

**THE LAW OF CONSENT AND SEXUAL
ASSAULT**

**DISCUSSION PAPER
MAY 2007**

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1. Introduction

In April 2006 the Attorney General's Department released the Report of the Criminal Justice Sexual Offences Taskforce entitled *Responding to sexual assault: the way forward*.

This Report made numerous recommendations aimed at improving the responsiveness of the criminal justice system to sexual assault complainants, whilst ensuring that an accused person receives a fair trial.

A number of the recommendations of the Taskforce have already been implemented in the *Criminal Procedure Amendment (Sexual and Other Offences) Act 2006*, and further recommendations are contained in a second Bill currently before Parliament – *Criminal Procedure Amendment (Vulnerable Persons) Bill 2006* .

One of the most important issues considered by the Taskforce was the law relating consent as it applies to sexual assault.

A Draft Exposure Bill concerning the law of consent has been prepared, taking into account a number of the Taskforce Recommendations, and is attached to this Discussion Paper at Appendix 3.

1.1 Summary of issues

1. Should NSW adopt a statutory definition of consent in the *Crimes Act 1900* or are the current common law directions adequate?
2. If a statutory definition is to be adopted should it be based on the:
 - Victorian Definition – *free agreement*;
 - Queensland definition - *freely and voluntarily given by a person with the cognitive capacity to give consent*; or
 - UK definition - *a person consents if he agrees by choice and has the freedom and capacity to make that choice*; or
 - The Canadian formulation of - *the voluntary agreement of the complainant to engage in the sexual activity in question*; or
 - some combination of the above?
3. Should the term *recklessness* be codified?
4. Is the term *indifference* preferable to the term *reckless*?
5. Should unlawful detention of the complainant vitiate consent?
6. Should the fact that the complainant is unconscious, asleep or affected by drugs be added as a factor that vitiates consent?
7. Should s.61R be redrafted so as to provide a non-exhaustive list of factual circumstances that *may* vitiate consent?
8. Should s.61R be amended to provide that extortion, threats to humiliate, disgrace, or harass *may* vitiate consent?
9. Should s.65A be repealed?
10. Should the abuse of authority or professional or other trust vitiate consent?
11. Should the recommendations of the Taskforce relating to vitiation of consent be implemented?
12. If the common law test was modified, what should it look like and how might it work in practice?
13. What is the purpose for creating a secondary, but lesser offence?
14. If s.61I is redrafted with the word ‘reckless’ instead of ‘indifference’ will it assume its common law meaning?
15. What is the reasonableness standard? Is it the standard of a reasonable person in the community, or the reasonableness of a person in the position of the accused?
16. Should there be some evidence of ‘reasonable steps’ that can be pointed to by the defence before the second offence can be left to the jury?

17. Should a second offence with a lower maximum penalty be created so that the trial judge does not have to make findings of fact with respect to the basis upon which the jury convicted? This is presently done with respect to many offences and a common problem when sentencing.
18. Would the creation of a lesser offence, presented to the jury as a statutory alternative, lead to compromised verdicts on behalf of the jury who may select the 'middle option' even though the evidence does not support it?
19. If a new offence is created with a maximum penalty of 5 years imprisonment, would these offences be Table offences for election by the Crown?

2. Consent

2.1 What is meant by consent?

In NSW, sexual offences against adults, with the exception of incest and attempt incest¹, require the prosecution to prove that the complainant did not consent to the sexual conduct. This is part of the *actus reus*² of the offence, and a matter of fact for the jury to determine by reference to the complainant's subjective state of mind at the time the sexual conduct occurred.

In NSW there is no statutory definition of consent. The current NSW Bench Book states "consent involves conscious and voluntary permission by the complainant to engage in sexual intercourse with the accused".³ It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it may be communicated in other ways. The common law provides that consent obtained after persuasion is still consent⁴. However, the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse; s.61R(2)(d) *Crimes Act 1900*. A complainant may freeze and say nothing, but that does not equal consent.⁵

2.2 Recent issues in NSW

A number of recent cases in NSW have considered the issue of consent. In *R v Mueller* [2005] 62 NSWLR 476 the appellant argued that the trial judge misdirected the jury on what was meant by consent. It was submitted that the trial judge's use of the words 'freely and voluntarily' when explaining the concept of consent to the jury, unduly narrowed the issue, conveying that consent after persuasion or with reluctance was not really consent. In examining this issue, Studdert J noted that the expression 'freely and voluntarily' is used in both the *Criminal Code* (WA) and *Criminal Code 1899* (Qld) where consent is defined. Additionally, he observed that in Victoria, consent is defined by s.36 of the *Crimes Act 1958* (Vic) as meaning "free agreement". His Honour also considered the decision of *R v Clark* (unreported NSWCCA 18 April 1998), where Simpson J expressed the view that for the purpose of NSW law, consent meant 'consent freely and voluntarily given'.⁶

After reviewing the statutory definitions employed in the other Australian States, Studdert J adopted the common law principle of consent stated in South Australia in *Question of Law (No 1 of 1993)* (1993) 59 SASR 214 where the court said: "*The law on the topic of consent is*

¹ Section 78A and 78B *Crimes Act 1900* (NSW), see also s 73 and 66F *Crimes Act 1900* (NSW).

² The *actus reus* is the physical act or state of affairs that constitutes the offence.

³ See the discussion of Simpson J in *R v Clark* [1998] (unreported, NSWCCA, 17 April 1998) and Hunt AJA and Hulme J in *R v Mueller* [2005] 62 NSWLR 476 discussed below.

⁴ *R v Holman* [1970] WAR 2 at 6

⁵ *R v Porteus* [2003] NSWCCA 18

⁶ In this case the accused and complainant were inmates at a prison in Albury. The complainant alleged the accused offered to protect him from others in the gaol in return for sexual favours. When the complainant refused this offer the accused grabbed him from behind and sexually assaulted him. The accused admitted that he offered to protect the complainant in return for sexual favours, but that the sexual intercourse which followed was consensual. The trial judge directed the jury that a complainant does not need to show physical resistance in order to prove consent. A question from the jury prompted the trial judge to explain: "If it is a question of a person putting up with the inevitable without a struggle that is not the same as consent.". Simpson J stated that although the term freely and voluntarily given is not used in NSW it is the appropriate test to apply when determining consent. According to Simpson J s.61R(2)(c) does not simply refer to threats or terror which may come from the accused person, but also those which emanate from other persons.

clear. Consent must be free and voluntary consent.”⁷ Studdert J was of the view that whilst there was no statutory requirement in NSW for a judge to give a direction that consent must be freely and voluntarily given, the direction given in *R v Mueller* was not erroneous when viewed in context.

In contrast, both Hunt AJA and Hulme J indicated they held reservations about this statement of law. Hulme J expressed the view that in summing up in a sexual assault case judges should avoid, or at least be very careful in referring to consent being ‘freely and voluntarily given’. Referring to dictionary definitions of these two words, he observed that ‘freely is defined as: “of one’s own accord, spontaneously; without restraint or reluctance; unreservedly, without stipulation; readily willingly”; whilst ‘voluntarily’ includes in its definition: “arising or developing in the mind without external constraint; not constrained, prompted or suggested by another.” His Honour noted that the law is clear that consent need not accord with many of these dictionary meanings, particularly as consent given reluctantly, or after a great deal of persuasion, is still consent. Hunt AJA agreed with these remarks, stating:

There will inevitably be difficulties for a jury in understanding how consent may at the same time be both (a) freely and voluntarily given and (b) given reluctantly or after persuasion. If both directions are given because of the necessity to do so in the particular case, the judge should also give assistance to the jury as to how each of those directions is relevant to the facts of the particular case, with an explanation which removes the likelihood of confusion.

The comments made by Hunt AJA and Hulme J squarely raise for consideration whether NSW should include a definition of consent in the *Crimes Act 1900*.⁸ The meaning of consent was not discussed when the Government first introduced the *Crimes (Sexual Assault) Amendment Act 1981*. This Act sought to produce a paradigm shift in the way that sexual assault was defined and viewed in NSW. The common law crime of rape was recodified into categories of sexual assault which attracted different penalties and the definition of sexual assault was drafted in gender neutral terms in order to emphasise the violent and degrading nature of the crime. In the Parliamentary debates the then Attorney General used the expression ‘consents freely and voluntarily’, however, this was in the context of explaining that a lack of physical resistance does not mean a person is deemed to consent.⁹

There is a considerable body of academic literature on the inherent problems with the legal concept of consent and how to define consent so as to give it appropriate contextual and contemporary meaning. For example, feminist legal theorist Nicola Lacey criticizes the common law notion of consent as presupposing the subordinate position of the victim. In this context consent is not understood in terms of mutuality, but rather a set of arrangements initiated by the defendant with a passive recipient, reinforcing stereotyped binaries such as

⁷ “The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.”

⁸ Others have expressed the view that the decision in *Mueller* does not change the law, as Hunt AJA agreed with Studdert J at [1] and other statements by him were not an attempt change the law.

⁹ “Proposed s.61D gives various circumstances which will be deemed to amount to non consent notably where the consent is obtained by threats or terror...also makes it clear that the victim of a sexual assault will not be deemed to have consented merely because no actual physical resistance was offered....The question is not whether a victim of a sex attack fights back; it is whether she consents freely and voluntarily” Mr Walker, *Hansard Legislative Assembly Parliamentary Debates*, Wednesday 18 March 1981, No 41 at 4771.

active/passive and possessing/possessed.¹⁰ Similarly, Ngaire Naffine has suggested that the common law crime of rape assumes a sexual subject who proposes sex to a sexual object; “*The implicit form of the transaction is one of the proposal by an initiating party to an act of sexual intercourse to which consent must be extracted from the offeree.*”¹¹ Naffine argues that this presupposes a coercive element and, as such, consent for the purposes of the law of rape does not mean free agreement. This issue was also discussed in the Model Criminal Code Officer’s Report on Sexual Offences. The authors of the report recommended that a definition of consent in the terms ‘free and voluntary agreement’ be adopted.¹²

2.3 Other jurisdictions

A number of Australian jurisdictions contain a definition of consent. In 1991, s.36 of the *Crimes Act 1958* (Vic) was amended to define consent as: *free agreement*. Section 36(a)-(g) sets out a non-exhaustive list of circumstances in which a person does not freely agree to an act. The Victorian model is based on the ‘communicative model’ of sexual relations and seeks to reflect contemporary values of sexual relationships. Similarly, s.348 of the *Criminal Code 1899* (Qld) states consent means ‘*freely and voluntarily given by a person with the cognitive capacity to give the consent*’. As with the Victorian legislation the Queensland Code sets out the circumstances when a person’s consent is deemed not to be freely and voluntarily given. Section 319 of the *Criminal Code* (WA) states that consent means ‘*consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means*’. The section further provides that where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act.

2.4 Other common law countries

In Canada, consent is defined in s.273.1 (1) of the *Criminal Code* (Can) as “*the voluntary agreement of the complainant to engage in the sexual activity in question.*” The use of the word ‘agreement’ reinforces that consent should be seen as a positive state of mind, and focuses the jury on the sexual autonomy and freedom of the complainant; *R v Ewanchuk* [1999] 1 S.C.R 330. A non-exhaustive list of circumstances is provided where no consent can be obtained; s.273.1(2)(a)-(e).

By far the most radical change to the law on consent has occurred in the United Kingdom. The introduction of the *Sexual Offences Act 2003* (UK) in May 2004, saw numerous amendments to the law in relation to consent, including the abolition of the *Morgan* test; discussed below. These changes arose from a comprehensive overview of the law in relation to sexual assault in the UK and a series of consultations and discussion papers. Originally the Home Office recommended that consent should be defined as ‘free agreement’¹³. However, by the time the Act was drafted this was altered so that s.74 of the Act reads “*a person consents if he agrees by choice, and has the freedom and capacity to make that choice.*” Sections 75 and 76 then set out a number of evidential presumptions and conclusions about

¹⁰ Lacey Nicola: “Unspeakable subjects, Impossible Rights; Sexuality, Integrity and the Criminal Law” (1998)

¹¹ *Canadian Journal of Law and Jurisprudence* 47 at 60

¹¹ Naffine Ngaire: “Reinterpreting the Sexes (through the crime of rape)” in *Feminism and Criminology*, Allen and Unwin, Sydney 1997 at 108

¹² Model Criminal Code Officer’s Committee of the Standing Committee of the Attorney’s-General, May 1999, at 23, and 43

¹³ Home Office: *Setting the Boundaries: Reforming the law on sex offences*, Summary Report and Recommendations July 2000 at 6, http://www.homeoffice.gov.uk/docs/set_summ.pdf

consent. The use of the words ‘freedom’ and ‘choice’ seek to bring about a shift in the way society views sexual relations.¹⁴

2.5 Taskforce Discussion

The majority of Taskforce members, including the DPP, NSW Health, Detective Superintendent Kim McKay, Women’s Legal Services, Dr Cossins, Associate Professor Stubbs, Office for Women, Violence Against Women Specialist Unit, Victims Services and NSW Rape Crisis Centre supported adopting a definition of consent, however, this was vigorously opposed by the Law Society, Bar Association and Public Defenders Office and not supported by the Legal Aid Commission. Members of the judiciary did not think that it was necessary to define consent and expressed concern that the adoption of a definition may either unduly broaden or unduly narrow the current common law meaning.¹⁵

Those in favour of defining consent advised that a definition would make it clearer for the community to understand what does and does not amount to consent, may serve an educative function¹⁶, as well as ensuring that standard directions are given.¹⁷ It was also submitted that the adoption of a definition of consent in other jurisdictions, such as Canada, has had a positive impact, in that acquiescence is far less likely to be transformed into consent.¹⁸ Those against adopting a definition of consent were concerned that the definitions adopted in other jurisdictions were at odds with how the common law definition of consent has evolved in NSW,¹⁹ and were of the view that it should be left to the courts to further develop this concept.²⁰ Concern was expressed that the words ‘free and voluntarily’ were unclear and would create problems where consent was given following persuasion.²¹

One judicial officer was of the view that the current directions on consent were adequate and that in the case of *Mueller*, a difficulty arose because the trial judge had departed from the standard directions.²² However, a recent report commissioned by the NSW Attorney General’s Department and conducted by the Australian Institute of Criminology (AIC) on juror’s perceptions of sexual assault victims, suggests that consent is a difficult concept for juries to understand. The study analysed whether the mode of delivery of victim’s evidence affected the level of jury empathy with the victim, views on the victim’s credibility and overall impression of the victim. The study involved eighteen mock juries, hearing the same evidence from a female adult sexual assault complainant, where the only issue in dispute was consent. Despite the definition of consent provided by the judge (and taken from the NSW Bench Book), many jurors had difficulty in understanding what was meant by consent and asked the following questions:

- What is the point at which consent is given?
- What defines whether consent has not been given?
- At what point does ‘yes’ become ‘no’ and to what degree should the accused reasonably be able to distinguish between them?

¹⁴ Sections 74, 75 and 76 are set out fully in Appendix 1.

¹⁵ Oral contributions of Magistrate Quinn, Justice Buddin and Judge Ellis, 7 December 2005.

¹⁶ Submission Dr Anne Cossins, 29 June 2005.

¹⁷ Submission Women’s Legal Services, 1 July 2005.

¹⁸ Submission Associate Professor Stubbs, 17 October 2005.

¹⁹ Submission Mr Phillip Gibson, Law Society of NSW, 17 October 2005.

²⁰ Oral contributions of Mr Stephen Odgers SC, Bar Association, 1 June 2005

²¹ Oral contributions of Mr Stephen Odgers SC,

²² Oral contributions of Judge Ellis, 1 June 2005.

The findings of the AIC study suggest there is a strong argument for adopting a definition of consent. The issue of lack of consent is ultimately a matter of fact to be determined by a jury. However, clear guidance should be given as to what this means. Defining consent in positive terms may give greater effect to the protection of sexual autonomy of the complainant.

Whilst the Taskforce members were divided on this issue, the Criminal Law Review Division (CLRD) was of the view that recent judicial comment and the experience of other jurisdictions provides a strong argument for adopting a definition of consent in NSW. Simply because definitions employed elsewhere may not be consistent with how the law has evolved in NSW, does not mean the law should remain the same. Parliament should make laws that reflect contemporary values. After consideration of all of the issues raised, the CLRD recommended, based on the submissions of some members, that a statutory definition of consent be adopted.

1. Should NSW adopt a statutory definition of consent in the *Crimes Act 1900* or are the current common law directions adequate?

2.6 If a definition of consent is adopted, what should it be?

The Taskforce considered whether the term ‘*free agreement*’ which is used in Victoria, should be adopted as a definition of consent. Whilst there was some support for this²³, a number of members expressed a preference for the definition employed in Queensland, which states that consent means ‘*freely and voluntarily given by a person with the cognitive capacity to give consent*’.²⁴ This definition entails an active decision to engage in sexual activity, rather than passive acquiescence and may also be helpful in taking into account the categories of sexual assault complainants and their features, such as intellectual disability.

Others were in favour of the United Kingdom definition that ‘*a person consents if he agrees by choice and has the freedom and capacity to make that choice*’²⁵ which, it was submitted, recognises that certain people do not have the capacity to consent. The UK definition and the Victorian definition are compelling because of the use of the word ‘agree’ or which suggests some degree of mutuality and consideration of the sexual activity that will take place. The UK definition also indicates that the jury must consider whether the complainant freely chose to engage in the activity, and had the freedom and capacity to make that choice, not limited to cognitive capacity.

Full extracts of the consent provisions from each of the above jurisdictions are reproduced in Appendix 1.

2. If a statutory definition is to be adopted should it be based on the:

- Victorian Definition – *free agreement*;

²³ Submissions Associate Professor Julie Stubbs and Office for Women. Whilst the Law Society opposed the introduction of a definition of consent, it advised that if a definition was adopted it preferred the words: “free agreement”.

²⁴ This was the preferred definition of the DPP, VAWSU, Office for Women and Women’s Legal Services.

²⁵ This was the preferred definition of Detective Superintendent Kim McKay NSW Police, Ms Jo Spangaro NSW Health, Dr Anne Cossins and Victims Services. The UK definition was the second preferred definition of the ODP and the VAWSU.

- Queensland definition - *freely and voluntarily given by a person with the cognitive capacity to give consent*; or
- UK definition - *a person consents if he agrees by choice and has the freedom and capacity to make that choice*; or
- The Canadian formulation of - *the voluntary agreement of the complainant to engage in the sexual activity in question*; or
- some combination of the above?

2.7 Exposure Draft

The Exposure Draft Bill, attached to this paper at Appendix 3, contains the following definition of consent which reflects the UK definition, however it defines *lack of consent* rather than consent, in accordance with the elements of the relevant sexual offences.

Definition of lack of consent

A person does not consent to sexual intercourse if the person:

- (a) does not have the capacity to agree to the sexual intercourse, or
- (b) has that capacity but does not have the freedom to choose whether to have the sexual intercourse, or
- (c) has that capacity and freedom but does not agree to the sexual intercourse.

3. Vitiating of Consent

3.1 Circumstances that vitiate consent

Section 61R *Crimes Act 1900* (NSW) provides a non-exhaustive list of the circumstances that negate consent. Section 61R(2)(c) states that a person who submits to sexual intercourse with another person as a result of threats or terror directed to that person or another person, is to be regarded as not consenting. Furthermore, a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse; s.61R(2)(d). These two circumstances were the focus of the section when it was introduced in 1981.²⁶

Section 61R(2)(a) states that *without limiting the grounds* on which it may be established, consent to sexual intercourse is vitiated where the victim consents:

- under a mistaken belief as to the identity of the other person, or
- under a mistaken belief that the other person is married to the person.

Subsection 61R(2)(a)(i) reflects the common law as stated in *R v Dee* (1884) 15 Cox CC 579. However, subsection (ii) was enacted to cure a particular deficiency in the common law identified by *R v Papadimitropoulos* (1957) 98 CLR 249. In that case the accused fraudulently convinced the complainant they were married after they signed and lodged a notice of an intention to marry with the registry office. The complainant, who did not speak English, believed they were married and sexual intercourse took place. There was some evidence to suggest the complainant would not have consented to sexual intercourse had she

²⁶ Formerly s 61D Crimes Act 1900 (NSW).

known she was not married. The High Court held that the accused's fraud did not vitiate consent.²⁷

Section 61R(2)(a1) was also inserted to address a particular situation not covered by the common law. The *Criminal Legislation (Amendment) Act 1992* (NSW) was passed following a decision in Victoria where the court held that a radiographer who performed vaginal examinations on patients for no real medical purpose, was not guilty of rape.²⁸ Section 61R(2)(a1) therefore provides that a person who consents to sexual intercourse under a mistaken belief that it is for medical or hygienic purposes (or any other mistaken belief about the nature of the act induced by fraudulent means) is taken not to consent to the intercourse.

3.2 Recent issues

Recently the NSW Court of Criminal Appeal has had cause to examine the terms of s.61R and in particular, its relationship with s.65A of the *Crimes Act 1900* (NSW).²⁹ In *R v Aiken* [2005] NSWCCA 328 the Court of Criminal Appeal observed that consent is not defined in NSW, and discussed the circumstances where consent is vitiated. The question on appeal was whether non-violent threats can vitiate consent pursuant to s.61R. The Court asked:

...must there be a threat of physical violence as opposed to some lesser threat? It cannot be that any type of threat necessarily enlivens the operation of s.61R(2)(c)...The alternatives contemplated in s.61R(2)(c) are 'threats or terror'.

The court went on to examine the dictionary definition of these words and was persuaded by an argument that when the word threat in s.61R(2)(c) is read in conjunction with s.65A (sexual intercourse procured by intimidation, coercion, and non-violent threats), the meaning of threat in s.61R is confined to threats of violence. The court asked: "*If s.61R(2)(c) extended to threats not involving a threat of physical force, why introduce s 65A?*" The impact of this decision will be considered later, however, it is cause to consider whether the circumstances where consent is vitiated should be clarified or extended.

3.3 Should the list of vitiating circumstances be expanded?

Whilst s.61R is drafted in non-exhaustive terms, it appears that the NSW Court of Criminal Appeal has not expressly considered what other situations may vitiate consent and a question arises as to whether additional matters should be included in the list of circumstances that vitiate consent. In order to address this issue it is useful to look at additional factors that vitiate consent in other jurisdictions.

The NSW Adult Sexual Assault Interagency Committee paper, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* sets out the additional circumstances that exist in other jurisdictions:

- unlawful detention (NT, ACT, VIC, UK);
- the victim was asleep or unconscious or affected by drugs (NT, ACT, VIC, UK);
- the threat to use extortion (ACT);
- threats to publicly humiliate, disgrace or mentally harass (ACT);

²⁷ Rather the court said: "...such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape."

²⁸ *R v Mobilio* [1991] 1 VR 339

²⁹ Section 65A provides that it is an offence for a person to procure sexual intercourse by the use of non-violent threats or coercive conduct, if in the circumstances the complainant could not reasonably be expected to resist. This carries a maximum penalty of 6 years imprisonment

- abuse of authority or professional or other trust (QLD, ACT, Canada);
- fraudulent misrepresentation of any fact (ACT);
- the agreement is expressed by words or conduct of a person other than the complainant (Canada); and
- the complainant expresses by words or conduct a lack of agreement to engage in the activity or to continue to agree in the activity (Canada).³⁰

The NSW Sexual Assault Interagency Committee has proposed that NSW adopt a number of these additional circumstances.³¹ In considering the other proposals, it is important to acknowledge that they may currently be relied upon to prove lack of consent pursuant to the common law. However, to deem that the presence of these factors should automatically negate consent entails a significant shift in legal policy. For that reason, a closer examination of each of the proposals is required.

3.4 Unlawful Detention

Arguably, the fact that someone is unlawfully detained may already be covered by s.61R(2)(c), as the person may submit to intercourse as a result of terror arising from detention. However, if this is only arguable, consideration should be given to including this as an additional factor within s.61R(2)(c). The DPP submitted that the unlawful detention of the complainant be limited to unlawful detention of the complainant by the accused person.³² The Taskforce agreed that if consent is given as a result of the unlawful detention of the complainant by the accused, this should vitiate consent.³³

5. Should unlawful detention of the complainant vitiate consent?

3.5 Unconscious, sleep or affectation by drugs

At common law it is clear that where a complainant is unconscious or asleep, he or she cannot give consent to sexual intercourse and is incapable of consenting.³⁴ Difficulties arise, however, where it may not be clear whether the complainant was conscious or not, or where the complainant is affected by drugs or alcohol. Often this will be a matter of fact for the jury to determine; *R v TA* [2003] NSWCCA 191.

If a definition of consent was adopted similar to that used in the UK, it may be unnecessary to include unconsciousness or sleep as a specific factor that vitiates consent.³⁵ However, it is

³⁰ NSW Adult Sexual Assault Interagency Committee: *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004 at 33

³¹ *Ibid.* at 34

³² Submission ODPP, 14 June 2005

³³ Those in favour of including unlawful detention; ODPP, Women's Legal Services, Dr Cossins, Office for Women, Victims Services, VAWSU. There was some opposition to the proposal from the Bar Association, Law Society and Public Defenders, however, this was mainly due to the wording of the original proposal. In the United Kingdom, the complainant is taken not to have consented where the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act, s 75(2)(c) Sexual Offences Act 2003 (UK).

³⁴ The Law Society submitted there may be certain factual scenarios where a person is unconscious or asleep, but consent is still an issue.

³⁵ A number of Taskforce members recognised that the list of vitiating circumstances may not need to be extended if the UK definition of consent is adopted; submissions NSW Health 24 June 2005, Dr Anne Cossins 29 June 2005, Associate Professor Julie Stubbs 17 October 2005, Detective Superintendent Kim McKay, 15 July 2005.

important to note that s.75(2)(d) the Sexual Offences Act 2003 (UK) states that the complainant is taken not to have consented where the complainant was asleep or otherwise unconscious at the time of the relevant act.³⁶ In addition, s.273.1(3) of the Criminal Code (Can) provides that no consent is obtained if the complainant is incapable of consenting to the activity. It may therefore be appropriate to explicitly state that consent is vitiated if the complainant is unconscious or asleep. His Honour Judge Ellis suggested that as consent cannot be given when someone is unconscious or asleep, it would be inaccurate to include this as a matter that ‘vitiates’ consent.³⁷ The list of vitiating circumstances is based on the premise that the ‘consent’ given is not a real consent at all. It would therefore seem to be more accurate to say in legislation that ‘*consent cannot be present if a person is asleep or unconscious*’, if this was considered necessary.

Currently, where the effect of alcohol or drugs is in issue, it is important that the trial judge clearly direct the jury to differentiate between those situations where the consumption of alcohol or drugs may give rise to a lack of inhibition; and those situations where the effect of the substance is such as to exclude voluntary and conscious consent. This will be a matter of fact and degree in each case; *Chant & Madden* NSWCCA, 12 June 1998. No doubt there will be circumstances where a person is so intoxicated as to be unable to consent. Expert evidence may be called on this issue to give the jury a further understanding of the complainant’s inability to comprehend. However, a person may be ‘affected’ by alcohol or drugs, but still be aware and capable of voluntarily consenting. As such, it does not seem appropriate to include this as a circumstance, which if present, automatically negates consent. Legislating in this manner would appear to create an inflexible rule, unable to respond to particular individuals, in certain circumstances.

The NSW DPP suggested that s.61R could be redrafted so as to provide a non-exhaustive list of factual circumstances that *may* vitiate consent.³⁸ Following the decision on *Aiken*, there is an argument that s.61R should be redrafted to make it clear that factors not specifically listed as vitiating circumstances, *may* nonetheless vitiate consent, for example substantial impairment by alcohol or drugs.³⁹ This may provide a clearer framework for issues surrounding consent.

6. Should the fact that the complainant is unconscious, asleep or affected by drugs be added as a factor that vitiates consent?

7. Should s.61R be redrafted so as to provide a non-exhaustive list of factual circumstances that *may* vitiate consent?

3.6 Extortion, threats to humiliate, disgrace, or harass

Section 65A of the *Crimes Act 1900* (NSW) currently provides that it is an offence for a person to procure sexual intercourse by the use of non-violent threats or coercive conduct, if in the circumstances the complainant could not reasonably be expected to resist. This carries a maximum penalty of 6 years imprisonment. The accused person must know that the

³⁶ Section 75(2)(f) provides that the complainant is taken not to have consented if any person administered or caused the complainant to take, without the complainant’s consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

³⁷ Oral contributions of Judge Ellis, 7 December 2005.

³⁸ Submission ODPP, 14 June 2005

³⁹ Submission Associate Professor Stubbs, 17 October 2005.

complainant submits to the intercourse as a result of the non-violent threat. The offence does not have the same proof elements as s.61I. This section was introduced by the *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW) and was aimed at ensuring that women who submit to sexual intercourse due to non-violent threats have recourse to the law. The main question is in what circumstances will it be deemed that a complainant could not reasonably resist? The legislature has made it clear that this is a matter of fact for the jury to determine.⁴⁰

The most difficult hurdle in bringing a prosecution under this section is proving beyond a reasonable doubt that the complainant could not reasonably resist. This imparts both a subjective and objective assessment of the complainant's situation, and his or her decision to submit will be determined by prevailing community standards. There has been no judicial interpretation of what this means. Not surprisingly, this section has not been widely utilised. Statistics from the Judicial Commission for the period 1997 to 2004 show only two convictions and sentences for this offence in the District Court following a plea of guilty.

The distinction made between violent and non-violent threats has been brought into sharp relief by the decision in *Aiken*. Whilst acknowledging that there may be cases where the effect of a non-violent threat is such as to force the complainant to submit to sexual intercourse, this will always be a matter of degree based on the circumstances of the case.

Adopting extortion or other non-violent threats as a specific vitiating circumstance, however, may lead to situations where any type of threat would automatically negate consent. The Model Criminal Code Officer's Committee (MCOCC) notes that there is one very important difference between a threat of violence and a threat of extortion, which must not be overlooked and that is: - a threat to terminate a person's employment, or disclose information to others, unless they engage in sexual activity, does not involve the complete lack of one's sexual 'choice'.⁴¹ This is no doubt the reason why the words 'could not reasonably resist' are used in s.65A.

MCOCC found the arguments put forward by Temkin to be persuasive. She writes:

The distinction between threats of violence and lesser threats...is best perceived in terms of the principles of sexual choice. Rape...should be confined to cases where the victim's sexual choice is eliminated. The defendant who threatens his victim with violence denies her the choice of whether to have intercourse with him or not. He means to have intercourse with her in any event....On the other hand, where the threat is to terminate a woman's employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious is appropriate.⁴²

Whether the threats are so destructive so as to prevent '*free and voluntary agreement*' is a matter of degree. It may not be the case that each and every threat or harassment will be sufficient to negate consent. However, whilst it may not be appropriate to extend the list of circumstances that automatically vitiate consent to include non-violent threats, in light of the decision in *Aiken*, there may be scope for redrafting s.61R to include factors that *may* vitiate

⁴⁰ "The question of what could not, in the circumstances, be reasonably be resisted, will be a question of fact for the jury." Mr Unsworth, Premier, Second Reading Speech, Legislative Assembly, Hansard, 29 October 1987, at 15466

⁴¹ MCOCC Report at 47

⁴² Temkin J: "Towards a Modern Law of Rape" (1982) 45 *The Modern Law Review* 399 at 411

consent, such as non-violent threats.⁴³ This would reflect the difference in ‘choice’ as outlined by Temkin and alert the jury to the fact that there may be some circumstances where a ‘non-violent’ threat may vitiate consent. Consequently, s.65A could be repealed. Given that this provision has not been utilised, this would appear to be an appropriate and sensible course of action. It is suggested that the phrase ‘non-violent threats’ could be used to cover a broad range of behaviours such as extortion, or threats to humiliate. Such an approach would also recognise that a person who submits to sexual intercourse in such circumstances may also be highly traumatised and vulnerable.

8. Should s.61R be amended to provide that extortion, threats to humiliate, disgrace, or harass *may* vitiate consent?

9. Should s.65A be repealed?

3.7 Abuse of authority or professional or other trust

The NSW Government has adopted a particular approach to protect against the abuse of power in matters involving the most vulnerable members of the community. The legislature has created offences where consent is no defence if the accused person held a position of trust or authority in relation to a vulnerable complainant; s.66F (a complainant with an intellectual disability) and s.73 (a complainant aged between 16 and 18 years).⁴⁴ In addition, where sexual intercourse without consent has occurred, or the complainant is under 16 years of age, the fact that the accused was in a position of authority is an aggravating factor that gives rise to a higher maximum penalty. The introduction of a model that applied generally whereby consent is deemed not to exist in certain relationships where there has been an abuse of trust would be a significant policy shift in the way in which sexual relations are governed in NSW.

Inclusion of this factor as a vitiating circumstance is clearly aimed at protecting against the abuse of power in certain types of relationships. The difficulty with this proposal is that it is not confined to any specific relationship and has the potential to affect a wide range of societal relationships where there may be an implied trust. In addition, it is not clear what kind of abuse need be present in order to negate consent. Sexual intercourse within the context of certain professional relationships, such as doctor-patient, may be deemed unethical, however, this does not necessarily mean it should be criminal. Careful consideration needs to be given to the precise circumstance in which intercourse took place, and whether the abuse of trust was such as to eliminate the complainant’s capacity to freely choose.

⁴³ This position appears to be supported by the DPP, Associate Professor Stubbs, Office for Women: “The Office for Women supports the view that extortion, threats to humiliate, disgrace or harass, abuse of authority or trust and fraudulent misrepresentation are not sufficient in and of themselves to automatically negate consent, but does consider that they may do so on some occasions.”

⁴⁴ Section 73 provides that any person who has sexual intercourse with a person who is under his or her ‘special care’ and above 16, but under 18 years of age is liable to imprisonment for 8 years. Where the person is over 17, but under 18 years, they are liable to imprisonment for 4 years. Consent is no defence; s 77 *Crimes Act*. For the purposes of this section a person is under the special care of the accused if the accused is either: a. A step-parent, guardian or foster parent of the victim, b. A school teacher and the victim is their pupil, c. In an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, d. a custodial officer of an institution where the victim is an inmate, e. a health professional and the victim is their patient. Section 66F *Crimes Act* provides that where a person has sexual intercourse with someone who has an intellectual disability, whilst that person is under their authority in connection with any facility or service provided to persons who have intellectual disabilities, that person is liable to imprisonment for 10 years.

One can certainly envisage circumstances where consent may not be considered to be free and voluntary due to an abuse of the relationship, for example, a treating psychiatrist who withholds medication unless a person submits to sexual intercourse. However, there are real problems with including this as a condition, which automatically negates consent. One member of the Taskforce submitted that an abuse of authority should be considered as a further vitiating circumstance. Although a person may have the capacity to choose to engage in intercourse, it is not really a free choice, but a choice between the lesser of two evils.⁴⁵ Other members of the Taskforce also thought a similar provision should be included⁴⁶ or at least set out as an evidential presumption like the UK legislation (although this is not actually one of the factors set out in the UK legislation).⁴⁷

Despite these concerns, care must be taken to ensure that a person's sexual choice is not inadvertently undermined by the use of such an inflexible statutory mechanism.⁴⁸ There is also a question as to whether this provision is really necessary. Whilst not specifically vitiating consent, a jury may nonetheless determine that consent is lacking where there is a gross breach of trust on the basis that it was not a free and voluntary choice. This should be the real focus of the enquiry.

10. Should the abuse of authority or professional or other trust vitiate consent?

3.8 Fraudulent misrepresentation - failure to disclose a communicable disease

The Taskforce Report also discussed fraudulent misrepresentation, for example a failure to disclose a communicable disease. This is a substantial and complex issue that is being considered by the CLRD as a discrete project.

3.9 Taskforce Recommendations

After considering the issue of vitiation of consent the Taskforce made the following recommendations:

9. That the list of circumstances in s.61R *Crimes Act 1900* that vitiate consent be expanded to include:
 - a. where consent is given as a result of the unlawful detention of the complainant by the accused;
 - b. where the complainant was incapable of understanding or appreciating the nature of the act (this is unnecessary if the UK definition of consent is adopted).
10. Section 65A *Crimes Act 1900* should be repealed.
11. Section 61R *Crimes Act 1900* should be redrafted to indicate a non-exhaustive list of circumstances that must be taken into account when determining whether there was consent, if proved, such as;
 - a. non-violent threats directed to the complainant or with respect to another person made by the accused or another person so as to coerce the complainant to engage in sexual activity with the accused or another;
 - b. the complainant was intoxicated.

⁴⁵ Submission Detective Superintendent Kim McKay, 15 July 2005.

⁴⁶ Submission ODPP,

⁴⁷ Submission VAWSU

⁴⁸ MCCOC at 49

11. Should the recommendations of the Taskforce relating to vitiation of consent be implemented?

3.10 Exposure Draft

The Exposure Draft Bill attached to this paper at Appendix 3 contains the following formulations with respect to the vitiation of consent:

Consent vitiated if under mistaken belief

A person is taken not to consent to sexual intercourse with another person if the person consents to sexual intercourse:

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

A person who knows that another person consents to sexual intercourse under such a mistaken belief is taken to know that the other person does not consent to the sexual intercourse.

Lack of physical resistance not necessarily consent

A person who has sexual intercourse with another person and who does not offer actual physical resistance to the sexual intercourse is not, by reason only of that fact, taken to consent to the sexual intercourse.

Consent vitiated if violent threat or detention

A person is taken not to consent to sexual intercourse with another person if the person submits to the sexual intercourse as a result of:

- (a) threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, or
- (b) the unlawful detention of the person who submits to the sexual intercourse.

Non-violent threats

A person who submits to sexual intercourse with another person as a result of intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force, is not, by reason only of that fact, taken to have consented to the sexual intercourse.

Sexual intercourse while intoxicated not necessarily consent

A person who has sexual intercourse with another person

while intoxicated by alcohol or a drug is not, by reason only of that fact, taken to have consented to the sexual intercourse.

Other provisions

Nothing in this section limits the grounds on which it may be established that consent to sexual intercourse is vitiated.

4. Fault elements

4.1 – Fault Elements – state of mind of criminal responsibility

One of the most controversial areas of the law relates to the *mens rea* that the Crown must prove to establish sexual intercourse without consent. Once a jury is satisfied that the complainant was not consenting to the sexual conduct, they must then consider whether the accused knew that the complainant was not consenting. The Crown must prove beyond reasonable doubt that the accused knew that the complainant did not consent. This is a completely subjective, and not an objective test, requiring an assessment of what was going on in the mind of the accused person. The accused may honestly, though mistakenly, believe the complainant was consenting to intercourse. This is often referred to as mistaken belief in consent.⁴⁹ In *R v Banditt* [2004] NSWCCA 208 the NSW Court of Criminal Appeal reinforced that if it were reasonably possible the accused believed the complainant was consenting, the accused would be entitled to an acquittal, whether or not there were any reasonable grounds for such a belief. The trial judge would, of course, be entitled to tell the jury that in determining whether the appellant believed, or might reasonably possibly have believed the complainant was consenting, the jury could examine whether there were any grounds for such a belief.⁵⁰

4.2 Recklessness

Section 61R *Crimes Act 1900* states that for the purposes of ss.61I, 61J and 61JA, a person who has sexual intercourse with another person without the consent of the other person, and who is reckless as to whether the other person consents to the sexual intercourse, is to be taken to know that the other person does not consent to the sexual intercourse. It is therefore sufficient if the prosecution proves the accused was reckless as to whether the complainant consents or not. The concept of recklessness is not defined in the *Crimes Act 1900* and has been interpreted by the courts.⁵¹

In the context of sexual offences and the issues of consent, the issue of recklessness often arises when there is a real question of fact as to whether the complainant was fully awake, so intoxicated as to be unable to consent, or where a prior sexual relationship has existed between the accused and the complainant. According to the NSW Bench Book, in order to establish that the accused has been acting recklessly, the Crown must prove beyond reasonable doubt, either:

1. The accused's state of mind was such that he or she **realised the possibility** that the complainant was not consenting but went ahead, determined to have intercourse,

⁴⁹ *DPP v Morgan* [1976] AC 192

⁵⁰ *R v Banditt* [2004] NSWCCA at [93]. Special leave to appeal to the High Court was granted and a case argued before the High Court on 8 September 2005, Judgment is reserved. A copy of the transcript is available from the High Court website, HCA Trans 683, <http://www.hcourt.gov.au/>

⁵¹ Recently the NSWCCA has held that the concept of recklessness equally applies to an offence of assault with act of indecency; *R v Mueller* [2005] NSWCCA 47

regardless of whether the complainant was consenting or not: *R v Murray* (1987) 11 NSWLR 12 at 15; *R v Hemsley* (1988) 36 A Crim R 334 at 337-338. Again, this is a wholly subjective test. This has been referred to as ‘advertent recklessness’.

2. The accused’s state of mind was such that he or she **simply failed to consider** whether or not the complainant was consenting at all, and just went ahead with the act of sexual intercourse, notwithstanding 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 or her mind to it: *R v Kitchener* (1993) 29 NSWLR 696 at 697; *R v Tolmie* (1995) 37 NSWLR 660; *R v Mitton* [2002] NSWCCA 124. This is a wholly subjective test and is often referred to as ‘non- advertent recklessness’.

Most sexual offences are not offences of specific intent.⁵² Therefore, the fact that the accused may have been drinking and intoxicated (where intoxication is self-induced) at the time of the commission of the offence is irrelevant in considering whether he or she had the *mens rea* for the offence, that is the knowledge or belief that the complainant was not consenting.⁵³

4.3 Recent issues - What is the appropriate test for recklessness in sexual offences?

Recently the NSW Court of Criminal Appeal considered the test to be applied in determining when an accused should be liable on the basis of recklessness, where they are conscious of a risk that the complainant may not be consenting.

⁵² Section 61K is the only sexual offence that is an offence of specific intent. Evidence that a person was intoxicated at the time of the conduct may be taken into account in determining whether the person had the intention to cause the specific result. However, such evidence cannot be taken into account if the person (a) has resolved to become intoxicated to do the relevant conduct, or (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

⁵³ Section 428B, s.428D *Crimes Act 1900*.

4.4 Case study - *R v Banditt*

In *R v Banditt* it was alleged that the appellant broke into the complainant's house late at night, went to the complainant's bedroom and proceeded to have sexual intercourse with her without her consent. The complainant gave evidence that before going to bed she locked all the doors and windows of the premises. She remembered waking up with someone on top of her who was trying to push his penis into her vagina. The complainant realised it was the appellant and told him to get off and get out. Evidence showed the appellant had gained entry to the premises via the toilet window and a DNA profile matching the profile of the complainant was located on the appellant's underwear.

When first spoken to by the police the appellant said he went to the complainant's place, but as everything was locked and no-one answered, he left and stayed with a friend. When later interviewed by way of Electronically Recorded Interview with Suspected Person (ERISP) he said that when he went to the complainant's house, the back door was unlocked and he went inside. He woke the complainant up and asked if he could stay. She said no and he left. At trial the appellant gave a third version, that on the night of the alleged offence he knocked on the windows and doors of the complainant's house, but there was no response. He entered the house via the downstairs toilet window and went up to the complainant's bedroom. The appellant saw her lying on the bed and called out her name and shook her leg. The appellant gave evidence that 'she woke up a little bit', and he lay down beside her. He put his arm around her and they started kissing and hugging. He then got on top of her and engaged in sexual intercourse, before she pushed him off and said no. The appellant said he initially lied to police, as he was too embarrassed to tell the truth in the presence of his uncle who had attended the police station with him. The appellant gave evidence that he and the complainant had engaged in consensual sexual intercourse a few months prior. The complainant denied this.

The appellant said he thought the complainant was awake and consenting. He gave evidence at trial that he thought the complainant was "vaguely awake", that she did not say 'yes', but showed consent by stroking him. Under cross-examination the complainant said that when the accused was trying to push his penis inside of her it was like a dream, because she was half asleep. The trial judge told the jury that if the complainant was asleep at the time when the appellant penetrated the complainant, no issue of consent could arise. However, if the jury thought there was a period of time during which the complainant was neither asleep nor really awake, then the jury would need to consider the issue of recklessness. The issue on appeal was whether the trial judge erred in his directions on recklessness.

The Honorable Justice Greg James dismissed the appeal stating that recklessness consists in an accused actually realising there is a possibility that the complainant is not consenting and, having that realisation, deciding to proceed to have sexual intercourse. In his view, the accused must foresee this as more than a *mere* or a *bare* possibility. His Honour said:

However, if an accused person is aware of a real possibility that the complainant does not consent to sexual intercourse, he acts recklessly if, having that knowledge, he decides to proceed to have sexual intercourse, even if he considers it probable that the complainant does consent to sexual intercourse.

Special leave was granted by the High Court to consider the appropriate test for recklessness. Is recklessness proved if the accused is aware of the possibility that the person is not consenting? The question for the Court to determine was whether recklessness requires more than advertence to the possibility of lack of consent or if it requires an additional determination to proceed with intercourse regardless of the lack of consent.

Mr Odgers SC, who argued the case for Mr Banditt before the High Court, submitted that the test adopted by the NSW Court of Criminal Appeal with respect to the meaning of recklessness departs from the law as established by *Morgan* and other earlier authorities. He argued that the approach of the Court of Criminal Appeal is inconsistent with the proposition that recklessness is not in issue where there is honest, but mistaken belief in consent:

The likely explanation is that James J considered that awareness of a possibility of absence of consent negates a 'belief' that consent is present. It is submitted that this approach is flawed.⁵⁴

Before the High Court, the appellant argued that recklessness is a concept of indifference and that not only must there be an awareness of the possibility that the complainant is not consenting, but this must be accompanied by a determination to have sexual intercourse with the complainant whether she is consenting or not:

...our contention is that the courts have been in a sense led astray by the daily formulation, which begins with this focus on awareness of risk, awareness of possibilities, and in truth – you do not need to ask a jury to even look at that. The Court of Criminal Appeal, on their approach says, “Well, a jury would have to be told if you’re satisfied beyond reasonable doubt that he was aware that it was a slight possibility she wasn’t consenting, then he’s not guilty. But if you’re satisfied beyond reasonable doubt that he was aware that it was a real possibility, then he is guilty”. We submit that this is fanciful; this is not the real world. It would be far preferable for this Court to endorse the approach of the House of Lords in *Morgan*, which does not even talk about possibilities or probabilities but, rather says, to a jury very simply, “Has it been proved beyond reasonable doubt that the accused did not believe that consent was present and simply did not care whether the complainant consented or not? “ That direction is, we say, the proper approach to recklessness....It is simple, it is understandable and it makes sense.

The Crown disagreed that in order to prove recklessness there needed to be any additional independent requirement that the accused be determined to have intercourse with the complainant whether she is consenting or not, relying upon the language of the statute and a number of South Australian and NSW authorities.⁵⁵

On 15 December 2005, the High Court, Gummow, Hayne and Heydon JJ in a joint judgment and Callinan J agreeing in a separate judgment, unanimously dismissed the appeal (*Banditt v The Queen* [2005] HCA 80). The Court held that the trial judge’s direction on recklessness in relation to consent was appropriate.

Their Honours, Gummow, Hayne and Heydon JJ commented that when directing a jury on recklessness it is inappropriate to simply invite the jury to consider the concept of recklessness without further explanation. Their Honours accepted the submission of the Crown that in a particular case one or more of the expressions used in *Morgan* may properly be used in explaining what is required by s.61R. The trial judge’s explanation to the jury, -

⁵⁴ At paragraph 3.15 of the appellant’s submissions for special leave.

⁵⁵ See *R v Wozniak and Pendry* (1977) 16 SASR 67 and

that if an offender is aware of the possibility that the woman is not consenting, but goes ahead anyway, he is reckless - was appropriate. No additional mental state, as submitted by the appellant, was required.

In a separate judgment Callinan J dismissed the appeal, but was of the view that any attempt to explain the concept of reckless as used in s.61R was unnecessary.

It is true, as Gummow, Hayne and Heydon JJ point out that in different branches of the law and difference enactments recklessness may have different elements. It is equally true that on occasions in the law a word will need explanation, elaboration or definition, but that need tends to arise most often by reason of an uncertain or ill-expressed context in which it forms part. Section s 61R is not such a context. The clause “who is reckless as to whether the other person consents to the sexual intercourse” is a perfectly simple one. I do not accept that it is beyond the capacity of a jury to understand and give effect to it...⁵⁶

Prior to the judgment in *Banditt*, the Taskforce was asked whether there should be legislative guidance on the appropriate test for recklessness.⁵⁷ Mr Odgers SC argued that the appropriate test for recklessness should be one of indifference, that is, recklessness means not caring whether or not the complainant consents. If that approach was rejected by the Taskforce he suggested that the definition used in 5.4 of the *Model Criminal Code* should be adopted, which provides that a person is reckless if: (a) he or she is aware of a substantial risk; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. He submitted that this approach is preferable, as it requires that the accused is aware that there is a substantial risk that the complainant is not consenting, and recognises that the jury may conclude that in some instances it may be reasonable to take the risk. This appears to be a much higher test than the one set in *R v Banditt*.

The DPP submitted that there should not be an attempt to define recklessness, but advised that there was merit in replacing recklessness with indifference, that is, ‘did not care’ as interpreted in *Morgan*. This was because recklessness appears to cause many problems in the law. NSW Health, Associate Professor Stubbs and Women’s Legal Services did not think that legislative guidance would be necessary if a different model, such as the Victorian model were adopted.

A similar submission was made by Detective Superintendent Kim McKay in the context of discussing the UK model:

If the UK model of the accused’s state of mind for criminal responsibility is adopted then the test for recklessness should be defined. Emphasis should be on the fact that the accused acted indifferently – that is not caring whether the complainant consented to the act.

⁵⁶ *Banditt v The Queen* [2005] HCA at [108].

⁵⁷ Mr Odgers SC proposed that s.61 of the *Crimes Act 1900* could be redrafted to define rape as where a person has sexual intercourse with another person without consent of the other person and either (a) knows that the other person does not consent to the sexual intercourse, or (b) is indifferent to whether the person does or does not consent to the sexual intercourse, carrying a penalty of 14 years imprisonment. Section 61R(1) which deems ‘recklessness’ to be knowledge could then be repealed. He suggested that a new offence then be created of negligent sexual intercourse without consent carrying 5 years imprisonment, which states that a person is guilty of an offence who has sexual intercourse with another person without the consent of the other person and negligent as to the lack of consent. A person is negligent if the person’s conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that consent to intercourse is or will be absent that the conduct merits criminal punishment. All other members of the Taskforce rejected this proposal.

The comments of Callinan J suggest that attempts to define reckless give rise to uncertainty:

“Reckless” is an old and well understood English word. It has been said that there are no true synonyms in the English language. The search for a truly synonymous phrase or expression will equally, frequently be likely to be futile.

It was the Taskforce’s recommended that there should be no legislative attempt to define recklessness.

One may argue that the formulation adopted by the NSW Court of Criminal Appeal puts an onus on the accused person to stop at any point where it occurs to him or her that there is a real possibility that the other person may not be consenting, even if they resolve that on balance this is probably not the case. In other jurisdictions the concept of recklessness has either been removed, or ameliorated by placing the onus on the accused to take reasonable steps to determine whether in fact consent has been given. The issue of adopting an objective fault element is therefore a far broader issue for the Taskforce to consider.

3. Should *recklessness* be defined in relation to sexual offences and the issues of consent?
4. Is the term *indifference* preferable to the term *reckless*?

5. Objective Fault

5.1 Should NSW adopt an objective fault element in consent?

One of the most controversial issues has been whether the defence of honest, but mistaken belief in consent should continue in its current form. There are arguments both for and against the importation of a reasonableness component. Many of these were discussed in detail by MCOCC when determining the standard that should be adopted in the Model Criminal Code.⁵⁸ Criticisms of the current common law test include:

- the accused can simply assert that he or she held an honest belief in consent which is difficult to refute, regardless of how unreasonable the belief is;
- the subjective test in *Morgan* encourages myths that women desire to be overpowered or are afraid to articulate their true desires; and
- the present law does not adequately protect the autonomy of people to participate in sexual activity.

It is argued that the adoption of the reasonableness test would refocus the mind of the jury on the standards that the community expects. Proponents of this test argue that as a matter of policy, the law should ensure that a reasonable standard of care is taken to ascertain whether a person is consenting before embarking on what could be potentially damaging behaviour.

Those in favour of retaining the current common law approach rely on a fundamental principle of criminal responsibility, that is, where a person is exposed to possible

⁵⁸ MCOCC at 69 -73

imprisonment for a serious criminal offence, the standard of proof should be that the accused was aware of the circumstances which made his or her conduct criminal.⁵⁹ This is taken directly from the decision in *Morgan*, where it was said:

...to insist that a belief must be reasonable to excuse is to insist that the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind although innocent of evil intent, can convict him if it be honest but not rational.⁶⁰

In order to be criminally responsible, it is considered that a person must have intended the harm, or that it has arisen as a result of recklessness. This concept was recently discussed by The Honourable Justice Michael Kirby in *Director of Public Prosecutions (NT) v WJI* [2004] HCA 47, in determining whether an accused must have an intention to have sexual intercourse without consent for the purposes of the *Criminal Code* (NT):⁶¹

In such circumstances, it is not self-evident that a person who engages in “sexual intercourse” with another, believing that other to be consenting to the “sexual intercourse”, should be liable to conviction of such a crime and exposed to condign punishment. This conclusion is not inapplicable simply because the other person was not in fact consenting and although the belief of the accused in the existence of consent might be viewed as unreasonable....Criminal responsibility for such a serious crime as sexual intercourse without consent, with such serious consequences upon conviction, is therefore only imposed by the NT Code where the accused’s conduct is culpable and, as in most crimes of this kind, where it involves a deliberate element (intention or foresight). It is thus the intention of the accused to have sexual intercourse without the consent of another, or although the accused has foreseen that such a lack of consent is a possible consequence of the conduct and continues uncaring and regardless, that attracts criminal responsibility.⁶²

It is argued that if an objective test was introduced, a person may be punished who did not believe that what they were doing was wrong, but because their belief did not accord to a standard of reasonableness determined by the community. Although there are strict liability offences with substantial penalties within the criminal law, such as dangerous driving occasioning grievous bodily harm, these are the exception, rather than the rule. However, it is important to note that in NSW the courts have already recognised that an accused person possesses the requisite intent to have non-consensual intercourse (or guilty mind) when they have failed to turn their mind to the issue at all.

The criminal law, in its important function of controlling behaviour, should promote standards of acceptable consensual sexual behaviour of the community....Lack of the merest advertence to consent in the case of sexual intercourse is so reckless that it is also the criminal law’s business. In this, the law does no more than reflect the community’s outrage at the suffering inflicted on victims of sexual violence.⁶³

⁵⁹ This was view expressed by Mr Richard Button SC of the Public Defenders Office.

⁶⁰ [1976] AC 182 at 210

⁶¹ s 192(3) of the NT Code provides that any person who has sexual intercourse without consent of the other person is guilty of a crime. The question on appeal was whether the prosecution need only prove, a. the accused intended to have intercourse and b. the complainant did not consent; without having to prove that the accused intended to have sexual intercourse without the complainant’s consent. The judgment is generally concerned with principles of statutory interpretation of s 192(3) and s 31(1) (mental element) and what is considered the relevant ‘act’; that is, whether it was sexual intercourse or sexual intercourse without consent.

⁶² Per Kirby J at [100]

⁶³ *R v Tolmie* (1995) 37 NSWLR 660 at 672 per Kirby P (as he was then).

Some of the most persuasive arguments against introducing an objective standard of reasonableness relate to the pragmatic difficulties that may arise. For example, how should an objective standard of reasonableness be formulated? Should a jury examine the accused's conduct by reference to some hypothetical reasonable person, or from the perspective of what would have been reasonable for a person who had the same qualities as the accused.⁶⁴ Such difficulties have been the source of considerable confusion and debate in the context of the defence of provocation. Some commentators have also argued that the adoption of an objective test may not enhance notions of proper conduct and consent, but instead be narrowly constructed to reflect historical legal standards of reasonableness.⁶⁵

Questions also arise as to what circumstances would transpire where a jury would be satisfied that the accused's belief was genuine, but not reasonable. Consideration of the issue of genuineness, often involves an assessment of whether there was a reasonable basis for that belief. A jury is more likely to consider a belief was genuine where there are reasonable grounds for formulating that belief. Conversely, a jury is more likely to reject that the accused held an honest belief where there appears to be a lack of evidence to support that belief, for example, where the accused broke into the complainant's home and the complainant said nothing as to the issue of consent. In *DPP v WJC* Mr Justice Kirby remarked, "...the prospects of a jury acquitting an accused of sexual intercourse without consent who had no reasonable basis for believing that the complainant had consented to the act, are extremely remote."⁶⁶

In contrast to the observations made by Justice Michael Kirby, the Supreme Court of Canada has noted that although cases involving a true misunderstanding between the parties to a sexual encounter may arise infrequently, they are of profound importance to the community's sense of safety and justice.⁶⁷ In addition, the Victorian Law Reform Commission has suggested that the current common law test does not adequately provide protection for women where an accused has distorted views about sex, or endorse a communicative model for sexual relations.

Whilst the Public Defenders Office, Law Society and Legal Aid Commission argued that the current law should be retained, there was considerable support for the importation of an objective fault element to this area of the law, from the DPP, Detective Superintendent Kim McKay, VAWSU, NSW Health, Women's Legal Services, Dr Cossins, Office for Women, Victim's Services, NSW Rape Crisis Centre and Associate Professor Stubbs.

12. If the common law test was modified, what should it look like and how might it work in practice?

5.2 Other jurisdictions

The test as set out in *Morgan* does not apply to the code states of Western Australia, Queensland and Tasmania. In those States the prosecution must prove that the complainant did not consent, but does not have to prove that the accused knew that the complainant was not consenting or that the accused was reckless as to consent. The accused may raise a

⁶⁴ In *BRK v The Queen* [2001] WASCA 161 the court held at 13 that there was no error in the direction the reasonableness be determined by the standards of a reasonable person of the same age, background and level of intellectual functioning as the accused.

⁶⁵ Bronitt "Rape and Lack of Consent" (1992) 16 *Criminal Law Journal* 289 at 307

⁶⁶ *DPP v WJC* [2004] HCA 47 at 106.

⁶⁷ *R v Ewanchuk* [1999] SCR 330

defence that he honestly and reasonably believed that the complainant was consenting.⁶⁸ The onus is on the prosecution to prove that there was no such honest and reasonable belief. The author of the Queensland Criminal Code Samuel Griffiths said; “...under the criminal law of Queensland...it is never necessary to have recourse to the old doctrine of mens rea, the exact meaning of which has been the subject of much discussion.”⁶⁹ The question in the code jurisdictions has generally been considered to be: “Did the accused believe that the complainant was consenting?” If so, was that belief reasonable?”⁷⁰

In Victoria, the law reflects the common law decision of *Morgan*, being that the accused does not have the *mens rea* for the offence of sexual assault if they have an honest belief that the complainant was consenting, regardless of whether it is unreasonable. Following a report from the former Law Reform Commission of Victoria in 1991, s.37 *Crimes Act 1958* (Vic) was inserted which provides that a direction should be given to juries that in considering the accused's alleged belief that the complainant was consenting, it must take into account whether that belief was reasonable in all the relevant circumstances— and relate any direction given to the facts, so as to aid the jury's comprehension.

Despite this direction, the Victorian Law Reform Commission has recommended that the law be further amended, to prevent an accused person from avoiding culpability if he did not take reasonable steps in the circumstances to ascertain whether or not the complainant was consenting. The Commission considered the provisions employed in other jurisdictions, with preference for the approach adopted in Canada. Before discussing their final recommendations it is useful to examine the legislation in the United Kingdom and Canada.

5.3 United Kingdom

One of the most important changes introduced by the comprehensive reform of the UK law on sexual assault was to override the common law as set out in *Morgan*. Section 1 of the Sexual Offences Act 2003 (UK) provides that the offence of rape is committed if an accused person intentionally penetrates another person, where that person does not consent and the accused person does not reasonably believe the other person consents. Whether a belief is reasonable is to be determined by having regard to all the circumstances, including the steps the accused person has taken to ascertain whether the complainant consents. The Crown Prosecution Service anticipates that an assessment of this belief will include an accused's attributes such as disability, or extreme youth.⁷¹ When recommending the introduction of this section, the Home Office formed the view that such an amendment would not affect the burden of proof or the presumption of innocence, fundamental to English justice.⁷²

⁶⁸ Section 325 *Criminal Code Act 1912* (WA): A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years. Section 24 of the Code on criminal responsibility applies to sexual offences: A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject. See *Hancock v The Queen* [2003] WASCA 218. See also s 349 (rape) and s 24 (mistake of fact) of the *Queensland Criminal Code* 1899.

⁶⁹ *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981

⁷⁰ MCOCC at 73

⁷¹ www.cps.gov.uk/legal/section7/sexoffencesact2003.html

⁷² Home Office: *Setting the Boundaries: Reforming the law on sex offences, Summary Report and Recommendations* 2000

5.4 Canada

In Canada, the *mens rea* of sexual assault is the intention to touch, knowing of, or being reckless or wilfully blind to a lack of consent, either by words or conduct of the person being touched.⁷³ Further, s.273.2 of the Criminal Code (Can) states that it is not a defence to a charge under ss.271, 272 or 273 that the accused believed that the complainant consented to the activity, where (a) the accused's belief arose from (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting. This provision was interpreted in *R v Ewanchuk* [1999] SCR 330, where the majority held that if the accused's belief is found to be mistaken, then the honesty of the belief must be considered.

As an initial step, the trial judge must determine whether any evidence exists to lend an air of reality to the defence. The question of whether or not the accused took reasonable steps to ascertain whether the complainant is consenting is an issue for the jury to determine only after the 'air of reality test' has been met.⁷⁴ There is no obligation for the accused to testify in order to raise this defence, however the accused must raise some plausible supporting evidence to give an 'air of reality' to the defence of mistaken belief. Once the trial judge decides there is sufficient evidence for the defence to go to the jury, the prosecution must prove beyond reasonable doubt that the accused did not have this belief. In considering whether an accused had taken reasonable steps, the court said:

Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual conduct, the accused should make certain that she has truly changed her mind before proceeding with further intimacies...⁷⁵

5.5 Victorian Law Reform Commission.

As discussed above, the VLRC favoured the approach in the *Canadian Criminal Code* with a number of qualifications. The Commission's recommendation sought to ensure that an evidentiary threshold was met, to support the mistaken belief in fact, before it could be left to the jury. It was preferred that this threshold test be enshrined in legislation. The VLRC Report stressed that there was no obligation on the accused to testify in order to raise the defence. Support for this belief may be inferred from the evidence of the accused, the complainant's evidence in chief, cross-examination or other sources.

Once a trial judge is satisfied that there is some evidence to support the accused's assertion of an honest, but mistaken belief in consent, the jury will be directed that the prosecution must prove:

- i. the accused intended to have intercourse with the complainant;
- ii. the complainant did not consent; and
- iii. the accused did not honestly believe that the complainant consented.

However, the jury cannot find that there has been an honest, but mistaken belief in consent if;

⁷³ *R v Ewanchuk* [1999] SCR 330

⁷⁴ The air of reality test is discussed in *R v Osolin* [1993] 4 SCR 595, *R v Park* [1995] 2 SCR 836, *R v Davis* [1999] 3 SCR 759, *R v MacFie* [2001] A.J. No.207 ABCA 43.

⁷⁵ *R v Ewanchuk* [1999] 1 SCR 330 per Major J

- i. the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- ii. the accused did not turn his or her mind to the possibility that the complainant was not consenting; or
- iii. one or more circumstances listed in s.36(1)(a)-(g) applies, and one of these matters is proved beyond a reasonable doubt.⁷⁶

The VLRC was of the view that its proposal avoids the dilemma of deciding whether the accused behaved like a reasonable person, or what attributes this person should be endowed with.⁷⁷ Whilst the term ‘reasonable steps’ demands a consideration of ‘standards of reasonableness’, the Commission is of the view that this test does not criminalise the accused for what he ought to have known, but rather imposes an obligation on the accused to take affirmative action to ascertain the existence of consent.

5.6 What is the appropriate test?

Submissions supporting the importation of an objective fault element were divided on the model that should be adopted, with each of the four models favoured by at least some participants. The NSW Adult Sexual Assault Interagency Committee submitted that the law should set standards on acceptable behaviour by importing an element of reasonableness in assessing whether the complainant consented to sexual intercourse. The Committee proposes that the *Crimes Act 1900* be amended to introduce an objective fault element, whereby a person commits sexual assault if he or she intentionally engages in sexual intercourse without another person’s consent, but the accused can raise a defence of honest and reasonable belief that the complainant was consenting. The Committee has endorsed the approach adopted in the Australian Code jurisdictions, where the prosecution does not have to prove that the accused had knowledge or was reckless as to whether the complainant was consenting or not. The Committee suggested that:

⁷⁶ Recommendation 174 reads:

- A person commits rape if he intentionally sexually penetrates another person without that person’s consent.
- It is a defence that the accused held an honest belief that the complainant was consenting to the sexual penetration.
- The accused must produce some evidence he had an honest belief the complainant consented before this matter can be left to the jury. The mere assertion by an accused that he believed the complainant was consenting shall not constitute sufficient evidence of an honest belief to consent.
- Where an accused alleges he believed the complainant consented to the sexual penetration, a judge must be satisfied there is sufficient evidence of the existence of such a belief before the defence of honest but mistaken belief can be considered by the jury.
- The defence of honest, but mistaken belief is not available where:
 - the accused did not take reasonable steps in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.
 - the accused did not turn his mind to the possibility that the complainant was not consenting.
 - one or more of the circumstances listed in section 36(a)-(g) existed and the accused was aware of the existence of such circumstances.
- In considering the question of whether the accused took reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting, the jury should not have regard to any evidence of the accused’s self induced intoxication.
- If relevant to the facts in issue in a proceeding, the judge must direct the jury that in considering the accused’s alleged belief that the complainant was consenting to the sexual act it must take into account whether that belief was reasonable in all the circumstances. VLRC Final Report at 422

⁷⁷ VLRC Final Report at 427

...this would make the position on consent the same as that in the Northern Territory, WA, Queensland and Tasmania, and would be consistent with the established application of honest and reasonable mistake of fact.⁷⁸

The DPP also expressed a preference for the model used in the Code States: “*There is an existing body of Australian case law on the subject and adoption of that model would ultimately assist in national standardization.*” This was also the preferred model of the Office for Women. The Law Society opposed the inclusion of an objective fault element and submitted that one difficulty with adopting the model employed in the Code States is that it removes the requirement for the prosecution to prove that the defendant did not know that the complainant was not consenting. The Law Society argued this would be a significant departure from the current law and, if any change was made, the onus of proof should remain on the prosecution. At the same time the Law Society suggested that changing to the Code model may have little practical effect on a sexual assault trial.⁷⁹

Detective Superintendent Kim McKay expressed support for the UK requirement that the accused has to show reasonable grounds for the belief that the complainant was consenting, taking into account the steps the accused person has taken to ascertain whether the complainant consents. This model was also supported by the VAWSU.

NSW Health and Victims Services suggested adopting the VLRC model, as adapted from the Canadian provisions. Dr Cossins also favoured the recommendations of the VLRC as a way to avoid the problem of whether the accused behaved like a reasonable person and to place a positive obligation on the accused to take positive action to ascertain the complainant’s consent. Women’s Legal Services and Associate Professor Stubbs favoured the Canadian approach, called a quasi-objective approach, on the basis that it is a balanced approach and empirical evidence suggests that it has been effective. The Adult Sexual Assault Interagency Committee indicated that it held reservations about adopting the Canadian approach, which would introduce a unique position to Australia without existing case law for guidance.

Whilst the approach adopted by Canada does represent a significant departure from the common law, it is in some ways a less dramatic one for NSW than the approach adopted in the Code States, which have removed any requirement that the prosecution prove the accused knew or was reckless as to whether the complainant was not consenting. In addition, the recent High Court interpretation of the Northern Territory Code, demonstrates that such a provision may be read down, unless there is careful drafting. The Law Society specifically rejected the adoption of the Canadian model, as in order to successfully maintain a defence of honest and reasonable mistake under this model, the accused must prove that the complainant communicated consent.

Consent is an integral component of the *mens rea*, but considered from the perspective of the accused. In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

⁷⁸ NSW Interagency Report: *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* November 2004 at 35 and 36.

⁷⁹ The submissions of the Law Society were supported by the Legal Aid Commission.

There is a difference in the concept of "consent" as it relates to the state of mind of the complainant vis-à-vis the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus* "consent" means that the complainant in her mind wanted the sexual touching to take place. In the context of *mens rea* -- specifically for the purposes of the honest but mistaken belief in consent -- "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. The two parts of the analysis must be kept separate.⁸⁰

5.7 Should the objective fault element be reflected in a separate offence with a lower maximum penalty?

Whilst the Taskforce was divided on whether to adopt the Canadian model with respect to introducing an objective fault element, a further proposal was put forward by Mr Stephen Odgers SC on 7 December 2005 suggesting that there may be some middle ground on this issue. He was of the view that whilst an accused's failure to take reasonable steps to ascertain consent should not be incorporated as an objective fault element in the current offence, a second and lesser offence could be created to criminalise this type of conduct. In his view, an accused person who holds an honest belief in consent, but has failed to take reasonable steps to ascertain whether there is consent, has less moral culpability than a person who has sexual intercourse without consent knowing the complainant is not consenting; or reckless as to consent. Mr Odgers proposed the following:

1. That s.61I be redrafted so that the a person who has sexual intercourse with another person without the consent of the other person and either:
 - a. knows that the other person does not consent to the sexual intercourse, or
 - b. is indifferent (or reckless) as to whether the person does or does not consent to the sexual intercourseis liable to imprisonment for 14 years.
2. That s.61R which deems recklessness to be knowledge should be repealed.
3. That a new offence should be created, namely 61IA:

Any person who has sexual intercourse with another person without the consent of the other person and who fails to take reasonable steps to ascertain whether the other person consented, is liable to imprisonment for 5 years.

4. That a new section be created so that if on trial for an offence under s.61I the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under s.61IA, it may find the accused guilty of the latter offence and the accused is liable to punishment accordingly.

Mr Odgers appears to have taken one aspect of the Canadian sexual offence and used this to create a new offence. In Canada the concept of 'reasonable steps' has been imported so that before the accused can raise honest and mistaken belief in consent, the court must be satisfied that he had done something to satisfy his belief that the complainant was consenting. Once satisfied the Crown must prove that the accused did not in fact hold this belief. The proposal of Mr Odgers SC is novel and it does not appear that any such provision exists in any other

⁸⁰ *R v Ewanchuk* [1999] SCR 330.

jurisdiction. Under his proposal the Crown would still have to prove beyond reasonable doubt that reasonable steps were not taken by the accused.

The main point that Mr Odgers appears to be concerned with is that a person convicted of a sexual offence because they failed to take reasonable steps to ascertain consent, should not be held liable to the same maximum penalty as a person who knows that there is no consent or is reckless as to consent. Mr Odgers argued that if the reasonable steps test was included as an objective fault element in the s.61I offence (as in Canada), there would be no way of knowing on what basis a jury had convicted the accused. As such, it would be left to the sentencing judge to determine upon which facts to sentence the accused, and in particular, whether it was because the accused was reckless or failed to take reasonable steps.

Due to the timeframe for discussion, members of the Taskforce were unable to properly consider the proposal, but agreed further consideration ought to be given to it.

13. What is the purpose for creating a secondary, but lesser offence?
14. If s.61I is redrafted with the word 'reckless' instead of 'indifference' will it assume its common law meaning?
15. What is the reasonableness standard? Is it the standard of a reasonable person in the community, or the reasonableness of a person in the position of the accused?
16. Should there be some evidence of 'reasonable steps' that can be pointed to by the defence before the second offence can be left to the jury?
17. Should a second offence with a lower maximum penalty be created so that the trial judge does not have to make findings of fact with respect to the basis upon which the jury convicted? This is presently done with respect to many offences and a common problem when sentencing.⁸¹
18. Would the creation of a lesser offence, presented to the jury as a statutory alternative, lead to compromised verdicts on behalf of the jury who may select the 'middle option' even though the evidence does not support it?
19. If a new offence is created with a maximum penalty of 5 years imprisonment, would these offences be Table offences for election by the Crown?

After careful consideration of the submissions the CLRD recommended that if there is to be a change in NSW based on either the Canadian model or VLRC proposal on which it is based, further consultation and consideration is required. In this model it is clear that the onus remains on the prosecution to prove that the accused knew or was reckless as to

⁸¹ See comments of Gleeson CJ, Hayne and Gummow JJ in *Cheung v The Queen* [2001] HCA at [5]: "The decision as to guilt of an offence is for the jury. The decision as to the degree of culpability of the offender's conduct, save to the extent to which it constitutes an element of the offence charged, is for the sentencing judge. If, and insofar as, the degree of culpability is itself an element of the offence charged, that will be reflected in an issue presented to the jury for decision by verdict. In such an event, the sentencing judge will be bound by the manner in which the jury, by verdict, expressly or by necessary implication, decided that issue. But the issues resolved by the jury's verdict may not include some matters of potential importance to an assessment of the offender's culpability. That is not unusual. It is commonplace".

consent. However, honest, but mistaken belief in consent is modified to incorporate an examination of whether the accused took reasonable steps to ascertain consent, from a subjective point of view. It is considered that there is merit in further investigating a model based on the Canadian legislation, which would appear to be the most appropriate model to adopt in NSW to reflect contemporary societal expectations surrounding sexual relationships.

5.8 Exposure Draft

The Exposure Draft Bill, attached to this paper at Appendix 3, contains the following formulation of an objective fault test:

Reasonable belief that person consents

In determining whether a person has reasonable grounds to believe that another person consents to having sexual intercourse with the person, regard is to be had to all the circumstances of the case:

- (a) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (b) not including the personal opinions, values and general social and educational development of the person.

Appendix 1

Statutory definitions of consent

Queensland Criminal Code

348 Meaning of “consent”

(1) In this chapter, “**consent**” means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

(2) Without limiting subsection (1), a person’s consent to an act is not freely and voluntarily given if it is obtained—

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.

Western Australia Criminal Code

s. 319 (2) For the purposes of this chapter

(a) “**consent**” means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;

(b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;

(c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.

ACT Crimes Act 1900

67 Consent

(1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—

- (a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
- (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or

- (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
- (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
- (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
- (f) by a mistaken belief as to the identity of that other person; or
- (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
- (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
- (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
- (j) by the unlawful detention of the person.

(2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

(3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

United Kingdom Sexual Offences Act

s.74: "Consent" For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

s. 75- Evidential presumption about consent

(1) If in proceedings for an offence to which this section applies it is proved-

- (a) that the defendant did the relevant act,
- (b) that any of the circumstances specified in subsection (2) existed, and
- (c) that the defendant knew that those circumstances existed the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that-

- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began

s. 76 Conclusive presumptions about consent

(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed-

(a) that the complainant did not consent to the relevant act, and

(b) that the defendant did not believe that the complainant consented to the relevant

(2) The circumstances are that-

(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant

Canadian Criminal Code

s. 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question

(3) No consent is obtained, for the purposes of this section, if:

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity

(4) Nothing in subsection (3) shall be construed as limiting the circumstances in which no consent is obtained.

(5) It is not a defence to a charge under this section that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge if

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

(6) If an accused alleges that he or she believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Model Criminal Code – Recommended definition of consent

5.2.3 Consent

(1) In this Part, *consent* means free and voluntary agreement.

(2) Examples of circumstances in which a person does not consent to an act include the following:

- (a) the person submits to the act because of force or the fear of force to the person or to someone else;
- (b) the person submits to the act because the person is unlawfully detained;
- (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
- (d) the person is incapable of understanding the essential nature of the act;
- (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes).

Note. Section 5.2.43 also requires that the judge direct a jury, in a relevant case, as to the factors the jury may have regard to in determining whether or not there was consent.

Appendix 2

Criminal Responsibility – Sexual assault without consent

Queensland Criminal Code

s. 349 Rape

(2) A person rapes another person if—

- (a) the person has carnal knowledge with or of the other person without the other person's consent; or
- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
- (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent

(1) For this section, a child under the age of 12 years is incapable of giving consent.

s. 23 Intention—motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—

- (a) an act or omission that occurs independently of the exercise of the person's will; or
- (b) an event that occurs by accident.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or cannot reasonably foresee the death or grievous bodily harm.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

s. 24 Mistake of fact

(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Western Australia Criminal Code

s. 325. Sexual penetration without consent

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

s. 24. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

United Kingdom Sexual Offences Act

s. 1 Rape

1) A person (A) commits an offence if-

a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) **A does not reasonably believe that B consents**

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

Canadian Criminal Code

s. 265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

This must be read in conjunction with s 273.

APPENDIX 3

Proposed Sexual Assault Amendments to the *Crimes Act 1900* – Consent

NOTE: THIS BILL DOES NOT REPRESENT GOVERNMENT POLICY, BUT HAS BEEN PREPARED FOR CONSULTATION ONLY.

A Bill for Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007

Schedule 1 Amendment of Crimes Act 1900

[1] Section 61I

Omit the section. Insert instead:

61I Sexual assault

A person:

(a) who has sexual intercourse with another person without the consent of the other person, and

(b) who:

(i) knows that the other person does not consent to the sexual intercourse, or

(ii) is reckless as to whether the other person consents to the sexual intercourse, or

(iii) has no reasonable grounds for believing that the other person consents to the sexual intercourse, is guilty of an offence.

Maximum penalty: imprisonment for 14 years.

[2] Section 61J Aggravated sexual assault

Omit section 61J (1). Insert instead:

(1) A person:

(a) who in circumstances of aggravation has sexual intercourse with another person without the consent of the other person, and

(b) who:

(i) knows that the other person does not consent to the sexual intercourse, or

(ii) is reckless as to whether the other person consents to the sexual intercourse, or

(iii) has no reasonable grounds for believing that the other person consents to the sexual intercourse, is guilty of an offence.

Maximum penalty: imprisonment for 20 years.

[3] Section 61JA Aggravated sexual assault in company

Omit section 61JA (1). Insert instead:

(1) A person:

(a) who has sexual intercourse with another person without the consent of the other person, and

(b) who:

(i) knows that the other person does not consent to the sexual intercourse, or

- (ii) is reckless as to whether the other person consents to the sexual intercourse, or
 - (iii) has no reasonable grounds for believing that the other person consents to the sexual intercourse, and
 - (c) who is in the company of another person or persons, and
 - (d) who:
 - (i) at the time of, or immediately before or after, the commission of the offence, maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
 - (ii) at the time of, or immediately before or after, the commission of the offence, threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
 - (iii) deprives the alleged victim of his or her liberty for a period before or after the commission of the offence, is guilty of an offence.
- Maximum penalty: imprisonment for life.

[4] Section 61R

Omit the section. Insert instead:

61R Consent in relation to sexual assault offences

(1) Offences to which section applies

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

(2) Definition of lack of consent

A person does not consent to sexual intercourse if the person:

- (a) does not have the capacity to agree to the sexual intercourse, or
- (b) has that capacity but does not have the freedom to choose whether to have the sexual intercourse, or
- (c) has that capacity and freedom but does not agree to the sexual intercourse.

(3) Reasonable belief that person consents

In determining whether a person has reasonable grounds to believe that another person consents to having sexual intercourse with the person, regard is to be had to all the circumstances of the case:

- (a) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (b) not including the personal opinions, values and general social and educational development of the person.

(4) Consent vitiated if under mistaken belief

A person is taken not to consent to sexual intercourse with another person if the person consents to sexual intercourse:

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

A person who knows that another person consents to sexual intercourse under such a mistaken belief is taken to know that the other person does not consent to the sexual intercourse.

(5) Lack of physical resistance not necessarily consent

A person who has sexual intercourse with another person and who does not offer actual physical resistance to the sexual intercourse is not, by reason only of that fact, taken to consent to the sexual intercourse.

(6) Consent vitiated if violent threat or detention

A person is taken not to consent to sexual intercourse with another person if the person submits to the sexual intercourse as a result of:

- (a) threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, or
- (b) the unlawful detention of the person who submits to the sexual intercourse.

(7) Non-violent threats

A person who submits to sexual intercourse with another person as a result of intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force, is not, by reason only of that fact, taken to have consented to the sexual intercourse.

(8) Sexual intercourse while intoxicated not necessarily consent

A person who has sexual intercourse with another person while intoxicated by alcohol or a drug is not, by reason only of that fact, taken to have consented to the sexual intercourse.

(9) Other provisions

Nothing in this section limits the grounds on which it may be established that consent to sexual intercourse is vitiated.

[5] Section 65A Sexual intercourse procured by intimidation, coercion and other non-violent threats

Omit the section.

[6] Eleventh Schedule Savings and transitional provisions

Insert at the end of the Schedule with appropriate Part and clause numbers:

Part Crimes Amendment (Consent—Sexual Assault Offences) Act 2007

Application of amendments

An amendment made by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* applies only in respect of an offence committed after the commencement of the amendment.