission CO70* [35]; Law Society of NSW, *Submission CO76*, 5; NSW Director of Public Prosecutions, *Submission CO85*, 3.

The person is mistaken

Recommendation 6.9: The person is mistaken

The *Crimes Act* should provide that a person does not consent to a sexual activity if:

- (a) the person participates in the sexual activity because the person is mistaken about:
 - (i) the nature of the sexual activity, or
 - (ii) the purpose of the sexual activity (including about whether the sexual activity is for health, hygiene or cosmetic purposes), or
- (b) the person participates in the sexual activity with another person because the person is mistaken:
 - (i) about the identity of the other person, or
 - (ii) that the person is married to the other person.

- 6.134 The law should continue to recognise that a person who participates in a sexual activity because of certain specified mistakes does not consent to that activity. We recommend some changes to the circumstances listed in s 61HE(6).
- 6.135 Currently, a person does not consent to sexual activity with another person if the person consents under any of the following:
- a mistaken belief as to the identity of the other person
 - a mistaken belief that the other person is married to the person
 - a mistaken belief that the sexual activity is for health or hygienic purposes, or
 - any other mistaken belief about the nature of the activity induced by fraudulent means.¹⁸⁹
- 6.136 As we discuss below, we recommend retaining all four of these grounds (with relevant amendments). We do not recommend adding any other “mistake” grounds, such as where a person participates in a sexual act because of “a mistaken belief that the other person does not have a grievous bodily disease”.¹⁹⁰ We consider the issue of misrepresentation about sexually transmitted diseases further, later in this Chapter.¹⁹¹

The “mistake” circumstances should be simplified and clarified

- 6.137 Currently, a person does not consent to a sexual activity if the person consents “under any of the ... mistaken beliefs”.¹⁹² The prosecution is not required to prove that the belief caused, induced, or was a reason for, the person’s participation in the sexual activity.

189. *Crimes Act 1900* (NSW) s 61HE(6).

190. A Dyer, *Submission CO02* [29].

191. See [6.185]–[6.186].

192. *Crimes Act 1900* (NSW) s 61HE(6) .

- 6.138 This means that the law could include cases where a person participates while under a mistake, but the person would have consented to the activity even if not mistaken.¹⁹³ The law should not deem these situations to be non-consensual.
- 6.139 To avoid this, we recommend that prosecutors should be required to prove that the person participated in the sexual activity “because” the person was mistaken (recommended s 61HJ(1)(i)). This would mean that the person’s mistake would need to be an operative reason (but not necessarily the only reason) for participating in the sexual activity. This is consistent with the test in many of the other circumstances in recommended s 61HJ(1).

The person is mistaken about the nature of the activity

- 6.140 We recommend that the *Crimes Act* continue to recognise that a person does not consent if they participate in a sexual activity because they are mistaken about the nature of the activity (recommended s 61HJ(1)(i)).
- 6.141 This longstanding common law principle¹⁹⁴ was recognised in the *Crimes Act* in 2003.¹⁹⁵ A version of this circumstance is contained in the law of other Australian states and territories (except the ACT and WA), the UK and New Zealand.¹⁹⁶
- 6.142 Courts have traditionally interpreted the expression “nature of the act” narrowly. It only applies when the complainant is mistaken about whether the act is, or is capable of being, a sexual act.¹⁹⁷ For instance, courts have held that a person is not mistaken about the “nature of the act” if the person is aware of participating in a sexual act but:
- the person is unaware that the accused has a sexually transmitted infection¹⁹⁸
 - the accused promises to pay the person for participating in the act, but does not¹⁹⁹
 - the person insists that a condom is used, but the accused does not use one,²⁰⁰ or
 - the person consents to an intimate medical procedure on the assumption that the procedure is for medical purposes, even if it is actually done for other reasons.²⁰¹

193. A Dyer, *Submission CO02* [31].

194. See *R v Flattery* (1877) 2 QBD 410; *Papadimitropoulos v R* (1957) 98 CLR 249, 260–261.

195. *Crimes Act 1900* (NSW) s 61R(2)(a1), as amended by *Crimes Amendment (Sexual Offences) Act 2003* (NSW) sch 1 [4].

196. *Crimes Act 1958* (Vic) s 36(2)(h); *Criminal Code* (NT) s 192(2)(e), s 192(2)(g); *Criminal Code* (Qld) s 348(2)(e); *Criminal Code* (Tas) s 2A(2)(g); *Criminal Law Consolidation Act* (SA) s 46(3)(h); *Sexual Offences Act 2003* (UK) s 76(2)(a); *Sexual Offences (Scotland) Act 2009* (Scot) s 13(2)(d); *Sexual Offences (Northern Ireland) Order 2008* (UK) s 10(2)(a); *Crimes Act 1961* (NZ) s 128A(7).

197. *R v Flattery* (1877) 2 QBD 410; *R v Williams* [1923] 1 KB 340.

198. *R v Clarence* (1888) 22 QBD 23.

199. *R v Linekar* [1995] QB 250.

200. *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) [87]–[88].

201. *R v Mobilio* [1991] 1 VR 339, 352.

- 6.143 Accordingly, this ground is likely to arise in limited situations. Where a person is mistaken about the sexual nature of an act, their consent should be legally invalid. We recommend retaining this circumstance in case this issue arises in the future.
- 6.144 We recommend that the expression “induced by fraudulent means” is removed. This is to make this ground consistent with the other “mistake” grounds, which do not include this element. We discuss the issue of fraud further below.²⁰²
- 6.145 Some suggest that if the “mistake” grounds do not include a “fraud” element, this is too broad and potentially unfair.²⁰³ It would criminalise situations where the complainant consents under a mistaken belief, but the accused person did nothing to induce the mistake.²⁰⁴ Those submissions overlook that the prosecution would still have to prove the accused person knew there was no consent. We discuss the mental element of the sexual offences in Chapter 8.

The person is mistaken about the purpose of the activity

- 6.146 Currently, a person does not consent to a sexual activity if the person consents under a mistaken belief that the sexual activity is for health or hygienic purposes.²⁰⁵ This circumstance was added in its original form in 1992,²⁰⁶ in response to a Victorian case that held that this situation was consensual.²⁰⁷
- 6.147 Submissions and survey responses generally support retaining this ground.²⁰⁸
- 6.148 Equivalent provisions in other jurisdictions are broader, referring to a “false representation”, “deception” or “mistake” about “the purpose of the act”, in general.²⁰⁹
- 6.149 We recommend that NSW law follow these approaches by recognising that a person does not consent to sexual activity if the person is mistaken about the purpose of the activity, in general (recommended s 61HJ(1)(i)(ii)). This extends the law by capturing any mistake about the purpose of a sexual activity, not just mistakes about health or hygienic purposes.

202. See [6.165]–[6.189].

203. See, eg, Law Society of NSW, *Submission CO76*, 5; NSW Director of Public Prosecutions, *Submission CO85*, 3; Legal Aid NSW, *Submission CO87*, 6.

204. NSW Director of Public Prosecutions, *Submission CO85*, 3.

205. *Crimes Act 1900* (NSW) s 61HE(6)(c).

206. *Crimes Act 1900* (NSW) s 61R(4)(a1), as inserted by *Criminal Legislation (Amendment) Act 1992* (NSW) sch 1 (4). This ground originally referred to “medical or hygienic purposes”, and was amended in 2014 to refer to “health or hygienic purposes”: *Crimes Legislation Amendment Act 2014* (NSW) sch 1.1 [2].

207. *R v Mobilio* [1991] 1 VR 339, 352. See also NSW, *Parliamentary Debates*, Legislative Assembly, 25 February 1992, 66, 67–68 (P Collins, Attorney-General, Minister for Consumer Affairs and Minister for Arts).

208. See, eg, Rape and Domestic Violence Services Australia, *Submission CO28*, appendix A: “Redrafted consent provision”; A Dyer, *Submission CO53* [9]; Women’s Legal Service NSW, *Submission CO70* [23]. In our survey, 74.04% of responses to Question 9 (1,152 out of 1,556 responses) said that the law should continue to provide that people cannot consent to sex if “they agreed to have sex because they mistakenly believed the sex was for health or hygienic purposes”.

209. See *Criminal Code* (NT) s 192(2)(g); *Criminal Code* (Qld) s 348(2)(e); *Criminal Code* (Tas) s 2A(2)(g); *Sexual Offences Act 2003* (UK) s 76(2)(a); *Sexual Offences (Northern Ireland) Order 2008* (UK) s 10(2)(a); *Sexual Offences (Scotland) Act 2009* (Scot) s 13(2)(d).

- 6.150 There is no reason why some mistakes about the purpose of a sexual activity mean a complainant does not consent, but others do not.
- 6.151 Of course, for criminal liability to be established, it would still be necessary that the prosecution prove that the accused person knew that the complainant was mistaken.

Other examples should be added to this circumstance

- 6.152 Recommended s 61HJ(1)(i)(ii) accommodates a range of potential scenarios in which a person is mistaken about the purpose of a sexual activity. We recommend providing examples of when this can occur. This is not intended to limit the subsection, but to confirm its application to some common situations.
- 6.153 The examples given are where the person mistakenly believes the activity is done for a health, hygienic or cosmetic purpose. The first two are contained in the current subsection.²¹⁰ The third recognises that cosmetic procedures involving intimate areas of the body are growing in popularity.²¹¹
- 6.154 The language in recommended s 61HJ(1)(i)(ii) is broad enough to cover other mistakes that may arise on the facts of a specific case. For instance, some submissions argue that the provision should cover the situation where a person mistakenly believes a sexual activity has a spiritual or religious purpose.²¹²

The person is mistaken about the identity of the other person

- 6.155 Currently, a person does not consent to sexual activity with another person if the person consents under a mistaken belief as to the identity of the other person.²¹³ This longstanding common law principle²¹⁴ was first added to the *Crimes Act* in 1981.²¹⁵ It was introduced to cover cases in which the complainant mistakenly believes they are engaging in sexual activity with a particular person, but in fact they are engaging in sexual activity with someone else.²¹⁶
- 6.156 The law of other Australian states and territories, and other countries, recognises a similar circumstance, with some variations in scope.²¹⁷ In Queensland, for example, a person does not consent if consent is obtained “by a mistaken belief induced by

210. *Crimes Act 1900* (NSW) s 61HE(6)(c).

211. See, eg, K Powley, “Rising Rates of Genital Cosmetic Surgery Subject of New Research” (29 June 2018) *Medical XPress* <<https://medicalxpress.com/news/2018-06-genital-cosmetic-surgery-subject.html>> (retrieved 17 September 2020).

212. Rape and Domestic Violence Services Australia, *Submission CO65* [10.10]; Women’s Legal Service NSW, *Submission CO70* [7.6]; NSW Director of Public Prosecutions, *Submission CO85*, 3.

213. *Crimes Act 1900* (NSW) s 61HE(6)(a).

214. See *R v Dee* (1884) 15 Cox CC 579, 587 (May CJ), 594 (Palles CB), 595 (Lawson J), 598 (O’Brien J) 599–600 (Murphy J); *Papadimitropoulos v R* (1957) 98 CLR 249, 260–261; *R v Gallienne* [1964] NSW 919, 925. See also S Bronitt and P Easteal, *Rape Law in Context: Contesting the Scale of Injustice* (Federation Press, 2018) 27–28.

215. *Crimes Act 1900* (NSW) s 61D(3)(a)(i), as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

216. See G D Woods, *Sexual Assault Law Reforms in New South Wales* (Department of the Attorney-General and of Justice, 1981) 19.

217. See, eg, *Crimes Act 1900* (ACT) s 67(1)(f); *Crimes Act 1958* (Vic) s 36(2)(i); *Criminal Code* (NT) s 192(2)(e); *Criminal Code* (Tas) s 2A(2)(g); *Criminal Law Consolidation Act* (SA) s 46(3)(g); *Crimes Act 1961* (NZ) s 128A(6).

the accused person that the accused person was the person's sexual partner".²¹⁸ Similarly, in the UK, a person does not consent if they agree because the other person impersonated someone known personally to them.²¹⁹

- 6.157 We recommend retaining this circumstance (recommended s 61HJ(1)(j)(ii)). Submissions and survey responses generally support this.²²⁰
- 6.158 There are concerns that this circumstance could capture mistakes about personal characteristics, such as a person's gender identity, sex characteristics or sexual health status.²²¹ We are not aware of any cases where this has occurred. Such a broad interpretation would be inconsistent with the reason why this category of mistaken belief was added to the *Crimes Act*.

The person is mistaken about being married to the other person

- 6.159 Currently, a complainant does not consent to a sexual activity with an accused person if the complainant consents under a mistaken belief that the accused person is married to the complainant.²²²
- 6.160 This was added in response to a High Court case from the 1950s, in which the accused person had misled the complainant into believing that they were married to each other. The complainant had agreed to sexual intercourse on this basis. The Court found that the complainant had consented. It held that consent requires comprehension of "what is about to take place, as to the identity of the man and the character of what he is doing". As the complainant held this understanding, she had consented.²²³
- 6.161 In 1981, NSW legislated to overturn this decision by introducing what is now s 61HE(6)(b).²²⁴ No other Australian state or territory has done so.
- 6.162 While there is support for this subsection,²²⁵ some submissions and survey responses criticise it.²²⁶ Criticisms include that it:
- suggests that marriage implies consent²²⁷

218. *Criminal Code* (Qld) s 348(2)(f).

219. *Sexual Offences Act 2003* (UK) s 76(2)(b); *Sexual Offences (Northern Ireland) Order 2008* (UK) s 10(2)(b); *Sexual Offences (Scotland) Act 2009* (Scot) s 13(2)(e).

220. See, eg, A Dyer, *Submission CO02* [29]; Rape and Domestic Violence Services Australia, *Submission CO28* [122]–[124], appendix A: "Redrafted consent provision"; Women's Legal Service, *Submission CO70* [23]. In our survey, 82.26% responses to Question 9 (1,280 out of 1,556 responses) said that the law should continue to provide that people cannot consent to sex if "they agreed to have sex because they had a mistaken belief about the other person's identity".

221. See, eg, Rape and Domestic Violence Services Australia, *Submission CO28*, rec 15 [136]–[139]; ACON, *Submission CO61*, 2; Inner City Legal Centre, *Submission CO82*, 4.

222. *Crimes Act 1900* (NSW) s 61HE(6)(b).

223. *Papadimitropoulos v R* (1957) 98 CLR 249, 261.

224. See *Crimes Act 1900* (NSW) s 61D(a)(ii), as inserted by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 (4).

225. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 8–9. In our survey, 71.14 % of responses to Question 9 (1,107 out of 1,556 responses) said that the law should continue to provide that people cannot consent to sex if "they agreed to have sex because they mistakenly believed the other person was married to them".

226. See, eg, ACON, *Submission CO12*, 5; Rape and Domestic Violence Services Australia, *Submission CO28*, rec 13 [132]–[133]; NSW Law Reform Commission, Consent Review Survey, Response #2363 (Qu 9), Response #2381 (Qu 9), Response #3477 (Qu 9).

- privileges marriage as a factor that influences whether a person consents without a reason for doing so,²²⁸ and
 - is too narrow because it only captures one type of relationship.²²⁹
- 6.163 These criticisms seem to rely on the circumstance applying far more broadly than it does. As we discuss above, it was introduced to address a specific case, with particular facts. We do not think it needs to be broadened to cover other relationship types.
- 6.164 We recognise that this circumstance may arise in a limited number of situations. Nevertheless, we recommend that the circumstance is retained in case this issue arises in the future (recommended s 61HJ(1)(j)(ii)).

The person participates because of a fraudulent inducement

Recommendation 6.10: The person participates because of a fraudulent inducement

The *Crimes Act* should provide that a person does not consent to a sexual activity if the person participates in the sexual activity because of a fraudulent inducement.

- 6.165 We recommend that the law recognise that if a person participates in a sexual activity because they have been fraudulently induced to do so, that person does not consent to the activity (recommended s 61HJ(1)(k)).
- 6.166 Submissions, survey responses and media commentary suggest that, across NSW, there may be many cases of the use of fraud or deceit to induce engagement in sexual activity.²³⁰ As we discuss below, the law in NSW does not capture these situations explicitly. Recommended s 61HJ(1)(k) is intended to correct this.
- 6.167 Recommended s 61HJ(1)(k) is largely consistent with our Draft Proposals.²³¹ Several submissions support this proposal.²³² Reasons for this support include that:
- being fraudulently induced to participate in sexual activity causes considerable psychological distress for complainants²³³

227. ACON, *Submission CO12*, 5.

228. Rape and Domestic Violence Services Australia, *Submission CO28* [133].

229. Sex Workers Outreach Project, *Submission CO15*, 7.

230. See, eg, Sex Workers Outreach Project, *Submission CO15*, 8; Inner City Legal Centre, *Submission CO82*, 3; NSW Law Reform Commission, Consent Review Survey, Response #1431 (Qu 8, Qu 10), Response #3243 (Qu 10); M McGowan and C Knaus, "It Absolutely Should be Seen as Rape: When Sex Workers are Conned" (13 October 2018) *The Guardian Australia* <www.theguardian.com/australia-news/2018/oct/13/it-absolutely-should-be-seen-as-when-sex-workers-are-conned> (retrieved 17 September 2020).

231. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 6.9.

232. J Charman, *Submission CO46*, 1; L, C and P, *Submission CO49*, 1; Women's Legal Service NSW, *Submission CO70* [27]; Law Society of NSW, *Submission CO76*, 5; NSW Director of Public Prosecutions, *Submission CO85*, 3.

233. J Charman, *Submission CO46*, 1; NSW Law Reform Commission, Consent Review Survey, Response 1431 (Qu 10). See also Inner City Legal Centre, *Submission CO82*, 3.

- a person does not freely and voluntarily agree to sexual activity if they have been fraudulently induced to participate in it,²³⁴ and
 - NSW law does not currently provide adequate redress in these circumstances.²³⁵
- 6.168 A person who is induced by fraud, of any kind, to participate in a sexual activity, cannot be said to have agreed freely and voluntarily to do so. Our recommendation is intended to cover any circumstance in which participation is dishonestly procured by a false representation or upon a false pretence, known by the maker to be false when it was made.

The reform would address the limited approach to fraud in NSW

- 6.169 Compared to other states and territories, NSW has a limited approach to criminalising sexual activity consent to which is obtained by fraud.
- 6.170 Aside from NSW and the NT, other Australian states and territories provide that:
- fraud is a circumstance in which a person does not consent to sexual activity,²³⁶ and / or
 - it is an offence to procure sexual activity by fraud.²³⁷
- 6.171 Currently, fraud is not expressly recognised in NSW as a circumstance in which a person does not consent. Fraud is mentioned indirectly in existing s 61HE(6)(d), which refers to a mistaken belief about the nature of activity “induced by fraudulent means”. As we discuss above, this is a narrow category of mistaken belief.²³⁸
- 6.172 In NSW, there is also no general offence of procuring sexual activity by fraud. Previously, there was an offence of inducing or procuring a woman to have “illicit carnal connection” by “any false pretence, false representation, or other fraudulent means”.²³⁹ This offence was separate to the sexual assault offences. At the time it was repealed in 2003, it had the same maximum penalty as the offence of sexual assault.²⁴⁰
- 6.173 Explaining the repeal, the then Attorney General said that the offence was “obsolete”, because a fraud element was to be included in (what is now) s 61HE(6)(d).²⁴¹ However, s 61HE(6)(d) is narrower than the repealed procurement offence, as it relates only to mistaken beliefs about the nature of the activity. The

234. NSW Director of Public Prosecutions, *Submission CO85*, 3.

235. Confidential, *Submission CO48*, 1.

236. *Crimes Act 1900* (ACT) s 67(1)(g); *Criminal Code* (Tas) s 2A(2)(f); *Criminal Code* (WA) s 319(2)(a). See also *Criminal Code* (Canada) s 265(3)(c).

237. *Crimes Act 1958* (Vic) s 45; *Criminal Code* (Qld) s 218(1)(b); *Criminal Code* (Tas) s 129(b); *Criminal Code* (WA) s 192(1)(b); *Criminal Law Consolidation Act* (SA) s 60(b). See also *Crimes Ordinance* (Hong Kong) s 120.

238. See [6.142]–[6.143].

239. *Crimes Act 1900* (NSW) s 66, repealed by *Crimes Amendment (Sexual Offences) Act 2003* (NSW) sch 1 [8].

240. See *Crimes Act 1900* (NSW) s 61I, s 66, repealed by *Crimes Amendment (Sexual Offences) Act 2003* (NSW) sch 1 [8].

241. NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 374, 376 (R Debus, Attorney-General).

repeal of this offence created a gap in NSW law, as there is no broad offence dealing directly with the fraudulent procurement of sexual activity.²⁴²

- 6.174 It may be possible for such cases to be dealt with under the general definition of consent (s 61HE(2)). Potentially, a jury could find that a complainant did not freely and voluntarily agree to the sexual activity if induced to participate through fraud.
- 6.175 On one view, this means that NSW adopts a highly flexible approach to the issue of fraud. The relationship between fraud and consent is largely left to be determined by fact finders on a case-by-case basis.
- 6.176 Our view is that this approach to fraud is inadequate, piecemeal and does not respond to community concerns. There is no certainty that fact finders will conclude that a person did not consent, as defined, when that person was fraudulently induced to participate in the sexual activity. Adding a broader fraud ground to the list of circumstances in which a person does not consent would provide such clarity.
- 6.177 The absence of a specific fraud provision also creates gaps in legal protection. For instance, a range of submissions, survey responses and researchers express concern about the lack of protection afforded to sex workers who are fraudulently promised payment for sexual services.²⁴³ Submissions argue that this should be considered sexual assault, as this reflects the experience of complainants.²⁴⁴
- 6.178 While it may be possible for this situation to be prosecuted as a sexual assault under the current law, this is not certain.²⁴⁵ A fraud provision would remove doubt.

The provision is not intended to capture trivial matters

- 6.179 Some submissions regard this reform as too broad and argue that it could capture conduct that, while immoral, should not be regarded as criminal (such as lies about a person's marital status, occupation or wealth).²⁴⁶
- 6.180 Fraud is a concept that is well understood in the civil and criminal law, and does not extend to cases of trivial or less serious deceptions. The criminal law has historically distinguished between fraud and "puffery" (for example, in general fraud offences).²⁴⁷ Our view is that deceptions such as lies about a person's marital status or

242. J Chen, "Fraudulent Sex Criminalization in Australia: Disparity, Disarray and the Underrated Procurement Offence" (2020) 43 *UNSW Law Journal* 581, 606. Similar arguments have been made in the UK, where a procurement offence was also repealed in 2003: see, eg, A Clough, "Conditional Consent and Purposeful Deception" (2018) 82 *Journal of Criminal Law* 178, 188. In contrast, the Law Reform Commission of Hong Kong recently recommended against the repeal of the offence of procurement by false pretences: Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences*, Report (2019) [2.91].

243. See, eg, Sex Workers Outreach Project, *Submission CO15*, 8; Inner City Legal Centre, *Submission CO82*, 3; NSW Law Reform Commission, Consent Review Survey, Response #594 (Qu 10), Response #835 (Qu 10), Response 1431 (Qu 10); Response #2519 (Qu 10); A Dyer, "Mistakes That Negate Apparent Consent" (2019) 43 *Criminal Law Journal* 159, 166–167.

244. See, eg, Sex Workers Outreach Project, *Submission CO15*, 8; Inner City Legal Centre, *Submission CO82*, 3. See also *R v Livas* [2015] ACTSC 50 [22].

245. A Dyer, *Submission CO02* [26], [28]–[29].

246. NSW Bar Association, *Submission CO47* [31], [33]–[34]; A Dyer, *Submission CO52*, [22], [26]–[27]; National Association for People with HIV Australia and the HIV/AIDS Legal Centre, *Submission CO80*, 4; The Public Defenders, *Submission CO84*, 4; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 7–8; Legal Aid NSW, *Submission CO87*, 6.

247. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [11.12.1.1.2].

occupation would be most likely viewed as puffery, and therefore not within the concept of fraud, and unlikely to be charged or prosecuted in the first place.

- 6.181 Case law from Australian states and territories also demonstrates that fraud provisions have been applied in cases involving serious conduct. We are not aware of any cases where these laws have criminalised conduct which would be considered trivial or not deserving criminal sanction.
- 6.182 To illustrate, in jurisdictions where fraud is recognised as a circumstance in which a person does not consent, there have been convictions in cases including where the accused person:
- was an adult man who posed online as a young woman and promised the complainant sexual favours from other young women if the complainant participated in sexual activity with him,²⁴⁸ and
 - pretended to the complainant, a sex worker, that he had paid for her services when he had not.²⁴⁹
- 6.183 Further, in jurisdictions with separate offences of procuring sexual activity by fraud, there have been convictions in cases including where the accused person:
- pretended to own an “adult services boutique business” and persuaded the complainants to have sex with him by pretending he was assessing their ability to perform sexual acts as employees of the business²⁵⁰
 - pretended to be a member of the Mafia, and told the complainants that they could join the Mafia and receive money and gifts if they engaged in sexual acts with him²⁵¹
 - persuaded a sex worker to take part in sexual intercourse with him by falsely representing that he would pay her afterwards,²⁵² and
 - pretended to be making a film and told the complainants they had to have sexual intercourse with him in order to obtain a role in the film.²⁵³

The reform protects complainants who are fraudulently induced to participate in sexual activity

- 6.184 Some submissions are concerned that this reform may capture specific situations that some believe should not be considered sexual assault.²⁵⁴
- 6.185 The first situation is where a person does not disclose or is dishonest about their HIV status. In Canada, a person does not consent if they submit or do not resist by

248. *R v Tamawiyi (No 2)* [2015] ACTSC 302, 11 ACTLR 82.

249. *R v Livas* [2015] ACTSC 50; *Livas v R* [2015] ACTCA 54.

250. *Onnis v R* [2013] VSCA 271.

251. *MacFie v R* [2012] VSCA 314.

252. *R v Rajakaruna* [2004] VSCA 114, 8 VR 340.

253. *R v Roy* (Unreported, VSCCA, 16 November 1993).

254. See, eg, ACON, *Submission CO61*, 1–2; Australian Queer Students’ Network, *Submission CO72*, 1–2; National Association for People with HIV Australia and the HIV/AIDS Legal Centre, *Submission CO80*, 1–2, 4; Inner City Legal Centre, *Submission CO82*, 2, 4.

reason of “fraud”.²⁵⁵ The Supreme Court of Canada has found that this will vitiate a complainant’s consent if the accused person did not disclose their HIV positive status to the complainant and there was a “realistic possibility of transmission” of HIV.²⁵⁶ These cases have been controversial and have been subject to significant criticism.²⁵⁷

- 6.186 Some submissions to our Draft Proposals were concerned that a fraud provision would lead to similar cases in NSW.²⁵⁸ They submit that one person’s consent to sexual activity should not be vitiated if the other person does not disclose their HIV status.
- 6.187 The second situation is where a person does not disclose or is dishonest about their gender or sexual history. Courts in England and Wales have found that a complainant who was unaware that the accused person was transgender (or otherwise presented as a gender different to that assigned at birth) did not consent to the sexual activity.²⁵⁹ In one case, the Court of Appeal (England and Wales) described the accused person’s conduct in presenting as male (when they were assigned female at birth) as a “deception”.²⁶⁰ These cases have been controversial and criticised.²⁶¹
- 6.188 These cases were determined under the general definition of consent that applies in England and Wales,²⁶² and not any specific fraud provision. However, many submissions express concern that introducing a specific fraud provision would make it more likely that a similar case may arise in NSW.²⁶³ One submission argues that the law must recognise “that a person’s gender experience and history is not a misrepresentation, regardless of whether their gender has been legally or medically affirmed”.²⁶⁴

255. *Criminal Code* (Canada) s 265(3)(c).

256. *R v Mabior* [2012] 2 SCR 584 [91]–[104]; *R v Cuerrier* [1998] 2 SCR 371 [125]–[139]. See also *R v DC* [2012] 2 SCR 626.

257. See, eg, S Cowan, “Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission” (2014) 17 *New Criminal Law Review* 135; M Shaffer, “Sex, Lies and HIV: Mabior and the Concept of Sexual Fraud” (2013) 63 *University of Toronto Law Journal* 466; R K Yamada, “Fraud, HIV, and Unprotected Sex: *R v Cuerrier*” (1999) 6 *Southwestern Journal of Law and Trade in the Americas* 157, 172–176.

258. See, eg, National Association of People with HIV Australia and the HIV/AIDS Legal Centre, *Submission CO80*, 1–2, 4–6; Inner City Legal Centre, *Submission CO82*, 2, 4; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 8.

259. See, eg, *R v McNally* [2013] EWCA Crim 1051, [2014] QB 593 [25]–[27]; *R v Newland* (Unreported, Chester Crown Court, Dutton J, 12 November 2015).

260. *R v McNally* [2013] EWCA Crim 1051, [2014] QB 593 [26].

261. See, eg, A Sharpe, “Queering Judgment: The Case of Gender Identity Fraud” (2017) 81 *Journal of Criminal Law* 417; G Doig, “Deception as to Gender Vitiates Consent: *R v McNally* [2013] EWCA Crim 1051” (2013) 77 *Journal of Criminal Law* 464, 466–467; F Ashley, “Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities” (2018) 41 *Dalhousie Law Journal* 339; E Lauder, “Judges, You Need to Catch Up with Parliament in Your Treatment of Transgender People” (6 May 2016) *Legal Cheek* <www.legalcheek.com/lc-journal-posts/judges-you-need-to-catch-up-with-parliament-in-your-treatment-of-transgender-people/> (retrieved 17 September 2020).

262. See *Sexual Offences Act 2003* (UK) s 74.

263. A Dyer, *Submission CO53* [3], [22], [27]; Australian Queer Students’ Network, *Submission CO72*, 1–2; National Association of People with HIV Australia, *Submission CO80*, 2; Inner City Legal Centre, *Submission CO82*, 4; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 8.

264. Inner City Legal Centre, *Submission CO82*, 4.

- 6.189 While we acknowledge these criticisms, the law must offer protection to complainants who are fraudulently induced to participate in sexual activity.

In summary

- 6.190 In this Chapter, we recommend changes to the lists of circumstances in which a person does not consent, or in which it “may be established” that a person does not consent. These changes affect the structure and wording of the current lists, and include new circumstances, to ensure that NSW law reflects contemporary attitudes towards sexual activity and consent.
- 6.191 A statutory list of circumstances in which a person does not consent is an essential part of how the law treats the concept of consent overall. It assists in elaborating the meaning of consent by distinguishing where consent cannot exist. It also affects the way knowledge of non-consent is assessed, an area that we look at in the next Chapter. Finally, a list of circumstances in which a person does not consent serves to educate people about the law, by sending a clear message about situations that are non-consensual.

7. Knowledge of non-consent

In brief

The *Crimes Act* should continue to specify three states of mind by which the accused person's knowledge of the absence of consent may be proved. To clarify and simplify the law, we recommend amendments to the existing test concerning "no reasonable grounds for believing" that the complainant consents, and to the requirement for fact finders to consider any steps taken by the accused person to ascertain consent.

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- 7.1 The common mental element (or “mens rea”) of the sexual offences is knowledge of non-consent. This means that, in addition to proving that the complainant did not consent, the prosecution must prove beyond reasonable doubt that the accused person knew that the complainant did not consent.¹
- 7.2 The principle of mens rea reflects a fundamental criminal principle: that a person should not be convicted for committing an act without also having a “guilty mind”. Issues relating to the mental element of the sexual offences have been highly controversial over the course of this review.
- 7.3 Section 61HE(3) of the *Crimes Act* currently defines “knowledge”. Section 61HE(4) specifies matters to which fact finders must, and must not, have regard when deciding whether the accused person knew the complainant did not consent.
- 7.4 We recommend reforms to clarify and simplify aspects of the mental element, with the aim of ensuring that it operates as intended.
- 7.5 Under current legislation knowledge may be proved by proof that:
- the accused person actually knows that the complainant does not consent to the sexual activity
 - the accused person is reckless as to whether the complainant consents to the sexual activity, or
 - the accused person has no reasonable grounds for believing that the complainant consents to the sexual activity.²
- 7.6 Section 61HE(4) states matters to which the fact finder must (and must not) have regard when determining knowledge. The fact finder must have regard “to all of the circumstances of the case ... including any steps taken by the [accused] person to ascertain whether the [complainant] consents to the sexual activity”, but must not have regard to “any self-induced intoxication” of the accused person.
- 7.7 We recommend that the following test replace the current s 61HE(3) and (4):³

Table 7.1: Recommended s 61HK of the *Crimes Act 1900* (NSW)

61HK Knowledge about consent

- (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

1. *Crimes Act 1900* (NSW) s 61I–s 61JA, s 61KC–s 61KF.

2. *Crimes Act 1900* (NSW) s 61HE(3).

3. See Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the *Crimes Act 1900*.

- (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) For the purposes of making any finding under this section, the trier of fact—
 - (a) must have regard to all the circumstances of the case, including whether the accused person said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person consented to the sexual activity, and if so, what the accused person said or did, and
 - (b) must not have regard to any self-induced intoxication of the accused person.

An overview of the mental element

- 7.8 Knowledge of non-consent and recklessness as to whether there is consent have long been part of the mental element for the crimes of rape or sexual assault.⁴ Determining whether the accused person 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”.⁵
- 7.9 The “no reasonable grounds” test was added to the mental element as part of the changes made by the 2007 reforms.⁶ As a hybrid “subjective / objective” test, it involves considering what the accused person “might have believed in all the circumstances” and determining “whether there might have been reasonable grounds for it”.⁷
- 7.10 The 2007 reforms also introduced the matters to which the fact finder must (and must not) have regard when determining knowledge.⁸ As discussed later in this Chapter, the requirement to consider “any steps” taken by the accused person to ascertain consent does not mean that the accused person must take such steps. However, fact finders may consider a failure to do so as highly relevant in some cases.
- 7.11 The prohibition on considering the accused person’s self-induced intoxication, if any, reflects a rule that applies more broadly. Fact finders are not to consider self-induced intoxication when making findings about the mental element for offences in NSW (aside from offences of specific intent).⁹

4. See G D Woods, *Sexual Assault Law Reforms in New South Wales* (Department of the Attorney-General and of Justice, 1981) 15–16, quoting *R v Daly* [1968] VR 257, 258–259.

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

6. *Crimes Act 1900* (NSW) s 61HA(3)(c), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1].

7. *Lazarus v R* [2016] NSWCCA 52 [156] (Fullerton J).

8. *Crimes Act 1900* (NSW) s 61HA(3)(d), as inserted by *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [1]. Section 61HA of the *Crimes Act 1900* (NSW) was replaced with s 61HE in 2018: *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [6].

9. A key element of an offence of “specific intent” is an intention to cause a specific result: *Crimes Act 1900* (NSW) s 428B(1). The sexual offences are not offences of specific intent.

The mental element should be knowledge of non-consent

Recommendation 7.1: The mental element of knowledge of non-consent

The *Crimes Act* should continue to recognise three states of mind by which the accused person's knowledge of the absence of consent may be proved.

- 7.12 Knowledge of non-consent should continue to be the mental element for the sexual offences. We support the general structure of s 61HE(3), which sets out three states of mind by which the accused person's knowledge of the absence of consent may be proved. Recommended s 61HK(1) adopts this structure.

A single “no reasonable belief” test should not be introduced

- 7.13 Instead of a test of knowledge of non-consent, some jurisdictions apply a single test of “no reasonable belief in consent”. Various forms of a single, “no reasonable belief” test are in force in Victoria, England and Wales, Northern Ireland, Scotland and New Zealand.¹⁰ In those places, the prosecution must prove beyond reasonable doubt that the accused person did not “reasonably believe” that the complainant consented.
- 7.14 Those in favour of a single test argue that it would be simpler and clearer for fact finders to understand and apply.¹¹ One benefit could be that fact finders would not have to engage with the artificial meaning of the word “knows” that currently appears in s 61HE(3).¹² Currently, an accused person is taken to know that the complainant does not consent even if the accused person actually believes (although without reasonable grounds) that the complainant consents.¹³
- 7.15 We are not persuaded that NSW should adopt a single mental element of “no reasonable belief”.
- 7.16 Such a reform is unlikely to simplify trials, as fact finders would effectively need to answer the same questions as they do now. In Victoria, for instance, the single test of “no reasonable belief” can be met by proving that:
- (a) the accused believed that the complainant was not consenting;
 - (b) the accused did not believe the complainant was consenting (this includes cases where the accused gave no thought as to whether the complainant was or was not consenting); or
 - (c) even if the accused believed the complainant was consenting, the accused's belief was not reasonable in the circumstances.¹⁴

10. *Crimes Act 1958* (Vic) s 36A, s 38(1)(c), s 39(1)(c), s 40(1)(d), s 41(1)(d); *Crimes Act 1961* (NZ) s 128(2)(b), s 128(3)(b); *Sexual Offences Act 2003* (UK) s 1(1)(c), s 2(1)(d), s 3(1)(d), s 4(1)(d); *Sexual Offences (Northern Ireland) Order 2008* (UK) art 5(1)(c), art 6(1)(d), art 7(1)(d), art 8(1)(d); *Sexual Offences (Scotland) Act 2009* (Scot) s 1(1)(b), s 2(1)(b), s 3(1)(b), s 4(b).

11. See, eg, Community Legal Centres NSW, *Submission CO25*, 13; Rape and Domestic Violence Services Australia, *Submission CO28* [208]; Domestic Violence NSW, *Submission CO29*, 7.

12. Rape and Domestic Violence Services Australia, *Submission CO28* [213].

13. *Crimes Act 1900* (NSW) s 61HE(3)(c).

14. *Keogh v R* [2018] VSCA 145 [52]. See also Judicial College of Victoria, *Victorian Criminal Charge Book*, “7.3.1.1 – Consent and Reasonable Belief in Consent (From 1/7/15)” [52] (last

- 7.17 This is broadly similar to s 61HE(3). For instance, an accused person who knows that the complainant does not consent will not have a reasonable belief in consent under Victorian law.¹⁵ This does not differ significantly from the analysis required by s 61HE(3). Arguably, it simply reframes the question.
- 7.18 Changing the test will not necessarily simplify jury directions. Trial judges in NSW are required only to direct on the states of mind that are relevant to the particular case.¹⁶
- 7.19 A single “reasonable belief” test would not necessarily introduce a more stringent standard than s 61HE(3) applies. Like NSW, the Victorian test is not wholly objective. Fact finders in Victoria are not to assess the accused person’s belief against the standard of a hypothetical reasonable person.¹⁷ Instead, reasonableness “depends on the circumstances” of the case.¹⁸ This is similar to the hybrid subjective / objective test in s 61HE(3)(c) of the NSW *Crimes Act*.¹⁹
- 7.20 While we do not support a single test of “no reasonable belief”, we agree that the “no reasonable grounds” test should be simplified. We discuss this later in this Chapter.²⁰

The *Crimes Act* should continue to list the three states of mind

- 7.21 While a range of submissions support the existing structure of the mental element,²¹ some argue that it should be amended.
- 7.22 One view is that the “no reasonable grounds” test could be removed entirely. This is because the “recklessness” limb arguably covers many cases involving an unreasonable belief in consent.²² A different view is that a recklessness standard is unnecessary if the mental element consists of actual knowledge and an objective standard.²³
- 7.23 As we discuss later in this Chapter, the NSW Bar Association considers that the “no reasonable grounds” test should (if retained) be relocated to a separate, lesser offence.²⁴

updated 19 March 2018) <www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#56177.htm> (retrieved 17 September 2020); Rape and Domestic Violence Services Australia, *Submission CO28* [197].

15. See Victoria, Department of Justice and Regulation, *Criminal Law Review, Victoria’s New Sexual Offence Laws: An Introduction* (2015) 6.
16. See Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (update 61.1, July 2019) [5-1566].
17. Explanatory Memorandum, Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 (Vic) 7.
18. *Crimes Act 1958* (Vic) s 36A(1). See also Victoria, Department of Justice and Regulation, *Criminal Law Review, Victoria’s New Sexual Offence Laws: An Introduction* (2015) 14.
19. See *O’Sullivan v R* [2012] NSWCCA 45, A Crim R 449 [125]–[126]; *Lazarus v R* [2016] NSWCCA 52 [156].
20. See rec 7.5 [7.63]–[7.80].
21. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 7, 13; Office of the Director of Public Prosecutions, *Submission CO14*, 5, 8; Law Society of NSW, *Submission CO18*, 9; A Dyer, *Submission CO53* [4].
22. E Methven and I Dobinson, *Preliminary Submission PCO77*, 14–16.
23. A Cossins, *Submission CO17*, 4.
24. See [7.81].

- 7.24 We are not persuaded that the structure of the knowledge element should change. We agree that “all three forms of knowledge together capture the different mental states that should be criminalised when an individual has sex without consent”.²⁵ It is helpful to list these states of mind clearly, bearing in mind that judges need to direct juries only on all those means of proving knowledge of non-consent that are relevant in any particular case.

The introductory words should be simplified and clarified

Recommendation 7.2: The introductory words of s 61HE(3)

- (1) Unnecessary words should be removed from the introductory words to s 61HE(3) of the *Crimes Act*.
- (2) The introductory words should explain that an accused person is “taken to know” that the complainant does not consent if any of the three states of mind in s 61HE(3)(a)–(c) of the *Crimes Act* exist.

- 7.25 We consider that the introductory words of s 61HE(3) should be simplified and clarified.²⁶ In recommended s 61HK(1), we seek to achieve this by omitting unnecessary descriptive details and providing that an accused person will be “taken to know” that the complainant does not consent if any of the three listed states of mind exists. This is intended to reflect the fact that the section refers to actual and constructive forms of knowledge.²⁷
- 7.26 Submissions on our Draft Proposals generally consider that our recommended language is an improvement on the current s 61HE(3).²⁸

No substantive changes to “actual knowledge” and “reckless”

Recommendation 7.3: “Actual knowledge” and “reckless”

- (1) “Actual knowledge” and “recklessness” should remain part of the mental element of knowledge of non-consent.
- (2) The reference to “knows” in s 61HE(3)(a) should be replaced with “actually knows”.
- (3) “Recklessness” should not be defined in the legislation.
- (4) A test of “indifference” should not replace “recklessness”.

- 7.27 We do not recommend substantive changes to the content of s 61HE(3)(a) and (b).

25. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 7. See also Office of the Director of Public Prosecutions, *Submission CO14*, 5.

26. See, eg, G Mason and J Monaghan, *Preliminary Submission PCO40* [13]; Victims of Crime Assistance League Inc NSW, *Submission CO11*, 3.

27. G Mason and J Monaghan, *Preliminary Submission PCO40* [13].

28. See, eg, Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 4; Women's Legal Service NSW, *Submission CO70* [37]; NSW Director of Public Prosecutions NSW, *Submission CO85*, 4.

Actual knowledge

- 7.28 The first limb of knowledge is “actual knowledge”. We agree that it should remain part of the mental element.²⁹
- 7.29 Recommended s 61HK(1)(a) modifies existing s 61HE(3)(a) slightly by referring to “actually knows” instead of “knows”. This adopts the commonly used term and more clearly differentiates between the actual and constructive forms of knowledge recognised in s 61HE(3).³⁰ It is not intended to change the meaning of s 61HE(3)(a).³¹

Recklessness

- 7.30 We do not recommend any changes to the content of the “reckless” limb in existing s 61HE(3)(b). Submissions generally support retaining recklessness as part of the mental element.³²

A legislative definition of recklessness is not necessary

- 7.31 Section 61HE(3) does not define the term “reckless”. It should not do so.
- 7.32 The common law recognises two categories of recklessness. As the model direction in the NSW *Criminal Trial Courts Bench Book* (“*Bench Book*”) explains, the prosecution must prove either:
- **inadvertent recklessness:** the accused person 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 of non-consent would have been obvious to someone with the accused person’s mental capacity if they had turned their mind to it, and
 - **advertent recklessness:** the accused person realised the possibility that the complainant was not consenting, but went ahead regardless of whether the complainant was consenting or not.³³
- 7.33 Some submissions suggest that “reckless” should be defined in the legislation. This definition could be based on the explanation in the *Bench Book*.³⁴
- 7.34 Those who support a legislative definition say it could clarify how recklessness applies in the specific context of sexual offences. Recklessness is a recognised legal term, which non-lawyers may not understand. Adding to the potential for

29. See NSW Bar Association, *Submission CO32*, 8; Law Society of NSW, *Submission CO76*, 6.

30. See also G Mason and J Monaghan, *Preliminary Submission PCO40* [13].

31. See also A Dyer, *Submission CO02* [97].

32. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 7; Office of the Director of Public Prosecutions, *Submission CO14*, 5; Women’s Legal Service NSW, *Submission CO27* [57]; Rape and Domestic Violence Services Australia, *Submission CO28* [159]–[160].

33. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (update 61.1, July 2019) [5–1566]. See also *R v Tolmie* (1995) 37 NSWLR 660, 672; *R v Mitton* [2002] NSWCCA 124, 132 A Crim R 123 [28].

34. L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 1.

confusion, recklessness has a different meaning in relation to other criminal offences.³⁵

- 7.35 Other submissions do not support a legislative definition.³⁶ They argue that the concept of recklessness is well established in relation to the sexual offences and that the *Bench Book* explanation is clear, adequate and flexible.³⁷
- 7.36 There are also concerns that a legislative definition could lead to further complexity and inflexibility.³⁸ The Taskforce recommended against a legislative definition in 2005. In doing so, the Taskforce referred to Justice Callinan's view that attempts to define recklessness will lead to uncertainty and are "likely to be futile".³⁹
- 7.37 We agree that a legislative definition of recklessness is unnecessary. The model directions in the *Bench Book* are well known. They can be updated to accommodate any future developments in the law.

A test of "indifference" should not replace the test of "recklessness"

- 7.38 One suggestion is that "recklessness" should be replaced by a test of "indifference". Under this test, a person would be taken to know about the lack of consent if "the person is indifferent as to lack of consent by the other person".⁴⁰
- 7.39 The indifference test would capture situations in which the accused person intended to go ahead even with knowledge that the complainant did not consent. It would not capture situations in which the accused person did not even consider whether the complainant consented.⁴¹
- 7.40 The NSW Bar Association supports this alternative test of "indifference". The Association considers both advertent and inadvertent recklessness to be problematic. In its view, "taking a risk that consent is absent" (advertent recklessness) is not as morally culpable as actually knowing that the complainant does not consent. The Association also argues that it is inappropriate to impose liability for true inadvertence, as it considers that this will likely only arise where the accused person is extremely intoxicated or suffering from a significant mental disability.⁴²

35. Children's Court of NSW, *Submission CO55*, 2. See also L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 1.

36. See, eg, A Dyer, *Submission CO02* [42]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 7; Office of the Director of Public Prosecutions, *Submission CO14*, 5; Law Society of NSW, *Submission CO18*, 5.

37. Office of the Director of Public Prosecutions, *Submission CO14*, 5; A Dyer, *Submission CO02* [42].

38. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 7; Office of the Director of Public Prosecutions, *Submission CO14*, 5.

39. NSW, Attorney General's Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) rec 15, 45, citing *Banditt v R* [2005] HCA 80, 224 CLR 262 [108].

40. NSW Bar Association, *Preliminary Submission PCO47*, 4. See also Law Society of NSW, *Submission CO18*, 6.

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

42. NSW Bar Association, *Preliminary Submission PCO47*, 3. But see A Dyer, *Submission CO02* [44].

- 7.41 The NSW Government considered a proposal to adopt an indifference test during the processes that led to the 2007 reforms.⁴³ The NSW Parliament did not enact this proposal.
- 7.42 We do not support a test of indifference. We consider that recklessness, as currently defined in the common law, is the appropriate test. We agree with the view that an accused person who is either advertently or inadvertently reckless ought to be held criminally responsible.⁴⁴ Different degrees of recklessness will be reflected in sentencing.

The “no reasonable grounds for belief” test should be modified

- 7.43 Under s 61HE(3)(c), an accused person is taken to know that the complainant does not consent where the accused person has “no reasonable grounds for believing” that the complainant consents.⁴⁵
- 7.44 In general, there is support for the test and for the principles behind it. However, there is also a view the test has not achieved its objectives in practice.⁴⁶
- 7.45 In summary, we recommend that a hybrid subjective / objective test should remain part of the mental element. We recommend reforms to clarify and simplify the operation of the “no reasonable grounds” test. We do not support the creation of a lesser offence of “negligent sexual assault”.
- 7.46 We acknowledge concerns that the current test may leave scope for misconceptions about consent to influence the assessment of reasonableness. In our view, the best way to address this is by clarifying the definition of consent and by implementing new, targeted, jury directions.

History and interpretation of the “no reasonable grounds” test

The test was introduced as part of the 2007 reforms

- 7.47 Before the 2007 reforms, an accused person who honestly, but mistakenly, believed the complainant consented could be acquitted. This could occur even if the belief was unreasonable.⁴⁷ This is known as the *Morgan* principle.⁴⁸
- 7.48 As the Taskforce observed, this was “a completely subjective ... test, requiring an assessment of what was going on in the mind of the accused person”.⁴⁹

43. NSW, Attorney General’s Department, 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.

44. A Dyer, *Submission CO02* [44]; Elizabeth Evatt Community Legal Centre, *Submission CO24*, 10; Rape and Domestic Violence Services Australia, *Submission CO28* [166].

45. *Crimes Act 1900* (NSW) s 61HE(3)(c).

46. See, eg, 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*, 2; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 11–12.

47. See G D Woods, *Sexual Assault Law Reforms in New South Wales* (Department of the Attorney-General and Justice, 1981) 16–17; NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 45.

48. *DPP v Morgan* [1976] AC 182.

- 7.49 In contrast, a purely objective test might require a fact finder (whether a judge or jury) to consider what a hypothetical reasonable person would have thought. The accused person could be acquitted if the fact finder determines that a reasonable person “would have also believed that the complainant was consenting”.⁵⁰ If not, the accused person could be found guilty.
- 7.50 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.⁵¹ There was concern that a purely objective test 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”.⁵² The Taskforce recommended that the issue be given further consideration.⁵³
- 7.51 The NSW Government decided to address the “honest but mistaken belief” test as part of the 2007 reforms. At the time, 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”.⁵⁴
- 7.52 The “no reasonable grounds” test was developed to respond to these concerns. When introducing this reform, the then 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.⁵⁵
- 7.53 The “no reasonable grounds” test remained controversial during the 2013 statutory review of the reforms, which was conducted by the NSW Department of Attorney General and Justice.⁵⁶ However, the Department did not recommend any changes to this test. Instead, the Department observed that the test reflects “the dialogue that should take place between individuals prior to sexual intercourse to reach a necessary mutuality of understanding in relation to consent”.⁵⁷

The test is a hybrid of subjective and objective elements

- 7.54 The CCA has since held that s 61HE(3)(c) does not apply a purely objective standard. In the first *Lazarus* trial, the judge directed the jury to consider whether

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49. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 42.
50. Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Issues Paper 15 (2018) [1.35].
51. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 47.
52. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 46.
53. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) rec 14.
54. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584, 3585 (J Hatzistergos, Attorney General and Minister for Justice).
55. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3880, 3907 (J Hatzistergos, Attorney General and Minister for Justice).
56. NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013) 19–21.
57. NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013) 4.

the accused person's belief in the complainant's consent was "a reasonable one".⁵⁸ However, the CCA held this direction was incorrect.⁵⁹

- 7.55 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".⁶⁰
- 7.56 Instead, fact finders should ask "what the accused himself might have believed in all the circumstances in which he found himself and then test that belief by asking whether there might have been reasonable grounds for it".⁶¹
- 7.57 This test is a hybrid of subjective and objective elements.⁶² Cossins explains:
- [F]act-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.⁶³

A hybrid subjective / objective test should remain

Recommendation 7.4: A hybrid subjective / objective test

A hybrid subjective / objective test should remain one of the three forms of knowledge.

- 7.58 Some submissions argue that the law should not impose liability for a sexual offence if the accused person honestly believed that the complainant consented.⁶⁴
- 7.59 Other submissions reject the idea that NSW should return to a wholly subjective approach.⁶⁵ They argue that a person who lacks reasonable grounds for a belief in consent commits a sexual offence. Supporters of that approach argue that it:
- signals to the community that everyone must take reasonable care to ascertain whether consent is given to sexual activity
 - can help prevent accused persons from relying on views that fall below accepted community standards

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

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

60. *Lazarus v R* [2016] NSWCCA 52 [156]. See also *O'Sullivan v R* [2012] NSWCCA 45, 233 A Crim R 449 [125]–[126].

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

62. G Mason and J Monaghan, *Preliminary Submission PCO40* [14] (footnote 11); 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.

63. A Cossins, *Preliminary Submission PCO33*, 28 (footnotes omitted).

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

65. See, eg, R Burgin, *Preliminary Submission PCO72*, 4–5; Community Legal Centres NSW, *Submission CO25*, rec 5, 10–11; Women's Legal Service NSW, *Submission CO27*, rec 10 [53]–[56]; Rape and Domestic Violence Services Australia, *Submission CO28*, rec 20 [175]–[181]; Domestic Violence NSW, *Submission CO29*, 7.

- promotes respect and communication about consent
 - promotes the principle of sexual autonomy, and
 - is consistent with legal developments in Australia and internationally.⁶⁶
- 7.60 Another view is that the hybrid test “strikes the right balance in protection of, and fairness to the accused, consistent with the seriousness of the offence of sexual assault, on one hand, and consideration of the victim”.⁶⁷
- 7.61 We agree that a hybrid subjective / objective test should remain part of the mental element of knowledge. It would not be acceptable, in 2020, to revert to the *Morgan* principle.
- 7.62 We consider that a hybrid test is preferable to a purely objective, “reasonable person” test. There are legitimate concerns that such a test would be unjust when applied to people who are unable to meet an objective standard of reasonableness due to uncontrollable personal characteristics, such as a cognitive impairment.⁶⁸

The “no reasonable grounds” test should be clarified and simplified

Recommendation 7.5: The “no reasonable grounds” test should be amended

The “no reasonable grounds” test in s 61HE(3)(c) of the *Crimes Act* should be replaced with the following test:

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

- 7.63 Some submissions support the current “no reasonable grounds” test as currently expressed and see no benefit in amending it.⁶⁹
- 7.64 Others consider the “no reasonable grounds” test to be confusing and difficult to apply.⁷⁰ There is concern that it could be interpreted too narrowly, such that “any” reasonable ground is sufficient to justify acquittal (we discuss this further below).⁷¹
- 7.65 To address these concerns, some support changing the “no reasonable grounds” test to align more closely with the test of “no reasonable belief” used elsewhere (discussed above). For instance, one submission considers that a “no reasonable

66. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 8; Office of the Director of Public Prosecutions, *Submission CO14*, 5; Law Society of NSW, *Submission CO18*, 6; Community Legal Centres NSW, *Submission CO25*, 11; Rape and Domestic Violence Services Australia, *Submission CO28* [176]–[179]; Legal Aid NSW, *Submission CO33*, 9.

67. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 8. See also Law Society of NSW, *Submission CO18*, 6.

68. See, eg, A Dyer, *Submission CO02* [48].

69. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 8; A Dyer, *Submission CO53* [5], [35]–[54]; Law Society of NSW, *Submission CO76*, 6.

70. See, eg, A Cossins, *Preliminary Submission PCO33*, 38; G Mason and J Monaghan, *Preliminary Submission PCO40* [22]; K Burton, *Preliminary Submission PCO76* [10]; Office of the Director of Public Prosecutions, *Submission CO14*, 5; Children’s Court of NSW, *Submission CO19*, 3; Rape and Domestic Violence Services Australia, *Submission CO28* [201]–[202].

71. See [7.68]–[7.69].

belief” test “represents the most clear and simple formulation for the fact finder to apply”.⁷²

- 7.66 We agree that there is a need to simplify and clarify the existing test. We support a broad, flexible approach to this limb of knowledge. While we do not support making “no reasonable belief” the sole mental element, our view is that a form of “no reasonable belief” test should replace the existing “no reasonable grounds” test as a form of knowledge.
- 7.67 With one minor change, recommended s 61HK(1)(c) reflects the language in our Draft Proposals.⁷³ In general, submissions support our proposal.⁷⁴ While some argue that the reform will change little in practice,⁷⁵ we consider that the recommended language is simpler and more accessible for fact finders to understand and apply. It is also designed to ensure that the test is interpreted and applied as originally intended.

The test should not be interpreted and applied narrowly

- 7.68 Currently, the prosecution must prove beyond reasonable doubt that the accused person had “no reasonable grounds” for believing the complainant consented.⁷⁶ In the first *Lazarus* appeal, Justice Fullerton observed that:
- 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.⁷⁷
- 7.69 Some submissions contend that this means that the existence 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”.⁷⁸ This arguably would not achieve the objectives that drove the introduction of the “no reasonable grounds” test.⁷⁹
- 7.70 This interpretation of Justice Fullerton’s remarks has been disputed.⁸⁰ Nevertheless, we consider it important to remove any doubt about this issue.

72. Rape and Domestic Violence Services Australia, *Submission CO28* [208].

73. To further clarify the operation of the subsection, our recommended s 61HK(1)(c) now refers to the “accused person” and the “other person”. Compare to NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 7.1.

74. Children’s Court of NSW, *Submission CO55*, 2; Rape and Domestic Violence Services Australia, *Submission CO65* [11.1]; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 4; Women’s Legal Service NSW, *Submission CO70* [37]; Women’s Safety NSW, *Submission CO74*, 9; NSW Director of Public Prosecutions, *Submission CO85*, 4; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5.

75. A Dyer, *Submission CO53* [6], [34]–[54]; Law Society of NSW, *Submission CO76*, 6. See also NSW Bar Association, *Submission CO32*, 10–11.

76. *Crimes Act 1900* (NSW) s 61HE(3)(c) (emphasis added).

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

78. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3. See also E Methven and I Dobinson, *Preliminary Submission PCO77*, 16–17; J Quilter, *Preliminary Submission PCO92*, 9–10; Children’s Court of NSW, *Submission CO19*, 3; Legal Aid NSW, *Submission CO33*, 9.

79. L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 1–2.

80. A Dyer, *Submission CO02* [54]–[57]; A Dyer, “Sexual Assault Law Reform in New South Wales: Why the *Lazarus* Litigation Demonstrates No Need for s 61HE of the Crimes Act to be Changed (Except in One Minor Respect)” (2019) 43 *Criminal Law Journal* 78, 94–97.

- 7.71 Accordingly, recommended s 61HK(1)(c) does not use the expression “no reasonable grounds”. Instead, we intend to emphasise that fact finders should assess the reasonableness of a belief holistically, in light of all relevant circumstances. As McNamara and others argue, “[t]his is preferable to leaving open the possibility that future trials may adopt a myopic focus on discrete grounds”.⁸¹

Reasonableness should be the focus, not whether there was an “honest belief”

- 7.72 We considered a range of ways of redrafting the test. One option is to adopt the language used in England and Wales, Northern Ireland and Victoria. That is, the person “does not reasonably believe” that the other person consents.⁸² A similar suggestion is to provide that “the accused had an unreasonable belief that the victim was consenting”.⁸³
- 7.73 Another option which has attracted support is to provide that “the person’s belief in consent was not reasonable in all the circumstances”.⁸⁴ The Office of the Director of Public Prosecutions considers that “[t]his test would be simpler and cement the higher standard for an accused’s sexual responsibility, namely, to act reasonably”.⁸⁵ One difficulty with this approach is that it presupposes that the accused person had such a belief.
- 7.74 Our recommended language draws on the latter option. However, there is an important difference: recommended s 61HK(1)(c) begins with “*any belief* that the person has, *or may have ...*”.
- 7.75 In recommending this language, we intend to focus attention on the reasonableness of any belief that the accused person had, or may have had, without presupposing that there was such a belief.
- 7.76 This has two implications. First, the prosecution would not have to prove that the accused person actually held such a belief or that the belief was held honestly. The question would arise only if the circumstances of the case so suggested, for example if the accused person (through cross-examination or otherwise) raised issues indicating a belief that the complainant consented. There is support for this approach in the first *Lazarus* appeal. In this case, the CCA invited fact finders to consider “what the accused himself *might* have believed in all the circumstances”.⁸⁶ This suggests that the presence of a belief does not have to be proven beyond reasonable doubt.
- 7.77 It would be appropriate to apply our recommended test when a suggestion emerges that the accused person either believed, or *might* have believed, that the complainant consented. The evidence does not have to arise from any particular source, such as the accused person’s testimony. It could, for example, arise from the complainant’s testimony, the nature of the cross-examination, or the record of the accused person’s police interview.

81. L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 2.

82. G Mason and J Monaghan, *Preliminary Submission PCO40* [23] (footnote 23). See also Rape and Domestic Violence Services Australia, *Submission CO28* [206].

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

84. J Quilter, *Preliminary Submission PCO92*, 10; L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 2; Office of the Director of Public Prosecutions, *Submission CO14*, 5.

85. Office of the Director of Public Prosecutions, *Submission CO14*, 6.

86. *Lazarus v R* [2016] NSWCCA 52 [156] (Fullerton J) (emphasis added).

- 7.78 Second, it would not be sufficient for conviction for the prosecution to prove that the accused person *did not* hold an honest belief in consent. Presently, there is some confusion about this point.
- 7.79 Monaghan and Mason argue that, in NSW, the mental element is not satisfied if the prosecution simply proves that the accused person did not honestly believe that the complainant consented.⁸⁷ Section 61HE(3) does not state that the mental element is satisfied if the accused person did not honestly believe the complainant consented. If there is no evidence of such a belief, Monaghan and Mason argue, this simply means that the “no reasonable grounds” test is not relevant. However, other limbs (particularly recklessness) may be.⁸⁸
- 7.80 We agree with this approach. To clarify, recommended s 61HK(1)(c) does not provide that the absence of an honest belief is sufficient to secure a conviction.

There should not be a separate offence of “negligent sexual assault”

Recommendation 7.6: Negligent sexual assault

There should not be a separate, lesser, offence of negligent sexual assault

- 7.81 A controversial issue is whether NSW should introduce a separate offence of “negligent sexual assault”. This offence could cover situations in which an accused person honestly believed that the complainant consented, but lacked reasonable grounds for that belief. It would attract a “substantially lower maximum penalty” than the current offence of sexual assault.⁸⁹

Arguments for and against a negligent sexual assault offence

- 7.82 Arguments in support of such an offence include that:
- it is unjust to subject a person who honestly, but unreasonably, believed there was consent to the same maximum penalty as a person who either knows or is indifferent to the absence of consent
 - a separate offence would assist judges to impose an appropriate sentence, whereas judges currently do not know on what basis the jury has found that the accused person knew that the complainant did not consent
 - the *Crimes Act* already contains examples of graded offences, in which the most serious penalties apply to offences with the highest level of culpability⁹⁰

87. But see Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 1989, “Sexual Intercourse without Consent” (update 61.1, July 2019) [5-1566].

88. 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, 253–254. See also E Methven and I Dobinson, *Preliminary Submission PCO77*, 11–12.

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

90. The NSW Bar Association refers to the examples of murder and negligent manslaughter; intentional infliction of grievous bodily harm, reckless infliction of bodily harm, and negligently causing grievous bodily harm (*Crimes Act 1900* (NSW) s 19A, s 24, s 33, s 35(2), s 35(4), s 54: NSW Bar Association, *Preliminary Submission*, PCO47, 5; NSW Bar Association, *Submission CO32*, 12–13. See also the distinctions between negligent, furious or reckless driving, negligently causing grievous bodily harm, dangerous driving, and manslaughter: *Road Transport Act 2013* (NSW) s 117, *Crimes Act 1900* (NSW) s 54, s 52A, s 24.

- jury directions would be simpler, and more targeted, in cases where the prosecution decides only to pursue the lesser offence
 - the lesser offence may be more readily prosecuted, and
 - an accused person may be willing to plead guilty to the lesser offence, sparing complainants the trauma of a trial, and also increasing conviction rates.⁹¹
- 7.83 Submissions overwhelmingly oppose the concept of a negligent sexual assault offence. There is a firm view that a person who holds an unreasonable belief in consent, and who engages in non-consensual sexual intercourse, is guilty of the offence of sexual assault.⁹²
- 7.84 Other reasons given for opposing such an offence include that:
- the harm to those who experience sexual assault is serious, regardless of the state of mind of the offender⁹³
 - the offence would signal to the community that some forms of sexual assault are not to be treated as seriously as others, which would be a backward step⁹⁴
 - the law should not downgrade the criminal liability of an accused person who fails to appreciate the absence of consent due to misogynistic attitudes,⁹⁵ and
 - it is impossible to say that cases covered by s 61HE(3)(c) are necessarily less culpable than cases involving actual knowledge or recklessness, so culpability should be evaluated on a case-by-case basis.⁹⁶
- 7.85 Sweden has adopted a negligent rape offence.⁹⁷ However, reviews in Ireland and Northern Ireland recently recommended against the introduction of such an offence.⁹⁸

91. See, eg, NSW Bar Association, *Preliminary Submission PCO47*, 5–6; Feminist Legal Clinic Inc, *Submission CO08*, 3; Office of the Director of Public Prosecutions, *Submission CO14*, 6; NSW Bar Association, *Submission CO32*, 12–13; Legal Aid NSW, *Submission CO33*, 10

92. See, eg, R Burgin, *Submission CO06*, 7; Rape and Domestic Violence Services Australia, *Submission CO28* [183].

93. See, eg, Legal Aid NSW, *Submission CO33*, 10–11. See also J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [11.88].

94. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 9; Office of the Director of Public Prosecutions, *Submission CO14*, 6; Elizabeth Evatt Community Legal Centre, *Submission CO24*, 9–10; Rape and Domestic Violence Services Australia, *Submission CO28* [183]; Legal Aid NSW, *Submission CO33*, 10–11. See also Women’s Legal Service NSW, *Submission CO27* [66], [68]–[70].

95. A Dyer, *Submission CO02* [80].

96. 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, 258.

97. See Sweden, Ministry of Justice, “Consent: The Basic Requirement of New Sexual Offences Legislation” (Fact Sheet, April 2018) <www.government.se/information-material/2018/04/consent--the-basic-requirement-of-new-sexual-offences-legislation/> (retrieved 17 September 2020); E Hofverberg, “Sweden: Supreme Court Defines Negligent Rape” (17 July 2019) *The Law Library of Congress* <www.loc.gov/law/foreign-news/article/sweden-supreme-court-defines-negligent-rape/> (retrieved 17 September 2020).

98. Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Report 122 (2019) rec 4.01 [4.1]–[4.8]; J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) rec 156 [11.88]–[11.94].

We do not support an offence of negligent sexual assault

- 7.86 A negligent sexual assault offence was considered during the Taskforce process in 2005 and again during consultations on the 2007 draft bill.⁹⁹ The NSW Government rejected a proposal to create such an offence because it believed that “all sexual assault is serious and should have the same penalties”.¹⁰⁰
- 7.87 We similarly find the arguments in favour of a negligent sexual assault offence to be unpersuasive.
- 7.88 Proposals to reduce the trauma experienced by complainants at trial, and to reduce the risk of unjust acquittals, deserve consideration. However, we do not accept that a negligent sexual assault offence would necessarily lead to more guilty pleas or increase the conviction rates. The enactment of a new offence would not resolve the common evidentiary difficulties that arise in sexual offence trials (we discuss this issue in Chapter 2).¹⁰¹
- 7.89 Creation of a lesser offence could be seen to run counter to previous efforts to address the misconception that sexual assault necessarily involves force or violence on the part of the accused person and resistance on the part of the complainant. The Irish Law Reform Commission recently concluded that creation of such an offence could also render the more serious offence “obsolete in some cases”.¹⁰² This would send the wrong message to the community and contradict education initiatives.
- 7.90 We disagree that judges are currently unaware of the basis upon which a jury has convicted. Cases can vary in degrees of moral culpability. During sentencing judges are required to make findings of fact, consistent with the jury verdict, including as to the state of mind of the accused person. Judges are aware, from the arguments led at trial, which of the three states of mind the prosecution relied upon to secure a conviction. It is not necessary to introduce a separate offence to deal with perceived problems of sentencing.

Addressing concerns about “reasonableness”

- 7.91 In this section, we consider whether there should be legislative guidance on the concept of “reasonable grounds” or “reasonable belief”. The law “does not require that the reasonable grounds must be caused by a complainant’s actions but simply that they be present”.¹⁰³ To Monaghan and Mason, this reflects the view that:

99. NSW, Attorney General’s Department, Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 50–51; NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3880, 3883–3884 (J Hatzistergos, Attorney General and Minister for Justice).

100. NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3880, 3885 (H Westwood).

101. Legal Aid NSW, *Submission CO33*, 11.

102. Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Report 122 (2019) [4.5]. See also J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [11.90]–[11.91].

103. *Lazarus v R* [2016] NSWCCA 52 [6] (Adams J).

the focus of the reasonable grounds requirement is not meant to be the complainant's actions; when read with s 61HA(3)(d) [now s 61HE(4)(a)], it is clearly meant to be the steps a defendant takes.¹⁰⁴

- 7.92 Many argue that “no reasonable grounds” and “no reasonable belief” tests do not work this way in reality. Instead, researchers contend that such tests enable misconceptions about consent to influence assessments of reasonableness.¹⁰⁵ Responses to our survey express similar concerns.¹⁰⁶
- 7.93 In NSW, it has been argued that the analysis of reasonableness in the *Lazarus* cases focused unduly on the complainant's acts and omissions (including the absence of resistance). There is a view that, throughout the court processes, insufficient attention was paid to what, if anything, the accused person did to find out whether the complainant consented.¹⁰⁷
- 7.94 Submissions suggest several law reform options to address these concerns. These include:
- requiring the accused person to meet an evidential burden when claiming there was an honest and reasonable, but mistaken, belief in consent
 - requiring an accused person to take steps to ascertain consent
 - providing that beliefs based on certain assumptions are not reasonable, and
 - providing that a belief in consent is not reasonable if the complainant did not say or do anything to communicate consent.¹⁰⁸
- 7.95 While there is a need to address misconceptions about consent, there are other, preferable, ways of doing this. As discussed in Chapters 5 and 8, we recommend clarifications to the definition of consent, along with a suite of new jury directions, to address common misconceptions and assumptions about sexual behaviour and consent.¹⁰⁹

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

105. See, eg, 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; W Larcombe and others, “‘I Think it’s Rape and I Think He Would be Found Not Guilty’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law” (2016) 25 *Social and Legal Studies* 611, 614–616.

106. See, eg, NSW Law Reform Commission, Consent Review Survey, Response #657 (Qu 4), Response #2035 (Qu 4), Response #3302 (Qu 4), Response #3767 (Qu 13).

107. See, eg, G Mason and J Monaghan, “Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases” (2019) 31 *Current Issues in Criminal Justice* 24, 32–34; A Cossins, “Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent” (2019) 42 *UNSW Law Journal* 462, 489–491; R Burgin, *Preliminary Submission PCO72*, 6–7.

108. See, eg, Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 16; R Burgin, *Preliminary Submission PCO72*, 5–8; E Methven and I Dobinson, *Preliminary Submission PCO77*, 18–21; The University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, rec 1, 4–5; L Ward, *Submission CO01*, 9; ACON, *Submission CO12*, 5; Sex Workers Outreach Project, *Submission CO15*, 10; A Cossins, *Submission CO17*, 7–8. See also R Burgin and J Crowe, *Submission CO63*, 4; UNSW School of Social Sciences, *Submission CO69*, 4.

109. Rec 5.3–5.6, rec 8.1, 8.3–8.7.

Accused persons should not be required to provide evidence of a belief

- 7.96 Some suggest that NSW law should require accused persons to provide evidence of any asserted mistaken, honest and reasonable belief in consent before this belief can be used to excuse their conduct.¹¹⁰
- 7.97 Such a requirement could be modelled on the approach adopted in Canada and Tasmania.¹¹¹ In Tasmania, for instance, the offence of rape requires proof of sexual intercourse without consent.¹¹² The physical act of penetration must be voluntary and intentional.¹¹³ The prosecution does not have to prove knowledge of non-consent as an element of the offence (or any other mental element).¹¹⁴
- 7.98 Accused persons can seek to excuse their conduct by arguing that they held an honest and reasonable, but mistaken, belief that consent was present.¹¹⁵ If such a belief is properly raised on the evidence, the onus is on the prosecution to disprove it beyond reasonable doubt.¹¹⁶ WA and Queensland take a similar approach.¹¹⁷
- 7.99 The Tasmanian *Criminal Code* also provides that a mistaken belief about the existence of consent is not honest or reasonable if the accused person:
- was in a state of self-induced intoxication and the mistake was not one that the accused person would have made if not intoxicated
 - was reckless as to whether or not the complainant consented, or
 - did not take reasonable steps, in the circumstances known to the accused person at the time of the offence, to ascertain that the complainant was consenting to the act.¹¹⁸
- 7.100 Cossins suggests that something similar could be introduced into NSW law as a “rebuttable presumption”. Under this approach,
- if a fact-finder decides beyond reasonable doubt that the complainant did not consent, the defendant is guilty of the offence of sexual intercourse without consent *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.¹¹⁹
- 7.101 This would impose an “evidentiary threshold” that must be met before a decision could be made that the belief was based on reasonable grounds. This may include

110. See, eg, E Methven and I Dobinson, *Preliminary Submission PCO77*, 18–21.

111. *Criminal Code* (Canada) s 273.2; *Criminal Code* (Tas) s 14A. See also Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) rec 174 [8.37]–[8.45].

112. *Criminal Code* (Tas) s 185.

113. *Criminal Code* (Tas) s 13(1).

114. *Criminal Code* (Tas) s 13(1); *Snow v R* [1962] Tas SR 271, 278–279 (Burbury CJ and Cox J); *Arnol v R* [1981] Tas R 157, 166–170 (Neasey J), 171–174 (Cosgrove J), *Bennett v R* [1991] Tas R 11, 17–19.

115. This relies on the excuse of “mistake of fact”: *Criminal Code* (Tas) s 14. See also *Snow v R* [1962] Tas SR 271, 276–277, 279 (Burbury CJ and Cox J), 295–297 (Crawford J).

116. *R v Brown* [1990] Tas R 46, 57–61.

117. *Criminal Code* (WA) s 24; *Criminal Code* (Qld) s 24.

118. *Criminal Code* (Tas) s 14A. See also *Criminal Code* (Canada) s 273.2.

119. A Cossins, “Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent” (2019) 42 *UNSW Law Journal* 462, 497–498; A Cossins, *Preliminary Submission PCO33*, 43.

requiring the accused person to raise evidence of the steps taken to ascertain consent.¹²⁰

- 7.102 Other submissions are concerned that this approach could shift the onus of proof away from the prosecution to the accused person, and challenge the accused person's right to be presumed innocent and to remain silent.¹²¹
- 7.103 Some of these criticisms may be overstated, particularly if the prosecution is still required to disprove the accused person's asserted belief beyond reasonable doubt.¹²² Furthermore, the reform would not necessarily require the accused person to testify at trial.¹²³ Evidence of such a belief may come from other sources.
- 7.104 Nevertheless, we do not recommend this reform. We are concerned it would create more complications. The Victorian Department of Justice rejected a similar model, which was recommended by the Victorian Law Reform Commission in 2004,¹²⁴ as "unnecessarily complex". This is because the model involves three steps: "creating criminal liability for certain conduct, then providing for a defence, then disallowing that defence when certain exceptions apply".¹²⁵
- 7.105 The Victorian Department considered that it would be simpler for juries to understand a "one-step approach". Under this approach, the absence of a reasonable belief in consent is an element of the offence that the prosecution must prove. It is not a "defence" that the accused person must first raise.¹²⁶
- 7.106 In our view, the proposed reform would involve a significant departure from the existing structure of s 61HE (which presently adopts a one-step approach). We have not received sufficient stakeholder support for such a change. Indeed, there is broad support for the existing structure of the mental element (as discussed above).

A person should not be required to take steps to ascertain consent

- 7.107 In NSW, and elsewhere, fact finders are required to consider "any steps" taken by the accused person to determine if the complainant consented.¹²⁷ A failure to take steps may be a highly relevant consideration in some cases.¹²⁸

120. A Cossins, "Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent" (2019) 42 *UNSW Law Journal* 462, 498.

121. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 9; Office of the Director of Public Prosecutions, *Submission CO14*, 6; Law Society of NSW, *Submission CO18*, 7; Rape and Domestic Violence Services Australia, *Submission CO28* [184], [188]–[189]; Legal Aid NSW, *Submission CO33*, 10.

122. See A Cossins, *Submission CO17*, 7.

123. See, eg, *R v Ewanchuk* [1999] 1 SCR 330 [44]; *R v Cutts* [2005] QCA 306 [48] (Williams JA), [74]–[75] (Jerrard JA).

124. Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) rec 174.

125. Criminal Law Review, *Review of Sexual Offences*, Consultation Paper (Department of Justice, Victoria, 2013) 33.

126. Criminal Law Review, *Review of Sexual Offences*, Consultation Paper (Department of Justice, Victoria 2013) 33.

127. *Crimes Act 1900* (NSW) s 61HE(4)(a); *Crimes Act 1958* (Vic) s 36A(2); *Sexual Offences Act 2003* (UK) s 1(2), s 2(2), s 3(2), s 4(2); *Sexual Offences (Northern Ireland) Order 2008* (UK) art 5(2), art 6(2), art 7(2), art 8(2); *Sexual Offences (Scotland) Act 2009* (Scot) s 16.

128. *R v XHR* [2012] NSWCCA 247 [62]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See, eg, *Day v R* [2017] NSWCCA 192 [37], [39], [41].

- 7.108 Section 61HE does not expressly require a person to take such steps. Some submissions argue that it should.¹²⁹ This idea was popular among survey responses.¹³⁰
- 7.109 As discussed above, Tasmania includes a “reasonable steps” requirement. This operates to limit the availability of the “mistake of fact” excuse. Accused persons cannot successfully argue that they held an honest and reasonable, but mistaken, belief in consent if they did not take reasonable steps (in the circumstances known to them at the time) to ascertain consent.¹³¹
- 7.110 The structure of the sexual offences law in NSW is different to that of the Tasmanian structure. Nevertheless, the NSW structure could accommodate a “reasonable steps” requirement if that were considered appropriate. This could be done, for example, by providing that the accused person does not have a reasonable belief that the complainant consented if the accused person took no steps, or no reasonable steps, to ascertain consent.¹³²
- 7.111 While we acknowledge the arguments in favour of such a reform, there are strong arguments against it. Our view is that the existing approach, with amendments, is preferable to enacting a requirement to take steps.

Arguments in favour of a requirement to take steps

- 7.112 Some submissions argue that a requirement to take steps would reflect an affirmative model of consent.¹³³ More specifically, it is argued that the requirement:
- would mean that fact finders cannot regard a failure to take steps as irrelevant¹³⁴
 - would direct attention to the accused person’s actions¹³⁵
 - could diminish the risk that arguments about reasonableness will be based on misconceptions, assumptions or excessive scrutiny of the complainant’s behaviour¹³⁶
 - could challenge assumptions associated with passivity and silence, including the idea that a person consents unless they say “no”¹³⁷

129. See, eg, R Burgin, *Preliminary Submission PCO72*, 5–8; The University of Newcastle Women’s Collective, *Preliminary Submission PCO94*, rec 1; B Fileborn, *NSW Consent Review Roundtable: Written Response* (30 May 2019) 2–3; R Burgin and J Crowe, *Submission CO63*, 4; UNSW School of Social Sciences, *Submission CO69*, 4.

130. In our survey, 77.5% of responses to Question 14 (1,078 out of 1,391 responses) agreed that a person who does not take steps to check if their sexual partner consents should not be allowed to argue that they believe there was consent.

131. *Criminal Code* (Tas) s 14A(1)(c). See also *Criminal Code* (Canada) s 273.2(b).

132. R Burgin, *Preliminary Submission PCO72*, 8; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 16. See also R Burgin, *Submission CO06*, 6.

133. See, eg, Sex Workers Outreach Project, *Submission CO15*, 10; R Burgin and J Crowe, *Submission CO63*, 4. See also R Burgin and A Flynn, “Women’s Behaviour as Implied Consent: Male ‘Reasonableness’ in Australian Rape Law”, *Criminology and Criminal Justice* (advance, 13 October 2019) <<https://doi.org/10.1177/1748895819880953>> 3.

134. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 13–14, quoting *R v XHR* [2012] NSWCCA 247 [62].

135. R Burgin, *Preliminary Submission PCO72*, 8.

136. R Burgin, *Submission CO06*, 6–7. See also NSW Law Reform Commission, *Consent Review Survey*, Response #3302 (Qu 14).

- would justifiably criminalise people who make no effort to ascertain consent or whose belief in consent is based on “self-serving misogynist beliefs”,¹³⁸ and
- could assist efforts to educate the community about responsible sexual behaviour, emphasising the importance of negotiating consent.¹³⁹

7.113 Another view is that the requirement would not be unduly onerous or unrealistic to comply with, especially if “steps” is read broadly (for instance, to include physical as well as verbal methods of communication).¹⁴⁰

Arguments against a requirement to take steps

7.114 However, there are strong arguments against this suggested reform. Some contend that the reform could adversely affect the rights of accused persons by:

- setting a standard that does not reflect the reality of many consensual sexual encounters¹⁴¹
- criminalising people who may otherwise hold an honest and reasonable belief, but who failed to take steps,¹⁴² and
- criminalising people who are unable to take such steps due to personal circumstances beyond their control (such as cognitive impairment).¹⁴³

7.115 Some express concern that such a reform could *effectively* turn the sexual offences into absolute liability offences, which would “have the potential to result in unjust convictions”.¹⁴⁴

7.116 Similar concerns led recent reviews in Northern Ireland and Ireland to recommend against introducing a requirement to take steps.¹⁴⁵ The review in Northern Ireland concluded that the obstacles to introducing such a requirement were impossible to overcome.¹⁴⁶

137. *R v Barton* [2019] SCC 33 [105].

138. *R v Barton* [2019] SCC 33 [105], quoting E A Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in E A Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press, 2012) 483, 492. See also *R v Darrach* [1998] OJ (3d) 1 [93].

139. R Burgin, *Preliminary Submission PCO72*, 2, citing A Flynn and N Henry, “Disputing Consent: The Role of Jury Directions in Victoria” (2012) 24 *Current Issues in Criminal Justice* 167, 172. See also Victims of Crime Assistance League Inc NSW, *Submission CO11*, 8.

140. Rape and Domestic Violence Services Australia, *Submission CO28* [55]–[56].

141. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5; Office of the Director of Public Prosecutions, *Submission CO14*, 7; J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [11.60]; NSW Law Reform Commission, Consent Review Survey, Response #3548 (Qu 14).

142. J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [11.61].

143. A Dyer, *Preliminary Submission PCO50* [22].

144. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5. See also; A Dyer, *Submission CO02* [83], [86]; Law Society of NSW, *Submission CO18*, 8.

145. J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [11.58]–[11.61]; Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Report 122 (2019) [3.108].

146. J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [11.59].

- 7.117 One possible way of mitigating these concerns could be to interpret and apply the requirement broadly. For instance, a “step” might involve any physical or verbal method of communication, or even the accused person’s internal thought processes in response to the circumstances (we discuss this issue below).¹⁴⁷
- 7.118 In that case, very little may be demanded of an accused person to satisfy the requirement. This may undermine the ability of the reform to achieve the benefits that its advocates seek to achieve.

Our view

- 7.119 We did not include a requirement to take steps in our Draft Proposals.¹⁴⁸ Some submissions criticise this,¹⁴⁹ while others support it.¹⁵⁰
- 7.120 We remain of the view that there should not be a requirement to take steps. We understand the reasons why submissions support this approach. However, we are concerned about the potential effect of such a requirement on the rights of accused persons.
- 7.121 We support the current approach of requiring fact finders to consider whether the accused person took steps to ascertain consent (although we recommend certain changes to redefine this requirement).¹⁵¹ As we discuss below, a failure to take steps may be persuasive in some cases. In our view, this approach appropriately directs attention to the accused person’s behaviour while also respecting fundamental criminal law principles.

The legislation should not state that certain beliefs are unreasonable

- 7.122 Another criticism of s 61HE(3) raised in submissions is that it does not specify when a belief in consent is and is not reasonable. It is argued that fact finders are free to develop and apply their own criteria of reasonableness. These criteria may vary from fact finder to fact finder and from case to case.¹⁵² It is nevertheless the classic role of fact finders to apply their own view of reasonableness.
- 7.123 Because this may lead to some fact finders drawing on possible misconceptions,¹⁵³ some suggest that there should be legislative guidance on what can, and cannot, constitute a “reasonable ground” for a belief in consent.¹⁵⁴ For instance, s 61HE

147. See [7.155]–[7.162].

148. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) [7.24].

149. See, eg, R Burgin and J Crowe, *Submission CO63*, 4; UNSW School of Social Sciences, *Submission CO69*, 4; S Mullins, *Submission CO79*, 1.

150. A Dyer, *Submission CO53* [33]; NSW Director of Public Prosecutions, *Submission CO85*, 4.

151. See rec 7.7 [7.151]–[7.153], [7.160], [7.164]–[7.165], [7.168]–[7.169].

152. See, eg, A Cossins, *Preliminary Submission PCO33*, 15, 39–40; A Cossins, *Submission CO17*, 5. See also W Larcombe and others, “‘I Think it’s Rape and I Think He Would be Found Not Guilty’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law” (2016) 25 *Social and Legal Studies* 611, 618–619.

153. See, eg, A Cossins, *Preliminary Submission PCO33*, 15–16, 39–40; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 12–13; A Cossins, *Submission CO17*, 5. See also V E Munro, “Judging Juries: The ‘Common Sense’ Conundrums of Prosecuting Violence Against Women” (2019) 3 *New Zealand Women’s Law Journal* 13, 24–28.

154. See, eg, Sex Workers Outreach Project, *Submission CO15*, 10. See also S Cowan, “‘Freedom and Capacity to Make a Choice’: A Feminist Analysis of Consent in the Criminal Law of Rape” in

could provide that a belief in consent is not reasonable if it is based on the complainant's:

- state or style of dress
- prior sexual conduct with the accused or another person
- consumption of alcohol or other drugs
- silence, or
- absence of physical resistance.¹⁵⁵

7.124 Others argue that such a list could be inflexible, mislead fact finders into thinking the list is exhaustive or unintentionally reaffirm certain misconceptions by repeating them.¹⁵⁶ Submissions observe that it is impossible and undesirable to define “reasonableness” in legislation. Fact finders should determine what is reasonable, informed by community standards, appropriate expert evidence and jury directions.¹⁵⁷

7.125 We do not support legislative reforms directed to qualifying, defining or explaining the concept of reasonableness. We recommend legislated, non-mandatory jury directions on specific misconceptions and assumptions about consent and sexual conduct.¹⁵⁸

7.126 It has been observed that “reasonable grounds” may arise from a prior sexual relationship between the complainant and the accused.¹⁵⁹ Recommended s 61HI(5) provides that a person is not to be “taken to consent to a sexual activity” only because the person consented to sexual activity on any other occasion.

7.127 We consider that our recommendations provide the appropriate mix of guidance, direction and flexibility. They address concerns about the application of the reasonableness standard without introducing an inflexible list of matters upon which a reasonable belief cannot be based.

It is unnecessary to refer to non-communication

7.128 A related suggestion is expressly to state that a belief in consent will not be reasonable if the complainant did not say or do anything to communicate consent.¹⁶⁰ We consider it unnecessary to refer specifically to non-communication of consent. This is because we recommend that the *Crimes Act* recognise

V E Munro and C F Stychin (ed), *Sexuality and the Law: Feminist Engagements* (Routledge, 2007) 51, 66.

155. See A Cossins, “Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent” (2019) 42 *UNSW Law Journal* 462, 498; A Cossins, *Submission CO17*, 8; ACON, *Submission CO12*, 5; B Fileborn, *NSW Consent Review Roundtable: Written Response* (30 May 2019) 2–3.

156. Rape and Domestic Violence Services Australia, *Submission CO28* [231].

157. See A Dyer, *Submission CO02* [67]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 8–9; Office of the Director of Public Prosecutions, *Submission CO14*, 6; Law Society of NSW, *Submission CO18*, 6–7; NSW Bar Association, *Submission CO32*, 11.

158. Rec 8.1–8.7.

159. *Greenhalgh v R* [2017] NSWCCA 94 [36] (Basten JA).

160. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 16; L Ward, *Submission CO01*, 9.

elsewhere that a person does not consent if the person does not say or do anything to communicate consent (recommended s 61HJ(1)(a)).¹⁶¹

- 7.129 There is said to be a risk that referring to non-communication in the mental element could lead to unjust outcomes, because an accused person could never hold a reasonable belief in consent if the complainant did not communicate consent.¹⁶² This, in turn, would not allow for any personal characteristics that may affect the accused person's ability to understand whether consent was present.
- 7.130 Both the existing law and recommended s 61HK(2)(a) contain safeguards to avoid injustice in such cases. Fact finders must have regard to "all the circumstances of the case" when making findings about the mental element.¹⁶³ This can include the accused's personal characteristics that affect their perception or understanding of the situation.¹⁶⁴

Matters that fact finders must, and must not, consider

Recommendation 7.7: Matters that fact finders must, and must not, consider

For the purposes of making any finding in relation to the mental element of knowledge of non-consent, the trier of fact:

- (a) must have regard to all the circumstances of the case, including whether the accused person said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person consented to the sexual activity, and if so, what the accused person said or did, and
- (b) must not have regard to any self-induced intoxication of the accused person.

- 7.131 Section 61HE(4) provides that fact finders must have regard to "all the circumstances of the case" when deciding whether the accused person knew that the complainant did not consent. This expressly includes "any steps" taken by the accused person to ascertain whether the complainant consented to the sexual activity" and expressly excludes "any self-induced intoxication" of the accused person.
- 7.132 We consider that the broad requirement to have regard to all the circumstances of the case, aside from any self-induced intoxication of the accused person, should remain (recommended s 61HK(2)). We recommend reforms to clarify the application of this requirement and that the requirement to consider "any steps" taken by the accused person should be redefined.

161. See rec 6.2 [6.25]–[6.57].

162. See A Dyer, *Submission CO02* [65].

163. *Crimes Act 1900* (NSW) s 61HE(4).

164. See, eg, *R v Mrzljak* [2004] QCA 420, [2005] 1 Qd R 308 [89]–[93]; *Aubertin v Western Australia* [2006] WASCA 229, 33 WAR 87 [43].

The broad requirement to consider “all the circumstances” should remain

- 7.133 Concerns have been raised internationally, and within Australia, about the breadth of a requirement to consider “all the circumstances of the case”. The requirement arguably allows fact finders to have regard to any prejudicial views and biases held by an accused person, which may also be held by fact finders.¹⁶⁵ Some argue that the expression may invite undue or excessive scrutiny of the complainant’s behaviour.¹⁶⁶
- 7.134 In light of this, there have been calls to restrict the circumstances to which fact finders may have regard when determining whether the accused person knew the complainant did not consent. For the following reasons, we support the law as it is currently expressed.

Alternatives to “all the circumstances”

- 7.135 Similar requirements to consider “all the circumstances” of the case are found in the laws of England and Wales and Northern Ireland.¹⁶⁷ There are examples of alternative approaches elsewhere.
- 7.136 The Scottish legislation does not require fact finders to consider “all the circumstances of the case”. It only requires fact finders to consider whether the accused person took any steps to ascertain consent.¹⁶⁸
- 7.137 The Irish Law Reform Commission recently recommended a similar approach. It recommended that juries have regard to the following specific circumstances that affected the accused person’s capacity to understand whether the complainant consented: disability, mental illness, age and maturity.¹⁶⁹
- 7.138 Victorian legislation refers to “the circumstances” rather than “all the circumstances”.¹⁷⁰ The Victorian Department of Justice says this means that some circumstances will be relevant, but not necessarily all.¹⁷¹ Juries can be directed that:
- a belief in consent based on a general assumption about the circumstances in which people consent is not a reasonable belief, and

165. See, eg, Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Report 122 (2019) [3.46]–[3.54], [3.62]; Victoria, Department of Justice and Regulation, Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction* (2015) 16; Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report 209 (2007) [3.77]; S Cowan, “Freedom and Capacity to Make a Choice’: A Feminist Analysis of Consent in the Criminal Law of Rape” in V E Munro and C F Stychin (ed), *Sexuality and the Law: Feminist Engagements* (Routledge, 2007) 51, 62; E Finch and V E Munro, “Breaking Boundaries? Sexual Consent in the Jury Room” (2006) 26 *Legal Studies* 303, 317–319.

166. See, eg, A Cossins, *Submission CO17* 4–5; 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.

167. *Sexual Offences Act 2003* (UK) s 1(2), s 2(2), s 3(2), s 4(2); *Sexual Offences (Northern Ireland) Order 2008* (UK) art 5(2), art 6(2), art 7(2), art 8(2).

168. *Sexual Offences (Scotland) Act 2009* (Scot) s 16. See Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report 209 (2007) [3.77].

169. Ireland, Law Reform Commission, *Knowledge or Belief Concerning Consent in Rape Law*, Report 122 (2019) rec 3.03–3.06, appendix B: “Draft Criminal Law (Rape) (Amendment) Bill 2019”.

170. *Crimes Act 1958* (Vic) s 36A.

171. Victoria, Department of Justice and Regulation, Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction* (2015) 14.

- the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief.¹⁷²
- 7.139 Juries may be directed that they may take into account any personal attribute, characteristic or circumstance of the accused.¹⁷³ A good reason for a judge to refuse to give this direction is that the attribute, characteristic or circumstance:
- did not affect, or was not likely to affect, the accused person's perception or understanding of the objective circumstances
 - was something that the accused person was able to control, or
 - was a subjective value, wish or bias held by the accused person.¹⁷⁴
- 7.140 Some submissions suggest that NSW should exclude additional matters, beyond self-induced intoxication, from the circumstances that fact finders must consider; for example any personal opinions, values or attitudes held by the accused person that do not meet community standards.¹⁷⁵
- 7.141 This is similar to a proposal that was considered during the 2007 reform process, but which was not enacted.¹⁷⁶ The apparent purpose of this proposal was "to remind the fact-finder that the defendant's belief had to be based on objectively reasonable grounds".¹⁷⁷ Some question the omission of this proposal, as they consider it may have helped challenge stereotypes about consent.¹⁷⁸

Our view

- 7.142 There are legitimate concerns that the broad requirement could unintentionally create space for misconceptions to operate. These concerns are best addressed by clarifying the meaning of consent and introducing new jury directions.¹⁷⁹
- 7.143 We consider that the broad requirement to consider "all the circumstances of the case" should remain (recommended s 61HK(2)(a)). Several submissions support this.¹⁸⁰ It is important that fact finders have regard to the context in which the sexual activity in question occurs.

172. *Jury Directions Act 2015* (NSW) s 47(3)(c)–(d).

173. *Jury Directions Act 2015* (Vic) s 47(3)(e).

174. *Jury Directions Act 2015* (Vic) s 47(4).

175. See, eg, Rape and Domestic Violence Services Australia, *Submission CO65*, rec 8 [11.10]–[11.12]; Women's Legal Service NSW, *Submission CO70*, rec 11 [45]; Women's Safety NSW, *Submission CO74*, 10–11. See also Australian Queer Students' Network, *Preliminary Submission PCO56*, 5.

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

177. A Cossins, "Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent" (2019) 42 *UNSW Law Journal* 462, 477.

178. 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. See also 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.

179. See rec 5.3–5.6, rec 8.1–8.7.

180. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 12; Office of the Director of Public Prosecutions, *Submission CO14*, 7, 8; Law Society of NSW, *Submission CO18*, 8, 9; NSW Bar Association, *Submission CO32*, 16, 18.

- 7.144 The requirement to consider “all the circumstances” of the case is an important part of the hybrid subjective / objective model. It mitigates the concern that a purely objective, “reasonable person” test would be unfair to people who cannot meet this test due to personal characteristics that are out of their control and that affect their ability to understand the situation.¹⁸¹ Case law from other jurisdictions indicates that it is relevant for fact finders to consider such characteristics as part of the circumstances.¹⁸²
- 7.145 Aside from the issue of self-induced intoxication, we do not support excluding any other specific matter from consideration.¹⁸³ In particular, we do not recommend that the legislation prohibit fact finders from considering any opinions of the accused that fall short of “community standards”. Nor do we support requiring fact finders to consider “what the community would reasonably expect of the accused in the circumstances”.¹⁸⁴
- 7.146 While we appreciate the basis for these suggestions, we doubt that they would be workable. The concept of “community standards” is hard to define and may be difficult for fact finders to apply. It may also be an ineffective filter, as research reveals that certain misconceptions exist within the community.¹⁸⁵

The application of this requirement should be clarified

- 7.147 Some submissions argue that it is unclear when the requirement to consider “all the circumstance of the case” applies. This is because the reference to “any such finding” in the current s 61HE(4) is arguably unclear.¹⁸⁶
- 7.148 Recommended s 61HK(2) clarifies that the requirement applies:
- only for the purpose of making findings about whether the accused person knew that the complainant did not consent, and
 - to all three ways in which knowledge of non-consent may be proved.

The requirement to consider “steps” should be redefined

- 7.149 As noted above, s 61HE(4)(a) requires fact finders to have regard to “any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity”.¹⁸⁷ It is mandatory for fact finders to consider any such steps.¹⁸⁸

181. See, eg, NSW Bar Association, *Preliminary Submission PCO47*, 5. This consideration also influenced the development of the *Sexual Offences Act 2003* (UK): see S Cowan, “Freedom and Capacity to Make a Choice’: A Feminist Analysis of Consent in the Criminal Law of Rape” in V E Munro and C F Stychin (ed), *Sexuality and the Law: Feminist Engagements* (Routledge, 2007) 51, 63–64.

182. See, eg, *R v Mrzljak* [2004] QCA 420, [2005] 1 Qd R 308 [89]–[93]; *Aubertin v Western Australia* [2006] WASCA 229, 33 WAR 87 [43].

183. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 12; Office of the Director of Public Prosecutions, *Submission CO14*, 8; Law Society of NSW, *Submission CO18*, 9; NSW Bar Association, *Submission CO32*, 18.

184. *Jury Directions Act 2015* (Vic) s 47(3)(d); Community Legal Centres NSW, *Submission CO25*, 13.

185. See, eg, K Webster and others, *Australians’ Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 3 (Australian National Research Organisation for Women’s Safety, 2018).

186. J Quilter, *Preliminary Submission PCO92*, 3; A Dyer, *Submission CO02* [99].

- 7.150 Parliament introduced this requirement as part of the 2007 reforms. The requirement reinforces the importance of communication about consent, and may help focus a fact finder's attention "more squarely on the actions and omissions of the accused, rather than just those of the complainant".¹⁸⁹
- 7.151 We consider that the legislation should continue to direct attention to what, if anything, an accused person did to ascertain consent (recommended s 61HK(2)(a)).
- 7.152 However, we recommend changes to the way the steps consideration is currently expressed. Recommended s 61HK(2)(a) is intended to:
- address concerns that the word "steps" has been interpreted too broadly
 - focus attention on whether the accused said or did anything to ascertain consent at the time, or immediately before, the sexual activity, and
 - if so, require fact finders to consider *what* the accused person said or did to ascertain consent.

Fact finders should consider whether the accused person "said or did" anything to ascertain consent

- 7.153 Recommended s 61HK(2)(a) has two parts. It directs the attention of fact finders to consider:
- whether the accused person said or did anything to ascertain consent, and
 - if so, what the accused said or did.
- 7.154 It responds to concerns that the CCA has interpreted the word "steps" too broadly.
- 7.155 As s 61HE(4)(a) does not define the word "steps", this task has been left to the courts. In the second *Lazarus* appeal, Justice Bellew remarked:
- [A] "step" ... 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.¹⁹⁰
- 7.156 According to Mason and Monaghan, this means that:

187. See [7.6], [7.107], [7.131].

188. *R v XHR* [2012] NSWCCA 247 [51]; *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378 [142].

189. A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See also G Mason and J Monaghan, *Preliminary Submission PCO40* [17]; Rape and Domestic Violence Services Australia, *Submission CO28* [217]; J Monaghan and G Mason, "Communicative Consent in New South Wales: Considering *Lazarus v R*" (2018) 43 *Alternative Law Journal* 96, 98, 100; Victoria, Department of Justice and Regulation, Criminal Law Review, *Victoria's New Sexual Offence Laws: An Introduction* (2015) 17.

190. *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378 [147] (Bellew J, Hoeben CJ agreeing at [1] and Davies J agreeing at [4]).

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.¹⁹¹

- 7.157 While some submissions support the CCA’s interpretation of “steps”,¹⁹² many others do not.¹⁹³ Submissions express concern that it:
- makes the reference to “steps taken” redundant,¹⁹⁴ and
 - places most of the responsibility for communicating consent, or the absence of consent, on the complainant.¹⁹⁵
- 7.158 In addition, some regard the CCA’s interpretation as inconsistent with the purpose of the 2007 reforms. Some argue that it conflicts with the objective of encouraging people to communicate about consent.¹⁹⁶ McNamara and co-authors argue that “[i]t is highly likely that Parliament’s intention in adding this phrase to the legislation was that it should refer to positive or explicit steps – usually words and/or actions”.¹⁹⁷
- 7.159 One option, which several submissions support, is to require fact finders to consider any “physical or verbal steps” taken by the accused.¹⁹⁸ Others suggest directing fact finders to consider whether the accused “took reasonable steps, through words or actions”.¹⁹⁹
- 7.160 We recommend that the concept of “steps” be clarified to direct the attention of fact finders to whether the accused person said or did anything to ascertain whether the complainant consented, and if so, what.²⁰⁰
- 7.161 Survey responses frequently emphasise that the legal understanding of “steps” should not be too rigid. They comment that what constitutes a step should depend on the circumstances, and that there should not be a “one size fits all” approach to

191. G Mason and J Monaghan, *Preliminary Submission PCO40* [19]. See also A Dyer, *Preliminary Submission PCO50* [24].

192. NSW Department of Family and Community Services, *Preliminary Submission PCO49*, 1; Law Society of NSW, *Submission CO18*, 7, 8; NSW Bar Association, *Submission CO32*, 14–16.

193. See, eg, G Mason and J Monaghan, *Preliminary Submission PCO40* [19]; A Dyer, *Preliminary Submission PCO50* [24]–[28]; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 14; L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 2. See also A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4–5; Victims of Crime Assistance League Inc NSW, *Submission CO11*, 7; A Cossins, *Submission CO17*, 8; Community Legal Centres NSW, *Submission CO25*, 14.

194. L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 2.

195. G Mason and J Monaghan, *Preliminary Submission PCO40* [19].

196. See, eg, G Mason and J Monaghan, *Preliminary Submission PCO40* [19]; A Dyer, *Preliminary Submission PCO50* [5], [24], [27]; Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 14.

197. L McNamara, J Stubbs, H Gibbon, M Schwartz and A Steel, *Submission CO13*, 2.

198. See, eg, A Dyer, *Preliminary Submission PCO50* [5], [28]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4–5; Community Legal Centres NSW, *Submission CO25*, rec 8, 10, 14; Women’s Legal Service NSW, *Submission CO27*, rec 12 [14.12], [61]; Domestic Violence NSW, *Submission CO29*, 7.

199. Rape and Domestic Violence Services Australia, *Submission CO28*, rec 24. See also Sex Workers Outreach Project, *Submission CO15*, 10.

200. See, eg, Victims Support Unit, Corrective Services NSW, *Submission CO31*, 2.

the definition of steps.²⁰¹ Our recommended language is flexible enough to accommodate verbal and non-verbal forms of communication.

- 7.162 Under our recommended approach, it would still be possible for fact finders to consider evidence of the accused person's thought processes as part of "all the circumstances of the case".
- 7.163 Our recommended language appeared in our Draft Proposals.²⁰² One submission opposed the proposal, preferring the CCA's interpretation.²⁰³ As discussed above, others consider that the proposal did not go far enough and argue for a clear requirement to take steps.²⁰⁴
- 7.164 A range of submissions expressly support our proposed approach to clarifying the meaning of "steps".²⁰⁵ We have therefore adopted it as our recommended approach, with one amendment (see below).

Words and acts at the time of, or just before, the sexual activity are most relevant

- 7.165 We have refined the language in our proposal to direct attention to anything the accused person said or did "at the time of or immediately before" the sexual activity (recommended s 61HK(2)(a)).
- 7.166 In Chapter 5, we emphasise the importance of recognising that consent must be present at the time of the sexual activity.²⁰⁶ It is therefore appropriate for fact finders to focus on what the accused person said or did to ascertain consent at the time of the activity or immediately before it.
- 7.167 It could be argued that the change is unnecessary, as juries are able to take the timing of any steps into account under the existing law. However, a specific reference would highlight the importance of taking responsibility to ascertain consent at the time of each sexual activity.
- 7.168 Anything the accused person said or did at other times may still form part of "all the circumstances of the case" and could be considered by fact finders on that basis. However, our recommended language would direct attention to the immediate context.

Fact finders should consider what the accused person said or did

- 7.169 The mere fact that steps were taken should not be the end of the inquiry. Fact finders should be required to consider *what* the accused person said or did (recommended s 61HK(2)(a)). This could encourage fact finders to consider whether what the accused said or did was adequate in the circumstances. In some

201. See, eg, NSW Law Reform Commission, Consent Review Survey, Response #620 (Qu 14), Response #2081 (Qu 14), Response 2124 (Qu 14), Response 2960 (Qu 14).

202. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 7.2.

203. Law Society of NSW, *Submission CO76*, 6–7.

204. See [7.119].

205. A Dyer, *Submission CO53* [4], [32]; Children's Court of NSW, *Submission CO55*, 2; R Burgin and J Crowe, *Submission CO63*, 4; Rape and Domestic Violence Services Australia, *Submission CO65* [11.8]–[11.9]; Women's Legal Service NSW, *Submission CO70* [44]; Community Legal Centres NSW, *Submission CO73*, 4; NSW Director of Public Prosecutions, *Submission CO85*, 4.

206. See rec 5.2 [5.22]–[5.27].

cases, it may not be. This may be an important consideration in determining whether the accused's belief in consent was reasonable.

- 7.170 One submission suggests that fact finders should be required to consider whether any steps taken were reasonable.²⁰⁷ This would add a layer of complexity to the task of fact finders. For instance, it may unintentionally suggest that the mental element is satisfied if the accused person's steps were not reasonable. This could distract from the central question of whether the accused person knew that the complainant did not consent. The requirement to consider what the accused person said or did is a simple and flexible way of directing the attention of fact finders to the nature or quality of the accused person's attempts to ascertain consent.

Fact finders should not be required to consider other specific matters

- 7.171 Some submissions suggest that fact finders should be required to consider other, specific, matters. For instance, fact finders could be required to consider the effect that the accused person's behaviour may have had on the behaviour of the complainant.²⁰⁸ This may be particularly relevant if the accused person engaged in a pattern of coercive and controlling behaviour towards the complainant.²⁰⁹
- 7.172 We do not recommend this. Section 61HE(4) is currently flexible enough to allow relevant matters to be raised at trial. It is not necessary to list further issues that fact finders must consider.²¹⁰ For example, s 61HE(4) would already require fact finders to have regard to the effects of the accused person's behaviour if this is raised by the evidence.
- 7.173 Relevant factors will differ from case to case. Adding other factors may have the unintended consequence of suggesting that this is a comprehensive list and discouraging fact finders from considering other important factors.
- 7.174 Adding other matters to s 61HE(4) may also complicate and lengthen jury directions unnecessarily.²¹¹ This would add to the already complex task of fact finders and should be avoided.

Fact finders should disregard the accused's self-induced intoxication

- 7.175 The law should continue to require fact finders to disregard any self-induced intoxication of the accused person when making findings about knowledge (recommended s 61HK(2)(b)).
- 7.176 Section 61HE(4)(b) currently has this effect. Fact finders must treat accused persons whose intoxication is self-induced as if they were sober.²¹²

207. Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 15–16. See also *Criminal Code* (Canada) s 273.2; *Criminal Code* (Tas) s 14A.

208. L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85* 4; Women's Legal Service NSW, *Submission CO27*, rec 14 [72]–[73]; Rape and Domestic Violence Services Australia, *Submission CO28*, rec 25 [221]–[224]. See also A Cossins, *Submission CO17*, 9.

209. Rape and Domestic Violence Services Australia, *Submission CO28* [224].

210. Office of the Director of Public Prosecutions, *Submission CO14*, 7; Law Society of NSW, *Submission CO18*, 8; NSW Bar Association, *Submission CO32*, 16.

211. Legal Aid NSW Staff, *Consultation CO06*.

212. *Day v R* [2017] NSWCCA 192 [36], [41].

- 7.177 There are sound reasons for excluding the accused person's self-induced intoxication. Referring to a similar law in Victoria, the Victorian Department of Justice and Regulation observed that "[t]his approach reflects a basic policy decision that self-induced intoxication should not be allowed to lower the standards of acceptable conduct".²¹³ In other words, the accused person cannot use self-induced intoxication as an excuse. We agree with this policy decision, as do many submissions.²¹⁴
- 7.178 It may be questioned whether s 61HE(4)(b) is necessary.²¹⁵ This is because s 428D(a) of the *Crimes Act* provides more generally that self-induced intoxication is not to be considered when making findings about the mental element for offences in NSW (aside from offences of specific intent).²¹⁶ This includes the sexual offences.
- 7.179 We think it is important to apply the exclusion specifically to the sexual offences. We agree with the former Attorney General that 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" ...²¹⁷
- 7.180 While we considered options for clarifying the exclusion, we do not recommend any changes to it. For instance, we asked in our Consultation Paper if the *Crimes Act* should explain when intoxication can be regarded as self-induced.²¹⁸ Submissions generally consider this to be undesirable, as it would further complicate the task of fact finders.²¹⁹ We agree.
- 7.181 We do not recommend any specific reform to help guide fact finders on how to apply the exclusion. We understand that there may be potential value in such reform. Fact finders are told that they must determine whether the accused person knew the complainant did not consent. But they are also told they must disregard the fact that the accused person was intoxicated. We have heard that some fact finders may find this process artificial, contradictory and confusing.²²⁰ Some survey responses displayed these views when questioning why self-induced intoxication should not be taken into account.²²¹

213. Victoria, Department of Justice and Regulation, Criminal Law Review, *Victoria's New Sexual Offence Laws: An Introduction* (2015) 17.

214. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 12; Office of the Director of Public Prosecutions, *Submission CO14*, 7; Law Society of NSW, *Submission CO18*, 9; Women's Legal Service NSW, *Submission CO27*, rec 15 [74]; Rape and Domestic Violence Services Australia, *Submission CO28*, rec 26 [225]–[227]; NSW Bar Association, *Submission CO32*, 17.

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

216. For an offence of specific intent, a key element of the offence is an intention to cause a specific result: *Crimes Act 1900* (NSW) s 428B. The sexual offences are not offences of specific intent.

217. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584, 3586 (J Hatzistergos, Attorney General and Minister for Justice).

218. NSW Law Reform Commission, *Consent in Relation to Sexual Offences*, Consultation Paper 21 (2018) [5.102–5.104], quoting *Crimes Act 1958* (Vic) s 322T(5).

219. Office of the Director of Public Prosecutions, *Submission CO14*, 7; A Cossins, *Submission CO17*, 9; Law Society of NSW, *Submission CO18*, 9. But see ACON, *Submission CO12*, 6.

220. J Quilter, *Preliminary Submission PCO92*, 12; NSW Bar Association, *Submission CO32*, 17; District Court of NSW Consultation 1, *Consultation CO03*; Legal Aid NSW Staff, *Consultation CO06*; Office of the Director of Public Prosecutions Staff, *Consultation CO22*; The Public Defenders, *Consultation CO25*.

221. See, eg, NSW Law Reform Commission, Consent Review Survey, Response 2753 (Qu 13), Response #3371 (Qu 13), Response #3457 (Qu 13).

- 7.182 This emphasises the importance of clear jury directions, including explanations of the rationale for the exclusion.
- 7.183 It may also be helpful to provide fact finders with further legislative detail on what they should do when there is evidence of self-induced intoxication on the part of the accused person. For instance, s 36B(1)(a) of the Victorian *Crimes Act* provides:
- if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time.
- 7.184 In our view this issue requires further consideration. We are unaware if the confusion reportedly experienced by jurors is limited to trials involving the sexual offences. It may also arise in trials for other offences to which the general rule in s 428D(a) of the *Crimes Act* applies.
- 7.185 If so, there may be merit in considering whether the general rule, and its specific application in s 61HE(4)(b), should both be changed. Our view is that the NSW Government should undertake further research and consultation on this issue.

Knowledge of when a person “does not consent”

- 7.186 Section 61HE(5) and (6) currently list circumstances in which a person “does not” consent.²²² Under s 61HE(7), an accused person who knows that the complainant consents under one of the mistaken beliefs listed in s 61HE(6) is taken to know that the complainant does not consent.
- 7.187 This “deeming provision” only applies to cases involving the mistaken beliefs listed in s 61HE(6). Section 61HE is silent as to what happens if the accused person knows that any of the other circumstances listed in s 61HE(5) exist.
- 7.188 Arguably, it is unclear whether this only applies if the accused person actually knows that the complainant consents under a mistaken belief. It is uncertain if the other states of mind by which the accused person’s knowledge of the absence of consent may be proved (recklessness as to consent and “no reasonable grounds” for a belief in consent) can also apply.²²³
- 7.189 Our recommended subdivision does not contain an equivalent to s 61HE(7).²²⁴ Our view is that it is unnecessary to set this out. This is because there is a direct relationship between the definition of consent and the circumstances listed in s 61HJ(1) in which a person does not consent.²²⁵

222. See [6.3].

223. J Quilter, *Preliminary Submission PCO92*, 10–12, citing *Gillard v R* [2014] HCA 16, 229 A Crim R

224. See also A Dyer, *Submission CO02* [88]–[90]; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 13; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 11, But see Office of the Director of Public Prosecutions, *Submission CO14*, 8; Law Society of NSW, *Submission CO18*, 10; NSW Bar Association, *Submission CO32*, 18.

224. See Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

225. Recommended s 61HH would also confirm that the word “consent”, when used throughout the recommended new subdivision (including in recommended s 61HJ), has the same meaning in recommended s 61HI: Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

- 7.190 If any of these circumstances is proven to exist, the complainant does not consent. If an accused person “knows”²²⁶ that the sexual activity occurred under any of these circumstances, by definition the accused person knows that the complainant did not consent to the activity.²²⁷
- 7.191 This issue attracted few comments in submissions on our Draft Proposals.²²⁸

An evidential burden for jury directions should not be imposed

- 7.192 One submission argues that an accused person should have to discharge an evidential burden before a judge directs on the mental element.²²⁹ The submission recommends that the following should be added to s 61HE:

A judge need only direct the jury as to one or more of the mental states for which subsection 3 provides if he or she is satisfied that there is evidence that puts that, or those, mental state(s) in issue.²³⁰

- 7.193 The author notes that, under that existing law, trial judges need only direct juries about the real issues in a case.²³¹ But he argues that legislative amendment is required to avoid directions being given on issues for which there is no evidential support, which may distract and confuse juries.²³²
- 7.194 We do not support this suggestion. The risk of injustice (and appeals) is too high. This is because knowledge of non-consent is an essential statutory element of the sexual offences in question which the prosecution must prove beyond reasonable doubt. Judges can currently tailor their directions to issues raised by the evidence to avoid unnecessary directions.²³³

In summary

- 7.195 In this Chapter, we acknowledge concerns that the mental element of the sexual offences has not been interpreted or applied as intended. We recommend ways in which the mental element of knowledge of non-consent should change to realise the objectives behind the 2007 reforms.

226. By any of the states of mind by which the accused person’s knowledge of the absence of consent may be proved, contained in recommended s 61HK(1): Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

227. See, eg, *R v MM* [2018] NSWDC 181 [297]; *GW v HM Advocate* [2019] HCJAC 23 [27].

228. See NSW Bar Association, *Submission CO47* [41] (not opposed to removing s 61HE(7) of the *Crimes Act 1900* (NSW)); A Dyer, *Submission CO53* [33] (agreeing with our analysis); NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 9 (arguing that further clarification is required).

229. A Dyer, *Submission CO02* [68]–[77].

230. A Dyer, *Submission CO02* [77].

231. A Dyer, “The Mens Rea for Sexual Assault, Sexual Touching and Sexual Act Offences in New South Wales: Leave it Alone (Although You Might Consider Imposing an Evidential Burden on the Accused)” (2019) 48 *Australian Bar Review* 63, 92 (footnote 248), citing *Alford v Magee* (1951) 85 CLR 437, 466.

232. A Dyer, “The Mens Rea for Sexual Assault, Sexual Touching and Sexual Act Offences in New South Wales: Leave it Alone (Although You Might Consider Imposing an Evidential Burden on the Accused)” (2019) 48 *Australian Bar Review* 63, 92.

233. See *R v Mueller* [2005] NSWCCA 47, 62 NSWLR 476 [3]–[4], [42].

- 7.196 This includes reforms to clarify and simplify the existing s 61HE(3). We recommend specific amendments to the test concerning “no reasonable grounds for believing” that the complainant consents, and to the requirement for fact finders to have regard to any steps taken by the accused person to ascertain consent.
- 7.197 We recognise the widely held concern that misconceptions and assumptions about consent continue to influence the way in which the law on knowledge of non-consent is applied at trial. To address this, a new suite of jury directions must accompany our recommended reforms to the law of consent. We explain our recommended procedure for, and content of, these jury directions in the following Chapter.

8. Jury directions and expert evidence

In brief

The *Criminal Procedure Act* should make provision for directions that address certain misconceptions about consensual and non-consensual sexual activity. These directions should only be given where the circumstances require and should be tailored to the evidence in the trial. No particular form of words should be prescribed, and trial judges should be able to give and repeat the directions at any time in the trial. It should be made clear that trial judges may give and repeat directions about delay in complaint, and differences in a complainant's account, for which provision is already made, at any time.

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- 8.1 An important issue in our review of consent in relation to sexual offences is the extent to which misconceptions about consensual and non-consensual sexual activity (often referred to as “rape myths”) can affect the operation of the law. Fact finders may hold these misconceptions and apply them in determining whether absence of consent has been proved and, if so, whether the accused person knew this.

- 8.2 In this Chapter, we recommend that provision be made for specific jury directions to apply in trials involving offences to which s 61HE of the *Crimes Act* currently applies.¹ These directions are intended to address certain misconceptions about consensual and non-consensual sexual activity and to guide fact finders in making determinations about consent and knowledge of non-consent.
- 8.3 We recommend a flexible process for the new directions. The trial judge would have discretion in relation to how and when they are given.
- 8.4 Our recommended directions would build on directions for which provision is currently made in NSW legislation and which deal with differences in a complainant's account and a lack of, or delayed, complaint.² We recommend some variations to these directions, to allow judges the discretion to give and repeat them at any time in the trial.
- 8.5 Misconceptions about consent and sexual assault can also be addressed by expert evidence. Such evidence can and should be admitted under the current law, without the need for any further amendments.

Current directions on consent and related matters

- 8.6 The *Criminal Procedure Act* prescribes some important statutory warnings that apply in sexual offence cases.³ In NSW, the *Bench Book* sets out suggested directions for judges to give to juries in a range of circumstances, including in trials for sexual offences and including the law of consent and knowledge of non-consent. The Judicial Commission of NSW develops and maintains the *Bench Book*.⁴
- 8.7 The purpose of warnings in sexual offence trials has changed over time. Historically, they were intended to protect the accused person against an unfair conviction. Increasingly, however, they are used to “counter myths about sexual assault and to ensure that complainants, as well as people charged with sexual offences, are treated fairly”.⁵

Directions in the *Criminal Trial Courts Bench Book*

- 8.8 The current *Bench Book* directions concerning consent deal with:
- the meaning of consent
 - the circumstances in which a person does not consent or may not consent
 - the circumstances in which the accused person can be taken to know that the other person does not consent, and

1. See Appendix D, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Criminal Procedure Act 1986.

2. *Criminal Procedure Act 1986* (NSW) s 293A, s 294.

3. *Criminal Procedure Act 1986* (NSW) ss 293A, s 294.

4. The Judicial Commission of NSW is an independent statutory body responsible for providing judicial education and training, publishing information about the criminal law to assist the courts, and examining complaints about judicial officers: Judicial Commission of New South Wales, *About Us* <www.judcom.nsw.gov.au/about-the-commission/> (retrieved 17 September 2020).

5. Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) [7.7] (footnotes omitted).

- the relevance of the accused person's self-induced intoxication when making findings about knowledge of consent.⁶
- 8.9 The model directions in the *Bench Book* have been developed to reflect existing law, but are not themselves authoritative statements of the law.⁷ These model directions are suggestions only. This means judges have the discretion to choose whether to use them, and to modify the wording of the model directions. They will not make an error of law simply because they have modified or failed to use the model direction.⁸ In practice, judges and legal practitioners often rely on the *Bench Book* for guidance.⁹
- 8.10 Some submissions support a review of the *Bench Book* directions about consent and knowledge of non-consent.¹⁰ There is a concern that the directions are too complex and need to be clarified or simplified.¹¹
- 8.11 Some submissions suggest amendments to the *Bench Book* direction about the meaning of consent.¹² Another submission questions the accuracy of the direction about knowledge.¹³
- 8.12 Another submission argues that the limited number of appeals on jury directions in NSW shows that the directions given by judges are generally appropriate.¹⁴
- 8.13 We do not recommend changes to the model directions in the *Bench Book*. Their content is a matter for the Judicial Commission. Our focus in this Chapter is on statutory directions in the *Criminal Procedure Act*.

Statutory warnings

- 8.14 The *Criminal Procedure Act* contains provisions with respect to directions that may, must or must not, in appropriate circumstances, be given on the following issues:
- differences in a complainant's account of an alleged sexual offence
 - a delay in, or lack of, complaint, and
 - uncorroborated evidence of a complainant.¹⁵

6. See Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 1989, "Sexual Intercourse without Consent" (update 61.1, July 2019) [5-1566]; Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 1989, "Sexual Intercourse without Consent" (update 59, December 2018) [5-660].

7. J J Spigelman, "Foreword" (October 2002) *Criminal Trial Courts Bench Book* <<https://www.judcom.nsw.gov.au/publications/benchbks/criminal/foreword.html>> (retrieved 18 September 2020).

8. *Ith v R* [2012] NSWCCA 70 [48].

9. NSW Bar Association, *Submission CO32*, 22.

10. Office of the Director of Public Prosecutions, *Submission CO14*, 9; Law Society of NSW, *Submission CO18*, 11; Legal Aid NSW, *Submission CO33*, 3.

11. See, eg, A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 14; NSW Bar Association, *Submission CO32*, 20. See also NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 12.

12. J Quilter, *Submission CO07*, 2–3; Rape and Domestic Violence Services Australia, *Submission CO28* [245]–[248].

13. E Methven and I Dobinson, *Preliminary Submission PCO77*, 11–14.

14. A Loughnan, C Mackay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 11.

Warnings about differences in a complainant's account

- 8.15 One common misconception is that complainants of sexual offences will always give a complete and consistent account. The assumption is that a “real victim” would remember all the details of the alleged offence, and be consistent when describing it.¹⁶
- 8.16 Research shows that inconsistencies or differences are common. These include inconsistencies between accounts (for example, between the complainant's police statement and account at trial) and within accounts (for example, within the complainant's evidence at trial). A complainant may, for example, describe an alleged sexual offence differently because of the way the complainant retains and recalls memories, the context in which the disclosure is being made, or feelings of stress or embarrassment.¹⁷
- 8.17 Section 293A of the *Criminal Procedure Act* provides that judges may give a warning to the jury to address this misconception. This is intended to deter jurors from making unwarranted assumptions about differences in a complainant's account (for example, that these differences must mean the complainant is lying).¹⁸
- 8.18 Where evidence in a trial suggests that there is, or may be, a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability, the trial judge may inform 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, and it is up to the jury to decide whether any differences in the complainant's account are important in assessing the complainant's truthfulness or reliability.¹⁹
- 8.19 This warning is not mandatory.

Warnings about delay in, or absence of, complaint

- 8.20 The common law required judges to warn juries in sexual assault trials that, in evaluating the complainant's evidence, and determining whether to believe the complainant, they could take into account any failure to complain at the earliest reasonable opportunity.²⁰ This rested on a general assumption that “a genuine

15. *Criminal Procedure Act 1986* (NSW) s 293A, s 294, s 294AA.

16. Victoria, Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A Jury-Centric Approach Part 2* (2017) 20.

17. Victoria, Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A Jury-Centric Approach Part 2* (2017) vii.

18. NSW, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 7–8 (M Speakman, Attorney General).

19. *Criminal Procedure Act 1986* (NSW) s 293A(2).

20. *Kilby v R* (1973) 129 CLR 460, 465.

sexual assault victim would make a complaint at first opportunity”.²¹ Delay in complaint could be grounds for an inference that:

- the complainant had consented, and/or
- the complainant’s testimony was unreliable.²²

8.21 Research has discredited the assumption that delay in complaint of a sexual offence indicates a lack of credibility. Delay is common rather than unusual.²³

8.22 Where evidence is given or a question is asked of a witness that tends to suggest the absence of, or delay in making, complaint, s 294 of the *Criminal Procedure Act* requires the judge to warn the jury that:

- a delay in or lack of complaint does not necessarily mean that the allegation is false, and
- there may be good reasons why a person who experiences sexual assault may hesitate in making, or refrain from making, a complaint.²⁴

8.23 Section 294(2)(c) prohibits judges from warning the jury that a delay in complaining is relevant to the complainant’s credibility “unless there is sufficient evidence to justify such a warning”.²⁵ This means:

there must be something in the evidence sufficient to raise in the judge’s mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint ... Those very matters may constitute the “good reasons” why there was no timely complaint for the purposes of [s 294(2)(b)] but, if not believed, may form the evidence justifying the warning under [s 294(2)(c)].²⁶

8.24 Judges are also prohibited from suggesting to the jury that it would be dangerous or unsafe to convict the accused person solely because of the delay.²⁷

Prohibitions on warnings about uncorroborated evidence

8.25 The common law identified complainants of sexual offences as one class of witness whose evidence should be treated with caution and required corroboration.

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21. Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, NSWLRC Report 112, VLRC FR (2005) [18.72].
 22. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.2.3.1].
 23. Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 4; Royal Commission into Institutional Responses to Child Sexual Abuse: *Criminal Justice Report*, Parts VII-X and Appendices (2017) 110–111. The Royal Commission observed that delay in complaint of sexual abuse is common generally, but particularly in the context of child sexual abuse.
 24. *Criminal Procedure Act 1986* (NSW) s 294(1), s 294(2)(a)–(b). This section was originally introduced in 1981 when it was inserted as *Crimes Act 1900* (NSW) s 405B: *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 [14].
 25. *Criminal Procedure Act 1986* (NSW) s 294(2)(c).
 26. *Jarrett v R* [2014] NSWCCA 140, 86 NSWLR 623 [43].
 27. *Evidence Act 1995* (NSW) s 165B(4).

According to some commentators, the underlying assumption was that women are prone to making false allegations of sexual assault.²⁸

- 8.26 Judges were required to warn the jury that it is dangerous to convict on a complainant's uncorroborated evidence (that is, evidence unsupported by other, independent evidence).²⁹ This was problematic, as the inherently private nature of sexual offences means that there are usually no witnesses. The majority of cases centre on the word of the complainant against the word of the accused person.³⁰
- 8.27 Corroboration warnings about the unreliability of certain types of witnesses are now recognised as discriminatory, and based on prejudice rather than empirical evidence.³¹ NSW law no longer requires evidence relied upon by a party to be corroborated, and judges are not required to warn the jury that it is dangerous to act on uncorroborated evidence.³²
- 8.28 Section 294AA of the *Criminal Procedure Act* prohibits a judge in a sexual offence proceeding from warning or suggesting to the jury that:
- complainants as a class are unreliable witnesses, and
 - it is dangerous to convict on the uncorroborated evidence of any complainant.³³

New jury directions should address misconceptions about consent

Recommendation 8.1: New statutory directions in relation to consent

- (1) NSW should introduce new directions to address common misconceptions about consensual and non-consensual sexual activity.
- (2) The directions should apply in trials for offences to which s 61HE of the *Crimes Act 1900* (NSW) currently applies.

- 8.29 We recommend new statutory jury directions to address common misconceptions or assumptions about consensual and non-consensual sexual activity (recommended s 292 of the *Criminal Procedure Act*). Several submissions support introducing such directions.³⁴ These new directions would build on the existing statutory warnings we mention above.

28. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press 7th ed, 2020) [8.2.3.2].

29. See, eg, *Kelleher v R* (1974) 131 CLR 534, 553.

30. D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) [8.5.2.2].

31. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010) vol 2 [28.13].

32. *Evidence Act 1995* (NSW) s 164.

33. See *Ewen v R* [2015] NSWCCA 117 [135]–[136], [141], 250 A Crim R 544, 572–573.

34. See, eg, A Dyer, *Submission CO02* [103]–[104]; A Cossins, *Submission CO17*, 9–10; Women's Legal Service NSW, *Submission CO27* [14.17]–[14.18], [80]–[81]; Domestic Violence NSW, *Submission CO60*, 4; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 4; Community Legal Centres NSW, *Submission CO73*, 4.

- 8.30 The new directions would apply to trials for offences to which s 61HE of the *Crimes Act* currently applies (that is, sexual assault, sexual touching and sexual act offences).³⁵ These are the same offences to which our recommended Subdivision on consent would apply.³⁶

There is a need for jury directions about consent

- 8.31 As we discuss in Chapter 2, a range of once common misconceptions about consensual and non-consensual sexual activity exist within the community.³⁷ It is possible that juries will make, or be invited by counsel to make, unwarranted assumptions about consent and sexual assault based on such misconceptions.³⁸ It is important that trial judges provide appropriate guidance to discourage jurors from relying on these assumptions when making their decisions.
- 8.32 The extent to which jurors are influenced by such misconceptions is difficult to know, as juries are not required to give reasons for their decisions. However, studies involving mock juries in Australia and the UK suggest that jurors rely heavily on their own assumptions and beliefs about sexual assault.³⁹
- 8.33 Jurors who recognise and reject a particular misconception at an abstract level may still fall back on it when making decisions in a sexual offence trial.⁴⁰ Sixty percent of participants in a UK mock juror study reported that they strongly disagreed with the statement: “if a woman doesn’t fight back you can’t really say it was rape”. Nevertheless, their deliberations in a mock trial revealed strong expectations that a complainant who knew the assailant would resist.⁴¹
- 8.34 A UK study involving interviews with people who served as jurors also suggests that a significant proportion of jurors were unsure about certain misconceptions. For example:
- just under a third of jurors were not sure whether people are more likely to be sexually assaulted by someone they know than a stranger, and

35. *Crimes Act 1900* (NSW) s 61I, s 61J, s 61JA, s 61KC, s 61KD, s 61KE, s 61KF.

36. See rec 4.2 [4.7].

37. See [2.40].

38. M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 10.

39. See, eg, 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) iii, 59–60; 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. See also F Leverick, “What do we Know about Rape Myths and Juror Decision Making?” (2020) 24 *International Journal of Evidence and Proof* 255, 256, 273.

40. See, eg, F Leverick, “What do we Know about Rape Myths and Juror Decision Making?” (2020) 24 *International Journal of Evidence and Proof* 255, 270.

41. 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, 790.

- over a third of jurors were not sure whether people would be visibly upset when recounting a traumatic event like a sexual assault.⁴²
- 8.35 There is a risk that misconceptions about consensual and non-consensual sexual activity can influence juror decision-making in sexual offence trials “to the detriment of a proper application of the law of consent”.⁴³ Jurors who are “not sure” about certain misconceptions, as well as those who positively believe in them, need further guidance in the form of jury directions.⁴⁴
- 8.36 We do not consider that directions of this nature would “intrude onto the jury’s domain and diminish the appearance of an impartial system of justice”.⁴⁵ Rather, they would ensure that jurors interpret the evidence and apply the law correctly, without recourse to possible misconceptions or assumptions.
- 8.37 We acknowledge that there is some uncertainty about the effectiveness of jury directions in dispelling misconceptions.⁴⁶ Some submissions suggest that further research and consultation should be conducted about this issue.⁴⁷
- 8.38 There are also concerns that jury directions could potentially entrench rather than dispel misconceptions.⁴⁸ For instance, one commentator argues that jurors could assimilate or distort the directions they hear to conform with their existing attitudes.⁴⁹
- 8.39 In light of these issues, we recommend several features to enhance the effectiveness of the new directions. In particular:
- judges would be required to relate the directions to the evidence in the trial, to assist jurors understand and apply them
 - judges would be expressly permitted to give and repeat the directions at any time during the trial, to aid juror understanding, and
 - the recommended directions are worded positively and state the correct position, rather than the misconception, to avoid reinforcing any misconception in jurors’ minds.⁵⁰
- 8.40 We also recommend that the directions be reviewed periodically to monitor their operation in practice. We discuss this in Chapter 10.⁵¹

42. B Leveson, “Criminal Trials: The Human Experience” (Valedictory Lecture, University College London, 13 June 2019) [29].

43. Women’s Legal Service, *Submission CO27* [79].

44. J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [6.84].

45. Law Society of NSW, *Submission CO76*, 7, citing NSW Law Reform Commission, *Jury Directions*, Report 136 (2012) [1.39].

46. See, eg, UNSW School of Social Sciences, *Submission CO69*, 4; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 9–10.

47. See, eg, Rape and Domestic Violence Services Australia, *Submission CO65*, 18–19; Women’s Legal Service NSW, *Submission CO70* [7.27], [47]; Community Legal Centres NSW, *Submission CO73*, 5.

48. Rape and Domestic Violence Services Australia Staff, *Consultation CO14*.

49. J Temkin, “‘And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse’: Challenging Rape Myths in the Courtroom” (2010) 13 *New Criminal Law Review* 710, 725.

50. New Zealand Law Commission, *The Second Review of the Evidence Act 2006*, Report 142 (2019) [12.104].

The new directions would guide jurors in making decisions

- 8.41 The directions in recommended s 292 of the *Criminal Procedure Act* are intended to guide jurors as they consider whether the prosecution has proved that:
- the complainant did not consent to the sexual activity, and
 - the accused person knew (as defined in recommended s 61HK of the *Crimes Act*) that the complainant did not consent.
- 8.42 Our preferred approach is different from that taken in Victoria. The *Jury Directions Act 2015* (Vic) (“*Jury Directions Act* (Vic)”) contains separate directions with respect to “consent” and “reasonable belief in consent” that explain:
- the meaning of consent and address certain misconceptions, and
 - the law on reasonable belief in consent.⁵²
- 8.43 Our view is that it is unnecessary for our recommended directions to be separated in this way. Directions that counteract possible misconceptions are not only relevant to the question of whether the complainant consented. They are also relevant to the question of whether the accused person knew that the complainant did not consent (including whether any belief in consent held by the accused person was reasonable in the circumstances).

The directions should be set out in legislation

- 8.44 In a 2012 report on *Jury Directions*, the NSWLRC did not support the codification of all jury directions.⁵³ However, the report recognised that Parliament could, in appropriate cases, enact “legislation that requires the giving of specific directions or precludes their use, or defines the content of what may permissibly be said”.⁵⁴
- 8.45 We think it is appropriate for new directions addressing possible misconceptions about consensual and non-consensual sexual activity to be legislated. They would build on the existing directions in the *Criminal Procedure Act* that address misconceptions about differences in a complainant’s account and a delay in, or lack of, complaint.
- 8.46 Several submissions support legislated directions to address misconceptions and assumptions.⁵⁵ Some consider that they would:
- ensure that consistent directions are given across cases⁵⁶

51. See rec 10.1 [10.20].

52. *Jury Directions Act 2015* (Vic) s 46, s 47.

53. NSW Law Reform Commission, *Jury Directions*, Report 136 (2012) [2.34].

54. NSW Law Reform Commission, *Jury Directions*, Report 136 (2012) [2.41].

55. See, eg, A Dyer, *Submission CO02* [67], [103]; A Cossins, *Submission CO17*, 10; Women’s Legal Service NSW, *Submission CO27* rec 14.18, [80]–[81]; Domestic Violence NSW, *Submission CO60*, 4; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 4; Community Legal Centres NSW, *Submission CO73*, 4.

56. A Dyer, *Submission CO02* [67]; A Cossins, *Submission CO17*, 10; Women’s Legal Service NSW, *Submission CO27* [81]; Rape and Domestic Violence Services Australia, *Submission CO28* [269].

- reduce the incentive for defence counsel to rely on misconceptions in argument,⁵⁷ and
- increase community confidence that juries will be informed by accurate understandings of consensual and non-consensual sexual activity.⁵⁸

8.47 However, some submissions argue that legislated directions would:

- limit a trial judge's ability to tailor the directions to the particular circumstances of the individual case,⁵⁹ and
- increase the risk of misdirections and appeals.⁶⁰

8.48 These concerns are applicable to legislated directions that are mandatory and require the trial judge to use specific wording. As we discuss below, we recommend a flexible procedure that would allow judges discretion in relation to how and when they give the directions.

8.49 Some suggest adding new directions about common misconceptions to the *Bench Book*, instead of legislation.⁶¹ As noted earlier, this suggestion misapprehends the nature of the *Bench Book*. Directions in the *Bench Book* can only reflect the existing law, as determined by case law or legislation.⁶² Their content is a matter for the Judicial Commission. Our approach would ensure that judges have the necessary legislative authority to give the new directions.

8.50 We recognise that legislative directions can only be amended or updated by Parliament.⁶³ There is a concern that legislation could “lock” NSW into specific directions.⁶⁴

8.51 In response to this concern, we recommend that the new directions be reviewed periodically to monitor their implementation.⁶⁵ The reviews can determine whether the directions need to be updated or amended, or whether any additional directions are needed.

None of the directions should be mandatory

8.52 In our Draft Proposals, we proposed one mandatory direction that would require judges to tell jurors to “carefully examine” their assumptions about:

- non-consensual sexual activity and the people who experience it, and

57. Rape and Domestic Violence Services Australia, *Submission CO28* [269].

58. Rape and Domestic Violence Services Australia, *Submission CO28* [269].

59. Legal Aid NSW, *Submission CO87*, 7. See also NSW Bar Association, *Submission CO32*, 22.

60. See, eg, Law Society of NSW, *Submission CO76*, 8; Legal Aid NSW, *Submission CO87*, 7.

61. Sydney Roundtable 3, *Consultation CO09*; Sydney Roundtable 4, *Consultation CO10*; NSW Bar Association, *Submission CO32*, 21–22; Law Society of NSW, *Submission CO76*, 9.

62. Judicial Commission of NSW, *Consultation CO17*.

63. NSW Bar Association, *Submission CO32*, 22–23; Law Society of NSW, *Submission CO76*, 8.

64. Rape and Domestic Violence Services Australia, *Submission CO65* [12.2].

65. See rec 10.1 [10.20].

- the circumstances in which people consent to a sexual activity.⁶⁶
- 8.53 The purpose of the proposed direction was to make jurors aware of their own assumptions in order that they proceed to interpret the evidence and apply the law correctly.⁶⁷
- 8.54 Some submissions support the proposed mandatory direction.⁶⁸ Others argued that the direction was vague and unlikely to have any significant impact on the jury.⁶⁹
- 8.55 One submission observed that the direction would “make very little sense to jurors if given in a vacuum”. For jurors to “carefully examine any assumptions” they may hold, they would first have to identify these assumptions and the flaws within them. Therefore, the mandatory direction would have to be given alongside one or more of the other directions that address specific assumptions (see below).⁷⁰
- 8.56 In light of these submissions, we do not recommend this direction. We agree that “the [proposed] mandatory direction has very little real value” by itself.⁷¹
- 8.57 We remain of the view that there should be directions to address specific assumptions or misconceptions about consent and sexual assault. We outline these directions later in this Chapter.

Procedure for the directions

Recommendation 8.2: Procedure for the directions

The *Criminal Procedure Act* should provide that, in a trial for an offence to which s 61HE of the *Crimes Act* currently applies, a judge:

- (a) must give one or more of the new directions:
 - (i) if there is a good reason to give the direction, or
 - (ii) if requested to give the direction by a party to the proceedings, unless there is a good reason not to give the direction
- (b) is not required to use a particular form of words in giving the direction, and
- (c) may, as the judge sees fit—
 - (i) give the direction at any time during a trial, and
 - (ii) give the same direction on more than one occasion during a trial.

- 8.58 We recommend a flexible procedure for the new jury directions (see recommended s 292(1)–(4) of the *Criminal Procedure Act*). This would allow the judge discretion in relation to how and when to give the directions. It is similar to

66. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.1.

67. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) [8.9]–[8.10].

68. See, eg, NSW Bar Association, *Submission CO47* [42]; Women’s Legal Service NSW, *Submission CO70* [48]; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5. See also Law Society of NSW, *Submission CO76*, 9.

69. M Nittis, *Submission CO51*, 2; Children’s Court of NSW, *Submission CO55*, 2–3.

70. NSW Director of Public Prosecutions, *Submission CO85*, 4.

71. NSW Director of Public Prosecutions, *Submission CO85*, 4.

certain aspects of the *Jury Directions Act* (Vic) and some of the directions in the *Evidence Act 1995* (NSW) ("*Evidence Act*").⁷²

8.59 Our recommended procedure does not include all aspects of the *Jury Directions Act* (Vic). For example, it does not include a list of "guiding principles" that recognises:

- the role of the jury in criminal trials
- the problems associated with complex, technical and lengthy directions
- the role of the trial judge in criminal trials and the role of counsel to assist the judge, and
- the role of the trial judge in giving jury directions in a criminal trial.⁷³

8.60 We think that such a list is more appropriate for a comprehensive jury directions scheme, like the *Jury Directions Act* (Vic) which applies to all criminal trials. The directions in recommended s 292 would only apply in trials for offences to which s 61HE of the *Crimes Act* currently applies.

8.61 Our recommended procedure is largely the same as the procedure we proposed in our Draft Proposals.⁷⁴ However, we have made some minor changes to the language of our recommended procedure.

Directions must generally be given on request

8.62 Under recommended s 292(2)(b), a judge would be required to give one or more of the specified directions if requested by a party to the proceedings (that is, the prosecution or defence). The *Jury Directions Act* (Vic) takes a similar approach.⁷⁵

8.63 The request process is intended to ensure that the judge gives only those directions that are necessary in the circumstances of the particular case, as identified in:

- the submissions of parties, and/or
- the discussions between the trial judge and the parties.

8.64 These discussions about what directions are necessary, and the content of the directions, may also reduce the likelihood of mistakes being made when the directions are framed.⁷⁶

8.65 A recent survey of a sample of judges in Victoria indicates that the request process in the *Jury Directions Act* (Vic) has been well received. Several judges commented that counsel must now pay increased attention to the directions that they seek and engage in crafting them. Some said that the *Jury Directions Act* (Vic) had improved

72. See *Jury Directions Act 2015* (Vic) s 6, s 14–16; *Evidence Act 1995* (NSW) s 165, s 165B.

73. *Jury Directions Act 2015* (Vic) s 5. See also Law Society of NSW, *Submission CO76*, 8–9.

74. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.2

75. *Jury Directions Act 2015* (Vic) s 14.

76. Victoria, Department of Justice, Criminal Law Review, *Jury Directions: A New Approach* (2013) 40.

the efficiency and organisation of trials, because “the necessary directions can be anticipated from the start of the trial, providing a focus for the trial”.⁷⁷

- 8.66 We also received support for this request process in submissions and consultations.⁷⁸

A requested direction need not be given if there is good reason not to

- 8.67 Under recommended s 292(2)(b) of the *Criminal Procedure Act*, a judge would not have to give a requested direction if there is a good reason for not giving it. This is intended to cover situations where, for example, a party requests a direction that is unrelated to the facts of the particular case.

- 8.68 A similar test applies to certain directions in the *Evidence Act*.⁷⁹ For example, under s 165(3) of the *Evidence Act*, a judge may decline to direct the jury that certain evidence is unreliable if there are “good reasons for not doing so”.

- 8.69 Existing case law about the “good reasons” test in the *Evidence Act* could guide the interpretation and application of the recommended test.⁸⁰ For example, the expression “good reasons” in s 165(3) has been held to mean “reasons” that appear “good” in the opinion of the trial judge.⁸¹ This confers a discretion on the trial judge and allows for flexibility.

- 8.70 Our recommendation uses the expression “a good reason”, instead of “good reasons” (as in the *Evidence Act*). This is not meant to change the meaning of the expression, but simply to clarify that the trial judge need not have multiple reasons for giving or not giving a direction. A single good reason should be sufficient.

- 8.71 Unlike the *Jury Directions Act* (Vic), our recommended approach does not require the trial judge to have regard to any specific matters, in determining whether there is a good reason for not giving a requested direction. In Victoria, trial judges must have regard to:

- the evidence in the trial, and
- the way in which the prosecution and the accused person have conducted their cases, including whether the direction:
 - concerns a matter not raised or relied on by the accused person, and
 - would involve the jury considering the issues in the trial in a different way to the way in which the accused person’s case was presented.⁸²

- 8.72 Our view is that such a requirement is not necessary. The *Evidence Act* does not include it. Instead, as discussed above, the trial judge has discretion under the

77. J Clough and others, *The Jury Project 10 Years On: Practices of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2019) 56–57.

78. Sex Workers Outreach Project, *Submission CO15*, 11; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 4; Women’s Legal Service NSW, *Submission CO70* [52]; County Court of Victoria, *Consultation CO02*; Sydney Roundtable 3, *Consultation CO09*.

79. *Evidence Act 1995* (NSW) s 165(3), s 165B(3).

80. Victoria, Department of Justice, Criminal Law Review, *Jury Directions: A New Approach* (2013) 20–21.

81. See *R v Flood* [1999] NSWCCA 198 [17]–[18].

82. *Jury Directions Act 2015* (Vic) s 14(2). See also Law Society of NSW, *Submission CO76*, 9.

Evidence Act in determining whether there is good reason not to give the relevant direction. We think that this discretionary approach is also appropriate for our recommended directions.

Directions must be given without a request, if there is a good reason to

- 8.73 Under recommended s 292(2)(a), a judge would be required to give an unrequested direction if there is a good reason for doing so. Some submissions support this particular aspect of our recommended process.⁸³ It is intended to cover the situation where, for example, a party fails to make a request even though the direction is relevant to the case.
- 8.74 This approach is different to that of the *Jury Directions Act* (Vic), which requires a judge to give an unrequested direction where there are “substantial and compelling reasons” for doing so.⁸⁴ The Victorian test is arguably more stringent than a “good reason” test, as the reasons for giving the directions would have to “substantially outweigh the reasons for not giving the direction”.⁸⁵
- 8.75 We are concerned that a stringent test for giving an unrequested direction could deter judges from giving potentially relevant and useful directions. We prefer a “good reason” test, as this would allow a judge greater discretion in determining whether the direction is warranted in a particular trial.

No requirement to use particular form of words

- 8.76 Under recommended s 292(3), a judge would not be required to use any particular form of words in giving the direction. While the legislation would set out the content of the directions (see below), judges would not be bound to use the same language. They could follow the wording in the legislation or modify the wording of the direction according to the circumstances of the trial.
- 8.77 Our recommendation largely follows our original proposal in the Draft Proposals.⁸⁶ Submissions in support observe that it promotes flexibility and allows judges to tailor the directions to the facts of the case.⁸⁷ Our recommendation is also similar to s 6 of the *Jury Directions Act* (Vic) and certain directions in the *Evidence Act*.⁸⁸
- 8.78 Our recommended approach is intended to avoid appeals based on a complaint that the judge does not use the words of the legislation.⁸⁹

Judges can give and repeat the directions at any time

- 8.79 Recommended s 292(4) clarifies that the trial judge may:

83. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 4; Women’s Legal Service, *Submission CO70* [53].

84. *Jury Directions Act 2015* (Vic) s 16(1).

85. Victoria, Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (2015) 32.

86. See NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.1.

87. Women’s Legal Service NSW, *Submission CO70* [50]–[51]; NSW Director of Public Prosecutions, *Submission CO85*, 4.

88. *Jury Directions Act 2015* (Vic) s 6; *Evidence Act 1995* (NSW) s 165(4), s 165B(4).

89. Victoria, Department of Justice, Criminal Law Review, *Jury Directions: A New Approach* (2013) 33; G Byrne and C Maxwell, “Putting Jurors First: Legislative Simplification of Jury Directions” (2019) 43 *Criminal Law Journal* 180, 199.

- give one or more of the specified directions at any time during a trial, and
 - give the same direction on more than one occasion during a trial.
- 8.80 This recommendation is largely the same as our original proposal in the Draft Proposals,⁹⁰ which received positive responses.⁹¹
- 8.81 The legislation should provide that the directions can be requested and given before the end of the trial. Directions may be more effective in counteracting any assumptions or misconceptions that jurors may hold if those assumptions and misconceptions are addressed at an early stage of the trial.⁹²
- 8.82 While judges already have the power to give directions earlier in the trial, specifying this power in legislation may encourage them to use it more often. The Royal Commission into Institutional Responses to Child Sexual Abuse (“Royal Commission”) observed that many judges will only give directions to the jury at the conclusion of the evidence, unless legislation requires otherwise.⁹³
- 8.83 We also consider that the trial judge should be permitted to repeat a direction given earlier (for example, around the time the complainant gave evidence) at the end of the trial. Research indicates that repeating jury directions at different times during the trial can help jurors to understand them.⁹⁴
- 8.84 This recommendation does not alter the existing position. There is presently nothing to prevent a judge giving appropriate directions at any stage of a trial, although considerations of fairness must operate.

Topics for the directions

- 8.85 Our recommended directions address possible misconceptions in relation to:
- the circumstances in which non-consensual sexual activity occurs
 - responses to non-consensual sexual activity
 - absence of physical injury to the complainant, or absence of violence or threats on the part of the accused person
 - responses to giving evidence about an alleged sexual offence at trial, and
 - the behaviour and appearance of complainants.
- 8.86 In selecting these topics, we have been guided by:

90. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.2.

91. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 4; Women’s Legal Service NSW, *Submission CO70* [50]–[51]; NSW Director of Public Prosecutions, *Submission CO85*, 4.

92. See, eg, E Henderson and K Duncanson, “A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?” (2016) 39 *UNSW Law Journal* 750, 778.

93. *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report*, Parts VII-X and Appendices (2017) 171.

94. See, eg, M Weinberg and others, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (Judicial College of Victoria, 2012) [1.44] citing J A Tanford, “The Law and Psychology of Jury Instructions” (1990) 69 *Nebraska Law Review* 71, 84.

- suggestions made in submissions and consultations
- the directions used in some other Australian states and territories and other countries, and
- research into common myths and misconceptions about sexual assault.

8.87 The directions are intended to:

- correct possible misconceptions or assumptions that jurors may hold about consensual and non-consensual sexual activity, and
- deter jurors from falling back on these misconceptions when making decisions in a trial.

8.88 The recommended directions are worded positively and focus on the correct position, rather than misconception or assumption. This is to avoid reinforcing the misconception in the minds of jurors.⁹⁵ Each of the directions uses different language. This is because different misconceptions and assumptions need to be challenged in different ways.⁹⁶

8.89 Some assumptions are always false, which means the directions to address them can be absolute and unqualified. Other assumptions may or may not be correct, depending on the circumstances.⁹⁷ This means the language of the directions addressing these assumptions must be tailored accordingly.

8.90 Some submissions have suggested additional directions to address more specific assumptions; for example, assumptions about sex work, sexuality, gender, and STIs including HIV.⁹⁸ We recognise that there are community prejudices and stigma areas about these matters.⁹⁹ While we have not included directions to address these assumptions specifically, we expect that the recommended directions could be applied and adapted to address these matters where relevant.

The circumstances in which non-consensual sexual activity occurs

Recommendation 8.3: Direction on the circumstances in which non-consensual sexual activity occurs

The *Criminal Procedure Act* should include a direction stating that non-consensual sexual activity can occur:

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95. New Zealand Law Commission, *The Second Review of the Evidence Act 2006*, Report 142 (2019) [12.104]. See also E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) rec 36, 497.
96. J Temkin, “‘And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse’: Challenging Rape Myths in the Courtroom” (2010) 13 *New Criminal Law Review* 710, 733.
97. J Temkin, “‘And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse’: Challenging Rape Myths in the Courtroom” (2010) 13 *New Criminal Law Review*, 710, 733. See also E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 45.
98. Sex Workers Outreach Project, *Submission CO15*, 11; Australian Queer Students’ Network, *Submission CO72*, 3; Inner City Legal Centre, *Submission CO82*, 5.
99. See, eg, Sex Workers Outreach Project, *Submission CO15*, 10; ACON, *Submission CO12*, 6; Australian Queer Students’ Network, *Submission CO72*, 3; National Association for People with HIV Australia and the HIV/AIDS Legal Centre, *Submission CO80*, 3.

- (a) in many different circumstances, and
- (b) between different kinds of people including:
 - (i) people who know one another, or
 - (ii) people who are married to one another, or
 - (iii) people who are in an established relationship with one another.

- 8.91 We recommend a new jury direction to address misconceptions and assumptions about the circumstances in which non-consensual sexual activity occurs (recommended s 292(5) of the *Criminal Procedure Act*). These misconceptions include, for example, that:
- a sexual assault is typically perpetrated by a stranger in a public area,¹⁰⁰ and/or
 - a sexual assault by a partner or acquaintance is less serious.¹⁰¹
- 8.92 Research indicates that defence counsel may draw on misconceptions or assumptions about the circumstances in which non-consensual sexual activity occurs as part of their strategy at trial. A UK study found that some defence counsel invoked the stereotypical assumption that sexual assault involves an attack by a stranger by highlighting the pre-existing relationship between the parties, however tenuous.¹⁰²
- 8.93 Arguments from counsel based even implicitly on these assumptions may reinforce and validate jurors' beliefs about sexual assault.¹⁰³
- 8.94 Even where jurors accept that sexual assault by a partner or acquaintance is common and serious, assumptions about the circumstances in which sexual assault occurs may still influence the reasoning process. In one UK study, while the majority of mock jurors accepted that people could be sexually assaulted by someone with whom they previously had a sexual relationship, they felt that it was more difficult to convict in these cases, because they are "less clear-cut", "more delicate" and "a lot harder" than sexual assaults involving a stranger.¹⁰⁴

100. J Quilter, *Submission CO07*, 2; 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; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 5; K Webster and others, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence Against Women Survey (NCAS)*, Research Report 3 (Australian National Research Organisation for Women's Safety, 2018) 54.

101. See, eg, K M Edwards and others, "Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change" (2011) 65 *Sex Roles* 761, 764.

102. 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, 210–211.

103. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 56.

104. L Ellison and V E Munro, "Better the Devil you Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Jury Deliberations" (2013) 17 *International Journal of Evidence and Proof* 299, 302, 310.

- 8.95 The direction in recommended s 292(5) is similar to the directions used in Victoria and in England and Wales.¹⁰⁵ The New Zealand Law Commission also recommended a similar direction in a recent report.¹⁰⁶
- 8.96 The language of the direction in recommended s 292(5) largely follows that in our Draft Proposals, but with some differences. The proposed direction was that:
- Non-consensual sexual activity can occur—
- (a) in many different circumstances, and
- (b) between different kinds of people including people who know each other.¹⁰⁷
- 8.97 We recommend a direction to clarify that non-consensual sexual activity can also occur between “people who are married to one another” and “people who are in an established relationship with one another”. These additions were suggested by a submission.¹⁰⁸ They address the specific misconception that sexual assault cannot occur or rarely occurs within marriage or established relationships.¹⁰⁹

Responses to non-consensual sexual activity

Recommendation 8.4: Direction on responses to non-consensual sexual activity

The *Criminal Procedure Act* should include a direction stating that:

- (a) there is no typical or normal response to non-consensual sexual activity, and
- (b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
- (c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

- 8.98 We recommend a new direction to address misconceptions about responses to non-consensual sexual activity (recommended s 292(6) of the *Criminal Procedure Act*). The direction is intended to counteract the misconception that people who experience sexual offences will always physically or verbally resist. Research shows that very few people resist a sexual assault, and it is common for people to “freeze”.¹¹⁰

105. *Jury Directions Act 2015* (Vic) s 46; M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1], example 1.

106. New Zealand Law Commission *The Second Review of the Evidence Act 2006*, Report 142 (2019) recommendation 22 [12.78].

107. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3.

108. NSW Director of Public Prosecutions, *Submission CO85*, 5. See also Positive Life NSW, *Submission CO62*, 3.

109. NSW Director of Public Prosecutions, *Submission CO85*, 5. See also K M Edwards and others, “Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change” (2011) 65 *Sex Roles* 761, 763–765.

110. 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; E McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual*

- 8.99 Research indicates that counsel may draw on common assumptions about people's reactions to sexual assault as part of their strategy at trial. For example, in a recent study of rape trials in New Zealand, the researchers found that the complainant's failure to be more resistant, louder or more immediate in her response was often explored in cross-examination to lay the foundation for an inference that she was actually consenting.¹¹¹
- 8.100 We reviewed a sample of transcripts of sexual assault trials in NSW between 2017 and 2018 and found that, in several cases, defence counsel questioned the complainant about the absence of verbal or physical resistance.¹¹² In the closing arguments of one case, the defence suggested that the complainant's silence and compliant behaviour sent "signals" to the accused person.¹¹³
- 8.101 Research also suggests that jurors may be influenced by misconceptions about responses to non-consensual sexual activity. The jurors in a UK mock jury study expected that a complainant would struggle physically and, in doing so, send a clear sign of rejection.¹¹⁴ In another UK study, many mock jurors accepted that a complainant's silence or passivity could "reasonably" be taken as consent by the accused person.¹¹⁵
- 8.102 The direction in recommended s 292(6) is similar to those used in Victoria and in England and Wales.¹¹⁶ We received support for a direction about responses to non-consensual sexual activity in submissions and consultations.¹¹⁷
- 8.103 The language of our recommended direction is largely consistent with that of the proposed direction in our Draft Proposals,¹¹⁸ which received a positive response.¹¹⁹

Violence Court Pilot (Canterbury University Press, 2020) 283; 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, 935; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 7.

111. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 277. See also J Horan and J Goodman-Delahunty, "Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned" (2020) 43 *UNSW Law Journal* 707, 716.
112. Transcript of Proceedings (District Court of New South Wales, 2016/00378845, Judge Norton, 16–23 July 2018); Transcript of Proceedings (District Court of New South Wales, 2014/00314401, Judge Zahra, 13–23 August 2018); Transcript of Proceedings (District Court of New South Wales, 2015/00363277, 2016/00072988, Judge Wells, 29 January–16 February 2018).
113. Transcript of Proceedings (District Court of New South Wales, 2017/00022528, Judge Norrish, 11 October 2018) 405.
114. L Ellison and V E Munro, "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49 *British Journal of Criminology* 202, 206–207.
115. E Finch and V E Munro "Breaking Boundaries? Sexual Consent in the Jury Room" (2006) 26 *Legal Studies* 303, 317–319.
116. *Jury Directions Act 2015* (Vic) s 46(3)(d); M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(e), example 12.
117. A Dyer, *Submission CO02* [104]; Victims of Crime Assistance League Inc NSW, *Submission CO11*, 8; Sex Workers Outreach Project, *Submission CO15*, 11; Law Society of NSW, *Submission CO18*, 11; Women's Legal Service NSW, *Submission CO27* [14.17], [80]; Sydney Roundtable 2, *Consultation CO08*; Women NSW Staff, *Consultation CO11*.

Lack of physical injury, violence or threats

Recommendation 8.5: Direction about a lack of physical injury, violence or threats

The *Criminal Procedure Act* should include a direction stating that:

- (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
- (b) the absence of injury or violence, or threats of injury or violence, does not mean that a person is not telling the truth about an alleged sexual offence.

8.104 We recommend a new direction to address any assumption that non-consensual sexual activity typically involves physical violence or threats of violence, and physical injury (recommended s 292(7) of the *Criminal Procedure Act*). Research suggests that many perpetrators do not use physical force and few people who experience a non-consensual sexual activity incur significant physical injury.¹²⁰

8.105 Research indicates that counsel may draw on misconceptions about force, threats and injury as part of their strategy at trial.¹²¹ A recent study in New Zealand found that, in several cases:

defence counsel made reference to the fact that there had been no violence or threats by the defendant, despite the fact that physical force or threat of violence is not a required element of rape.¹²²

8.106 Research also indicates that jurors may be influenced by these misconceptions. The mock jurors in several UK studies expected that a “genuine victim” of a sexual assault would sustain physical injury.¹²³

118. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3.

119. NSW Director of Public Prosecutions, *Submission CO85*, 5.

120. Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 6–7; K Webster and others, *Australians’ Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence Against Women Survey (NCAS)*, Research Report 3 (Australian National Research Organisation for Women’s Safety, 2018) 54, citing D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Australian Institute of Criminology, 2003) 30; R R Zilkens and others, “Sexual Assault and General Body Injuries: A Detailed Cross-Sectional Australian Study of 1163 Women” (2017) 279 *Forensic Science International* 112, 115.

121. See, eg, 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, 210–211; R Burgin, “Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform” (2019) 59 *British Journal of Criminology* 296, 300–301.

122. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 459.

123. L Ellison and V E Munro, “Turning Mirrors Into Windows? Assessing the Impact of Mock Juror Education in Rape Trials” (2009) 49 *British Journal of Criminology* 363, 371–372; L Ellison and V E Munro, “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *British Journal of Criminology* 202, 206–207; 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, 314–315.

- 8.107 Our recommended direction is similar to those used in Victoria and in England and Wales, as well as one recommended by the New Zealand Law Commission.¹²⁴
- 8.108 The language of the direction in recommended s 292(7) is largely the same as that of the direction we proposed in our Draft Proposals. We have made one change. The proposed direction was that:
- [T]he absence of injury or violence, or threats of injury or violence, does not, *of itself*, mean that a person is not telling the truth about an alleged sexual offence.¹²⁵
- 8.109 Several submissions opposed including the expression “of itself”.¹²⁶ Some argued that it could reinforce misconceptions about the presence or absence of violence or injury, instead of dispelling them.¹²⁷
- 8.110 In response to these submissions, the recommended direction does not include the expression “of itself”. The assumption that a lack of violence, threats or injury means that a complainant must have consented is patently false. Therefore, it is appropriate for a direction that challenges this assumption to use unqualified and unequivocal language.

Responses to giving evidence

Recommendation 8.6: Direction on responses to giving evidence

The *Criminal Procedure Act* should include a direction stating that:

- (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and
- (b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

- 8.111 We recommend a new jury direction to address possible misconceptions about responses to giving evidence about an alleged sexual offence (recommended s 292(8) of the *Criminal Procedure Act*). The recommended direction addresses a possible misconception that a person who experiences non-consensual sexual activity will display emotion or distress when recounting it.¹²⁸

124. *Jury Directions Act 2015* (Vic) s 46(3)(c); M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(e), example 12; New Zealand Law Commission, *The Second Review of the Evidence Act 2006*, Report 142 (2019) rec 22 [12.86].

125. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3 (emphasis added).

126. Rape and Domestic Violence Services Australia, *Submission CO65* [12.13]; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 4; Women’s Legal Service NSW, *Submission CO70* [59]; Community Legal Centres NSW, *Submission CO73*, 4; NSW Director of Public Prosecutions, *Submission CO85*, 5.

127. Rape and Domestic Violence Services Australia, *Submission CO65* [12.13]; NSW Director of Public Prosecutions, *Submission CO85*, 5.

128. J Temkin, “And Always Keep A-Hold of Nurse, for Fear of Finding Something Worse”: Challenging Rape Myths in the Courtroom” (2010) 13 *New Criminal Law Review* 710, 715–717.

- 8.112 In fact, complainants can respond to the process of giving evidence in different ways. They may appear emotional and distressed, anxious and irritable, or numb and controlled. A controlled presentation can be a coping mechanism.¹²⁹
- 8.113 Research indicates that complainants who appear calm or controlled are perceived as less credible than those who appear distressed. Emotional demeanour is not, however, a reliable indicator of honesty.¹³⁰
- 8.114 The results of a UK mock jury study found a positive connection between a jury direction and the mock jurors' analysis of the complainant's calm demeanour when giving evidence. Jurors who had been given the direction were more willing to question the link between:
- the complainant's emotional display when recounting the alleged sexual offence, and
 - the credibility and truthfulness of this account.¹³¹
- 8.115 Our recommended direction is similar to one used in England and Wales.¹³² We received support for a direction on this topic in submissions and consultations.¹³³
- 8.116 The language of the direction in recommended s 292(8) is largely consistent with the language in our Draft Proposals,¹³⁴ but with some differences.
- 8.117 The expression "trauma may affect people differently" has been added, to explain why people can have different responses to giving evidence about an alleged sexual offence. This was suggested by a submission.¹³⁵ It is also consistent with the expression used in the statutory direction about differences in a complainant's account.¹³⁶
- 8.118 The proposed direction also included "the presence or absence of emotion or distress is not, of itself, a reliable indicator of whether or not the person is telling the truth".¹³⁷ Several submissions opposed including the expressions "of itself" and "reliable indicator".¹³⁸ These expressions could imply that the complainant's

129. Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) 13.

130. F T Nitschke, B M McKimmie and E J Vanman, "A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants: Does Complainant Distress Influence Credibility?" (2019) 145 *Psychological Bulletin* 953, 955–956.

131. L Ellison and V E Munro, "Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 *British Journal of Criminology* 363, 374–375. The same was true of mock jurors who received expert evidence about demeanour.

132. M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(2)(b), example 7.

133. A Dyer, *Submission CO02* [104]; Office of the Director of Public Prosecutions, *Submission CO14*, 9; NSW Director of Public Prosecutions, *Submission CO85*, 5; Sydney Roundtable 3, *Consultation CO09*. See also Rape and Domestic Violence Services Australia, *Submission CO28* [267].

134. See NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3.

135. Women's Legal Service, *Submission CO70* [60]–[62].

136. See *Criminal Procedure Act 1986* (NSW) s 293A(2)(a)(ii).

137. See NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3.

138. Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 5; Women's Legal Service NSW, *Submission CO70* [58]; Community Legal Centres NSW, *Submission CO73*, 5.

demeanour may in fact be a reliable indicator of truthfulness or of consent in some cases.¹³⁹

- 8.119 The recommended direction is “the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence”. The language is still qualified because the way that a complainant presents when giving evidence, and the significance of this, can vary from case to case. That is:
- a particular complainant may or may not be emotional when giving an account of an alleged sexual offence, and
 - this may or may not be consistent with the truthfulness of this account.

Behaviour and appearance of a complainant

Recommendation 8.7: Direction on behaviour and appearance of a complainant

The *Criminal Procedure Act* should include a direction stating that it should not be assumed that a person consented to a sexual activity because the person:

- (a) wore particular clothing or had a particular appearance, or
- (b) consumed alcohol or any other drug, or
- (c) was present in a particular location.

- 8.120 We recommend a new direction to address possible misconceptions or assumptions about the behaviour and appearance of a complainant (recommended s 292(9) of the *Criminal Procedure Act*).
- 8.121 The language we recommend largely follows the proposed direction in our Draft Proposals, but with some differences. The proposed direction was:
- None of the following is, of itself, a reliable indicator that a person consents to a sexual activity—
- (a) the person’s clothing or appearance,
 - (b) the consumption by the person of alcohol or any other drug,
 - (c) the person’s presence in a particular location.¹⁴⁰
- 8.122 Some submissions argued that the expressions “of itself” and “reliable indicator” could reinforce misconceptions and assumptions about complainants’ appearance or behaviour.¹⁴¹ They could imply that a person’s clothing or appearance,

139. Community Legal Centres NSW, *Submission CO73*, 5.

140. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3.

141. Rape and Domestic Violence Services Australia, *Submission CO65* [12.13]–[12.14]; Women’s Legal Service NSW, *Submission CO70* [56]–[57]; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission CO68*, 4; Women’s Safety NSW, *Submission CO74*, 3.

consumption of alcohol or another drug, or presence in a particular location may in fact be a reliable indicator of consent in some cases.¹⁴²

- 8.123 We accept these submissions. The introductory words of the recommended direction are “[i]t should not be assumed that a person consented to a sexual activity because” of these factors. We have also simplified the language in recommended s 292(9)(a)–(c).
- 8.124 The direction in recommended s 292(9)(a) addresses possible misconceptions or assumptions about clothing or appearance. These include the views that:
- sexual assault may be “invited” or “provoked” by the style of dress adopted by a complainant, and
 - consent to sexual activity may be assumed (or inferred) from the style of dress adopted by the complainant.¹⁴³
- 8.125 Research indicates that these misconceptions or assumptions can feature in sexual offence trials. For example, a recent study of sexual offence trials in New Zealand found that, in several cases, complainants were questioned about what they were wearing, both by defence counsel during cross-examination and by the judge.¹⁴⁴ The study also found that, in some cases, the defence referred to the complainant’s clothing in closing arguments to the jury.¹⁴⁵
- 8.126 In one of the trials of which we reviewed the transcripts, the trial judge asked the complainant about the clothing she was wearing at the time of the alleged sexual offence.¹⁴⁶ In another trial, defence counsel referred to the style of underwear that the complainant was wearing during the closing address to the jury.¹⁴⁷
- 8.127 Research also suggests that some jurors may believe that people who wear revealing clothing provoke sexual offending or are responsible for it.¹⁴⁸ Jurors who hold this view may, for example,

142. J Quilter and L McNamara, *Submission CO66*, 4; Community Legal Centres NSW, *Submission CO73*, 5; Women’s Safety NSW, *Submission CO74*, 11. See also NSW Director of Public Prosecutions, *Submission CO85*, 5.

143. N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, 2013) 6; H McGee and others, “Rape and Child Sexual Abuse: What Beliefs Persist about Motives, Perpetrators, and Survivors?” (2011) 26 *Journal of Interpersonal Violence* 3580, 3582, 3587–3588; J Temkin, “‘And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse’: Challenging Rape Myths in the Courtroom” (2010) 13 *New Criminal Law Review* 710, 715.

144. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 287.

145. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 289.

146. Transcript of Proceedings (District Court of New South Wales, 2015/00126139, Judge Arnott, 9 October 2017) 34.

147. Transcript of Proceedings (District Court of New South Wales, 2017/00022528, Judge Norrish QC, 4 October 2018) 182, 404.

148. See, eg, K M Edwards and others, “Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change” (2011) 65 *Sex Roles* 761, 766; J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 46.

focus on whether they think the complainant is “to blame” rather than focusing on the question of consent. Jurors may also reason that a complainant who dressed or acted in a certain way must have wanted sexual activity.¹⁴⁹

- 8.128 The direction in recommended s 292(9)(a) is similar to one used in England and Wales.¹⁵⁰ The New Zealand Law Commission also recently recommended that a jury direction be developed to “prevent jurors from relying on erroneous assumptions based on a complainant’s clothing”.¹⁵¹ Several submissions support a direction on this topic.¹⁵²
- 8.129 The direction in recommended s 292(9)(b) is intended to address misconceptions or assumptions about a complainant’s consumption of alcohol or drugs. This includes the view that:
- alcohol reasonably makes women more likely to consent to sexual intercourse when otherwise they would not; and that women are responsible for making themselves vulnerable by drinking too much.¹⁵³
- 8.130 Research suggests that jurors may adhere to the misconception that a complainant who consumes alcohol or drugs is responsible for, or provokes, sexual offending.¹⁵⁴ It has been suggested that jurors who hold this view could, for example, reason that:
- a complainant who drank alcohol with the accused person must have wanted sexual activity, and/or
 - the accused person should not be held responsible because the complainant “got herself into that situation” by choosing to drink alcohol.¹⁵⁵
- 8.131 The direction in recommended s 292(9)(b) is similar to a direction used in England and Wales.¹⁵⁶ Some submissions support a direction about a complainant’s consumption of alcohol or drugs.¹⁵⁷

149. New Zealand Law Commission, *The Second Review of the Evidence Act 2006*, Report 142 (2019) [12.63].

150. M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(a), example 8.

151. New Zealand Law Commission, *The Second Review of the Evidence Act 2006*, Report 142 (2019) [12.66].

152. A Dyer, *Submission CO02* [104]; ACON, *Submission CO12*, 6; Office of the Director of Public Prosecutions, *Submission CO14*, 9.

153. E Henderson and K Duncanson, “A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?” (2016) 39 *UNSW Law Journal* 750, 769. See also E Finch and V E Munro, “The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants” (2007) 16 *Social and Legal Studies* 591, 598–599; 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, 291.

154. See, eg, E Finch and V E Munro, “The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants” (2007) 16 *Social and Legal Studies* 591, 592–593, 598–600, 605, 607; J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 46.

155. New Zealand Law Commission, *The Second Review of the Evidence Act 2006*, Report 142 (2019) [12.72].

156. M Picton and others (ed), *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (Judicial College, United Kingdom, July 2020) [20-1] 11(3)(b), example 9.

- 8.132 Finally, the direction in recommended s 292(9)(c) is intended to address assumptions about a complainant's presence in a particular location; for example, that a complainant who went to a nightclub, or to the accused person's home, can be assumed to have consented to sexual activity.¹⁵⁸ Some submissions support a direction on this topic.¹⁵⁹

Amendments to existing directions

Recommendation 8.8: Amendments to existing directions

- (1) Section 293A of the *Criminal Procedure Act* should be amended to provide that a judge may:
 - (a) give the direction in this section at any time during a trial, and
 - (b) give the direction in this section on more than one occasion during a trial.
- (2) Section 294 of the *Criminal Procedure Act* should be amended to provide that a judge may:
 - (a) give the direction in this section at any time during a trial, and
 - (b) give the direction in this section on more than one occasion during a trial.

- 8.133 As discussed above, s 293A and s 294 of the *Criminal Procedure Act* contain warnings about differences in a complainant's account and a delay in, or lack of, complaint.
- 8.134 We recommend that the "warnings" in s 293A and s 294 be renamed "directions".¹⁶⁰ This is to be consistent with the new jury directions we recommend (recommended s 292).
- 8.135 The *Criminal Procedure Act* does not specify when trial judges should give these directions. Judges usually give directions at the end of the trial.
- 8.136 We recommend amending s 293A and s 294 so that it is clear that a judge may give and repeat these directions at any suitable time. This could encourage judges to do so more often. It may also improve the effectiveness of these directions.
- 8.137 We do not recommend any changes to the content of the directions in s 293A and s 294, nor to s 294AA of the *Criminal Procedure Act* (which prohibits warnings about uncorroborated evidence or the unreliability of complainants in general). The

157. A Dyer, *Submission CO02* [104]; Office of the Director of Public Prosecutions, *Submission CO14*, 9. See also Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 4; Women's Safety NSW, *Submission CO74*, 11.

158. See, eg, Community Legal Centres NSW, *Submission CO25*, 14–15; J Temkin, "And Always Keep A-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom" (2010) 13 *New Criminal Law Review* 710, 733.

159. Women's Safety NSW, *Submission CO74*, 11; NSW Director of Public Prosecutions, *Submission CO85*, 5. See also Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 4; Women's Legal Service NSW, *Submission CO70* [57].

160. See Appendix D, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Criminal Procedure Act 1986.

Royal Commission reviewed the NSW legislation concerning corroboration, delay and reliability and determined that it:

- is consistent with the social science research on these issues, and
- ensures that the accused person can receive a fair trial, by allowing for relevant directions to be given where necessary in a particular case.¹⁶¹

8.138 The Royal Commission also recommended that other Australian states and territories enact legislation in similar terms.¹⁶²

8.139 We recommend that s 293A, s 294 and s 294AA be reviewed periodically to monitor how they are operating in practice.¹⁶³

Direction on domestic or family violence

8.140 In our Draft Proposals, we proposed the following direction:

A person may participate in sexual activity because of fear of harm in circumstances of domestic and family violence—

- (a) including where there has been an ongoing pattern of coercive and controlling behaviour, and
- (b) whether or not there was a threat of harm immediately before or during the sexual activity.¹⁶⁴

8.141 The purpose of the direction was to ensure that recommended s 61HJ(1)(e) and s 61HJ(1)(f) of the *Crimes Act* are not interpreted narrowly. After further consideration, we recommend making our intention clear in the substantive law of consent. We recommend that the *Crimes Act* provide that a person does not consent to a sexual activity if the person participates because of force, fear of force, fear of harm of any kind, coercion, blackmail or intimidation:

- regardless of when the relevant conduct occurs, and
- regardless of whether it occurs in a single instance or as part of an ongoing pattern.¹⁶⁵

8.142 Our proposed jury direction was in much the same form.

8.143 The proposed direction was intended to highlight to jurors that these circumstances can arise in the context of a long-term pattern of coercive or other similar behaviour. We envisaged that such a direction would be applicable in cases involving domestic or family violence, which is often characterised by patterns of behaviour (rather than a single incident).

161. *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report*, Parts VII-X and Appendices (2017) 140.

162. *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report*, Parts VII-X and Appendices (2017) recommendation 65, 140–141, 192–193.

163. See rec 10.1 [10.21]– [10.22]

164. See NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 8.3.

165. Rec 6.6.

- 8.144 The proposed direction received a mixed response among submissions. A key concern was that, due to the absence of a definition of domestic or family violence, the direction did not provide sufficient explanation to the jury about the nature of domestic or family violence.¹⁶⁶ This response indicates that the intention behind our proposed direction was unclear. Recommended s 61HJ(1)(e)–(f) of the *Crimes Act* is meant to make our intention clear.

Expert evidence

- 8.145 Misconceptions of the kind we discuss above may also be addressed with expert evidence. We have considered whether the *Evidence Act* should be amended expressly to allow expert evidence on this topic.
- 8.146 The *Evidence Act* provides for the admissibility of opinion evidence where such evidence is relevant to an issue at trial, is given by a person who has specialised knowledge based on training, study or experience, and is based on this knowledge.¹⁶⁷
- 8.147 The *Evidence Act* was amended in 2007 expressly to provide for the admissibility of opinion evidence about the impact of sexual abuse on children, and their behaviour during and following the abuse.¹⁶⁸ Some submissions support a further amendment to provide for the admissibility of opinion evidence about adult responses to sexual assault.¹⁶⁹ It is suggested that this could:
- remove doubt about the admissibility of expert evidence about adult responses to sexual assault and allow such evidence to be used more often¹⁷⁰
 - harmonise the use of expert evidence across sexual offence trials in NSW, regardless of the complainant's age or circumstances of the alleged offence,¹⁷¹ and
 - give weight to the importance of addressing misconceptions in sexual offence trials.¹⁷²
- 8.148 Our view is that this amendment is not required, as expert evidence about adult responses to sexual assault is already admissible under the current law.¹⁷³ The Office of the Director of Public Prosecutions says that “[e]xpert evidence has been

166. See, eg, Rape and Domestic Violence Services Australia, *Submission CO65* [12.16]. See also Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 4–5; Women's Legal Service NSW, *Submission CO70* [66]; Community Legal Centres NSW, *Submission CO73*, 5; Women's Safety NSW, *Submission CO74*, 12–14; NSW Director of Public Prosecutions, *Submission CO85*, 5.

167. See *Evidence Act 1995* (NSW) s 56, s 79, s 108C.

168. See *Evidence Act 1995* (NSW) s 79(2), s 108C(2), inserted by *Evidence Amendment Act 2007* (NSW) sch 1 [34], [51]

169. Office of the Director of Public Prosecutions, *Submission CO14*, 10; Australia's National Research Organisation for Women's Safety, *Submission CO20*, 14; Women's Legal Service NSW, *Submission CO27*, rec 20.

170. Information provided by the Office of the Director of Public Prosecutions (14 August 2019); Office of the Director of Public Prosecutions NSW, *Submission CO14*, 10.

171. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 17.

172. Australia's National Research Organisation for Women's Safety, *Submission CO20*, 14.

173. Law Society of NSW, *Submission CO18*, 12; NSW Bar Association, *Submission CO32*, 23, citing *Hoyle v R* [2018] ACTCA 42, 339 FLR 11.

used in NSW in relation to the behavioural responses of adults who experience sexual assault”.¹⁷⁴ Cases in Victoria and the ACT, where the same law as that in NSW applies (that is, there is no specific reference to adult responses to sexual assault),¹⁷⁵ indicate that such evidence may be admitted in an appropriate case.¹⁷⁶

- 8.149 Our recommended directions, which address several different misconceptions about consent and sexual assault, may also avoid the need for expert evidence to be called or reduce the number of topics to be covered by such evidence. This may mitigate the problems of limited funding or availability of experts.¹⁷⁷

In summary

- 8.150 Research suggests that jurors in sexual offence trials may be influenced by possible misconceptions about consensual and non-consensual sexual activity. This may influence the way jurors apply the law of consent.
- 8.151 New jury directions are needed in NSW to give appropriate guidance to jurors and discourage them from relying on misconceptions when making decisions in sexual offence trials. We recommend directions to address misconceptions and assumptions about consensual and non-consensual sexual activity. These directions are expressed in general terms, so that they are applicable in a broad range of cases.
- 8.152 We also recommend a flexible procedure for giving these directions. Judges would be required to give one or more of the directions on the request of the prosecution or defence, or, in the absence of request, where there is good reason to do so. Judges would not have to give a requested direction if there is good reason for not giving it. Judges would not be required to use a particular form of words when giving the directions.
- 8.153 Judges would be permitted to give and repeat the directions at any suitable time during the trial. We recommend that judges be permitted to give and repeat the existing directions about delay in complaint, and differences in a complainant’s account, at any time.
- 8.154 There is no need for any amendments to the *Evidence Act* to permit expert evidence about the responses of adults to non-consensual sexual activity. In our view such evidence can and should be admitted under the current law, without the need for further amendment.

174. Office of the Director of Public Prosecutions, *Submission CO14*, 10.

175. *Evidence Act 2008* (Vic) s 56, s 79, s 108C; *Evidence Act 2011* (ACT) s 56, s 79, s 108C.

176. See *Jacobs v R* [2019] VSCA 285 [61]; *Hoyle v R* [2018] ACTCA 42, 339 FLR 11 [228], [235], [238], [242], [244]; *R v Saran* [2018] ACTSC 234 [20]–[25].

177. A Cossins, *Submission CO17*, 10–11.

9. The meanings of “sexual intercourse”, “sexual touching” and “sexual act”

In brief

The definitions of “sexual intercourse”, “sexual touching” and “sexual act” should be made more inclusive, clear, and refer to the continuation of the intercourse, touching or act.

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- 9.1 Section 61HE of the *Crimes Act* applies to the offences of sexual assault, sexual touching, sexual act, their aggravated versions and attempts to commit those offences.¹ The physical elements of these offences are non-consensual “sexual intercourse”, “sexual touching” or “sexual act”, respectively.
- 9.2 In this Chapter, we address the meanings of “sexual intercourse”, “sexual touching” and “sexual act”. These terms are defined in s 61HA–61HC of the *Crimes Act*. We recommend changes to these definitions to achieve:
- clarity, consistency and simplicity, and
 - inclusivity of all genders, sexes and sexual orientations.

Surgically constructed parts of the body should be recognised

Recommendation 9.1: Recognising surgically constructed parts of the body

The *Crimes Act* should provide that it is not relevant for the purposes of Part 3, Division 10 whether a part of the body referred to in the Division is surgically constructed or not.

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

- 9.3 Many submissions argue that the definitions of “sexual intercourse”, “sexual touching” and “sexual act” should be formulated so as to include reference to people of all genders, sexes and sexual orientations.²
- 9.4 Some submissions support the inclusion of certain surgically constructed body parts (for instance, a penis, vagina, or anus) in these definitions.³ Currently, the definition of “sexual intercourse” includes the penetration of a surgically constructed vagina.⁴ This was introduced in 1996⁵ to recognise that sexual assault “may also be committed upon transgender persons”.⁶
- 9.5 As we discuss in Chapter 2, research shows that transgender people experience high rates of sexual violence.⁷ The legislation should be so framed as to avoid any risk that sexual intercourse, sexual touching and sexual acts involving surgically constructed body parts are excluded from these definitions.
- 9.6 There are no specific references to surgically constructed body parts elsewhere in the definitions of “sexual intercourse”, “sexual act” or “sexual touching”.
- 9.7 In the Draft Proposals, we proposed that a new subsection be inserted at the beginning of our proposed new Subdivision. We proposed that the legislation provide that “[a] reference in this Division to a part of the body includes a surgically constructed part of the body”.⁸
- 9.8 This would apply to all of the offences contained in Part 3, Division 10 of the *Crimes Act*. Specifically, it would apply to references to parts of the body mentioned in the definitions of “sexual intercourse”, “sexual touching” and “sexual act”. For consistency, it would also apply to references to “vagina” and “anus” in the offence of “sexual assault by forced self-manipulation”.⁹
- 9.9 We consider that this is preferable to using the words “surgically constructed” in each of the definitions. Our approach avoids adding length and complexity to each definition. The words “including a surgically constructed vagina” currently in s 61HA(a) and s 80A would be unnecessary and should be removed.

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2. Australian Queer Students’ Network, *Preliminary Submission PCO56*, 3–4; ACON, *Submission CO12*, 7; Sex Workers Outreach Project, *Submission CO15*, 11; Law Society of NSW, *Submission CO18*, 11; Australia’s National Research Organisation for Women’s Safety, *Submission CO20*, 11; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 12; Rape and Domestic Violence Services Australia, *Submission CO28* [241]–[244]; Rape and Domestic Violence Services Australia, *Submission CO65* [13.1]; NSW Bar Association, *Submission CO32*, 20; UNSW School of Social Sciences, *Submission CO69*, 4; Australian Queer Students’ Network, *Submission CO72*, 1; Inner City Legal Centre, *Submission CO82*, 3; WILMA Women’s Health Centre, *Submission CO81*, 1; Central Coast Community Women’s Health Centre, *Submission CO83*, 1; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5; Wagga Women’s Health Centre, *Submission CO88*, 1.
 3. See, eg, Australian Queer Students’ Network, *Preliminary Submission PCO56*, 4; A Dyer, *Submission CO02* [100]; ACON, *Submission CO12*, 2; Rape and Domestic Violence Services Australia, *Submission CO28* [244]; NSW Bar Association, *Submission CO47* [43]; Australian Queer Students’ Network, *Submission CO72*, 1.
 4. *Crimes Act 1900* (NSW) s 61HA(a).
 5. *Crimes Act 1900* (NSW) s 61H(1)(a), as amended by *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) sch 3 [1].
 6. NSW, *Parliamentary Debates*, Legislative Assembly, 1 May 1996, 643, 644 (K Yeadon, Minister for Land and Water Conservation, on behalf of P Whelan, Minister for Police).
 7. See [2.65].
 8. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 9.1 [9.4].
 9. *Crimes Act 1900* (NSW) s 80A.

- 9.10 Some submissions support this approach.¹⁰ Some comment that it may help ensure access to justice for people of any gender, sex or sexual orientation.¹¹
- 9.11 One submission expresses concern that this reform could suggest that surgically constructed body parts “are substantially different, and therefore less valid, to that of cisgender individuals”.¹² This is not our intention. We consider this reform would ensure that the law treats people with surgically constructed body parts, and people without them, consistently.
- 9.12 We have therefore maintained our proposed approach in recommended s 61H(4), with some drafting changes.¹³ We recommend that the section say:
- It is not relevant for the purposes of this Division whether a part of the body referred to in this Division is surgically constructed or not.
- 9.13 Below, we explain further how recommended s 61H(4) would apply to each of the definitions.¹⁴

The definition of “sexual intercourse” should be clarified

Recommendation 9.2: The definition of “sexual intercourse”

“Sexual intercourse” should be defined in s 61HA of the *Crimes Act* as:

- (a) the penetration to any extent of the genitalia or anus of a person by—
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person,except where the penetration is carried out for proper medical purposes, or
- (b) the introduction of any part of the genitalia of a person into the mouth of another person, or
- (c) the stimulation of the female genitalia with the mouth or tongue, or
- (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

- 9.14 The common physical element of the sexual assault offences is non-consensual sexual intercourse. Section 61HA currently defines “sexual intercourse” as follows:

For the purposes of this Division, **sexual intercourse** means—

- (a) 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 by—

10. NSW Bar Association, *Submission CO47* [43]; Australian Queer Students' Network, *Submission CO72*, 1; NSW Director of Public Prosecutions, *Submission CO85*, 6.

11. See, eg, Rape and Domestic Violence Services Australia, *Submission CO65* [13.1]; UNSW School of Social Sciences, *Submission CO69*, 4.

12. ACON, *Submission CO61*, 1. See also Inner City Legal Centre, *Submission CO82*, 3.

13. See Appendix C, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900.

14. See [9.23], [9.28], [9.33], [9.58].

(i) any part of the body of another person, or

(ii) any object manipulated by another person,

except where the penetration is carried out for proper medical purposes, or

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or

(c) cunnilingus, or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

9.15 Some submissions consider that the definition of “sexual intercourse” should be more inclusive and cover all people regardless of their sex, gender or sexual orientation.¹⁵ Our recommendations aim to achieve this and also to simplify and clarify the language used in this definition. They do not do so completely, for reasons we shall discuss below.

9.16 Accordingly, we recommend changes to paragraphs (a)–(c) of this definition. We do not recommend any changes to paragraph (d).

9.17 We also consider that further research and consultation is required to address some outstanding questions about the scope of the definition as it applies to oral sexual contact.

Penetration of the genitalia or anus of any person

9.18 We recommend amending current s 61HA(a) so that it includes the penetration to any extent of the genitalia or anus of any person.

9.19 Section 61HA(a) currently refers to the “genitalia ... of a female person”. This replaced the “vagina of any person” in 1992.¹⁶ The purpose of this amendment was to clarify that “sexual intercourse” includes the penetration of external parts of the female genitalia and not only the vagina.¹⁷

9.20 Currently, s 61HA(a) does not include the penetration of male genitalia, or intersex variations of genitalia.

9.21 Many submissions argue that s 61HA(a) should include these forms of penetration.¹⁸ We agree. This change would help to ensure that the *Crimes Act*

15. Australian Queer Students' Network, *Preliminary Submission PCO56*, 3–4; ACON, *Submission CO12*, 7; Sex Workers Outreach Project, *Submission CO15*, 11; Law Society of NSW, *Submission CO18*, 11; Australia's National Research Organisation for Women's Safety, *Submission CO20*, 11; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 12; Rape and Domestic Violence Services Australia, *Submission CO28* [241]–[244]; Rape and Domestic Violence Services Australia, *Submission CO65* [13.1]; NSW Bar Association, *Submission CO32*, 20; WILMA Women's Health Centre, *Submission CO81*, 1; Central Coast Community Women's Health Centre, *Submission CO83*, 1; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5; Wagga Women's Health Centre, *Submission CO88*, 1.

16. *Crimes Act 1900* (NSW) s 61H(1)(a), as inserted by *Criminal Legislation (Amendment) Act 1992* (NSW) sch 1(2).

17. *Criminal Legislation (Amendment) Act 1992* (NSW) sch 1 (2), explanatory note – item (2).

18. Australian Queer Students' Network, *Preliminary Submission PCO56*, 3; A Dyer, *Submission CO02* [100]; ACON, *Submission CO12*, 2; Sex Workers Outreach Project, *Submission CO15*, 11; Law Society of NSW, *Submission CO18*, 11; Australia's National Research Organisation for

recognises that all people may experience or commit sexual assault, regardless of sex, gender or sexual orientation.¹⁹

- 9.22 Some submissions suggest that the words “genitalia” or “anus” require legislative definition.²⁰ In our view, this is unnecessary. Courts use the ordinary meaning to determine what constitutes female genitalia.²¹ We expect they would do the same for “genitalia” (more generally) and “anus”.
- 9.23 When read alongside recommended s 61H(4) (see above), recommended s 61HA(a) would include cases involving any genitalia or anus that is surgically constructed. It would also cover penetration of any genitalia or anus *by* a part of the body that is surgically constructed.
- 9.24 To simplify s 61HA(a), we recommend removing the expression “sexual connection occasioned by”. This expression is unnecessary, and its removal will not change the substance of the subsection.

Introduction of any genitalia into the mouth of another person

- 9.25 Currently, s 61HA(b) only covers the introduction of any part of the penis into the mouth of another person.
- 9.26 Submissions suggest that this aspect of the definition should be broadened to ensure the law is inclusive of all sex and genders.²² We agree. This involves replacing the word “penis”, currently in s 61HA(b), with “genitalia”.
- 9.27 For the reasons discussed above, we:
- recommend removing the words “sexual connection occasioned by” at the start of s 61HA(b), and
 - do not recommend defining the word “genitalia”.
- 9.28 When read alongside recommended s 61H(4), recommended s 61HA(b) would include the introduction of surgically constructed genitalia into the mouth of another person. It would also include the introduction of genitalia into the surgically constructed mouth of another person.

Stimulation of the female genitalia with the mouth or tongue

- 9.29 Currently, s 61HA(c) refers to the word “cunnilingus”. “Cunnilingus” is defined at common law as the “oral stimulation of the female genitals with the mouth or tongue”.²³ This is well-settled and reflects the dictionary definition.²⁴

Women’s Safety, *Submission CO20*, 11; NSW Young Lawyers’ Criminal Law Committee, *Submission CO21*, 12; Rape and Domestic Violence Services Australia, *Submission CO28* [242]–[243]; NSW Bar Association, *Submission CO32*, 20; NSW Bar Association, *Submission CO47* [46].

19. ACON, *Submission CO12*, 2; NSW Young Lawyers’ Criminal Law Committee, *Submission CO21*, 12; Australia’s National Research Organisation for Women’s Safety, *Submission CO20*, 11; Rape and Domestic Violence Services Australia, *Submission CO28* [242]–[243].

20. NSW Bar Association, *Submission CO47* [45]; M Nittis, *Submission CO51*, 2.

21. See, eg, *R v NLR* [2008] NTSC 10, 22 NTLR 122 [8].

22. See, eg, Rape and Domestic Violence Services Australia, *Submission CO28* [244]; Australian Queer Students’ Network, *Submission CO72*, 1.

9.30 We recommend replacing s 61HA(c) with the following:

(c) the stimulation of the female genitalia with the mouth or tongue

This makes the law clearer and more accessible.

9.31 We have not included the word “oral” because its meaning is repeated and more clearly communicated by the words “with the mouth or tongue”. We have used the word “genitalia” instead of the word “genitals” to be consistent with the other parts of the definition of “sexual intercourse” and because the words are synonymous.²⁵ These changes are not intended to alter the substance of the common law definition of “cunnilingus”.

9.32 Our recommendation is not in gender-neutral form. That is because deleting the word “female” would make the stimulation of male genitalia (without consent) the offence of sexual assault, rather than sexual touching, to which higher penalties apply and on which different views may well be held. We draw this to the attention of the legislature for its consideration in due course.

9.33 When read alongside recommended s 61H(4), recommended s 61HA(c) would include cases involving the stimulation of:

- surgically constructed female genitalia, or
- female genitalia by a mouth or tongue that is surgically constructed.

Should “sexual intercourse” include oral contact with the genitalia or anus?

Recommendation 9.3: Oral contact with the genitalia or anus

Consideration should be given as to whether the definition of “sexual intercourse” in s 61HA of the *Crimes Act* should include the touching or stimulation of any genitalia or the anus with the mouth or tongue.

9.34 In our Draft Proposals, we proposed replacing current s 61HA(b)–(c) with the following new subsection:

the touching of any part of the genitalia or anus of a person with the mouth or tongue of another person.²⁶

9.35 This would have broadened the definition of “sexual intercourse” to include non-penetrative contact between the mouth or tongue and any form of genitalia or an anus.

23. *BA v R* [2015] NSWCCA 189 [9]; *R v BA* [2014] NSWCCA 148 [37].

24. *BA v R* [2015] NSWCCA 189 [10], citing *R v NLR* [2008] NTSC 10, 22 NTLR 122 [4]. See also *Scott v R* [2020] NSWCCA 81 [114].

25. The word “genitalia” is used in recommended s 61HA and current s 61HA(a) of the *Crimes Act 1900* (NSW). See also *Macquarie Dictionary Online* 2016 (Macquarie Dictionary Publishers, an imprint of Pan Macmillan Australia Pty Ltd) <www.macquariedictionary.com.au> genitalia.

26. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 9.2 [9.5].

- 9.36 We proposed this change because the definition of “sexual intercourse” already covers non-penetrative oral stimulation of female genitalia. Some submissions argue that other forms of non-penetrative oral contact should be included in the definition of sexual intercourse.²⁷
- 9.37 Some submissions support the proposal. However, others raise serious concerns about its potential application and scope. After further consideration, we have decided not to recommend this change but to recommend that further consideration be given to whether the change is warranted.

Responses to our proposal

- 9.38 Several submissions support our proposal.²⁸ Reasons include:
- touching of genitalia or an anus with a mouth or tongue involves an invasion of autonomy similar to the other forms of sexual intercourse, regardless of whether penetration occurs²⁹
 - the definition of “sexual intercourse” should include the touching of the anus with the mouth or tongue,³⁰ and
 - the proposal would make the definition of “sexual intercourse” gender and sex-neutral.³¹
- 9.39 Other submissions argue that the proposal would unjustifiably broaden the definition of “sexual intercourse”.³² Currently, while cunnilingus can be prosecuted as sexual assault, other forms of non-penetrative oral sexual conduct can only be prosecuted as sexual touching. However, some forms of non-penetrative sexual conduct would be regarded as a form of sexual assault under our proposal.
- 9.40 Some argue that the proposal would capture conduct that is not serious enough to constitute sexual intercourse, such as kissing the penis or wiping the penis across the face.³³
- 9.41 Some express concern that our proposal would expose some accused persons to significantly higher maximum penalties than they would face currently.³⁴ Sexual assault is a more serious offence, with a significantly higher maximum penalty (14 years’ imprisonment) than sexual touching (five years’ imprisonment).³⁵
- 9.42 Other issues relating to our proposal include:

27. See, eg, Australian Queer Students’ Network, *Preliminary Submission PCO56*, 4.

28. A Dyer, *Submission CO53* [6]; Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 1; Law Society of NSW, *Submission CO76*, 9; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5.

29. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5.

30. See, eg, ACON, *Submission CO61*, 1; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5. See also The Public Defenders, *Submission CO84*, 6.

31. NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 5.

32. See, eg, The Public Defenders, *Submission CO84*, 5–6; Legal Aid NSW, *Submission CO87*, 8.

33. The Public Defenders, *Submission CO84*, 6.

34. NSW Bar Association, *Submission CO47* [44]; Legal Aid NSW, *Submission CO87*, 8.

35. *Crimes Act 1900* (NSW) s 61KC, s 61I.

- it could lead to more litigation, potentially involving lengthy arguments about interpretation and the relevant type of conduct (for instance, whether it involved the anus and what constitutes an “anus”)³⁶
- it could increase the workload of the District Court, as some prosecutions that would currently take place in the Local Court would take place in the District Court if the conduct is charged as sexual assault,³⁷ and
- it would put NSW law “out of step” with the definitions of rape and sexual assault in other Australia states and territories, and the *Model Criminal Code*.³⁸

Our view

- 9.43 This is clearly a complex issue. Submissions diverge over whether forms of non-penetrative oral sexual conduct other than cunnilingus are serious enough to warrant inclusion in the definition of sexual intercourse.
- 9.44 After further consideration, our view is that this issue requires further consultation and research.³⁹ We recommend that further consideration be given to whether the definition of “sexual intercourse” should include the touching or stimulation with the mouth or tongue of a person to the anus or genitalia of another person.

The definitions of “sexual touching” and “sexual act” should be clearer and more inclusive

- 9.45 We do not recommend substantial changes to the definitions of “sexual touching” and “sexual act”. This is because, with two exceptions, we have not received submissions suggesting such changes.⁴⁰ As the offences are relatively new a body of case law has yet to develop on their interpretation and application.
- 9.46 However, we do recommend ways in which the definitions of “sexual touching” and “sexual act” should be amended to be made clearer and more inclusive.

The definitions should refer to “continuation”

Recommendation 9.4: The continuation of sexual touching and a sexual act

The definitions of “sexual touching” and “sexual act” in s 61HB and s 61HC of the *Crimes Act* should be amended to clarify that the definitions include the continuation of sexual touching or a sexual act, respectively.

36. Legal Aid NSW, *Submission CO87*, 8–9.

37. The offence of sexual touching is to be dealt with summarily in the NSW Local Court unless the prosecutor elects otherwise: *Criminal Procedure Act 1986* (NSW) s 260, sch 1, table 2 pt 1(1). The offence of sexual assault is dealt with on indictment in a superior court: *Criminal Procedure Act 1986* (NSW) s 5(1).

38. Legal Aid NSW, *Submission CO87*, 8–9. But see *Crimes Act 1961* (NZ) s 2 definition of “sexual connection”, s 128.

39. See, eg, Law Society of NSW, *Submission CO76*, 9; The Public Defenders, *Submission CO84*, 6.

40. A Dyer, *Submission CO02* [95]; Children’s Court of NSW, *Submission CO55*, 3.

- 9.47 Section 61HA(d) defines “sexual intercourse” to include “the continuation of sexual intercourse”. This means that sexual intercourse that continues after a person has withdrawn consent can constitute sexual assault, provided the accused also knew (in one of the ways defined) that there was no consent.⁴¹
- 9.48 There is currently no reference to the continuation of sexual touching or continuation of a sexual act in the definitions of “sexual touching” and “sexual act”. We recommend that there should be (recommended s 61HB(1A) and s 61HC(1A)).
- 9.49 This reform would clarify that a person who withdraws consent to sexual touching or a sexual act would not be treated as consenting if this conduct continues.
- 9.50 Many submissions support adding a reference to continuation to the definitions of “sexual touching” and “sexual act”.⁴² One submission notes that this would bring these definitions into line with the definition of sexual intercourse and reinforce our recommendation on the withdrawal of consent.⁴³

The definitions should use gender-neutral language

Recommendation 9.5: Gender-neutral language

The definitions of “sexual touching” and “sexual act” in s 61HB and s 61HC of the *Crimes Act* should be amended to:

- (c) remove references to the breasts of a “female person, or transgender or intersex person identifying as female”, and
- (d) clarify that “breasts” includes the breasts of any person regardless of the person’s gender or sex.

- 9.51 “Sexual touching” and a “sexual act” involve touching or an act that occurs in circumstances where a reasonable person would consider the touching or act to be sexual.⁴⁴
- 9.52 The definitions of “sexual touching” and “sexual act” list matters to be taken into account when deciding whether a reasonable person would consider the touching or act to be sexual. This includes whether the area of the body touched, doing the touching or involved in the act is a
- person’s genital area 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.⁴⁵
- 9.53 In our Draft Proposals, we proposed removing the current references to the breasts of a “female person, or transgender or intersex person identifying as female” in

41. *R v Tolmie* (1995) 37 NSWLR 660, 672.

42. A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 5; NSW Bar Association, *Submission CO47* [46]; A Dyer, *Submission CO53* [6], [56]; Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 1; UNSW School of Social Sciences, *Submission CO69*, 5; NSW Director of Public Prosecutions, *Submission CO85*, 6.

43. NSW Director of Public Prosecutions, *Submission CO85*, 6. See rec 5.3 [5.37]–[5.45].

44. *Crimes Act 1900* (NSW) s 61HB(1), s 61HC(1).

45. *Crimes Act 1900* (NSW) s 61HB(2)(a), s 61HC(2)(a).

s 61HB(2)(a) and s 61HC(2)(a). We proposed that these subsections should instead refer to “the person’s breasts”.⁴⁶ Several submissions support this proposal.⁴⁷

- 9.54 We recommend this reform (see recommended s 61HB(2) and s 61HC(2)).
- 9.55 By this recommendation, we do not intend to exclude people who are transgender or intersex from the definitions of sexual touching and sexual act. Our view is that the expression “the person’s breasts” should be read broadly to include the breasts of any person regardless of that person’s gender or sex. After further consideration, we recommend making this clear in recommended s 61HB(2)(a) and s 61HC(2)(a).⁴⁸
- 9.56 This would not mean that activity involving a person’s breasts would always be seen as sexual touching or a sexual act. It would clarify that the fact that the activity involved breasts is relevant to deciding if a reasonable person would regard the act or touching to be sexual.

The definitions should include surgically constructed body parts

- 9.57 In our view, whether the conduct involved a person’s genital area, anal area or breasts should always be relevant to the question of whether the reasonable person would consider the touching or act be sexual. This is regardless of whether these body parts are surgically constructed or not.
- 9.58 When read alongside recommended s 61H(4), the references to “genital area”, “anal area” and “breasts” in s 61HB(2)(a) and s 61HC(2)(a) would cover those body parts if they are surgically constructed.

In summary

- 9.59 In this Chapter, we recommend changes to the definitions of “sexual intercourse”, “sexual touching” and “sexual act” to make them more inclusive of all genders, sexes and sexual orientations. We also recommend that the definitions refer to the continuation of intercourse, touching or act.
- 9.60 In the next, and final, Chapter, we turn our attention to the measures that are required to ensure that the reforms recommended in this Report are implemented effectively.

46. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019) proposal 9.4 [9.8].

47. NSW Bar Association, *Submission CO47* [46]; A Dyer, *Submission CO53* [6], [56]; Rape and Domestic Violence Services *Submission CO65* [13.1]; Australia’s National Research Organisation for Women’s Safety, *Submission CO67*, 1; UNSW School of Social Sciences, *Submission CO69*, 4–5; Australian Queer Students’ Network, *Submission CO72*, 1; NSW Director of Public Prosecutions, *Submission CO85*, 6.

48. NSW Director of Public Prosecutions, *Submission CO85*, 6.

10. Implementing and monitoring the reforms

In brief

To ensure that any changes to the law are operating as intended, certain sections of the *Crimes Act* and the *Criminal Procedure Act* should be subject to regular review. So that the reforms can achieve their full impact, an education campaign should accompany their enactment. In the longer term, there must be broader research and community education about consent, sexual activity and the law.

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- 10.1 In this Report, we have recommended reforms to the *Crimes Act* and *Criminal Procedure Act*. These reforms are intended to simplify and modernise the law concerning consent and knowledge of non-consent, clarify its objectives, and set clear standards for sexual activity.
- 10.2 In this Chapter, we consider how to ensure the successful implementation of these reforms.

There is a need for regular law reform, review and education

- 10.3 Regular law reform is essential to enable the justice system to respond effectively to criminal behaviour, including sexual offending. If the law reflects an outdated or incorrect understanding of how and why sexual offences occur, then it will not result in just outcomes.
- 10.4 However, as one submission writes, law reform alone is not enough:

[L]aw reform is the first step. It sets the tone and a framework for change. For ultimately, if we want to change community attitudes and set new norms of acceptable behaviour, behaviour which respects the right of every person to safety, justice and wellbeing, then we first need to change the law.

The next essential step will be to address the culture of the criminal justice system to ensure processes are accessible and trauma-informed for those seeking protection and justice.¹

1. Women's Safety NSW, *Submission CO74*, 14.

- 10.5 Since sexual offending is a fraught and contested area, where misconceptions are pervasive, sexual offence law reform may be particularly susceptible to implementation problems. To reduce the risk of this, we recommend that any changes to the law resulting from this Report are accompanied by:
- regular statutory reviews, which consider how the amended laws are being interpreted and what impact the changes are having on criminal justice outcomes, and
 - an education package for participants in the criminal justice system, to convey their objectives, principles and intended effects.
- 10.6 We recommend that the NSW Department of Communities and Justice fund research into the experience of sexual offence complainants, with a view to addressing the high attrition rates in sexual offence matters. While outside the scope of our review, these attrition rates impede just outcomes, and accordingly deserve specific attention.
- 10.7 We recommend that information about the changes to the law resulting from our recommended reforms be incorporated in consent education initiatives in the broader community.
- 10.8 There is a real risk that without these measures, the intentions behind our recommendations will not translate into practice.

The reforms should be subject to statutory review

Recommendation 10.1: Statutory review

- (1) A new section should be inserted into the *Crimes Act* requiring the Minister to undertake a review of s 61H, s 61HA, s 61HB, s 61HC and s 61HE (or any sections that are enacted in response to this Report to replace the existing s 61HE).
- (2) A new section should be inserted into the *Criminal Procedure Act* requiring the Minister to undertake a review of s 292 (or any section that is enacted in response to this Report that contains jury directions in relation to consent), s 293, s 293A, s 294 and s 294AA.
- (3) These reviews should:
 - (a) determine whether the policy objectives of these provisions remain valid and whether the terms of these provisions remain appropriate for securing those objectives
 - (b) be conducted as soon as possible after each five year period after the date of commencement of the amending Act enacted in response to our Report, and
 - (c) be tabled in each House of Parliament within 12 months after the review is required to be undertaken.
- (4) The review referred to at (2) should consider the relationship between any other reforms which are enacted in response to this Report and s 293 of the *Criminal Procedure Act*, including recommended s 61HJ(1)(a) of the *Crimes Act*.

- 10.9 Several submissions consider that there should be a regular statutory review of the reforms resulting from our recommendations.² These submissions argue that a review requirement would:
- ensure the impacts of the reforms are monitored
 - allow government to assess whether they are working effectively
 - provide an opportunity to identify any unintended consequences of the reforms, and
 - enable prompt and responsive amendments to address any identified problems.³
- 10.10 We agree that any amending Act resulting from our Report should contain a statutory review mechanism.

The reviews should be thorough and occur regularly

- 10.11 A statutory review process accompanied the 2007 reforms.⁴ However, the 2007 reforms only required one review. Some submissions suggest that there should be regular, periodic reviews.⁵ We agree, and recommend that the reviews be conducted every five years.
- 10.12 Consent and sexual assault are highly contested issues. Community attitudes can change rapidly and expert knowledge and opinion is produced and updated frequently. Regular reviews of the reforms are necessary to ensure that the law continues to reflect experience and public expectations.
- 10.13 Submissions also suggest that appropriate organisations to conduct a review may include Australia's National Research Organisation for Women's Safety, universities, or an expert taskforce.⁶ Consistent with common practice for statutory reviews, the Minister responsible for the legislation (currently the Attorney General) should be required to undertake the reviews.
- 10.14 It would be advisable, though, for the Minister to consult widely and draw on the expertise of such organisations in conducting the reviews. We recommend that a review should, at a minimum:

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2. Domestic Violence NSW, *Submission CO60*, 3; Australia's National Research Organisation for Women's Safety, *Submission CO67*, 6; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, rec 7; Community Legal Centres NSW, *Submission CO73*, 5; Women's Safety NSW, *Submission CO74*, 4; Rape and Domestic Violence Services Australia, *Submission CO65*, rec 3, rec 4 [6.1]–[6.2]; Women's Legal Service NSW, *Submission CO70*, rec 24 [6], [7.24], [47].
 3. Domestic Violence NSW, *Submission CO60*, 3; Rape and Domestic Violence Services Australia, *Submission CO65* [6.1]; Women's Legal Service NSW, *Submission CO70* [6].
 4. *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) sch 1 [4]. A review was published in October 2013: NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013).
 5. Community Legal Centres NSW, *Submission CO73*, 5; Rape and Domestic Violence Services Australia, *Submission CO65*, rec 4 [6.2]; Women's Legal Service NSW, *Submission CO70*, rec 24 [7.24], [89].
 6. Domestic Violence NSW, *Submission CO60*, 5; Rape and Domestic Violence Services Australia, *Submission CO65*, rec 5 [6.3]; Women's Legal Service NSW, *Submission CO70*, rec 25 [90]; Community Legal Centres NSW, *Submission CO73*, 5.

- consider a wide range of perspectives from legal and non-legal sectors⁷
 - consider the experiences of complainants, and
 - be informed by research about sexual offences, including from NSW.
- 10.15 Recommended s 583 (*Crimes Act*) and recommended s 368 (*Criminal Procedure Act*) list certain sections of the Acts that should be reviewed (we discuss these “reviewable provisions” below). These recommended sections would require the Minister “to determine whether the policy objectives of the [reviewable] provisions remain valid and whether the terms of the provisions remain appropriate for securing those objectives”. This is a common way to describe the terms of reference of a statutory review in NSW.
- 10.16 In Chapter 4, we explain that one of our key recommendations is that the *Crimes Act* should expressly recognise certain principles that underpin the communicative model of consent.⁸ Recommended s 61HF provides that an objective of our recommended new Subdivision of the *Crimes Act* is to recognise these principles. A review of the new Subdivision should consider whether this objective remains valid and whether it has been realised by any reforms (if enacted).
- 10.17 Among other things, the reviews should consider issues such as whether the reforms arising from this Report have:
- influenced the frequency with which arguments based on misconceptions about consensual and non-consensual sexual activity are used in sexual offence trials
 - reduced the over-emphasis in trials on whether the complainant resisted or otherwise demonstrated a lack of consent
 - enabled the law better to respond to situations in which a complainant “freezes” and does not say or do anything to communicate consent
 - improved the way the law treats sexual activity involving intoxicated complainants
 - improved the way the law responds to non-consensual sexual activity occurring in the context of domestic and family violence, and
 - led to a greater emphasis on whether the accused person took steps to ascertain consent and, if so, whether those steps were adequate.
- 10.18 This list is not, and should not be viewed as, exhaustive. However, it is intended to illustrate some of the changes we seek to achieve.

Both the substantive and procedural law should be reviewed

- 10.19 The review process should cover the new Subdivision that we recommend should replace the existing s 61HE.⁹ The definitions of sexual intercourse, sexual touching

7. Rape and Domestic Violence Services Australia, *Submission CO65*, rec 5 [6.3]; Community Legal Centres NSW, *Submission CO73*, 5.

8. See rec 4.3 [4.9]–[4.12], [4.20]–[4.21].

9. See rec 4.1 [4.2].

and sexual act, and related definitions, would also be reviewable.¹⁰ In Chapter 9, we recommend reforms to these definitions.¹¹

- 10.20 The jury directions relating to consent, which we recommend should be inserted into the *Criminal Procedure Act* as recommended s 292, should also be reviewed.¹²
- 10.21 The statutory review should also consider how s 293A, s 294 and s 294AA of the *Criminal Procedure Act* are operating in practice. As we discuss in Chapter 8, existing s 293A and s 294 already provide for warnings about differences in a complainant's account and a delay in, or lack of, complaint. Section 294AA prohibits judges from warning the jury that complainants are an unreliable class of witness or that it is dangerous to convict on the uncorroborated evidence of a particular complainant.¹³
- 10.22 We recommend procedural changes to s 293A and s 294, to ensure that judges may give the warnings at any time during the trial.¹⁴ We do not recommend any substantive changes to s 293A, s 294 or s 294AA. We consider that s 293A, s 294 and s 294AA should be reviewed to determine whether the terms of these provisions remain appropriate for securing the policy objectives behind them.¹⁵
- 10.23 The review should also consider how any other reforms which are enacted interact with s 293 of the *Criminal Procedure Act*, which governs the admissibility of sexual experience evidence. In particular, some submissions are concerned about how recommended s 61HJ(1)(a), which provides that a person does not consent if the person does not say or do anything to communicate consent, might affect the operation of s 293 if it is enacted. Some say it could lead to increased cross-examination at trial about a complainant's past consensual sexual activity and how consent was communicated in those instances.¹⁶ If so, this could result in further trauma for complainants, undermining the objectives behind s 293.¹⁷
- 10.24 A statutory review process should therefore monitor the impact of recommended s 61HJ(1)(a) (if enacted) on the use of sexual experience evidence in trials, to determine whether it has led to any unintended consequences (recommended s 368(4)(b) of the *Criminal Procedure Act*).¹⁸
- 10.25 The statutory review provision (recommended s 368) refers to s 294CB instead of s 293. This is because s 293 has been renumbered, and moved to a different subdivision to the one where our recommended jury directions and the existing statutory directions are located.¹⁹ However, the substance of s 293 has not changed.

10. *Crimes Act 1900* (NSW) s 61H, s 61HA, s 61HB, s 61HC.

11. See rec 9.2, rec 9.4–9.5.

12. See rec 8.3–8.7.

13. See [8.17]–[8.19], [8.22]–[8.23], [8.28].

14. Rec 8.8.

15. See [8.137]–[8.139].

16. Australian Lawyers Alliance, *Submission CO44* [5]–[6]; NSW Young Lawyers Criminal Law Committee, *Submission CO86*, 4.

17. Australian Lawyers Alliance, *Submission CO44* [6].

18. See [6.50]–[6.52].

19. See Appendix D, Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the *Criminal Procedure Act 1986*.

An education program should accompany the reforms

Recommendation 10.2: Education about the reforms

- (4) The NSW Department of Communities and Justice should fund the design and delivery of a targeted education program to accompany any reforms resulting from this Report.
- (5) The education program should be available, at a minimum, to judges, prosecutors, criminal defence lawyers and police.
- (6) The education program should include information about the nature and intended effect of the reforms, as well as research about trends and themes in sexual offending.

- 10.26 In this Report, we highlight concerns that the law of consent in NSW is not achieving its objectives. Despite several law reform processes over several decades,²⁰ conviction rates in sexual assault cases have remained consistently lower than for other offences and the experience of complainants at trial continues to be reported as being unsatisfactory.²¹
- 10.27 One explanation for this is that the legislative change alone may have a limited impact on the criminal justice system as a whole. The effectiveness of legislative reforms is also influenced by factors such as the availability of resources, institutional structures, and social and political conditions.
- 10.28 In the context of sexual offence law, the culture, values and attitudes of participants in the criminal justice system can be particularly influential. If police officers, lawyers and judges do not apply sexual offence laws consistently with the laws' objectives, the intentions behind law reform may not translate into practice. Researchers point to a number of other places where this has occurred including Tasmania,²² New Zealand,²³ England and Wales,²⁴ and Canada.²⁵
- 10.29 Some submissions express concerns that the existing culture within the NSW criminal justice system may prevent future reforms, including any resulting from this

20. See [1.6]–[1.21], [3.3]–[3.18], [3.29]–[3.31].

21. See, eg, Community Legal Centres NSW, *Submission CO25*, 16–17; Rape and Domestic Violence Services Australia, *Submission CO28* [12]; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO23*, 2.

22. 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) 188–189.

23. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 480–481.

24. C McGlynn, "Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?" in C McGlynn and V E Munro (ed), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 139, 142–143; 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, 281–283.

25. See, eg, L Vandervort, "Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*" in E A Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) 111, 113–114; H Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in E A Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) 613, 614, 624.

Report, from having their intended effect.²⁶ As we discuss in Chapter 2, evidence suggests that some people continue to hold assumptions and misconceptions about sexual behaviour, sexual relations and sexual offending.²⁷

- 10.30 The persistence of such misconceptions makes sexual offences particularly vulnerable to a “justice gap”²⁸ between the intended, and actual, effects of reforms. A Canadian researcher observes that:

[I]nterpretation and enforcement of the sexual assault laws is very easily confounded by error due to the strong influence of invalid generalizations about male and female gender roles and sexuality — myths and stereotypes, generalizations about the links between sexual activity, gender, race, consent, and a wide range of personal and social factors and characteristics. Legal deliberation about sexual assault is known to be easily distorted by attitudes that reflect gender and racial bias and prejudice. Some of that prejudice and attitudinal bias is conscious, but much of it is often outside ordinary conscious awareness.²⁹

Education is necessary to address cultural barriers to implementation

- 10.31 In our view, effective implementation of amendments to sexual offence law will require that participants in the criminal justice system are educated about them. Several submissions argue that education is the most effective way to transform culture and attitudes.³⁰
- 10.32 We recommend that the NSW Department of Communities and Justice fund the design and delivery of a comprehensive education program about the reforms. At a minimum, this should target:
- judicial officers³¹
 - prosecutors and defence lawyers,³² and
 - police officers.³³

26. See, eg, Community Legal Centres NSW, *Submission CO25*, 16–17; Women’s Legal Service NSW, *Submission CO27* [22]–[24], [26]–[27]; Rape and Domestic Violence Services Australia, *Submission CO28* [14]–[17], [61].

27. See [2.40].

28. J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 1.

29. L Vandervort, “Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*” in EA Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press, 2012) 111, 113.

30. See, eg, NSW Department of Family and Community Services, *Submission CO03*, 1–2; Community Legal Centres NSW, *Submission CO25*, 17; Women’s Legal Service NSW, *Submission CO27* [9], [26].

31. See, eg, Inner City Legal Centre, *Preliminary Submission PCO44* [19]; M Dobbie, *Preliminary Submission PCO75*, 2; Northern Sydney Sexual Assault Service, *Preliminary Submission PCO81*, 1; Women Lawyers Association of NSW, *Preliminary Submission PCO110*, 1; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 15; L Coates, *Submission CO16*, 7; Law Society of NSW, *Submission CO18*, 2–3; Community Legal Centres NSW, *Submission CO25*, 18; Domestic Violence NSW, *Submission CO29*, 8; Legal Aid NSW, *Submission CO33*, 6.

32. See, eg, M Dobbie, *Preliminary Submission PCO75*, 2; Community Legal Centres NSW, *Submission CO25*, 18; Legal Aid NSW, *Submission CO33*, 6.

10.33 The education program must explain the objectives of the reforms (see recommended s 61HF of the *Crimes Act*) and how the reforms change the law. It could also:

- include content about the social context of sexual assault, including its gendered nature³⁴
- explain what research says about trauma and how it affects responses to sexual assault (including the “freeze” response)³⁵
- explain what research says about the effects of intoxication on behaviour and memory³⁶
- explain particular effects of sexual assault on certain groups, including Indigenous people, people from culturally and linguistically diverse backgrounds and LGBTQIA+ people³⁷
- outline best practice, trauma-informed ways to communicate with complainants³⁸
- explain the ethical and legal limitations on examination and cross-examination of complainants (in the case of lawyers and judges)³⁹
- identify and challenge misconceptions and assumptions about sexual offences,⁴⁰ and
- include information on the nature and dynamics of domestic violence.⁴¹

33. See, eg, Inner City Legal Centre, *Preliminary Submission PCO44*, [19]; Community Legal Centres NSW, *Submission CO25*, 18; Women’s Legal Service NSW, *Submission CO27*, rec 21 [14.21], [92], [94]; Domestic Violence NSW, *Submission CO29*, 8; Legal Aid NSW, *Submission CO33*, 6; Western NSW Community Legal Centre Inc and Western Women’s Legal Support, *Submission CO34*, rec 7.

34. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) rec 49(x).

35. See, eg, C Goosen, *Preliminary Submission PCO26*, 1; M Dobbie, *Preliminary Submission PCO75*, 2; Women Lawyers Association of NSW, *Preliminary Submission PCO110*, 1; A Loughnan, C McKay, T Mitchell and R Shackel, *Submission CO09*, 15; Community Legal Centres NSW, *Submission CO25*, 18; Women’s Legal Service NSW, *Submission CO27* [92]; Domestic Violence NSW, *Submission CO29*, 8.

36. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) rec 49(viii).

37. Community Legal Centres NSW, *Submission CO25*, 18.

38. E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) rec 49(iv).

39. See, eg, E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) rec 49(iii).

40. Community Legal Centres NSW, *Submission CO25*, 18. See also Legal Aid NSW, *Submission CO33*, 6.

41. Women’s Legal Service NSW, *Submission CO27*, rec 21 [14.21]–[14.23], [94]; Western NSW Community Legal Centre Inc and Western Women’s Legal Support, *Submission CO34*, rec 7.

Government should fund research into complainant experiences

Recommendation 10.3: Research into complainant experiences

The NSW Department of Communities and Justice should fund research about the experiences of complainants of sexual offences in the NSW criminal justice system.

- 10.34 The experience of complainants in the criminal justice system is a fundamental consideration in any reform process affecting sexual offence law and practice. This is especially important given the high attrition rates for sexual offences. Many submissions and survey responses comment on complainant experiences⁴² and these perspectives have informed our review, but our review is constrained by our terms of reference. There is in any event a lack of recent research about the experiences of complainants.
- 10.35 A contemporary and comprehensive study of complainants' experiences of sexual offence laws and processes would give future law reformers a body of evidence to draw upon. We therefore recommend that the NSW Department of Communities and Justice separately fund research into the experiences of complainants of sexual offences in the criminal justice system.
- 10.36 Many submissions to this review highlight the value of a report produced by the NSW Department for Women in 1996, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* ("Heroines of Fortitude").⁴³ This ground-breaking report studied 150 sexual assault trials heard in the NSW District Court over 12 months. It made comprehensive and broad-ranging findings about the conduct of trials, including:
- the availability of support services
 - common themes in the cross-examination of complainants, and
 - the extent to which lawyers and judges complied with rules of evidence.⁴⁴
- 10.37 The *Heroines of Fortitude* report painted a comprehensive picture of the experience of being a complainant in a sexual offence trial in NSW. It contained several recommendations for reform, many of which have been implemented.⁴⁵
- 10.38 No similar study has been conducted in the nearly 25 years since the *Heroines of Fortitude* report, despite significant reforms to sexual offence law and procedure since then. Many submissions support commissioning another, similar review to

42. See, eg, Victims of Crime Assistance League Inc NSW, *Submission CO11*, 3–4; Women's Legal Service NSW, *Submission CO27* [87]–[91]; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission CO30*, 6–7, 11; Western NSW Community Legal Centre Inc and Western Women's Legal Support, *Submission CO34*, 5–6; NSW Law Reform Commission, Consent Review Survey, Response #141 (Qu 4), Response 2954 (Qu 4), Response 2977 (Qu 4), Response 3305 (Qu 4).

43. See, eg, J Quilter, *Submission CO07*, 4; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO23*, 5; J Quilter and L McNamara, *Submission CO66*, 4; Women's Legal Service NSW, *Submission CO70* [80]–[81].

44. See, eg, NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) 141, 179–181, 248–249, 251–252.

45. See, eg, NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) rec 5, rec 10.

assess the impact of reforms introduced since *Heroines of Fortitude*.⁴⁶ Such a report would contribute to a growing body of research from places outside NSW that considers complainant experiences.⁴⁷

10.39 The research could:

- consider transcripts or audio recordings of sexual offence trials
- interview complainants about their experiences
- consider the impact of reforms, including any reforms implemented as a result of this Report
- consider both the substantive and procedural law, and
- make recommendations for improvements to law and procedure.

10.40 We recognise that there are practical issues with this type of research. It generally requires transcription of court proceedings, which can be expensive.⁴⁸ Another significant barrier is access to court proceedings, transcripts or judgments. Only a small proportion of District Court judgments are published,⁴⁹ and people who are not parties to a proceeding do not have a general right to access District Court files.⁵⁰ A range of laws limit access to complainants' evidence and personal information.⁵¹ Issues relating to access to court information will be considered in the Commission's forthcoming *Open Justice Review: Court and Tribunal Information: Access, Disclosure and Publication*.⁵²

10.41 In our view, the benefits of conducting this research outweigh the cost of addressing these barriers. The *Heroines of Fortitude* report is a strong example of the quality of research that can be produced when such barriers are overcome.

46. J Quilter, *Submission CO07*, 4; J Quilter and L McNamara, *Submission CO66*, 4–5; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 5; Women's Legal Service NSW, *Submission CO70* [80]–[91]; Community Legal Centres NSW, *Submission CO73*, 5; Women's Safety NSW, *Submission CO74*, 4, 14–15.

47. See, eg, 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); E Craig, "Capacity to Consent to Sexual Risk" (2014) 17 *New Criminal Law Review* 103; E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

48. See, District Court of NSW, "Forms and Fees for General Services" (27 August 2020) <www.districtcourt.nsw.gov.au/district-court/forms-and-fees/forms-and-fees-for-general-court-services.html> (retrieved 18 September 2020).

49. L McNamara and J Quilter, *Preliminary Submission PCI14* to NSW Law Reform Commission, *Open Justice Review: Court and Tribunal Information: Access, Disclosure and Publication* (28 May 2019) 2.

50. See, eg, *District Court Rules 1973* (NSW) pt 52 r 3(2); *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, 62 NSWLR 512 [31].

51. See, eg, *Criminal Procedure Act 1986* (NSW) s 291; *Crimes Act 1900* (NSW) s 578A.

52. For more information, see NSW Law Reform Commission, *Open Justice Review: Court and Tribunal Information: Access, Disclosure and Publication* <www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Courtinformation/Project_update.aspx> (retrieved 17 September 2020).

Education within the broader community

Recommendation 10.4: Education within the broader community

Government initiatives directed to educating the broader community about consent and sexual activity should be reviewed to ensure that they incorporate, and are consistent with, the reforms arising from this Report.

- 10.42 Educating people working within the criminal justice system is an immediate priority. This is needed to ensure that our recommended reforms are implemented properly and in the spirit of their objectives. However, education must extend to the broader community. This is a long-term project.
- 10.43 The prevailing attitudes and culture within wider society shape how the criminal justice system operates. Many submissions argue that the most effective way to bring about lasting change is through broader cultural transformation.⁵³
- 10.44 Fortunately, this work is already in progress. There are already various consent education initiatives in NSW. Information about the changes to the law resulting from the recommended reforms should be incorporated in existing government-funded and government-delivered initiatives. We summarise the key initiatives briefly below.

Existing education initiatives

- 10.45 The Australian curriculum (implemented in NSW by the NSW Education Standards Authority) requires that students from year 3 onwards learn about relationships and sexuality.⁵⁴ In NSW public schools (although not necessarily in private schools),⁵⁵ students learn about many aspects of relationships, sexuality and sexual health, including responsibilities in sexual relationships.⁵⁶
- 10.46 All Australian universities have, or have committed to developing, dedicated training and education programs for staff and students about sexual assault, sexual harassment and respectful relationships.⁵⁷ Many of these programs were developed

53. See, eg, University of Technology Sydney, *Preliminary Submission PCO80*, 4; Victims of Crime Assistance League Inc NSW, *Submission CO11*, 9; NSW Young Lawyers Criminal Law Committee, *Submission CO21*, 8; Women's Legal Service NSW, *Submission CO27* [26]; Rape and Domestic Violence Services Australia, *Submission CO65* [5.7]–[5.10]; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission CO68*, 6–7; Community Legal Centre NSW, *Submission CO73*, 2.

54. See "Health and Physical Education" (2019) Australian Curriculum, Assessment and Reporting Authority <www.australiancurriculum.edu.au/f-10-curriculum/health-and-physical-education/> (retrieved 17 September 2020).

55. N Sekulovska, "Religious Schools Need to Acknowledge that Students are Sexual Beings' Says Expert" (23 May 2018) *The Feed* <www.sbs.com.au/news/the-feed/religious-schools-need-to-acknowledge-that-students-are-sexual-beings-says-expert> (retrieved 17 September 2020).

56. NSW, Department of Education, "Sexuality and Sexual Health Education in NSW Government Schools" (21 April 2016) <cpb-ap-se2.wpmucdn.com/learning.schools.nsw.edu.au/dist/c/8/files/2015/06/Fact-sheet-sexuality-education-25roez1.pdf> (retrieved 17 September 2020).

57. Australian Human Rights Commission, *Audit of University Responses to the Change the Course Report: Snapshot of Progress: August 2018* (2018) 1.

in response to the Australian Human Rights Commission's report into sexual assault and sexual harassment at Australian universities.⁵⁸

- 10.47 There are also education programs and resources for young people outside school and university curricula. These include:
- *Love Bites*, a school-based Domestic and Family Violence and Sexual Assault prevention program designed by the National Association for Prevention of Child Abuse and Neglect and delivered across Australia⁵⁹
 - *Let's Talk about Consent*, a specialised crime prevention and education workshop delivered by the Children's Legal Service Community Legal Education Unit at Legal Aid NSW,⁶⁰ and
 - the "Consent" resources from *TeachLaw*, a national, online platform to assist teachers in educating children and young people about the law⁶¹
 - *Sex, Safety and Respect: Understanding Consent*, a workshop for university student leaders run by Rape and Domestic Violence Services Australia,⁶² and
 - *The Practical Guide to Love, Sex and Relationships*, a teaching resource prepared by the Australian Research Centre in Sex, Health and Society at La Trobe University.⁶³
- 10.48 In December 2018, the NSW Government launched a new community campaign called #makenodoubt. This was the first stage of the NSW Government's commitment under the *NSW Sexual Assault Strategy 2018–2021* to "use community education to address the role the bystander and community can play in identifying sexual offending and speaking out".⁶⁴ It involves a video, public billboards, and social media campaign.

In summary

- 10.49 Law reform is essential to modernising the way the criminal justice system responds to sexual offending. Any reforms enacted pursuant to this Report should be subject

58. See Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017).

59. NAPCAN, "Love Bites" (2020) <www.napcan.org.au/Programs/love-bites/?gclid=EAlalQobChMI0ZKihd2E6AIVVRSPCh2baAWiEAAYAAAEgKE-vD_BwE> (retrieved 17 September 2020).

60. Legal Aid NSW, *Submission CO33*, 5.

61. TeachLaw, "Consent: Years 10–12" (June 2019) *Youth Law Australia* <teachlaw.org.au/topics/new-south-wales/consent/> (retrieved 17 September 2020).

62. Rape and Domestic Violence Services Australia, "Training: Sex, Safety and Respect: Understanding Consent" (2019) <www.rape-dvservices.org.au/training-and-professional-services/for-students-educators-and-organisations/training-sex-safety-respect> (retrieved 17 September 2020).

63. The Australian Research Centre in Sex, Health and Society, La Trobe University, "*The Practical Guide to Love, Sex and Relationships: A Teaching Resource for Years 7 to 10*" (2015) <www.lovesexrelationships.edu.au/> (retrieved 14 August 2020).

64. NSW, Communities and Justice, "Make No Doubt: Consent at the Heart of New Campaign" (Media Release, 13 December 2018) <www.facs.nsw.gov.au/about/media/releases/archive/make-no-doubt-consent-at-the-heart-of-new-campaign> (17 September 2020).

to regular statutory review, to ensure they are achieving their objectives and as circumstances and behaviour change in future.

10.50 Education should be provided to those involved in the criminal justice system at the time the reforms are rolled out, to clearly explain their objectives and effects.

10.51 The NSW Government should:

- fund research into the experiences of complainants of sexual offences in the criminal justice system, and
- review initiatives at educating the broader community about consent and sexual activity to ensure that they incorporate and are consistent with any reforms that arise out of this Report.

Appendix A

Crimes Act 1900 (NSW) s 61HA (as at time of reference)

Crimes Act 1900

Part 3 Offences against the person

Division 10 Offences in the nature of rape, offences relating to other acts of sexual assault etc

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 B

Crimes Act 1900 (NSW) s 61HE (as at time of publication)

Crimes Act 1900

Part 3 Offences against the person

Division 10 Sexual offences against adults and children

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.

Appendix C

Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Crimes Act 1900

Crimes Act 1900

Part 3 Offences against the person

Division 10 Sexual offences against adults and children

Subdivision 1 Interpretation

61H Definitions

(1) In this Division—

cognitive impairment—see section 61HD.

sexual act—see section 61HC.

sexual intercourse—see section 61HA.

sexual touching—see section 61HB.

(1A) (Repealed)

(2) For the purposes of this Division, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person.

(3) For the purposes of this Act, a person who incites another person to carry out sexual touching or a sexual act, as referred to in a provision of Subdivision 3, 4, 6, 7 or 11, is taken to commit an offence on the other person.

(4) It is not relevant for the purposes of this Division whether a part of the body referred to in this Division is surgically constructed or not.

61HA Meaning of “sexual intercourse”

For the purposes of this Division, *sexual intercourse* means—

(a) the penetration to any extent of the genitalia or anus of a person by—

(i) any part of the body of another person, or

(ii) any object manipulated by another person,

except where the penetration is carried out for proper medical purposes, or

(b) the introduction of any part of the genitalia of a person into the mouth of another person, or

(c) the stimulation of the female genitalia with the mouth or tongue, or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

61HB Meaning of “sexual touching”

(1) For the purposes of this Division, *sexual touching* means a person touching another person—

(a) with any part of the body or with anything else, or

(b) through anything, including anything worn by the person doing the touching or by the person being touched,

in circumstances where a reasonable person would consider the touching to be sexual.

- (1A) The continuation of sexual touching as defined in subsection (1) is also **sexual touching** for the purposes of this Division.
- (2) The matters to be taken into account in deciding whether a reasonable person would consider touching to be sexual include—
- (a) whether the area of the body touched or doing the touching is the person's genital area, **anal area or breasts—**
 - (i) **whether or not the breasts are sexually developed, and**
 - (ii) **regardless of the person's gender or sex, or**
 - (b) whether the person doing the touching does so for the purpose of obtaining sexual arousal or sexual gratification, or
 - (c) whether any other aspect of the touching (including the circumstances in which it is done) makes it sexual.
- (3) Touching done for genuine medical or hygienic purposes is not sexual touching.

61HC Meaning of “sexual act”

- (1) For the purposes of this Division, **sexual act** means an act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual.
- (1A) The continuation of a sexual act as defined in subsection (1) is also a **sexual act** for the purposes of this Division.
- (2) The matters to be taken into account in deciding whether a reasonable person would consider an act to be sexual include—
- (a) whether the area of the body involved in the act is a person's genital area, **anal area or breasts—**
 - (i) **whether or not the breasts are sexually developed, and**
 - (ii) **regardless of the person's gender or sex, or**
 - (b) whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification, or
 - (c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual.
- (3) An act carried out for genuine medical or hygienic purposes is not a sexual act.

Subdivision 1A Consent and knowledge about consent

61HF Objective

An objective of this Subdivision is to recognise the following—

- (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.

61HG Application of Subdivision

- (1) This Subdivision applies to offences, or attempts to commit offences, against sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.
- (2) This Subdivision sets out—
 - (a) the circumstances in which a person consents or does not consent to a sexual activity, and

- (b) the circumstances in which a person knows or is taken to know that another person does not consent to a sexual activity.

61HH Definitions

In this Subdivision—

consent has the same meaning as in section 61HI.

sexual activity means sexual intercourse, sexual touching or a sexual act.

61HI Consent generally

- (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 before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.
- (3) 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.
- (4) 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.

Note. For example, a person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.
- (5) 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 any other occasion, or
 - (b) another person on that or any other occasion.

61HJ Circumstances in which there is no consent

- (1) A person does not consent to a sexual activity if—
 - (a) the person does not say or do anything to communicate consent, or
 - (b) the person does not have the capacity to consent to the sexual activity, or
 - (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
 - (d) the person is unconscious or asleep, or
 - (e) the person participates in the sexual activity because of force, fear of force or fear of harm of any kind to the person, another person, an animal or property, regardless of—
 - (i) when the force or the conduct giving rise to the fear occurs, or
 - (ii) whether it occurs in a single instance or as part of an ongoing pattern, or
 - (f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
 - (i) when the coercion, blackmail or intimidation occurs, or
 - (ii) whether it occurs in a single instance or as part of an ongoing pattern, or
 - (g) the person participates in the sexual activity because the person or another person is unlawfully detained, or
 - (h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or
 - (i) the person participates in the sexual activity because the person is mistaken about—
 - (i) the nature of the sexual activity, or

- (ii) the purpose of the sexual activity (including about whether the sexual activity is for health, hygienic or cosmetic purposes), or
 - (j) the person participates in the sexual activity because the person is mistaken—
 - (i) about the identity of the other person, or
 - (ii) that the person is married to the other person, or
 - (k) the person participates in the sexual activity because of a fraudulent inducement.
- (2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.

61HK Knowledge about consent

- (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) For the purposes of making any finding under this section, the trier of fact—
- (a) must have regard to all the circumstances of the case, including whether the accused person said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person consented to the sexual activity, and if so, what the accused person said or did, and
 - (b) must not have regard to any self-induced intoxication of the accused person.

Part 16 Miscellaneous enactments

583 Review of certain provisions relating to consent

- (1) The Minister is to undertake reviews of the reviewable provisions to determine whether the policy objectives of the provisions remain valid and whether the terms of the provisions remain appropriate for securing those objectives.
- (2) The reviews are to be undertaken as soon as possible after each 5 year period after the date of commencement of the *Crimes Amendment (Consent Review) Bill 2020*.
- (3) A report on the outcome of each review is to be tabled in each House of Parliament within 12 months after the review is required to be undertaken.
- (4) In this section—
- reviewable provisions* means—
- (a) sections 61H, 61HA, 61HB and 61HC, and
 - (b) Subdivision 1A of Division 10 of Part 3.

Appendix D

Indicative consolidation of Crimes Amendment (Consent Review) Bill 2020 into the Criminal Procedure Act 1986

Criminal Procedure Act 1986

Part 5 Evidence in sexual offence proceedings

Division 1 Evidence in certain sexual offence proceedings

Subdivision 3 Directions to jury

292 Directions in relation to consent

- (1) This section applies to a trial of a person for an offence, or attempt to commit an offence, against section 61I, 61J, 61JA, 61KC, 61KD, 61KE or 61KF of the *Crimes Act 1900*.
- (2) In a trial to which this section applies, the judge must give any one or more of the directions in this section—
 - (a) if there is good reason to give the direction, or
 - (b) if requested to give the direction by a party to proceedings, unless there is a good reason not to give the direction.
- (3) A judge is not required to use a particular form of words in giving a direction in this section.
- (4) A judge may, as the judge sees fit—
 - (a) give a direction in this section at any time during a trial, and
 - (b) give the same direction on more than one occasion during a trial.
- (5) **Circumstances in which non-consensual sexual activity occurs**
Direction—
Non-consensual sexual activity can occur—
 - (a) in many different circumstances, and
 - (b) between many different kinds of people including—
 - (i) people who know one another, or
 - (ii) people who are married to one another, or
 - (iii) people who are in an established relationship with one another.
- (6) **Responses to non-consensual sexual activity**
Direction—
 - (a) there is no typical or normal response to non-consensual sexual activity, and
 - (b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
 - (c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.
- (7) **Lack of physical injury, violence or threats**
Direction—

- (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
- (b) the absence of injury or violence, or threats of injury or violence, does not mean that a person is not telling the truth about an alleged sexual offence.

(8) Responses to giving evidence

Direction—

- (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and
- (b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

(9) Behaviour and appearance of complainant

Direction—

It should not be assumed that a person consented to a sexual activity because the person—

- (a) wore particular clothing or had a particular appearance, or
- (b) consumed alcohol or any other drug, or
- (c) was present in a particular location.

293A Direction may be given by Judge if differences in complainant's account

- (1) This section applies if, on the trial of a person for a prescribed sexual offence, the Judge, after hearing submissions from the prosecution and the accused person, considers that there is evidence that suggests a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability.
- (2) In circumstances to which this section applies, the Judge may **direct** the jury—
 - (a) that experience shows—
 - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time, and
 - (ii) trauma may affect people differently, including affecting how they recall events, and
 - (iii) it is common for there to be differences in accounts of a sexual offence, and
 - (iv) both truthful and untruthful accounts of a sexual offence may contain differences, and
 - (b) that it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.

(2A) A judge may, as the judge sees fit—

- (a) give a direction in this section at any time during a trial, and
- (b) give the same direction on more than one occasion during a trial.

(3) In this section—

difference in an account includes—

- (a) a gap in the account, and
- (b) an inconsistency in the account, and
- (c) a difference between the account and another account.

294 Direction to be given by Judge in relation to lack of complaint in certain sexual offence proceedings

- (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest—
 - (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or
 - (b) delay by that person in making any such complaint.
- (2) In circumstances to which this section applies, the Judge—
 - (a) must **direct** the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
 - (b) must **direct** the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and
 - (c) must not **direct** the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.
- (2A) A judge may, as the judge sees fit—
 - (a) give a direction in this section at any time during a trial, and
 - (b) give the same direction on more than one occasion during a trial.
- (3)–(5)(Repealed)

294AA Direction to be given by Judge in relation to complainants' evidence

- (1) A judge in any proceedings to which this Division applies must not **direct** a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.
- (2) Without limiting subsection (1), that subsection prohibits a **direction** to a jury of the danger of convicting on the uncorroborated evidence of any complainant.
- (3) Sections 164 and 165 of the *Evidence Act 1995* are subject to this section.

Part 6 Review of provisions

368 Reviews of certain provisions relating to consent

- (1) The Minister is to undertake reviews of the reviewable provisions to determine whether the policy objectives of the provisions remain valid and whether the terms of the provisions remain appropriate for securing those objectives.
- (2) The reviews are to be undertaken as soon as possible after each 5 year period after the date of commencement of the *Crimes Amendment (Consent Review) Bill 2020*.
- (3) A report on the outcome of each review is to be tabled in each House of Parliament within 12 months after the review is required to be undertaken.
- (4) In this section—

reviewable provisions means—

 - (a) sections 292, 293A, 294 and 294AA, and
 - (b) section 294CB, including its relationship with section 61HJ(1)(a) of the *Crimes Act 1900*.

Appendix E

Thematic summary of survey responses

In brief

We conducted an online survey to encourage wide public participation in our review. In this Appendix, we summarise the key themes that emerged in the survey responses.

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Introduction

- E.1 We wanted to encourage people who otherwise might not participate in a law reform process to have their say about the law of consent.
- E.2 To achieve this, we developed an online response form (the “survey”) using SurveyMonkey.¹ This gave people a quick and easy way to participate in our review, without having to prepare a formal submission.
- E.3 We opened the survey on 19 October 2018, when we released our Consultation Paper.² We closed the survey on 18 October 2019, when we released our Draft Proposals.³

1. SurveyMonkey Inc <www.surveymonkey.com> (retrieved 17 September 2020).

2. NSW Law Reform Commission, *Consent in Relation to Sexual Offences*, Consultation Paper 21 (2018).

3. NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019).

Survey design

- E.4 The survey consisted of 14 questions: three preliminary questions and 11 “substantive” questions. None of the substantive questions were compulsory.
- E.5 The questions were organised into four key topics relating to the review, namely:
- the law of consent generally (Questions 4 and 5)
 - the definition of consent (Questions 6 and 7)
 - where a person does not consent (Questions 8, 9, 10, 11 and 12), and
 - knowledge of consent (Questions 13 and 14).
- E.6 We used a mix of question styles. Some questions asked for an open-ended response, while others asked the respondent to answer “yes” or “no”, or to check responses they agreed with.
- E.7 All questions gave people the option to explain their answer in a comment. We include a copy of the survey questions in Appendix F.
- E.8 To encourage people to share their views on this sensitive topic, we did not require anyone to provide any personal details or to complete all of the questions. While this meant we did not collect demographic data, we did this to make the survey as accessible as possible.

Our process

- E.9 We advertised the survey widely, including on our website, through our mailing list, on Twitter and on Facebook.
- E.10 We “boosted” (advertised) our Facebook posts about the survey in order to reach more people (including people who did not follow the NSWLRC Facebook page). We targeted people aged over 18 and who live in NSW.
- E.11 The majority of respondents (73%) accessed the survey through Facebook. Most of the other respondents (27%) accessed the survey through our website or mailing list. Only a few accessed it through Twitter.

Participation

- E.12 The survey received a high level of interest. In total, 3,858 people accessed the survey.
- E.13 About half of the respondents (49% or 1904 people) completed at least one substantive question. Just under a third of respondents (28% or 1078 people) completed all of the substantive questions.

General views on the law of consent

- E.14 In Question 4, we invited comment on the law of consent in NSW.

- E.15 Many survey responses are critical of aspects of the law of consent. The main concerns are perceptions that:
- the law fails complainants and favours the accused person
 - the law places an onus on complainants to demonstrate non-consent, and
 - the application of the law is influenced by misconceptions about consensual and non-consensual sexual activity.
- E.16 In Question 5, we asked whether the law of consent should change. Of the people who answered this question, 72% believe that it should.
- E.17 Responses to this question suggest that the law could be reformed by:
- adopting an affirmative standard of consent
 - recognising other aspects of consent, such as the fact that consent can be withdrawn or can be conditional
 - removing the requirement for the prosecution to prove that the accused person knew the complainant did not consent
 - changing the “no reasonable grounds” test, with some suggesting that the test should focus on what a reasonable person would have done
 - requiring the accused person to prove there was consent, and
 - lowering the standard of proof in sexual assault trials from “beyond reasonable doubt” to the “balance of probabilities”.

The definition of consent

- E.18 In Question 6, we asked people for their views on the current definition of consent.

Some responses support the definition of consent

- E.19 Some responses support the current definition of consent and do not believe the law should change. They argue it:
- balances the rights of the complainant and the accused person, and
 - is realistic and reflects contemporary sexual interactions.

Other responses had concerns

- E.20 On the other hand, many responses criticise the definition of consent. Concerns include that the definition does not:
- account for the “freeze” response to non-consensual sexual activity
 - address matters such as the capacity for consent to be withdrawn or conditional, and the need for continuous consent, or
 - reflect social standards.

E.21 Others argue that problems with the issue of consent stem from factors other than the law itself. These include:

- difficulties in understanding or applying the law
- evidentiary issues at trial, and
- cultural attitudes and beliefs about sexual conduct.

Some responses support an affirmative consent standard

E.22 In Question 7, we noted that some people believe the law should recognise a person's consent only when they communicate it clearly through their words or actions. This is sometimes known as an "affirmative consent" standard.

E.23 We asked respondents whether the law should include an "affirmative consent" standard. Of the people who answered this question, 76% believe that it should.

E.24 Reasons given for supporting such a standard include that it would:

- be clearer than the current definition of consent
- address the need for consent to be ongoing and allow a person to withdraw their consent
- help shift the focus of argument at trial away from examining the complainant's behaviour and towards examining what the accused person did
- assist prosecutions of sexual assault
- dispel rape myths and victim blaming attitudes, and
- facilitate cultural change.

E.25 On the other hand, some responses criticise an affirmative consent standard. Concerns include that such a standard would:

- be too prescriptive, unrealistic, impractical or invasive
- broaden the criminal law
- be detrimental to both accused persons and complainants
- reverse the onus of proof
- encourage false accusations of sexual assault, or
- have no positive, practical impact.

E.26 Other responses are uncertain about an affirmative consent standard, with some believing it should be a social rather than a legal standard. Still others think the law already contains an affirmative consent standard.

Where a person does not consent

- E.27 In Questions 8, 9, 10, 11 and 12, we asked respondents about situations in which a person does not, or may not, consent to sexual activity.

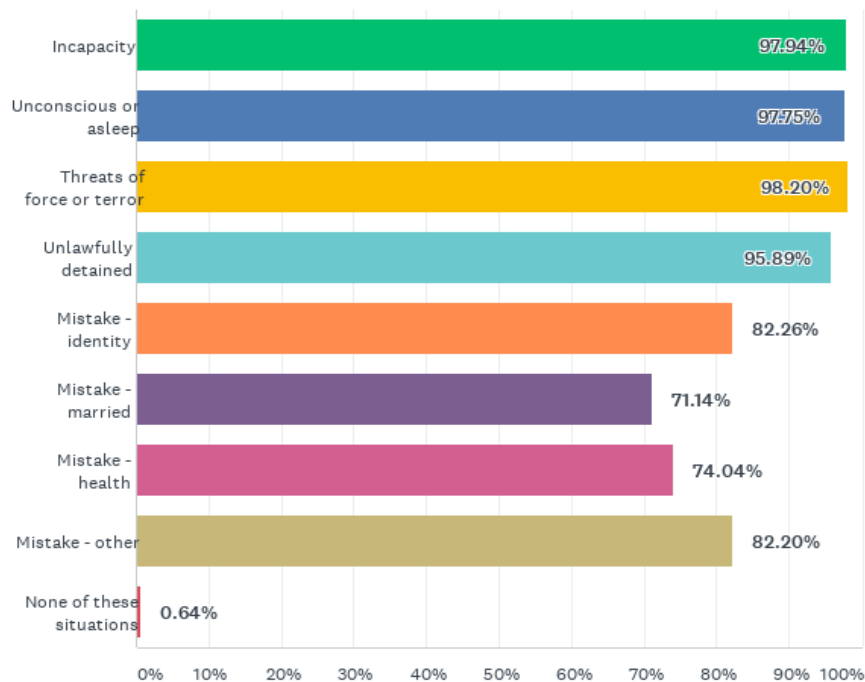
Most responses support a list of situations in which a person does not consent

- E.28 In Question 8, we asked whether the law should list situations in which a person does not consent. Of the people who answered this question, 94% believe that it should.
- E.29 Reasons that responses give in favour of such a list include that it:
- guides and educates fact finders, prosecutors, complainants, potential offenders and the community in general
 - protects vulnerable people
 - may assist to prosecute allegations of sexual assault, and
 - may help to dispel rape myths.
- E.30 On the other hand, some oppose such a list. Concerns include that it:
- may be inflexible, or
 - can be detrimental to complainants (for example, because it suggests that sexual assaults are only “real” if they occur in one of the listed situations).

Most responses support the existing circumstances

- E.31 In Question 9, we asked people to choose which of the circumstances, currently recognised by the law, should remain part of the law. The results are below:

Figure E.1: Circumstances in which a person does not consent to sexual activity



Source: SurveyMonkey Inc

- E.32 Many responses think all of the existing circumstances should continue to be part of the law. However, some responses support keeping some circumstances, but not others.
- E.33 For example, some responses only support recognising that a person does not consent when they are incapable of consenting or they are unconscious or asleep. They argue that in the other circumstances, a person still consents.
- E.34 Others support including all the listed circumstances except for the “mistaken belief” categories. There is a view that these situations are less serious than the other circumstances recognised by the law. Some think the accused person should not be held responsible for the complainant’s mistake.

Some responses suggest new circumstances

- E.35 In Question 10, we asked whether other situations should be added to the list of circumstances in which a person does not consent.
- E.36 Of the people who answered this question, 70% think the law should recognise other situations in which a person does not consent. The most commonly suggested situations are where:
- there is a power imbalance or an abuse of power
 - there is a history of domestic or family violence
 - there is emotional abuse, blackmail or financial abuse
 - the complainant has a disability or mental illness, or is injured or unwell

- the complainant gives conditional consent (for example, they consent to sexual intercourse but only if a condom is used) and the accused person does not comply with this condition
- the accused person does not disclose that they have a sexually transmitted infection
- there are language barriers between the people participating in the sexual activity
- the complainant is in prison
- the complainant withdraws consent
- the complainant physically resists the sexual activity
- the complainant is fearful, and
- the complainant “freezes” or does not otherwise communicate consent.

E.37 However, some responses say the list is extensive and there is no need to add any other circumstances.

Most responses support the situations in which it “may” be shown that a person does not consent

E.38 In Question 11, we asked whether the law should list situations in which it “may” be shown that a person does not consent. Of those who answered this question, 86% agree that the law should do this.

E.39 Reasons given include that such a list:

- is flexible and allows for variations in circumstances
- guides and educates fact finders, prosecutors, complainants, potential perpetrators and the community in general
- protects and/or validates people who have experienced sexual assault, and
- may assist to prosecute allegations of sexual assault.

E.40 However, some responses do not think the law should list situations in which it “may” be shown there is no consent. Reasons include that such a list is:

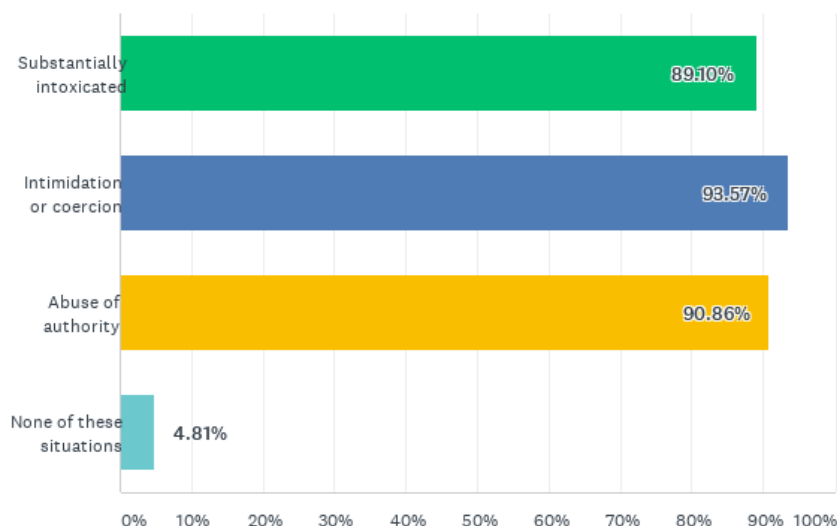
- vague and unclear
- unnecessary and prescriptive, and
- detrimental to accused persons and/or complainants.

E.41 Some responses are unsure about whether the law should list circumstances in which it may be shown there was no consent.

E.42 However, others are confused by the difference between this list and the list of circumstances in which the law recognises that a person does not consent. This may indicate that the law is unclear and difficult for the general community to understand.

- E.43 In Question 12, we summarised the current list of circumstances in which it “may” be proved that a person does not consent. We asked people to choose which of these circumstances should stay in this list. The results are below:

Figure E.2: Circumstances in which it may be proved that a person does not consent



Source: SurveyMonkey Inc

- E.44 Some responses support keeping all the circumstances but argue they should be recognised as circumstances in which a person “does not” consent.
- E.45 On the other hand, some argue that all these circumstances should continue to be circumstances in which it “may” be established that a person does not consent. This is because it is possible that a person might not consent in these situations, but it would depend on the specific context.

Knowledge of consent

- E.46 In Question 13, we invited comment on the need for prosecutors to prove that the accused person knew there was no consent.

General comments about the knowledge requirement

Many responses support the knowledge requirement

- E.47 Many responses support this requirement and do not believe it should change. Reasons for this include that it is:
- needed to ensure fairness to the accused person, including in situations where they genuinely believed there was consent
 - needed to stop, or deal with, false accusations, and
 - appropriate, given the serious consequences of being found guilty of a sexual offence.

- E.48 More generally, other responses emphasise the importance of the principle of mens rea in the criminal justice system.

Some responses have concerns about the knowledge requirement

- E.49 However, the requirement to prove “knowledge” attracted significant criticism. For instance, many responses suggest that the current law:

- is too hard to understand and to prove, which makes it too difficult to secure a conviction
- may discourage people who have experienced sexual assault from coming forward to the police
- provides a loophole for an accused person, as it is too easy to claim a belief in consent
- can lead to excessive scrutiny of the complainant’s behaviour at trial, which may involve victim blaming
- can allow an accused person to claim it was reasonable to believe that a complainant who froze, and did not fight back, consented
- minimises the importance of obtaining consent, and
- allows misconceptions and cultural assumptions about sexual conduct and about women in general to influence the way trials are conducted and the decision-making process of jurors.

- E.50 Many responses say that the *Lazarus* case brought these problems to light (see Chapter 3 for a discussion of this case).⁴

- E.51 On the other hand, some responses express concern that the current requirement is unfair to accused persons. Some believe that a person who does not actually know the complainant does not consent is less blameworthy than a person who either mistakenly believes there is consent or is reckless about whether the complainant consents.

- E.52 There are also mixed views about the way the law prohibits fact finders from considering any self-induced intoxication of the accused person when making findings about knowledge.

- E.53 Some responses think the current prohibition does not make sense, as fact finders can consider the *complainant’s* intoxication when making findings about consent. Others think that the prohibition is important because it stops an accused person from using their intoxication to excuse their behaviour.

Some responses suggest reforms to the knowledge requirement

- E.54 Survey responses suggest a range of general reforms to the requirement to prove “knowledge”, including:

4. *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, NSWDC, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378.

- removing the requirement entirely, so prosecutors only have to prove the complainant did not consent
- removing the requirement in some situations, such as when it is proven that the accused person used force or the complainant was highly intoxicated, asleep or unconscious, and
- requiring the accused person to demonstrate they either knew, or reasonably believed, that the complainant consented.

Steps to ascertain consent

- E.55 In Question 14, we asked people whether they agree with the statement: “a person should take steps to check if their sexual partner consents. If they don’t take these steps, they shouldn’t be able to argue they believed there was consent”.

Should people be required to take steps to find out if their sexual partner consents?

- E.56 Of the people who answered Question 14, 78% agree with the statement. Reasons given for supporting such a requirement include that it would:

- help protect people against sexual assault
- help educate the community
- reduce uncertainty, confusion and the potential for signals to be misinterpreted
- place more responsibility on the accused person
- make it harder for an accused person to lie or rely on rape myths
- not be hard to comply with, and
- not take the fun out of sex or ruin romance.

- E.57 Others oppose such a requirement, believing it would:

- be unrealistic, inflexible, impractical and out of touch with how relationships work
- take the fun and romance out of sex
- mean that more people would be prosecuted in situations where they should not be
- conflict with established legal principles (including by effectively shifting the burden of proof), and
- be an unnecessary and unwanted intrusion into relationships.

- E.58 Another view is that while it is best practice to take such steps, the law should not mandate this. Some think that such a requirement would not make any difference and that education is a better solution.

- E.59 Others believe that this requirement should only apply in certain situations. For instance, it might be appropriate to require steps to be taken when there is no pre-existing relationship between the people participating in a sexual activity.
- E.60 Some say their response to this question would depend upon the steps required by the law.

What steps should a person take?

- E.61 We asked people who answered “yes” to Question 14 to indicate what steps the law should require a person to take.
- E.62 The most commonly held view among responses is that people should ask for consent. Responses also frequently say that people should “check in” with their sexual partners at different stages of intimacy to ensure they consent and continue to do so.
- E.63 Other responses emphasise the importance of observing body language and acting on non-verbal forms of communication.
- E.64 However, many responses highlight the need for flexibility. Responses frequently emphasise that the law should not contain an exhaustive list of steps or a complex checklist. A related view is that the steps required should depend on the circumstances, including the nature of the relationship.

Appendix F

Survey questions

About this survey

The NSW Law Reform Commission is reviewing the law about consent in relation to sexual assault.

We'd like to know your thoughts about the law of consent. In this survey, we invite you to comment on some important features of the law.

This survey will take 5 to 10 minutes to complete. You do not need to answer every question. If you would like to skip a question, simply leave the answer space blank and move on to the next question.

You can choose to remain anonymous if you wish.

Confidentiality

We will consider the responses to this survey carefully. We may refer to your comments in our publications (including our final report).

You may ask us to treat your comments as confidential. If so, we will take your comments into account but we will not identify you in our publications.

More information on our privacy policy can be found [here](#).

* 1. Would you like your answers to be confidential?

☐ Yes

☐ No

2. What are your contact details? (This is optional)

Name

Email Address

3. Would you like to sign up to our email list to receive updates about our work?

☐ Yes

☐ No

Background to the law

Consent is an important part of sexual assault law in NSW. A person commits the offence of sexual assault if:

- they have sexual intercourse with another person, without that person's consent, and
- they know the other person doesn't consent.

In a trial, the prosecution must prove each of these things beyond reasonable doubt.

This survey asks some questions about specific aspects of the law. But before we start, we'd like to know if you have any general comments about the law of consent.

4. What are your views about the law of consent in NSW?

5. Do you think the law of consent should change?

☐ Yes

☐ No

Please give reasons for your choice. If yes, what should the law say?

The meaning of consent

The law says someone “consents” to sex if they “freely and voluntarily” agree to it. The fact that a person doesn’t physically resist sex isn’t enough to show they consented to it.

Some people think this definition of consent should be changed. Some say the law should recognise a person’s consent only when they communicate it clearly through their words or actions. This is sometimes known as an “affirmative consent” standard.

6. What do you think about the current definition of consent?

7. Do you think the law should include an “affirmative consent” standard?

☐ Yes

☐ No

Please let us know the reasons for your view.

When a person can't consent

The law lists some situations where a person can’t consent to sex.

If any of these situations exist, the accused will not be able to argue that the person consented.

This list is not exhaustive. This means the prosecution can prove there was no consent in other situations too.

On the next few pages, we’ll set out this list and ask if you agree with it.

8. In general, do you think the law should list some situations in which a person can't consent?

☐ Yes

☐ No

Please let us know the reasons for your answer.

9. The law says that people can't consent to sex in any of the following situations. Please tick the situations that you think should stay in this list.

☐ They don't have the capacity to consent because of their age or cognitive incapacity

☐ They agreed to have sex because they mistakenly believed the other person was married to them

☐ They are unconscious or asleep

☐ They agreed to have sex because of threats of force or terror (directed at them or someone else)

☐ They agreed to have sex because they mistakenly believed the sex was for health or hygienic purposes

☐ They agreed to have sex because they were unlawfully detained

☐ They agreed to have sex because they had other mistaken beliefs that came about due to the other person's fraud

☐ They agreed to have sex because they had a mistaken belief about the other person's identity

☐ None of these situations

Please let us know the reasons for your views.

10. Should other situations be added to this list?

☐ Yes

☐ No

Please let us know the reason for your views. If yes, what other situations should be recognised and why?

When “may” it be proven that a person doesn’t consent

The law also lists some other situations in which the prosecution may be able to show there was no consent.

This list is just a guide – the prosecution still has to prove there was no consent in each case.

11. In general, do you think the law should list some situations in which it “may” be shown the person doesn’t consent?

- ☐ Yes
- ☐ No

Please let us know the reason for your views. If so, what should be included in this list?

12. The law says that it may be proven that someone doesn’t consent if they have sex for any of the following reasons. Please tick the situations that you think should stay in this list.

- ☐ They were substantially intoxicated by alcohol or a drug
- ☐ They were intimidated, coerced or received other threats (aside from threats of force)
- ☐ There was an abuse of a position of authority or trust
- ☐ None of these situations

Please let us know the reasons for your views.

When someone knows the other person doesn't consent

The prosecution must also prove the accused knew the other person didn't consent.

This is because the law accepts people shouldn't be convicted if they don't have a "guilty mind".

To prove the accused "knew" there was no consent, the prosecution must show the accused either:

- actually knew the other person didn't consent
- was reckless about whether the other person consented, or
- had no reasonable grounds for believing the other person consented.

When deciding if the accused knew there was no consent, a jury (or a judge, if there is no jury) must consider all the circumstances of the case.

This includes any steps the accused took to work out if the other person consented. However, juries cannot take the accused's voluntary intoxication into account.

13. What do you think about the need to prove the accused knew there was no consent?

14. Some people say a person should take steps to check if their sexual partner consents. If they don't take these steps, they shouldn't be allowed to argue they believed there was consent. Do you agree?

☐ Yes

☐ No

Please let us know the reasons for your view. If yes, what steps should they be required to take?

Appendix G

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 (16 May 2018)
PCO22	Helene Thomas (20 May 2018)
PCO23	Ron Hedgcock (21 May 2018)
PCO24	Professor Patricia Easteal AM (28 May 2018)
PCO25	Confidential (29 May 2018)
PCO26	Caroline Goosen (30 May 2018)
PCO27	Jane Guilfoyle (2 June 2018)
PCO28	Katherine 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 (20 June 2018)
PCO38	Eugene Lubarsky (20 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 Otłowski (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 (25 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 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 Carolyn McKay, Dr Tanya Mitchell and Associate Professor Rita Shackel (28 June 2018)
PCO66	Tony Mohr (28 June 2018)
PCO67	Young Women's Advisory Group, Equality Rights Alliance (29 June 2018)
PCO68	Edwin Montoya Zorrilla (29 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	Dr 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** Associate Professor Julia Quilter (29 June 2018)
- PCO93** Dr Mehreen Faruqi MLC (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 and 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 (27 July 2018)
- PCO109** Confidential (15 August 2018)
- PCO110** Women Lawyers Association of NSW (15 October 2018)

Appendix H

Submissions

- CO1** Lachlan Ward (3 December 2018)
- CO2** Andrew Dyer (17 January 2019)
- CO3** NSW Department of Family and Community Services (31 January 2019)
- CO4** Care Leavers Australasia Network (31 January 2019)
- CO5** Australian Lawyers Alliance (31 January 2019)
- CO6** Rachael Burgin (31 January 2019)
- CO7** Associate Professor Julia Quilter (31 January 2019)
- CO8** Feminist Legal Clinic Inc (1 February 2019)
- CO9** Professor Arlie Loughnan, Dr Carolyn McKay, Dr Tanya Mitchell and Professor Rita Shackel (1 February 2019)
- CO10** Positive Life NSW (1 February 2019)
- CO11** Victims of Crime Assistance League Inc NSW (1 February 2019)
- CO12** ACON (1 February 2019)
- CO13** Professor Luke McNamara, Professor Julie Stubbs, Helen Gibbon, Melanie Schwartz and Professor Alex Steel (1 February 2019)
- CO14** Office of the Director of Public Prosecutions (1 February 2019)
- CO15** Sex Workers Outreach Project (1 February 2019)
- CO16** Lisa Coates (1 February 2019)
- CO17** Professor Annie Cossins (4 February 2019)
- CO18** Law Society of NSW (6 February 2019)
- CO19** Children's Court of NSW (7 February 2019)
- CO20** Australia's National Research Organisation for Women's Safety (8 February 2019)
- CO21** NSW Young Lawyers Criminal Law Committee (8 February 2019)
- CO22** Confidential (14 February 2019)
- CO23** Wirringa Baiya Aboriginal Women's Legal Centre Inc (15 February 2019)
- CO24** Elizabeth Evatt Community Legal Centre (22 February 2019)
- CO25** Community Legal Centres NSW (22 February 2019)
- CO26** Women's Electoral Lobby (22 February 2019)
- CO27** Women's Legal Service NSW (22 February 2019)
- CO28** Rape and Domestic Violence Services Australia (22 February 2019)
- CO29** Domestic Violence NSW (25 February 2019)
- CO30** Women's Domestic Violence Court Advocacy Service NSW Inc (25 February 2019)
- CO31** Victims Support Unit, Corrective Services NSW (26 February 2019)
- CO32** NSW Bar Association (1 March 2019)
- CO33** Legal Aid NSW (1 March 2019)
- CO34** Western NSW Community Legal Centre Inc and Western Women's Legal Support (1 March 2019)
- CO35** Dr Maria Nittis and Christie Andrighetto (20 March 2019)
- CO36** Confidential (17 April 2019)
- CO37** Murray Shields (21 October 2019)

- CO38** Dotti (21 October 2019)
- CO39** Confidential (23 October 2019)
- CO40** Confidential (24 October 2019)
- CO41** Kristian Schweikert (25 October 2019)
- CO42** Confidential (26 October 2019)
- CO43** Confidential (1 November 2019)
- CO44** Australian Lawyers Alliance (1 November 2019)
- CO45** Confidential (6 November 2019)
- CO46** Judi Charman (7 November 2019)
- CO47** NSW Bar Association (7 November 2019)
- CO48** Confidential (8 November 2019)
- CO49** Lee, Chloe and Prestin (8 November 2019)
- CO50** David Kopycinski (9 November 2019)
- CO51** Dr Maria Nittis (11 November 2019)
- CO52** Sarah Megginson (11 November 2019)
- CO53** Andrew Dyer (14 November 2019)
- CO54** Michael Taylor (14 November 2019)
- CO55** Children's Court of NSW (15 November 2019)
- CO56** Tamara Dickens (15 November 2019)
- CO57** Confidential (15 November 2019)
- CO58** Confidential (16 November 2019)
- CO59** Confidential (17 November 2019)
- CO60** Domestic Violence NSW (18 November 2019)
- CO61** ACON (18 November 2019)
- CO62** Positive Life NSW (18 November 2019)
- CO63** Dr Rachael Burgin and Professor Jonathan Crowe (18 November 2019)
- CO64** Confidential (18 November 2019)
- CO65** Rape and Domestic Violence Services Australia (18 November 2019)
- CO66** Associate Professor Julia Quilter and Professor Luke McNamara (18 November 2019)
- CO67** Australia's National Research Organisation for Women's Safety (18 November 2019)
- CO68** Wirringa Baiya Aboriginal Women's Legal Centre Inc (18 November 2019)
- CO69** UNSW School of Social Sciences (18 November 2019)
- CO70** Women's Legal Service NSW (18 November 2019)
- CO71** Care Leavers Australasia Network (18 November 2019)
- CO72** Australian Queer Students' Network (18 November 2019)
- CO73** Community Legal Centres NSW (18 November 2019)
- CO74** Women's Safety NSW (18 November 2019)
- CO75** Kerrie Matchett (19 November 2019)
- CO76** Law Society of NSW (20 November 2019)
- CO77** Lismore Women's Health and Resource Centre (21 November 2019)
- CO78** Confidential (21 November 2019)
- CO79** Saxon Mullins (21 November 2019)
- CO80** National Association for People with HIV Australia and the HIV/AIDS Legal Centre (25 November 2019)

- CO81** WILMA Women's Health Centre (26 November 2019)
- CO82** Inner City Legal Centre (26 November 2019)
- CO83** Central Coast Community Women's Health Centre (27 November 2019)
- CO84** The Public Defenders (1 December 2019)
- CO85** NSW Director of Public Prosecutions (3 December 2019)
- CO86** NSW Young Lawyers Criminal Law Committee (3 December 2019)
- CO87** Legal Aid NSW (4 December 2019)
- CO88** Wagga Women's Health Centre Inc (4 December 2019)

Appendix I

Consultations

Tasmanian Legal Practitioners (CO01)

19 February 2019

Ms Kim Baumeler, Barrister, Liverpool Chambers
Mr Daryl Coates SC, Tasmanian Director of Public Prosecutions
Ms Linda Mason SC, Tasmanian Deputy Director of Public Prosecutions
Associate Professor Terese Henning, Director, Tasmanian Law Reform Institute

County Court of Victoria (CO02)

20 February 2019

Judges of the County Court of Victoria
Mr John Riordan, Manager, Law Reform and Policy

District Court of NSW Consultation 1 (CO03)

11 April 2019

Judges of the District Court of NSW

Department of Justice and Community Safety, Victorian Government Staff (CO04)

9 May 2019

Mr Greg Byrne, Special Counsel, Criminal Law Reform
Ms Anna Tucker, Criminal Law Reform

Professor Elisabeth McDonald (CO05)

17 May 2019

Professor Elisabeth McDonald MNZM, University of Canterbury

Legal Aid NSW Staff (CO06)

27 May 2019

Legal Aid NSW Staff

Sydney Roundtable 1 (CO07)

31 May 2019

Ms Christie Andrighetto, sexual assault counsellor
Mr Brandon-Leith Bear, ACON
Ms Sarah Lambert, ACON
Ms Niamh Joyce, Australian Queer Students' Network
Mr Dashie Prasad, Australian Queer Students' Network
Ms Kate Meagher, Centre for Social Justice and Inclusion, University of Technology Sydney
Ms Catherine Pruscino, Centre for Social Justice and Inclusion, University of Technology Sydney
Ms Tara Hunter, Northern Sydney Sexual Assault Service
Detective Superintendent John Kerlatec, NSW Police Force
Detective Chief Inspector Mick Harrow, NSW Police Force
Ms Kathleen Carmody, Office of the Advocate for Children and Young People
Ms Tatiana Barisa, Office of the Commissioner, NSW Police Force
Ms Liz Sutherland, Positive Life NSW
Dr Mary Dobbie, Royal Prince Alfred Hospital
Ms Hannah Stenstrom, Victims of Crime Assistance League Inc NSW
Ms Stephanie Wallace, Victims Support Unit, Corrective Services NSW
Ms Rachel Francois, Women's Electoral Lobby
Ms Jozefa Sobski AM, Women's Electoral Lobby

Sydney Roundtable 2 (CO08)

31 May 2019

Ms Anna Kerr, Feminist Legal Clinic
Ms Emily Gray, Inner City Legal Centre
Mr Stephen Odgers SC, NSW Bar Association
Ms Gabrielle Bashir SC, NSW Bar Association
Mr Tim Game SC, NSW Bar Association
Ms Johanna Pheils, Office of the Director of Public Prosecutions NSW
Mr Peter McGrath, Office of the Director of Public Prosecutions NSW
Ms Melissa Marshall, Rape and Domestic Violence Services Australia
Mr Andrew Dyer, University of Sydney
Professor Annie Cossins, UNSW
Ms Helen Gibbon, UNSW
Ms Corrie Goodhand, Women Lawyers' Association of NSW
Ms Bronwen Conn, Women NSW, Department of Family and Community Services
Ms Emma Holloway, Women NSW, Department of Family and Community Services

Sydney Roundtable 3 (CO09)

4 June 2019

Dr Rachael Burgin
Ms Lisa Coates, Charles Sturt University
Ms Gayatri Nair, Domestic Violence NSW

Ms Thea Deakin-Greenwood, Elizabeth Evatt Community Legal Centre
Ms Penny Musgrave, Law Society of NSW
Mr Michal Mantaj, Law Society of NSW
Ms Alex Davis, Legal Aid NSW
Mr Thomas Spohr, Legal Aid NSW
Dr Elyse Methven, University of Technology Sydney
Mr Ian Dobinson, University of Technology Sydney
Ms Helen Campbell, Women's Legal Service

Sydney Roundtable 4 (CO10)

4 June 2019

Ms Helen Sowe, Australia's National Research Organisation for Women's Safety
Dr Louis Schetzer, Australian Lawyers Alliance
Ms Sarah Ienna, NSW Young Lawyers Criminal Law Committee
Ms Lauren Mendes, NSW Young Lawyers Criminal Law Committee
Mr Morgan Begg, Rule of Law Institute of Australia
Ms Jackie Macmillan, Sex Workers Outreach Project
Professor Simon Bronitt, University of Queensland
Dr Carolyn McKay, University of Sydney
Associate Professor Julia Quilter, University of Wollongong
Ms Rachael Martin, Wirringa Baiya Aboriginal Women's Legal Centre
Ms Hayley Foster, Women's Domestic Violence Court Advocacy Service NSW

Women NSW Staff (CO11)

14 June 2019

Women NSW Staff

Dubbo Roundtable (CO12)

17 June 2019

Ms Christine Mendes, Barrister
Mr Liam Shaw, Crown Prosecutor
Mr Mark Davies, Crown Prosecutor
Ms Rebecca Mitchell, Legal Aid NSW
Ms Brooke Ellery, Office of the Director of Public Prosecutions NSW
Mr Ian Nash, Public Defender
Ms Catherine Anderson, Western NSW Local Health District
Ms Kate Jackson, Western Women's Legal Support
Ms Amy Schneider, Western Women's Legal Support
Ms Mary Simpson, Women's Domestic Violence Court Advocacy Service NSW
Ms Wendy Hanchard, Women's Domestic Violence Court Advocacy Service NSW

District Court of NSW Consultation 2 (CO13)

18 June 2019

Judge of the District Court of NSW and Associate

Rape and Domestic Violence Services Australia Staff (CO14)

20 June 2019

Ms Karen Willis, Executive Officer

Ms Melissa Marshall, Legal and Policy Officer

Dr Rachael Burgin (CO15)

21 June 2019

Dr Rachael Burgin

Dr Helen Cockburn (CO16)

21 June 2019

Dr Helen Cockburn, University of Tasmania

Judicial Commission of NSW (CO17)

24 June 2019

Members of the Criminal Trial Courts Bench Book Committee

Mr Ernest Schmatt AM PSM, Chief Executive

Ms Pierrette Mizzi, Director, Research and Sentencing

NSW Police Force, Western Region Staff (CO18)

25 June 2019

Ms Rebecca Camilleri, Domestic Violence Coordinator, NSW Police Force, Western Region

District Court of NSW Consultation 3 (CO19)

5 July 2019

Judge of the District Court of NSW

Sexual Assault Support Service Staff (CO20)

8 July 2019

Ms Jill Maxwell, CEO
Ms Holly Mason-White, Manager, Services and Policy

District Court of NSW Consultation 4 (CO21)

15 July 2019

Judge of the District Court of NSW

Office of the Director of Public Prosecutions NSW Staff (CO22)

16 July 2019

Office of the Director of Public Prosecutions NSW Staff

CASA House Staff Consultation 1 (CO23)

23 July 2019

Ms Jenna Tuke, Coordinator, CASA House, Royal Women's Hospital, Melbourne

CASA House Staff Consultation 2 (CO24)

5 August 2019

Ms Jessica Maxwell, Counsellor / Advocate and Primary Prevention, CASA House,
Royal Women's Hospital, Melbourne

The Public Defenders (CO25)

16 August 2019

Ms Belinda Rigg SC, Senior Public Defender
Mr Tony Evers, Public Defender

Legal Aid NSW Staff (CO26)

28 November 2019

Legal Aid NSW Staff

Professor Gail Mason (CO27)

2 December 2019

Professor Gail Mason, University of Sydney

Appendix J

Bibliography

- J.1 A full bibliography for this review can be found on our website:
www.lawreform.justice.nsw.gov.au.

