

Final Submission to the NSW Law Reform Commission's Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences

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Introduction

1. In this submission, I respond to most of the questions posed by the New South Wales Law Reform Commission (NSWLRC) in its recent Consultation Paper¹ regarding s 61HA of the *Crimes Act* 1900 (NSW) and related issues. It must be noted immediately, however, that on 1 December 2018 the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* came into force. This means that s 61HA no longer deals with consent and knowledge of non-consent for the purposes of the sexual assault offences for which the *Crimes Act* provides. Because s 61HE now regulates such matters (indeed, as the Consultation Paper notes,² s 61HE applies also to the new sexual touching and sexual act offences created by ss 61KC, 61KD, 61KE and 61KF of the Act), I will refer in this submission to the terms of this new section when making recommendations for reform.
2. Consistently with the views that I expressed in my preliminary submission to this Review, no radical changes should be made to s 61HE.³ However, after reading the Consultation Paper and many of the preliminary submissions, and after considering the terms of the new section, I do accept that it is desirable to make certain alterations to that section in addition to the one that I advocated in my initial submission.⁴ It is possible that few of the changes to s 61HE that I argue for here would alter the law in this area; however, in my submission, they would clarify the scope of s 61HE – and the manner in which it operates.
3. In short, in my submission, the following alterations should be made to s 61HE:
 - s 61HE(6), which provides that certain mistaken beliefs negate complainants' consent to sexual activity, should be modified in the manner noted at paragraph 29;
 - s 61HE(8), which provides for three circumstances in which it 'may be established' that a person has not consented to sexual activity, should be repealed (for the reasons that I give at paragraphs 34-38);
 - the list of factors in s 61HE(5) that certainly negate complainants' consent to sexual activity should be expanded and modified in the manner suggested at paragraph 38;

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¹ New South Wales Law Reform Commission, 'Consultation Paper 21: Consent in relation to sexual offences' (October 2018).

² Ibid 89 [6.2].

³ Andrew Dyer, *Preliminary Submission PCO50*, [3]-[5], [45].

⁴ See *ibid* [28].

- a new provision in s 61HE should provide that trial judges need only direct juries about one or more of the mental states for which current s 61HE(3) provides, if there is evidence that puts that, or those, mental states in issue (for the reasons that I give at paragraphs 68-77);
- (what is now) s 61HE(4)(a) should be amended in the manner that I recommended in my preliminary submission⁵ (see paragraph 86);
- s 61HE(7), which deems an accused to ‘know’ that the complainant was not consenting if s/he consents under any of the mistaken beliefs to which s 61HE(6) refers, should be altered in the manner noted at paragraph 87;
- the wording of ss 61HE(3)(a) and 61HE(4) should be altered in the ways suggested at paragraphs 97 and 99 respectively; and
- the subsections in s 61HE should be re-ordered (see paragraph 98).

In addition, minor changes should be made to: ss 61HB(1) and 61HC(1) (see paragraph 95); s 61HA(a) (see paragraph 100); and the jury directions concerning consent in the *Criminal Trials Court Benchbook* (see paragraph 102).

The meaning of consent

Question 3.1: Alternatives to a consent-based approach

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

4. With great respect, I do not agree with the proposal of Peter Rush and Alison Young, in their preliminary submission to this review,⁶ to make sexual assault a ‘result-crime.’⁷ At the core of Rush and Young’s argument is the contention that:⁸

sexual assault is a crime whose distinctive feature ... is that the accused (usually male) *causes sexual harm* to socially vulnerable members of the community (primarily women and children, but also members of the LGBTQI communities).

Accordingly, they argue, it should no longer be necessary for the Crown to prove that the complainant was not consenting to the sexual intercourse that took place.⁹ Rather,

⁵ See also Arlie Loughnan et al, *Preliminary Submission PCO 65*, 4-5.

⁶ Peter Rush and Alison Young, *Preliminary Submission PCO 59*.

⁷ As Brennan J observed in *He Kaw Teh v The Queen* (1985) 157 CLR 523, 565 (*‘He Kaw Teh’*), ‘the definition of a criminal offence ordinarily comprehends ... the prohibited act or omission (conduct), the circumstances in which the act is done or the omission is made and, in some instances, the results of the act or omission. These elements – conduct, circumstances and results – are what Dixon CJ in *Vallance v The Queen* called the external elements necessary to form the crime.’ At present, the sexual assault offences in the *Crimes Act* are of course ‘circumstance-crimes’: accompanying the relevant conduct (sexual intercourse) is a circumstance that makes the conduct criminal (the complainant’s non-consent).

⁸ Rush and Young, above n 6, 1. [Emphasis added]

⁹ *Ibid.*

‘what must be prohibited by the legal characterisation of the offence is the *causing of sexual harm* by an accused.’¹⁰ ‘A serious offence of sexual assault’, they think, should be defined as follows:¹¹

A person who:

- (a) engages in sexual intercourse with another person, and
- (b) causes serious injury to that other person,
- (c) with the intention of causing injury or with recklessness as to causing injury

is guilty of the offence of sexual assault.

5. I disagree with this proposal for three main reasons. First, the model provision just noted treats as sexual assault, conduct that, because it is consensual, should not be characterised in this way. The appellants in the well-known case of *Brown v DPP*,¹² for instance, engaged in sexual intercourse with their ‘victims’ (I imagine¹³) and intentionally or recklessly caused them injury.¹⁴ It is of course highly debatable whether they should have been convicted of any assault or wounding offences. It is surely even more questionable whether such persons ought to be convicted of sexual assault. The same point can be further exemplified if we alter the facts of *Lazarus*. The complainant in that case was not consenting. But what if she had been? In such a scenario, there would have been sexual intercourse within the meaning of new s 61HA, and Mr Lazarus would recklessly have caused the complainant injury. A person who has anal intercourse with a person whom they know to be a virgin, must foresee the possibility that he or she will cause him or her injuries of the type that Ms

¹⁰ Ibid. [Original emphasis]

¹¹ Ibid 2.

¹² [1994] 1 AC 212.

¹³ Having said that, no acts of sexual intercourse are described in the Court of Appeal’s judgment in that case (see *R v Brown* [1992] 1 QB 491, 495-7 (*‘Brown’*)). It is true that Lord Lane CJ tells us, for example, that Jaggard considered it to be necessary to push ‘a piece of wire and later his finger down the urethra in Laskey’s penis’ (at 597); but, in NSW, the penetration of male genitalia does not amount to sexual intercourse: *Crimes Act 1900* (NSW) s 61HA. But even if there was no sexual intercourse in *Brown*, there could easily have been; and in those circumstances, sexual assault convictions would seem a singularly inappropriate response.

¹⁴ I use the term ‘injury’ here, rather than ‘serious injury’, because Rush and Young are not always clear about whether the latter should be necessary or, alternatively, whether the former should suffice. In their preliminary submission, for example, they say that ‘[t]he physical element [of the proposed offence] simply requires proof of *injury* and the accused’s causative relation to the occurrence of the injury. ... Such injury can be defined in a number of ways: we would not limit it to physical injury, but also extend it to injury to mental well-being, whether permanent or temporary. There may also be [a] need ... to include adverse economic consequences’: Rush and Young, above n 6, 2 [Emphasis added] Moreover, in their 2002 submission to the Victorian Law Reform Commission, Rush and Young supported the enactment of an offence that required proof that the accused: (a) sexually penetrated the complainant; and (b) caused *injury* to her/him, with the intention of causing harm or with recklessness as to causing injury: Peter Rush and Alison Young, *Submission to Victorian Law Reform Commission Reference on Sexual Offences: Law and Procedure, 2001/2*, [7]. [Emphasis added] Cf., however, Peter Rush and Alison Young, ‘A Crime of Consequence and a Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code’ (1997) 9 *Australian Feminist Law Journal* 100, 107-8. In any case, it seems that at least some of the activities in which the appellants in *Brown* engaged, resulted in serious injury (even though there was no evidence that any of the ‘victims’ sought medical attention): see *Brown* [1992] 1 QB 491, 495-7. Indeed, the scarring of the complainant, A, as a result of Laskey’s act of branding his initials on him (see 495) would presumably amount to the ‘permanent ... disfiguring of ... [his] person’, and thus to grievous bodily harm: *Crimes Act 1900* (NSW) s 4.

Mullins in fact sustained.¹⁵ If the injured person willingly participated in the intercourse that took place, however, why should it be possible to convict of sexual assault the person who inflicted such injuries?¹⁶

6. Secondly, under the Rush and Young approach, there would seemingly still be significant focus on the issues of consent and the accused's knowledge of non-consent. In cases where the Crown alleged that the act(s) of sexual penetration themselves caused the (serious) injury,¹⁷ the injury or injuries alleged would quite often be psychological in character. Surely in such cases the defence would routinely argue that the accused did not cause (indeed, could not have caused) the complainant's psychological injury, because the complainant consented to the sexual intercourse that took place.¹⁸ Rush and Young's response to this concern is that consent:¹⁹

is *not* part of the legal *definition* – it is only *evidence* going to disprove the prosecution's allegation that the victim suffered the serious injury caused by the sexual penetration.

This, of course, is true. But it is very powerful evidence; and the point is that it would frequently be adduced.

7. Rush and Young's response to this point is, with respect, unpersuasive. They say:²⁰

When read in conjunction with the doctrine of causation, the scope for using the standard of consent as *evidence* disproving the actual existence of the prohibited consequence (serious injury) would be reduced considerably. As the doctrine of criminal causation has increasingly emphasised, the beliefs of victims ... are irrelevant to the causal inquiry in criminal trials because that inquiry is centred on the accused.

This is quite a sweeping statement. It ignores the fact that the beliefs, and conduct, of victims *can* be relevant to causal questions. It is well-established, for example, that, in a fright or self-preservation case, the accused's violence will have caused the victim's injuries or death only where the victim's response to that violence was reasonable (or proportionate).²¹ More relevantly for present purposes, however, it overlooks the fact that, in the types of cases that we are currently discussing, the defence would not be claiming that an act of the complainant broke the chain of causation between the accused's conduct and the complainant's (serious) injury. It would instead be claiming that the accused's act of consensual sexual intercourse set in motion no

¹⁵ The doctor who examined Ms Mullins reported that 'she had a number of painful grazes around the entrance to the anus. She was in pain, and it was extremely difficult for me to examine her because it was very painful': Transcript, 'I am that girl' (ABC, *Four Corners*, 7 May 2018) <<http://www.abc.net.au/4corners/i-am-that-girl/9736126>>.

¹⁶ Rush and Young have expressly stated elsewhere that 'where the acts of sexual penetration provide the setting in which the other acts are alleged to be the cause of the serious injury ... whether or not the victim consented to sex would be totally irrelevant to the determination of guilt or innocence': Rush and Young, 'A Crime of Consequence', above n 14, 111 [Original emphasis].

¹⁷ See *ibid* 110.

¹⁸ Assuming of course that the defence conceded that there was sexual intercourse between the accused and the complainant.

¹⁹ Rush and Young, 'A Crime of Consequence', above n 14, 111 [Emphasis added].

²⁰ *Ibid*.

²¹ *Royall v The Queen* (1990) 172 CLR 378, 412-3 (Deane and Dawson JJ), 425 (Toohey and Gaudron JJ).

causal chain in the first place. Any psychological injury that the complainant sustained, the defence would say, must have been caused by events that preceded the sexual contact between the accused and the complainant. And it might add – though the point is so obvious that it probably would not need to – that it would be simply irrational to regard that consensual contact as breaking the causal chain that those events started.

8. Rush and Young are similarly dismissive of the idea that, under their approach, accused persons might continue to argue that they believed that consent had been granted.²² But it would seem that, in some trials, the defence would claim that the accused neither intended to cause (serious) injury nor foresaw the possibility that it would be caused, because he or she mistakenly believed that the complainant was consenting. Rush and Young argue that such a claim is ‘structurally similar’²³ to the claims of accused persons in homicide cases such as *Crabbe v The Queen*²⁴ to the effect that they merely intended to frighten, not kill. They continue:²⁵

But the judicial and legal community would now regard it as absurd for defendants to argue that they are not guilty because they honestly but mistakenly believed that they would frighten rather than kill. In fact, the usual judicial interpretation is to say that such a belief does not raise an issue of innocence but rather at least raises an issue of recklessness and at most is characterised as being reckless as to a result. The doctrinal reason why the honest belief claim sounds absurd in those examples is that murder is a *result* crime – that is, the primary determinants of criminal liability are the mentality of the accused as to consequences ...

The problem with this is that, as *Pemble v The Queen*²⁶ demonstrates, it is *not* absurd for a homicide defendant to claim that s/he mistakenly believed that his/her conduct would merely frighten. If the jury thought that such a claim might be true, it would have to acquit him or her of murder. The accused’s mental state would be inconsistent with his/her realising that death would probably result from his/her act. Likewise, in a sexual assault case in which it was alleged that the intercourse caused psychological injury, the accused could not believe in consent *and* have the mens rea for Rush and Young’s offence. The two mental states are incompatible with one another. Accordingly, it is difficult to believe that the defence would refrain from leading evidence of a belief that, if it was (or might have been) held, would prevent the Crown from proving the mental element of the offence charged.

²² Rush and Young, ‘A Crime of Consequence’, above n 14, 115.

²³ *Ibid.*

²⁴ (1985) 156 CLR 464.

²⁵ Rush and Young, ‘A Crime of Consequence’, above n 14, 115.

²⁶ (1971) 124 CLR 107 (*‘Pemble’*). In that case, the accused claimed that he had merely intended to frighten the deceased with a rifle; he had not meant to shoot her dead: at 110-1. The High Court unanimously allowed his appeal from a conviction for murder, partly on the basis that the judge had not properly brought it home to the jury that they could only convict him of murder if they found either that he acted with intent to kill or inflict grievous bodily, or with *advertent* recklessness: at 119-121 (Barwick CJ), 127 (McTiernan J), 135 (Menzies J), 138-9 (Windeyer J). For Menzies J, ‘a specific direction was necessary upon the verdicts open to the jury if they should believe the accused when he said [among other things] ... that he intended to do no more than frighten the girl. ... That direction should have informed the jury that ... in those circumstances they could not find murder ...’: at 133. By majority, their Honours substituted a verdict of guilty of manslaughter for the verdict that the jury had returned: at 126 (Barwick CJ), 128 (McTiernan J), 139 (Windeyer J).

9. Thirdly, the offence that Rush and Young imagines would seemingly be apt to facilitate unmeritorious acquittals. Rush and Young concede that, in cases where the complainant was not consenting to the intercourse, there is:²⁷

[n]o doubt [that] defence lawyers may want to suggest that the injury suffered was not caused by the acts of the accused but by previous events which had a traumatic impact on the complainant.

But they think that it would only be in ‘exceptional cases’²⁸ that such arguments would succeed. They then add:²⁹

the decision as to whether or not there is in fact a competing cause and whether or not the acts of the accused were never an operating and substantial cause is a decision for the jury. Furthermore, as the appellate cases on causation involving intervening acts of third parties and victims indicate, such arguments are rarely successful and accepted by the jury.

10. However, the cases to which Rush and Young refer are factually and legally different from the cases that would arise if the provision that they support were implemented. In cases such as *R v Smith*,³⁰ *Hallett v R*³¹ and *R v Blaue*,³² the accused subjected the deceased to life-threatening violence. The question that arose was whether a *subsequent* act – either of the doctors who treated the deceased, or of nature, or of the deceased herself – broke the causal chain between the accused’s violence and the deceased’s death. Rush and Young are right to observe that, almost invariably in such cases, the Courts have held that it was open to the jury to answer that question in the negative. But what distinguishes cases like this from those where there is evidence that the complainant’s psychological injury *preceded* any non-consensual intercourse between her/him and the accused, is that, with the former, the issue is whether the subsequent act is so overwhelming as to render the accused’s violence merely part of the history.³³ This is not easy to establish (even as a reasonable possibility). In cases of the latter kind, on the other hand, the claim would be that the accused’s act of non-consensual intercourse caused a psychological injury that the complainant had not already sustained. In some cases, *this* would not be easy to establish. Some sexual assault complainants are very psychologically troubled.³⁴ Sexual assault prosecutions should not be frustrated just because the Crown is unable to prove *beyond reasonable doubt* that an incident of non-consensual intercourse has caused a complainant with serious mental illness(es) to sustain even further psychological damage.

²⁷ Rush and Young, ‘Submission to Victorian Law Reform Commission’, above n 14, [17.2].

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ [1959] 2 QB 35.

³¹ [1969] SASR 141.

³² [1975] 1 WLR 1411.

³³ *Smith* [1959] 2 QB 35, 43.

³⁴ See, for example, *Khamis v R* [2018] NSWCCA 31.

Question 3.2: The meaning of consent

Is the NSW definition of consent clear and adequate? What are the benefits, if any, of the NSW definition? What problems, if any, arise from the NSW definition? What are the potential benefits of adopting an affirmative consent standard? What are the potential problems with adopting an affirmative consent standard? Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say? Do you have any other ideas about how the definition of consent should be framed?

11. Section 61HE(2) of the *Crimes Act 1900* (NSW) provides that '[a] person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity.' In my submission, this definition is clear and adequate, and should be retained. The idea that underlies s 61HE(2), and which is encapsulated by it, is that a person will only have consented to sexual intercourse, sexual touching or a sexual act if he or she has made an autonomous decision to engage in such conduct. Certainly, if no further guidance were given in s 61HE about the circumstances in which a complainant's participation in this activity is – and is not – autonomous, it might be accurate to say that the s 61HE(2) definition is too ambiguous. But ss 61HE(5), (6) and (8) do provide such guidance. These sub-sections are largely in keeping with the common law's approach to such questions,³⁵ providing as they do that the person who engages in sexual activity due to duress,³⁶ or because of certain types of mistake,³⁷ or while unconscious,³⁸ mentally ill³⁹ or an infant,⁴⁰ has made no free choice to do so. Subject to what I say below about these provisions, I support that approach.
12. However, I do not accept that the NSW *Crimes Act* should adopt an affirmative consent standard. Nor do I accept that a provision similar to s 2A(2)(a) of the *Criminal Code Act 1924* (Tas) and s 36(2)(l) of the *Crimes Act 1958* (Vic) should be inserted into the NSW Act.
13. Concerning the second issue, I adhere to the views that I expressed at [6]-[18] of my preliminary submission. And I add this. Provisions such as ss 2A(2)(a) and 36(2)(l) appear to deliver something that in fact they do not. The effect of a legislative statement that a person does not consent to an act if s/he 'does not say or do anything to communicate consent'⁴¹ might seem at first glance to be that the accused will be guilty of sexual assault if: (a) s/he has had non-consensual intercourse with the

³⁵ See, for example, *Burns v The Queen* (2012) 246 CLR 334, 364 [86]-[87] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Burns*'). Note, in particular, their Honours' statement (at 364 [87]) that: '[t]he deceased was a sane adult. It is not suggested that his decision to take the methadone was vitiated by mistake or duress. His ability to reason as to the wisdom of taking methadone is likely to have been affected by the drugs that he had already taken but that is not to deny that his act was voluntary and informed [cf. *Crimes Act 1900* (NSW) s 61HE(8)(a)].'

³⁶ *Crimes Act 1900* (NSW) s 61HE(5)(c) and (d).

³⁷ *Crimes Act 1900* (NSW) s 61HE(6).

³⁸ *Crimes Act 1900* (NSW) s 61HE(5)(b).

³⁹ *Crimes Act 1900* (NSW) s 61HE(5)(a).

⁴⁰ *Crimes Act 1900* (NSW) s 61HE(5)(a).

⁴¹ *Criminal Code Act 1924* (Tas) s 2A(2)(a).

complainant; and (b) the complainant has not expressly told him/her that s/he was consenting. But, in truth, it does not have this effect at all. Rather, it just states the obvious fact that if a person performs an act or acts immediately before and/or during sexual intercourse (as will generally be the case), s/he will nevertheless not have consented to that intercourse unless s/he performed it, or them, because s/he was a willing participant in the intercourse. In other words, despite the presence of the word ‘communicates’ in s 2A(2)(a), this provision does not mandate communication about consent. Rather, it relates to the question of whether the complainant was in fact consenting. It does not help juries to answer that question. Indeed, it tends to distract them from it, by focussing their attention on the complainant’s behaviour at the time of the intercourse, rather than on evidence that sheds far greater light on what her/his ‘subjective internal state of mind [was] towards the [intercourse], at the time that it occurred’⁴² (see [12]-[15] of my preliminary submission).

14. Concerning the first issue, if the effect of s 2A(2)(a) *were* to mandate the conviction of any person who had non-consensual intercourse with another person after failing to achieve a positive indication from her/him that s/he was consenting, I would still not support it. This is not because I am hostile to the idea of the law encouraging individuals to communicate about consent with their prospective sexual partners. As I argued in my preliminary submission (see [24]-[28]), and as I maintain below (at [86]), I support altering the wording of s 61HE(4)(a) so as to enable trial judges to inform juries that, when determining whether the accused had the mens rea for sexual assault, they must have regard to any ‘physical or verbal steps’ that the accused took to ascertain whether the complainant was consenting. Rather, I oppose the adoption of an affirmative consent standard because, if such a standard were to be enshrined in the *Crimes Act*, this would effectively make sexual assault an absolute liability offence.
15. In *Wampfler v R*,⁴³ Street CJ noted that:

statutory offences fall into three categories:

- (1) Those in which there is an original obligation on the prosecution to prove mens rea.
- (2) Those in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question is not criminal in which case the prosecution must undertake the burden of negating such belief beyond reasonable doubt.
- (3) Those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence.

Leaving aside the fact that the accused need not discharge an evidential burden before a jury considers his/her claim that s/he believed on reasonable grounds that consent had been granted, the sexual assault offences in the *Crimes Act* fall within category 2.⁴⁴ They are offences, that is, of so-called strict liability. So, if the Crown is to secure

⁴² *The Queen v Ewanchuk* [1999] 1 SCR 330, 348 [26] (Major J, writing for himself, Lamer CJ and Iacobucci, Bastarache and Binnie JJ).

⁴³ (1987) 11 NSWLR 541, 546.

⁴⁴ At least insofar as the non-consent actus reus element is concerned. If the accused is to be convicted of the s 61I, s 61J or s 61JA offence, the sexual intercourse must have been intentional, although the Crown will very

a conviction for the s 61I offence, it is not enough for it to prove that the accused performed the actus reus (non-consensual sexual intercourse). If it were, the offence would fit within category 3. It would be an absolute liability offence. Rather, the accused must be acquitted of sexual assault if the prosecution is unable *additionally* to prove that s/he had no reasonable grounds for believing that the complainant was consenting.⁴⁵

16. A provision that ‘specifically require[d people] to find out whether their sexual partner [was] consent[ing] ... to sexual activity’⁴⁶ would render nugatory the honest and reasonable mistake of fact ‘defence’ for which s 61HE(3)(c) provides. Imagine, for example, the position if the NSW Parliament repealed s 61HE(4)(a) and enacted a new sub-section in s 61HE that provided that ‘a person knows that the alleged victim does not consent to the sexual activity unless the alleged victim expressly informs the person that s/he is consenting to that sexual activity.’ Under such an arrangement, there would be no room for an exculpatory mistake. As I sought to explain in my preliminary submission (see [23]), this is because there are three things that can happen when one person has intercourse with another. First, Person A can ask Person B whether s/he is consenting and be told ‘yes’. If intercourse then occurs, Person A believes *correctly* that s/he has the consent of Person B. There is no mistake. Secondly, Person A can ask Person B whether s/he is consenting and be told ‘no.’ If intercourse then occurs, Person A knows that consent has not been granted. Again, there is no mistake. Thirdly, Person A can fail to ask Person B whether s/he is consenting, and receive no express indication from him/her either way about this matter. It is only in these circumstances that Person A can mistakenly believe in the presence of consent. But such a person can never fit within s 61HE(3)(c). This is because the new sub-section deems him/her to have the mens rea for sexual assault by virtue of the fact that Person B has not expressly told him that s/he is consenting.
17. I continue to submit that it is highly undesirable for this ‘reversion to the objective standards of early law’⁴⁷ to occur. But if it does occur, it should not occur by stealth. If the honest and reasonable mistake of fact ‘defence’ is no longer to be available to a person accused of sexual assault in NSW, the legislature should face up to this squarely. It should not hypocritically provide for a ‘defence’ that can never be established. Rather, it should: repeal s 61HE(3) and (4); amend s 61I so as it reads ‘Any person who has sexual intercourse with another person without the consent of

seldom be put to the proof on this matter. As Bray CJ noted in *The Queen v Brown* [1975] 10 SASR 139, 141, ‘it is very difficult for a man to have intercourse unintentionally’; and it is not common for an accused to claim that s/he did. The Crown might additionally have to prove mens rea in respect of the aggravating circumstance(s) that it relies upon in cases where the accused is charged with a s 61J or s 61JA offence: see, for example, s 61J(2)(a) and s 61JA(1)(c)(i).

⁴⁵ S/he must also be acquitted in the rare cases referred to at paragraphs 41 and 43.

⁴⁶ New South Wales Law Reform Commission, above n 1, 36 [3.37].

⁴⁷ *Thomas v The King* (1937) 59 CLR 280, 308 (Dixon J) (*‘Thomas’*). By ‘objective’, Sir Owen of course meant ‘absolute’; he was not referring to objective fault. In like vein, another great judge, Lord Reid, noted in *Sweet v Parsley* [1970] AC 132, 148, (*‘Sweet’*) that ‘there has for centuries been a presumption that Parliament did not intend to make criminals of persons’ merely upon proof that they have committed the actus reus of an offence. See, too, *Fowler v Padget* (1798) 7 TR 509, 514, where Lord Kenyon CJ famously noted that ‘it is a principle of natural justice, and of our law, that actus non facit reum nisi mens sit rea.’

the other person is liable to imprisonment for 14 years, regardless of his or her state of mind'; and make similar changes to ss 61J and 61JA. Such an arrangement would at least have the benefit of simplicity and clarity.

Negation of consent

Question 4.1: Negation of consent

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

18. As I suggest above at [11], I support the retention in s 61HE of a list of circumstances in which consent is negated. In my view, these lists provide valuable guidance to triers of fact in sexual assault trials about the circumstances in which a person will and will not have 'freely and voluntarily agreed to sexual activity' within the meaning of s 61HE(2).
19. It follows that I respectfully disagree with the NSW Bar Association's contention that these provisions 'serve no useful purpose and are potentially misleading.'⁴⁸ The Bar Association exemplifies this point⁴⁹ through reference to s 61HE(8)(a). This provides that 'it may be established that a person does not consent to sexual activity' if s/he 'consents to the sexual activity while substantially intoxicated by alcohol or any drug.' I agree with the Bar Association, and with Julia Quilter,⁵⁰ that this provision is problematic. I deal with this issue below. But I cannot agree that it is either useless or misleading to provide that there is no consent where, for example, the complainant participates in sexual activity because of threats of force or terror,⁵¹ or because s/he is unlawfully detained,⁵² or because s/he is asleep or unconscious,⁵³ or because of certain mistaken beliefs.⁵⁴ How is it inaccurate, for instance, to state that a person does not consent to sexual activity if s/he agrees to that activity under a mistaken belief that it is for medical or hygienic purposes?⁵⁵ And why is a provision that states this useless? Does it not serve the 'useful purpose' of making it clear that the approach taken in *R v Mobilio*⁵⁶ is not the law in NSW?
20. However, after reading the material at 4.70-4.74 of the Consultation Paper regarding the practice of 'stealthing' – and after considering much of the Australian, English and Canadian case law from the last couple of centuries concerning the circumstances in which sexual assault complainants' mistaken beliefs negate their apparent consent

⁴⁸ NSW Bar Association, *Preliminary Submission PCO 49*, 2.

⁴⁹ *Ibid.*

⁵⁰ Julia Quilter, *Preliminary Submission PCO 92*, 6-8.

⁵¹ *Crimes Act 1900* (NSW) s 61HE(5)(c).

⁵² *Crimes Act 1900* (NSW) s 61HE(5)(d).

⁵³ *Crimes Act 1900* (NSW) s 61HE(5)(b).

⁵⁴ *Crimes Act 1900* (NSW) s 61HE(6).

⁵⁵ *Crimes Act 1900* (NSW) s 61HE(6)(c).

⁵⁶ [1991] 1 VR 339 ('*Mobilio*').

– I submit that some changes should be made to s 61HE(6) of the *Crimes Act*. If a person consents to intercourse only because of a mistaken belief that her/his partner will wear a condom during that intercourse, s/he has not consented to the unprotected intercourse that in fact takes place. Canadian⁵⁷ and English⁵⁸ law acknowledges this. In my opinion, NSW law should take the same approach. Indeed, in my submission, the law should also state that the person who ‘consents’ to intercourse only because of a mistaken belief that: (a) s/he will be paid by the other person⁵⁹; or (b) the other person does not have a grievous bodily disease (in circumstances where there is a real risk that the complainant will contract that disease),⁶⁰ has not truly consented at all. The best way to achieve this result would be to provide in s 61HE(6) for an expanded list of mistaken beliefs that negate a person’s apparent consent. That sub-section should also expressly provide that this list is non-exhaustive.

21. At common law, it is only in very limited circumstances that a mistaken belief will vitiate the complainant’s consent. As Stephen J put it in *The Queen v Clarence*:⁶¹

the only sorts of fraud which so far destroy the effect of a woman’s consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.

The High Court in *Papadimitropoulos v The Queen* accepted this to be so,⁶² although their Honours insisted that it is not the accused’s fraud, but the complainant’s mistake, that has the vitiating effect.⁶³ This, with respect, is correct. As noted above, a person consents when s/he makes a free (or autonomous) decision to participate in the relevant activity. If a person consents to sexual intercourse only because s/he mistakenly believes that (a) the intercourse is a medical procedure⁶⁴ or (b) the person with whom s/he is having intercourse is her/his regular sexual partner⁶⁵ (the two categories to which Stephen J refers), s/he has clearly *not* made a free choice. This is so whether or not the accused has deliberately deceived the complainant.⁶⁶ That having been said, fraud is highly relevant to whether the accused had the mens rea for sexual assault.⁶⁷

22. Even when it came to mistakes as to the ‘identity of the man’⁶⁸ or ‘the character of what he was doing’,⁶⁹ judges were slow to accept that the complainant’s ‘consent’

⁵⁷ *Hutchinson v The Queen* [2014] 1 SCR 346 (‘Hutchinson’).

⁵⁸ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849, [86] (‘Assange’).

⁵⁹ Cf. *R v Linekar* [1995] QB 251 (‘Linekar’).

⁶⁰ *The Queen v Cuerrier* [1998] 2 SCR 371 (‘Cuerrier’); *The Queen v Mabior* [2012] 2 SCR 584 (‘Mabior’); cf. *The Queen v Clarence* (1888) 22 QBD 23 (‘Clarence’). I take the term ‘grievous bodily disease’ from *Crimes Act 1900 NSW* s 4.

⁶¹ *Clarence* (1888) 22 QBD 23, 44.

⁶² (1957) 98 CLR 249, 261 (‘Papadimitropoulos’).

⁶³ *Ibid* 260.

⁶⁴ See, for example, *The Queen v Flattery* (1877) 2 QBD 410; *The King v Williams* [1923] 1 KB 340.

⁶⁵ See, for example, *R v Dee* (1884) 15 Cox CC 579 (‘Dee’); *Pryor v R* (2001) 124 A Crim R 22 (‘Pryor’).

⁶⁶ On this point, see Rebecca Williams, ‘Deception, Mistake and Vitiating of the Victim’s Consent’ (2008) 124 *Law Quarterly Review* 132, 145.

⁶⁷ As the High Court also made clear in *Papadimitropoulos* (1957) 98 CLR 249, 260.

⁶⁸ *Ibid* 261.

⁶⁹ *Ibid*.

was not a real one. In a series of nineteenth century English cases, it was held that it was not rape for a man to procure intercourse with a woman by impersonating her husband,⁷⁰ and it was only in 1884 that an Irish court, in *R v Dee*, pronounced these decisions to be ‘most irrational.’⁷¹ Consent involves the ‘free exercise of the will of a conscious agent,’⁷² it was held, and that there is no such free exercise where a person consents to ‘a lawful and marital act’ but in fact unwittingly participates in an ‘act of adultery.’⁷³ The following year, the English Parliament accepted the correctness of the Irish approach.⁷⁴

23. When it came to mistakes as to the nature of the act, the position was much the same. In *The Queen v Case*,⁷⁵ a doctor was convicted merely of assault, in circumstances where he had had ‘carnal connexion’ with a girl of fourteen, who ‘was ignorant of the nature of the defendant’s act, and made no resistance, solely from a *bona fide* belief that the defendant was (as he represented) treating her medically with a view to her cure.’⁷⁶ It is true that, in *The Queen v Flattery*,⁷⁷ it was held that the appellant had rightly been convicted of rape in similar circumstances. It is also true that the same was held in *The King v Williams*,⁷⁸ where a choirmaster had persuaded a sixteen year old girl to submit to what was in fact sexual intercourse, under the pretext that he was making ‘an air passage’⁷⁹ to correct her breathing. But the narrowness of the relevant principle was exposed in *R v Mobilio*.⁸⁰ In that case, the defendant was a radiographer who had inserted certain equipment into patients’ vaginas, ostensibly for medical purposes, but really for his own sexual gratification. The Victorian Court of Criminal Appeal unanimously set aside his resulting rape convictions. In doing so, their Honours explained that cases such as *Flattery* and *Williams* turned upon the relevant

⁷⁰ *R v Jackson* (1822) Russ and Ry 487; *R v Saunders* (1838) 9 Car & P 265 (‘*Saunders*’); *R v Williams* (1838) 8 Car & P 286; *R v Clarke* (1854) Dears 397; *R v Barrow* (1868) LR 1 CCR 156. The impersonator had, however, committed an assault. As Gurney B put it, when summing up in *Saunders* (1838) 9 Car & P 265, 266, ‘I am bound to tell you that the evidence in this case does not establish the charge contained in this indictment [rape], as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband; but if you think that that was the case, and that it was a fraud upon her, and that there was not consent as to this person, you must find the prisoner guilty of an assault.’ There is of course no little illogicality here. As May CJ pointed out in *Dee* (1884) 15 Cox CC 579, 586, ‘[i]f the consent of the woman prevented the crime from being a rape, it would seem that it would prevent it being an assault, which consent excludes.’ Such illogicality seems to have been rooted in the persistent, but wrong, idea that ‘the use of force or violence was an essential element’ of rape (to use the words of Williams JA in *Pryor* (2001) 124 A Crim R 22, 23 [5]). Certainly, the judges in *Dee* thought this notion underlay the English approach, with O’Brien J reminding his English counterparts that: ‘Whether the act of consent be the result of overpowering force, or of fear, or of incapacity, or of natural condition, or of deception, it is still want of consent’: (1884) 15 Cox CC 579, 598. Despite such exhortations, however, the misconceived notion that rape is always a crime of force seems still to influence the decisions in this area (as I suggest below).

⁷¹ *Dee* (1884) 15 Cox CC 579, 599 (Murphy J).

⁷² *Ibid* 595 (Lawson J).

⁷³ *Ibid* 587 (May CJ).

⁷⁴ *Criminal Law Amendment Act* 1885 (UK). See also *Clarence* (1888) 22 QBD 23, 43-4.

⁷⁵ (1850) 1 Den 580.

⁷⁶ *Ibid* 580.

⁷⁷ (1877) 2 QB 410.

⁷⁸ [1923] 1 KB 340.

⁷⁹ *Ibid* 341.

⁸⁰ [1991] 1 VR 339.

complainants' 'ignorance and naivety ... as to sexual matters.'⁸¹ By contrast, they continued, where the complainant knows what sexual intercourse is and consents to it, her/his consent is a real one – even if the defendant has led her/him to believe that the intercourse was medically necessary. Accordingly, their Honours regarded as wrongly decided the Canadian case of *R v Harms*,⁸² where the Court had arrived at a contrary conclusion. In the instant case, the Court held that the complainants' ignorance of Mobilio's sexual purpose did not negate their respective consents to his penetrative acts.⁸³ Their consents were real because they agreed to the introduction into their respective vaginas of the object that Mobilio in fact inserted.⁸⁴ Or, to use the Court's language:⁸⁵

In this case each of the women consented to the applicant introducing the transducer into her vagina in the performance of the act of conducting a transvaginal ultrasound examination. This is precisely what the applicant did. ... [T]he woman's consent to the proposed act which she knew to be of the nature and character of the act which was done, was not deprived of reality if she believed the applicant proposed to do the act solely for a medical diagnostic purpose and if he did it solely for his own sexual gratification.

24. Of course, the NSW legislature has made it clear that *Mobilio* is not the law in this state.⁸⁶ It has also reversed⁸⁷ *Papadimitropoulos*'s holding⁸⁸ that a person who agrees to intercourse only because s/he mistakenly believes that s/he is married to the accused, has made no mistake as to the 'nature and character of the act' so as to negate her/his apparent consent. Nevertheless, there has been, until recently, a continued reluctance among common law judges to allow that complainants who consent to intercourse only because of a mistaken belief, have in fact not consented at all. In *Clarence*,⁸⁹ it was held that a woman had validly consented to intercourse with her husband, in circumstances where he knew, but she did not know, that he had contracted gonorrhoea. For Wills J:⁹⁰

⁸¹ *Ibid* 349.

⁸² [1944] 2 DLR 61. In that case, the Court read *Flattery* and *Williams* as being authority for a wider principle than that which the Court in *Mobilio* thought it stood for. As Mackenzie J put it (at [32]): 'In the present case counsel for the prisoner contended that running all through these cases was a doctrine that a man cannot be convicted of rape if it appear that the woman actually knew that the act he sought to accomplish involved sexual intercourse. I find myself unable to agree with him. It seems to me that the principle they are seeking to enunciate is rather that a man shall be deemed guilty of rape if he has succeeded by fraud no less than by force in overcoming her permanent will to virtue.' Accordingly, the Court held that, just because the complainant understood that she was having sexual intercourse with the accused, did not make her consent real. Because she thought that the accused's purpose was 'pathological and not carnal' ([19]), the complainant did not know 'the nature and quality of [his] ... act' (at [16]).

⁸³ *Mobilio* [1991] 1 VR 339, 352.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*.

⁸⁶ *Crimes Act 1900* (NSW) s 61HE(6)(c). For a trenchant critique of *Mobilio*, see Jenny Morgan, 'Rape in Medical Treatment: The Patient as Victim' (1991) 18 *Melbourne University Law Review* 403.

⁸⁷ *Crimes Act 1900* (NSW) s 61HE(6)(b).

⁸⁸ *Papadimitropoulos* (1957) 98 CLR 249, 261.

⁸⁹ (1888) 22 QBD 23.

⁹⁰ *Ibid* 27.

That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.

Over one hundred years later, the Court of Appeal of England and Wales, in *R v Linekar*,⁹¹ took precisely the same view. In that case, the evidence was that the appellant had engaged the services of a sex worker, but had then made off without paying her after she had provided those services. The Court set aside his conviction for rape. After conceding that '[a]n essential ingredient of the offence of rape is the proof that the woman did not consent to the actual act of sexual intercourse with the particular man who penetrated her',⁹² Morland J held that nothing like that had happened here. Citing with approval the reasoning in *Clarence* and *Papadimitropoulos*,⁹³ his Lordship held that the complainant's consent would have been negated only if she had made a mistake as to the nature of the act or the identity of the accused.⁹⁴ But, as it was, her consent was as 'full and conscious as consent could be.'⁹⁵

25. Some commentators approve of the reasoning in *Clarence* and *Linekar*;⁹⁶ I do not.⁹⁷ Indeed, I reject in the strongest terms the notion that the person who consents to intercourse either in ignorance of her/his partner's grievous bodily disease,⁹⁸ or due to a mistaken belief that s/he will be paid, has freely and voluntarily agreed to that intercourse. Like the person who has intercourse with a person who is impersonating her/his regular lover, or the person who believes that penetration of her vagina is medically necessary, these individuals clearly have only participated in the sexual activity because of their mistake. It is true that the accused has used trickery not force. It is also true that, on the surface, the complainant has willingly participated in the sexual activity.⁹⁹ But neither of these matters should be allowed to obscure the fact

⁹¹ [1995] QB 252.

⁹² *Ibid* 255.

⁹³ *Ibid* 258-261.

⁹⁴ *Ibid* 259.

⁹⁵ *Ibid*, quoting *Clarence* (1888) 22 QBD 23, 44 (Stephen J).

⁹⁶ See, for example, George Syrota, 'Rape: When Does Fraud Vitiolate Consent?' (1995) 25 *Western Australian Law Review* 334, 341; Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 25 *Western Australian Law Review* 223, 226, 233-4; Jonathan Rogers, 'The effect of "deception" in the Sexual Offences Act 2003' (2013) 4 *Archbold Review* 7, 8-9.

⁹⁷ Nor, clearly, does Jonathan Herring, 'Mistaken Sex' [2005] *Criminal Law Review* 511, 517.

⁹⁸ In my view, this is so even where the risk of his/her contracting the disease is negligible or speculative: cf. *Mabior* [2012] 2 SCR 584, 616-23 [84]-[104]. But, in these circumstances, the accused should not be convicted of a sexual offence, because his/her right to privacy – and therefore not to disclose his/her condition to the complainant – seems to trump the complainant's right to sexual autonomy: see text accompanying nn 124-5.

⁹⁹ Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71 *Journal of Criminal Law* 412, 415, is one commentator who is unable to see past the fact that (a) the accused has used no force and (b) the complainant has willingly participated in the actual act of intercourse. With respect, he, and Hyman Gross, 'Rape, Moralism and Human Rights' [2007] *Criminal Law Review* 220, esp. 225-7, take insufficient account of the 'powerful violation of [the] ... victim's sexual autonomy' that occurs when s/he has intercourse only because of a mistaken belief (to use Herring's language, and as he points out: Jonathan Herring, 'Human Rights and Rape: a Reply to Hyman Gross' [2007] *Criminal Law Review* 228, 230-1). See also Jonathan Herring, 'Rape and the Definition of Consent' (2014) 26 *National Law School of India Review* 62, 70-2, and Tom Dougherty, 'Sex, Lies, and Consent' (2013) 123(4) *Ethics* 717, 722-7.

that the complainant has consented to something quite different from that which has in fact occurred. In the language of Wilde CJ in *Case*:¹⁰⁰

She [has] consented to one thing, he [has done] ... another materially different, on which she has been prevented by his fraud from exercising her judgment and will.

26. If cases such as this were to arise in NSW at the moment, might the accused be convicted of sexual assault? In my view, with respect, the Consultation Paper is right to suggest that the person who engages in ‘stealthing’ might already commit that offence.¹⁰¹ The same is possibly true of the person: (a) who fails to disclose to a sexual partner that s/he has a grievous bodily disease, or who deliberately deceives a sexual partner about this matter (in circumstances where there is a real risk that the disease will be passed onto the other person); or (b) who fails to pay a sex worker whose services s/he has used. My reasons are as follows.
27. First, it seems possible that, if the accused’s deception results in the complainant’s mistakenly believing that the accused will wear a condom during intercourse, the complainant has consented to this sexual activity under ‘a mistaken belief *about the nature of the activity* induced by fraudulent means’, within the meaning of s 61HE(6)(d) of the *Crimes Act* [emphasis added]. It is true that, in *Assange v Swedish Prosecution Authority*,¹⁰² Sir John Thomas P (as he then was), writing for the Court, found that a deception of this kind was not a deception ‘as to the nature and purpose of the Act’ within the meaning of s 76(2)(a) of the *Sexual Offences Act 2003* (UK). But his Lordship’s approach to this question was influenced by a desire to ensure that s 76, which provides for certain conclusive presumptions, operated as narrowly as possible.¹⁰³ And he did indicate that, had it not been for this consideration, he might have decided this point differently. Specifically, his Lordship said:¹⁰⁴

We accept it could be argued that sexual intercourse without a condom is different to sexual intercourse with a condom, given the presence of a physical barrier, a perceived difference in the degree of intimacy, the risks of disease and the prevention of a pregnancy; moreover the editors of *Smith & Hogan* (12th edition at p. 866) comment that some argued that unprotected sexual intercourse should be treated as being different in nature to protected intercourse.

It is, of course, less easy to argue that (a) a sex worker who has intercourse with a customer who then does not pay or (b) a person who has unprotected intercourse with a person who has dishonestly led him/her to believe that s/he has no grievous bodily

¹⁰⁰ (1850) 1 Den 580, 582.

¹⁰¹ New South Wales Law Reform Commission, above n 1, 62 [4.74].

¹⁰² [2011] EWHC 2849, [87].

¹⁰³ *Ibid.* Section 76 provides that, if the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act, or induced the complainant to consent to the act by impersonating a person known personally to the complainant, it will be conclusively presumed that the complainant was not consenting and the defendant knew this. Judicial wariness of this provision’s mandatory effect has led to ‘the applicability of s 76 ... [being] reduced to vanishing point’: Karl Laird, ‘Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003’ [2014] 7 *Criminal Law Review* 492, 504. See, for example, *R v Jheeta* [2008] 1 WLR 2582, 2589-90 [23]-[24].

¹⁰⁴ *Assange* [2011] EWHC 2849, [87].

disease, is mistaken as to the ‘nature of the activity.’¹⁰⁵ On the other hand, the legislative history must be considered. The words now found in s 61HE(6)(d) were inserted into the *Crimes Act* in 2003.¹⁰⁶ At the same time, Parliament repealed¹⁰⁷ s 66 of the Act, which created an offence of inducing or procuring ‘illicit carnal connection’ with a woman ‘by any false pretence, false representation, or other fraudulent means.’ In his Second Reading Speech for the 2003 Bill, the Minister appeared to state the view that the s 61HE(6)(d) words covered the same ground as did the repealed offence. He said:¹⁰⁸

The offence of procuring carnal knowledge by fraud found in section 66 of the Act is removed, as it is an obsolete offence. The issue of fraud is incorporated through amendment of the consent provisions found in section 61R of the Act.

It is well-established that Ministerial statements about the meaning of statutory words are far from conclusive.¹⁰⁹ Statutory interpretation is a job for the courts, not Parliament. Nevertheless, it is perhaps arguable that s 61HE(6)(d) operates as broadly as the s 66 offence did.

28. Secondly, s 61HE(10) expressly provides that the section ‘does not limit the grounds on which it may be established that a person does not consent to a sexual activity.’ Might it be, then, that mistakes other than those for which s 61HE(6) provides, are capable of rendering a person’s participation in such activity other than free and voluntary for the purposes of s 61HE(2)? In England and Wales, it has been held that a person does not ‘agree [to intercourse] by choice’, within the meaning of s 74 of the *Sexual Offences Act*, if s/he only had the intercourse because of the accused’s deceptively leading her/him to believe that he: (a) would wear a condom during the

¹⁰⁵ Having said that, Williams seems to indicate that, in her opinion, the latter kind of mistake might be such a mistake: Williams, above n 66, 152. ‘Sex resulting in the transmission of HIV’, she says, ‘could be said to be physically different from sex with an HIV negative person.’ If this is right, maybe sex with an HIV positive person is also physically different from sex with an HIV negative person.

¹⁰⁶ *Crimes Amendment (Sexual Offences) Bill 2003* (NSW), Schedule 1 [4].

¹⁰⁷ *Crimes Amendment (Sexual Offences) Bill 2003* (NSW), Schedule 1 [8].

¹⁰⁸ NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 376 (Mr Bob Debus, Attorney-General).

¹⁰⁹ Indeed, in *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [12], Spigelman CJ went so far as to say that: ‘Statements of intention as to the meaning of words by ministers in a Second Reading Speech, let alone other statements in parliamentary speeches are virtually never useful. Relevantly, in my opinion, they are rarely, if ever, “capable of assisting in the ascertainment of the meaning of the provisions” within s 34(1) of the *Interpretation Act* 1987. I only refrain from using the word “never” to allow for a truly exceptional case, which I am not at present able to envisage.’ For a recent case in which the NSWCCA held to be legally erroneous a Minister’s understanding of the effect of a particular provision in a Bill that he was introducing, see *Issa v R* [2017] NSWCCA 188, [69]-[72].

intercourse;¹¹⁰ (b) was biologically male;¹¹¹ or (c) would not intentionally ejaculate in her vagina.¹¹² If such individuals fit within s 74, surely it is possible that they also fit within s 61HE(2)? It is true that, in *R v B*,¹¹³ the Court of Appeal of England and Wales held that '[w]here one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated.' But the Court apparently left open the question of whether the position is different if the person with the disease actively deceives his/her sexual partner about this matter.¹¹⁴ And, in any case, the Canadian Supreme Court has taken the, with respect, more principled view that the person who is at real risk of transmitting a serious disease to a prospective sexual partner, will have had non-consensual intercourse in cases both of deception and non-disclosure.¹¹⁵

29. Nevertheless, we cannot be certain that mistakes as to condom-use, disease-status and/or payment of a sex worker do negate consent in NSW. It is in these circumstances that I propose that such mistakes be expressly provided for in s 61HE(6). In my submission, the sub-section should be amended to state:

Without limiting the circumstances in which a person's mistake about, or ignorance as to, a matter, means that he or she does not consent to a sexual activity, a person does not consent to a sexual activity if she only participates in it because of:

¹¹⁰ *Assange* [2011] EWHC 2849, [88]-[91]. Note, too, the Canadian Supreme Court's decision in *Hutchinson* [2014] 1 SCR 346. All seven members of the Court agreed that the appellant's sabotage of a condom that the complainant insisted he wear during intercourse, meant that the intercourse was non-consensual. For the majority (McLachlin CJ, Rothstein, Cromwell and Wagner JJ), this was for the following reasons: see esp. 375-7 [64]-[74]. Although there had been 'voluntary agreement of the complainant to engage in the sexual activity in question' within the meaning of the *Criminal Code*, R.S.C. 1985, c. C-46, s 273.1(1), that consent had been negated by 'fraud' pursuant to s 265(3)(c). This was because the appellant had been dishonest, and there was a risk of serious bodily harm (pregnancy, their Honours held, was equivalent to serious bodily harm) resulting from such dishonesty. The minority (Abella, Moldaver and Karakatsanis JJ), on the other hand, considered that the relevant provision in this case was s 273.1(1), not s 265(3)(c). For these Justices, there was no voluntary agreement to the sexual activity, because '[t]he deliberate sabotaging of that condom without her knowledge or agreement makes what happened different from what the complainant agreed to': at 379 [79]. The major practical difference between these approaches appears to be this. Under the minority's view, the accused's deception of the complainant as to condom use will *always* mean that the complainant was not consenting to the sexual activity (such a view is of course consistent with *Assange*). Under the majority's view, on the other hand, such deception will mean that there will be no consent only where the accused's failure to wear a condom creates a risk of serious bodily harm (including pregnancy). It is submitted that there is much force in the minority's contention that the latter approach does not satisfactorily uphold the 'right to sexual autonomy and physical integrity': at 388 [98].

¹¹¹ *R v McNally* [2014] QB 593, 600-1 [23]-[27] ('*McNally*').

¹¹² *R (F) v Director of Public Prosecutions* [2014] QB 581, 591-2 [26] ('*R(F)*').

¹¹³ [2007] 1 WLR 1567, 1571 [17].

¹¹⁴ *Ibid* 1571 [19]. Certainly, this is how *R(B)* has subsequently been interpreted: *McNally* [2014] QB 593, 600 [24].

¹¹⁵ *Mabior* [2012] 2 SCR 584, 609-610. Cf. Samantha Ryan, "'Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' [2019] 1 *Criminal Law Review* 1, 12-14, who thinks that non-disclosure, unlike deception, 'does not necessarily prevent a sexual partner from making an informed choice': at 12. Whatever force Ryan's argument has where GBH offences are involved, it is submitted that it is not persuasive respecting sexual offences. In the case of such offences, the accused's non-disclosure makes the complainant's decision to engage in intercourse non-autonomous. Such a complainant has not agreed to have intercourse with a person who *certainly* has a grievous bodily disease. Rather, s/he has agreed to have intercourse with someone who, *for all s/he knows, might* have such a disease.

- (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) a mistaken belief that the other person will wear a condom during the sexual activity (provided that that sexual activity is sexual intercourse);
- (e) a mistaken belief that the other person will pay the person for participating with him or her in the sexual activity;
- (f) a mistaken belief that the other person does not have a grievous bodily disease, or his or her ignorance of the fact that the other person has such a disease, in circumstances where there is a real risk that the person will contract the disease as a result of the sexual activity.

30. There are a few features of this proposal that require explanation.

31. First, s 61HE(6) currently provides that the complainant does not consent if s/he consents ‘under’ any of the mistaken beliefs noted in s 61HE(6)(a)-(d). The problem with this is that it is possible for a person’s consent ‘under’ a mistaken belief to be a perfectly valid consent. If A wrongly thinks that s/he is married to B (who in fact has not lawfully dissolved his/her first marriage), but would have participated in sexual activity with him/her even if s/he had known that s/he was not, it is simply wrong to state that s/he has not consented to the relevant activity. A has had intercourse, let us say, ‘under’ a mistaken belief. But only if s/he had the intercourse *because of the* mistaken belief, could it be said that s/he made no autonomous decision to proceed. As much is suggested by Herring when he proposes, controversially, but I think largely correctly, the following legal rule:¹¹⁶

If at the time of the sexual activity a person:

- (i) is mistaken as to a fact; and
- (ii) *had s/he known the truth about that fact would not have consented to it* [the sexual activity]

then she did not consent to the sexual activity. If the defendant knows (or ought to know) that s/he did not consent (in the sense just described) then s/he is guilty of an offence.

32. Secondly, my proposal might raise some eyebrows insofar as it concerns mistakes about, or ignorance as to, a grievous bodily disease that the accused is at real risk of transmitting.¹¹⁷ I note in this regard the concern expressed in the Consultation Paper that:¹¹⁸

¹¹⁶ Herring, above n 97, 517. [Emphasis added] See also Simon Gardner, ‘Appreciating *Olugboja*’ (1996) 16(3) *Legal Studies* 275, 287-8. To adapt Gardner’s example, is the sex worker who has intercourse with A, thinking that A is really her twin sister, B (a regular client), necessarily not consenting? I would suggest that the sex worker *is* consenting if his/her mistake made no difference to his/her decision to proceed with sex.

¹¹⁷ Though it would appear to have some academic support. Bronitt, for instance, has written that: ‘There is a qualitative difference between consent to an act of intercourse and consent to that intercourse aware that one’s partner is infected with HIV/AIDS. In this writer’s opinion, the restrictive approach to fraud vitiating consent in the common law represents a serious lacuna in the present law: Simon Bronitt, ‘Criminal Liability for the Transmission of HIV/AIDS’ (1992) 16 *Criminal Law Journal* 85, 89.

¹¹⁸ New South Wales Law Reform Commission, above n 1, 60-1 [4.67]. See also Deborah Kim and Simon Bronitt, ‘Case and Comment: *Zaburoni v The Queen* [2016] HCA 12’ (2017) 41 *Criminal Law Journal* 50, 54-5.

Failure to disclose HIV/AIDS positive status is not a specific negating circumstance in the consent laws of any Australian state or territory. The issue raises questions including whether such a law would discourage people from undertaking appropriate health checks and talking openly about HIV, and whether it would apply if someone were unaware of their HIV/AIDS positive status.

Under my proposal, consent *would* be vitiated if the accused were unaware of his/her HIV/AIDS positive status. But the accused would generally not be guilty of sexual assault: his/her ignorance of the disease would often¹¹⁹ prevent him/her from having the mens rea for that offence. Regarding the Commission's other concern, the Canadian Supreme Court in *Mabior v The Queen*¹²⁰ has queried whether, if the law is changed in this manner, people *will* be deterred from undergoing health checks. In its view, which I respectfully share, speculative concerns of this nature¹²¹ – which additionally seem to assume that citizens have greater knowledge of the law that governs them than they in fact do, and overlook the fact that it has long been a crime recklessly or intentionally to inflict a grievous bodily disease on a person¹²² – should not stand in the way of a law that gives appropriate protection to sexual autonomy. If a person consents to unprotected intercourse only on the basis that his/her HIV positive prospective sexual partner does not have a grievous bodily disease, s/he has not consented to the act that in fact takes place. There is no difference in principle between this scenario and the situations that are already covered by s 61HE(6). That having been said, however, in cases where the risk of transmission is negligible,¹²³ maybe it can be said that the accused's failure to disclose his/her disease status ought not to have made a difference to the complainant's decision to proceed with intercourse. It is for this reason, perhaps – but mainly to reduce the burden on persons

¹¹⁹ I say 'generally' and 'often' because the accused who does not *know* that he or she has a serious disease might nevertheless strongly suspect that he or she does. If that is the case, the Crown might be able to prove that he or she was reckless as to the complainant's consent: i.e. realised the possibility that he or she was not consenting. But if a person has non-consensual intercourse knowing that it is possible that the complainant is not consenting, why should s/he not be convicted of sexual assault?

¹²⁰ *Mabior* [2012] 2 SCR 584, 608 [59].

¹²¹ See Simon Bronitt, 'Spreading disease and the criminal law' [1994] *Criminal Law Review* 21, 27.

¹²² See *Crimes Act* ss 33(1), 35(1) and (2), and s 4. In 2007, s 4 was amended to make it clear that a person who caused a person to contract a grievous bodily disease had inflicted grievous bodily harm on him/her for the purposes of s 33 and 35: *Crimes Amendment Act 2007* (NSW), Schedule 1 [1]. But, according to a majority of the High Court in *Aubrey v The Queen* (2017) 260 CLR 305, even before 2007, a person 'inflict[ed] grievous bodily harm' upon a person, within the meaning of ss 33 and 35, if s/he transmitted a serious sexual disease such as HIV to him/her. It is difficult to believe that any person would be undeterred by the ss 33 and 35 offences from undergoing health checks, but would be deterred by my proposed s 61HE(6)(f) from doing so. In any case, are there really people who will think to themselves 'I won't undergo testing because if I do *and* I find out I'm HIV positive *and* I then have unprotected intercourse with another person, I might be prosecuted for sexual assault?' As Alan Turner, 'Criminal Liability and AIDS' (1995) *Auckland University Law Review* 875, 884, 887, has noted, surely the intricacies of the criminal law will be the furthest thing from the mind of a person who believes that s/he might have a disease of this nature, and is considering whether to undergo testing.

¹²³ In *Mabior*, the Court held that there will exist only a negligible risk where '(i) the accused's viral load at the time of sexual relations was low, *and* (ii) condom protection was used: *Mabior* [2012] 2 SCR 584, 619 [94].

infected by particular diseases of disclosing the fact¹²⁴ – that I have included the words ‘in circumstances where there is a real risk that the person will contract such a disease’ at the end of my proposed s 61HE(6)(f).¹²⁵

33. Thirdly, my proposal achieves a balance between the concerns of (a) those who fear over-criminalisation if any mistake as to a material fact vitiates consent,¹²⁶ and (b) those, like Herring, who contend that in any case where the complainant would not have consented but for a mistake, his/her sexual autonomy has been violated. It does this by expressly providing that the list of vitiating mistakes is a non-exhaustive one. This allows judges, in individual cases not covered by proposed s 61HE(6)(a)-(f), to determine whether the complainant’s mistake has negated his or her apparent consent. In the unlikely event that a case arose in which the Crown was able to prove that a complainant only had intercourse because of a dishonest declaration of love,¹²⁷ or because of lies about the accused’s wealth,¹²⁸ or because s/he mistakenly believed that the accused was of a particular racial or ethnic background,¹²⁹ it would be for the Courts to determine whether non-consensual intercourse had in fact occurred. In the far more likely event of a complainant alleging that her/his decision to have intercourse was not a free one because it was made only due to his/her mistaken belief that the accused was biologically a male¹³⁰ or would not intentionally ejaculate inside

¹²⁴ It is arguable that it is to cast an unfair burden on a person to require him/her to disclose to prospective sexual partners that s/he has a serious disease, when there is only a speculative risk that s/he will transmit that disease to that other person: see, for example, Ryan, above n 115, 11.

¹²⁵ This accords with *Mabior* [2012] 2 SCR 584, 616 [84], 622 [104].

¹²⁶ See, for example, Morgan, above n 96, 229: ‘Take the example of a man who falsely professes his undying love for a woman; is it sexual assault if she says that she only agreed to sexual intercourse because she believed his protestations? What about the woman who tells a man that she is unmarried when she is in fact married? Or the woman who agrees to sexual intercourse on the basis of the man’s false promise that he intends to marry her?’

¹²⁷ There are formidable obstacles in the way of proving such a thing, meaning that academic and judicial fears about such cases (see, for example, *Michael v Western Australia* (2008) 183 A Crim R 348, 362 [64], 371 [88] (Steyler P) are, with respect, slightly overblown. Further, as JR Spencer, ‘Sex by Deception’ (2013) 9 *Archbold Review* 6, 8, observes, the offence of procuring a woman by false pretences to have intercourse was ‘part of English criminal law for 119 years ... and during its lengthy lifetime it was never criticised as leading to prosecutions that were oppressive.’

¹²⁸ See *McNally* [2014] QB 593, 600 [23], [25].

¹²⁹ See Laird, above n 103, 507. Cf. Spencer, above n 127, 8, who argues, with some force, that a conviction in such circumstances might not be quite as undesirable as first appears. ‘Even racists’, he says, ‘are entitled to make their own decisions about those to whom they wish to give themselves in sex.’

¹³⁰ *McNally* [2014] QB 593. Sharpe argues that the transgender person who has ‘transitioned’ should not be liable to be convicted of any offence in circumstances where s/he has failed to disclose her/his gender history to his/her partner: Alex Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ [2014] *Criminal Law Review* 207, 218-222. I respectfully agree. As in the case of the person who poses only a negligible risk of transmitting a grievous bodily disease to his/her sexual partner (see above n 124), the transgender person’s privacy interest seems to trump the autonomy interest of the complainant: see Sharpe at 221. But what of the transgender person, like Justine McNally, who still has the genitalia of the sex with which s/he does not identify? I find it difficult to accept that a gay woman, for example, is acting in an invidiously discriminatory way if she would never consent to intercourse with a person who has a penis: cf. Sharpe at 221-2. Accordingly, in a case such as *McNally*, the complainant’s autonomy interest does seem to trump the defendant’s privacy interest. In other words, a sexual assault conviction seems justified where the complainant consents to sexual activity only because of a mistaken belief that the accused has female (or male) genitalia.

him or her,¹³¹ it would likewise be for the judges to determine whether s/he really had consented. Of course, as stated above, ss 61HE(10) and (2) do seem already to provide the Courts with the tools to find that no real consent has been granted in cases of mistake not specifically referred to in s 61HE(6). But, in my view, this should be made clear in s 61HE(6) itself. Given the fertility of the fraudulent imagination,¹³² and the consequent difficulty of foreseeing the particular cases that will arise in this area in the future, it is important to state in plain terms that s 61HE(6) potentially covers mistakes in addition to those for which it expressly provides.¹³³

34. Before leaving the negation of consent provisions in the *Crimes Act*, I wish briefly to consider s 61HE(8). This sub-section provides that it *may* be established that a person is not consenting to a sexual activity if s/he ‘consents’ to that sexual activity: while ‘substantially intoxicated by alcohol or other drugs’ (s 61HE(8)(a)); ‘because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force’ (s 61HE(8)(b)); or ‘because of the abuse of a position of authority or trust’ (s 61HE(8)(c)).
35. In my respectful opinion, Quilter might well be right to say that, in cases where it is engaged, s 61HE(8)(a) does no real work.¹³⁴ The same might be true of s 61HE(8)(c). Take, for example, a case where a complainant has had intercourse with her/his employer or PhD supervisor and then claims that that intercourse was non-consensual. Section 61HE(8)(c) does not determine the question of whether such a complainant was consenting. It merely provides that s/he might not have been. It is true that judges can inform juries in such cases that, if the complainant had intercourse because of the accused’s abuse of his/her position of authority, this is ‘relevant’ to whether s/he was consenting.¹³⁵ But because people commonly give valid consent in such situations, this might not provide the jury with very much guidance about the relevant question. If the jury is to go on find that there was in fact no consent, it will do so because there are *other* factors that persuade it that the complainant did not freely and voluntarily agree to the sexual activity. The real work will have been done by s 61HE(2), not s 61HE(8)(c).
36. The same comments apply, but possibly with even greater force, to cases where s 61HE(8)(a) is enlivened. A person who is (highly) affected by alcohol or other drugs is often still capable of acting autonomously.¹³⁶ Accordingly, if a ‘substantially intoxicated’ complainant has *not* made an autonomous decision to participate in

¹³¹ *R (F)* [2014] QB 581. Of course, I could have added this mistake to the list in my proposed s 61HE(6). The only reason why I did not is that cases of this nature seem rarer than those that I do refer to in that proposed sub-section, and there is arguably not as much point in legislating for the unusual as there is for the more common (in this context, anyway).

¹³² As noted in *Fardon v Attorney General of Queensland* (2004) 223 CLR 575, 619 [105] (Gummow J), quoting Lord Hardwicke LC.

¹³³ Jonathan Crowe, ‘Fraud and consent in Australian rape law’ (2014) 38 *Criminal Law Journal* 236, 246-7, too, has noted the need for some flexibility in this context.

¹³⁴ Quilter, above n 50, 6.

¹³⁵ Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’

¹³⁶ As the High Court has recognised: *Burns* (2012) 246 CLR 334, 364 [87] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

sexual activity, this will frequently be for a reason other than her/his intoxication. To tell a jury that such a complainant may not have been consenting is often, on one view, merely to state an obvious fact that sheds no light on the complainant's attitude to the sexual activity that has occurred. Again, if the jury goes on to find that the complainant was not consenting, this will usually be because of factors other than the complainant's intoxication.

37. In my view, however, the most obvious difficulty with s 61HE(8)(b) is a different one. Imagine a case where a complainant alleges that s/he has only had intercourse with the accused because of the accused's threat to terminate her/his employment if s/he did not.¹³⁷ It is far from clear to me that, in such a case, s 61HE(8)(b) would have no real influence on the jury's deliberations. On the contrary, it seems probable that, if the jury were to find that there was no consent, this would be because of its satisfaction that the threat rendered the complainant's consent meaningless. But – and this is the difficulty to which I have just referred – why should it be open to the jury to make a contrary finding? The Criminal Justice Sexual Offences Taskforce defended the different treatment of violent and non-violent threats in (what is now) s 61HE on the basis that, in the case of the latter, the complainant's ability to choose whether to engage in sexual activity is not necessarily *eliminated*.¹³⁸ But is it not so constrained as to mean that s/he has been prevented from 'freely and voluntarily agree[ing]' to the sexual activity? The Queensland legislature clearly thinks so, because it has provided in s 348(2)(c) of that state's *Criminal Code* that 'a person's consent to an act is not freely and voluntarily given if it is obtained ... by threat or intimidation.' In other states, too, no distinction is drawn between violent and non-violent threats in this context.¹³⁹ It is true that there is authority that, for the purposes of the law of duress and necessity, only a threat of death or (really) serious injury¹⁴⁰ is capable of rendering the accused's conduct non-autonomous (and therefore non-criminal).¹⁴¹ But there are perhaps reasons why a person who inflicts harm on an innocent person or his/her property should never be excused if s/he has done so due to a threat of, say, extortion. There are no such grounds for regarding as autonomous a complainant's participation in sexual activity, where the accused has procured such participation through the use of threats of any kind.
38. One possible solution to these problems would be to repeal s 61HE(8) and expand and modify the list of factors, in s 61HE(5), that certainly negate consent. That is, s 61HE(5) could be amended to provide:

¹³⁷ See Attorney-General's Department of NSW, Criminal Justice Sexual Offences Taskforce, 'Responding to sexual assault: the way forward' (December 2005) 38, quoting Jennifer Temkin, 'Towards a Modern Law of Rape' (1982) 45 *The Modern Law Review* 399, 406-7.

¹³⁸ See Attorney-General's Department of NSW, above n 137, 38.

¹³⁹ For instance, s 2A(2)(c) of the *Criminal Code Act 1924* (Tas) provides that 'a person does not freely agree to an act if the person ... agrees or submits because of a threat of any kind against him or her or against another person'; and s 319(2) of the *Criminal Code 1902* (WA) states that 'a consent is not freely and voluntarily given if it is obtained by ... threat.'

¹⁴⁰ *R v Abusafiah* (1992) 24 NSWLR 531, 545; *Rogers v R* (1996) 86 A Crim R 542, 547; *R v Z* [2005] 2 AC 467, 490 [21].

¹⁴¹ But cf. *R v Lawrence* [1980] 1 NSWLR 122, 143.

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, cognitive incapacity or intoxication, 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 intimidation or threat(s) of any kind, whether the intimidation or threat(s) are directed at him or her or another person, or
- (d) if the person consents to the sexual activity because the person is unlawfully detained, or
- (e) if the person consents to the sexual activity because he or she is overborne by a person exercising authority over him or her.

The benefit of such an arrangement is that it provides clearer guidance to juries about when consent has not been granted. It does so without causing the slightest unfairness to accused persons. The complainant who is so intoxicated as not to be capable of consenting is of course not consenting (see proposed s 61HE(5)(a)). Nor is the person who is overborne by a person who is exercising authority over him or her (proposed s 61HE(5)(e)). And, nor, for the reasons just given, is the person who consents *because of* intimidation or threats (whether violent or non-violent). As with cases of mistake, if a person would not have ‘consented’ to activity but for a threat of whatever nature, his or her sexual autonomy has been infringed seriously enough to negate that consent. To be sure, this would render non-consensual sexual activity between an actor and a producer who had threatened her/him that s/he would not otherwise be given a role in his/her new film (see *R v Olugboga* [1982] 1 QB 320, 328). But the view that this should not be so, seems to be predicated on the erroneous notion that the core aim of sexual offences continues to be *not* the protection of sexual autonomy, but instead the protection of people against aggression and force (see Simon Gardner, ‘Appreciating *Olugboga*’ (1992) 16(3) *Legal Studies* 275, 280).

Knowledge about consent

Question 5.1 and Question 5.13: Actual knowledge and recklessness; A single mental element

Should ‘actual knowledge’ remain part of the mental element for sexual assault offences? If so, why? If not, why not? Should ‘recklessness’ remain part of the mental element for sexual assault offences? If so, why? If not, why not? Should ‘reckless’ be defined in the legislation? If so, how should it be defined? Should the term ‘reckless’ be replaced by ‘indifferent’? If so, why? If not, why not?

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

39. Section 61HE(3) provides that:

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.

40. In my submission, all three forms of knowledge for which s 61HE(3) provides should be retained. The argument to the contrary appears to be that the actual knowledge and recklessness mental states, provided for by s 61HE(3)(a) and s 61HE(3)(b) respectively, are redundant.¹⁴² In other words, according to this argument, if, at present, an accused engages in (say) non-consensual intercourse with another person, s/he must be convicted of sexual assault unless (leaving the onus of proof to one side) s/he believed on reasonable grounds that the complainant was consenting. For, if the accused lacks this mental state, s/he must logically either have: (i) actually known that the complainant was not consenting;¹⁴³ (ii) known that it was possible that s/he was not consenting;¹⁴⁴ (iii) not have considered at all whether the complainant was consenting;¹⁴⁵ or (iv) believed unreasonably that the complainant was consenting.¹⁴⁶ No other, innocent, state of mind is possible. Accordingly, so the argument goes, might it not be better for s 61HE simply to provide – as English¹⁴⁷ and Victorian¹⁴⁸ law essentially does – that the person who engages in non-consensual sexual activity with another person is guilty of the relevant sexual offence if s/he has no reasonable grounds for believing that the complainant is consenting?
41. The problem with this argument is that it is not quite true to say that the accused who lacks the belief to which s 61HE(3)(c) refers *must* have the mens rea for the offences to which s 61HE applies. Consider the accused with a very low IQ who engages in non-consensual sexual activity with another person without considering the question of consent. Such an accused has no positive belief that the complainant is consenting. S/he therefore does not believe on reasonable grounds that consent has been granted. Nevertheless, if it is reasonably possible that the risk of non-consent would not have

¹⁴² See New South Wales Law Reform Commission, above n 1, 87 [5.119].

¹⁴³ *Crimes Act 1900* (NSW) s 61HE(3)(a) makes this a guilty mental state for sexual assault (and the other offences to which s 61HE applies).

¹⁴⁴ *Hemsley v R* (1988) 36 A Crim R 334, 336-8, makes it clear that this is a guilty mental state for sexual assault. Note, too, that in *Banditt v The Queen* (2005) 224 CLR 262 (*'Banditt HCA'*), the High Court upheld the trial judge's direction that, if an accused 'is aware that there is a possibility that [the complainant] is not consenting but he goes ahead anyway, that is recklessness': see 269 [14]. A realisation of the possibility of non-consent was also a sufficient mens rea for the now repealed indecent assault offences: *Fitzgerald v Kennard* (1995) 28 NSWLR 185, 204 (*'Fitzgerald'*).

¹⁴⁵ *R v Tolmie* (1995) 37 NSWLR 660, 672 (Kirby P, with whom Barr AJ agreed) (*'Tolmie'*), establishes that the accused who fails to consider the question of consent will generally have the mens rea for sexual assault. Inadvertent recklessness was also a sufficient mental state for the old indecent assault offences: *Fitzgerald* (1995) 28 NSWLR 185, 195 (Sheller JA), 204-6 (Cole JA).

¹⁴⁶ *Crimes Act 1900* (NSW) s 61HE(3)(c) makes this a guilty mental state for sexual assault (and the other offences to which s 61HE applies).

¹⁴⁷ See, for example, *Sexual Offences Act 2003* (UK) ss 1(1)(c) and 3(1)(d).

¹⁴⁸ See, for example, *Crimes Act 1958* (Vic) ss 38(1)(c) and 40(1)(d).

been obvious to a person of his/her mental capacity if s/he had turned his/her mind to the relevant question, s/he must be acquitted.¹⁴⁹ However, if s 61HE(3) were amended to provide that ‘A person has the requisite mental state for the offences to which this section applies if he or she has no reasonable grounds for believing that the alleged victim consents to the sexual activity’, such a person would suddenly be guilty of the relevant sexual offence. I do not believe that it is desirable to alter the law in this way. A person should not be convicted of a serious offence because of his/her failure to perceive a risk that s/he could not reasonably have been expected to perceive.¹⁵⁰

42. Nor, with respect, is it necessary or desirable to define the term ‘reckless’ in s 61HE(3)(b).¹⁵¹ If there were any lack of clarity about the meaning of this term, the position might be different. But this is not so. As Bell J remarked in *Mitton v R*:¹⁵²

... the law has been settled in this respect for some years. Recklessness for the purposes of s 61R(1) may be both advertent and nonadvertent. In the former case it may be established by proof that the accused adverted to the possibility that the complainant was not consenting and with that awareness proceeded to have intercourse in any event: *Regina v Hemsley* (1988) 36 A Crim R 334. Recklessness may also be established in a case where the accused does not turn his mind to the question of consent at all in circumstances in which the risk that the complainant is not consenting is one which would have been obvious to a person of the accused’s mental capacity had he turned his mind to it: *Regina v Kitchener* (1993) 29 NSWLR 696; *Regina v Tolmie* (1995) 37 NSWLR 660.

Given that these two forms of recklessness are set out clearly in the standard directions concerning sexual assault,¹⁵³ no trial judge could possibly be under any illusions as to what recklessness involves for the purposes of s 61HE(3)(b).

43. Finally, I respectfully do not agree that the term ‘reckless’ should be replaced with the term ‘indifferent’ in s 61HE(3)(b). In its preliminary submission to this Review, the NSW Bar Association queries whether either advertent or inadvertent recklessness should be sufficient mental states for sexual assault. Of the former, it says:¹⁵⁴

If recklessness is deemed to be the same as knowledge of lack of consent, it should involve a comparable level of criminal culpability or moral blameworthiness to knowledge. Merely taking a risk that consent is absent, particularly if the risk is perceived to be small and there are reasons available to explain why the risk was not eliminated, does not necessarily import a comparable level of culpability to knowledge of absence of consent.

¹⁴⁹ *Tolmie* (1995) 37 NSWLR 660, 672 (Kirby P, with whom Barr AJ agreed); *Mitton v R* (2002) 132 A Crim R 123, 129 [28] (*‘Mitton’*); *R v Banditt* (2004) 151 A Crim R 215, 228 [78] (*‘Banditt NSWCCA’*).

¹⁵⁰ See, in this regard, *R v G* [2004] 1 AC 1034. There, it was held to be unjust to convict of a statutory arson offence boys who gave no thought to the possibility that the relevant property would be destroyed or damaged, in circumstances where a reasonable adult – but not a reasonable child – would have perceived the risk of such destruction/damage.

¹⁵¹ Cf. Luke McNamara et al, *Preliminary Submission PCO* 85, 1-2.

¹⁵² *Mitton* (2002) 132 A Crim R 123, 139 [28].

¹⁵³ Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’

¹⁵⁴ NSW Bar Association, above n 48, 3.

But an accused will only be advertently reckless if s/he realises that there is a *real* possibility that the complainant is not consenting; a realisation of a ‘bare possibility’ is not enough.¹⁵⁵ Such a person might not be quite as morally culpable as the accused who has actual knowledge of non-consent; but it is surely fair to label him/her a rapist even so. Even if such a person cares enough about consent to stop when explicitly told to do so, s/he does not care enough about it to refrain from intercourse until his/her substantial doubts about the complainant’s willingness have been clarified. In *Banditt v The Queen*,¹⁵⁶ Gummow, Hayne and Heydon JJ seem to have made more or less the same point. Their Honours accepted¹⁵⁷ that ‘the appellant’s submissions set up a false dichotomy between proceeding regardless of an awareness of the possibility of lack of consent and indifference as to whether there is consent.’¹⁵⁸ By doing so, they acknowledged that the liability for sexual assault of a person who breaks into another’s house¹⁵⁹ and has intercourse with her despite an awareness of the real possibility that she is not consenting, should not turn on whether he desists when she tells him to do so.¹⁶⁰

44. Concerning inadvertent recklessness, the Bar Association says:¹⁶¹

[W]here there is true inadvertence regarding consent it is inappropriate to impose liability for such a serious offence. Realistically the only circumstance where an accused might have failed completely to even advert to the question of consent is where he was extremely intoxicated or suffers from a significant mental disability.

Especially now that s 61HE(3)(b) applies to the offences created by ss 61KC, 61KD, 61KE and 61KF, it must be doubted whether only an accused who is highly intoxicated or has an intellectual disability could be inadvertently reckless. The defendant in *Fitzgerald v Kennard*,¹⁶² for example, seems to have both sober and of standard intelligence. Moreover, the Bar Association’s concerns about persons with mental disabilities unfairly being convicted of sexual assault on this basis might overlook the fact that such persons can be convicted only if the risk of non-consent would have been obvious to a person of his/her mental capacity if s/he had turned his/her mind to the relevant question. However common inadvertent recklessness is, if an accused person displays so little sensitivity to the rights of the complainant as not even to consider whether s/he is consenting to sexual activity,¹⁶³ s/he is generally morally culpable enough to be convicted of the relevant sexual offence.

¹⁵⁵ *Banditt NSWCCA* (2004) 151 A Crim R 215, 232 [92].

¹⁵⁶ (2005) 224 CLR 262.

¹⁵⁷ *Ibid* 276 [38].

¹⁵⁸ *Ibid* 269 [16].

¹⁵⁹ *Ibid* 268 [11].

¹⁶⁰ *Ibid* 276 [39]-[41].

¹⁶¹ NSW Bar Association, above n 48, 3.

¹⁶² (1995) 28 NSWLR 185. At 197, Cole JA records that, when asked whether he considered that the complainant wanted him to touch her sexually, the defendant said that the question of consent ‘didn’t enter my mind.’

¹⁶³ See *Tolmie* (1995) 37 NSWLR 660, 671 (Kirby P).

Question 5.7, Question 5.2 and Question 5.3: ‘No reasonable grounds’ and other forms of knowledge; The ‘no reasonable grounds’ test; A ‘reasonable belief’ test

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

What are the benefits of the ‘no reasonable grounds’ test? What are the disadvantages of the ‘no reasonable grounds’ test? Should NSW adopt a ‘reasonable belief test? If so, why? If not, why not? If so, what form should this take?

45. I respectfully disagree with the proposals of Luke McNamara et al¹⁶⁴ and Julia Quilter¹⁶⁵ to substitute the words ‘the person’s belief in consent was not reasonable in the circumstances’ for the words ‘the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity’ in s 61HE(3)(c) (the text of which appears at [39] above). These authors appear to favour such a proposal because of their belief that such new statutory language would allow trial judges to direct juries in the terms in which Huggett DCJ erroneously directed the jury at the first Lazarus trial.¹⁶⁶ The ‘purely objective test’¹⁶⁷ that her Honour considered to apply, it is said, was ‘significantly narrowed’¹⁶⁸ by the New South Wales Court of Criminal Appeal (NSWCCA) on appeal. But it is not desirable for a judge to state or imply, as Huggett DCJ did,¹⁶⁹ that the accused should be convicted of sexual assault if a reasonable person would have realised that consent had been withheld. And even if it were, the language favoured by McNamara et al and Quilter would certainly not facilitate the sort of jury directions that they apparently wish to facilitate.
46. To understand the NSWCCA’s reasoning on this point in the first Lazarus appeal,¹⁷⁰ it is necessary to appreciate the difference between a reasonable person standard and a standard under which ‘the relevant question is whether there were reasonable grounds for the belief held by the accused.’¹⁷¹ As Fairall and Barrett¹⁷² have explained, where the common law or a statute provides that a person will not be guilty of an offence if s/he has an honest and reasonable but mistaken belief in circumstances that, if they existed, would have rendered his/her act innocent, there are two possible approaches to what reasonableness entails. ‘The first’, they say, ‘is a purely objective approach whereby the accused’s belief is evaluated by the tribunal of fact with reference to a hypothetical reasonable person.’¹⁷³ Such a person, the Victorian Department of Justice and Regulation adds, ‘is a relatively abstract and hypothetical person, who

¹⁶⁴ McNamara et al, above n 151, 3.

¹⁶⁵ Quilter, above n 50, 9.

¹⁶⁶ Ibid 9-10; McNamara et al, above n 151, 3.

¹⁶⁷ Quilter, above n 50, 9.

¹⁶⁸ Ibid 10. See also McNamara et al, above n 151, 3.

¹⁶⁹ *Lazarus v R* [2016] NSWCCA 52, [156] (*‘Lazarus I’*).

¹⁷⁰ Ibid [156]-[157].

¹⁷¹ *Aubertin v Western Australia* (2006) 33 WAR 87, 92 [25] (*‘Aubertin’*).

¹⁷² Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (Lexis Nexis Butterworths, 2017) 65 [2.34].

¹⁷³ Ibid.

does not share any of the personal characteristics of the particular accused.’¹⁷⁴ Under the second approach, on the other hand:¹⁷⁵

the tribunal of fact ... [must] consider whether the accused’s belief was reasonably held given the relevant circumstances. Given that the focus is on the accused’s belief, personal characteristics of the accused that may have impacted upon his or her view of the relevant events can be taken into consideration when determining whether there was a reasonable basis for the belief. This second approach is favoured by the wording of various statutory enactments and the common law expression of the excuse, which require the *accused’s belief* to be honestly and reasonably held.

47. When Huggett DCJ told the jury at the first Lazarus trial that:¹⁷⁶

If you consider that [the complainant’s] actions caused a belief in the mind of the accused that she was consenting to penile-anal intercourse with him *and* you consider that such a belief was a reasonable one, then the third element would not have been proven ...

she suggested that the approach to reasonableness in s 61HE(3)(c) was the first one countenanced by Fairall and Barrett.¹⁷⁷ Mr Lazarus would be guilty of sexual assault if a reasonable person would not have shared his belief that the complainant was consenting. This was an error, because, consistently with Fairall and Barrett’s observation in the final sentence of the above quotation, the statutory language was much more compatible with the second, ‘hybrid standard of reasonableness’¹⁷⁸ to which they refer. In other words, like the ‘various statutory enactments’ of which Fairall and Barrett write, and ‘the common law expression of the excuse’, s 61HE(3)(c) does not refer to the reasonable person. Rather, it asks ‘whether the Crown has proved the *accused* “has no reasonable grounds for believing” that there was consent.’¹⁷⁹

48. While it would be possible for Parliament to alter the language of s 61HE(3)(c) so as to provide for a reasonable person test, it should not do so. Perhaps the point is best illustrated through reference to cases such as *R v Mrzljak*¹⁸⁰ and *Butler v The State of Western Australia*,¹⁸¹ where the Queensland and Western Australian Courts of Appeal, respectively, had before them rape defendants with significant intellectual disabilities. In my submission, it would be obviously unjust to convict such persons of

¹⁷⁴ Criminal Law Review Department of Justice and Regulation, ‘Victoria’s New Sexual Offence Laws: An Introduction’ (June 2015) 14 [7.1.1].

¹⁷⁵ Fairall and Barrett, above n 172, 65 [2.34]. [Original emphasis]

¹⁷⁶ *Lazarus I* [2016] NSWCCA 52, [145]. [Emphasis added by the NSWCCA].

¹⁷⁷ *Ibid* [156].

¹⁷⁸ Criminal Law Review Department of Justice and Regulation, above n 174, 14 [7.1.1].

¹⁷⁹ *Lazarus I* [2016] NSWCCA 52, [156]. [Original emphasis]. Section 61HE(4) provides further textual support for the notion that s 61HE(3)(c) creates no reasonable person standard. That provision states that, for the purposes of making a finding that the accused had the mens rea for the offences to which s 61HE applies, ‘the trier of fact must have regard to all the circumstances of the case.’ Concerning similar language in s 1(2) of the *Sexual Offences Act 2003* (UK), see Jennifer Temkin and Andrew Ashworth, ‘The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328, 340-1.

¹⁸⁰ [2005] 1 Qd R 308.

¹⁸¹ [2013] WASCA 242 (‘*Butler*’).

sexual assault on the basis that their belief in consent was not one that a reasonable person would have held. Instead, if they are to be convicted because of a mistake that they have made about consent, this should only occur once the Crown has proved that their mistake was not a reasonable one for *them* to have made. No one should be convicted of an offence, let alone a serious one, because of his/her failure to reach a standard of reasonableness that s/he could not possibly have attained.

49. In fact, even in cases, like *Lazarus*, where the accused has no subjective feature – such as an intellectual disability,¹⁸² or mental illness,¹⁸³ or youth¹⁸⁴ – that affects his/her capacity to understand events, a reasonable person standard has the capacity to cause injustice. The Queensland case of *R v Wilson*¹⁸⁵ exemplifies the point. In that case, the accused had been charged with dangerous driving causing death and grievous bodily harm, in circumstances where he had overtaken a car when it was unsafe to do so because a motorcycle was travelling in the opposite direction.¹⁸⁶ Wilson’s motorcycle had crashed into the other motorcycle (which of course he had not seen until it was too late), killing the other rider and seriously injuring that rider’s pillion passenger.¹⁸⁷ He claimed that he had had an ‘honest and reasonable, but mistaken, belief’ that it was safe to overtake, and that therefore, by virtue of s 24 of the *Criminal Code 1899* (Qld), he was not guilty of the offences charged.
50. The trial judge directed the jury in these terms concerning s 24:¹⁸⁸

You might have little difficulty coming to the conclusion that Mr Wilson’s mistake was honest. There is no suggestion that he wanted to commit suicide or kill or injure anyone ...

The real question you have to consider, members of the jury, then is was it reasonable? ... And whether his mistake was reasonable, once again, is to be determined by the objective standard of ordinary, reasonable people. An ordinary, reasonable person in the position that Mr Wilson was in. In order to reject the mistake ... defence you must be satisfied beyond reasonable doubt that an ordinary, reasonable person would not have made that mistake.

Once again, you look at the whole of the circumstances. It was a long, straight stretch of road ahead of Mr Wilson. If there was nothing coming then it wouldn’t have been particularly dangerous to pass. So you picture yourselves the theoretical, ordinary, reasonable person pulling up to overtake at whatever speed you think he did and consider whether an ordinary, reasonable person could have made that mistake. It really comes down to this, members of the jury, would an ordinary, reasonable person, keeping a reasonably good lookout, that you would expect an ordinary person to do when starting to overtake a vehicle in front at that speed, would such an ordinary, reasonable person have looked closely and carefully enough to observe the oncoming motorcycle ...

¹⁸² *R v Mrzljak* [2005] 1 Qd R 308 (‘*Mrzljak*’); *Aubertin* (2006) 33 WAR 87, 96 [43].

¹⁸³ *R v Dunrobin* [2008] QCA 116, [45]-[47] (Muir JA), [75] (Fryberg J), [91] (Lyons J). Cf. *R v B(MA)* [2013] 1 Cr App R 36.

¹⁸⁴ *Aubertin* (2006) 33 WAR 87, 96 [43].

¹⁸⁵ [2009] 1 Qd R 476 (‘*Wilson*’).

¹⁸⁶ *Ibid* 477 [1]-[2].

¹⁸⁷ *Ibid* 477 [2].

¹⁸⁸ *Ibid* 481 [17].

On appeal, the Crown conceded that this direction was wrong.¹⁸⁹ As is the case with s 61HE(3)(c), the question posed by s 24 is not whether the accused's belief was one that a reasonable person would have held. It is whether *the accused's* belief was reasonable.¹⁹⁰ Or, as McMurdo P put it,¹⁹¹ '[i]t is clear from its terms that s 24 requires a consideration of whether there were reasonable grounds for the accused person's belief as to a state of things, not, in the primary judge's words, whether a theoretical, ordinary, reasonable person would or should have made the mistake.'

51. For the time being, however, I wish to focus on another aspect of her Honour's reasoning. Justice McMurdo noted that the distinction between the trial judge's direction and the direction that should have been given, was 'subtle.'¹⁹² She accepted that, at first glance, the Court, by attaching so much importance to this distinction, might be thought to have been engaging in 'hair-splitting semantics.'¹⁹³ But her Honour maintained that:¹⁹⁴

on careful reflection the differences are potentially significant, at least in this case. The consequences of Mr Wilson's mistake were horrific, namely the death of Mr Wood and the serious injuries to Ms Nielsen and Mr Wilson himself, as well as causing Mr Drendel to come off his motorcycle. A jury apprehending those consequences could be expected to conclude, putting themselves in Mr Wilson's position, that no theoretical, ordinary, reasonable person would, could or should have made such a grave mistake. Had the jury been directed to focus on Mr Wilson's honest but mistaken belief as to there being no oncoming traffic when he overtook the Pulsar, they might have been more willing to conclude that the prosecution had not proved beyond reasonable doubt that Mr Wilson's honest but mistaken belief was unreasonable in the circumstances.

In other words, the trial judge's direction – just like Huggett DCJ's direction in *Lazarus* – made it too easy for the jury to convict. It created a risk that, when deciding the reasonableness question, jury members would focus only on the harm caused by the accused, and fail to give any consideration to how he perceived the situation confronting him.

52. If a reasonable person standard were enshrined in s 61HE(3)(c), directions of the type given in *Wilson* and *Lazarus* would be acceptable. As noted above, this would be apt to cause injustice in any case where an accused has a feature that makes it impossible for him/her to reach the standards of the reasonable person. But it would also facilitate the sort of crude jury reasoning to which McMurdo P refers. If a person has made a genuine mistake about consent, s/he should not be convicted because the trier of fact pays excessive attention to the consequences of that mistake. S/he should only be convicted if, after looking at the situation from the accused's point of view, the trier

¹⁸⁹ Ibid 482 [19].

¹⁹⁰ Ibid 483 [20] (McMurdo P), 488-9 [41] (Fraser JA), 490 [52] (Douglas J). See also *Mrzljak* [2005] 1 Qd R 308, 315 [21] (McMurdo P), 321 [53] (Williams JA), 327 [81] (Holmes J).

¹⁹¹ *Wilson* [2009] 1 Qd R 476, 483 [20].

¹⁹² Ibid.

¹⁹³ Ibid 483 [23].

¹⁹⁴ Ibid.

of fact concludes that the Crown has proved beyond reasonable doubt that s/he had no reasonable basis for thinking what s/he did.

53. Even if a direction such as Huggett DCJ's were desirable, however, as stated above, the language that McNamara et al and Quilter think should appear in s 61HE(3)(c) would not allow such a direction to be given. With the greatest respect, the same is true of the words that Gail Mason and James Monaghan¹⁹⁵ think should appear in that provision (those commentators argue that the words 'the person does not reasonably believe that the other person consents to the sexual activity' should be substituted for the words 'the person has no reasonable grounds for believing that the other person consents to the sexual intercourse' in s 61HE(3)(c)). The language of 'reasonable belief' appears in s 24(1) of the *Criminal Code 1899* (Qld), s 24 of the *Criminal Code 1902* (WA), s 14 of the *Criminal Code Act 1924* (Tas) and s 9.2(1)(a) of the *Criminal Code Act 1995* (Cth). As the above discussion of *Wilson* makes clear (see [50]), the Queensland Court of Appeal has found that this language creates the same standard as that for which s 61HE(3)(e) provides. The Western Australian Court of Appeal,¹⁹⁶ the Full Court of the Supreme Court of Tasmania¹⁹⁷ and the Federal Court¹⁹⁸ have made exactly the same findings. The test created by each of these provisions is not a reasonable person test.¹⁹⁹ It is a reasonable grounds test.²⁰⁰ The trier of fact, in other words, must ask itself whether it was reasonable *for the accused* to hold the belief²⁰¹ (or – and this is the same thing – whether *the accused's* belief that the complainant was consenting, was held on reasonable grounds²⁰²). Accordingly, the very same direction that the NSWCCA approved in *Lazarus* – and earlier in *O'Sullivan v The Queen*²⁰³ – is called for. For, in *Wilson*, McMurdo P, after recording the Crown's concession that the trial judge's reasonable person direction was erroneous, noted with evident approval its further concession that:²⁰⁴

¹⁹⁵ Gail Mason and James Monaghan, *Preliminary Submission PCO 40*, [23].

¹⁹⁶ *Aubertin* (2006) 33 WAR 87, 91-8 [21]-[48] (McLure JA, with whom Roberts-Smith and Buss JJA agreed).

¹⁹⁷ *Hindrum v Lane* (2014) 24 Tas R 290, 299-301 [26]-[27] (Tennent J, with whom Pearce J relevantly agreed) ('*Hindrum*').

¹⁹⁸ *Su v Australian Fisheries Management Authority (No. 2)* (2008) 189 A Crim R 23, 39-40 [102]-[106] (Reeves J) ('*Su*').

¹⁹⁹ *Mrzljak* [2005] 1 Qd R 308, 315 [21] (McMurdo P), 321 [53] (Williams JA), 327 [81] (Holmes J); *Aubertin* (2006) 33 WAR 87, 96 [42] (McLure JA, with whom Roberts-Smith and Buss JJA agreed); *Su* (2008) 189 A Crim R 23, 40 [106] (Reeves J); *Hindrum* (2014) 24 Tas R 290, 299 [26], 301 [27] (Tennent J).

²⁰⁰ *Mrzljak* [2005] 1 Qd R 308, 315 [21] (McMurdo P), 321 [53] (Williams JA), 327 [81] (Holmes J); *Wilson* [2009] 1 Qd R 476, 482 [19]-[20] (McMurdo P); 490 [52] (Douglas J); *Aubertin* (2006) 33 WAR 87, 92-8 [25]-[48]; *Higgins v Western Australia* (2016) 263 A Crim R 474, 479 [24] and [26] (McLure P) ('*Higgins*'); *Butler* [2013] WASCA 242, [22] (McLure P) ('*Butler*'); *Narkle v Western Australia* [2011] WASCA 160, [2] (McLure P) ('*Narkle*'); *Su* (2008) 189 A Crim R 23, 40 [105] (Reeves J); *Hindrum* (2014) 24 Tas R 290, 300 [27] (Tennent J, with whom Pearce J relevantly agreed).

²⁰¹ *Mrzljak* [2005] 1 Qd R 308, 321 [53] (Williams JA), 327 [81] (Holmes J); *Wilson* [2009] 1 Qd R 476, 483 [20] (McMurdo P), 488 [39] (Fraser JA), 490 [51] (Douglas J); *Aubertin* (2006) 33 WAR 87, 96 [43]; *Su* (2008) 189 A Crim R 23, 40 [106] (Reeves J); *Hindrum* (2014) 24 Tas R 290, 300-1 [27] (Tennent J).

²⁰² *Mrzljak* [2005] 1 Qd R 308, 315 [21] (McMurdo P), 321 [53] (Williams JA); *Wilson* [2009] 1 Qd R 476, 482 [20] (McMurdo P), 490 [52] (Douglas J); *Higgins* (2016) 263 A Crim R 474, 479 [24]-[26] (McLure P); *Hindrum* (2014) 24 Tas R 290, 300 [27] (Tennent J); *Su* (2008) 189 A Crim R 23, 40 [105]-[106].

²⁰³ (2012) 233 A Crim R 449, 473-4 [124]-[126] (Davies and Garling JJ) ('*O'Sullivan*').

²⁰⁴ *Wilson* [2009] 1 Qd R 476, 477 [19]. [Emphasis added]

the correct question was whether the prosecution proved beyond reasonable doubt that there were *no reasonable grounds* for Mr Wilson's honest but mistaken belief that it was safe to overtake the Pulsar.

Justice Douglas expressly agreed with the McMurdo P's reasons.²⁰⁵

54. This brings me to another of McNamara et al and Quilter's claims. Those commentators place some emphasis on the obligation of trial judges to direct juries that the Crown must prove beyond reasonable doubt that the accused had '*no reasonable grounds*' for any belief that consent had been granted.²⁰⁶ 'If the Crown is unable to negative beyond reasonable doubt an assertion by the accused that there was a single 'reasonable ground' to support his [or her] mistaken belief in consent (even in the face of considerable evidence that the mistake was an unreasonable one)', McNamara et al say, 'an acquittal will result.'²⁰⁷ But, in my opinion, and with respect, this is to misunderstand the reasoning in *Lazarus*.
55. It is perhaps helpful to set out that reasoning in full. After recording the directions that Huggett DCJ gave about what is now s 61HE(3)(c), Fullerton J (with whom Hoeben CJ at CL and Adams J agreed) said:²⁰⁸

The Crown submitted (correctly) that, properly understood, s 61HA(3)(c) does impose an objective test, in the sense that (ignoring the onus of proof) the grounds which might lead to a belief of consent must be objectively reasonable. However, this is not the equivalent of the trial judge's direction that it was for the jury to "consider whether such a belief [that the complainant was consenting] was a reasonable one". The latter formulation implies that the jury should ask what a reasonable person might have concluded about consent, rather than 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. In many such 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. A reasonable person might conclude one way or the other but the statutory test is whether the Crown has proved the *accused* "has no reasonable grounds for believing" that there was consent.

And in the next paragraph of her Honour's judgment, Fullerton J concluded that:²⁰⁹

it remained incumbent on the trial judge to direct the jury that it was for the Crown to negative any reasonable possibility that the appellant believed (even if wrongly) that she was consenting. It was also incumbent on the trial judge to direct the jury that, in considering whether there were reasonable grounds for that belief as the statutory test requires.

McNamara et al and Quilter seem to think that the distinction that Fullerton J is drawing in the first of these passages is between the accused whose belief in consent is reasonable and the accused who has just one reasonable ground for his/her belief in

²⁰⁵ Ibid 477 [51].

²⁰⁶ McNamara, above n 151, 3; Quilter, above n 50, 10.

²⁰⁷ McNamara, above n 151, 3.

²⁰⁸ *Lazarus I* [2016] NSWCCA 52, [156]. [Original emphasis].

²⁰⁹ Ibid [157].

consent.²¹⁰ Justice Fullerton, they seem to argue, is contending that it is unnecessary that the accused's belief be reasonable ('in all the circumstances'); it is sufficient if that belief was supported by a single reasonable ground. But that is not the distinction that she is drawing. And that is not what she is saying. At the risk of repetition, what Fullerton J is really distinguishing between is a belief that a reasonable person would have held and a belief that the accused reasonably holds.²¹¹ What her Honour is saying is that s 61HE(3)(c) requires *the accused's* belief to be reasonable. If she had instead been drawing the distinction that McNamara et al and Quilter thought she was, she surely would not have approved, in the second passage that I have set out above, the jury direction that she does. Like Davies and Garling JJ in *O'Sullivan*,²¹² in that passage, Fullerton J indicates that it is permissible for trial judges to tell juries that, if the accused might have believed that the complainant was consenting, s/he will be guilty of sexual assault only if the Crown 'negatives' any reasonable possibility that s/he had reasonable *grounds* for this belief. If McNamara et al and Quilter were right, surely the Crown would have to eliminate the reasonable possibility that the accused had a reasonable *ground* for believing in consent.²¹³ Anything else would be a misdirection.

56. There is much authority that demonstrates that there is no difference between the person whose belief is reasonable for him or her²¹⁴ and the person whose belief is

²¹⁰ It is true that Fullerton J refers to the fact that, in (at least) many contested cases, there might have been reasonable grounds for believing that consent has been granted and reasonable grounds pointing in the opposite direction. It is also true that she then goes on to say that: 'A reasonable person might conclude one way or the other but the statutory test is whether the Crown has proved that *the accused* "has no reasonable grounds for believing" that there was consent.' But it is telling that her Honour italicises the word 'accused' and not the word 'no.' This, I think, is a strong indication that the point that she was making was really that the s 61HE(3)(c) test is a 'was *the accused's* belief reasonable?' inquiry and not a 'would the reasonable person have thought there was consent?' inquiry. Accordingly, when Fullerton J refers to there being reasonable grounds for a belief in consent, and other reasonable grounds for not believing in consent, she appears to be making the same point as Fraser JA did in *Wilson* [2009] 1 Qd R 476, 488-9 [38]-[41]. See also *R v Julian* (1998) 100 A Crim R 430, 448 (Dowsett J) ('*Julian*'). If the test were a reasonable person test, it would be a rigid test. Even if different people might reasonably have come to different conclusions about consent, if the reasonable person would have thought that there was no consent, the relevant issue must be decided adversely to the accused. On the other hand, a 'was the accused's belief reasonable?' test will lead to acquittal even if a reasonable person would have realised that there was no consent, if the accused's belief did not 'depart from the bounds of reasonableness' (that is, was a reasonable one *for him/her* to hold): *Julian* at 448.

²¹¹ As noted above, the Australian courts have regularly drawn such a distinction. For further examples, see *Viro v The Queen* (1976) 141 CLR 88, 146 (Mason J) (in *Lazarus I* [2016] NSWCCA 52, [156], just after the first passage that I have set out at [55], Fullerton J refers with approval to Sir Anthony's reasoning on this point); *R v Conlon* (1993) 69 A Crim R 93, 98, 101 (Hunt CJ at CL) ('*Conlon*'); *R v Hawes* (1994) 35 NSWLR 294, 305-6 (Hunt CJ at CL, with whom Simpson and Bruce JJ agreed) ('*Hawes*'); *McCullough v R* (1982) 6 A Crim R 274, 281 ('*McCullough*'); *Julian* (1998) 100 A Crim R 430, 434 (Pincus JA), 438-9 (Thomas J), 448 (Dowsett J); *DPP (Vic) v Parker* (2016) 258 A Crim R 527, 541-2 [43].

²¹² In *O'Sullivan*, the trial judge told the jury that, 'if there is the reasonable possibility that the accused did honestly believe on reasonable *grounds* that [JS] was consenting, then you would have to find this third element of the offence is not made out, and return a verdict of "not guilty" of this charge: (2012) 233 A Crim R 449, 474 [125]. [Emphasis added]. Justices Davies and Garling held that there could be no criticism of the trial judge's directions, which 'followed carefully those set out in the Bench Book': at 475 [126].

²¹³ The Benchbook also makes it clear that a judge may inform a jury that the Crown 'must eliminate any reasonable possibility that [the accused] did honestly believe on reasonable *grounds* that [the complainant] was consenting: The Criminal Trials Court Benchbook, 'Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.' [Emphasis added]

²¹⁴ As opposed to a belief that a reasonable person would have held.

held on reasonable grounds. Throughout the case law concerning the common law ‘defence’ of honest and reasonable mistake of fact, the terms ‘reasonable belief’ and ‘reasonable grounds for belief’ are used interchangeably. So, in *Proudman v Dayman*, we find Sir Owen Dixon announcing that:²¹⁵

It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on *reasonable grounds* that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and *reasonable belief* in a state of facts which, if they existed, would make the defendant’s act innocent affords an excuse for doing what would otherwise be an offence.

...

The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had *reasonable grounds* for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe.

And in *Jiminez v The Queen*, six High Court Justices said this:²¹⁶

It was, however, also open to the jury to find that the applicant honestly and *reasonably believed* that, in all the circumstances, it was safe to drive.

...

If, in a case based on tiredness, there is material suggesting that the driver honestly believed on *reasonable grounds* that it was safe for him to drive, the jury must be instructed with respect to that question. In particular, they must be told that if they conclude that the driving was a danger to the public, they must also consider whether the driver might honestly have believed on *reasonable grounds* that it was safe for him to drive.

These are just two examples.²¹⁷ What they demonstrate is that, as the High Court observed in *Taiapa v The Queen*,²¹⁸ ‘to ask whether a person has a reasonable belief

²¹⁵ (1941) 67 CLR 536, 540-1. [Emphasis added]

²¹⁶ (1992) 173 CLR 572, 583-4 (*‘Jiminez’*).

²¹⁷ See also, for instance, *CTM v The Queen* (2008) 236 CLR 440, 456 [35] (Gleeson CJ, Gummow, Crennan and Kiefel JJ) (*‘CTM’*); *Sweet* [1970] AC 133, 164 (Lord Diplock); *Mayer v Marchant* [1973] 5 SASR 567, 568 (Bray CJ); *He Kaw Teh* (1985) 157 CLR 523, 592 (Dawson J); *Ibrahim v R* [2014] NSWCCA 160, [48]-[66] (Simpson J, with whom Hidden and Hamill JJ agreed); *Bank of New South Wales v Piper* [1897] AC 383, 389-390; *The Queen v Tolson* (1889) 23 QBD 168, 181-4 (Cave J), 193 (Hawkins J) (*‘Tolson’*). In other cases, not concerned with the honest and reasonable mistake of fact defence, the Courts have also seen the person who has reasonable grounds for believing as having a reasonable belief: see, for example, *Prior v Mole* (2017) 261 CLR 265, 275 [18]-[19] (Kiefel CJ and Bell J), 277 [23] and 283 [48] (Gageler J), 289 [66] (Nettle J) (*‘Prior’*).

²¹⁸ (2009) 240 CLR 95, 105 [29] (French CJ, Heydon, Crennan, Kiefel and Bell JJ). In so doing, their Honours cited with approval Stephen J’s approach in *Marwey v The Queen* (1977) 138 CLR 630, 641. There, his Honour noted that: ‘The form of question which deals with the objective element: “Are we satisfied that the accused did not have reasonable grounds for believing that the stabbing was necessary?” cannot, I think, produce an answer different from that which would be given to the question, “Are we satisfied that his belief that stabbing was necessary was not a reasonable one?” If reasonable grounds existed then the belief was itself reasonable.’

is not different in substance from asking whether a person has reasonable grounds for belief.’

57. When their Honours said this, were they saying that a person’s belief will be reasonable if s/he has two or more reasonable grounds for his or her belief, but unreasonable if s/he has just one reasonable ground? Or did they mean something different? In my view, they meant something different. When a judge refers to ‘reasonable grounds’, s/he means ‘a reasonable basis.’²¹⁹ The same is true of s 61HE(3)(c). This explains why it is not contradictory for a judge, in a sexual assault case, to tell a jury *both*:²²⁰

Therefore if you are not satisfied that the accused knew the complainant wasn’t consenting, the Crown must prove one of two facts before you can find the accused guilty: either (a) that the accused did not honestly believe that the complainant was consenting or (b) that, if he did have an honest belief in consent, that he had *no* reasonable grounds for that belief.

and²²¹

It is for the Crown to prove that [the accused] had a guilty mind. It must eliminate any reasonable possibility that [the accused] did honestly believe on reasonable *grounds* that [the complainant] was consenting.

It also explains why Australian courts have repeatedly held or implied that statutory or common law tests that require accused persons to have reasonable grounds for belief entitle judges to instruct juries that the Crown must prove beyond reasonable doubt that the accused had ‘no reasonable grounds’ for the specified belief.²²² So, in *Zecevic v Director of Public Prosecutions*,²²³ the High Court held that an accused will successfully raise the common law ‘defence’²²⁴ of self-defence if it is reasonably

²¹⁹ Note in this respect *R v Speretto* [1970] 1 NSW 502, 505; *Prior* (2017) 261 CLR 265, 289 [68] (Nettle J); and the trial judge’s directions in *R v McEwan* [1979] 2 NSWLR 926, 929. See also *GJ Coles & Co Ltd v Goldsworthy* [1985] WAR 183, 187-8 (Burt CJ).

²²⁰ *O’Sullivan* (2012) 233 A Crim R 449, 474 [125]. [Emphasis added] This direction is in almost identical terms to those that feature in the Benchbook: The Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’

²²¹ The Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’ [Emphasis added] A very similar direction was given in *O’Sullivan*: see above n 212.

²²² See, for example, *Babic v R* (2010) 28 VR 297, 318 [95] (Neave and Harper JJA), 304 [34] (Ashley JA) (‘*Babic*’); *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662 (Wilson, Dawson and Deane JJ) (‘*Zecevic*’); *Dziduch v R* (1990) 47 A Crim R 378, 379-380 (Hunt J, with whom Enderby and Sharpe JJ agreed) (‘*Dziduch*’); *Conlon* (1993) 69 A Crim R 92, 96 (Hunt CJ at CL); *Hawes* (1994) 35 NSWLR 294, 303 (Hunt CJ at CL, with whom Simpson and Bruce JJ agreed); *R v Katarzynski* [2002] NSWSC 613, [6] (Howie J); *Egitmen v Western Australia* (2016) 263 A Crim R 203, 219 [105] (Buss P, with whom Mazza JA relevantly agreed), 253-4 [302] (Mitchell JA); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 61 (Kirby ACJ); *WCW v Western Australia* (2008) 191 A Crim R 22, 43 [128] (Murray AJA). See also *Tolson* (1889) 23 QBD 168, 183 (Cave J); *He Kaw Teh* (1985) 157 CLR 523, 579 (Brennan J).

²²³ *Zecevic* (1987) 162 CLR 645, 661 (Wilson, Dawson and Deane JJ). Chief Justice Mason agreed with these three Justices: at 654.

²²⁴ Self-defence is of course not a true defence, because, once this issue is raised, the onus of proof is on the Crown not the accused: *Dziduch* (1990) 47 A Crim R 378, 380-1; *Youssef v R* (1990) 50 A Crim R 1, 2-3 (Hunt J, with whom Wood and Finlay JJ agreed) (‘*Youssef*’); *CTM* (2008) 236 CLR 440, 446 [6].

possible that s/he ‘believed on reasonable grounds that it was necessary in self-defence to do what he did.’ If ‘reasonable grounds’ meant ‘more than one reasonable ground’, it would not have been correct for Hunt J (as he then was) in *Dziduch v R*²²⁵ to hold that, to disprove self-defence, ‘[t]he Crown may establish either that the accused had no such belief or that there were *no* reasonable grounds for such a belief.’ It would be enough for it to prove that the accused had but one reasonable ground. Similarly, in *Babic v R*,²²⁶ the Victorian Court of Appeal considered s 9AD of the *Crimes Act 1958* (Vic), which provided:

A person who, by his or her conduct, kills another person in circumstances that, but for s 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section [namely, that the conduct was necessary to defend himself or herself from the infliction of death or really serious injury].

Justices Neave and Harper (with whom Ashley JA expressly agreed on this point²²⁷) approved the following direction in a case where the jury concluded that it was reasonably possible that the accused did believe that his/her conduct was necessary to defend him or herself from being killed or being caused to sustain really serious injury.²²⁸

you must go on to consider whether he/she is guilty of defensive homicide. He/she will be guilty of that crime only if the prosecution proves beyond reasonable doubt that the accused had *no* reasonable grounds for having the belief ...

Again, such a direction is consistent only with the view that ‘reasonable grounds’ means ‘a reasonable basis.’ If it instead means ‘more than one reasonable ground’, the direction that the Court unanimously approved would be wrong. In such a scenario, the Crown would merely have to prove that the accused did not have two or more reasonable grounds for his/her belief.

58. I must deal with one final objection to the language of s 61HE(3)(c). In their preliminary submission to this Review, Gail Mason and James Monaghan ‘propose replacing the ‘no reasonable grounds’ wording with a *simpler* ‘reasonable belief’ test.’²²⁹ ‘Under such a test’, they continue:²³⁰

the fact finder would first ask if the defendant had a belief as to whether the complainant was consenting – a question about the defendant’s subjective mental state. Then, considering all the circumstances of the case and any steps that the defendant took, they would ask whether that belief was a reasonable one – a question that tests the defendant’s subjective belief against an objective standard.

²²⁵ *Dziduch* (1990) 47 A Crim R 378, 379. See also *Hawes* (1994) 35 NSWLR 294, 303 (Hunt CJ at CL, with whom Simpson and Bruce JJ agreed). [Emphasis added]

²²⁶ (2010) 28 VR 297.

²²⁷ *Ibid* 304 [34].

²²⁸ *Ibid* 318 [95].

²²⁹ Mason and Monaghan, above n 195, [23]. [Emphasis added]

²³⁰ *Ibid* [23]-[24].

We submit that a test along these lines preserves one of the virtues of the 2007 amendments – the combination of subjective and objective elements – while removing the confusing distinction between such a belief and its grounds. In addition to clarifying the law for fact finders, such a test focuses their attention more directly on the requirement to act reasonably in sexual interactions, and thus sets a higher standard for sexual responsibility.

59. It follows from what I have written above that, with the utmost respect, I cannot agree that Mason and Monaghan’s reasonable belief wording *would* ‘set ... a higher standard for sexual responsibility.’ As I have sought to explain, this wording would not change the law. It would facilitate precisely the same jury directions as are given at present in NSW. It follows, of course, that I also necessarily respectfully disagree with Mason and Monaghan’s contention that their proposed language would simplify the law. And, in any case, I do not accept that s 61HE(3)(c) demands that jurors engage in a ‘convoluted analysis.’²³¹
60. This can be seen if we consider the standard direction that juries are given in cases in which s 61HE(3)(c) is engaged. As would be the case under the test that Mason and Monaghan propose, juries are asked to determine whether the Crown has proved beyond reasonable doubt either (a) that the accused did not honestly believe that the complainant was consenting or (b) that the accused had no reasonable grounds for believing that s/he was.²³² After the judge reiterates that it is for the Crown to eliminate any reasonable possibility that the accused did believe on reasonable grounds that the complainant was consenting,²³³ s/he will then go on to inform the jury that, when deciding this matter, it must consider what ‘steps’, if any, the accused took to ascertain whether consent had been granted.²³⁴ Such directions do not require juries to ‘understand the very fine distinction between a belief based on reasonable grounds on one hand, and a reasonable belief or the belief that a reasonable person might have held, on the other.’²³⁵ The judge should not say anything to them about the reasonable person at all.²³⁶ And while juries do have to ‘avoid appealing to ‘reasonable person’ standards’,²³⁷ so they would under the test that Mason and Monaghan propose. Moreover, as argued above, fairness demands that a person be judged not by ‘an objective test of what the whole community thinks is reasonable’ but rather by a standard that asks what ‘would have been reasonable *for him* as he stood there then.’²³⁸
61. As for Mason and Monaghan’s contention that juries are required to go through a ‘complex multi-step process’²³⁹ and ‘grasp the fine distinction between a belief and

²³¹ Ibid [22].

²³² The Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Mason and Monaghan, above n 195, [22].

²³⁶ *Lazarus I* [2016] NSWCCA, [156]. See also *Aubertin* (2006) 33 WAR 87, 97 [47].

²³⁷ Mason and Monaghan, above n 195, [22].

²³⁸ As the trial judge put it in *McCullough* (1982) 6 A Crim R 274, 281. [Emphasis added]

²³⁹ Mason and Monaghan, above n 195, [22].

the grounds of that belief',²⁴⁰ the position would be no different under their proposal. As is the case now, juries would be asked: (a) whether the accused believed in consent; (b) whether *he or she* had reasonable grounds for that belief;²⁴¹ and (c) to consider what steps, if any, s/he took before satisfying him/herself of the relevant matter. I can see nothing excessively complex about such a process. Of course, any complexity could be reduced by reverting to the law as stated by *Morgan v DPP*.²⁴² But Mason and Monaghan have, I think rightly, made clear their disapproval of any law that would make enquiries (b) and (c) above unnecessary.²⁴³

62. In sum, I support the language that currently appears in s 61HE(3)(c). Neither the language favoured by McNamara et al and Quilter, nor that which Mason and Monaghan support, should be substituted for the reasonable grounds language. The language proposed by these commentators would not change the law in this area (the words 'the person' appear in both proposals, and McNamara et al and Quilter's 'in the circumstances' language also indicates strongly that the relevant question would continue to be 'was *the accused's* belief reasonable/held on reasonable grounds?'). Nor should Parliament insert into s 61HE(3)(c) language that would facilitate the conviction of a person on the basis that, though s/he believed that consent had been granted, a reasonable person would not have held such a belief.

²⁴⁰ Ibid.

²⁴¹ *Wilson* [2009] 1 Qd R 476, 482 [19] (McMurdo P), 490 [51] (Douglas J); *Mrzljak* [2005] 1 Qd R 308, 315 [21] (McMurdo P), 321 [53] (Williams JA), 326-7 [79]-[81], 330 [92] (Holmes J); *Aubertin v Western Australia* (2006) WAR 33, 92-7 [25]-[48]; *Higgins* (2016) 263 A Crim R 474, 479 [24] (McLure P).

²⁴² [1976] AC 182.

²⁴³ See generally James Monaghan and Gail Mason, 'Communicative consent in New South Wales: Considering *Lazarus v R*' (2018) 43(2) *Alternative Law Journal* 96; James Monaghan and Gail 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.

Question 5.4, Question 5.10, Question 5.11 and Question 5.12: Legislative guidance on ‘reasonable grounds’; Considering other matters; Excluding the accused’s self-induced intoxication; Excluding other matters

Should there be legislative guidance on what constitutes ‘reasonable grounds’ or ‘reasonable belief’? If so, why? If not, why not? If so, what should this include?

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

Should a fact finder be required to exclude the accused’s self-induced intoxication from consideration when making findings about knowledge? If so, why? If not, why not?

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

63. It is one thing to say that an accused will be acquitted of the offences to which s 61HE applies if (ignoring the onus of proof) s/he believed on reasonable grounds that the complainant was consenting. It is another to specify the circumstances in which an accused will, and will not, have a reasonable basis for his/her belief in consent. I respectfully agree with Annie Cossins that the law should state that a complainant’s (a) style of dress or (b) consumption of alcohol and/or drugs, is incapable of providing an accused with reasonable grounds for any belief that s/he had that the complainant was consenting.²⁴⁴ In the Canadian case of *The Queen v Park*,²⁴⁵ for instance, the accused said that he thought that the complainant was consenting because, among other things, she met him with a kiss at the door to her flat at 6.10 am wearing only a bathrobe. That was clearly not a belief that it was reasonable for him to hold. Similarly, in *R v Livermore*,²⁴⁶ the Canadian Supreme Court was right to reject the notion that ‘being out late, drinking beer and switching seats in a car [so as the complainant was seated next to the accused]’ was capable of ‘providing a foundation for an honest belief in consent to sexual intercourse.’
64. I also respectfully have no objection to a jury being told that, when assessing whether the accused had reasonable grounds for his or her belief in consent, it should take into account any overbearing behaviour on the accused’s part around the time of the intercourse.²⁴⁷ I respectfully accept that the more ‘aggressive or authoritative’²⁴⁸ the accused’s behaviour is, the less likely it is that he or she had the relevant belief.
65. Finally, I have no difficulty accepting the proposition that the complainant’s silence or lack of physical resistance is in many cases not enough to supply the accused with

²⁴⁴ New South Wales Law Reform Commission, above n 1, 74-5 [5.53].

²⁴⁵ [1995] 2 SCR 836, 846 [10] (*Park*).

²⁴⁶ [1995] 4 SCR 123, 137 [21] (*Livermore*).

²⁴⁷ McNamara, above n 151, 4.

²⁴⁸ *Ibid.*

reasonable grounds.²⁴⁹ But, with respect, I think that there are dangers in allowing juries to be instructed that a complainant's passivity is *always* insufficient to provide the accused with a reasonable basis for believing that consent has been granted. Take, for example, the accused with an intellectual disability who believes wrongly that consent has been granted. Such an accused might base his or her belief on the fact that the complainant has failed to say 'no' or 'stop'. But is such a belief necessarily unreasonable for a person with his or her disability to hold? Even if such an accused has done something to frighten the complainant into passivity, his or her disability might have prevented him or her from realising this.

66. A related point is that an accused person is only capable of having an honest and reasonable but mistaken belief in consent if the complainant has been silent and has not resisted. This is because, as soon as the complainant says 'no' or resists, there is no room for a mistake. If the law were to provide that an accused never has reasonable grounds for believing in consent where the complainant is passive – as it would come close to doing if it mandated a jury direction of the type that we are presently considering – the honest and reasonable mistake of fact 'defence' could never successfully be raised. The offences to which s 61HE applies would effectively become absolute liability offences. The protection for the accused for which s 61HE(3)(c) provides would be rendered illusory.
67. The question that now arises, however, is whether *s 61HE* should state that neither a complainant's (a) style of dress nor (b) intoxication is capable of supplying an accused with reasonable grounds for his/her belief in consent; and that the trier of fact must take into account any overbearing behaviour on his/her part, when answering the s 61HE(3)(c) question. In my opinion, it might be better to deal with these matters separately, in legislation that provides for both mandatory and suggested jury directions.²⁵⁰ There is a case for making s 61HE as simple and brief as possible. There is also the consideration that, ultimately, the reason for giving legislative force to these propositions is to ensure that judges direct juries consistently with them. If one accepts, as I do, the desirability of legislated jury directions for sexual assault cases, the logical place for such statutory commands is in special jury directions legislation.

²⁴⁹ See New South Wales Law Reform Commission, above n 1, 75 [5.53].

²⁵⁰ See *Ibid* 94-8 [6.25]-[6.42].

Question 5.5: Evidence of the accused's belief

Should the law require the accused to provide evidence of the 'reasonableness' of his or her belief? If so, why? If not, why not? If so, what form should this requirement take?

68. I expressed the view above (at [40]-[41]) that s 61HE(3) should continue to provide that actual knowledge, recklessness and the absence of an honest and reasonable belief in consent are sufficient mental states for the offences to which that section applies. For so long as s 61HE(3) *does* provide this, I am not convinced that the *only* time when a person accused of committing one of those offences should have to discharge an evidential burden, is before the jury considers whether the Crown has eliminated the reasonable possibility that s/he believed on reasonable grounds that the complainant was consenting.²⁵¹ Rather, in my opinion, there is force in Jeremy Gans's view²⁵² that such a person should have to discharge an evidential burden before *any* direction on the mental state for the offence is given.
69. Before a jury may consider the common law 'defence' of honest and reasonable mistake of fact, an accused who seeks to rely upon this ground of exculpation must produce or point to evidence that, taken at its highest in his/her favour, could lead a jury to have a reasonable doubt about the relevant issue.²⁵³ As the Commission notes in the Consultation Paper,²⁵⁴ the same is true of the 'defences' for which s 24(1) of the *Criminal Code 1899* (Qld) and s 24 of the *Criminal Code 1902* (WA), respectively, provide. In *Thomas v The King*,²⁵⁵ Dixon J famously expressed the opinion that these two provisions 'state ... the common law [of honest and reasonable mistake of fact] with complete accuracy.' Whether or not that is true,²⁵⁶ there can be no doubt that the person accused of (for example) sexual penetration without consent²⁵⁷ in Western Australia, or rape²⁵⁸ in Queensland, can only have his/her s 24 'defence'²⁵⁹ considered if, as McLure P put it in *Higgins v Western Australia*:²⁶⁰

there is evidence which ... could ... lead a reasonable trier of fact to have a reasonable doubt that the appellant honestly believed on reasonable grounds that the complainant consented to the sexual activity the subject of the charge.

²⁵¹ See Elyse Methven and Ian Dobinson, *Preliminary Submission PCO 77*, 18-19.

²⁵² Jeremy Gans, 'When Should the Jury be Directed in the Mental Element of Rape?' (1996) 20 *Criminal Law Journal* 247.

²⁵³ *CTM* (2008) 236 CLR 440, 456 [35] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 467 [78] (Kirby J), 492-3 (Hayne J); *He Kaw Teh* (1985) 157 CLR 523, 535 (Gibbs CJ), 546 (Mason J), 558-9 (Wilson J), 574 (Brennan J), 592-3 (Dawson J). Concerning how evidential burdens are discharged, see *Braysich v The Queen* (2011) 243 CLR 434, 454 [36] (French CJ, Crennan and Kiefel JJ).

²⁵⁴ See New South Wales Law Reform Commission, above n 1, 75 [5.55]-[5.56].

²⁵⁵ (1937) 59 CLR 279, 305-6.

²⁵⁶ See *Ostrowski v Palmer* (2004) 218 CLR 493, 526 [82] (Callinan and Heydon JJ).

²⁵⁷ See *Criminal Code 1902* (WA) s 325(1).

²⁵⁸ See *Criminal Code 1899* (Qld) s 349(1).

²⁵⁹ I use the inverted commas because, as Brennan J pointed out in *He Kaw Teh* (1985) 157 CLR 523, 573, since *Woolmington v DPP* [1935] AC 462, the ultimate onus of negating honest and reasonable mistake of fact – both at common law and in the Code states – has rested on the Crown. See also *CTM* (2008) 236 CLR 440, 446 [6]; *Youssef* (1990) 50 A Crim R 1, 2-4.

²⁶⁰ (2016) 263 A Crim R 474, 479 [24].

And so the question arises: why should the position be different concerning s 61HE(3)(c)? After all, like s 24 of the Codes, s 61HE(3)(c) is in essence a statutory expression of the common law ‘defence.’

70. I would, on balance, accept that the law in this respect should be brought into conformity with that in these Code states *if* – contrary to my recommendation (see [40]-[41]) – s 61HE(3)(c) were amended simply to provide that a person who engages in non-consensual sexual activity with another has the requisite mens rea if s/he ‘has no reasonable grounds for believing that the alleged victim consents to the sexual activity.’ One textbook argues that evidential burdens constitute an ‘assault’ on *Woolmington’s* ‘golden thread.’²⁶¹ ‘The accused even has an evidential burden under the [Commonwealth] *Criminal Code*,’ the authors state:²⁶²

when seeking to argue that a mistaken belief about, or ignorance of, facts on their part negated the intent, knowledge or recklessness required for proof of the offence in question (ss 9.1, 13.3(2)). Yet the accused’s state of mind where this is specified as mens rea for an offence is a basic component of the offence definition.

The contrary view, with which I respectfully agree, is that:²⁶³

The right to trial by jury does not encompass a right to a confused jury. The defendant does not have the right to benefit from ... juror speculation on a version of events *wholly* unsupported by the evidence of either party at the trial. Rather, the defence has a right to the jury’s consideration of all issues which genuinely arise at the trial ...

Whether the issue regards a ‘basic component of the offence’ is, with respect, a matter of no moment. It is rightly unnecessary, for example, to give the jury a direction concerning the need for the accused’s act to have been voluntary, except in those rare cases²⁶⁴ where the accused, or evidence led by the Crown, puts this matter in issue.²⁶⁵ Accordingly, in the Canadian case of *R v Osolin*,²⁶⁶ all Justices agreed that s 265(4) of the Canadian *Criminal Code*, which imposes an evidential burden on any person who seeks to rely on mistake of fact as a ‘defence’ to certain offences, contravened neither the right to be presumed innocent²⁶⁷ nor the accused’s right to a jury trial.²⁶⁸ As Cory J noted,²⁶⁹ if juries are directed on issues other than those for which there is some

²⁶¹ David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (2015, The Federation Press) 238 [3.7.2].

²⁶² *Ibid* 239 [3.7.2].

²⁶³ Gans, above n 252, 265-6. [Original emphasis]

²⁶⁴ *Ryan* (1967) 121 CLR 205, 213 (Barwick CJ).

²⁶⁵ *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 413 (Lord Denning); *Ryan* (1967) 121 CLR 205, 217 (Barwick CJ); *Youssef* (1990) 50 A Crim R 1, 2-4 (Hunt J, with whom Wood and Finlay JJ agreed); *Woodbridge v The Queen* (2010) 208 A Crim R 503, 527-8 [72]-[73] (Davies J, with whom McClellan CJ at CL and RS Hulme J relevantly agreed); *R v Boyle* (2009) 26 VR 219, 233 [49]-[50] (‘*Boyle*’).

²⁶⁶ [1993] 4 SCR 595 (‘*Osolin*’).

²⁶⁷ See *Canada Act 1982 (UK)* c 11, sch B pt I, s 11(d) (‘*Canadian Charter of Rights and Freedoms*’).

²⁶⁸ *Canadian Charter of Rights and Freedoms*, s 11(f).

²⁶⁹ *Osolin* [1993] 4 SCR 595, 683. See also *Park* [1995] 2 SCR 836, 846 [11], where L’Heureux-Dubé J said that: ‘The common law has long recognized that a trial judge need not put to the jury defences for which there is no real factual basis or evidentiary foundation. Courts must filter out irrelevant or specious defences, since their primary effect would not be to advance the quest for truth in the trial, but rather to confuse finders of fact and

evidential support, the only result is likely to be distraction and confusion. In a related vein, Bell J of the High Court of Australia has recently observed that when a judge directs a jury about a matter that has ‘barely been raised by the evidence ... jurors’ eyes are apt to glaze over.’²⁷⁰

71. The main reason why I am not convinced that an evidential burden should be imposed on the accused concerning the s 61HE(3)(c) matter *only*, is as follows. Consider a trial at which (a) the accused’s evidence is that the complainant obviously and enthusiastically consented and (b) the complainant’s evidence is that s/he left the accused in no doubt that that s/he was not consenting.²⁷¹ In such a case, there is no evidence of the accused’s having made a mistake, let alone a reasonable one. If there were an evidential burden on the accused concerning the s 61HE(3)(c) mental state, the judge would not direct the jury about it. But might s/he not direct the jury about the mental state(s) in ss 61HE(3)(a) and/or 61HE(3)(b)? (Imagine, for example, a case of this sort where the accused had an intellectual disability, but there was no evidence that s/he had failed altogether to consider the question of consent, in circumstances where the risk of non-consent would not have been obvious to a person of his/her mental capacity.) It is true that, under the *Alford v Magee*²⁷² principle, the judge would not be *required* to give such a direction. In *The Queen v Getachew*,²⁷³ the High Court accepted that the trial judge had been within his rights not to direct the jury about the mens rea for rape,²⁷⁴ in circumstances where the accused had raised no issue that ‘he had thought or believed that the complainant was consenting to the penetration.’²⁷⁵ But, as *R v Kitchener*²⁷⁶ and *R v Tolmie*,²⁷⁷ for instance, show, sometimes judges give directions about the mental element for sexual assault that are not strictly necessary. In both those cases, a direction concerning inadvertent recklessness was given despite the fact that there was no evidence that really raised the issue.

divert their attention from factual determinations that are pertinent to the issue of innocence or guilt.’ It is clear from the context that, by using the term ‘defences’, her Honour was seeking to draw no distinction between issues that go to the definition of the offence and those that do not.

²⁷⁰ Justice Virginia Bell, ‘Jury Directions: The Struggle for Simplicity and Clarity’ (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 16.

²⁷¹ Gans calls such trials ‘straight consent trials’: Gans, above n 252, 256-7. An example of such a case is *R v Farid Taran* [2006] EWCA Crim 1498, where Hughes LJ (as his Lordship then was) said, at [14], that ‘the complainant’s evidence was that she was struggling to get out of the car and making her lack of consent abundantly plain’, whereas the appellant’s case was that the complainant ‘was throwing herself at him.’

²⁷² (1951) 85 CLR 437, 466. In that case, the High Court made it clear that a trial judge in a criminal case need only direct the jury on the real issue(s) in the case. Their Honours provided the example of a prosecution for larceny where the only real issue was whether there was a taking and carrying away. In such a case, there would be no need for the judge to direct the jury about ‘the general law of larceny’ or the mens rea elements of that offence. All he or she would have to do is ‘tell [it] ... that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny.’ See the discussion of *Alford v Magee* in *Huynh v The Queen* (2013) 87 ALJR 434, 441 [31].

²⁷³ (2012) 248 CLR 22 (*‘Getachew’*).

²⁷⁴ *Ibid* 36 [35]-[36].

²⁷⁵ *Ibid* 26 [5].

²⁷⁶ (1993) 29 NSWLR 696, 700 (*‘Kitchener’*).

²⁷⁷ (1995) 37 NSWLR 660, 665.

72. If the judge *did* direct the jury about the ss 61HE(3)(a) and/or 61HE(3)(b) mental states in such a case, is there not a danger that the jury would acquit the accused even if it accepted that the Crown had proved that the complainant was not consenting (the one real issue at the trial)? Gans thinks²⁷⁸ that there is a possibility that, once a direction is given about the mental element, the jury might acquit on the basis that the accused did not have the required knowledge – in the teeth of the evidence at trial. Some words of Kirby P (as he then was) in *Kitchener*²⁷⁹ and *Tolmie*²⁸⁰ seem consistent with such an approach. In the latter case, his Honour said:²⁸¹

I think that it would have been better if it [inadvertent recklessness] had not been put to the jury at all. However, once given, it was necessary that the direction should be made in accordance with the law, *in case the jury might have acted upon it* and been misled: see *Domican v The Queen* (1992) 173 CLR 555 at 568-570.

In these circumstances, I do not accept that the law should place an evidential burden on the accused of the type to which the Commission refers at 5.56 of the Consultation Paper.

73. Moreover, my position would be unchanged if, contrary to what I have just suggested, there is *no* real prospect of a judge ever directing a jury about the ss 61HE(3)(a) and/or 61HE(3)(b) mental states in the types of trials that I have imagined. If that is so, there is much to be said for the law *requiring* judges to give no direction about the mental element *at all* in such trials, in accordance with the proposal that I will now set out. In other words, despite my views about there being an evidential burden for the s 61HE(3)(c) mental state only, I accept, on balance, that it is desirable to require the accused to give, or point to, evidence, before s/he is entitled to a direction about the mental element more broadly. If we again consider the case where there is *no evidence whatsoever* that the accused was mistaken as to consent,²⁸² why would it be at all unjust to the accused to deprive him/her of a direction concerning not only the s 61HE(3)(c) mental state, but also the ss 61HE(3)(a) and 61HE(3)(b) ones? It has long been the case in Canada that the jury need not be directed on the mens rea for rape and like offences if ‘the only realistic issue which ... arise[s] is the simple issue of consent or no consent.’²⁸³ It is not obvious to me that Gans is wrong to support such an approach.²⁸⁴

²⁷⁸ Gans, above n 252, 259-261.

²⁷⁹ (1993) 29 NSWLR 696, 700.

²⁸⁰ (1995) 37 NSWLR 660, 665.

²⁸¹ *Ibid.* [Emphasis added]

²⁸² Or (a) failed to consider the question of consent, in circumstances where the risk of non-consent would *not* have been obvious to a person of his/her mental capacity (see paragraph 41) or (b) realised that there was only a negligible possibility that the complainant was not consenting (see paragraph 43).

²⁸³ As McIntyre J put it in *Pappajohn v The Queen* [1980] 2 SCR 120, 132. There is a great deal of Canadian jurisprudence, beginning with *Pappajohn*, that considers the circumstances in which there will be an ‘air of reality’ to the accused’s claim of mistake, such as to oblige a trial judge to direct the jury about the mental element for offences such as rape. See, for example, *The Queen v Bulmer* [1987] 1 SCR 782; *The Queen v Robertson* [1987] 1 SCR 782; *Osolin* [1993] 4 SCR 595; *Park* [1995] 2 SCR 836; *Livermore* [1995] 4 SCR 123; and *The Queen v Esau* [1997] 2 SCR 777.

²⁸⁴ Gans, above n 252, 261-6.

74. The only thing that gives me pause for thought concerning this point is the reasoning of five High Court Justices in *CTM v The Queen*.²⁸⁵ If an evidential burden of the type presently under consideration could always be discharged upon the accused's providing, or pointing to, no more than 'slender evidence'²⁸⁶ of mistake, that would be one thing. If that were so, there would be no danger of the burden operating in a way that took away from accused persons lines of defence for which there was *some* evidence.²⁸⁷ But in *CTM* it was held, over the dissent of Kirby J, that the accused's out of court statement that he mistakenly believed that the complainant was 16 years of age, was not enough to require the trial judge to direct the jury about honest and reasonable mistake of fact.²⁸⁸ In so holding, Gleeson CJ, Gummow, Crennan and Kiefel JJ attached significance to the accused's failure to give sworn testimony about the relevant matter, and his counsel's failure to cross-examine the complainant about it.²⁸⁹ Surely there is force in Kirby J's contention that this tends to undermine the principle that '[i]n an accusatorial trial ... the accused is entitled to put the prosecution to the proof'?²⁹⁰ Surely, too, the effect of the majority's approach is to force accused persons to 'give or adduce exculpatory evidence for him or herself'²⁹¹, if they want the jury to be able to consider the relevant matter – contrary to what the High Court held in *Pemble*²⁹²? In short, in agreement with Kirby J, it should have been enough in *CTM* that *some* evidence of honest and reasonable mistake of fact arose from the prosecution case.²⁹³
75. Accordingly, my only real objection to a new provision requiring a person accused of an offence to which s 61HE applies to discharge an evidential burden before a mens rea direction can be given, is the possibility that it would lead judges to 'usurp the function of the jury.'²⁹⁴ In my submission, it is important that judges not take 'defences' (or defences) for which there is a genuine evidential basis, away from accused persons, simply because *the court* forms a view that those defences should not succeed.
76. Two considerations must, however, be balanced against this concern. The first is the undesirability of a judge directing the jury about mens rea in those cases where there is 'not a scintilla of evidence'²⁹⁵ to raise this issue. Why should the accused have the benefit of such a direction in such cases? And why should the jury be distracted, and possibly confused, by this irrelevant issue? The second is that, whatever force there was in Kirby J's reasoning in *CTM*, was there a significant possibility that the jury

²⁸⁵ (2008) 236 CLR 440.

²⁸⁶ *The Queen v Khazaal* (2012) 246 CLR 601, 624 [74] (Gummow, Crennan and Bell JJ).

²⁸⁷ See *CTM* (2008) 236 CLR 440, 474 [107] (Kirby J).

²⁸⁸ *Ibid* 456-7 [36]-[39] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 496 [194] (Hayne J).

²⁸⁹ *Ibid* 457 [39]. See also 496 [194] (Hayne J).

²⁹⁰ *Ibid* 473 [106].

²⁹¹ *Ibid*.

²⁹² (1970) 124 CLR 107, 117-9 (Barwick CJ), 133 (Menziez J). See also *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161 (Gibbs CJ, Wilson, Brennan and Deane JJ).

²⁹³ *Ibid* 474 [107].

²⁹⁴ *Lindsay v The Queen* (2015) 255 CLR 272, 287 [39]. In that case, the High Court was certainly alive to this concern: at 284 [27]-[28], 287 [39] (French CJ, Kiefel, Bell and Keane JJ), 300-1 [82]-[84] (Nettle J).

²⁹⁵ To use the words of the Victorian Court of Appeal in *Boyle* (2009) 26 VR 219, 235 [57].

would acquit the defendant in that case? As noted above (at [70]), Bell J has expressed the view that when juries are directed about tangential matters like this, for which there is some, though slender, evidence,²⁹⁶ they will often ignore them. That having been said, it must be accepted that the orthodox view that an issue should be left with the jury even if there is only ‘very slight’ evidential support for it,²⁹⁷ seems preferable to the majority’s decision in *CTM*.

77. On the whole, then, I do support a provision along the following lines, which should appear after the present s 61HE(4) in the *Crimes Act*:

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.

I note that, concerning recklessness at least, such a provision might reflect the general practice of judges in sexual assault trials at present. Certainly, the Benchbook indicates that a direction regarding recklessness should only be given ‘[i]f applicable.’²⁹⁸ I note also that I have used the term ‘evidence’, as opposed to ‘sufficient evidence’, in this proposed provision. I have done so to make it clear, as far as possible, that judges should direct juries concerning a requisite mental state so long as there is *some* evidence that puts this matter in issue.

Question 5.6: Should NSW adopt a ‘negligent’ sexual assault offence? If so, why? If not, why not?

78. I adhere to the views that I expressed about this matter at [30]-[34] of my preliminary submission.

79. In its preliminary submission to this Review, the NSW Bar Association says that:²⁹⁹

the existing criminal law treats the subjectively culpable and negligent infliction of harm separately, with very different applicable maximum penalties. There is absolutely no justification for adopting a different approach with sexual offences.

However, with respect, the criminal law does *not* always attach higher penalties to offenders who display subjective, as opposed to objective, culpability. Certainly, as the Association observes,³⁰⁰ the maximum penalty for involuntary manslaughter is 25 years, whereas the penalty for murder is life imprisonment. But a person can commit murder without displaying subjective fault. If an individual kills, however unintentionally, in an attempt to commit, or during or immediately after his or her or an accomplice’s commission, of a sufficiently serious offence to attract the operation of the constructive murder rule, s/he will be exposed to the same maximum penalty as

²⁹⁶ In accordance with *Pemble* (1970) 124 CLR 107.

²⁹⁷ *Clarke v R* (1995) 78 A Crim R 226, 231 (Hunt CJ at CL, with whom McInerney J agreed).

²⁹⁸ Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’

²⁹⁹ NSW Bar Association, above n 48, 5.

³⁰⁰ *Ibid.*

a person who kills with one of the subjective states of mind to which s 18(1)(a) of the *Crimes Act* refers.³⁰¹ Moreover, as the Association concedes,³⁰² dangerous driving causing grievous bodily harm is an offence of strict liability. So is dangerous driving causing death.³⁰³ So is bigamy.³⁰⁴ So is participating in a criminal group.³⁰⁵ And so is the crime of having sexual intercourse with a person aged 14 or 15³⁰⁶ (although of course that is a sexual offence). Assault occasioning actual bodily harm is an offence of *absolute* liability in respect of the ‘actual bodily harm’ actus reus element.³⁰⁷

80. The fact that the criminal law is not as consistent as the Bar Association represents it as being, however, does not necessarily establish that a person may justifiably be convicted of the offences to which s 61HE applies if s/he believes unreasonably that his/her partner is consenting. The Association’s view that such liability is *unjustified* seems largely to be based on its contention that:³⁰⁸

An accused who is so stupid or negligent as to fail to appreciate that there are good reasons to conclude that consent is absent should not be regarded as in the same league as an accused who knows that consent is absent or is indifferent as to the lack of consent.

But it is often misogyny that causes a man to fail to appreciate the obvious fact that his sexual partner is not consenting. In *R v Cogan and Leak*,³⁰⁹ for example, the jury accepted that Cogan honestly believed that the complainant was consenting even though she had twice said ‘no’, sobbed throughout intercourse and tried to turn away from him. In *Park*,³¹⁰ as we have just seen, the defendant said that he thought that the complainant was consenting partly because of how she was dressed at the relevant time. And in another Canadian case, *The Queen v Ewanchuk*,³¹¹ a judge of the Alberta Court of Appeal accepted that there was ‘no room to suggest that Ewanchuk knew, yet disregarded her [the complainant’s] underlying state of mind as he furthered his romantic intentions.’ This, despite the fact that the complainant had repeatedly said ‘no’ and ‘stop’, and had told the accused that he was scaring her.³¹² As I said in my preliminary submission (at [33]), it is difficult to see why the prejudices of such offenders should (potentially) cause their criminal liability to be downgraded. Indeed,

³⁰¹ See *Crimes Act 1900* (NSW) s 18(1)(a).

³⁰² NSW Bar Association, above n 48, 5.

³⁰³ *Jiminez* (1992) 173 CLR 572.

³⁰⁴ *Tolson* (1889) 23 QBD 168. Section 92 of the *Crimes Act 1900* (NSW) creates this offence.

³⁰⁵ *Crimes Act 1900* (NSW) s 93T(1).

³⁰⁶ *CTM* (2008) 236 CLR 440. See also *Crimes Act 1900* (NSW) s 66C(3) and (4).

³⁰⁷ *Coulter v The Queen* (1987) 61 ALJR 537; *R v Williams* (1990) 50 A Crim R 213, 220-2. See also *Crimes Act 1900* (NSW) s 59(1) and (2). Nor does the *Crimes Act* deal in a consistent manner with subjective recklessness. In the case of grievous bodily harm and wounding, for example, the reckless offender is subject to a lower maximum penalty than the one who acts with intent: see *Crimes Act 1900* (NSW) ss 33 and 35. But, in the case of kidnapping offences or recording or distributing an intimate image without consent, the offender who realises the possibility that the complainant is not consenting is convicted of the same offence as is the offender who actually knows that this is the case: see *Crimes Act 1900* (NSW) s 86 and *Castle v R* (2016) 92 NSWLR 17 (kidnapping) and *Crimes Act 1900* (NSW) ss 91P(1) and 91Q(1) (the intimate images offences).

³⁰⁸ NSW Bar Association, above n 48, 5.

³⁰⁹ [1976] QB 217, 221-2.

³¹⁰ [1995] 2 SCR 836.

³¹¹ [1999] 1 SCR 330, 373 [89].

³¹² *Ibid* 368-9 [80].

in my view, like the accused who does not realise that his/her conduct is dishonest by the standards of ordinary decent people, they should gain no advantage from their ‘moral obtuse[ness].’³¹³ And, as I also said in my preliminary submission (at [33]-[34]), the test created by s 61HE(3)(c) is stringent enough only to catch those whose culpability warrants their conviction for sexual assault. Only where the accused can point to no reasonable basis for *his or her* belief will s/he be convicted.

81. The Association also worries that:³¹⁴

An accused who lacks the capacity of a hypothetical reasonable person (for example, an accused with a mental disability) and who mistakenly believes that consent is present should not be held to the standard of people who have full capacity.

The answer to *this* concern is that the accused with an intellectual handicap is *not* held to the standard of persons of standard intelligence. As is explained at length above (at paragraphs 45-55), the question for the jury in a case where s 61HE(3)(c) is engaged is not whether a reasonable person would have believed that the complainant was consenting. It is whether it was reasonable for the accused to believe what s/he did.³¹⁵ Accordingly, a person with an intellectual impairment could be convicted on the basis of possessing the mental state for which s 61HE(3)(c) provides only if it was not reasonable *for him or her* to hold the relevant belief.³¹⁶

Question 5.8 and Question 5.9: Defining ‘steps’; Steps to ascertain consent

Should the legislation define ‘steps taken to ascertain consent’? If so, why? If not, why not? If so, how should ‘steps’ be defined? Should the law require people to take steps to work out whether their sexual partners consent? If so, why? If not, why not? If so, what steps should the law require people to take?

82. I adhere to the views that I expressed about this matter at [24]-[28] of my preliminary submission.

83. I respectfully do not support the submission of Rape & Domestic Violence Services Australia (R&DVSA) that:³¹⁷

³¹³ See Chief Justice Murray Gleeson, ‘Australia’s Contribution to the Common Law’ (2008) 82 *Australian Law Journal* 247, 249, commenting on *R v Ghosh* [1982] QB 1053. In *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391, the United Kingdom Supreme Court dispensed with the second limb of the *Ghosh* test for dishonesty, partly on the basis that, as Lord Hughes put it at 1234 [72], ‘if a wholly “subjective” test of when an established state of knowledge or belief is and is not dishonest were to be applied, the consequences would be that any defendant whose subjective standards were sufficiently warped would be entitled to be acquitted.’

³¹⁴ NSW Bar Association, above n 48, 5.

³¹⁵ *O’Sullivan* (2012) 233 A Crim R 449, 473-4 [124]-[126] (Davies and Garling JJ); *Lazarus I* [2016] NSWCCA 52, [156].

³¹⁶ See *Mrzljak* [2005] 1 Qd R 308; *Aubertin* (2006) 33 WAR 87, 96 [43]. As Holmes J put it in the former case, evidence of the accused’s intellectual impairment – together with evidence that he was unable to converse in English – was capable of leading a jury to ‘accept that a belief that would not be reasonable if held by a native English speaker of normal IQ was honestly held by the appellant on reasonable grounds’: at 330 [92].

³¹⁷ Rape & Domestic Violence Services Australia, *Preliminary Submission PCO* 88, 16 [6.28].

A new provision should be inserted after s 61HA(3) which states: “A person does not reasonably believe that the other person consents where (a) the other person did not say or do anything to indicate consent and (b) they took no steps to find out whether the other person was consenting.”

If the word ‘steps’ were given the meaning that the NSWCCA gave that term in the second Lazarus appeal,³¹⁸ such a provision would not change the law at all. If, on the other hand, the word were given the meaning that I think it should be given, this proposed provision would turn into absolute liability offences the offences to which s 61HE(3) applies.

84. In *Lazarus*, Bellew J (with whom Hoeben CJ at CL and Davies J agreed) said:³¹⁹

The word “steps” is not defined in the Act but in my view there is no warrant to ascribe to it anything other than its natural and ordinary meaning. That meaning connotes doing something positive. The Collins English Dictionary defines the term “take steps” as meaning:

... to undertake measures to do something with a view to the attainment of some end
...

It follows that in my view, a “step” for the purposes of s. 61HA(3)(d) must involve the taking of some positive act. However, for that purpose a positive act does not 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.

In other words, in the NSWCCA’s view, a person takes a ‘step’ within the meaning of (what is now) s 61HE(4)(a) if he or she goes to the trouble of forming a positive belief that the complainant is consenting.

85. If we return to R&DVSA’s proposal, and accepting that ‘steps’ means what the NSWCCA thinks it does, an accused of course does not reasonably believe that the complainant is consenting if s/he has taken ‘no steps to find out whether the [complainant] ... was consenting.’ A ‘step’, after all, is the formation of a positive belief in consent. A person who forms no such belief about this matter necessarily lacks a reasonable belief about it.

86. If, however, s 61HE(4)(a) were altered in the way that I think it should be (see [28] of my preliminary submission), the consequences of R&DVSA’s proposal would be draconian. I will explain. In my preliminary submission, I criticised the NSWCCA’s reasoning in *Lazarus*, essentially on the basis that s 61HE(4)(a)’s purpose will be defeated for as long as juries can be told that, when assessing whether the accused believed on reasonable grounds that the complainant was consenting, they must take into account the fact that the accused took the ‘step’ of forming a belief that s/he was. I submitted (and continue to submit) that s 61HE(4)(a) should be altered to read as follows:³²⁰

³¹⁸ *R v Lazarus* [2017] NSWCCA 279, [146]-[147] (*‘Lazarus II’*).

³¹⁹ *Ibid.*

³²⁰ Dyer, above n 3, [28].

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 **physical or verbal** steps taken by the person to ascertain whether the other person consents to the sexual intercourse ...

In my opinion, this would ensure that s 61HE(4)(a) operates in the way that the legislature intended it to operate. The idea behind this provision, I think, is to ensure that juries are told to consider whether the accused (a) asked the complainant whether s/he was consenting or (b) took any other active measures to ascertain whether s/he was doing so, when those juries come to determine whether the accused's belief in consent was reasonable. But if such a proposal were adopted – and I note that R&DVSA criticise the *Lazarus* 'steps' reasoning on pretty much the same grounds as I do³²¹ – R&DVSA's proposal would leave the honest and reasonable mistake of fact 'defence' with no work to do. R&DVSA consider that an accused should only successfully be able to raise this 'defence' if s/he has taken a 'step' or 'steps.' But it is seemingly impossible for the person who has taken active measures to ascertain whether his/her partner is consenting to believe mistakenly that s/he is. As I noted above, the person who asks the other person whether s/he is consenting cannot be mistaken as to her/his consent. The person who, by gesture, makes the same inquiry, is apparently in the same position. In its submission, R&DVSA describes as 'conservative' those who resist objective mens rea standards for sexual assault.³²² Perhaps a similar epithet could properly be applied to those who, by favouring the 'abandonment entirely of any requirement of a guilty mind'³²³ would return us to the position that applied '[c]enturies ago'³²⁴, under which:³²⁵

a man might have been found guilty merely because it was his conduct which caused the harm, even though his acts or omissions were quite accidental or unintentional.

With that having been said, however, I do continue to accept that it should only be in very limited circumstances that an accused should be able to be exonerated on the basis of his/her having believed on reasonable grounds that the complainant was consenting.³²⁶

³²¹ Rape & Domestic Violence Services Australia, above n 317, 14 [6.17]-[6.18].

³²² Ibid 12 [6.3].

³²³ 'Report of the Advisory Group on the Law of Rape', Cmnd 6352 (December 1975) 12 [74]. The Advisory Group was chaired by The Hon Mrs Justice Heilbron DBE.

³²⁴ Ibid 8 [50].

³²⁵ Ibid.

³²⁶ See Dyer, above n 3, [40].

Question 5.14 and Question 5.15: Knowledge of consent under a mistaken belief; Other issues about the mental element

Does the law regarding knowledge of consent under a mistaken belief need to be clarified? If so, how should it be clarified? Are there any other issues about the mental element for sexual assault offences that you wish to raise?

87. I respectfully agree with Julia Quilter's proposal,³²⁷ in her preliminary submission to this review, that Parliament should clarify the law regarding knowledge of consent under a mistaken belief. Section 61HE(7) of the *Crimes Act 1900* (NSW) currently provides that:

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.

(The mistaken beliefs to which this sub-section is referring are those for which s 61HE(6) provides.) In my view, s 61HE(7) should be amended to provide:

For the purposes of subsection (3), the other person is taken to know that the person does not consent to the sexual activity if the other person:

- (a) actually knows that the person is consenting only because of one of the mistakes or states of ignorance to which s 61HE(6) refers;
- (b) is reckless as to whether the person is consenting only because of one of the mistakes or states of ignorance to which s 61HE(6) refers; or
- (c) has no reasonable grounds for believing that the other person is consenting for some reason that would make his or her consent valid, and not only because of one of the mistakes or states of ignorance to which s 61HE(6) refers.

88. As Quilter³²⁸ and the Commission³²⁹ have noted, the effect of the High Court's decision in *Gillard v The Queen*³³⁰ might well be that an accused who is reckless as to the fact that the complainant is consenting 'under' a mistaken belief as to the accused's identity (for example), does not *by virtue of s 61HE(7)* have the mens rea for sexual assault. If this is right, the same would of course be true of the accused who has made no honest and reasonable mistake about the relevant matter. In *Gillard*, the High Court did suggest that proof of a consent-vitiating circumstance (such as one of the s 61HE(6) mistakes) 'may ... support an inference' that the accused had one of the states of mind to which s 61HE(3) refers (and so is guilty of the relevant offence).³³¹ So, for example, a jury might accept that the accused who realised that the complainant might have been consenting under a s 61HE(6) mistaken belief, was

³²⁷ Quilter, above n 50, 10-12.

³²⁸ Quilter, above n 50, 11-12.

³²⁹ New South Wales Law Reform Commission, above n 1, 88 [5.125]-[5.127].

³³⁰ (2014) 88 ALJR 606.

³³¹ *Ibid* 613 [27].

reckless as to her or his consent within the meaning of s 61HE(3). But s 61HE(7) does not deem³³² this to be so. It does not require this outcome.

89. Section 61HE(7) *should* require this outcome. The precise wording of the provision that the Court was considering in *Gillard* might have justified its contention that:³³³

Proof that the appellant was heedless of the risk that he was abusing his position of authority over DD or JL and that this may have caused DD's consent to sexual intercourse or JL's consent to the commission of an act of indecency in her presence, did not establish that the appellant was reckless as to DD's or JL's consent.

But, whether or not this is so, an accused surely fits within s 61HE(3)(b) if s/he realises it is possible that the complainant is consenting 'only because of' one of the mistakes or states of ignorance that, in my opinion, should vitiate consent (see paragraph 29 above). Because s/he knows of the possible existence of the circumstance that negates the complainant's consent, s/he knows that the complainant might not be consenting. Such an accused's position is no different from that of the accused who knows that the complainant might be asleep and then proceeds with sexual activity even so.³³⁴

90. Likewise, an accused has the s 61HE(3)(b) mental state if s/he does not even consider whether the complainant is consenting because of one of the s 61HE(6) mistakes (provided that the risk that s/he *was* would have been obvious to a person of the accused's mental capacity if s/he had considered the relevant question). And the accused who has the mental state that my proposed s 61HE(7)(c) envisages, fits within s 61HE(3)(c). My proposed s 61HE(7) acknowledges this.

Issues related to s 61HA

Question 6.1: Upcoming amendments

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

91. In an article about the *Sexual Offences Act 2003* (UK), Jennifer Temkin and Andrew Ashworth said this about ss 75(1) and 75 (2)(b) of that Act, which provide for a conclusive presumption that the complainant was not consenting to the offences to which s 75 applies if s/he was asleep at the time of the relevant conduct:³³⁵

³³² If the *Gillard* reasoning applies to s 61HE(7), that provision merely deems, or declares, or puts it beyond doubt, that the accused who actually knows that the complainant who consents 'under' a s 61HE(6) mistaken belief, has the mens rea for the relevant offence: Ibid 613 [28].

³³³ Ibid 613 [29].

³³⁴ In *Getachew* (2012) 248 CLR 22, 36 [35], the High Court (French CJ, Hayne, Crennan, Kiefel and Bell JJ) accepted that the accused who knows that the complainant might be asleep when s/he sexually penetrates her/him is 'aware that she might not be consenting. No other possibility [is] ... open.'

³³⁵ Temkin and Ashworth, above n 179, 338.

The provisions of the Act on consent apply not only to rape and assault by penetration but also to touching which falls within sexual assault or causing sexual activity. A conclusive presumption of absence of consent and absence of reasonable belief in consent, if applied to all situations where C was asleep at the time, would render D liable for sexual assault [the English equivalent of sexual touching, created by s 3(1) of the *Sexual Offences Act*] if he sexually touched his partner C while C was asleep even though D was in the habit of doing so and C had not objected to this in the past. Even though complaints are unlikely to be made in such cases, this may be regarded as casting the law's net too wide.

The same criticisms apply to s 61HE(5)(b) of the *Crimes Act 1900* (NSW). Do they have force?

92. In my view, they do – even though, consistently with Temkin and Ashworth's remarks about the English provisions, s 61HE(5)(b) is unlikely in practice to give rise to the prosecution of the kinds of persons of whom those commentators write. Criminal liability should not even be a possibility for such people. Or, to put the same point in a different way, criminal offences should, where possible,³³⁶ be defined in such a way as only to catch conduct that merits criminalisation. However, in my submission, the best solution to such a problem is not to provide that s 61HE(5)(b) is applicable only to the offences created by ss 61I, 61J and 61JA. Rather, it is to alter the language of ss 61HB and 61HC.
93. The sexual touching offences created by ss 61KC and 61KD essentially replace the indecent assault offences that, until the coming into force of the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), were provided for by ss 61L and 61M of the *Crimes Act*. The sexual act offences created by ss 61KE and 61KF essentially replace the act of indecency offences that were formerly provided for by ss 61N and 61O. In his Second Reading Speech for the relevant Bill, the Attorney-General explained that these changes were made for the purpose of modernising the language of the particular offences. 'These amendments,' he said, 'will ... address the fact that [the ss 61L, 61M, 61N and 61O] ... offences use the outdated terminology of "indecency."'³³⁷ After observing what I just have – namely, that 'the conduct currently covered by the offences of indecent assault and acts of indecency will be covered by the offences of sexual touching and sexual act'³³⁸ – the Attorney-General continued:³³⁹

This more modern and more easily understood terminology is defined in subdivision 1 in a way that reflects the core of the common law meaning of indecency. Sexual touching will cover contact offences that involve some form of physical contact with the victim. Sexual acts

³³⁶ Sometimes this appears to be impossible. If, as I tend to think, any 'but for' mistake is enough in reality to vitiate a person's consent to sexual intercourse (see paragraph 31 above), a person falls within s 61I whenever a person with whom he or she has had intercourse has participated only because of a mistake as to the accused's wealth, say, and the accused 'knows' that this was the case. If, as many people believe, this is problematic, the solution would seem not to be to define the offence of sexual assault differently from how it is presently defined. Rather, it should be left to *the Courts* to rule that, however much cases like this appear to fall within s 61I, they in fact do not (see paragraph 33 above).

³³⁷ NSW, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 6 (Mr Mark Speakman, Attorney-General).

³³⁸ *Ibid.*

³³⁹ *Ibid* 6-7.

will cover non-contact offences that involve sexual touching other than touching the victim, including forcing or inciting a victim to touch themselves.

But, with great respect, it is not really true to say that the language in s 61HB, which defines ‘sexual touching’, and s 61HC, which defines ‘sexual act’, *does* capture the ‘core of the common law meaning of indecency.’

94. Section 61HB(1) provides essentially that ‘sexual touching’ comprises any touching by one person of another person that ‘a reasonable person would consider ... to be sexual.’ Section 61HC(1) provides that a ‘sexual act’ is an act *other than sexual touching* that a reasonable person would characterise in the same way. These definitions can be contrasted with the meaning of ‘indecency’ for the purposes of the old ss 61L, 61M, 61N and 61O offences. A person acted ‘indecently’ for the purposes of the old offences if his or her conduct, *as well as being sexually connotative*,³⁴⁰ was considered by the jury to be ‘contrary to the ordinary standards of morality of respectable people within the community.’³⁴¹
95. The effect of ss 61HB and 61HC appears to be to criminalise, under ss 61KC, 61KD, 61KE and 61KF, conduct that would – or, at the very least, would probably – not have been contrary to ss 61L, 61M, 61N or 61O. Take, for example, Temkin and Ashworth’s accused (see paragraph 91). The person who touched his or her partner sexually in the circumstances that those commentators envisage would probably not have been guilty of indecent assault. This is because, even though such touching is sexual connotative, a jury would have been unlikely to find that it was contrary to community standards. The same probably goes for, say, the woman who, knowing that a man has a girlfriend or might be gay (and therefore might not be consenting), suddenly kisses him passionately or squeezes his bottom – without his consent, as it turns out. But now, because of s 61HB, both of these persons would fall within the scope of s 61KC. In my submission, this could be avoided simply by adding to s 61HB and s 61HC, respectively, the words that I have placed in bold below:

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, **and the touching is contrary to community standards of acceptable behaviour.**

- (2) The matters to be taken into account in deciding whether a reasonable person would consider touching to be sexual include:

³⁴⁰ *Harkin v R* (1989) 38 A Crim R 296, 301.

³⁴¹ *Ibid* 299-301.

- (a) whether the area of the body touched or doing the touching is the 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, 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, **and the act is contrary to community standards of acceptable behaviour.**
- (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 or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed, or
 - (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.

In my view, such an amendment is desirable. I am aware of nothing that suggests that, leaving aside questions of nomenclature, the traditional approach to offences of this sort was deficient or caused difficulties in practice. If there is no such evidence, that traditional approach should be maintained. That is, the 'core of the common law meaning' of indecency should be restored.

Question 6.2: Language and structure

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

96. In her preliminary submission to this Review, Kelley Burton, argues that 'the reference to the trier of fact not having regard to the 'self-induced intoxication of the person' in s 61HE(4)(b), is confusing.'³⁴² She wonders whether 'the person' to whom this provision refers is the accused or the complainant.³⁴³ With respect, it is clear that it is referring to the accused. Section 61HE(4) provides that, for the purpose of

³⁴² Kelley Burton, *Preliminary Submission PCO 76*, 2 [7].

³⁴³ *Ibid.*

making a finding contemplated by s 61HE(3)(a)-(c) – namely, that ‘the person’ ‘knows’ that ‘the alleged victim’ consents to the sexual activity – 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.

The consistent use in s 61HE(3) and (4) of the term ‘the person’ to refer to the accused and ‘the alleged victim’ to refer to the complainant, makes it plain who ‘the person’ in s 61HE(4) is.

97. Gail Mason and James Monaghan think that the language of s 61HE(3)(a) is ‘awkwardly repetitive.’³⁴⁴ I respectfully agree. They recommend that that provision be amended to read:³⁴⁵

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, **is taken to know** that the alleged victim does not consent to the sexual activity if:

- (a) the person **actually** 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.

There can be no suggestion that the language that currently appears in s 61HE(3)(a) has caused any confusion. It is clear what it means.³⁴⁶ There can also be no suggestion that Mason and Monaghan’s words would change the meaning of s 61HE(3)(a). But, with respect, Mason and Monaghan’s phraseology is more elegant than that which currently appears in that provision. I support it on that basis.

98. After noting, in s 61HE(1), the offences to which the section applies, s 61HE deals with the meaning of consent, then with knowledge about consent, then with negation of consent. Julia Quilter argues that it would be more logical for s 61HE to deal first with consent, then with negation of consent, and then with knowledge about consent. I respectfully agree.³⁴⁷ I support her proposal that the provisions be re-ordered, while

³⁴⁴ Mason and Monaghan, above n 195, 4 [13].

³⁴⁵ Ibid.

³⁴⁶ In this regard, note that the standard direction concerning s 61HE(3)(a) uses exactly the same language as that which Mason and Monaghan favour: ‘In a situation where [the complainant] does not in fact consent, [the accused’s] state of mind at the time of the act of intercourse might be that [he/she] actually knew that [the complainant] was not consenting. That is a guilty state of mind for this offence.’ See The Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’

³⁴⁷ Quilter, above n 50, 10.

noting that this is a cosmetic change only. If this change were made, it would not change the meaning of s 61HE in any way.

99. Quilter also argues that s 61HE(4) would be more happily drafted if it provided ‘For the purpose of making a finding in relation to s 61HE(3), the trier of fact must ...’ instead of ‘For the purpose of making any such finding, the trier of fact must ...’.³⁴⁸ I agree, although, with respect, I think that ‘For the purpose of making a finding **for which subsection 3 provides**, the trier of fact must ...’ might be better still. Though Quilter’s formulation is unlikely to lead to any confusion, a finding can be ‘in relation to’ – that is, have a connection with – a provision, without necessarily being mandated or allowed for by that provision.
100. Finally, I support the proposal of the Australian Queer Students Network (AQSN)³⁴⁹ to make a slight alteration to the definition of ‘sexual intercourse’ in the new s 61HA of the *Crimes Act*. At the moment, s 61HA(a) relevantly provides that ‘sexual intercourse’ comprises ‘sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person.’ As the AQSN notes, this fails to include ‘the penetration of the variety of genitalia that people have, including people with intersex variations.’³⁵⁰ Section 61HA(a) should be amended to provide, relevantly, that ‘sexual intercourse means ‘sexual connection occasioned by the penetration to any extent of the anus or genitalia (including an anus or genitalia that has been surgically constructed) of a person.’³⁵¹

Question 6.3, Question 6.4 and Question 6.5: Jury directions on consent; Jury directions on other related matters; Legislated jury directions

Are the current jury directions on consent in the NSW *Criminal Trial Court Bench Book* clear and adequate? If not, how could they be improved? Should jury directions about consent deal with other related matters in addition to those that they currently deal with? If so, what matters should they deal with? Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed? What are the benefits of legislated jury directions on consent and/or other related matters? What are the disadvantages of legislated jury directions on consent and/or other related matters?

101. In my opinion, the standard jury direction regarding sexual assault are, in all but one respect, clear and accurate. With the greatest respect, if Huggett DCJ had adhered to them at the first Lazarus trial, her Honour would not have fallen into error. As much is shown by *O’Sullivan*, where Davies and Garling JJ held that King DCJ’s directions about (what is now) s 61HE(3)(c) ‘followed carefully those set out in the Bench Book. There can be no criticism of them.’³⁵²

³⁴⁸ Ibid 3.

³⁴⁹ Australian Queer Students Network, *Preliminary Submission PCO 56*, 3.

³⁵⁰ Ibid.

³⁵¹ See *ibid* 4.

³⁵² (2012) 233 A Crim R 449, 475 [126].

102. The one way in which the directions appear to be inaccurate is this. Concerning the former s 61HE(3)(d), the directions state:³⁵³

In determining whether the Crown has proved that [the accused] *actually knew* that [the complainant] was not consenting to intercourse with [him/her] you must take into account what steps were actually taken by [the accused] to ascertain whether [the complainant] was consenting to intercourse.

The problem with this is that it is not *only* when it is determining whether the accused ‘actually knew’ that the complainant was not consenting, that the trier of fact has an obligation³⁵⁴ to have regard to any steps that the accused took to ascertain whether the complainant was consenting to the sexual activity. It must also consider what steps the accused took, when it determines whether s/he had the s 61HE(3)(b) and (c) mental states.³⁵⁵ Indeed, the old s 61HE(3)(d) would appear to be at its most relevant in a case where there is evidence that the accused believed on reasonable grounds that the complainant was consenting. Accordingly, in my opinion, the standard direction might usefully be amended in the following way. After every discussion of a s 61HE(3) mental state, the direction might state that, when determining whether the accused had that mental state, the trier of fact must have regard to any steps that s/he took. In other words, the direction might state:

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

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

[Deal with relevant evidence.]

On the other hand, you may decide on the basis of the evidence led in the trial *[or if applicable and relied on by the accused]* that [he/she] might have believed [the complainant] was consenting to intercourse with [him/her]. Whether that belief amounts to a guilty state of mind depends upon whether [the accused] honestly held it and, if so, whether the Crown has proved beyond reasonable doubt that there were no reasonable grounds for [the accused] to believe that [the complainant] consented. Therefore, the Crown must prove beyond reasonable doubt one of two facts before you can find the accused guilty, either:

- (a) that [the accused] did not honestly believe that [the complainant] was consenting, or
- (b) even if [he/she] did have an honest belief in consent, there were no reasonable grounds for believing that [the complainant] consented to the sexual intercourse.

³⁵³ Criminal Trials Court Benchbook, ‘Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008.’ [Emphasis added]

³⁵⁴ *R v XHR* [2012] NSWCCA 247, [51], [61]–[65] (*XHR*); *Lazarus II* [2017] NSWCCA 279, [142].

³⁵⁵ *XHR* [2012] NSWCCA 247, [49].

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

In determining whether the Crown has proved that [the accused] had no reasonable grounds for believing that [the complainant] was consenting to intercourse with [him/her] you must take into account what steps were actually taken by [the accused] to ascertain whether [the complainant] was consenting to intercourse. [See s 61HE(3)(d) *Crimes Act 1900*.]

[Deal with relevant evidence.]

[If applicable — where the Crown relies upon recklessness under s 61HE(3)(b) to prove the accused knew the complainant was not consenting — see commentary in para 4 at [5-1565] above.]

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

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

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

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

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

(b) [the accused’s] state of mind was such that [he/she] realised the possibility that [the complainant] was not consenting but went ahead regardless of whether [he/she] was consenting or not.

[This is a wholly subjective test. This has been referred to as advertent recklessness.]

[Deal with relevant evidence.]

In determining whether the Crown has proved that [the accused] simply failed to consider whether [the complainant] was consenting to intercourse with [him/her], in circumstances where the risk that [the complainant] was not consenting would have been obvious to someone with the accused’s mental capacity if [he/she] had turned [his/her] mind to it, you must take into account what steps were actually taken by [the accused] to

ascertain whether [the complainant] was consenting to intercourse. [See s 61HE(3)(d) *Crimes Act 1900.*]

In determining whether the Crown has proved that [the accused] realised the possibility that [the complainant] was consenting to intercourse with [him/her] but went ahead regardless of whether [he/she] was consenting or not, you must take into account what steps were actually taken by [the accused] to ascertain whether [the complainant] was consenting to intercourse. [See s 61HE(3)(d) *Crimes Act 1900.*]

It is possible that, at the second Lazarus trial, Tupman DCJ overlooked the s 61HE(3)(d) requirement partly because of the Benchbook's failure to deal with it as clearly, accurately or thoroughly as it could have done.

103. As I have foreshadowed above (see paragraph 67), I support legislated jury directions for sexual offences. In my opinion, they are a sensible way of combating 'rape myths' and possible juror prejudice. In the alternative, I support a supplementation of the directions in the Criminal Trials Court Benchbook. (The reason why I favour the former approach to the latter is that, though it is less flexible,³⁵⁶ the judiciary has no capacity to undermine, or hold to be wrong, any of the propositions that are given statutory force. Having said that, this does make it critical for prospective directions to be very carefully considered before they are given legislative force.)

104. As I have indicated above (see paragraph 67), I support directions, in appropriate cases,³⁵⁷ to the effect that neither (a) a complainant's style of dress nor (b) her/his consumption of alcohol and/or drugs is capable of providing the accused with reasonable grounds for any belief that the complainant was consenting to the sexual activity. I have also indicated (see paragraph 67) that I support a direction along the lines that, in appropriate cases, the jury should take into account any overbearing conduct on the part of the accused around the time of the relevant sexual activity, when it determines whether s/he had reasonable grounds for any belief in consent. I can also see nothing wrong with the directions that the Commission sets out/refers to at:

- 6.32 and 6.33 of the Consultation Paper (concerning how complainants might react to non-consensual sexual activity, and the fact that a person who is not consenting might freeze or fail to resist);
- 6.34 of the Consultation Paper (concerning the fact that a lack of violence etc does not necessarily mean that the complainant was consenting);
- 6.35 of the Consultation Paper (concerning the irrelevance to the question of consent of a complainant's wearing revealing clothing);

³⁵⁶ See New South Wales Law Reform Commission, above n 1, 98 [6.46].

³⁵⁷ The relevant legislation should provide, as the *Jury Directions Act 2015* (Vic) does, that: the directions may be given upon the request of the Crown or defence (see, for example, ss 46(1) and 47(1)); the judge must give the requested direction 'unless there are good reasons for not doing so' (see s 14(1)); and the judge need not give any direction that neither party has requested, unless s/he considers that there are 'substantial and compelling reasons for doing so' (see s 16(1)).

- 6.36 of the Consultation Paper (concerning the irrelevance to the question of consent of a complainant’s intoxication);
- 6.37 of the Consultation Paper (concerning the irrelevance of a complainant’s phlegmatic manner when giving evidence, to the question of whether s/he is telling the truth about non-consensual sexual activity that s/he alleges occurred);
- 6.39 and 6.40 of the Consultation Paper (concerning previous consensual sexual activity between the complainant and the accused); and
- 6.42 of the Consultation Paper (concerning a person’s entitlement to withdraw consent at any time before the sexual activity has concluded).

Regarding this last matter, however, I am respectfully not convinced that the law in NSW fails properly to address withdrawal of consent.³⁵⁸ Section 61HA(d) defines ‘sexual intercourse’ to mean, relevantly, ‘the continuation of sexual intercourse as defined in paragraph (a), (b) and (c).’ By so doing, it makes it clear that the person who, for example, continues with penile-vaginal intercourse after the complainant has revoked consent, will be guilty of sexual assault if he had one of the mental states for which s 61HE(3) provides.

Question 6.6: Amendments to expert evidence law

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

105. I have no remarks to make about this subject. Concerning these matters, I defer to the knowledge and expertise of my colleague, Rita Shackel, who co-authored a preliminary submission to this review.³⁵⁹

Conclusion

106. In my submission, s 61HE should be amended so as to read:

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.

³⁵⁸ See New South Wales Law Reform Commission, above n 1, 98 [6.41].

³⁵⁹ Loughnan et al, above n 5.

(2) Meaning of “consent”

A person *consents* to a sexual activity if the person freely and voluntarily agrees to the sexual activity.

(3) 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, cognitive incapacity or intoxication, 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 intimidation or threat(s) of any kind, whether the intimidation or threat(s) are directed at him or her or another person, or
 - (d) if the person consents to the sexual activity because the person is unlawfully detained, or
 - (e) if the person consents to the sexual activity because he or she is overborne by a person exercising authority over him or her.
- (4) Without limiting the circumstances in which a person’s mistake about, or ignorance as to, a matter, means that he or she does not consent to a sexual activity, a person does not consent to a sexual activity if she only participates in it because of:
- (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) a mistaken belief that the other person will wear a condom during the sexual activity (provided that that sexual activity is sexual intercourse);
 - (e) a mistaken belief that the other person will pay the person for participating with him or her in the sexual activity;
 - (f) a mistaken belief that the other person does not have a grievous bodily disease, or his or her ignorance of the fact that the other person has such a disease, in circumstances where there is a real risk that the person will contract the disease as a result of the sexual activity.
- (5) For the purposes of subsection (8), the other person is taken to know that the person does not consent to a sexual activity if the other person:
- (a) actually knows that the person is consenting only because of one of the mistakes or states of ignorance to which subsection (4) refers;
 - (b) is reckless as to whether the person is consenting only because of one of the mistakes or states of ignorance to which subsection (4) refers; or
 - (c) has no reasonable grounds for believing that the other person is consenting for some reason that would make his or her consent valid, and not only because of one of the mistakes or states of ignorance to which subsection (4) refers.
- (6) A person who does not offer physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to that sexual activity.

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

(8) 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, is taken to know that the alleged victim does not consent to the sexual activity if:

- (a) the person actually 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.

(9) For the purpose of making a finding for which subsection (8) provides, the trier of fact must have regard to all the circumstances of the case:

- (a) including any physical or verbal 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.

(10) A judge need only direct the jury as to one or more of the mental states for which subsection (8) provides if he or she is satisfied that there is evidence that puts that, or those, mental state(s) in issue.

(11) In this section:

sexual activity means sexual intercourse, sexual touching or a sexual act.

I also submit that:

- s 61HA(a) be amended in the way that I recommend at paragraph 100;
- ss 61HB and 61HC be amended in the way that I recommend at paragraph 95;
- the Benchbook directions be amended in the way that I recommend at paragraph 102; and
- Parliament give legislative force to the jury directions that I discuss at paragraph 104. In the alternative, I submit that directions along these lines should be added to the Criminal Trials Court Benchbook.