THE LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Project 113
Sexual Offences

Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact

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The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.

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Preface

The Hon John Quigley MLA, Attorney General for Western Australia, has asked us to review sexual offences in Western Australia and provide advice for consideration by the Western Australian Government on possible amendments to enhance and update the offence provisions (and related or ancillary provisions or legal rules).

This review of sexual offences is one of three projects that form part of the Government's plan to develop Western Australia's first sexual violence prevention and response strategy. In the Discussion Paper, we explain how you can be involved in the other projects.

This review is timely as over the last 30 years there have been only limited changes made to Western Australian's sexual assault laws despite the significant changes in societal attitudes towards sexual behaviour and violence over that time.

Through this project we aim to make recommendations that, if implemented, will ensure that Western Australia's sexual offences laws use terms that are appropriate to 21st century society, uphold the rights of adults to sexual autonomy, protect vulnerable people from sexual abuse and exploitation and employ modern concepts of what constitutes consensual sexual activity.

The Attorney General has specifically requested us to have regard to contemporary understanding of, and community expectations relating to, sexual offences. Therefore, it is crucial that we seek, obtain and listen to the community's views about Western Australia's current sexual offence laws and how they could be improved to meet the community's expectations before we formulate the recommendations to be given to the Attorney General.

Against this background the Commission is publishing Volume 1 of its Discussion Paper on Western Australia's sexual offence laws. Volume 1 of the Discussion Paper informs you about important aspects of existing sexual offence laws in Western Australia, being the definition of consent, the mistake of fact defence and jury directions. It raises issues to make you think about what improvements could be made to the existing laws and questions which you may answer so that we can hear your ideas and opinions on these key topics. Volume 2 of the Discussion Paper, to be published in February 2023, will deal primarily with the substantive sexual offences.

In conjunction with publication of Volume 1 of the Discussion Paper, we are publishing a Background Paper that we commissioned from leading academics and researchers. The purpose of the Background Paper is to inform us and you about sexual violence in our community and the factors that may contribute to it. We encourage you to read it before you respond to us about the issues raised in the Discussion Paper. You may or may not agree with what it says and you are welcome to tell us what your views are on the same topics. Any views expressed in the Background Paper are those of the authors and do not necessarily reflect the views of the Commission.

Also, to inform us about the issues, we sought preliminary views from a range of stakeholders. The Discussion Paper refers to some of the responses we received. The views expressed are those of the stakeholders identified and do not necessarily reflect the views of the Commission.

Thank you for taking the time to read Volume 1 of the Discussion Paper and to contribute to the process of law reform to improve Western Australia's sexual offence laws.

The Law Reform Commission of Western Australia

List of Defined Terms

ABS	The Australian Bureau of Statistics.
Absence of complaint	A failure by the complainant to tell anyone about an alleged incident of sexual violence.
Accused / accused person	The alleged perpetrator of a sexual offence in circumstances where charges have been laid.
ACT Act	*Crimes Act 1900* (ACT).
Affirmative model of consent / affirmative consent	A model of consent in which participants communicate their willingness to engage in sexual activity and take measures to ascertain that the other participant is consenting.
ALRC	The Australian Law Reform Commission.
Amended Victorian Jury Directions Act	The *Jury Directions Act 2015* (Vic) as it will be amended by the *Justice Legislation Amendment Act 2022* (Vic).
ANROWS	Australia's National Research Organisation for Women's Safety.
Background Paper	S Tarrant, H Douglas and H Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022).
Balance of probabilities	A standard of proof which requires the jury to be satisfied that it is more likely than not that the fact in issue occurred.
Beyond reasonable doubt	The standard of proof to which the prosecution must prove all criminal offences, including sexual offences. It is the highest standard of proof used in Australian law.
Code	The general term for a statute which does not rely principally on previously existing common law principles. The *Criminal Code Compilation Act 1913* (WA) is an example of a code.
The *Code*	*Criminal Code Compilation Act 1913* (WA).
Code jurisdictions	Jurisdictions which only rely on statute law, for example, Western Australia and Queensland.
Commission	Law Reform Commission of Western Australia.
Common law	Laws made by judges in legal cases.
Common law jurisdictions	Jurisdictions which rely on a combination of the common law and statute law, for example, Victoria and New South Wales.
Communicative model of consent	A model of consent in which participants actively communicate their willingness to engage in the sexual activity by words or conduct.
Complainant	A person against whom a sexual offence is alleged to have been committed.

Complaint	A report about sexual violence made to the police.
Criminal Procedure Act	*Criminal Procedure Act 2004* (WA).
The defence	The lawyer who represents the accused person. Care should be taken not to confuse this meaning with the use of the term 'defence' to refer to legal defences, such as the defence of mistake of fact.
Delayed complaint	A complaint about an alleged incident of sexual violence which is not made immediately.
Discussion Paper Volume 1	Volume 1 of the Commission's Sexual Offences Discussion Paper (this document).
Discussion Paper Volume 2	Volume 2 of the Commission's Sexual Offences Discussion Paper. Volume 2 will focus on the sexual offences that should be included in the *Code* and the penalties that should be set for those offences.
Discussion Papers	Volumes 1 and 2 of the Commission's Sexual Offences Discussion Paper.
Elements	Aspects of an offence that the prosecution must prove beyond reasonable doubt for the accused to be convicted.
Evidence Act	*Evidence Act 1906* (WA).
Evidentiary burden	An obligation on an accused person to produce a certain amount of evidence in support of a defence before the judge will allow the jury to consider whether that defence applies.
Gender history	A person's previous gender-related identity or identities.
Gender identity	A person's current personal sense of their gender, including trans, gender-diverse and non-binary gender identities.
General verdict	A verdict of guilty or not guilty of a charged offence.
ILRC	The Irish Law Reform Commission.
Judicial officer	A magistrate or judge.
Jury direction	Instructions that the judge gives to the jury, including about the relevant law and a summary of each party's case.
Justice Legislation Amendment Act	*Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic)
LCNZ	The Law Commission of New Zealand.
LGBTIQA+	Lesbian, gay, bisexual, transgender, intersex, queer, asexual, and other diverse sexual orientations and gender identities.

Longman warning	A warning that may be given to juries in cases where a delay in making a complaint has caused the accused to suffer a forensic disadvantage. It advises the jury of the forensic disadvantage caused by the delay and warns the jury that it must scrutinise the complainant's evidence with great care, taking into account any facts and circumstances (including the forensic disadvantage) which have a logical bearing on the truth and accuracy of that evidence.
LRCWA review	The Commission's review of Western Australia's sexual offence laws (Project 113).
Majority verdict	A verdict on which at least 10 jury members agree.
MCCOC	The Model Criminal Code Officers Committee.
Mistake of fact defence	A legal defence which allows an accused to be acquitted if they made an honest and reasonable mistake about a key fact. In the context of sexual offences, it will most commonly be argued that the accused made an honest and reasonable mistake about the complainant's consent.
Mixed element	An element of the mistake of fact defence that relates to whether the accused's purported belief that the complainant was consenting was reasonable. It is referred to as the mixed element because it contains both subjective and objective aspects.
Murray Report	MJ Murray, *The Criminal Code: A General Review* (Attorney General's Department, Western Australia, 1983).
NSW Act	*Crimes Act 1900* (NSW).
NSW Criminal Procedure Act	*Criminal Procedure Act 1986* (NSW).
NSWLRC Commission	The New South Wales Law Reform Commission.
OCVOC	Office of the Commissioner for Victims of Crime.
OCVOC review	A review of the end-to-end criminal justice process for victim-survivors of sexual offending, from reporting an offence to the release of the offender which is being carried out by the OCVOC.
ODPP	Office of the Director of Public Prosecutions of Western Australia.
Offender	A person who has been convicted of a sexual offence.
People who have experienced sexual violence / victims / victim-survivors	People who have experienced incidents of sexual violence in a general sense (as opposed to a legal sense).
Perpetrator	A person who has committed an act of sexual violence, regardless of whether the matter has proceeded to court or the individual has been found guilty.

Prostitution Act	*Prostitution Act 2000* (WA).
QLRC	The Queensland Law Reform Commission.
Queensland Code	*Criminal Code Act 1899* (Qld).
Queensland Taskforce	The Queensland Government Women's Safety and Justice Taskforce.
Royal Commission	The Royal Commission into Institutional Responses to Child Sexual Abuse.
SA Act	*Criminal Law Consolidation Act 1935* (SA).
Sentence	The punishment that a judicial officer imposes on an offender.
Sex	The physical or biological characteristics with which a person was born.
Sex characteristics	The physical features relating to sex that a person has at the time of sexual activity.
Sexual assault	Term used by the ABS to describe acts which would be a criminal offence in a state or territory. It is also a specific type of sexual offence in some jurisdictions. We only use this term when discussing ABS data or referring to another source in which the term is used.
Sexual offence	The specific acts of sexual violence which are defined as crimes. Examples include sexual penetration without consent, indecent assault and sexual offences against children.
Sexual orientation	A person's emotional, affectional or sexual attraction to people of a different gender, the same gender or more than one gender.
Sexual violence	All sexual activity that occurs without consent, or which involves the sexual exploitation of vulnerable people, regardless of whether the activity was reported to the police, charged as a criminal offence or proceeded to trial. The activity does not need to have involved physical violence.
Special verdict	A verdict about a fact which is relevant to a charged offence.
Statute law	Laws made by Parliament in statutes (also known as legislation).
Stealthing	Non-consensual condom removal.
STI	Sexually transmissible infection.
Subjective element	An element of the mistake of fact defence that relates to the accused's subjective belief that the complainant consented to the sexual activity.
Terms of Reference	The Terms of Reference set by the Attorney General for Western Australia in order to determine the area of potential reform.
Unanimous verdict	A verdict on which all jury members agree.
Tasmanian Code	*Criminal Code Act 1924* (Tas).

Victorian Act	*Crimes Act 1958* (Vic).
Victorian Jury Directions Act	*Jury Directions Act 2015* (Vic).
Vic (current)	Provisions in the current Victorian legislation (not taking account into amendments made by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) which has passed but is not yet in force.
Vic (new)	Provisions in Victorian legislation as they will be once amendments made by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) come into force.
VLRC	The Victorian Law Reform Commission.

1. Introduction

Chapter overview

This Discussion Paper provides you with information about Western Australia's sexual offence laws and seeks your views on whether they should be reformed. This Chapter explains why the Western Australian Government has asked us to review sexual offence laws and outlines the issues that we will and will not be examining in this review. It also examines the principles that will guide us and explains how you can tell us your views.

Introduction

1.1. The Attorney General of Western Australia has asked the Law Reform Commission of Western Australia (the Commission) to review Western Australia's sexual offence laws (the **LRCWA review**). We have been asked to provide advice to the Government about the ways in which these laws should be changed, having regard to the way that sexual offences are currently understood in the community.

1.2. The Attorney General has also asked the Office of the Commissioner for Victims of Crime (**OCVOC**) to:

- Review the end-to-end criminal justice process for victim-survivors of sexual offending, from reporting an offence to the release of the offender (the **OCVOC review**); and
- Lead the development of Western Australia's first sexual violence prevention and response strategy. The purpose of this strategy is 'to improve outcomes for victim-survivors of sexual violence, focusing on primary prevention, support for victim-survivors' recovery and holding perpetrators to account'.[1]

[1] https://www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime/sexual-violence-prevention-and-response-strategy.

1.3. This is the first of two Discussion Papers that provide you with information about the issues that the Commission will be examining in the LRCWA review. It asks some questions for your consideration and explains how you can share your views with the Commission.

1.4. We want to hear your views. We are interested in hearing from anyone who has professional or personal experience in the area, and from those who have ideas for reform, or want to comment on what is working, what needs to be fixed and how to fix it.

Language used in the Discussion Papers

1.5. Many different terms are used by members of the community to describe the types of behaviour we are interested in and the people who are involved. To make sure that we are all talking about the same thing, it is important to be clear about the way in which language is used. This section outlines the key terms we use in the Discussion Papers and seeks your views on the best language to use going forward.

1.6. We start by noting that sexual activities can involve two or more participants. However, for the sake of simplicity, throughout the Discussion Papers we will generally refer to sexual activities involving two people.

1.7. We use the term **sexual violence** to refer broadly to all sexual activity that occurs without consent, or which involves the sexual exploitation of vulnerable people. It does not matter if the activity was reported to the police, charged as a criminal offence or proceeded to trial. It also does not matter if the activity involved physical violence. We acknowledge that some people may find use of the term 'violence' strange, as they may associate it with the use of physical force. However, the term violence recognises that sexual acts which violate a person's autonomy or exploit their vulnerabilities are inherently violent, even in the absence of force. We also note that the term sexual violence is commonly used by people who work in the area.

1.8. We use the term **sexual offence** to refer to the specific acts of sexual violence which are defined as crimes. These include sexual penetration without consent (which is sometimes referred to in the community as rape), indecent assault and sexual offences against children. We note that the Australian Bureau of Statistics (**ABS**) uses the term **sexual assault** to describe acts which would be a criminal offence in a state or territory. However, the term sexual assault is also sometimes used to describe a specific type of sexual offence. To avoid confusion, we only use this term when discussing ABS data or referring to another source in which it is used.

1.9. When discussing people who have experienced incidents of sexual violence in a general sense (rather than a legal sense), we use the term **people who have experienced sexual violence** rather than the terms victims or victim-survivors. This is because it recognises that sexual violence is an experience: it does not define the individuals involved. It also recognises that people who have experienced sexual violence do not have one shared identity.[2] However, for contextual reasons, or for the sake of readability, we sometimes do refer to **victims** or **victim-survivors** (a term which recognises both victimisation and resilience). We acknowledge that there are different views about what terminology best reflects the experience of people who have experienced sexual violence.

[2] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Issues Papers A-H, October 2020) 8.

1.10. Where a complaint of sexual violence has been made to the police or after a charge of a sexual offence has been laid, we use the legal term **complainant** to describe the person against whom the sexual offence is alleged to have been committed.

1.11. We use the term **perpetrator** to refer to a person who has committed an act of sexual violence, regardless of whether the matter has proceeded to court or the individual has been found guilty. Where criminal charges have been brought but not completed, we use the term **accused person** (or simply **the accused**) to refer to the alleged perpetrator of the sexual offence.

1.12. We use the term **offender** to refer to people who have been convicted of sexual offences. Our use of this term is not intended to imply that offenders have a shared identity. We acknowledge that offenders are complex individuals who often come from disadvantaged backgrounds, and whose needs should also be considered in developing an appropriate response to sexual violence.

1.13. At various points throughout the Discussion Papers we refer to communicative and affirmative models of consent. These are different ways of understanding what must occur for there to be valid consent to a sexual activity. A **communicative model of consent** requires participants to actively display their willingness to engage in the sexual activity. Under this model, passively submitting to a sexual activity is insufficient to constitute consent: participants must communicate their consent by words or conduct, reaching a mutual agreement about the activity in which they wish to engage. Consent is seen to be a continuous process of mutual decision-making, that involves multiple decisions that occur over the course of the sexual activity.[3] A person consents to a specific sexual activity and can change their mind at any time.

1.14. Like the communicative model of consent, an **affirmative model of consent** (sometimes simply called **affirmative consent**) requires participants to display their willingness to engage in sexual activity. However, it also requires participants to actively seek the consent of the other participant to the sexual activity. In other words, they must take measures to ascertain that the other participant is consenting.[4]

1. What language should we use in our future publications to refer to incidents of sexual violence, the people who experience sexual violence, and the people who commit acts of sexual violence?

Structure of this Discussion Paper

1.15. This Discussion Paper is divided into the following 8 chapters:

- Chapter 1 explains why the government is reviewing sexual offence laws and outlines the issues that we will and will not be examining in this review. It also examines the principles that will guide us and explains how you can tell us your views.
- Chapter 2 outlines the way in which we currently address sexual offending in Western Australia. It explores the trial process and the way in which offences can be proven.
- Chapter 3 considers whether the *Criminal Code Act Compilation Act 1913* (WA) (the ***Code***) should contain any objectives or guiding principles.

[3] See, eg, L Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217, 236.

[4] See, eg, G Mason and J Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases' (2019) 31 *Current Issues in Criminal Justice* 24, 26.

- Chapter 4 examines the issue of consent. It discusses the way in which consent should be defined. It also considers the circumstances in which consent should not be considered free and voluntary.
- Chapter 5 addresses the mistake of fact defence. It discusses when a belief should be considered to be reasonable, and whether an accused person should be required to take steps to find out if the other person is consenting.
- Chapter 6 focuses on jury directions. It considers whether there is a need to legislate for such directions, and the content of possible directions.
- Chapter 7 explores the issue of special verdicts. It discusses the way in which special verdicts operate and considers whether it would be desirable for Western Australian law to allow for a special verdict to be given in sexual offence cases.
- Chapter 8 considers the implementation and monitoring of reforms.

1.16. This Discussion Paper also includes two appendices.

- Appendix A contains a list of the organisations that made preliminary submissions to the review.
- Appendix B contains a list of all of the questions we have asked throughout the Discussion Paper.

1.17. There is a list of defined terms at the beginning of this Discussion Paper which explains the acronyms and key terms we use in the paper. Terms which are included in the list are written in bold font the first time they are used.

Background to these reviews

There is too much sexual violence in Western Australia

1.18. Sexual violence is a widespread problem. The ABS has estimated that almost 1 in 5 Australian women (18%) and 1 in 20 Australian men (5%) have experienced sexual assault since the age of 15.[5]

1.19. There is some evidence that sexual violence is increasing. The sexual assault rate across Australia has increased from 69 victims per 100,000 persons in 1993 to 107 victims per 100,000 persons in 2020.[6] In the most recent ABS survey, Western Australia recorded the largest increase of any State or Territory in the number of recorded victims of sexual violence from the previous year (a 10% increase).[7]

1.20. It is possible that this increase in the number of recorded victims does not reflect an increase in sexual violence. It may be the result of other factors, such as more people reporting sexual violence to the police. Even if this is the case, the incidence of sexual violence is unacceptably high.

[5] Australian Bureau of Statistics, *Personal Safety, Australia: Statistics for Family, Domestic, Sexual Violence, Physical Assault, Partner Emotional Abuse, Child Abuse, Sexual Harassment, Stalking and Safety* (Catalogue No 4906.0, 18 November 2017).

[6] Australian Bureau of Statistics, *Recorded Crime – Victims* (Catalogue No 4510.0, 24 June 2021).

[7] Ibid.

Sexual violence is extremely harmful

1.21. It is especially important for the criminal justice system to address sexual violence given how harmful it is. It can have a profound impact on the health and wellbeing of those who experience it, as well as on their families and communities. It is associated with a wide range of physical and psychological effects, including injuries, depression, anxiety, post-traumatic stress disorder and increased drug and alcohol dependency. It can affect a person's relationships and how much they trust other people, as well as their ability to engage in work or education or in social interactions. The effects of sexual violence often affect all areas of a person's life and can be long-lasting.[8] These effects can be particularly severe where sexual violence is experienced by children.[9]

1.22. Sexual violence also places a high financial burden on the individuals involved and the community. The costs to individuals include the costs of health services and loss of income. The costs to the community include the costs of the criminal justice process (such as the costs of police, prosecutors, courts and prisons) and the costs of providing support services. It has been suggested that sexual violence is the costliest sub-category of crime.[10]

1.23. The harmfulness of sexual violence is discussed in detail in the **Background Paper** that we commissioned as part of this review.[11] See 'Our process' below for further information about the Background Paper.

Sexual violence violates the victim-survivor's rights

1.24. Sexual violence violates the sexual autonomy, bodily integrity and dignity of the people who experience it. It may also violate several rights protected under international human rights law, such as the prohibition on torture, inhuman and degrading treatment, and the right to private and family life.[12] United Nations human rights treaty bodies, such as the Committee on the Elimination of Discrimination against Women have regularly highlighted the obligation to prevent, investigate, prosecute and punish the human rights violations caused by sexual violence.[13]

Sexual violence disproportionately affects certain community members

1.25. Any member of community can experience sexual violence. However, it is largely a gendered crime. Most people who experience sexual violence are women and most perpetrators are men.[14] This makes sexual violence a form of gender-based discrimination, which can affect

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8 See, eg, S Tarrant, H Douglas and H Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 1.3.1; Natalie Townsend et al, *A Life Course Approach to Determining the Prevalence and Impact of Sexual Violence in Australia: Findings from the Australian Longitudinal Study on Women's Health* (Report, ANROWS, August 2022); C Boyd, 'The Impacts of Sexual Assault on Women' (Resource Sheet, Australian Centre for the Study of Sexual Assault, April 2011).

9 See, eg, Australasian Institute of Judicial Administration (AIJA), *Bench Book for Children Giving Evidence in Australian Court* (March 2020) 10.

10 See, eg, Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) 44-46.

11 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 1.

12 *International Covenant on Civil and Political Rights*, signed 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) ('*ICCPR*') Articles 7 and 17.

13 See Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [1.3]-[1.17].

14 The Background Paper notes that 'in 2019-2020, 96.85 percent of sex offenders in Australia were male, 83.65 percent of sex offence victims were female. In 2016, 17 percent of women and 4.3 percent of men reported that they had been

the lives and freedom of women and girls, even if they have not personally experienced sexual violence. This was noted by the ACT's Sexual Assault Prevention and Response Steering Committee, which wrote:

> While not all women will have had a direct and personal experience of sexual violence the ever-present threat of sexual violence impacts the full and equal participation of women in society, limiting women's ability to safely travel alone, be out in public spaces at night, use ride-share services, or even accept a lift home, to name but a few instances. For example, women report being four to five times more afraid for their personal safety than men in walking in their local area after dark, being home alone at night, or using public transport at night.[15]

1.26. The gendered nature of sexual violence, and the root causes of violence against women, are considered in more detail in the Background Paper.[16]

1.27. Disproportionately high rates of sexual violence are also experienced by children, Aboriginal and Torres Strait Islander peoples, people with disability, lesbian, gay, bisexual, queer, transgender, intersex and asexual (**LGBTIQA+**) people, young people in out-of-home care, people working in the sex industry and women from culturally and linguistically diverse backgrounds.[17] This is often a reflection of broader structures of discrimination or marginalisation.[18] In this regard, it is 'important to recognise that it is not a person's identity that attracts sexual violence but that those who inflict sexual violence are more likely to target some people and not others'.[19]

Sexual violence is under-reported, under-charged and under-prosecuted

1.28. Despite its harmful nature, sexual violence is significantly under-reported to police.[20] For example, surveys in Australia, Canada, England, Wales, Scotland and the United States indicate only about 14 percent of people who have experienced sexual violence report it to the police.[21] This is due to many factors, including fear of the perpetrator, fear of being disbelieved, distrust of authorities, scepticism about the criminal justice process, feelings of shame,

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sexually assaulted since the age of 15': Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) n 50, citing data retrieved from the Australian Bureau of Statistics (ABS) *Sexual Assault – Perpetrators* (2 February 2022) and ABS, *Sexual Violence – Victimisation* (24 August 2021).

15 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 16 (citations omitted).

16 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 1.2.

17 See, eg, ibid; Australian Bureau of Statistics, *Recorded Crime – Victims* (Catalogue No 4510.0, 24 June 2021); *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Police Responses to People with Disability* (Research Report, October 2021); AO Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (Australian Research Centre in Sex, Health and Society, Latrobe University, 2020); A Quadara, 'Sex Workers and Sexual Assault in Australia: Prevalence, Risk and Safety' (Issues No 8, Australian Centre for the Study of Sexual Assault, 2008); N Taylor and J Putt, 'Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia' (Trends and Issues in Crime and Criminal Justice No 345, Australian Institute of Criminology, September 2007).

18 T Mitra-Kahn, C Newbigin and S Hardefeldt, 'Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women' (Landscapes State of Knowledge Paper Issue No DD01, Australia's National Research Organisation for Women's Safety (ANROWS), December 2016) 12.

19 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) 3.

20 See, eg, Australian Bureau of Statistics, *Personal Safety, Australia: Statistics for Family, Domestic, Sexual Violence, Physical Assault, Partner Emotional Abuse, Child Abuse, Sexual Harassment, Stalking and Safety* (Catalogue No 4906.0, 18 November 2017).

21 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) 26.

embarrassment or self-blame, language or cultural issues, poor recollection of the event due to intoxication or drug use, and uncertainty about whether the conduct constituted an offence.[22] Barriers to reporting and disclosure are addressed in the Background Paper.[23]

1.29. Sexual offences are also charged and prosecuted at lower rates than other offences, with matters dropping out of the criminal justice system at each stage of the process.[24] For example, 'in Western Australia, in 2021, sexual offences had the highest attrition rate compared with other offences; 30 days after the report only about one in eight reports of sexual violence were proceeded with'.[25] There are many reasons for this process of attrition, including the police being unable to find the perpetrator, witnesses being unwilling to give evidence and prosecutors not believing the jury is likely to convict.[26] Police acceptance of misconceptions about sexual violence may also create obstacles.[27] Such misconceptions may influence the police's views about a complainant's credibility and potentially impact on the way they exercise their discretion to investigate and pursue charges.[28] In addition, the person who experienced the sexual violence may also decide not to proceed with a matter. This may be due to dissatisfaction with the process, or for other reasons such as feelings of shame, distress or fear.[29]

1.30. Matters that do proceed to court have lower conviction rates than other serious offences.[30] For example, 'in Western Australia between 2010-2011 and 2020-2021 sexual offences had the lowest conviction rate compared with other offences: 80.34 percent compared with the highest conviction rate of 99.82 percent for traffic and vehicle regulatory offences'.[31] This may be due to a lack of physical evidence, the fact that there were no witnesses to the event and/or doubts about the complainant's honesty or reliability. It may also be the result of juror misconceptions about the nature of sexual assaults, the meaning of consent and/or the way in which people respond to sexual violence.

People often misunderstand the nature of sexual violence and the meaning of consent

1.31. Misconceptions about sexual violence (sometimes known as rape myths) are widespread.[32] Some commonly held misconceptions identified by researchers are outlined and addressed in Table 1.1 below.

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22 See, eg, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.13]; Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Table 1 (pp 26-9).

23 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 3.1.

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

25 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) 25.

26 See, eg, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.20]-[2.24].

27 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 3.2.

28 Ibid 29, citing Patrick Tidmarsh, Gemma Hamilton, and Stefanie Sharman, 'Changing Police Officers' Attitudes in Sexual Offense Cases: A 12-Month Follow-Up Study' (2020) 47(9) *Criminal Justice and Behaviour* 1176, 1176.

29 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.31].

30 Ibid [2.32].

31 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) 25.

32 See, eg, A Cossins, 'Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 49(2) *UNSW Law Journal* 462. In this Discussion Paper we have mainly used the term 'misconceptions about sexual violence' rather than 'rape myths' because there is no offence of rape in Western Australia.

Misconception	Reality
Acts of sexual violence are usually committed by strangers in a dark isolated area.	Most acts of sexual violence are committed by someone the victim-survivors knows, often in a familiar residential location.
Acts of sexual violence usually involve the use of physical force.	Most perpetrators have a prior relationship with the victim-survivor and do not use physical force.
'Real' victims of sexual violence would show signs of physical injury.	Injury rates are variable. Many people are not physically injured.
'Real' victims of sexual violence would resist and fight off the offender.	Victim-survivors frequently freeze or cooperate with the offender.
'Real' victims of sexual violence would report their experience immediately. If they delay, they are likely to be lying.	Most people who experience sexual violence delay reporting their experience or never disclose it.
'Real' victims of sexual violence would discontinue any relationship they have with the perpetrator.	Victim-survivors often stay in a relationship with their abusers for various reasons, such as fear or financial isolation.
'Real' victims of sexual violence would be distressed when reporting their experiences to police or discussing it in court.	Many victim-survivors respond in a calm and controlled manner. This may be a coping mechanism.
Memories of acts of sexual violence should be clear, coherent, detailed and specific.	Memories of acts of sexual violence are commonly fragmented, inconsistent and lack specificity.
It is easy to report acts of sexual violence and difficult to defend allegations.	There are many barriers to reporting acts of sexual violence. Low conviction rates suggest that allegations are not difficult to defend.
Many people lie and fabricate reports of sexual violence.	The rate of false allegations is very low. The overwhelming majority of sexual violence reports are true.
Intoxicated victims consent to sex but regret it afterwards and allege that it was non-consensual.	Alcohol is involved in a high proportion of sexual violence. It can be used deliberately to facilitate offending, or opportunistically to take advantage of people who are heavily intoxicated and unable to consent.
One person's word against another is not enough to convict them of a sexual offence. There needs to be other evidence.	Most sexual violence occurs away from public view. There will usually be a lack of forensic evidence. Many convictions rely solely on the testimony of the victim-survivor.

Table 1.1: Common Misconceptions about Sexual Violence[33]

In addition, many of these misconceptions extend beyond the scope of the penetrative sexual offence (whatever it is called).

33 These misconceptions and realities are taken from Australian Institute of Family Studies and Victoria Police, 'Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners' (Resource, Australian Institute of Family Studies and Victoria Police, 2017). See also Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 2.

1.32. There is some evidence that the number of Australians who hold these misconceptions is declining.[34] However, they are still held by a concerning number of people. For example, in the most recent national survey of community attitudes towards violence against women conducted by Australia's National Research Organisation for Women's Safety (**ANROWS**), it was found that:

- 7% of people agreed that if 'a woman doesn't physically resist—even if protesting verbally—then it isn't really rape'.
- 11% of people thought that it was likely that a woman who waited weeks or months to report sexual assault was lying.
- 31% of people agreed that 'a lot of the times women who say they were raped had led the man on and then had regrets'.
- 42% of people agreed that it is 'common for sexual assault accusations to be used as a way of getting back at men'.
- 16% of people agreed that many allegations of sexual assault made by women are false, with a further 9% unsure whether this was the case.[35]

1.33. Many misconceptions are also held about sexual violence against men. These include that men cannot be forced to have sex against their will; that it is improbable that women will commit acts of sexual violence against men, as women are sexually passive and men are sexually dominant; that if a man had an erection he must have been consenting; and that only gay men can be raped or can rape other men. Evidence demonstrates that all of these beliefs are false.[36]

1.34. People also frequently misunderstand the law of consent. For example, some people wrongly believe that:[37]

- A person who dresses or acts provocatively consents to sex.
- A person who consents to one sexual activity consents to all sexual activities.
- A person who has previously consented to sex consents to sex in the future.
- A person who consents to have sex with one person consents to sex with others.
- The use of drugs or alcohol is an indication of consent.

1.35. Research suggests that these misunderstandings of consent, along with the misconceptions about sexual violence discussed above, may improperly influence a jury's decision in a sexual offence trial.[38] These misconceptions may also affect a person's willingness to report an experience of sexual violence, and the charging decisions made by police and prosecutors.

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34 See, eg, K Webster et al, 'Australians' Attitudes to Violence Against Women and Gender Equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)' (Research Report, ANROWS, March 2018).

35 Ibid.

36 See, eg, Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [6.27].

37 See, eg, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.43].

38 Cossins, 'Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 49(2) *UNSW Law Journal* 462.

1.36. Common misconceptions about sexual violence are discussed in further detail in the Background Paper.[39]

The response to reports of sexual violence is often poor

1.37. People who experience sexual violence often describe having poor experiences when they report sexual violence. They frequently say that the response by government agencies and the justice system fails to meet their needs and is retraumatising rather than supportive.[40]

1.38. One area of particular concern is the police response to reports of sexual violence. People often complain that they are not believed, are closely interrogated, or have their experience trivialised. They also say that police fail to adequately communicate with them about the process.[41]

1.39. Another area of concern is the trial process. People frequently report having very poor experiences in court, due to repeated challenges to their credibility, harsh cross-examination and the use of rape myths to undermine their account. They also suffer distress due to the need to repeatedly give accounts of intimate and painful matters, sometimes in the presence of the perpetrator.[42] The shortcomings of the trial process are further addressed in the Background Paper,[43] which includes the following quote from American psychiatrist Judith Herman, which highlights how the needs of victims are often diametrically opposed to what is required by legal proceedings:

> Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience. Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation between a complaining witness and the accused. Indeed, if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.[44]

1.40. In recent reviews of this area, people who have experienced sexual violence have spoken of the 'urgent need for judges, police, and lawyers to have a deep and nuanced understanding of these crimes and what it is like for victim survivors to go through a legal process. There needs to be a better understanding of the impacts of violence, and the impacts of going through a criminal proceeding in a sexual violence matter'.[45]

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39 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 2.

40 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 3. See also Preliminary Submission 11 (Women's Legal Service WA) 4.

41 See, eg, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.47].

42 Ibid [2.50]-[2.54].

43 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 3.3.

44 Judith Herman, 'Justice From the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, quoted in ibid 30.

45 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 13.

Sexual offence laws may need to be updated to reflect evolving community views

1.41. Over the past five years the issue of sexual violence has been addressed much more frequently in the public domain than ever before. This has partly been in response to the rise of the #MeToo movement, which has resulted in people all over the world sharing their experiences of sexual violence and demanding change. In Australia, the public conversation has been further advanced by the work of high-profile advocates for victim-survivors of sexual assault, such as Grace Tame, Brittany Higgins and Saxon Mullins.

1.42. One of the key issues that has been raised in recent years is the way in which consent should be defined. It has been suggested that current Australian approaches are outdated, and that jurisdictions need to adopt an affirmative model of consent. As noted above, an affirmative model of consent 'emphasises that consent to a sexual activity is a positive decision to participate in sexual activity which must be sought and communicated and cannot be assumed. Consent should be a continuous process of mutual decision-making throughout a sexual activity'.[46]

1.43. A second issue relates to the practice of '**stealthing'**. Stealthing occurs where a person consents to a sexual act 'on the basis of an agreement that the other person will use a condom, but the other person does not do so or removes the condom part way through the sexual act'.[47] It is unclear whether this is a criminal offence under current laws. It has been suggested that as this practice is becoming increasingly common it needs to be addressed in legislation.[48]

1.44. A third issue relates to the mistake of fact defence.[49] This defence may be raised by an accused person who asserts that they reasonably, but mistakenly, believed the complainant was consenting to the sexual activity. It has been criticised on the basis that it allows accused persons to rely on, and to encourage, jurors' misconceptions about sexual behaviour to support the assertion that their mistake was reasonable. It has been suggested that the law needs to be reformed to prevent this from occurring.[50]

1.45. In response to these concerns, many other jurisdictions around Australia and internationally have recently reviewed and reformed their laws and practices in this area.[51] We plan to consider these and other potential reforms, in order to make recommendations about modernising Western Australia's approach to sexual offences in a way which will help achieve just outcomes for those who experience sexual violence and ensure the fair trial of people accused of committing sexual offences.

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46 Ibid 78.

47 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) 132.

48 See, eg, B Chesser and A Zahra, 'Stealthing: A Criminal Offence?' (2019) 31 *Current Issues in Criminal Justice* 217.

49 Technically, this is an excuse rather than a defence. However, it is commonly referred to as a defence and will be referred to in that way throughout the Discussion Papers.

50 See, eg, Cossins, 'Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 49(2) *UNSW Law Journal* 462; Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 4.

51 See, eg, Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019); Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019); Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019); Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021); Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021); Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022).

What we will be examining

1.46. The Attorney General has set out the matters that the Commission is allowed to examine (see the Terms of Reference box below).

1.47. We have been asked to review the offences contained in Chapter XXXI of the *Criminal Code Compilation Act 1913* (WA) (the ***Code***). These are:

- Sexual penetration without consent (rape).
- Sexual coercion.
- Indecent assault.
- Sexual offences against children.
- Sexual offences against people who lack the capacity to consent or who are vulnerable to sexual exploitation.
- Incest.
- Sexual servitude offences.

1.48. We have also been asked to review three other offences:

- Allowing children to be on premises for the purposes of having sex.
- Procuring a person to be a prostitute.
- Procuring a person to have sex by threat, fraud or administering drugs.

1.49. In reviewing these offences, we have been asked to consider whether changes should be made to the law of consent. In particular, we have been asked to consider:

- Whether we should introduce a requirement for affirmative consent.
- In what circumstances a person does not consent. This may include where they are coerced or deceived (such as in the case of stealthing).
- How the law should deal with claims that the accused mistakenly believed the complainant was consenting.

1.50. We have also been asked to consider whether the decision-maker in a sexual offence case (usually the jury) should be permitted to give a special verdict; that is, some kind of verdict other than guilty or not guilty.

1.51. As part of this review, we will also consider the following matters:

- Whether any other sexual offences should be added to Chapter XXXI of the *Code*.
- What the maximum penalty should be for the sexual offences we are examining.
- What aggravating circumstances should increase the maximum penalty for those sexual offences.
- Whether the law should require judges to direct juries about specific matters.

Terms of Reference

Pursuant to section 11(2)(b) of the *Law Reform Commission Act 1972* (WA), the Law Reform Commission of Western Australia is to review Chapter XXXI of the *Criminal Code Compilation Act 1913* (WA) (Code) and sections 186, 191 and 192 of the *Code* and provide advice for consideration by the Government on possible amendments to enhance and update these provisions (and related or ancillary provisions or legal rules), having regard to contemporary understanding of, and community expectations relating to, sexual offences.

In carrying out its review, the Commission should consider whether there is a need for any reform and, if so, the scope of reform regarding the law relating to consent (including knowledge of consent) and, in particular:

a. whether the concept of affirmative consent should be reflected in the legislation;

b. how section 24 of the *Code* (dealing with mistake of fact) applies to the offences created by the above-mentioned provisions;

c. how consent may be vitiated, including through coercion, fraud or deception, for example, through 'stealthing'; and

d. whether special verdicts should be used.

What we will not be examining

1.52. Properly addressing sexual violence is a complex task that involves many legal and non-legal measures. It requires a holistic approach from government and the community, to address the various social, cultural and systemic factors that allow sexual violence to thrive.[52]

1.53. The Commission has only been asked to focus on one component of the response to sexual violence: the sexual offence laws. We cannot address any of the following matters:

- Primary prevention of sexual violence.
- The processes for reporting allegations of sexual offending.
- Police investigation processes and evidence gathering.
- Charging and prosecutorial decisions.
- Diversion from the criminal justice process.
- The use of restorative justice mechanisms to address sexual offending.
- Evidentiary issues, including measures to protect complainants in court and the admissibility of tendency and coincidence evidence.
- Sentencing (other than the setting of maximum penalties for the offences under review and the determination of relevant aggravating circumstances).
- Penal and rehabilitative matters, including the reintegration of offenders into society.
- Post-sentence measures, such as sex offender registration.
- Development of specialist courts or alternative legal procedures.
- Providing financial assistance or compensation to people who experience sexual violence.

[52] See, eg, Preliminary Submission 11 (Women's Legal Service WA) 5-6.

- Redress schemes for people who have experienced sexual assault in an institutional environment.
- Civil law responses to sexual assaults.
- Reducing delays in the system.
- Counselling and support services for people who experience sexual violence.
- Inter-agency governance, protocols and collaboration.
- Funding issues.

1.54. We also cannot examine any current offences other than those outlined in the section 'What we will be examining', even if they relate to sex. These include:

- Other offences relating to prostitution (such as those contained in section 190 of the *Code* or in the *Prostitution Act 2000* (WA)) (the **Prostitution Act**).[53]
- Child exploitation offences.
- Pornography offences and other image-based offences.

1.55. We acknowledge that many, if not all, of the issues mentioned in this section are likely to play a key role in developing a comprehensive response to sexual violence. While we unable to examine these matters, that does not mean they are unimportant or have been forgotten. Many of them are likely to be addressed by the OCVOC in the course of the OCVOC review, or in developing the Western Australian sexual violence prevention and response strategy. If you want to provide information about any of these matters to the OCVOC, you can contact them at sexualviolencestrategy@justice.wa.gov.au.

Our process

1.56. The LRCWA review was announced on 8 February 2022. Following that announcement, the Commission sent a letter to many organisational stakeholders informing them of the review and asking if they wanted to make any preliminary submissions to help guide the review.

1.57. We received 18 preliminary submissions, which are listed in Appendix A. We thank the organisations involved in writing these submissions for taking the time to provide us with such valuable feedback. The submissions have helped us to identify issues, and where relevant we have incorporated the information provided to us into the Discussion Papers. We note, however, that we have not come to any preliminary views based on these submissions.

1.58. We have drafted two Discussion Papers which set out the key issues we will be examining in this review. The main foci of this Discussion Paper (**Discussion Paper Volume 1**) are the law of consent and the mistake of fact defence. This Discussion Paper also considers issues relating to objectives and guiding principles, jury directions, special verdicts, and the implementation and monitoring of reforms. **Discussion Paper Volume 2** focuses on the sexual offences that should be included in the *Code* and the penalties that should be set for those offences. We anticipate that Discussion Paper Volume 2 will be published in February 2023.

[53] The Commission notes that it received three preliminary submissions suggesting that section 190 of the *Code* be repealed: Preliminary Submission 3 (Magenta); Preliminary Submission 4 (Darren Kavanagh, WorkSafe Western Australia Commissioner); Preliminary Submission 12 (Sexual Health Quarters). The Commission is unable to make recommendations in this regard.

1.59. While the focus of this review is on sexual offence laws, it is our view that the law cannot be addressed in isolation. It is necessary to understand the environment in which the law operates, and the cultural, structural and systemic factors that contribute to the problems we are trying to address. For this reason, the Commission engaged three legal academics, Professor Heather Douglas and Associate Professors Stella Tarrant and Hilde Tubex, to draft a Background Paper for us. The Background Paper discusses social issues relevant for considering sexual offence laws. It examines the issues from three perspectives: the harmfulness of sexual violence; common misconceptions about sexual violence; and complainants' experiences of the criminal justice system. The paper identifies relevant Western Australian data on sexual offending in each section. Additional Western Australian data is set out in an Appendix to the paper. The Background Paper can be downloaded from the Commission's website.

1.60. In preparing the Discussion Papers, we have also conducted our own research. We have looked at papers and reports on sexual offences that have been produced by law reform commissions and other organisations across Australia and internationally; considered some of the vast academic literature in the area; and examined laws that currently operate in other jurisdictions.

1.61. The Discussion Papers provide an overview of the issues we intend to address in this review and ask various questions for your consideration. In drafting them our aim has been to provide you with enough information to be able to engage in a thoughtful and critical discussion of the key issues. We have not intended to provide a comprehensive analysis of all relevant matters.

1.62. We hope that you will provide us with your thoughts on the issues raised. We have described the process for making a submission below. Please note that we have set a deadline of 17 March 2023 for submissions in relation to Discussion Paper Volume 1.

1.63. Following the publication of the Discussion Papers, we will be conducting consultations with stakeholders in the area, including interested members of the public. Please let us know if you want to be involved in these consultations by emailing us at lrcwa@justice.wa.gov.au or calling us on 08 9264 1600.

1.64. We will also be reviewing the transcript of every sexual offence trial that took place before the District Court in 2019. We will extract data for analysis on issues including: what charges were laid, whether the accused pleaded guilty or not guilty to each charge, the verdict for each charge, the nature of the defence, whether the mistake of fact defence was left to the jury, the nature of the relationship between the accused and complainant, whether the accused or complainant was intoxicated, whether the accused or complainant suffered from a disability, and whether particular legal directions were provided to the jury. Confidentiality undertakings are in place to ensure that no identifying information will be published.

1.65. Our Final Report is due on 1 July 2023. In that Report we will have a more detailed discussion of the issues raised in the Discussion Papers. We will analyse the data we extract from the transcripts, outline the community feedback we receive in submissions and consultations, and make recommendations to the Government. It is up to the Government to decide whether to implement those recommendations.

Making a submission

1.66. Throughout this Discussion Paper we ask several questions. We are hoping that you will tell us your thoughts on these questions. The best way to do so is in writing.

1.67. There is no standard format for making a written submission. You can choose to answer some or all of the questions we have asked. You can also simply tell us your views, or about your experiences, without directly answering any question. Please keep in mind, however, that we are only able to look at sexual offence laws. We cannot consider any of the issues mentioned in the section 'What we will not we be examining'. We are bound to follow any legal requirements, including in relation to mandatory reporting, that operate in Western Australia.

1.68. Please make your submission by 17 March 2023.[54] You can make your submission by:

- **Emailing it to lrcwa@justice.wa.gov.au; or**
- **Posting it to Law Reform Commission of Western Australia, GPO Box F317, PERTH WA 6841.**
- **From 25 January 2023, submitting it to a user-friendly online portal which will guide users through the questions in this Discussion Paper one by one and allow you to submit a tailored response to all or some of the questions. The portal will be available on the Commission's website.**

1.69. Your submission should include your name or organisation. In the Final Report we will publish a list of people and organisations that have made submissions. Please let us know if you do not want to be included in that list.

1.70. You should also tell us if you want your submission to be confidential. If you do not ask for it to be kept confidential, we will treat it as public. This means that we may refer to it in our Final Report.

1.71. If we form the view that a submission that we receive would be relevant to the OCVOC review, we will forward it to the OCVOC. Please advise us if you do not want us to do so.

1.72. If you want to make a submission, but cannot do so in writing, please contact us on 08 9264 1600 to make alternative arrangements. Please let us know if you need an interpreter or other assistance.

1.73. We are aware that the content of documents published under this reference or that participation in consultation may evoke feelings of distress. Support is available from various services, including:

- Sexual Assault Resource Centre Crisis Counselling: 08 6458 1828 or 1800 199 888 (8.30 am – 11.00 pm, 7 days a week).
- 1800Respect: 1800 737 732 (24 hours, 7 days a week).

1.74. Please note that we do not provide legal advice. If you need help with a legal issue, you can contact Legal Aid WA, a community legal centre or a solicitor. In an emergency, or if you or someone you know is in immediate danger, call the police now on 000.

Our guiding principles

1.75. We have tentatively identified six principles to guide our review of sexual offences. These are outlined below. The principles are of equal importance and are not listed in order of priority. We would like to hear your views on whether these principles are appropriate or should be changed in any way.

[54] This is the deadline for submissions to Discussion Paper Volume 1. As noted in 'Our process' above, we anticipate publishing Discussion Paper Volume 2 in Feburary 2023. The submission deadline for Discussion Paper Volume 2 will be outlined in that Discussion Paper.

Principle 1: Sexual offence laws should protect sexual autonomy and bodily integrity

1.76. The sexual autonomy principle provides that the law should protect sexual autonomy. While sexual autonomy is a complex concept, at its core there are two key components:[55]

- People should generally be free to determine what sexual activities they participate in. While there are some exceptions to this (for example, people should not be free to have sex with children), these exceptions must be based on clear and convincing reasons.
- People should be free to refuse to engage in sexual activities at any time for any reason.

1.77. The law should also protect bodily integrity. People should have the right not to have their body sexually touched or interfered with without their consent.[56]

1.78. Each participant to a sexual activity needs to consent to that activity freely and voluntarily. Their consent must be mutual and ongoing. If a person is required to participate in a sexual activity without their consent, or after their consent has been withdrawn, their sexual autonomy and bodily integrity have been infringed. This is wrong and should be taken seriously by the State. It should generally be treated as a crime and the perpetrator should be punished.

Principle 2: Sexual offence laws should protect people who are vulnerable to sexual exploitation

1.79. Some people, such as children, may be particularly vulnerable to sexual exploitation. The protective principle provides that the law should protect such people from being exploited.[57]

1.80. We acknowledge that there is a possibility for conflict between the protective principle and the sexual autonomy principle. For example, the law currently provides that a child of 16 years is capable of consenting to sex. If they wish to consent to a sexual activity, a conflict may arise between:

- The child's autonomy to freely and voluntarily choose to engage in a sexual activity, which points towards allowing the sexual activity; and
- The child's vulnerability to sexual exploitation, which points towards preventing the sexual activity.

Such circumstances need to be carefully assessed, to ensure that an appropriate resolution of this conflict is reached.

Principle 3: Sexual offence laws should incorporate a model of shared responsibility

1.81. The principle of shared responsibility provides that all participants to a sexual activity have a shared responsibility to ensure that the other participants are freely and voluntarily consenting.

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[55] See, eg, K Grewal, 'The Protection of Sexual Autonomy under International Criminal Law' (2012) 10 *Journal of International Criminal Justice* 373, 386; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [3.20].

[56] See, eg, J Herring and J Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) *Cambridge Law Journal* 566, 568; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [4.16].

[57] See, eg, Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [1.28].

Principle 4: Sexual offence laws should be non-discriminatory

1.82. While sexual offences are most often committed by men against women, all people can experience and perpetrate sexual offences. The non-discrimination principle recognises that everyone is equally deserving of the protection and sanction of the law, and requires sexual offence laws to be framed in a gender neutral and non-discriminatory way.

1.83. This includes ensuring that the law offers equal protection to LGBTIQA+ people. Sexual offences should not involve arbitrary distinctions based on sexual orientation or types of sexual practice.

Principle 5: Sexual offence laws should be clear

1.84. While clarity of law is always important, it is especially important in the context of sexual offences given how often people misunderstand the nature of sexual violence and the meaning of consent. People need to be able to clearly understand what consent means, and what they must do to make sure the other person is consenting. They also need to know when they must not engage in a sexual activity.

1.85. It is useful to bear in mind that sexual offence laws have multiple audiences, each of whom will benefit from a clear legal framework:

- People who engage in sexual activities, who need to know what they can and cannot do.
- Police, prosecutors, lawyers, judges and juries, who need to understand when and how to apply the law.
- Educational institutions, who may use the law as a resource to teach people about the meaning of consent and the law of sexual offences.
- The community generally, whose views on permissible and impermissible sexual behaviour may be reflected in and influenced by the legal framework.

Principle 6: The interests of complainants, accused people and the community must all be considered

1.86. When reviewing sexual offence laws, the interests of complainants, accused people and the community should all be considered.

1.87. Laws and procedures should be centred around the experiences of complainants. Complainants should be listened to, provided with support, and treated with respect. Criminal justice processes should be designed to minimise the risk of secondary victimisation, and to result in the conviction and punishment of perpetrators.

1.88. Laws and procedures should also be fair to accused people. Being convicted of a sexual offence has very serious consequences. It can result in a lengthy term of imprisonment as well as a significant amount of stigma. Consequently, people who are accused of sexual offences must have the right to be presumed innocent, the right to silence, the right to have a fair trial, and the right to only be convicted on the basis of reliable evidence. These are all fundamental aspects of our criminal justice system.

1.89. Consideration should also be given to the community's interest in preventing sexual offending, encouraging people to report offences, punishing guilty people, and not convicting innocent people. For example, care should be taken to ensure that procedures do not discourage

reporting or stigmatise and traumatise witnesses, because this 'may result in some offenders escaping apprehension, which may put more members of the community at risk'.[58]

1.90. While these interests are often presented as being in conflict with each other, this is not necessarily the case.[59] They each occupy important positions in the administration of the criminal justice system, and should all be considered in developing a just approach to sexual offending.

2. The Commission has identified six principles to guide its review:

- **Principle 1: Sexual offence laws should protect sexual autonomy and bodily integrity.**
- **Principle 2: Sexual offence laws should protect people who are vulnerable to sexual exploitation.**
- **Principle 3: Sexual offence laws should incorporate a model of shared responsibility.**
- **Principle 4: Sexual offence laws should be non-discriminatory.**
- **Principle 5: Sexual offence laws should be clear.**
- **Principle 6: When reviewing sexual offence laws, the interests of complainants, accused people and the community must all be considered.**

Are these principles appropriate? Are there any other principles that should guide the Commission's review?

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

[59] See, eg, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [24.75].

2. How we currently address sexual offending

Chapter overview

This Chapter looks at how the criminal justice system currently addresses sexual offences. It examines the nature of Western Australia's criminal code, how the criminal justice process is started, how an offence is proved and the criminal trial process. It also defines several terms that are used in the Discussion Paper.

The *Criminal Code*

2.1. In Australia, each State and Territory makes its own criminal laws. The Commonwealth can also make criminal laws in limited areas.

2.2. There are two ways in which criminal laws (offences and defences) can be made:

- They can be made by judges in legal cases. This is known as the **common law.**
- They can be made by Parliament in statutes. This is known as **statute law.** Where a statute does not rely principally on previous common law principles, it is called a **code.**

2.3. Around Australia two different approaches have been taken to criminal laws:

- Some jurisdictions, such as Victoria and NSW, rely on a combination of the common law and statute law. These are known as the **common law jurisdictions**.
- Some jurisdictions, such as Queensland and Tasmania, only rely on statute law. In these jurisdictions the criminal law has been codified in a criminal code and other statutes. These are known as the **code jurisdictions**.

2.4. Western Australia is a code jurisdiction. Most of its criminal offences are set out in the *Code*, although some are set out in other statutes. There are no common law offences other than contempt of court.

2.5. The *Code* is divided into Chapters. Chapter XXXI is titled Sexual Offences and sets out most of the sexual conduct which is classified as criminal in Western Australia. However, some sexual offences are contained in other parts of the *Code* or in other Acts.

Starting the criminal justice process

2.6. The criminal justice process usually starts when possible criminal behaviour is brought to the attention of the police. This may happen when a victim or witness reports the behaviour to the police, or when the police see the behaviour themselves.

2.7. Because sexual violence usually takes place in private, the process for addressing sexual offending usually starts when the person who experienced the violence makes a report (or **complaint**) to the police.

2.8. Once a complaint has been made, the police investigate the matter. At the conclusion of their investigation, they must decide whether there is sufficient evidence to charge a person with one or more offences. To do this, they must consider matters such as the strength and reliability of the evidence gathered, whether that evidence would be admissible in court, and what defences could be raised.

2.9. Where a person is charged with a sexual offence, the case will usually be heard in the District Court of Western Australia. However, some less serious offences can be heard in the Magistrates Court of Western Australia. Matters that are heard in the Magistrates Court are generally prosecuted by the WA Police Force Prosecuting Division. Matters that are heard in the District Court are prosecuted by the Office of the Director of Public Prosecutions (**ODPP**).

2.10. The prosecuting agency must consider whether there is sufficient evidence to proceed with the prosecution. They will consider the same factors considered by the police. They must also consider whether it is in the public interest to prosecute the alleged offender.

Proving an offence

2.11. All criminal offences contain requirements (**elements**) that the prosecution must prove **beyond reasonable doubt** for the accused to be convicted. For example, the offence of sexual penetration without consent has two elements that the prosecution must prove:

- The accused must have sexually penetrated the complainant; and
- The complainant must not have consented to the sexual penetration.[1]

2.12. The prosecution may also need to disprove a defence or excuse that has been raised.[2] For example, the accused may raise the defence of mistake of fact.[3]

2.13. Where the accused wants to raise a defence, they must provide sufficient evidence to demonstrate to the court that there is an issue worth considering. This is known as meeting the **evidentiary burden**.

2.14. If the accused meets the evidentiary burden, the prosecution will usually need to disprove the relevant defence beyond reasonable doubt. For example, if the accused has raised the defence of accident,[4] the prosecution will need to prove beyond reasonable doubt that they did not commit the offence accidentally.

2.15. In rare cases, however, Parliament may specify that the accused needs to prove a defence. Where the accused must prove a defence, they do not need to prove it beyond reasonable doubt. They only need to prove that it was more likely than not. This is known as proving the defence on the **balance of probabilities**.

Sexual offences in common law and code jurisdictions

2.16. In considering possible reforms to our sexual offence laws, it is important to understand the different way in which sexual offences are structured in common law and code jurisdictions.

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1 *Criminal Code Act Compilation Act 1913* (WA) s 325.

2 There is a technical difference between 'defences' (which the accused must prove) and 'excuses' (which the prosecution must disprove). For the sake of simplicity, throughout this Paper we will use the term 'defence' to refer to both.

3 *Criminal Code Act Compilation Act 1913* (WA) s 24.

4 Ibid s 23B.

2.17. In common law jurisdictions, the prosecution must prove that the accused had a specific mental state as part of the offence. For example, in Victoria (a common law jurisdiction) the offence of rape requires proof that:

- The accused sexually penetrated the complainant;
- The complainant did not consent to the sexual penetration; and
- The accused did not reasonably believe the complainant consented (the mental state requirement).[5]

2.18. The specific mental state element of the current Victorian law is a statutory modification to the common law, which requires the prosecution to prove that the accused intended to sexually penetrate the complainant knowing they were not consenting to the act.

2.19. By contrast, sexual offences in code jurisdictions do not usually contain a mental state requirement.[6] They only require proof that the accused committed the relevant conduct (for example, sexual penetration) and (if relevant) that the complainant did not consent to that conduct.[7]

2.20. The accused's mental state may, however, be relevant to the defences that are raised in code jurisdictions. For example, the accused's belief that the complainant consented may be relevant to the mistake of fact defence.[8]

2.21. This distinction between common law and code jurisdictions should be kept in mind when addressing the questions raised in the Discussion Papers. This is because many of the issues that have been raised in the literature and in other jurisdictions relate to the common law approach to sexual offences. They may have less relevance to a code jurisdiction such as Western Australia.

The trial and sentencing process

2.22. Where an accused person has been charged with a sexual offence, they may choose to plead guilty. This happens in a large percentage of cases.[9] Where an offender pleads guilty there is no trial. Instead, there is a sentencing hearing in which a **judicial officer** (a magistrate or judge) determines the penalty to impose (see below).

2.23. Where the accused does not plead guilty, a trial will be held. Western Australia has an adversarial system, where the trial is a contest between the state and the accused person. The state is represented by the prosecution, and the accused is usually represented by defence counsel (the **defence**).[10] The complainant is not a party to the proceedings. They are a witness, who will give evidence about the charged offence(s).

2.24. Cases that are heard in the Magistrates Court are decided by a magistrate. Cases that are heard in the District Court are generally decided by a jury.[11] A jury must generally be

5 *Crimes Act 1958* (Vic) s 38.

6 The one exception is the NT, which includes a mental state requirement as part of its sexual offences: see *Criminal Code Act 1983* (NT) ss 192(3)-(4A); 43AK (the **NT Code**).

7 While a lack of consent is relevant to many sexual offences, there are some sexual offences where this does not need to be proven. These include sexual offences against children.

8 *Criminal Code Act Compilation Act 1913* (WA) s 24.

9 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022), Appendix, Fig 16.

10 The accused can represent themselves. Where this occurs, they are called self-represented litigants.

11 It is possible to apply for a matter to be determined by a judge rather than a jury. However, this is very rare.

comprised of not less than 12, and not more than 18, jurors.[12] The magistrate or jury must decide whether the prosecution has proven the offence(s) charged by proving each of the elements of the offence beyond reasonable doubt. Their decision must be based solely on the evidence heard during the trial.

2.25. District Court matters are presided over by a judge. The role of the judge is to make sure the trial is conducted according to law. They will make decisions about the evidence that may be admitted into court, ensure that proper procedures are followed and direct the jury about its role and the law it must apply in deciding its verdict. If the accused is convicted, the judge will determine their sentence.

2.26. The trial starts with the prosecution outlining its case to the magistrate or jury. The defence may then do the same. The prosecution will then call all of its witnesses, including the complainant, to give evidence. The defence will usually cross-examine the witnesses. The prosecution may re-examine its witnesses, to clarify any evidence that they gave during cross-examination. Once all of the prosecution witnesses have been called, the prosecution closes its case.

2.27. The defence may then open its case. If it did not outline its case at the start of the trial, it may now do so. It can then call its witness, including the accused.[13] The defence does not have to call any witnesses and the accused does not have to give evidence. No adverse inference may be drawn by the jury against the accused because they did not give evidence. The prosecution can cross-examine the accused and any witnesses that are called, and the defence can re-examine them. Once the defence has called all of its witnesses, it closes its case.

2.28. The prosecution and defence then review their cases in closing addresses. In jury trials, the judge then sums up the parties' cases, instructs the jury about the relevant law which the jury must apply in considering its verdict, and identifies the issues it must consider. This is known as a **jury direction**.

2.29. The magistrate or jury will then consider all of the evidence they have heard and determine their verdict. They will generally have two verdicts to choose from: guilty or not guilty. Where the defence of insanity has been raised, they may also give a special verdict of not criminally responsible on account of unsoundness of mind.[14] If the judge is of the opinion that the proper sentence or order to be imposed on an accused if convicted may depend upon a specific fact, the judge may require the jury to give a special verdict about that fact.[15] This is, however, rare.

2.30. In District Court jury trials, the jury must generally reach a **unanimous verdict** in order to convict an accused. However, if a jury has been deliberating for more than three hours the judge may allow the jury to deliver a verdict on which at least 10 of them agree (a **majority verdict**).[16] Jury deliberations are confidential.[17]

2.31. Where the accused is convicted, the judge or magistrate must determine the **sentence** to impose. The jury plays no role in sentencing. The maximum penalty for the relevant criminal offence will be set out in the statute. This penalty is reserved for the worst cases. In most cases a lesser penalty will be imposed.

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12 *Juries Act 1957* (WA) s 18.

13 While the defence can call the accused to give evidence, in many cases it will choose not to do so.

14 *Criminal Procedure Act 2004* (WA) s 113(1).

15 Ibid s 113(2). We consider special verdicts in detail in Chapter 7.

16 Ibid s 114.

17 *Juries Act 1957* (WA) ss 56B-56D.

2.32. It is up to the judge or magistrate to decide what penalty to impose, taking into account the principles set out in the *Sentencing Act 1995* (WA) and in sentencing law. To help them determine the appropriate sentence there will be a plea in mitigation in which the prosecution and defence present them with relevant information. After receiving that information, the judge or magistrate will sentence the accused, explaining the reasons for their decision.

2.33. Because most sexual offence cases are heard in the District Court, throughout the Discussion Papers we will refer solely to judges and juries (unless there is a reason to specifically refer to magistrates). However, many of the matters raised will equally apply to magistrates.

3. Should the *Code* specify objectives or guiding principles?

Chapter overview

This Chapter considers whether the *Criminal Code* should contain any objectives or guiding principles. It outlines the primary purpose of objectives and guiding principles and describes their current use in sexual offence laws around Australia. It discusses the arguments for and against specifying sexual offence-specific objectives and guiding principles. It considers what objectives or guiding principles could be included in the *Criminal Code* and how they could be framed.

Objectives and guiding principles

3.1. In passing legislation, the Parliament will sometimes include an objectives or purposes provision which 'explicitly states the social, economic or political objective or goal that is sought to be achieved' by the whole or part of an Act.[1] For example, section 3(1) of the *Public Health Act 2016* (WA) sets out 10 objectives of that Act, which include:

- To promote and improve public health and wellbeing and to prevent disease, injury, disability and premature death.
- To protect individuals and communities from diseases and other public health risks and to provide, to the extent reasonably practicable, a healthy environment for all Western Australians.
- To promote the provision of information to individuals and communities about public health risks.
- To encourage individuals and communities to plan for, create and maintain a healthy environment. …

3.2. Objectives provisions are generally used for one or more of the following reasons:

- *Communication reasons*: to make the basic purpose of a regime clear to a reader before they get into the detailed provisions, so as to help them understand and apply the legislation.
- *Signalling reasons*: to set the direction of a regime and often to signal a change in the high-level policy approach.
- *Concrete administrative or legal reasons*: either, at a high level, to set a basis for implementing, monitoring, and assessing the performance of a regime or, at a more micro-level, to form a basis for statutory criteria or tests for discretions under a regime.

[1] D Berry, 'Purpose Sections: Why they are a Good Idea for Drafters and Users' (2011) 2 *The Loophole* 49, 49.

- *Interpretative reasons*: To guide the interpretation of the legislation.[2]

3.3. Parliament may also (or alternatively) set out principles which should guide the interpretation or application of the whole or part of an Act. For example, section 3(2) of the *Public Health Act 2016* (WA) sets out five principles to which 'regard must be had' in pursuing the objectives set out in section 3(1). These include:

- The sustainability principle: Ensuring that decisions and actions not only benefit people today, but do not have adverse consequences for future generations.
- The precautionary principle: Where there is limited scientific evidence about the nature of a threat, erring on the side of caution to protect public health.
- The principle of proportionality: Making decisions and responses which are proportionate to the public health risk.

3.4. While guiding principles provisions may be used for the same reasons as objectives provisions, their main focus is on providing guidance to judicial officers or other decision-makers about the interpretation or application of the (relevant part of the) Act. They 'set out, in legal terms, high-level statements of core policy aims or general underlying values that affect how the legislation should be interpreted and applied'.[3]

3.5. It is important to note that while objectives and guiding principles provisions can be used as an aid to interpreting the words of legislation,[4] such provisions cannot override clear statutory language. Their use as an interpretive aid is limited to helping resolve any uncertainty or ambiguity.[5]

3.6. Objectives and guiding principles differ from statutory jury directions (which are discussed in Chapter 6). Statutory jury directions are directly targeted at the jury: they set out matters that a judge must tell the jury about in specific circumstances. By contrast, the jury is not the main target of objectives and guiding principles provisions. While a judge may, in appropriate cases, bring a relevant objective or guiding principle to the jury's attention – and may be mandated to do so by a related statutory jury direction – such provisions are targeted at all potential users of the relevant legislation. In this regard, Berry defines users of legislation as people:

> who either need or wish to consult particular legislation in order to find out how it affects either themselves or other people. For example, …. a police officer will need to consult the relevant provisions of statutes relating to the criminal law and the law of evidence, in particular those relating to powers of arrest and other enforcement powers. A law student who is studying trade practices or consumer protection law will want to consult the relevant legislation relating to trade practices or consumer protection. A judge who is hearing a case involving the interpretation of a particular statute will need to consult the statute and so on. The term refers not only to real users but also to anyone who is looking for a particular legislative provision and to anyone who wants to try to understand the provision or simply wants to read it.[6]

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2 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines: Supplementary Material: Designing Purpose Provisions and Statements of Principle* (Legislation Design and Advisory Committee (NZ), 2021) 1. Available at http://www.ldac.org.nz/guidelines/supplementary-materials/designing-purpose-provisions-and-statements-of-principle/.

3 Ibid 6.

4 See, eg, *Russo v Aiello* (2003) 215 CLR 643.

5 See, eg, *S v Australian Crime Commission* (2005) 144 FCR 431.

6 Berry, 'Purpose Sections: Why they are a Good Idea for Drafters and Users' (2011) 2 *The Loophole* 49, 61.

3.7. At present, the *Code* does not include any objectives or guiding principles, either generally or specifically in relation to sexual offences. In this Chapter we consider whether it should specify any sexual offence-specific objectives or guiding principles.

The use of objectives and guiding principles in sexual offence law

3.8. Victoria was the first Australian jurisdiction to legislate sexual offence-specific objectives. The *Crimes Act 1958* (Vic) (the **Victorian Act**) specifies that the objectives of its sexual offence laws are:

> a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and
>
> b) to protect children and persons with a cognitive impairment or mental illness from sexual exploitation.[7]

3.9. Victoria was also the first Australian jurisdiction to legislate sexual offence-specific guiding principles. The Victorian Act states:

> It is the intention of Parliament that in interpreting and applying [the sexual offence provisions], courts are to have regard to the fact that—
>
> a) there is a high incidence of sexual violence within society; and
>
> b) sexual offences are significantly under-reported; and
>
> c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment or mental illness; and
>
> d) sexual offenders are commonly known to their victims; and
>
> e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.[8]

3.10. These objectives and guiding principles were added to the Victorian Act following the Victorian Law Reform Commission's (**VLRC**) review of sexual offence laws in 2004.[9] The VLRC's reasons for recommending the inclusion of these provisions were as follows:

> - The criminal law has both a regulatory and an educative function. It should emphasise that people have a right to make decisions about their sexual activity and to choose not to engage in sexual activity. The [guiding principles] clause will ensure that the provisions of sexual offences laws are interpreted consistently with the goals of the legislation.
>
> - A statement of [guiding principles] will give added weight to any directions or instructions that a judge gives to the jury. The judge and jury can refer to the principles to shed light on where any ambiguity may exist in the interpretation of particular sections.
>
> - Sexual assault continues to be under-reported, and the serious social harm of sexual assault has only recently begun to be given the recognition that it deserves. The unique nature and context of sexual assault should be clearly stated by the

7 *Crimes Act 1958* (Vic) s 37A.
8 Ibid s 37B.
9 Victorian Law Reform Commission, *Sexual Offences* (Final Report, 2004).

> legislature, so that this underwrites the interpretation of the particular provisions in the legislation.[10]

3.11. In their 2010 joint review of family violence laws, the Australian Law Reform Commission (**ALRC**) and the New South Wales Law Reform Commission (**NSWLRC**) recommended adoption of the Victorian approach.[11] The Report noted that:

> Statements of objectives and guiding principles can perform an important symbolic and educative role in the application and interpretation of the law, as well as in the general community. While much more is required to change culture, such statements provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and provide a benchmark against which to assess the implementation of the law and procedure.[12]

3.12. While the ALRC and NSWLRC were largely satisfied with the content of the Victorian objectives and guiding principles, they recommended the following minor amendments be made:

- The guiding principles should also state that 'sexual violence [within a family] constitutes a form of family violence'; and
- The principle which refers to the fact that a significant number of sexual offences are committed against women, children and other vulnerable persons should specifically include a reference to 'people from Indigenous and culturally and linguistically diverse backgrounds'.[13]

3.13. These recommendations were not acted on, and Victoria remained the only Australian jurisdiction with sexual offence-specific objectives or guiding principles for many years.

3.14. In 2020 the issue was again addressed by the NSWLRC in its Report on *Consent in Relation to Sexual Offences*.[14] This time, the NSWLRC did not recommend adopting the broad Victorian approach. While it acknowledged the importance of the matters addressed in the Victorian provisions, it was of the view that most of those matters could be addressed through jury directions.[15] Instead, it thought that the objectives section should simply focus on 'the communicative model of consent that underpins the NSW approach to consent and knowledge of non-consent'.[16] Consequently, it made the following recommendation:

> The *Crimes Act* should state that an objective of the new Subdivision is to recognise the following principles of the communicative model of consent:
>
> (a) every person has a right to choose whether or not to participate in a sexual activity
>
> (b) consent to a sexual activity is not to be presumed, and

[10] Victorian Law Reform Commission, *Sexual Offences* (Interim Report, 2003) [8.88].
[11] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) Recs 25-8 and 25-9.
[12] Ibid [25.199].
[13] Ibid.
[14] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020).
[15] Ibid [4.22].
[16] Ibid [4.34].

(c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.[17]

3.15. This recommendation was accepted by the NSW Parliament, and these objectives have been added to the *Crimes Act 1900* (NSW) (the **NSW Act**).[18] They apply to the part of the Act that is about consent and knowledge of consent.[19] A virtually identical provision has also been added to the *Crimes Act 1900* (ACT) (the **ACT Act**).[20]

3.16. The objectives in the Victorian Act have recently been amended.[21] The existing provision has been modified so that it is expressed in gender neutral terms. It also makes it clear that people have the right to choose to engage in sexual activities (as well as to choose not to).[22] In addition, the following objective has been added:

(ab) to promote the principle that consent to an act is not to be assumed—that consent involves ongoing and mutual communication and decision-making between each person involved (that is, each person should seek the consent of each other person in a way and at a time that makes it clear whether they consent).[23]

Arguments in favour of specifying objectives and/or guiding principles

3.17. The discussion above reveals five main arguments which have been made in support of the legislative inclusion of sexual offence-specific objectives or guiding principles:

- They can help ensure that the law is applied and interpreted consistently, and in accordance with the goals of the legislation.
- They can play an educative role, helping to address common misconceptions about sexual offending. In this regard, it has been noted that community organisations often refer to the law when delivering consent education. It has been suggested that a 'clear statement of principles in legislation would assist educators to explain the purpose of the law of consent and how it operates'.[24]
- They can affirm Parliament's commitment to the underlying principles. This 'may provide an important symbolic statement about the nature of such violence, the community's lack of tolerance for such violence, and the response of the law'.[25] This may help create a culture of respect.
- They can enhance the weight of any directions the judge gives to the jury about the specified matters.

17 *Crimes Act 1900* (NSW) Rec 4.3.

18 Ibid s 61HF.

19 Ibid Subdivision 1A.

20 *Crimes Act 1900* (ACT) s 50A.

21 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 6. These changes have not yet commenced operation.

22 The revised section 37A(a) will state: 'to uphold the fundamental right of every person to make decisions about their sexual behaviour and to choose whether or not to engage in sexual activity'.

23 *Crimes Act 1958* (Vic) s 37A(ab), amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 6.

24 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [4.12].

25 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [25.189].

- They can provide a benchmark against which to measure the effectiveness of the law.

3.18. In relation to the first-mentioned point, it is useful to note that the Victorian objectives and guiding principles have been used to help interpret the Victorian sexual offence provisions.[26] For example, in *DPP v Yeong (A Pseudonym*) it was noted that the text of the Victorian rape and consent provisions[27] gives rise to:

> two alternative constructions. On the one hand, is a narrow construction, reflecting the common law, in which there will be free agreement to the penetration if the person agrees that penetration can occur and the person understands the nature and sexual character of the act. On the other, is a broader conception of 'free agreement' that reflects a capacity to make an informed decision as to whether or not sexual activity should take place and the conditions on which it does so.[28]

3.19. The majority of the Victorian Court of Appeal relied on the objectives set out in section 37A of the Victorian Act, along with the text of the relevant provisions, to conclude that the broader conception was the correct construction.[29]

3.20. It has also been argued that an objectives provision is good for users of legislation because:

> it provides a beacon to guide them through the substantive provisions of the statute. It provides them with a context within which they can engage with those provisions… A statute user who is aware of the objects that the statute is intended to achieve is better able to understand the means by which those objects are to be attained. Furthermore, an understanding of the totality of what a statute is seeking to do helps users to recognise the significance of the parts of the statute both in relation to the law as a whole and in relation to one another…
>
> In so far as users are decision makers, a purpose section of a statute provides them with a yardstick or benchmark to which they can (and indeed should) refer when making decisions under the statute. A decision maker who makes a decision under the statute without taking into account its purpose will be liable to have the decision questioned by judicial review or, in the case of a judicial decision, by appeal to a superior court.[30]

3.21. In addition, Western Australian courts are required to interpret statutory provisions in a manner that is likely to promote the purposes or objects of the relevant statute.[31] It has been argued that the imposition of this requirement makes it 'inexcusable not to include a section that expressly states the purposes or objects of the statute'.[32]

Arguments against specifying objectives and/or guiding principles

3.22. In 2020, the Queensland Law Reform Commission (**QLRC**) considered whether sexual offence-specific objectives or guiding principles should be added to the *Criminal Code Act 1899* (Qld) (the **Queensland Code**). It did not recommend their inclusion for three main reasons.

3.23. First, it was concerned that this could create problems rather than solve them:

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26 See, eg, *Clarkson v The Queen* [2011] VSCA 157; *DPP v Yeong (A Pseudonym)* [2022] VSCA 179.

27 *Crimes Act 1958* (Vic) ss 34C and 38.

28 *DPP v Yeong (A Pseudonym)* [2022] VSCA 179, [88].

29 Ibid [43], [89] (Niall JA and T Forrest JA).

30 Berry, 'Purpose Sections: Why they are a Good Idea for Drafters and Users' (2011) 2 *The Loophole* 49, 61.

31 See *Interpretation Act 1984* (WA) s 18.

32 Berry, 'Purpose Sections: Why they are a Good Idea for Drafters and Users' (2011) 2 *The Loophole* 49, 62.

> If provisions similar to those in Victoria were to 'govern' the interpretation of offence provisions in Chapter 32 of the Criminal Code, it is unclear how they could or would operate without potentially creating interpretive difficulties and introducing irrelevant considerations into the jury's function to decide the guilt of a defendant and to return a verdict on the evidence. They might create ambiguity rather than resolve it.[33]

3.24. Secondly, it was not persuaded that such provisions were necessary. It was of the view that the law itself should be clearly expressed in the Queensland Code. There should be no need to rely on general contextual information or aims to interpret its offence provisions.[34] This view can be seen to be a reflection of the principles of a rules-based approach to criminal law. This is that a jurisdiction's criminal laws are a comprehensive body of rules that set out in detail the rules that establish the obligations of persons within that jurisdiction. They are precisely drafted to give advance notice of the standards to which there must be adherence. The prescriptive rules reduce potential for bias or arbitrariness in their interpretation and application.

3.25. Thirdly, it was not convinced that such provisions would help the jury to perform its role.[35] In this regard, it argued that a 'properly directed jury is tasked with the duty to consider and weigh the evidence in proof of those elements and should not be distracted by "principles" that do not bear on the evidence in that case'.[36]

3.26. In its recent report on sexual violence, the Queensland Women's Safety and Justice Taskforce (the **Queensland Taskforce**) also did not recommend the inclusion of sexual offence-specific objectives or guiding principles, but for a very different reason. It was concerned about how such objectives or guiding principles would fit within the structure of the Queensland Code:

> Unlike Victoria, Queensland's criminal law is codified and the adoption of 'principles' into some chapters of the *Criminal Code* and not others would be inconsistent with the design intent of Queensland's codified criminal law. It could lead to confusion in statutory interpretation.[37]

3.27. The Queensland Taskforce instead suggested including the relevant information in a sexual assault bench book or a training program for lawyers and judicial officers.[38] The Western Australian *Code* is very similar to the Queensland Code, and so may raise similar concerns to those raised by the QLRC and the Queensland Taskforce.

3.28. Various other arguments have also been made against enacting sexual offence-specific objectives or guiding principles, including:

- If the jury's attention is drawn to a relevant objective or guiding principle, the specified matter may be given undue weight.[39]
- Jury directions which are worded in a way that is consistent with the objectives and/or guiding principles could be seen as pro-prosecution. This could create the appearance that the judge is not impartial and may affect the accused's right to a fair trial.[40]

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33 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [8.98].

34 Ibid [8.101].

35 Ibid [8.102].

36 Ibid [8.99].

37 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 353-4.

38 Ibid 353-4. A bench book is a publication which provides information to judicial officers. We discuss bench books in more detail in Chapter 6.

39 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) 1180, referring to a submission from the Law Society of NSW.

40 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) [283].

- It is the jury's role to make factual determinations. If the judge directs the jury about the type of factual matters included in the Victorian guiding principles, they will be trespassing into the jury's domain.[41]
- Different people may give different weight and meaning to the objectives or guiding principles. This could lead to the inconsistent interpretation and application of the law.
- The inclusion of objectives or guiding principles may make matters more complex or confusing, increasing the possibility of appeals.
- It is unnecessary to specify the types of matters included in the Victorian Act, as these can be included in the Act's second reading speech.
- Criminal laws are not the appropriate place for educative measures. While such measures are important, other means should be used to transmit the relevant information.[42]

3.29. We would like to hear your view on whether the *Code* should include sexual offence-specific objectives and/or guiding principles, and the reasons for your view.

3. Should the *Code* specify objectives and/or guiding principles concerning sexual offending? Why/why not?

Framing of the provision

3.30. If it is decided that the *Code* should include sexual offence-specific objectives and/or guiding principles, it will be necessary to decide which type(s) of provision should be enacted and how the provision(s) should be framed.

3.31. In this regard, it is useful to consider the experience of the NSWLRC in its project on *Consent in Relation to Sexual Offences*. It initially proposed the enactment of a guiding principles provision which was framed as follows:[43]

> **Draft s 61HF Principles to be used in interpreting and applying Subdivision**
>
> Regard must be had to the following principles when interpreting or applying this Subdivision—
>
> (a) every person has a fundamental right to choose whether or not to participate in a sexual activity,
>
> (b) a person's consent to a sexual activity should not be presumed,
>
> (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.[44]

3.32. One of the NSWLRC's aims in framing their proposal in this way was 'to ensure that the proposed principles would guide the interpretation and application of the new Subdivision at

[41] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [283].

[42] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) 1180, referring to a submission from National Legal Aid.

[43] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Draft Proposals, October 2019) [4.1].

[44] Ibid Proposal 4.1.

all stages of the criminal justice process (and not just at trial)'.[45] However, some submissions expressed concerns about the potential legal effect of the principles. For example, the Law Society of NSW argued that they would 'add an unnecessary layer of complexity' to the law. This could 'could lead to longer trials, greater cross-examination, additional jury directions, greater risk of legal error and more appeals'.[46]

3.33. As a result of these concerns, the NSWLRC changed its approach in its Final Report. It recommended that these principles instead be framed as objectives. It stated that this would 'make it clear that an objective of the Subdivision is to recognise core principles of the communicative model of consent'.[47] This was the approach ultimately taken by the NSW Parliament when enacting the provision.[48]

3.34. Some key issues to consider when addressing this issue include:

- Whether the *Code* should include an objectives provision and/or a guiding principles provision.
- Whether the provision should explicitly state its intended target. For example, should it state that the relevant factors must be considered by the judge and/or the jury.
- How the provision should specify its function. For example, should it list factors that a judge 'must take into account', 'have regard to' or 'be guided by'.
- Whether the provision should be accompanied by statutory jury directions which mirror the relevant objectives or guiding principles. Jury directions are addressed in Chapter 6.

4. If the *Code* does specify objectives and/or guiding principles concerning sexual offending, how should the relevant provision(s) be framed?

Content of the provision

3.35. If it is decided that the *Code* should include sexual offence-specific objectives and/or guiding principles, it will also be necessary to determine what the relevant provision(s) should address. This is likely to depend on whether an objectives provision or a guiding principles provision is enacted.

Objectives

3.36. Four objectives have been specified in the Victorian, NSW and ACT Acts:

i. Upholding the right to choose whether or not to participate in a sexual activity. This reflects our first guiding principle for this project: that sexual offence laws should protect sexual autonomy and bodily integrity.

ii. Protecting children and persons with a cognitive impairment or mental illness from sexual exploitation. This reflects our second guiding principle: that sexual offence laws should protect people who are vulnerable to exploitation.

[45] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [4.16].
[46] Ibid [4.17], citing Law Society of NSW, *Submission CO76*, 3.
[47] Ibid [4.15]-[4.19].
[48] *Crimes Act 1900* (NSW) s 61HF.

iii. Recognising that the consent to a sexual activity is not to be presumed. This reflects a communicative model of consent, whereby consent should always be communicated actively, even in an established and ongoing relationship.[49]

iv. Recognising that consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the participants. This also reflects the communicative model of consent.

3.37. The new Victorian provision expands on the final objective, by stating that 'each person should seek the consent of each other person in a way and at a time that makes it clear whether they consent'.[50] This reflects an affirmative model of consent.

Guiding principles

3.38. Victoria is the only jurisdiction to include a guiding principles provision. As noted above, this provision sets out various factual matters to which courts must have regard when interpreting and applying Victoria's sexual offence provisions. These include:

- The prevalence of sexual offending;[51]
- The under-reporting of sexual offending;[52] and
- The circumstances in which sexual offending commonly occurs.[53]

3.39. The ALRC and NSWLRC recommended that the guiding principles should also address the relationship between sexual violence and family violence.[54] This point was emphasised by the Centre for Women's Safety and Wellbeing in its Preliminary Submission, which suggested that the principles should specifically refer to intimate partners:

> The value of including this terminology directly within interpretive principles is that it emphasises that sexual assault is also perpetrated by intimate partners. Women are more likely to be sexually assaulted by an intimate partner than by a stranger or acquaintance. Despite this, intimate partner sexual violence continues to lack public visibility.
>
> There is evidence that the community consistently views intimate partner sexual violence as both less serious and more justifiable than sexual violence by a stranger or acquaintance… Intimate partner sexual offences are worth specifically mentioning because they are unique, as they typically happen in the context of consensual sexual relations before and after the assault, inside patterns of sexual activity that are established and often do not include verbalised consent.[55]

3.40. There are many other factual matters that could also be addressed in guiding principles, including:

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49 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [4.26].

50 *Crimes Act 1958* (Vic) s 37A(ab), amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 6.

51 See, eg, *Crimes Act 1958* (Vic) s 37B(a).

52 See, eg, ibid s 37B(b).

53 See, eg, ibid s 37B(c)-(e).

54 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [25.199].

55 Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 7 (citations omitted).

- The harmfulness of sexual offending. For example, the provision could note the harmful impact that sexual offending has on the health and wellbeing of those who experience it, as well as on their families and communities.
- The various ways in which people may respond to sexual offending. For example, the provision could note that people who experience sexual offending frequently freeze or cooperate with the offender.
- Common misconceptions about sexual offending or consent. For example, the provision could address any of the misconceptions outlined in Part 2 of the Background Paper.[56]

3.41. These suggestions are not comprehensive – there are many other topics that could be addressed in objectives and/or guiding principles. We are interested to hear your views on any matters that should or should not be included.

5. If the *Code* does specify objectives and/or guiding principles concerning sexual offending, what should be included or excluded?

[56] Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022).

4. How should consent be defined?

Chapter overview

This Chapter looks at the law of consent. It provides a history of Western Australia's consent laws and explains the current law. It considers several ways in which consent could be defined or clarified, as well as the possibility of introducing a requirement to communicate consent. It examines various circumstances in which consent may not be present and seeks views on whether they should be listed in the *Code*. It also addresses matters related to the timing of consent, the withdrawal of consent, the scope of the consent provision and its location in the *Code*.

Introduction

4.1. One of the key principles guiding this review is that sexual offence laws should protect sexual autonomy and bodily integrity. This means that people should generally have the right to choose the sexual activities in which they engage and should not be required to participate in sexual conduct without their consent.[1] Non-consensual sexual conduct is wrong and should be criminalised.

4.2. The importance of consent to sexual offence laws has been emphasised by the United Nations Committee on the Elimination of Discrimination Against Women, which has stated that State parties should:

> Ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes … is based on the lack of freely given consent and takes into account coercive circumstances.[2]

4.3. All Australian jurisdictions, including Western Australia, have made consent fundamental to their sexual offence laws. Most sexual offences (other than those involving children or people who lack the capacity to consent) require proof, at a minimum, that (i) the accused engaged in certain sexual conduct; and (ii) the complainant did not consent to that conduct. It is consent that distinguishes lawful and unlawful sexual activity.

4.4. Although there is widespread agreement that consent should play a central role in sexual offence laws,[3] views differ on how consent should be defined. In this Chapter we consider this issue.

History of Western Australia's consent laws

4.5. Prior to 1985, the *Code* did not contain a chapter that specifically focused on sexual offences. Sexual offences were included in Chapter XXII (Offences against morality), Chapter XXX (Assaults) and Chapter XXXII (Assaults on females: abduction). The most serious sexual offence was rape, which in general terms was defined as a man having carnal knowledge[4] of a woman or girl, who was not his wife, without her consent.[5]

4.6. Consent was not defined in this early version of the law: the common law approach to consent was relied upon. Under this approach it was left to the jury to decide whether the complainant had consented, using their ordinary understanding of the term.[6] This could cover a 'wide spectrum of states of mind ranging from actual desire on the one hand to reluctant

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1 As noted in Chapter 1, there are some exceptions to this principle. For example, people should not be free to have sex with children.

2 Committee on the Elimination of Discrimination against Women, General recommendation No 35 on gender-based violence against women, updating general recommendation No 19, UN Doc CEDAW/C/GC/35 (14 July 2017) [29](e).

3 While agreement about the importance of consent to sexual offence laws is widespread, it is not unanimous. For example, Tadros argues that consent is too ambiguous to sit at the heart of a criminal offence, and that it results in too great a focus being placed on the complainant's conduct (V Tadros, 'Rape Without Consent' (2006) 26 *Oxford Journal of Legal Studies* 515). While we acknowledge that there is some force to these arguments, our Terms of Reference assume that lack of consent will be retained as an element of sexual offences that are committed against adults with capacity. The Discussion Paper proceeds on this basis.

4 Carnal knowledge was not defined in the *Code* but was understood to mean sexual penetration.

5 *Criminal Code Act Compilation Act 1913* (WA) s 325 (repealed in 1985).

6 See, eg, *Holman v The Queen* [1970] WAR 2, in which the court's consideration of the meaning of consent was based on the common law approach.

acquiescence on the other'.[7] In Western Australia, this was reflected in the notorious words of Chief Justice Jackson in *Holman v R*, in which his Honour said:

> A woman's consent to intercourse may be hesitant, reluctant, grudging or tearful, but if she consciously permits it (providing her permission is not obtained by force, threats, fear or fraud) it is not rape.[8]

4.7. It can be seen from this comment that the *Code* did specify some circumstances in which rape was committed despite the complainant's consent. These were where the consent was obtained by force, threats or intimidation of any kind, fear of bodily harm, false and fraudulent representations about the nature of the act, or in the case of a married woman, by impersonating her husband.

4.8. In 1983 Michael Murray QC published a review of the *Code* (the **Murray Report**) in which he made various recommendations for reforming the law of sexual offences, including:[9]

- Consolidating the sexual offences into one Chapter of the *Code*.
- Expanding the rape offence to include the non-consensual sexual penetration of men or boys.
- Changing the name of the rape offence to sexual assault, to emphasise that 'what we are concerned with here is the forcible or non-consensual interference with the person of another, rather than with an act of intercourse as a sexual activity which has simply in some way gone wrong'.[10]
- Including a general definition of consent that applies to all non-consensual sexual offences. The definition should 'emphasise that what the law is interested in is a free and voluntary consent given without any form of pressure'.[11]
- Framing the consent provision in a way that makes it clear that the complainant does not consent where their participation is secured by force, threats, intimidation, fear or fraud (rather than suggesting, as the pre-1985 law did, that there is consent in these circumstances, but that an offence is nonetheless committed).
- Broadening the circumstances in which consent is negated to include where it is obtained by any deception or fraudulent means.

4.9. These recommendations were enacted by the *Acts Amendment (Sexual Assaults) Act 1985*, which inserted a new Chapter into the *Code*: Chapter XXXIA – Sexual Assaults. The most serious offence in this Chapter was sexual assault, which was expressed in gender neutral terms.[12] It made it an offence for anyone to sexually penetrate another person without their consent. This included men who sexually penetrated their wives without consent – they were no longer immune from prosecution.

4.10. The Act also added a general definition of consent to the *Code*. Consent was defined to mean 'a consent freely and voluntarily given'.[13] This was stated not to be the case if the consent was 'obtained by force, threat, intimidation, deception or fraudulent means'. The provision also

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7 P Rook and R Ward, *Sexual Offences Law and Practice* (Sweet & Maxwell, 5th ed, 2016) [1.170].

8 *Holman v The Queen* [1970] WAR 2, 6.

9 MJ Murray, *The Criminal Code: A General Review* (Attorney General's Department, Western Australia, 1983) 218-222. Michael Murray QC AM served as a judge of the Supreme Court of Western Australia from 1990-2012.

10 Ibid 219.

11 Ibid 220.

12 *Criminal Code Act Compilation Act 1913* (WA) s 324D (repealed in 1992).

13 Ibid s 324G (repealed in 1992).

made it clear that 'a failure to offer physical resistance to a sexual assault does not of itself constitute consent to a sexual act'.

4.11. Since 1985 there have been various other changes made to Western Australia's sexual offence laws, including moving all the offences to Chapter XXXI and changing the name of the sexual assault offence to 'sexual penetration without consent'. However, the definition of consent remains largely the same. The only substantive change has been the insertion of an additional clause which makes it clear that children under the age of 13 are incapable of consenting. This change was made in response to complaints 'about the pressure put on young girls in sexual abuse cases to make them say that they have consented to the offence'.[14]

The current law

4.12. Section 319(2) of the *Code* currently states:

> 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.

4.13. In the sections below we consider some specific proposals for reform of this provision. However, we would also like to hear your general views on whether any aspects of the current definition give rise to particular concerns or create problems in practice.

6. Do any aspects of the current definition of consent give rise to particular concern or create problems in practice?

Defining consent

4.14. The relevant legislation dealing with sexual offences in all Australian jurisdictions includes a provision which defines or expands upon the meaning of consent. We have set out the various consent provisions in Table 4.1 below. We note that in Victoria the law of sexual offences has recently been amended by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), but that these reforms have not yet commenced operation. Consequently, in Table 4.1 (as well as the other tables included in this Chapter) we have included provisions that relate to both the current Victorian Act and the Act as it will be amended.[15]

[14] Western Australia, *Parliamentary Debates*, Legislative Council, 6 May 1992, 1802-1803.

[15] In the tables we refer to the provisions in the current Victorian legislation as **Vic (current)** and the provisions that will be in the amended legislation as **Vic (new)**. In the text we respectively refer to these as the current and new Victorian Acts or provisions.

Jurisdiction	Meaning of Consent
ACT	Informed agreement to the sexual act that is (a) freely and voluntarily given; and (b) communicated by saying or doing something.[16]
NSW	At the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.[17]
NT & Vic (new)	Free and voluntary agreement.[18]
Qld	Consent freely and voluntarily given by a person with the cognitive capacity to give the consent.[19]
SA	The person freely and voluntarily agrees to the sexual activity.[20]
Tas & Vic (current)	Free agreement.[21]
WA	Consent freely and voluntarily given.[22]

Table 4.1: Australian approaches to defining consent

4.15. It can be seen from Table 4.1 that Western Australia and Queensland simply provide that consent must be freely and voluntarily given and set out some circumstances in which that is not the case. By contrast, all other Australian jurisdictions explicitly define consent in their legislation. In each of these jurisdictions, as well as in some international jurisdictions, consent is defined in terms of an agreement between the participants. For example:

- Victoria and Tasmania define consent as 'free agreement'.
- NSW, NT and SA define consent in terms of free and voluntary agreement. This is the approach that will also be taken in the new Victorian Act.
- The ACT defines consent in terms of the 'informed agreement' of the participants that is freely and voluntarily given.
- Canada defines consent as 'voluntary agreement'.[23]
- England, Wales and Northern Ireland define consent as occurring when a person 'agrees by choice, and has the freedom and capacity to make that choice'.[24]

4.16. One option for reform would be to adopt a similar approach and replace the phrase 'freely and voluntarily given' with a phrase that refers to the agreement of the participants. This was

16 *Crimes Act 1900* (ACT) s 50B.
17 *Crimes Act 1900* (NSW) s 61HI(1).
18 *Criminal Code Act 1983* (NT) s 192(1); *Crimes Act 1958* (Vic) s 36(1), amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
19 *Criminal Code Act 1899* (Qld) s 348(1).
20 *Criminal Law Consolidation Act 1935* (SA) s 46(2) (the **SA Act**).
21 *Criminal Code Act 1924* (Tas) s 2A(1) (the **Tasmanian Code**); *Crimes Act 1958* (Vic) s 36(1).
22 *Criminal Code Act Compilation Act 1913* (WA) s 319(2).
23 *Criminal Code*, RSC, 1985, c C-46 s 273.1(1).
24 *Sexual Offences Act 2003* (UK) s 74; *The Sexual Offences (Northern Ireland) Order 2008* (NI) s 3.

suggested by the Centre for Women's Safety and Wellbeing in its preliminary submission to us.[25]

4.17. Various law reform bodies have recommended referring to agreement in the definition of consent. For example, the Model Criminal Code Officers Committee (**MCCOC**), when developing a national model criminal code for Australian jurisdictions, considered the relative merits of the current Western Australian definition and a definition which refers to agreement. The Committee noted that there was little difference between the two approaches, with both requiring something more than mere submission. However, it ultimately favoured use of the phrase 'free and voluntary agreement' over the phrase 'freely and voluntarily given' for two reasons:

> First, it makes clear that lack of consent is not confined to physical circumstances involving the use of force or violence. Second, it emphasises, by way of the use of the word 'agreement', that consent should be seen as a positive state of mind. Defining consent in positive terms has been a focal point of reform in recent years, on the basis that to do so more properly reflects two objectives of sexual offences law: the protection of the sexual autonomy and freedom of choice of adults.[26]

4.18. For similar reasons, the ALRC and NSWLRC previously recommended that all federal, state and territory sexual offence provisions 'include a statutory definition of consent based on the concept of free and voluntary agreement':[27]

> A definition based on agreement properly reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing both positive and communicative understandings of consent through use of the term agreement.[28]

4.19. In its recent review of consent laws, the NSWLRC recommended that consent continue to be defined in terms of free and voluntary agreement. It noted that many submissions supported the current definition and considered it to reflect a communicative model of consent. In its consultations it found that the definition was 'generally well regarded and understood'.[29] It was of the view that the term 'agreement' emphasises that consent is a positive state of mind and is something to be sought and communicated rather than assumed.[30] It also makes it clear that 'absence of consent is not confined to situations involving the use of force or violence', and that 'evidence of resistance and injury are not required to prove absence of consent'.[31]

4.20. The Queensland Taskforce also recommended that the terminology of agreement be adopted in its 2022 review of sexual offences. While it acknowledged that some people consider the concept of 'giving' consent to be more empowering than 'agreeing', the Taskforce was:

> persuaded by what they heard from so many women all over Queensland: that, in practice, the 'giving' of consent suggests that women and girls are sexual 'gatekeepers'. This makes them liable to be pressured by others to 'give' or perhaps 'give up' their consent. The Taskforce accepted the contentions of these women, and

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25 Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 1.

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

27 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) Rec 25-4.

28 Ibid [25.86].

29 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.12].

30 Ibid [5.15].

31 Ibid [5.16].

> those who work with and support them, that the term 'agreed' was more reflective of modern community standards, which value equality and mutual respect in sexual relationships, and better promotes and upholds those contemporary standards. The Taskforce also concluded that this change to the criminal law would not compromise the right of the accused person to a fair trial.[32]

4.21. Other arguments in favour of using the terminology of agreement include:

- The current provision does not define consent: it simply describes circumstances in which consent will be valid. By contrast, a provision which states that consent means 'free and voluntary agreement' would define the concept in a way that is easy to understand.[33]
- 'Giving' consent is a unilateral action, whereas 'agreeing' to sexual activity implies equality and mutuality.[34] This better reflects a communicative model of consent.
- To reach an agreement about a matter, there needs to be clarity about the type of act to be engaged in, the participants who will engage in the act, and when the act will take place. This level of specificity may not be required in order to 'give' consent.[35]
- An approach based on the participants' agreement will help shift the focus of court proceedings from the complainant (and whether they gave consent) to the conduct of the participants to the agreement.[36]
- It will further the harmonisation of consent laws across Australia.

4.22. However, support for this approach is not universal. In its 2020 review of consent laws, the QLRC considered many of the arguments outlined above but ultimately did not recommend adopting the terminology of agreement. It was of the view that:

- The current definition of consent already reflects a communicative model of consent, in that it requires consent to be 'given' (that is, communicated) to the other person.
- It is appropriate for the law to focus on the complainant's state of mind, as that is the means by which their control over sexual autonomy is respected.
- The introduction of a new term like 'agreement' would not substantially change the operation of the law and may create uncertainty in interpretation.[37]

4.23. In relation to the last point, it should be noted that the Supreme Court of Western Australia has held that 'consent requires, in effect, an agreement as to what it is that is being consented to'.[38] This indicates that although consent is not explicitly defined in terms of an agreement, it is already understood in that way. Consequently, changing the wording of the *Code* provision to refer to agreement may have little effect.

4.24. Other arguments against use of the term agreement include:

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32 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 212.

33 J Duffy, 'Sexual Offending and the Meaning of Consent in the Queensland Criminal Code' (2021) 45 *Criminal Law Journal* 93.

34 Ibid.

35 See submission to Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020).

36 Ibid [5.74].

37 Ibid [5.72]-[5.76].

38 *Saibu v The Queen* (1993) 10 WAR 279, 291.

- The concept of a 'free agreement' is vague and unclear. It does not clarify the form the agreement must take, or the way that it must be manifested.[39] Different people are likely to reach different conclusions about what it means.[40]
- Defining consent in this way does not clearly endorse a positive standard of consent. The definition still centres on the participants' mental states, rather than redefining consent as an act of communication.[41]
- Adopting its use will not shift the focus from the complainant, as it will still be necessary to determine whether the complainant agreed to the sexual activity.
- Due to its similarity with the current approach, it will not result in any cultural change.
- Defining consent in terms of a free, voluntary or informed agreement may confuse the jury.

4.25. In its 2022 review, the Queensland Taskforce noted that it had carefully considered the concern raised by the QLRC that the terminology of agreement could cause confusion. However, it was of the view that 'practitioners and courts would be assisted in this respect by a wealth of jurisprudence from around Australia where this language has been used for some time and without compromising the accused person's right to a fair trial'.[42] In addition, it believed that community education programs could be used to explain the new law to the general public.

4.26. If the term agreement is to be used, it will be necessary to decide how the relevant definition should be phrased. For example, should the words free, voluntary and/or informed precede the word agreement?

4.27. Alternatively, is there a better way to define consent? While it is most commonly defined in terms of an agreement, there may be other ways in which to define it. We would be interested to hear any other suggestions you may have.

7. Should the *Code* define consent? If so, how should it be defined?

Communicating consent

4.28. While the current Western Australian law requires consent to be given, it does not specify the way in which that must be done. Courts have held that while this will usually be done by words or actions, 'in some circumstances, a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour'.[43]

4.29. By contrast, legislation in various jurisdictions, including the ACT, NSW, Tasmania and Victoria,[44] requires the participants to a sexual activity to say or do something to indicate

[39] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) 96.

[40] A Gruber, 'Consent Confusion' (2016) 38 *Cardozo Law Review* 415, 417–418.

[41] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.18]-[3.23].

[42] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 213.

[43] *R v Makary* [2019] 2 Qd R 528 [50]. Although this is a Queensland case, the court was discussing a provision which is identical to that contained in the *Code*.

[44] *Crimes Act 1900* (ACT) s 50B; *Crimes Act 1900* (NSW) s 61HJ(1)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l); *Crimes Act 1958* (Vic) s 36AA(1)(a), amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

consent. This is seen by some people to be an essential component of a communicative model of consent.[45]

4.30. Australian jurisdictions have taken different approaches to legislating the requirement to communicate consent:

- In the ACT it is included as part of the definition of consent. Consent is defined to mean informed agreement to a sexual act that is freely and voluntarily given, and which is communicated by saying or doing something.[46]
- In NSW, Victoria and Tasmania, a failure to say or do something to communicate consent is included in a list of circumstances[47] in which a person is stated not to consent (NSW and Victoria) or not to freely agree (Tasmania) to the sexual act.[48]

4.31. It is important to note that the focus here is on whether the complainant consented to the sexual activity by saying or doing anything (the communicative model of consent). The issue of whether the accused should be required to take steps to find out whether the complainant consented (the affirmative model of consent) is addressed in Chapter 5.

4.32. Various law reform bodies have recommended the enactment of a provision requiring the communication of consent by the complainant. For example, the ACT's Sexual Assault Prevention and Response Steering Committee recently recommended the enactment of a model which requires the complainant to have demonstrated consent in words or action in order for the complainant to have consented to a sexual act.[49] It concluded that:

> An affirmative communicative model of consent, based on the recognition that every person has agency and a right to choose whether to participate in a sexual act, is the most appropriate model [on which] to base laws of consent. In a positive consent model, if a person wishes to engage in sexual activity, they will actively demonstrate their willingness either verbally or through their physical actions. Submission to sexual advances is not enough to demonstrate consent. This indicates a shift away from the belief that a woman not consenting to sexual activity will actively 'fight back' or resist. Not only is a positive consent model more appropriate in recognition of a person's agency and rights to bodily autonomy but it also avoids the risk that a person experiencing a 'freeze' response in fear of sexual assault is assumed to be consenting.[50]

4.33. In reaching this conclusion, the Committee noted that the law is a 'significant mechanism for community education and cultural change'.[51] It was of the view that a communicative model of consent would provide clarity to the community about the bounds of consent. It thought that this would help dispel myths, and thereby 'contribute to the reduction of sexual violence'.[52]

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45 See, eg, R Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296.

46 *Crimes Act 1900* (ACT) s 50B.

47 These lists of circumstances are discussed in the section 'Circumstances in which there is no consent' below.

48 *Crimes Act 1900* (NSW) s 61HJ(1)(a); *Crimes Act 1958* (Vic) s 36(2)(l); *Crimes Act 1958* (Vic) s 36AA(1)(a), amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

49 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) Rec 22. This model was implemented by the ACT Government: see *Crimes Act 1900* (ACT) s 50B.

50 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 78-9. While in this quote the Committee refers to an affirmative model of consent, they are discussing what we have called a communicative model of consent: see paras [1.13]-[1.14] above.

51 Ibid 78-9.

52 Ibid.

4.34. In its review of consent in relation to sexual offences, the NSWLRC similarly recommended the enactment of a provision which states that 'a person does not consent to a sexual activity if the person does not say or do anything to communicate consent'.[53] It provided the following reasons for its recommendation:[54]

- It reinforces the communicative model of consent, by making it clear that if a person does not communicate their consent through words or actions they are not consenting to the sexual activity.
- It will help to address the misconception that a person who does not consent will physically or verbally resist, and that a person who fails to resist is consenting. It makes it clear that passivity or silence does not constitute consent.
- It will offer protection to people who freeze, or who are unable to communicate their lack of consent for other reasons (such as fear of physical or financial consequences).[55]
- It may help people who were silent or who did not actively resist to recognise their experience as non-consensual and empower them to report it to the police.
- It may assist with decisions to charge and prosecute cases in which the complainant did not say or do anything to indicate a lack of consent.
- It may help educate members of the community about the meaning of consent. This could 'help to facilitate a cultural shift around consent, by promoting a standard of behaviour for sexual activity based on mutual communication'.[56]
- It reflects community expectations of the minimum standard of behaviour required of people who wish to engage in sexual activities.
- It will shift the focus of inquiry at trial from whether the complainant resisted, or otherwise demonstrated an absence of consent, to whether the complainant did anything to communicate consent.

4.35. In making this recommendation, the NSWLRC disagreed with stakeholders who had argued that consent is an internal state of mind, which can exist without communication. It considered consent to be 'a communicated state of mind; that is, a permission that is given by one person to another'.[57] It noted that a similar approach has been taken by the Supreme Court of Ireland, which has stated that 'consent is the active communication through words or physical gestures' that the person 'agrees with or actively seeks' the sexual activity.[58]

4.36. While the NSWLRC was of the view that a positive act of communication should be mandated, it did not want to prescribe the form the communication must take. It intended the expression 'does not say or do anything to communicate consent' to be sufficiently broad to cover both verbal and non-verbal communication. It considered this to be important given there is no standard way in which people communicate consent, and that consent to sexual activity is frequently communicated in non-verbal ways. In addition, it acknowledged that communication

53 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 6.2.

54 Ibid [6.26]-[6.57]; Rec 6.2.

55 See also Preliminary Submission 11 (Women's Legal Service WA) 2.

56 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.41].

57 Ibid [6.28].

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

can be contextual. Under its proposed approach, fact finders would be able to consider the specific factual circumstances to determine if there was a communication of consent.[59]

4.37. Other arguments that have been raised in favour of requiring the participants to have actively communicated their consent include:

- It can help remove any ambiguity about whether a participant has consented. This is seen to be a particular concern where there is reliance on a 'subjective interpretation of non-verbal cues as consent'.[60]
- It can help minimise the impact of victim-blaming views and other rape myths.[61]
- It provides better guidance to jurors and may help them perform their role.[62]
- It will have a 'positive social and cultural impact on how we view and value healthy relationships and bodily autonomy'.[63]
- It will bring Western Australia in line with other Australian jurisdictions that have adopted this approach.[64]

4.38. By contrast, in its recent review of consent laws the QLRC did not recommend enacting a requirement that consent be expressed in word or conduct. It was of the view that:

> A requirement of unequivocal and express language or actions before there is consent in law presents difficulty. Such a model would reduce the means by which consent is given for the purposes of the law. It takes no account of variations in the dynamics of relationships.
>
> A reform of this nature would be unlikely to produce any positive outcome in terms of shifting the focus at trial from the words or actions of the complainant to those of the defendant; it would still be necessary to consider whether and in what way the complainant gave an unequivocal and express 'yes'.[65]

4.39. Other arguments that have been made against requiring participants to say or do something to communicate consent include:

- People frequently engage in consensual sexual activities without expressly communicating their willingness to do so in words or actions. Imposing this requirement will unduly criminalise a lot of consensual sexual activities and could lead to injustice.[66]
- It is 'confusing and ambiguous' and open to different interpretations by jurors.[67]

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59 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.31]-[6.34].

60 Preliminary Submission 12 (Sexual Health Quarters) 4.

61 Mason and Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases' (2019) 31 *Current Issues in Criminal Justice* 24.

62 Ibid; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.53].

63 Preliminary Submission 12 (Sexual Health Quarters) 4.

64 Preliminary Submission 4 (Darren Kavanagh, WorkSafe Western Australia Commissioner) 1-2.

65 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.54]-[5.55].

66 D Tuerkheimer, 'Affirmative Consent' (2016) 13 *Ohio State Journal of Criminal Law* 441; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.72].

67 ALA Submission to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.54].

- It will distract jurors from the more important task of determining if the complainant freely and voluntarily consented to the sexual activity.[68]
- It may result in relevant circumstances, such as 'the nature and duration of the relationship between the parties involved in the sexual activity and how that relationship might impact on the ways in which those parties might communicate', being given less weight by the jury.[69]
- It will not reduce the influence of rape myths.[70] This is demonstrated by the continued influence of such myths in sexual offence trials in Victoria and Tasmania, where this approach has been adopted.[71]
- It is unnecessary as jurors can already be told that a lack of resistance does not constitute consent.[72]
- It could lead to extensive cross-examination of the complainant about their conduct, and whether it was done in order to communicate consent. This could include cross-examination about their prior sexual history, and how they have previously communicated consent.[73]
- It will inappropriately shift the onus of proof to the accused to demonstrate that consent had been communicated. In practice, this is likely to require the accused to give evidence.
- The criminal law is an ineffective tool for changing societal attitudes. It would be better to instead focus on educational initiatives about consent.

4.40. The latter three arguments were each acknowledged by the NSWLRC in its Final Report, which responded as follows:

- While a communication provision would require the jury to focus on the complainant's actions at the time of the alleged offence, based on its consultations with practitioners and experts in Tasmania (which already had such a provision) it did not believe that the enactment of such a provision would heighten the scrutiny of complainants at trial.[74]
- Concerns about the onus shifting to the accused to demonstrate communication of consent were misconceived.[75] The prosecution would still have to prove, beyond reasonable doubt, that the complainant did not do or say anything to communicate consent. Where the prosecution presented evidence of a lack of communication, this could be rebutted in various ways by defence counsel without the accused having to give evidence. For example, they could cross-examine the complainant or rely on evidence given by other witnesses.

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68 Ibid [3.68].

69 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.90].

70 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.54].

71 A Powell, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22 *Griffith Law Review* 456; H Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012).

72 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.67].

73 P Rumney, 'The Review of Sex Offences and Rape Law Reform: Another False Dawn?' (2001) 64 *Modern Law Review* 890; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.64]-[3.65].

74 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.49].

75 Ibid [6.53]-[6.57].

- The proposed reforms would provide a useful foundation for educational initiatives, as consent educators commonly draw upon legal concepts and definitions when educating people about giving and seeking consent.[76] In addition, the proposed reform was simply one part of a larger suite of recommended reforms, which included education programs.[77]

4.41. Another consideration which may add weight to the case against introducing a communicative consent provision into the *Code* is that in Western Australia, unlike in non-code jurisdictions and Tasmania, the prosecution does not have to prove that the accused had a subjective intention to do the act which constitutes the relevant sexual offence knowing or being reckless as to whether the complainant consented. Thus, it may be reasoned that there is less emphasis in sexual offence trials held in Western Australia on whether the complainant did or do not communicate their lack of consent. A mischief which the communicative model of consent aims to solve, being undue emphasis on how the complainant communicated their lack of consent, may not be such a problem in Western Australia. There may be problems in how the mistake of fact defence operates in sexual offence trials, but as is discussed in Chapter 5 there are other ways to address these problems than to introduce a communicative model of consent.

4.42. If a provision about the complainant's communication of consent is to be included in the *Code*, there are four issues that should be considered:

- Should the provision require that the complainant 'indicate' consent, as is the case in Victoria,[78] or should it require that they 'communicate' consent, as is the case in NSW and Tasmania?[79] The word 'communicate' was preferred by the NSWLRC, as it explicitly acknowledges the influence of the communicative model of consent.[80]
- Should the provision simply refer to the complainant not saying or doing anything to communicate consent, or should it be framed more broadly? For example, Cossins has argued that the relevant provision should state:

  > The fact that a person froze, or was unable to respond to a sexual act, or did not say or do anything to indicate free agreement in response to a sexual act is enough to show that the act took place without that person's consent.[81]

- Should the provision be included as part of the definition of consent or should it be included in the list of circumstances in which there is no consent?[82] The former approach is taken in the ACT, where consent is defined to mean 'informed agreement to the sexual act that is … communicated by saying or doing something'.[83] The latter approach is taken in Victoria, NSW and Tasmania, which have a separate provision which specifies that there is no consent where a person does not say or do anything to communicate or indicate consent.[84]

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76 Ibid [6.43]-[6.44].

77 Ibid [6.45]-[6.46].

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

79 *Criminal Code Act 1924* (Tas) s 2A(2)(a); *Crimes Act 1900* (NSW) s 61HJ(1)(a).

80 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.30].

81 A Cossins, Preliminary Submission to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [4.78].

82 See the section 'Circumstances in which there is no consent' below for a detailed discussion of the list of circumstances in which there is no consent.

83 *Crimes Act 1900* (ACT) s 50B.

84 *Criminal Code Act 1924* (Tas) s.2A(2)(a); *Crimes Act 1958* (Vic) s.36(2)(l); *Crimes Act 1900* (NSW) s 61HJ(1)(a).

- Should the provision be accompanied by statutory jury directions which mirror the relevant principle? Jury directions are addressed in Chapter 6.[85]

8. Should the *Code* require participants to say or do something to indicate their consent to a sexual activity? If so, how should this requirement be framed?

Clarifying consent

4.43. The *Code* currently contains one provision which helps clarify the meaning of consent: section 319(2)(b) explains that it is not constituted by a mere lack of physical resistance. It would be possible for the *Code* to also address other negative indicators of consent. In this section we address four possibilities: a lack of verbal resistance; consent to other sexual acts; consent to sexual activities on other occasions; and agreements to provide commercial sexual services.

4.44. We note that in its review of sexual offences, the Scottish Law Commission (**Scottish LC**) stated that the value of negative indicators is that they 'challenge stereotypes about situations when people, especially women, are deemed to be giving consent to sexual activity where they do not expressly state their consent'.[86] However, it did not recommend that such indicators be included in Scotland's statutory provisions on consent for the following reasons:

> One problem is in selecting the appropriate indicators. Even in the context of sexual practices in contemporary society, many things do not and should not be held to amount to consent. Picking some, but omitting others, may give rise to the unwelcome risk of an inference of consent in those situations which are not included. Furthermore, the main purpose of indicators of this type is to block the use of inference based on unacceptable stereotypes or social conventions. If the legal system has a role in promoting this goal it might be more appropriately done, as it is in Victoria, by way of jury directions. We also take the view that much can be done, by education and public awareness campaigns, to increase general attitudes and perceptions about situations that do not mean a person is consenting to sex.[87]

Lack of verbal resistance

4.45. The *Code* currently makes it clear that a failure by a person 'to offer physical resistance does not of itself constitute consent to the act'.[88] It has been suggested that the law should also provide that a mere failure to offer verbal resistance does not constitute consent. It has been argued that this reform would:

- Address the common misconception that people who experience non-consensual sexual activity will voice opposition to it.
- Recognise that people commonly freeze out of fear and do not respond verbally.[89]

4.46. Most other Australian jurisdictions address this issue in their legislation. However, they do so in two different ways:

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85 For specific consideration of jury directions on this issue, see paras 6.69-6.71.

86 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.53].

87 Ibid.

88 *Criminal Code Act Compilation Act 1913* (WA) s 319(2).

89 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.48].

- The NSW, ACT and new Victorian Acts include it as a negative indicator, specifying that a person does not consent only because they did not verbally or physically resist.[90]
- The ACT, NT, SA and current and new Victorian Acts include it as a jury directions issue.[91] In the ACT, NT and SA the judge must direct the jury that a person is not to be regarded as consenting only because they did not protest or physically resist.[92] In Victoria the judge may direct the jury that 'people who do not consent to a sexual act may not protest or physically resist the act'.[93]

4.47. If this issue is to be addressed in the *Code*, consideration will need to be given to the best way in which to address it.

Consent to other acts

4.48. The current consent provision in the *Code* is expressed in general terms: it simply explains the meaning of consent, without relating it to a specific sexual activity. It would be possible for the *Code* to make it clear that consent relates to a particular sexual activity, and that consent to one sexual activity does not constitute consent to any other sexual activity. For example, consent to vaginal intercourse does not constitute consent to anal intercourse.

4.49. This issue was addressed by the NSWLRC, which recommended the enactment of a provision which states that 'a person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity'.[94] In making this recommendation the NSWLRC noted that this was probably already the law in NSW, but it considered it important that it be expressly stated for three reasons:[95]

- It can help challenge assumptions that a person who consents to one sexual activity is consenting to any sexual contact.
- It can help communicate to the jury that consent is an ongoing process which often involves the making of multiple decisions during a sexual encounter.
- It can help educate people in the community about consent, including people who may be considering making a complaint but are unsure whether 'the law would treat them as having consented to a particular sexual activity because they consented to a different one'.[96]

4.50. Various other jurisdictions have enacted laws addressing this issue.[97] Two different approaches have been taken:

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90 *Crimes Act 1900* (NSW) s 61HI(4); *Crimes Act 1900* (ACT) s 67(2)(a); *Crimes Act 1958* (Vic) s 36(2), as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

91 Jury directions are addressed in Chapter 6. For a discussion of jury directions on this issue, see paras 6.69-6.71.

92 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C; *Criminal Code Act 1983* (NT) s 192A(1); *Evidence Act 1929* (SA) s 34N(1).

93 *Jury Directions Act 2015* (Vic) s 46(3)(d)(ii); *Jury Directions Act 2015* (Vic) s 47E, as inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48. The new provision adds an example which states that 'The person may freeze and not do or say anything'.

94 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 5.5. This provision has been enacted: see *Crimes Act 1900* (NSW) s 61HI(5).

95 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.51]-[5.59].

96 Ibid [5.55].

97 See, eg, *Crimes Act 1900* (ACT) s 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(5); *Crimes Act 1958* (Vic) s 36(3), as inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5(3); *Sexual Offences (Scotland) Act 2009* (Scot) s 15(2).

- Some jurisdictions have addressed it as part of the definition of consent.[98] For example, the ACT Act states that a person does not consent to an act with the accused person only because they consented to 'another act with the accused person'.[99]
- Some jurisdictions have addressed it as a jury directions matter.[100] For example, in SA the judge must direct the jury that a person is not to be regarded as having consented to a sexual activity merely because 'the person freely and voluntarily agreed to sexual activity of a different kind with the defendant'.[101]

4.51. It should be noted that in NSW the provision about consent to other acts is used to address the issue of non-consensual condom removal (stealthing). After stating the general principle, the provision gives the example of a person who consents to sexual activity using a condom. It states that the person 'is not, by reason of that fact, to be taken to consent to a sexual activity without using a condom'.[102] We address this in more detail in the section 'Stealthing (non-consensual condom removal)' below.

Consent on other occasions

4.52. The *Code* is currently silent about the relevance of the complainant's past sexual activities to consent. By contrast, some jurisdictions make it clear that a person does not consent to a sexual activity with a person simply because they had previously consented to:

- A sexual activity with that person or someone else; or
- A sexual activity of that kind or any other kind.[103]

4.53. The NSWLRC recommended the inclusion of a prior consent provision as it would highlight the fact that 'consent is required for every instance of sexual activity'.[104] It would also address any false assumptions that:

- a person who consents to sexual activity at one time will necessarily consent again in the future, and
- a person who engages in sexual activity with one person will, or is likely to, engage in sexual activity with another person.[105]

4.54. In this regard, it should be noted that while evidence of prior consensual sexual activity will generally be inadmissible in court, it can be admitted in certain circumstances.[106] Where this does occur, there is a risk that 'jurors could reason that a complainant who has had certain experiences might be the "kind of person" who is more likely to consent to the sexual activity in question'.[107] This type of provision aims to deter jurors from reasoning in this way. On the

[98] *Crimes Act 1900* (NSW) s 61HI; *Crimes Act 1958* (Vic) s 36(3), as inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5(3); *Sexual Offences (Scotland) Act 2009* (Scot) s 15(2).

[99] *Crimes Act 1900* (ACT) s 67(2)(b).

[100] Jury directions are addressed in Chapter 6. For a discussion of jury directions on this issue, see paras 6.75-6.76.

[101] *Evidence Act 1929* (SA) s 34N(1)(d)(i).

[102] *Crimes Act 1900* (NSW) s 61HI.

[103] See, eg, ibid s 61HI(6); *Crimes Act 1958* (Vic) s 36(3), as inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5(3); *Crimes Act 1900* (ACT) s 67(2)(b).

[104] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.88].

[105] Ibid [5.83].

[106] *Evidence Act 1906* (WA) s 36BC. Evidence relating to the disposition of a complainant in sexual matters is also generally inadmissible: see ibid s 36BA. See *Bull v R* (2000) 201 CLR 443 on the relationship between sections 36BA and 36BC.

[107] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.85].

other hand, it may be reasoned that this is a matter of common sense which jurors are expected to, and do, bring to their evaluation of the evidence.

4.55. Once again, other Australian jurisdictions have taken different approaches to addressing this issue: NSW addresses it as part of the definition of consent;[108] SA and the NT address it as part of the jury directions on consent;[109] and the ACT and the new Victorian provisions address it as both a definitional matter and a jury directions issue.[110]

Commercial sexual services

4.56. In Western Australia sex work is governed by the Prostitution Act. This Act makes most sex work related activities illegal, although it not illegal for an adult without prescribed convictions to be a sex worker. Despite the various legislative prohibitions related to sex work, people still engage in sexual activities for money. While the general consent provisions apply to such activities, data indicates that people working in the sex industry experience high levels of sexual violence.[111] It has been suggested that this may be a result of the commercial nature of the activity, with people engaging in sex work seen as commodities rather than people, and some clients wrongly believing that 'they have the power to do whatever they like with the women during the bookings given they paid for it'.[112]

4.57. One way to address this issue would be for the *Code* to make it clear how the consent provisions operate when there is an agreement for commercial sexual services. Such an approach has been taken in New Zealand, where section 17 of the *Prostitution Reform Act 2003* (NZ) states:

- Despite anything in a contract for the provision of commercial sexual services, a person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person.
- The fact that a person has entered into a contract to provide commercial sexual services does not of itself constitute consent for the purposes of the criminal law if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service.

4.58. A provision of this nature would offer protection to people who work in the sex industry, by making it clear that the communicative model of consent equally applies to them. They have a right to sexual autonomy and bodily integrity, and should be free to determine what sexual activities they do and do not participate in. Clients have an obligation to ensure, as they do for any sexual activity in which they engage, that all participants are consenting to the relevant sexual activities. If they fail to do so they risk being charged with an offence.

4.59. It may, however, be inappropriate for the *Code* to address a matter relating to sex work, given that it is regulated by the Prostitution Act. It may be preferable for this issue to be addressed

[108] *Crimes Act 1900* (NSW) s 61HI(6).

[109] *Criminal Code Act 1983* (NT) s 192A(c); *Evidence Act 1929* (SA) s 34N(1)(d). Jury directions are addressed in Chapter 6. For a discussion of jury directions on this issue, see paras 6.75-6.76.

[110] *Crimes Act 1900* (ACT) s 67(2)(b); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C(d); *Crimes Act 1958* (Vic) s 36(3), as inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5(3); *Jury Directions Act 2015* (Vic) s 47F, as inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

[111] Quadara, 'Sex Workers and Sexual Assault in Australia: Prevalence, Risk and Safety' (Issues No 8, Australian Centre for the Study of Sexual Assault, 2008).

[112] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) 14.37, quoting Submission 50 (Project Respect).

in the context of a broader review of laws about sex work, which could also consider any legal consequences that may flow where a sex worker breaches a commercial agreement.

Questions about clarifying the meaning of consent

9. Should the *Code* clarify the meaning of consent in any way? For example, should it make it clear that a person does not consent only because they:

- **Failed to verbally resist;**
- **Consented to a different act with the same person;**
- **Had previously consented to a sexual activity with that person or someone else;**
- **Had previously consented to a sexual activity of that kind or any other kind; and/or**
- **Had entered into an agreement for commercial sexual services?**

If so, what matters should be addressed and how should they be addressed? For example, should they be addressed as part of the definition of consent and/or in jury directions?[113]

Circumstances in which there is no consent

4.60. The *Code* currently provides that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'.[114] In this section we consider whether this provision should be reformed in any way. We start by considering whether it is desirable to specify circumstances in which consent is not freely and voluntarily given. We then consider the circumstances (if any) that should be specified. We end by considering the way in which the provision should be framed.

Listing circumstances in which there is no consent

4.61. Legislation in every Australian jurisdiction contains a provision which specifies circumstances which either do not constitute consent or which negate any ostensible consent for the purposes of the relevant sexual offences.[115] These non-exhaustive lists of circumstances are seen to be useful for numerous reasons:[116]

- They provide guidance to police, prosecutors, judicial officers and jurors about the meaning of consent, helping to resolve any legal uncertainties.
- They may make it easier for the prosecution to prove that the complainant did not consent, by confirming that sexual activity is never consensual in certain circumstances. This may encourage the police or prosecution to bring charges in circumstances where they may otherwise be reluctant to do so.

[113] Jury directions are addressed in Chapter 6. In determining whether a matter should be addressed in jury directions, consideration should be given to the general arguments for and against legislating jury directions set out in paras 6.48-6.59.

[114] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

[115] See *Crimes Act 1900* (ACT) s 67(1); *Crimes Act 1900* (NSW) ss 61HE(5)–(8); *Criminal Code Act 1983* (NT) s 192(2); *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Criminal Code Act 1924* (Tas) ss 2A(2)–(3); *Crimes Act 1958* (Vic) s 36(2); *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

[116] See, eg, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.12]-[6.13]; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.24].

- They can help fact finders reach consistent outcomes in similar cases, while allowing for flexibility in unusual cases.
- They can validate the experience of people who have experienced sexual violence, by confirming that a sexual encounter was not consensual. This may encourage them to report their experience to the police.
- They can help educate the community about the types of circumstances in which sexual activity is not permitted and help address any misconceptions they may hold.

4.62. However, some stakeholders consider these lists of circumstances to be unnecessary, given the broad and flexible definition of consent.[117] They have suggested that the focus of a sexual offence trial should be on the question of whether the complainant's consent was freely and voluntarily given, and that these lists may divert attention away from that issue. The NSW Bar Association has argued that the lists 'serve no useful purpose and are potentially misleading'.[118]

4.63. Before considering the possible contents of the list, we are interested to hear your views on whether the *Code* should continue to list circumstances in which consent is not freely and voluntarily given. Further arguments for and against reforming the contents of the list are set out in the section 'Reforming the list of circumstances' below.

10. Should the *Code* continue to list circumstances in which consent is not freely and voluntarily given, such as when it is obtained by force, threat or fraud? Why/why not?

Circumstances to include in the list

4.64. The *Code* currently lists five circumstances in which there is no consent: where it is obtained by force, threat, intimidation, deceit, or any fraudulent means.[119] This is the least exhaustive list in Australia: other jurisdictions list various other circumstances, such as where a participant was asleep or unconscious, or where they held a mistaken belief about the sexual activity that was not induced by another person.

4.65. While the lists differ from jurisdiction to jurisdiction, they cover three types of circumstance:[120]

- Cases where a person lacked capacity to consent (for example, where they were asleep or unconscious).
- Cases where a person lacked relevant information about the sexual activity (for example, where they were defrauded or made a mistake).
- Cases where a person was pressured into participating in the sexual activity (for example, where they were threatened or harmed).

[117] See New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.11].

[118] NSW Bar Association Submission to the New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [4.84].

[119] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

[120] Some jurisdictions also include the fact that the complainant did not communicate consent in their list of circumstances. As other jurisdictions instead treat this as an issue bearing on the fundamental definition of consent, we have addressed it in the section 'Communicating consent' above.

4.66. We examine each of these categories in turn below. We then consider some broad arguments for and against reforming the law in this area. We conclude this section by seeking your views on what should be included in the list.

Lack of Capacity

4.67. It is generally accepted that for a person to be able to consent to an activity, sexual or otherwise, they must have the capacity to do so.[121] While this appears to be the law in Western Australia – for example, it has been held that a person who is unconscious is incapable of consenting[122] – the only capacity-related issue that is explicitly addressed in the *Code's* consent provision relates to children: section 319(2)(c) states that 'a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child'.

4.68. By contrast, all other Australian jurisdictions specifically refer to broader capacity-related issues in their legislation. These provisions fall within the following three categories, which are discussed in turn below:

- General incapacity to consent.
- Sleep and unconsciousness.
- Intoxication.

4.69. It should be noted that the *Code* does contain specific offences for people who engage in sexual activities with certain individuals who lack the capacity to understand the nature of the act or to guard themselves against sexual exploitation.[123] These offences are discussed in Discussion Paper Volume 2.

General incapacity

4.70. Western Australia is the only Australian jurisdiction to limit its reference to incapacity to children. All other jurisdictions have broader provisions which provide that there is no consent where any person (adult or child) is incapable of understanding the nature of the act or of consenting to it for some other reason (see Table 4.4.2 below).

[121] See, eg, J Kleinig, 'The Nature of Consent' in FG Miller and A Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2010) 3.

[122] *Saibu v The Queen* (1993) 10 WAR 279.

[123] *Criminal Code Act Compilation Act 1913* (WA) s 330.

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person does not have the capacity to agree to the act.[124]
NSW	If the person does not have the capacity to consent to the sexual activity.[125]
Qld	If the person does not have the cognitive capacity to give the consent.[126]
SA	If the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing, or if the person is unable to understand the nature of the activity.[127]
NT, Vic (current & new)	If the person is incapable of understanding the sexual nature of the act.[128]
Tas	If the person is unable to understand the nature of the act.[129]
WA	If the person is under the age of 13 years.[130]

Table 4.2: Australian approaches to incapacity to consent

4.71. It is important to note that none of the other jurisdictions' provisions provide that a person is incapable of consenting to sex simply by virtue of having a particular condition or disability (such as a cognitive impairment). Their focus is on the individual's capacity to consent to a particular activity at a specific time. This is consistent with the lists describing circumstances in which consent is not given.

4.72. It is also important to note that none of these provisions require the accused to have caused or induced the incapacity in any way. The focus is simply on the complainant's capacity to consent to the sexual activity at the relevant time.

4.73. On the surface, the provisions listed in Table 4.4.2 appear to fall into two broad categories: those which provide that a person does not consent to a sexual activity if they do not have the capacity to consent; and those which provide that a person does not consent if the person is incapable of understanding the (sexual) nature of the act. It seems, however, that this is a difference of form rather than substance. This is because courts have held that in both cases a person does not consent to a sexual activity if they do not understand:

- The physical nature of the acts that will take place (for example, that their vagina will be penetrated by a penis);
- The sexual character of the acts; or
- That they can refuse to consent to the acts.[131]

[124] *Crimes Act 1900* (ACT) s 67(1)(l).
[125] *Crimes Act 1900* (NSW) s 61HJ(1)(b).
[126] *Criminal Code Act 1899* (Qld) s 348(1).
[127] *Criminal Law Consolidation Act 1935* (SA) ss 46(3)(e)-(f).
[128] *Criminal Code Act 1983* (NT) s 192(2)(d); *Crimes Act 1958* (Vic) s 36(2)(g); *Crimes Act 1958* (Vic) s 36AA(1)(i), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
[129] *Criminal Code Act 1924* (Tas) s 2A(2)(i).
[130] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(c).
[131] See, eg, *R v Morgan* [1970] VR 337; *R v Mobilio* [1991] 1 VR 339; *R v Mueller* [2005] NSWCCA 47.

4.74. There is, however, a distinction in the way the provisions address the cause of the person's incapacity. While most of the provisions do not explicitly refer to a specific cause, the Queensland Code refers to the person's 'cognitive capacity' to consent;[132] and the SA Act refers to people who are unable to consent due to a 'physical, mental or intellectual condition or impairment'.[133]

4.75. The NSW Act previously included a reference to cognitive incapacity. However, the NSWLRC recommended this term be removed. It considered the key issue to be the person's capacity to engage in the relevant sexual activity. As the concept of cognitive incapacity is captured by the more general notion of capacity, it considered this reference to be unnecessary.[134]

4.76. The NSW Act also previously included a reference to age. The NSWLRC recommended that this term also be removed, given that sexual offences against children do not require proof of non-consent in NSW. This is similarly the case in Western Australia, raising questions about the need for a provision which states that children under 13 cannot consent.[135] We are interested to hear your views on whether this provision nonetheless serves a useful role.

4.77. There is also a distinction in the location of the provisions. While most jurisdictions include incapacity in their list of proscribed circumstances, in Queensland the issue is addressed in the definition of consent.[136] The Law Reform Commission of Hong Kong **(Hong Kong LRC**) has also taken the view that capacity should be addressed in the definition of consent, recommending the enactment of a provision that states that a person consents to sexual activity if the person (a) freely and voluntarily agrees to the sexual activity; and (b) has the capacity to consent to such activity.[137]

4.78. A slightly different approach has been taken in Scotland. The *Sexual Offences (Scotland) Act 2009* (Scot) contains a provision that relates to the capacity of a person with a 'mental disorder' (which is defined to mean a person with any mental illness, personality disorder or learning disability[138]) to consent to sexual activities. It provides specific guidance on the circumstances in which such a person should be considered incapable of consenting:

> A mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to do one or more of the following—
>
> a) understand what the conduct is,
>
> b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place),
>
> c) communicate any such decision.[139]

4.79. The Hong Kong LRC recommended adopting the Scottish approach.[140] It was of the view that this approach struck an appropriate balance 'between respect for the right of mentally disordered persons to engage in sexual activity and protecting them from sexual

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[132] *Criminal Code Act 1899* (Qld) s 348(1).
[133] *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e). See also *Crimes Act 1961* (NZ) s 128A(5).
[134] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.66]-[6.75].
[135] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(c).
[136] *Criminal Code Act 1899* (Qld) s 348(1).
[137] Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) Rec 3.
[138] *Mental Health (Care and Treatment) (Scotland) Act 2003* (Scot) s 328.
[139] *Sexual Offences (Scotland) Act 2009* (Scot) s 17.
[140] Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) Rec 4.

exploitation'.[141] By contrast, the NSWLRC did not consider it necessary to define capacity to consent. It was of the view that 'the common law provides adequate guidance on this phrase' (see para 4.73 above) and that a definition 'could unintentionally limit this circumstance'.[142] As Western Australia is a code jurisdiction it may be preferable to define capacity to consent, rather than rely on the common law definition.

Sleep and unconsciousness

4.80. Legislation in most Australian jurisdictions provides that a person does not consent if they are asleep or unconscious.[143] This is not, however, the case in Western Australia or Queensland, where this matter has been left to the courts to address. While courts in both jurisdictions have held that a person who is unconscious is incapable of consenting,[144] the Queensland Court of Appeal has suggested in some circumstances, such as where the participants have an existing relationship, it may be acceptable to commence a sexual activity with a person who is asleep.[145]

4.81. This raises the question of whether it should be permissible for a person to consent in advance to sexual activity occurring while they are asleep or unconscious. For example, a person may ask their sexual partner to wake them up with a sexual act, or they may choose to engage in acts of erotic asphyxiation that result in unconsciousness. This is not currently permitted in any of the jurisdictions which have addressed this issue in legislation.

4.82. In its review of sexual offences, the NSWLRC noted that some of the submissions and survey responses it received supported this approach. It also has some support in the academic literature, where it has been argued that allowing people to consent to sexual activities in advance aligns with the principle of sexual autonomy,[146] and that the resulting acts lack harmfulness and so should not be criminalised.[147] For these reasons, the Scottish LC has previously recommended that the relevant provision should state that a person does not consent 'where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances'.[148]

4.83. By contrast, the NSWLRC rejected this approach. It saw it to be inconsistent with its general approach to the timing of consent, which it recommended must exist at the time of the sexual activity.[149] It also considered there to be strong reasons for treating all sexual activity involving unconscious or sleeping people as non-consensual, noting the high vulnerability of people who are unconscious or asleep. It was of the view that the 'principles of autonomy and freedom of choice require that consent, once given, can be withdrawn', and was concerned that a 'person who initially agrees to certain sexual acts occurring, is unaware of and unable to

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141 Ibid [2.31].

142 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.62].

143 *Crimes Act 1900* (ACT) ss 67(1)(m)-(n); *Crimes Act 1900* (NSW) s 61HJ(1)(d); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(d).

144 *Saibu v The Queen* (1993) 10 WAR 279; *R v Francis* [1993] 2 Qd R 301; *R v Millar* [2000] 1 Qd R 437.

145 *R v Winchester* [2011] QCA 374.

146 J Sealy-Harrington, 'Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent' (2014) 18 *Canadian Criminal Law Review* 119, 144–146.

147 Ibid 140.

148 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) Rec 5(b). This recommendation has not been implemented. The law in Scotland provides that a person is incapable, while asleep or unconscious, of consenting to any conduct: *Sexual Offences (Scotland) Act 2009* (Scot) s 14(2).

149 See 'The timing of consent' below.

modify or withdraw consent in response to a change in circumstances'.[150] Consequently, it recommended that the law explicitly state that a person does not consent to sexual activity if the person is unconscious or asleep.[151] The timing of consent is considered further below.

Intoxication

4.84. It is often the case that one or more of the people involved in acts of sexual violence have consumed alcohol or other drugs,[152] with data showing that at least half of all complainants were intoxicated at the time of the alleged offence.[153] Research indicates that where evidence of a complainant's intoxication is given in rape trials the conviction rate is lower than when they are sober.[154] Various reasons have been suggested for this finding, including that:

- jurors are frequently told to use their common knowledge about intoxication to interpret this evidence, but there may be a wide gap between jurors' understandings of intoxication and what medical research shows, and
- a complainant who was intoxicated at the time of the assault may be viewed as less credible.[155]

4.85. In addition, as noted in the Background Paper, research indicates that people are inclined to ascribe responsibility for sex to an intoxicated complainant, unless there is evidence of other wrongdoing (such as drink spiking) on the part of the accused.[156]

4.86. Legislation in all Australian jurisdictions other than Queensland and Western Australia explicitly addresses the relevance of the complainant's intoxication to consent (see Table 4.4.3 below).

[150] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.90]. See also *Saibu v The Queen* (1993) 10 WAR 279.

[151] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 6.5.

[152] See, eg, L Wall and A Quadara, 'Under the Influence? Considering the Role of Alcohol and Sexual Assault in Social Contexts' (Issues No 18, Australian Centre for the Study of Sexual Assault, 2014). We note that our focus in this section is on the complainant's intoxication. The accused's intoxication may also be relevant to the defence of honest and reasonable mistake of fact. We address this issue in Chapter 5.

[153] See, eg, AD Cowley, '"Let's Get Drunk and Have Sex": The Complex Relationship of Alcohol, Gender, and Sexual Victimisation' (2014) 29 *Journal of Interpersonal Violence* 1258.

[154] See, eg, VE Munro and L Kelly, 'A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales' in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking* (Willan, 2009) ; S Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26 *New Zealand Universities Law Review* 614.

[155] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.79] (citations omitted). See also H Young, '*R v A (J)* and the Risks of Advance Consent to Unconscious Sex' (2010) 14 *Canadian Criminal Law Review* 273.

[156] E Finch and VE Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants' (2005) 45 *British Journal of Criminology* 25, 36.

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person is incapable of agreeing to the act because of intoxication.[157]
NSW & NT	If the person is so affected by alcohol or another drug as to be incapable of consenting.[158]
Qld & WA	Not addressed in legislation.
SA	If the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity.[159]
Tas	If the person is so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required.[160]
Vic (current & new)	If the person is so affected by alcohol or another drug as to be incapable of consenting to the act or withdrawing consent to the act.[161] The new Victorian Act will also include a Note which states that this circumstance may apply where a person 'gave consent when not so affected by alcohol or another drug as to be incapable of consenting'.[162]

Table 4.3: Australian approaches to intoxication and consent

4.87. It can be seen that each of these provisions requires the complainant to have been intoxicated to a certain extent: a person's ability to consent is not negated simply by virtue of intoxication. This reflects the fact that the law is not concerned with circumstances in which a person's sexual inhibitions may have been affected by their intoxication. Its concern is with circumstances in which alcohol or other drugs affect a person's capacity to agree to the relevant activity freely and voluntarily.[163]

4.88. The provisions also do not draw a distinction based on whether the person became intoxicated voluntarily or involuntarily, or whether the intoxication was caused by alcohol or other drugs. All that matters is the extent to which the person was intoxicated. However, there is some variation in the wording of the provisions, with some simply referring to the person's intoxication, and others making it clear that the intoxication may be caused by alcohol or other drugs.

4.89. The NSW provision was enacted at the recommendation of the NSWLRC, which noted that there was widespread support for including this circumstance in the list. In addition, it was of the view that such a provision could help mitigate the influence of misconceptions about intoxication and consent, as well as having 'an educative effect, by emphasising the importance of ensuring that an intoxicated person is capable of consenting before engaging

[157] *Crimes Act 1900* (ACT) s 67(1)(g).

[158] *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Criminal Code Act 1983* (NT) s 192(2)(c).

[159] *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d).

[160] *Criminal Code Act 1924* (Tas) s 2A(2)(h).

[161] *Crimes Act 1958* (Vic) ss 36(2)(e)-(f); *Crimes Act 1958* (Vic) ss 36AA(1)(g)-(h), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

[162] *Crimes Act 1958* (Vic) s 36AA(1)(h), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

[163] See, eg, *R v SAX* [2006] QCA 397.

in sexual activity with them'.[164] It also considered it to be beneficial to make NSW law consistent with the laws of most other Australian states and territories.

4.90. The Queensland Taskforce reached a similar conclusion, noting that research it had undertaken with the community:

> revealed that community members had difficulties with how to navigate sexual consent particularly when alcohol is involved. By being explicit in its intentions, Parliament could assist those who conduct education about consent in schools and the wider community to explain the circumstances where consent does not and cannot exist as including when a person is highly intoxicated … This would likely also be of assistance to jurors.[165]

4.91. By contrast, in its review of consent laws the QLRC did not recommend the inclusion of a provision relating to intoxication. It was of the view that the general requirement that a person have the 'cognitive capacity' to give consent already allows evidence of the complainant's intoxication to be taken into account, and that any amendment 'could introduce confusion and ambiguity into an already settled area of law'.[166]

4.92. The QLRC also noted that two academic stakeholders had raised doubts about the utility of including intoxication in the list of circumstances in which there is not consent, suggesting that any issues would be better addressed by the increased use of expert evidence.[167] The stakeholders referred to a study of rape trials they had undertaken, in which they found that 'evidence of a complainant's intoxication frequently took the form of self-assessment by the complainant, using (understandably) imprecise and colloquial language about how they felt, recollections of how much they had consumed, or answers to a question that asked them to rate their intoxication on a 1–10 scale'.[168] Little guidance was provided to jurors about how to relate this evidence to the legal standard. They concluded that their research suggests that:

> even where legislation identifies complainant intoxication as a factor that may vitiate consent, such provisions may not be entirely effective in achieving their goal: to transform the ways in which complainant intoxication evidence operates in rape trials. In our view it is doubtful whether the suggested wording of a statutory amendment to the *Criminal Code* (Qld) – 'the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual act' – is, on its own, likely to break the nexus between complainant intoxication and assumed consent. The proposal does not address the problems we have identified in our research: imprecision around what intoxication means and the evidence required to establish it, and a tendency to treat relevant intoxication as synonymous with being asleep or unconscious (or very nearly so). Centring the inquiry on incapacity may serve only to consolidate the problematic practice of equating relevant intoxication with being asleep or unconscious. Unfortunately, our research to date suggests that alternative statutory formulations may be no more effective.[169]

4.93. If intoxication is to be addressed in the *Code*, consideration must be given to the way in which it is addressed. Most of the provisions listed in Table 4.4.3 simply require the person to have

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[164] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.82].

[165] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 210.

[166] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.52]-[6.54].

[167] Ibid [6.47]-[6.51].

[168] Submission 40 to Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020), quoted at [6.48].

[169] Submission 40 to ibid, quoted at [6.49].

been so intoxicated that they are unable to consent: they provide no further guidance about the effects the intoxication had on the person's capacity to consent. While some submissions to the NSWLRC review suggested that further guidance should be provided,[170] the NSWLRC did not consider this be necessary. It was of the view that the meaning of this phrase is sufficiently clear, and that it 'allows fact finders to determine whether a complainant is incapable of consenting as a question of fact, based on the evidence and circumstances of the case'.[171]

4.94. A similar conclusion was reached by the Scottish LC, which argued that it is not possible to 'set a test for when a person lacks capacity to consent as a consequence of taking drink or drugs',[172] due to the varying degrees to which a person may become intoxicated:

> A person may become so intoxicated that she falls asleep or becomes unconscious, in which case the particular definition dealing with these scenarios may come into play. At the other end of the scale, taking drink or drugs may lead to someone losing his or her inhibitions and then doing things whilst drunk that he or she would not have done when sober. The drunken activity is nonetheless based on consent, and sexual activity in this situation would be based on consent. But there is also an effect of intoxication that a person's capacity to make decisions, including the capacity to consent to sexual activity, progressively diminishes until it eventually disappears. There is, then, a distinction between intoxication which results in a lack of capacity to consent and intoxication which alters a person's choices but does not deprive him of the capacity to consent. The difficulty lies in applying this distinction in practical settings. On which side of this line any case falls is a matter of its particular facts and circumstances.[173]

4.95. The Tasmanian Code does provide some guidance on this issue, referring to circumstances in which a person is so affected by alcohol or another drug as to be 'unable to form a rational opinion' in respect of the relevant matter.[174]

4.96. As an alternative to the inclusion of intoxication in the list of circumstances that negate consent, where the issue of the effect of the complainant's intoxication is relevant, trial judges could be required to give jury directions of the kind described by the Scottish LC.[175] Some judges would give such a direction without a legislative direction to do so.

4.97. It would also be possible for the *Code* to address the relevance of the complainant's intoxication to the withdrawal of consent. Victoria is currently the only jurisdiction that has a provision specifically on this issue: it provides that a person does not consent if they are so affected by alcohol or another drug as to be incapable of withdrawing consent to the act.[176] The NSWLRC did not recommend the inclusion of such a provision, as it was of this view that this situation was already captured by the general requirement that consent be present at the time of the sexual activity.[177]

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[170] See New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.87].

[171] Ibid [6.87].

[172] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.63].

[173] Ibid [2.63].

[174] *Criminal Code Act 1924* (Tas) s 2A(2)(h).

[175] Jury directions are addressed in Chapter 6. For a discussion of jury directions on this issue, see paras 6.77-6.82.

[176] *Crimes Act 1958* (Vic) s 36(2)(f); *Crimes Act 1958* (Vic) s 36AA(1)(h), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

[177] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.88].

4.98. One final issue that could be addressed in the *Code* is whether it should be permissible for person to consent in advance to having sex whilst extremely intoxicated. Such an approach was proposed by the Scottish LC, which recommended that the relevant provision should state that a person does not consent 'where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of expressing or indicating consent unless consent had earlier been given to engaging in the activity in that condition'.[178] This approach raises broader issues of whether a person must consent at the time of the act, or if they can give consent at an earlier time. The issue of timing is addressed below.

Lack of relevant information

4.99. The second broad category of circumstances in which a person arguably does not consent to a sexual activity is where they engaged in that activity on the basis of incomplete or incorrect information. This may be because they were defrauded or deceived in some way, or it could simply be the result of a mistaken belief.

4.100. While fraudulent behaviour operates to negate consent in many legal contexts, the law has traditionally taken a restrictive approach to this issue in the context of sexual offences. For example, in his leading English treatise of criminal law published in 1883, James Fitzjames Stephen stated that 'where consent is obtained by fraud the act does not amount to rape'.[179]

4.101. Stephen was concerned about the implications of allowing fraud to negate consent, as he made clear when he presided over the first case to fully consider this issue, *R v Clarence* (*Clarence*).[180] In that case the accused had been charged with knowingly infecting his wife with gonorrhoea, which was a fatal disease at the time. The Court rejected the argument that the wife's consent to the sexual activity had been negated by his failure to inform her about his disease. Justice Stephen stated that:

> If fraud vitiates consent, every case in which a man infects a woman or commits bigamy [without informing the woman of the infection or his marriage] … is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled.[181]

4.102. Due to these concerns, the court concluded that consent is only negated by fraud related to the nature of the act or the identity of the participant.[182] The court defined the concept of the 'nature of the act' very restrictively, to refer only to cases in which the person was defrauded about the fact that the act was sexual in nature. Deceptions about other matters, such as a participant's sexual health, were not included.

4.103. This restrictive approach was accepted by the High Court of Australia in *Papadimitropoulos v R* (*Papadimitropoulos*),[183] a case in which the accused tricked the complainant into believing that they were married. The High Court held that consent to sexual penetration merely requires:

[178] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) Rec 5(a).
[179] JF Stephen, *Digest of the Criminal Law* (Macmillan, 3rd ed, 1883) 185.
[180] *R v Clarence* (1888) 22 QBD 23.
[181] Ibid 43.
[182] Ibid 44.
[183] *Papadimitropoulos v R* (1957) 58 CLR 249.

> 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 the consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape.[184]

4.104. In that case, as the complainant understood that she was participating in a sexual activity, her consent was not negated. It did not matter that she only participated in the activity because she thought she was validly married to the accused: that was an antecedent matter which was immaterial to the question of whether or not she had consented to the sexual activity. The Court did note, however, that the accused could be convicted of a less serious offence, such as procuring sexual intercourse by fraud. We consider this offence in Discussion Paper Volume 2.

4.105. The restrictive common law approach to fraud was widely criticised following the Victorian case of *R v Mobilio (Mobilio)*.[185] In that case the accused was a radiographer, who conducted internal vaginal examinations on several patients using an ultrasound transducer. There was no medical value to these scans: they were done solely for the accused's sexual gratification. He was charged with rape, on the basis that the women's consent had been undermined by his deception. He was, however, acquitted on the basis that the complainants understood the nature of the act and the identity of the accused. His deception was about the purpose of the act, which was not a matter covered by the restrictive common law approach. The common law has taken a similarly restrictive approach to fraudulent representations about payment for sexual services[186] and about the use of a condom.[187]

4.106. By contrast, most Australian jurisdictions have enacted provisions which take a much broader approach to the circumstances in which fraud, deception or mistake negate consent (see Table 4.4.4 below). The approaches taken vary widely between jurisdictions.

[184] Ibid 261.
[185] *R v Mobilio* [1991] 1 VR 339.
[186] *R v Linekar* [1995] QB 250.
[187] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person participates in the act because of fraudulent misrepresentation of any fact made by someone else, or because of an intentional misrepresentation by another person about the use of a condom.[188] If the person is mistaken about the identity of the other person.[189]
NSW	If the person participates in the sexual activity because of a fraudulent inducement. A 'fraudulent inducement' is defined to not include a misrepresentation about a person's income, wealth or feelings.[190] If the person participates in the sexual activity because they are mistaken about: the nature of the sexual activity; the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes; the identity of the other person; or that the person is married to the other person.[191]
NT	If the person submits because of a false representation as to the nature or purpose of the act.[192] If the person is mistaken about the sexual nature of the act or the identity of the other person, or if the person mistakenly believes that the act is for medical or hygienic purposes.[193]
Qld	If the consent was obtained by false and fraudulent representations about the nature or purpose of the act, or by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.[194]
SA	If the person is under a mistaken belief as to the identity of the other person,[195] or is mistaken about the nature of the activity.[196]
Tas	If the person agrees or submits because of the fraud of the accused.[197] If the person is reasonably mistaken about the nature or purpose of the act or the identity of the accused.[198]
Vic (current)	If the person is mistaken about the sexual nature of the act or the identity of any other person involved in the act; if the person mistakenly believes that the act is for medical or hygienic purposes; or, if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes.[199]
Vic (new)	If the person engages in the act on the basis that a condom is used, and either before or during the act any other person involved in the act intentionally removes the condom or tampers with the condom, or the person who was to use the condom intentionally does not use it.[200] If the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid. A false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit.[201] If the person is mistaken about the sexual nature of the act or the identity of any other person involved in the act; if the person mistakenly believes that the act is for medical or hygienic purposes; or, if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes.[202]
WA	If the consent was obtained by deceit or any fraudulent means.[203]

Table 4.4: Australian approaches to fraudulent representations and mistaken beliefs

[188] *Crimes Act 1900* (ACT) s 67(1)(i)-(j).

4.107. It can be seen from Table 4.4.4 that the *Code* does not currently refer to mistaken beliefs: it only covers circumstances in which consent was obtained by deceit or any fraudulent means (the **fraud provision**). It has been held that each of these terms connotes dishonesty:

> The essence of deceit, in its ordinary meaning and in the context of the criminal law, is to induce a person to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. The essence of 'any fraudulent means', in its ordinary meaning and in the context of the criminal law, includes conduct which may not be in the nature of deceit, but which can properly be stigmatised as dishonest.[204]

4.108. The Western Australian Court of Appeal has held that this requires proof of six matters:

a) The accused made the alleged representation.

b) The accused intentionally made the alleged representation.

c) The alleged representation was false.

d) The accused knew that the alleged representation was false.

e) The complainant believed that the alleged representation was true.

f) If the alleged representation had not been made, the complainant would not have consented to the accused's alleged indecent act or alleged sexual penetration.[205]

4.109. While the accused needs to have intentionally made the alleged representation, there is no need for the accused to have intended to obtain the complainant's consent by making that representation. The accused's motivation for deceiving the complainant is irrelevant.[206]

4.110. It is not clear whether the provision applies regardless of the nature of the false representation, or whether it is restricted in some way. This matter was considered by the Court in *Michael v The State of Western Australia* (*Michael*),[207] with each judge drawing a different conclusion:

189 Ibid s 67(1)(h).
190 *Crimes Act 1900* (NSW) ss 61HJ(1)(k), 61HJ(3).
191 Ibid s 61HJ(1)(i)-(j).
192 *Criminal Code Act 1983* (NT) s 192(2)(g).
193 Ibid ss 192(2)(e)-(f).
194 *Criminal Code Act 1899* (Qld) ss 348(2)(e)-(f).
195 *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g).
196 Ibid s 46(3)(h).
197 *Criminal Code Act 1924* (Tas) s 2A(2)(f).
198 Ibid s 2A(2)(g).
199 *Crimes Act 1958* (Vic) ss 36(2)(h)-(k).
200 Ibid s 36AA(1)(o), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
201 *Crimes Act 1958* (Vic) ss 36AA(1)(m), 36AA(2), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
202 *Crimes Act 1958* (Vic) ss 36AA(1)(j)-(n), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
203 *Criminal Code Act Compilation Act 1913* (WA) s 319(2).
204 *HES v The State of Western Australia* [2022] WASCA 151, [120] (Buss P); see also [217] (Mitchell JA).
205 Ibid [131] (Buss P); see also [137] (Mazza JA), [243] (Mitchell JA).
206 Ibid.
207 *Michael v State of Western Australia* (2008) 183 A Crim R 348.

- Steytler P adopted a broad interpretation, suggesting that the provision covers consent obtained by any fraudulent representation.
- EM Heenan AJA adopted a restrictive interpretation, stating that the provision only applies to consent obtained by fraudulent representations about the nature or purpose of the activity, the identity of the participants, or that the participants are married to each other.[208]
- Miller JA rejected EM Heenan AJA's restrictive interpretation but did not express a view about the precise scope of the provision.

4.111. This issue was considered again in the recent case of *HES v The State of Western Australia* (*HES*).[209] However, once more the judges did not clearly agree on the scope of the provision:

- Buss P adopted a broad interpretation, holding that in enacting the relevant provision Parliament had 'intended to reform significantly the strict approach to the vitiation of consent' previously taken, and to 'expand significantly the circumstances in which consent would be vitiated'.[210]
- Mitchell JA noted the conflicting views taken in *Michael* but did not consider it necessary to deal with the issue.[211]
- Mazza JA did not address the matter.

4.112. Although in *Michael* President Steytler was of the view that the provision covered any fraudulent representation, he expressed concerned about the breadth of its scope. He referred to an article by Professor Neil Morgan on the issue,[212] and stated that:

> Professor Morgan suggests, rightly, that the ramifications of the wide view are truly dramatic. He offers examples of a man who falsely professes his undying love for a woman who agrees to have sexual intercourse only because she believes his protestations; of a woman who tells a man that she is unmarried when she is in fact married; and of a woman who agrees to sexual intercourse on the basis of the man's false promise that he intends to marry her. He suggests that it cannot have been intended that the law of sexual assault should reach so far or that attempted sexual assault charges might lie in the case of failed 'seductions'.[213]

4.113. President Steytler concluded that 'the most appropriate solution' to these difficulties is to amend the legislation:

> Plainly, the use of the words 'deceit or any fraudulent means' renders the section susceptible to an interpretation that is dramatic in its reach, for the reasons suggested by Professor Morgan … amongst others. There is obviously a need for some limit to be placed upon the meaning of those words. That is best done by the legislature.[214]

4.114. In *HES* President Buss reiterated this point. He noted that although the reasons for the judgment in *Michael* were published in March 2008, no legislative amendment has been made to these words.[215]

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208 Ibid [383]-[384].
209 *HES v The State of Western Australia* [2022] WASCA 151.
210 Ibid [115].
211 Ibid [238]-[239].
212 N Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26 *University of Western Australia Law Review* 223.
213 *Michael v State of Western Australia* (2008) 183 A Crim R 348, [62] (Steytler P).
214 Ibid [89].
215 *HES v The State of Western Australia* [2022] WASCA 151, [119].

4.115. The NSW Criminal Justice Sexual Offences Taskforce has also queried the appropriateness of criminalising all fraudulent or deceptive conduct:

> The term 'fraud' is very broad and the possibilities of misrepresentation are endless; ranging from a lie as to marital status, background, job, sexual prowess, declarations of love, or failure to make payment for sexual services. Should a failure to disclose any factor, or any significant factor that may influence a person's decision to engage in sexual conduct, mean that no true consent was given? It may be argued that had the complainant known the truth, he or she would not have consented, but does this mean the other person should be liable for the offence of sexual assault?[216]

4.116. Similar concerns were raised by the MCCOC in its report on sexual offences. It was of the view that allowing consent to be negated by any type of fraud would threaten the seriousness of the offence of unlawful sexual penetration. It argued that 'while inducing others to take part in a sexual act by deceptive means may not be acceptable to most people, there is no public interest served in making this type of behaviour subject to the sanction of the criminal law. Alternatively, there may be some particular acts of fraud which should come under the criminal law. However, these ought to be the subject of some lesser offence such as those relating to procuration'.[217] We discuss the possibility of using a specifically tailored offence to address such conduct in Discussion Paper Volume 2.

4.117. In light of these concerns, a preliminary question to be considered is whether the fraud provision should be limited or clarified in any way, or whether it is preferable to retain the current broad approach.

4.118. If the fraud provision is to be amended in any way, it is necessary to consider how it should be framed. In this regard, we note that the legislation from other Australian jurisdictions addresses six specific areas in which a person does not consent due to a lack of relevant information. These are where they are mistaken, deceived or defrauded about:

- The nature of the act.
- The identity of a participant.
- The purpose of the act.
- The marital status of the participants.
- The use of a condom.
- Payment for sexual services.

4.119. In this section, after considering a preliminary issue relating to mistaken beliefs, we consider each of these areas in turn. We also consider cases in which the complainant lacks relevant information about another person's fertility, sexual health, sex, sex characteristics, sexual orientation, gender identity or gender history. We conclude the section by considering other ways in which the section could be limited, such as by focusing on the seriousness of matter about which the complainant was defrauded, deceived or mistaken, or by explicitly excluding certain matters from the scope of the relevant provision.

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

[217] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person* (Report, 1999) [55].

Mistaken beliefs

4.120. As noted above, the *Code* does not currently refer to mistaken beliefs: it only covers circumstances in which consent was obtained by deceit or any fraudulent means. By contrast, legislation in all other Australian jurisdictions provides that consent is negated where the complainant was mistaken about a relevant matter, such as the nature of the sexual act or the identity of the other participant (see Table 4.4.4 above). It would be possible to adopt such an approach in Western Australia.

4.121. In the sections below we consider some specific mistaken beliefs that could be addressed in the *Code*. If any of these mistaken beliefs are to be legislatively addressed, four key questions will need to be determined.

4.122. First, should the provision be confined to mistaken beliefs that were induced by the accused (as is the case in Queensland), or should it apply whenever the complainant held a relevant mistaken belief (as is the case in the other jurisdictions)? In this regard, the NSWLRC recommended focusing solely on whether the complainant held the mistaken belief.[218] Although it noted there were some concerns that this was 'too broad and potentially unfair' to accused people who may be convicted when they played no role in causing the mistaken belief, it was of the view that those concerns 'overlook that the prosecution would still have to prove the accused person knew there was no consent'.[219]

4.123. It is important to note that in Western Australia, the prosecution does not need to prove that the accused knew the complainant was not consenting or had any awareness of that fact. However, if an accused person was not aware that the complainant held the mistaken belief, and so believed they were consenting, they could raise the mistake of fact defence.[220] The prosecution would then be required to prove either that they did not genuinely hold such a belief or that the belief was unreasonable. We discuss the mistake of fact defence in Chapter 5.

4.124. Secondly, should the provision require the complainant's mistaken belief to have been reasonable (as is the case in Tasmania) or should it simply provide that a person does not consent if they were mistaken about the relevant matter (as is the case in the other jurisdictions)?

4.125. Thirdly, should the provision require the complainant to have participated in the sexual activity because of the mistaken belief (as is the case in NSW), or should it simply require the complainant to have held the relevant belief (as is the case in the other jurisdictions)? In this regard, the NSWLRC has noted that under the latter approach, the provision would apply to cases 'where a person participates while under a mistake, but the person would have consented to the activity even if not mistaken'.[221] It was of the view that the law 'should not deem these situations to be non-consensual',[222] and so recommended that:

> prosecutors should be required to prove that the person participated in the sexual activity 'because' the person was mistaken… This would mean that the person's

[218] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.144].

[219] Ibid [6.145].

[220] *Criminal Code Act Compilation Act 1913* (WA) s 24.

[221] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.138].

[222] Ibid.

mistake would need to be an operative reason (but not necessarily the only reason) for participating in the sexual activity.[223]

4.126. Fourthly, should the fraud provision be replaced by a provision focussing solely on mistaken beliefs, or should the provision refer to fraud, deception and mistaken beliefs? In this regard, legislation in the ACT, the NT and Tasmania includes references to both mistaken beliefs and fraudulent conduct.[224] By contrast, the legislation in SA and Victoria refers solely to mistaken beliefs.[225] In these jurisdictions, a lesser offence of procuring a sexual act by fraud is used to address cases in which a sexual act occurs due to the accused's fraudulent conduct.[226]

4.127. The latter approach reflects the High Court's decision in *Papadimitropoulos*.[227] The Court was of the view that the key issue in these cases was what the complainant believed, not whether that belief was induced by the accused. It consequently held that there is no consent if the complainant is mistaken about the nature and character of the act or the identity of the accused, regardless of how the complainant came to hold that belief. Such an approach has also been recommended by Dyer, who argues that 'it is the complainant's mistake that renders his/her conduct non-consensual. Accordingly, the focus of any provision … must be on such mistakes – and not on whatever it is that has produced them'.[228]

4.128. The main argument in favour of retaining a focus on the accused's role in fraud or deception is that it 'ensures that the conduct on the part of the defendant has the appropriate criminality, rather than being inadvertent or accidental'.[229] However, it is important to bear in mind that even if the law were to specify that consent is negated by a mistaken belief, that does not mean an accused person will be convicted of an offence simply because the complainant held a mistaken belief at the time of their sexual encounter. If they were unaware that the complainant was mistaken about the relevant matter, and their lack of awareness was reasonable in the circumstances, they should be able to rely on the mistake of fact defence.[230] However, if they exploited the complainant's misunderstanding or were aware of the possibility that the complainant was consenting because of it, they may be guilty of an offence.[231] We consider issues surrounding the accused's mental state in Chapter 5.

Nature of the act

4.129. As noted above, one of the two circumstances in which the common law recognises that a lack of relevant information may undermine consent is where a person does not understand that the act is sexual in nature. For example, in *R v Williams*[232] the complainant was a teenager whose singing teacher told her that inserting his penis into her vagina would remedy her breathing and improving her singing. She agreed to him doing so, unaware that she was participating in a sexual activity. It was held that her apparent consent was negated.

4.130. This issue is not specifically addressed in the *Code*. However, it will be covered by the fraud provision if the accused falsely misrepresented the act to be non-sexual. This is also the case

[223] Ibid [6.139].

[224] See, eg, *Crimes Act 1900* (ACT) s 67(1)(h)-(j); *Criminal Code Act 1983* (NT) ss 192(2)(e)-(g); *Criminal Code Act 1924* (Tas) s 2A(2)(f)-(g).

[225] *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g)-(h); *Crimes Act 1958* (Vic) ss 36(2)(h)-(k).

[226] *Criminal Law Consolidation Act 1935* (SA) s 60; *Crimes Act 1958* (Vic) s 45. We discuss these offences in Discussion Paper Volume 2.

[227] *Papadimitropoulos v R* (1957) 58 CLR 249.

[228] A Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159, 174.

[229] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) 158-9.

[230] *Criminal Code Act Compilation Act 1913* (WA) s 24.

[231] Preliminary Submission 16 (ODPP) 4.

[232] *R v Williams* [1923] 1 KB 340.

in the ACT and Queensland. By contrast, the other Australian jurisdictions provide that a person does not consent whenever they are mistaken about the sexual nature of the act, regardless of the accused's role in inducing that mistake.

4.131. In its review of consent laws, the NSWLRC recommended that this issue be addressed in the legislation. While it noted that it is only likely to arise in very limited situations, it was of the view that where it does arise consent should be legally invalid.[233]

4.132. If this matter is to be explicitly addressed in the *Code* it will be necessary to determine whether the law should provide that a person does not consent whenever they are mistaken about the sexual nature of the act, or whether the provision should be confined to circumstances in which the accused fraudulently induced that belief. It will also be necessary to determine whether the complainant's mistake needs to have been reasonable, and whether the complainant needs to have participated in the sexual activity because of the mistaken belief. These issues are discussed in the section 'Mistaken beliefs' above.

Identity of the participants

4.133. The second circumstance in which the common law recognises that a lack of relevant information may undermine consent is where a person is mistaken about the identity of the other participant.[234] For example, they may believe they are engaging in a sexual activity with their sexual partner, when in fact it is their partner's twin.

4.134. This issue is not explicitly addressed in the *Code*. However, if the accused induced the false belief, it would be covered by the fraud provision. By contrast, all other Australian jurisdictions explicitly address this issue (see Table 4.4.4 above).

4.135. If this issue is to be addressed in the *Code*, it will need to be decided whether it should apply whenever the complainant was mistaken about the accused's identity or if the accused needs to have played a role in causing them to hold that belief. All Australian jurisdictions other than Queensland simply require the complainant to have been mistaken. By contrast, in Queensland the mistaken belief must have been induced by the accused. A similar approach is taken in the UK.[235]

4.136. It will also be necessary to decide whether the provision should be limited to specific types of mistakes about identity. For example, the Queensland Code requires the complainant to have mistakenly believed that the accused was the complainant's sexual partner, and legislation in the UK requires the accused to have impersonated a person known personally to the complainant.[236] In recommending this formulation, the Scottish LC stated:

> The requirement that the impersonation must be of someone known to the victim helps to avoid problems about distinguishing between a person's identity and attributes. The definition does not cover the situations where the accused induced the victim into having sex by claiming falsely that he was a famous film star or football player or that he was rich, situations to be decided by applying the general definition.[237]

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[233] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.143].

[234] *Papadimitropoulos v R* (1957) 58 CLR 249.

[235] *Sexual Offences Act 2003* (UK) s 76(2)(b); *The Sexual Offences (Northern Ireland) Order 2008* (NI) s 10(2)(b); *Sexual Offences (Scotland) Act 2009* (Scot) s 13(2)(e).

[236] *Sexual Offences Act 2003* (UK) s 76(2)(b); *The Sexual Offences (Northern Ireland) Order 2008* (NI) s 10(2)(b); *Sexual Offences (Scotland) Act 2009* (Scot) s 13(2)(e).

[237] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.77].

4.137. By contrast, all other Australian jurisdictions simply require the complainant to have been mistaken about the accused's identity. In recommending this approach, the NSWLRC noted that concerns had been raised that 'this circumstance could capture mistakes about personal characteristics, such as a person's gender identity, sex characteristics or sexual health status'.[238] However, it was not aware of any cases where this had occurred, and was of the view that such a broad interpretation 'would be inconsistent with the reason why this category of mistaken belief was added' to the legislation.[239]

Purpose of the act

4.138. Another way in which a person may lack relevant information about a sexual activity is if they mistakenly believe that the sexual activity is being performed for a non-sexual purpose. This was the situation in *Mobilio*, discussed above.

4.139. Although not specifically addressed in the *Code*, where the accused induces such a belief this is likely to be covered by the fraud provision. By contrast, most other Australian jurisdictions explicitly address this issue in their legislation (see Table 4.4.4 above).

4.140. If this issue is to be addressed in the *Code*, it will need to be decided whether the relevant provision should only apply to cases in which the accused defrauded or deceived the complainant about their purpose (as is the case in Queensland), or whether it should apply to all cases in which the complainant was mistaken about the accused's purpose (as is the case in NSW, the NT, Tasmania and Victoria).

4.141. It will also need to be decided whether the provision should apply to all frauds/mistakes about the accused's purpose, or whether this should be limited in any way. In this regard, the NSWLRC recommended that the provision apply to all mistakes as to purpose. It saw there to be 'no reason why some mistakes about the purpose of a sexual activity mean a complainant does not consent, but others do not'.[240] It did, however, think that it would be useful to provide some examples of this type of mistake, 'to confirm its application to some common situations'.[241] It recommended including the examples of where a person mistakenly believes the activity is done for health, hygienic or cosmetic purposes. The first two of these examples were already the law in NSW at the time, while the third 'recognises that cosmetic procedures involving intimate areas of the body are growing in popularity'.[242] The use of these examples was not intended to limit the subsection, which the NSWLRC considered to be broad enough to cover other mistakes, such as where a person 'mistakenly believes a sexual activity has a spiritual or religious purpose'.[243] These recommendations were enacted by the NSW Government.

4.142. Slightly different approaches have been taken in other Australian jurisdictions:

- The Queensland Code refers broadly to all false or fraudulent representations about the purpose of the act.[244]

[238] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.158].
[239] Ibid.
[240] Ibid [6.150].
[241] Ibid [6.152].
[242] Ibid [6.153].
[243] Ibid [6.154].
[244] *Criminal Code Act 1899* (Qld) ss 348(2)(e)-(f).

- The Tasmanian Code refers broadly to mistakes about the purpose of the act, but requires the mistake to have been reasonable.[245]
- The Victorian Acts limit the scope of this ground to mistaken beliefs that the act is for medical, hygienic, veterinary, agricultural or scientific research purposes.[246]
- The NT Code draws a distinction between cases of fraud and mistake: the fraud provision applies to all false representations about the accused's purpose;[247] the mistake provision is limited to mistaken beliefs that the act is for medical or hygienic purposes.[248]

Marital status of the participants

4.143. As noted above, in *Papadimitropoulos* the accused tricked the complainant into believing that they were married. The High Court held that this did not undermine the complainant's consent, as she understood that she was participating in a sexual activity with the accused.[249] In response, NSW enacted a provision which states that a person does not consent to a sexual activity if they mistakenly believe they are married to the other person. No other Australian jurisdiction has explicitly addressed this issue.

4.144. In its recent review of consent laws, the NSWLRC noted that stakeholders were mixed in their views on this provision. While some supported it, others criticised it on the basis that it:

- suggests that marriage implies consent
- privileges marriage as a factor that influences whether a person consents without a reason for doing so, and
- is too narrow because it only captures one type of relationship.[250]

4.145. The NSWLRC was of the view that these criticisms were misplaced. It considered that the provision was 'introduced to address a specific case, with particular facts', and did not think that it needed to 'be broadened to cover other relationship types'.[251] While it acknowledged that the circumstance was unlikely to be raised in many cases, it recommended that it be retained in case it does arise in the future.[252]

4.146. It should be noted that the NSW provision only applies to mistakes that the people are married to each other. It does not apply to other mistakes about marital status, such as that a person is unmarried. Such a provision would have much broader application and would raise concerns about the role of the criminal law in regulating adultery. See the section 'Seriousness of the fraud, deception or mistake' below for further discussion of this issue.

Stealthing (non-consensual condom removal)

4.147. One of the specific matters our Terms of Reference ask us to consider is the practice of stealthing. This occurs where person A consents to a sexual act on the basis that person B will use a condom but, without telling person A, person B does not do so or removes the

[245] *Criminal Code Act 1924* (Tas) s 2A(2)(g).

[246] *Crimes Act 1958* (Vic) ss 36(2)(h)-(k); *Crimes Act 1958* (Vic) ss 36AA(1)(j)-(n), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

[247] *Criminal Code Act 1983* (NT) s 192(2)(g).

[248] Ibid ss 192(2)(e)-(f).

[249] *Papadimitropoulos v R* (1957) 58 CLR 249.

[250] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.162] (citations omitted).

[251] Ibid [6.163].

[252] Ibid [6.164].

condom part way through the sexual act. Of a similar nature are cases in which person B sabotages or tampers with the condom in some way, so that it no longer functions properly. In each of these cases person A lacks relevant information about the sexual act which is taking place: they believe they are engaging in sex with a functional condom when they are not. It is arguable that this lack of information undermines their consent. In this regard, it is important to note that not only does such behaviour violate a person's sexual autonomy and bodily integrity, but it may create a risk of pregnancy or the transmission of a sexually transmissible infection (**STI**).

4.148. As a preliminary matter, we note that concerns have been expressed about the use of the term stealthing. Some people consider that it glamourises or minimises the seriousness of the issue,[253] while others are concerned that it is an emotive and stigmatising term.[254] Consequently, it has been suggested that it would be preferable to use term such as non-consensual condom removal instead. While we acknowledge these concerns, we use the term stealthing in this report as it is the term that is used in our Terms of Reference. It is also a term that is commonly used in the community. We welcome submissions on whether we should continue to use this term in our future publications.

4.149. While there is little research about how common this practice is, a 2017 study of more than 2000 people who visited the Melbourne Sexual Health Centre over three months from December 2017 found that 32% of women and 19% of men had experienced stealthing.[255] There appears to be a particularly high incidence of this behaviour in the sex industry.[256] For example, in its submission to the VLRC's review of sexual offences, Project Respect informed the VLRC that 14% of women it had met during outreach in brothels in 2018–19 experienced the removal of a condom during a booking. It claimed that 'this form of sexual assault is increasing exponentially'.[257] Despite the prevalence of such behaviour, research suggests that it is not commonly reported to the police.[258]

4.150. It is unclear whether stealthing is covered by the *Code's* consent provision. In its preliminary submission, the ODPP noted that it was not aware of any Western Australian cases which had raised this issue, but suggested that it would arguably 'be open for the State to prosecute an accused who had removed or deliberately damaged a condom (where the complainant had consented to sexual activity with a condom) on the basis of the current *Code* definition of "consent"'.[259]

4.151. This issue was addressed by the Canadian Supreme Court in *R v Hutchinson*, which considered the application of consent and fraud provisions which are similar to those in Western Australia.[260] Different approaches were taken by the majority and minority judges. The majority held that where the complainant participated in a sexual activity on the basis that a condom would be used, but it was not used, they have nevertheless consented. This is because they have agreed to the physical act (for example, vaginal or anal intercourse). The

[253] See, eg, RL Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018) 13(12) *Plos One* e0209779.

[254] Preliminary Submission 10 (WAAC) 1.

[255] Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018) 13(12) *Plos One* e0209779.

[256] Ibid 13.

[257] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.80], quoting Submission 50 (Project Respect).

[258] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Issues Papers A-H, October 2020) C 32.

[259] Preliminary Submission 16 (ODPP) 4. See also Preliminary Submission 1 (Her Honour Chief Judge Julie Wager, District Court of Western Australia).

[260] *R v Hutchinson* [2014] SCR 346.

use of a condom is irrelevant to this issue: it simply relates to the manner in which the act is performed (for example, with or without birth control). However, where the accused was dishonest about the condom use, and the sexual activity involved a significant risk of serious harm (which includes the physical changes associated with pregnancy), their consent is negated by fraud.[261]

4.152. By contrast, the minority did not think there had been any consent in these circumstances. They were of the view that 'when a woman agrees to have sexual intercourse with a condom, she is consenting to a particular sexual activity. It is a different sexual activity than sexual intercourse without a condom'.[262] They considered such an act to be non-consensual regardless of the risk of harm, stating:

> With respect, it does not follow that because a condom is a form of birth control, it is not also part of the sexual activity. Removing the use of a condom from the ambit of what is consented to in the sexual activity because in some cases it may be used for contraceptive purposes, means that an individual is precluded from requiring a condom during intercourse where pregnancy is not an issue. That is, individuals who engage in sexual activity that has no risk of pregnancy, either because of age, fertility, or gender, for example, would have no legal right to insist upon the use of a condom. If one of those individuals has insisted upon the use of a condom, and their partner has deliberately and knowingly ignored those wishes — whether by not using a condom at all, removing it partway through the sexual activity, or sabotaging it — that individual will nonetheless be presumed to have consented under the approach suggested by our colleagues. In other words, because the person could not become pregnant, the criminal law will not uphold his or her right to sexual autonomy and physical integrity. With respect, even aside from the problematic analogy between pregnancy and bodily harm, this result does not reflect the fact that everyone has a right to insist on a condom as part of the sexual activity—for whatever reason. All individuals must have an equal right to determine how they are touched, regardless of gender, sexual orientation, reproductive capacity, or the type of sexual activity they choose to engage in. We fail to see how condoms can be seen as anything but an aspect of how sexual touching occurs. When individuals agree to sexual activity with a condom, they are not merely agreeing to sexual activity, they are agreeing to how it should take place. That is what [the consent provision] was intended to protect.[263]

4.153. There was a similar division of opinion in the recent Victorian case of *DPP v Yeong (A Pseudonym)*.[264] However, in that case the positions were reversed. The minority (Macaulay JA) held that there was no rape, as the complainant had consented to his anus being penetrated by the accused's penis. It did not matter that he had done so on the condition that the accused use a condom. By contrast, the majority (Niall and T Forrest JJA) held that:

> it would be open to a jury to conclude that the complainant did not consent to the act of penetration on the basis that the condition that a condom be used was, from the perspective of the complainant, essential to the physical act of penetration and that non-satisfaction of the condition vitiated any consent that was otherwise freely given. We reach that conclusion because free agreement extends to the freedom to choose the manner in which physical penetration is to occur, and the requirement to wear a condom may be from the perspective of a participant inextricably bound up with the act of penetration and inseparable from the issue of consent.

[261] Ibid (McLachlin CJ and Cromwell J for McLachlin CJ, Cromwell, Rothstein and Wagner JJ).
[262] Ibid 377 (Abella, Moldaver and Karakatsanis JJ) (emphasis in original).
[263] Ibid.
[264] *DPP v Yeong (A Pseudonym)* [2022] VSCA 179.

> A condom acts as a physical barrier between the two participants. It may guard against the transmission of disease and is a prophylactic against pregnancy in the case of heterosexual intercourse. The use of a condom is not only concerned with the consequences of the act of intercourse but also how the act is to be performed and the nature of the physical connection between the participants. In that sense, mistakes as to whether other forms of contraception are being used or how the risk of pregnancy is being addressed may be different. On the respondent's approach, [the rape provisions] are indifferent to whether or not a condom is used and consent to intercourse with a condom must always carry with it consent to intercourse without a condom. We do not agree. That approach does not accord with the primacy that the Act gives to sexual autonomy and choice, and the connection between the act of intercourse and the wearing of a condom. On the prosecution case, had the complainant been aware that the respondent was about to insert his penis without a condom in place, he plainly would have stopped that from occurring in the exercise of his free choice to engage in the sexual activity. In assessing the question of free agreement, it would be anomalous if that choice was negated because the act of penetration without a condom occurred surreptitiously and without his knowledge. To deny him free agreement in that way, is inconsistent with the text and scheme of the Act.[265]

4.154. The latter approach has also been taken by courts in the UK.[266] For example, in *Assange v Swedish Prosecution Authority* the Court held:

> It would plainly be open to a jury to hold that, if [the complainant] had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the *Sexual Offences Act 2003*, whatever the position may have been prior to that Act.[267]

4.155. Some support for this approach can also be seen in the Queensland case of *R v RAD.*[268] In that case the complainant said that she told the accused to put on a condom. He refused to do so but had sexual intercourse with her anyway. He was charged with rape on the basis that the complainant had not consented to 'sexual activity without a condom'.[269] The prosecution argued that although the complainant was willing to have sex with him if he wore a condom, his failure to do so meant that she did not consent or that her consent was not free and voluntary. He was convicted at trial and the matter was not overturned on appeal.

4.156. This approach was endorsed by the NSWLRC in its review of consent laws. While it noted that stealthing 'carries a significant risk of transmission of sexually transmitted infections' and may also 'cause psychological harm to a person on whom it is perpetrated, such as emotional stress, guilt and shame', it did not see these potential harms to be the central concern. It considered it to be a 'core principle of the modern law of sexual offences' that:

> The violation of autonomy involved in non-consensual sexual activity is itself a harm that warrants criminal sanction – regardless of whether there is physical injury.

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265 Ibid [92]-[93].

266 See, eg, *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R(F) v DPP(A)* [2013] EWCA 945 (Admin).

267 *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) [86]. Section 74 of the *Sexual Offences Act 2003* (UK) provides that 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'.

268 *R v Rad* [2018] QCA 103.

269 Ibid [31].

> Stealthing takes an otherwise consensual sexual activity outside the scope of what has been consented to, namely sexual activity with a condom. On this view, stealthing deprives the person of free and voluntary choice.[270]

4.157. The NSWLRC noted in its review that there 'is broad acceptance in submissions and survey responses, supported by relevant academic literature and in the media, that where a person has agreed to sexual activity involving use of a condom, and the other person engages in "stealthing" …, then that other person's conduct should be a crime'.[271] The NSWLRC also considered that the behaviour should be criminalised, and that it should be expressly addressed in legislation. It was of the view that this would:

- encourage people to report cases of stealthing to the police
- assist police and prosecutors when deciding whether to investigate and prosecute cases involving stealthing, and
- assist community education initiatives aimed at preventing stealthing.[272]

4.158. The NSWLRC considered various ways in which non-consensual condom removal could be addressed, such as adding it to the list of circumstances in which a person does not consent or providing that a person does not consent where they participate because of a mistaken belief that the other person would wear a condom.[273] However, it was of the view that the key issue in these cases was the scope of consent, and consequently recommended that it be addressed 'by including sex with a condom as an example of a particular sexual activity to which a person may consent without consenting to any other sexual activity'.[274] This recommendation was accepted by the NSW Government, which included the following provision in its section defining consent:

> A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.
>
> Example – A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.[275]

4.159. The VLRC also considered this matter in its review of sexual offences. While it similarly concluded that stealthing should be criminalised, it instead recommended that it be added to the list of circumstances in which a person does not consent.[276] This recommendation was accepted by the Victorian Government, which enacted a provision which states that a person does not consent to a sexual activity if:

> the person engages in the act on the basis that a condom is used and either—
>
> - before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or

[270] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.68].
[271] Ibid [5.64]; Rec 5.5.
[272] Ibid [5.74].
[273] Ibid [5.75].
[274] Ibid [5.77].
[275] *Crimes Act 1900* (NSW) s 61HI(5).
[276] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 51.

- the person who was to use the condom intentionally does not use it.[277]

4.160. The ACT has also recently added stealthing to its list of circumstances, enacting a provision which states that a person does not consent if they participate in a sexual act 'because of an intentional misrepresentation by another person about the use of a condom'.[278] A similar provision has recently been passed by the South Australian Parliament and is awaiting assent.[279]

4.161. By contrast, while the QLRC expressed concern about the practice of stealthing, it did not recommend amending Queensland's consent provision to specifically address the issue. While not made explicit, it appears that this was due to a belief that the conduct was already covered by Queensland's consent provisions. A similar view was expressed by the Law Society of Western Australian in its preliminary submission. It stated that 'the existing sexual offences are sufficiently broad to cover emerging issues such as "stealthing"'.[280]

4.162. However, a different approach was taken by the Queensland Taskforce in its subsequent review of Queensland's sexual offence laws. It stated that the 'overwhelming feedback that the Taskforce received in consultation forums across Queensland and in submissions was that the practice of stealthing amounts to sex without consent, that is, rape'.[281] It was of the view that legislation that expressly addressed the issue would clarify the law and would 'send a message to the community that the conduct constitutes a crime. This may encourage both victims to make a complaint about this conduct and police to investigate it, resulting in more such charges progressing through the courts'.[282] Consequently, it recommended that Queensland adopt the same approach as taken in NSW.[283]

4.163. Although the QLRC did not recommended addressing stealthing in the context of consent, it did state that there 'may well be merit in considering whether this practice should be specifically dealt with as an offence in its own right'.[284] This approach was recommended by Magenta in its preliminary submission. It argued that removing a condom during sex is a 'special type of sexual offending', which is not as severe as sexual penetration without consent but is more severe than indecent assault. Consequently, it recommended the enactment of a specific offence to address such conduct.[285]

4.164. By contrast, the WAAC opposed the creation of a separate offence in its preliminary submission. It expressed concern that 'creating a separate offence of stealthing lacks a consistent principle that underlies it and could be used as an over-criminalisation (and unnecessary stigmatisation) of an issue that can already be prosecuted under the Criminal Code'.[286] It noted that the purported justification of the ACT's reforms in this area was the risk of STI transmission and unplanned pregnancy. If it this the case, it queried why the reforms focus solely on condom use, rather than on other more effective forms of birth control or STI prevention. It was of the view that the law was using HIV stigma to justify criminalisation of

[277] *Crimes Act 1958* (Vic) s 36AA(1)(o), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
[278] *Crimes Act 1900* (ACT) s 67(1)(j).
[279] Statutes Amendment (Stealthing and Consent) Bill 2022 (SA) s 2.
[280] Preliminary Submission 13 (The Law Society of Western Australia) 2.
[281] Women's Safety and Justice Taskforce (Qld), *Community Attitudes to Sexual Consent* (Research Report, July 2022) 219.
[282] Ibid.
[283] Ibid Rec 44.
[284] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.142]-[6.143].
[285] Preliminary Submission 3 (Magenta) 2.
[286] Preliminary Submission 10 (WAAC) 7.

such conduct, and that 'laws targeting stealthing are particularly gendered and incapable of encompassing the attitudinal factors salient in relations among gay and bisexual men'.[287]

4.165. The creation of a new offence was considered by the VLRC, which found that:

> There may be advantages to a separate offence. Some people may consider this a different type of harm to rape and sexual assault. People who experience this form of sexual violence could find labels of 'rape' or 'sexual assault' stigmatising. Standard sentencing requirements for rape and sexual assault would limit sentencing options.
>
> However, there are disadvantages to a separate offence. Creating a separate offence can suggest that this behaviour is less serious than rape or sexual assault and fails to properly recognise what consent means. Further, we are conscious of the challenges associated with creating new sexual offences, including issues with interpretation and possible appeals.[288]

4.166. In light of these disadvantages, the VLRC did not recommend the creation of a separate offence. This approach was also rejected by the NSWLRC, which was of the view that as 'English authority provides good reason for thinking that stealthing is already caught by the existing provisions, it is preferable simply to clarify that that is so, rather than to create a new offence'.[289]

4.167. If stealthing is to be addressed in the *Code*, various matters will need to be determined. First, it will need to be decided whether to include it in the list of circumstances, address it as part of the general definition of consent, or create a separate offence.

4.168. Secondly, it will need to be decided whether the relevant provision should only apply to condoms, or whether it should extend to all measures people use to protect themselves against pregnancy or STIs. In this regard, we note that the NSWLRC initially proposed that the relevant provocation refer to 'a device that prevents transmission of sexually transmitted infections'.[290] However, this proposal was criticised for 'being wordy or unclear', and for potentially increasing stigmatisation of people with STIs.[291] The NSWLRC noted that the intent of the provision was 'to recognise that a person who consents to sexual activity using a condom does not thereby consent to sexual activity without the use of a condom'.[292] Consequently, in its Final Report it instead recommended using the expression 'sexual activity using a condom'.[293]

4.169. By contrast, the VLRC recommended that the provision should apply to all cases in which a person 'consented to sexual activity with a device to prevent sexually transmitted infections or contraceptive device'.[294] It was of the view that the language used in the provision 'should be inclusive of the different devices people use to protect themselves during sexual activities. People may use condoms to prevent STIs, not just for contraception. People may also use

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[287] Ibid 7.

[288] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.92]-[14.93].

[289] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.76].

[290] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Draft Proposals, October 2019) Proposal 5.6.

[291] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.79].

[292] Ibid [5.80].

[293] Ibid Rec 5.5. This recommendation was enacted: see *Crimes Act 1900* (NSW) s 61HI(5).

[294] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 51.

other protective devices such as dental dams'.[295] However, this recommended was not accepted by the Victorian Government.[296] Instead, it enacted a provision relating solely to the use of condoms.[297] The ACT Act also only refers to condoms.

4.170. An example of a broader approach is provided by the Singapore *Penal Code*. It includes a provision that states that Person A fraudulently obtains Person B's consent if they make a deceptive or false representation about 'the use or manner of use of any sexually protective measure'.[298] A 'sexually protective measure' is defined to mean:

> i. where B is female, a device, drug or medical procedure to prevent pregnancy or sexually transmitted diseases as a result of sexual intercourse; or
>
> ii. where B is male, a device, drug or medical procedure to prevent sexually transmitted diseases as a result of sexual intercourse.[299]

4.171. Thirdly, if the provision focuses on condoms, should it only refer to condom use (as is the case in the ACT and NSW), or should it also explicitly refer to condom removal or tampering (as is the case in Victoria)? What about other forms of contraceptive sabotage, such as tampering with a person's contraceptive pill? In its preliminary submission, Sexual Health Quarters recommended that the provision be sufficiently broad to cover all forms of contraceptive sabotage, noting that:

> Contraceptive sabotage as a coercive tactic is a form of intimate partner violence. Someone who has had any form of contraception tampered with should be protected legally, whether the contraceptive is Long-Acting Reversible Contraception (LARC), the contraceptive pill, emergency contraception, or barrier contraception...
>
> While 'stealthing' should be criminalised in Western Australia, the law needs to include tampering with, hiding, or destroying someone's birth control method in addition to non-consensual removal of condoms and other barrier contraceptive methods during sex. This should include the use of coercion and/or violence to prevent a person's access to emergency contraception and medical termination.[300]

4.172. In this regard, the Centre for Women's Safety and Wellbeing noted in its preliminary submission that

> there is an inextricable connection between reproductive coercion and intimate partner sexual violence. Intimate partner sexual violence refers to sexual activity without consent in heterosexual and non-heterosexual intimate [relationships]. It includes … tactics used to control decisions around reproduction (eg refusing to wear a condom).

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295 Ibid [14.95].

296 It is unclear why the Victorian Government did not implement this recommendation. In its initial response to the VLRC Report it stated that it would legislate to make it clear that removing a condom or other protective device was a crime (Victoria, *Parliamentary Debates*, Legislative Council, 16 November 2021, 4312). However, without explanation, the subsequent Bill (which was enacted) was limited to non-consensual condom removal.

297 *Crimes Act 1958* (Vic) s 36AA(1)(o), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5. The word 'condom' is intended to apply to both external and internal condoms: Explanatory Memorandum, Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic), 9. It does not, however, cover other protective devices, such as dental dams.

298 *Penal Code 1871* (Sg) s 376H(1)(d).

299 Ibid s 376H(3)(c).

300 Preliminary Submission 12 (Sexual Health Quarters).

> Research highlights that intimate partner violence interferes with reproductive and sexual autonomy through pregnancy promotion, contraceptive sabotage and pregnancy outcome control.
>
> While contraceptive sabotage and pregnancy outcome control are self-explanatory, pregnancy promotion refers to the ignoring or disregard by a sexual partner for reproductive preferences through behaviours that prevent effective contraceptive use, including the removal or sabotage of contraceptive devices (i.e. vaginal rings and intrauterine devices).
>
> Research suggests that domestic and family violence does not facilitate safe negotiation of contraception or sex, reproductive coercion often co-occurs with other violent controlling behaviours, and women may consent to sexual activity to prevent the escalation of physical violence…
>
> It is important to ensure that any person engaging in sexual activity can indicate that their consent hinges upon the use of a condom (or other safer sex paraphernalia) irrespective of whether their intended use is to prevent the transmission of sexually transmitted diseases, or for reason of reproductive control.[301]

4.173. Fourthly, should the provision only apply to intentional misrepresentations about the relevant matter, or should it apply to all false representations or mistaken beliefs? In this regard, we note that concern has been expressed about criminalising unintentional contraceptive failures. It has been noted that contraceptives 'can fail for a variety of reasons so the language around vitiation of consent needs to ensure that people are not unfairly targeted due to improper use. Incorrect condom use or engaging in behaviours that decrease contraceptive efficacy without intent could unintentionally be criminalised'.[302]

4.174. Finally, should the provision require proof that the conduct involved a significant risk of serious harm, as is the case in Canada, or should proof of the relevant act be sufficient?

Monetary exchange

4.175. In its review of consent laws, the NSWLRC noted that 'a range of submissions, survey responses and researchers express concern about the lack of protection afforded to sex workers who are fraudulently promised payment for sexual services. Submissions argue that this should be considered sexual assault, as this reflects the experience of complainants'.[303] One way to address these concerns would be to provide that consent is negated where a person has been defrauded or deceived about payment for a sexual act.

4.176. As noted above, a restrictive approach has been taken to this issue at common law, with courts holding that consent is not negated where a person has been defrauded or deceived about payment for sexual services.[304] This is because misrepresentations about payment are not seen to relate to the nature of the act or the identity of the accused.

4.177. By contrast, it is possible that this type of conduct would be captured by the *Code's* fraud provision. This was held to be the case in the ACT, which has a similarly broad provision.[305] In *Livas v R* the accused failed to pay a person engaging in sex work the agreed fee for the sexual activities in which they had engaged. He was convicted of rape, on the basis that her

[301] Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 7-8.

[302] Preliminary Submission 12 (Sexual Health Quarters) 5.

[303] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.177].

[304] *R v Linekar* [1995] QB 250.

[305] The ACT Act provides that consent is negated by 'a fraudulent misrepresentation of any fact made by the other person': *Crimes Act 1900* (ACT) s 67(1)(g).

consent was negated by his fraudulent representation.[306] In her judgment, Justice Penfold noted that:

> Sex workers clearly fall into the category of vulnerable workers in general and may be particularly vulnerable to abuse of this kind. Certainly, no one should doubt that fraudulently achieving sexual intercourse by this kind of activity constitutes rape, rather than a dishonesty offence, although of course dishonesty is a major element of this fact situation.[307]

4.178. In its review of consent laws, the QLRC did not recommend specifically addressing this issue. It noted that sex workers are already offered some protection by the scope of the consent provision, which requires consent to be freely and voluntarily given, as well as by specific offences that may apply in the circumstances, such as fraud.[308] It was unwilling to recommend any further protections, as it was of the view that the subject 'raises broader policy questions about the regulation and protection of sex workers, and their experiences within the criminal justice system' that were outside the scope of its review.[309]

4.179. In its later review of Queensland's sexual offence laws, the Queensland Taskforce noted that the QLRC had subsequently been asked to recommend a framework for a decriminalised sex work industry. Consequently, the Taskforce did not consider it appropriate to make any recommendations. However, it stated that it did:

> wish to give voice to the views of sex workers with whom the Taskforce met during a small group discussion facilitated by Respect Inc. They described the usual practice as specifically agreeing the acts and payment in detail with the client, often via text message, before any acts taking place. They argued that acts committed beyond an agreed scope should be considered to have occurred without consent and that sex workers should not be precluded from making a complaint about sexual violence in these circumstances.
>
> The majority of sex workers and advocates consulted by the Taskforce were firmly of the view that non-payment constitutes rape or sexual assault. Other sex workers have expressed publicly that they are somewhat ambivalent about whether non-payment should constitute rape (noting the higher likelihood of violence being involved) or a less-serious charge. These sex workers, however, emphasised that this conduct was more serious than fraud because of the fraudulent invasion of their bodily integrity.[310]

4.180. Victoria is the only Australian jurisdiction to have addressed this issue in its legislation to date. The new Victorian provisions state that a person does not consent if 'the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid'.[311] The Act provides that 'a false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit'.[312]

4.181. This type of approach was supported by the Centre for Women's Safety and Wellbeing in its preliminary submission. It suggested that the list of circumstances in which a person does not

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306 *R v Livas* [2015] ACTSC 50.

307 Ibid [34].

308 *Criminal Code Act 1899* (Qld) s 408C.

309 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [44].

310 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 220.

311 *Crimes Act 1958* (Vic) s 36AA(1)(m), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

312 *Crimes Act 1958* (Vic) s 36AA(2), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

consent should include the circumstance where a person 'consents to a sexual act under a mistaken belief induced by the other person that there will be a monetary exchange in relation to the sexual act'.[313] Such an approach was also supported by Sexual Health Quarters, which argued that:

> Sex work is the act of payment in consideration for the sexual stimulation of a person through physical contact. Therefore, consent is negated when it is given on condition of payment and that payment is subsequently denied. We consider this an urgent consideration as we are quickly transitioning to a cashless economy where sex workers are increasingly being forced to navigate client chargebacks and discrimination from merchant services and banks.[314]

4.182. By contrast, Magenta argued that this issue should be addressed by the creation of a new, specifically targeted offence:

> Currently the law fails to provide adequate clarification for conditional consent, or consent obtained by fraud. Failing to pay for a sexual service when payment was agreed… is a special type of sexual offending. Under the current offences detailed in Chapter XXXI of the code, this should exceed the current criteria for 'indecent assault' while also not meeting the current severity of 'sexual penetration without consent' – therefore Magenta suggests it requires a new offence, unless these sections are rewritten significantly.[315]

4.183. In considering this issue, it should be borne in mind that most sex industry-related activities are currently illegal in Western Australia, although there is no prohibition on an adult without prescribed convictions working as a sex worker.[316] Consequently, it may be considered preferable for this issue to be addressed in the context of a broader review of prostitution laws.

Fertility

4.184. Another issue to consider is whether the *Code* should address cases in which a person is deceived about a sexual participant's fertility status. This issue arose in the English case of *R v Lawrence*.[317] In that case the complainant made it clear to the accused that she would not have unprotected sex with him if he were fertile. The accused misled her into believing that he had had a vasectomy. They had unprotected sex and she became pregnant. The Court of Appeal held that the accused's deception about the vasectomy did not negate consent because:

- it was not closely connected to the nature or purpose of the sexual act; and
- it did not deprive the complainant of the freedom to choose whether or not to have sex.

4.185. The Court held that deception about fertility differs from deception about condom use. In the context of non-consensual condom removal, the deception relates to the nature of the physical act in which the parties engage (sex with or without a condom). In the fertility case, the deception relates to the possible consequences of the act (pregnancy). In the Court's view, deception about the quality of the ejaculate (i.e., whether it is capable of leading to pregnancy or not) is fundamentally different to deception about whether ejaculate will enter the vagina.

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313 Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 2.
314 Preliminary Submission 12 (Sexual Health Quarters) 5.
315 Preliminary Submission 3 (Magenta) 2.
316 See 'Commercial sexual services' above.
317 *R v Lawrence* [2020] EWCA Crim 971.

The latter is a deception about the 'physical performance of the sexual act'; whereas the former is a deception as to 'the risks or consequences associated with' the sexual act.[318]

4.186. This distinction has been criticised as lacking a principled basis.[319] While it may be true that there is a physical difference between the acts performed in the non-consensual condom removal context and the fertility deception context, in both cases the complainant's sexual autonomy appears to have been undermined. In both cases the complainant would not have agreed to the relevant sexual activity had they known the truth.

Sex, sex characteristics, sexual orientation, gender identity and gender history

4.187. In some cases, a person who engages in a sexual activity may lack information about:

- The physical or biological characteristics a participant was born with (their **sex**).
- The physical features relating to sex that a participant has at the time of the sexual activity (their **sex characteristics**).
- A participants' current personal sense of their gender (their **gender identity**). This includes trans, gender-diverse and non-binary gender identities.
- A participants' previous gender-related identity or identities (their **gender history**).
- A participants' emotional, affectional or sexual attraction to people of a different gender, the same gender or more than one gender (their **sexual orientation**).

4.188. Where this is the case, difficult questions are raised about whether the person has consented to the sexual activity. Courts in England and Wales have held that they may not have done so: that consent can be negated where a person fails to disclose that their gender identity is different from their sex.[320] For example, in *R v McNally* the Court stated that:

> while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male. Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception.[321]

4.189. These cases have been strongly criticised.[322] It has been argued that they are discriminatory, as they are based on the assumption that being trans is a form of gender identity fraud: that a person who was born male but has a female gender identity is lying about their 'true' gender. By contrast, it is contended that there is no fraudulent misrepresentation about gender identity in these circumstances, as the person is truly representing their personal sense of gender. This point was emphasised by Sexual Health Quarters in their preliminary submission, which

[318] Ibid [37].

[319] See, eg, S Kaushik, 'The Impossible Trinity of Deception, Sex and Consent' (2021) 85(6) *Journal of Criminal Law* 415.

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

[321] *R v McNally* [2013] EWCA Crim 1051, [26].

[322] See, eg, G Doig, 'Deception as to Gender Vitiates Consent: *R v McNally* [2013] EWCA Crim 1051' (2013) 77 *Journal of Criminal Law* 464; A Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-consent' (2014) *Criminal Law Review* 207; F Ashley, 'Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities' (2018) 41 *Dalhousie Law Journal* 339.

stated that 'transgender and gender diverse peoples' gender identities are as valid as cisgender identities, so non-disclosure of biological sex is not a criminally deceptive act'.[323]

4.190. In response, it could be argued that the person is being deceptive by not disclosing their sex or gender history. However, Sharpe has argued that requiring a person to do so would be incompatible with the right to privacy.[324] She contends that trans people have a right not to disclose details of their sex or gender history to all prospective sexual partners.

4.191. This issue is a particularly difficult one to resolve, given the conflicting rights of the participants.[325] On the one hand, people have a right to sexual autonomy, which is undermined when they are not provided with relevant information on which to base their decisions. On the other hand, people have a right to privacy, which is undermined if they are required to disclose personal and sensitive matters such as their gender history. This is particularly important given that 'disclosure of biological sex before, during, or after a sex act carries significant risk for trans and gender diverse people'.[326] In its preliminary submission, Sexual Health Quarters argued that amending the *Code* in a way that required disclosure of such matters 'would be a catastrophic blow to human rights and human dignity'.[327]

4.192. Various approaches could be taken to addressing this issue. One option would be to prioritise the interests of trans and gender diverse people, by explicitly providing that failing to disclose one's sex, sexual characteristics, gender identity, gender history or sexual orientation does not constitute fraud. Such an approach was recommended by the WAAC in its preliminary submission:

> The law must not extend to so-called 'gender fraud' if a nondisclosure or misrepresentation of a person's assigned gender at birth does not match their current gender identity. This would risk criminalising trans and gender diverse people who are an already-vulnerable community. We refer to cases overseas where gender non-conforming individuals have been prosecuted for sexual assault. These situations must not be considered fraudulent, as their impact would be troubling and problematic for all people whose gender identity lies outside the gender binary. Likewise, countries that criminalise trans and gender diverse people perform worse at reaching HIV care cascade targets. Therefore, we recommend a complete carve-out in the law to protect these people.[328]

4.193. To a certain extent, this approach was taken by the ACT Government in making its recent reforms to the ACT's consent laws. In its Revised Explanatory Memoranda to the Crimes (Consent) Amendment Bill 2022 it stated, when addressing the new fraud provision, that:

> Non-disclosure about gender history is not inherently fraudulent misrepresentation. A body of a person of diverse gender expression is not inherently deceptive and their gender identity is their real and authentic identity. A person of diverse gender expression is not obliged to disclose their gender history. Non-disclosure of gender history is not active deception. Cisgender normativity, gender identity discrimination and transphobia should not influence an outcome of trial.[329]

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[323] Preliminary Submission 12 (Sexual Health Quarters) 6.

[324] Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-consent' (2014) *Criminal Law Review* 207, 208.

[325] See 'Balancing conflicting interests and public policy concerns' below.

[326] Preliminary Submission 12 (Sexual Health Quarters) 6.

[327] Ibid.

[328] Preliminary Submission 10 (WAAC) 7 (citations omitted).

[329] Revised Explanatory Memoranda to the Crimes (Consent) Amendment Bill 2022 (ACT) 14.

4.194. Similarly, in explaining the provision on mistaken belief in identity, the Revised Explanatory Memoranda states that a 'person cannot claim a mistaken belief about the identity of the other person only because the other person has not disclosed a matter related to their gender identity'.[330] Despite these statements, however, the issues of sex, sexual characteristics, gender identity, gender history or sexual orientation are not explicitly addressed in the ACT Act. The relevant provisions simply state that a person does not consent if they participate in the act because of fraudulent misrepresentation of any fact made by someone else, or because of a mistaken belief about the identity of that other person.[331] It is unclear whether a court would agree that failing to disclose one's sex, sexual characteristics, gender identity, gender history or sexual orientation does not fall within the scope of these broadly drawn provisions.

4.195. Another option would be to prioritise sexual autonomy, by retaining a broad fraud provision. This was the approach taken by the NSWLRC in its review of consent. While it acknowledged the concerns raised above, it was of the view that 'the law must offer protection to complainants who are fraudulently induced to participate in sexual activity'.[332] Consequently, it recommended that the legislation provide that a person does not consent to a sexual activity if the person participates in the sexual activity because of a fraudulent inducement'.[333]

4.196. A third option would be to only criminalise fraudulent or deceptive conduct which the complainant has made clear is materially important to them.[334] In the current context this would require the complainant to have made it clear to the accused that they will only engage in a sexual activity with a person if they know their sex, gender history, gender identity, sexual orientation or and/or sexual characteristics, and the accused intentionally fails to disclose the relevant matter or deceives the accused about it. The advantage of such an approach is that it would not require people to disclose private matters in all cases, but it would offer protection to complainants for whom such matters were particularly important. However, it would still require disclosure of private matters in certain cases and allows discrimination on the basis of attributes which are protected in other contexts.[335] In this regard, Sharpe has argued that gender history should not be considered a material fact, as it casts doubts upon the authenticity of gender identities.[336] There may also be practical difficulties in ascertaining when a complainant considers a matter to be material.

4.197. A fourth option would be to specify that mere non-disclosure of a person's sex, sex characteristics, sexual orientation, gender identity or gender history is not sufficient to negate consent: that only active fraudulent misrepresentations which are deliberately intended to induce a person to engage in sexual activities negate consent. This would require the accused to have set out to deceive the complainant about one of the relevant matters, rather than simply remaining silent. Such an approach may overcome the privacy concerns raised above. However, it may be difficult to draw a line between an active fraudulent misrepresentation of a fact and non-disclosure.[337] For example, is a person who was born female but who uses a

[330] Ibid.

[331] *Crimes Act 1900* (ACT) s 67(1)(h)-(j).

[332] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.189].

[333] Ibid Rec 6.10.

[334] For further discussion of this type of approach, see the section 'Seriousness of the fraud, deception or mistake' below.

[335] See Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report* (Law Reform Commission of Western Australia, 2022).

[336] Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-consent' (2014) *Criminal Law Review* 207, 218.

[337] See A Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81 *Journal of Criminal Law* 417.

traditionally male name, dresses in traditionally male clothing, and wears a penile prosthesis, misrepresenting themselves to be male?

4.198. There may be other ways in which this issue could be addressed. We would be interested in hearing any suggestions you may have.

Sexual health

4.199. As noted above, one of the earliest cases on sexual fraud (*Clarence*) involved the accused failing to disclose that he had a sexually transmissible infection (gonorrhoea).[338] In that case the court held that the complainant's consent had not been negated, as the fraud did not relate to the nature of the act or the identity of the participants. Deception about a participant's sexual health was not considered a sufficient basis to negate consent.

4.200. It is unclear how the *Code's* consent provision would apply to fraud or deception about sexual health: this will depend on whether a broad or restrictive interpretation is given to the provision.[339] The transmission of diseases is, however, addressed by other areas of the law. For example:

- Under the *Public Health Act 2016* (WA), a person who has a notifiable infectious disease must take all reasonable precautions to ensure that others are not unknowingly placed at risk of contracting the disease.[340] The Chief Health Officer may make a public health order in relation to a person with such a disease, if they reasonably believe that the person may behave in a way that is likely to transmit the disease, and that will pose a material public health risk.[341] A person who fails to comply with a public health order without reasonable excuse faces 12-months' imprisonment or a $50,000 fine.[342]
- Where a person intentionally does an act that is likely to result in another person having a serious disease, they can be convicted of the offence of committing an act intended to cause grievous bodily harm.[343]
- Where a person unlawfully causes a person to contract a serious disease, they can be convicted of unlawfully causing grievous bodily harm.[344]

4.201. It is important to note that these mechanisms have different areas of focus: the *Public Health Act 2016* (WA) is concerned with stopping the spread of infectious diseases; and the grievous bodily harm offences are concerned with the potential physical harm caused by the transmission of serious diseases. By contrast, the main concern in the current context is the protection of the complainant's sexual autonomy. The question is whether a person should be considered to have freely and voluntarily consented to a sexual activity where they lacked information about a participants' sexual health.

4.202. No Australian jurisdictions explicitly address the issue of fraud or deception about sexual health in their legislation. It is, however, addressed in Singapore's *Penal Code*, which provides that a person is guilty of procurement of sexual activity by deception or false representation if the deception or false representation relates to the risk of contracting a sexually transmitted disease.[345]

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338 *R v Clarence* (1888) 22 QBD 23.
339 See the discussion of *Michael* and *HES* in paras 4.110-4.114 above.
340 *Public Health Act 2016* (WA) s 88(4).
341 Ibid s 116.
342 Ibid s 122.
343 *Criminal Code Act Compilation Act 1913* (WA) s 294(1)(h).
344 Ibid s 297.
345 *Penal Code 1871* (Sg) s 376H.

4.203. The issue has also been addressed by courts in Canada, where the *Criminal Code* provides that a person does not consent to a sexual activity where they participate by reason of fraud.[346] It has held that this applies to cases in which the accused does not disclose their HIV positive status to the complainant, and there is a realistic possibility of HIV transmission. There is no realistic possibility of transmission where the accused has a low viral load and uses a condom.[347]

4.204. The main argument in favour of criminalising the failure to disclose the accused's HIV positive status is that it upholds the right of people to determine the risks involved in their sexual activities. This is an essential aspect of sexual autonomy. In addition, it has been suggested that it is unlikely that it will have any impact on public health objectives, as:

> the intricacies of the criminal law are likely to be the furthest thing from the mind of a person who, anxious that s/he might have a serious disease, is considering whether to find out whether s/he does. And even if this were not so, it has long been a crime in the various Australian jurisdictions for a person recklessly or intentionally to inflict a grievous bodily disease on a person. It is difficult to believe that [this approach] would deter any person from undergoing testing who would not already be deterred by the GBH offences from doing so.[348]

4.205. However, the approach taken by the Canadian courts has been the target of significant criticism.[349] It has been argued that:

- Non-disclosure of a STI is a health issue. It is inappropriate to treat it as a sexual offence.
- It is unnecessary to address this issue in the sex offence context, given the other public health and criminal law mechanisms that are in place.[350]
- It may undermine public health objectives. For example, 'people may avoid STI testing out of fear of being charged with sexual assault, or so they can maintain plausible deniability in the event of a negation of consent accusation based on STI transmission or exposure. Early testing and treatment for sexually transmitted infections is crucial and avoiding testing can lead to long term health consequences'.[351]
- It undermines the participants' right to autonomy and privacy. People should be entitled not to disclose their health conditions, 'especially when they are taking appropriate precautions to prevent transmission'.[352] This is considered to be particularly important given the risks of harm, discrimination, vilification and harassment that can result from

[346] *Criminal Code*, RSC, 1985, c C-46, s 265(3)(c).

[347] *R v Mabior* [2012] 2 SCR 584; *R v Cuerrier* [1998] 2 SCR 371; *R v Gauthier* [2020] BCSC 146.

[348] Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159, 175.

[349] See, eg, RK Yamada, 'Fraud, HIV, and Unprotected Sex: *R v Cuerrier*' (1999) 6 *Southwestern Journal of Law and Trade in the Americas* 157; M Shaffer, 'Sex, Lies and HIV: Mabior and the Concept of Sexual Fraud' (2013) 63 *University of Toronto Law Journal* 466; S Cowan, 'Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission' (2014) 17 *New Criminal Law Review* 135; Canadian HIV/AIDS Legal Network, *The Criminalisation of HIV Non-disclosure in Canada: Current Status and the Need for Change* (Canadian HIV/AIDS Legal Network, 2019); Attorney General's Department of NSW Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005); Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.158].

[350] The QLRC did not recommend adoption of this approach for this reason: Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.178]-[6.182].

[351] Preliminary Submission 10 (WAAC) 4. See also Preliminary Submission 17 (Department of Health) 3.

[352] Preliminary Submission 10 (WAAC) 4.

disclosure of HIV status.[353] Disclosure decisions should rest solely with affected individuals, without them facing fear of criminal law repercussions.[354]

- It may result in unintentional net-widening, with allegations of sexual assault being made whenever a person contracts common STIs such as herpes, chlamydia or gonorrhoea.[355]
- It inappropriately places the responsibility for preventing HIV transmission onto the HIV positive person alone, rather than adopting a shared responsibility model.[356] 'Both parties are responsible for preventing HIV prevention and should take appropriate precautions such as using PrEP, U=U[357] or using condoms. None of these easily available prevention mechanisms require HIV disclosure'.[358]
- It stigmatises people with HIV and has a discriminatory impact on LGBTIQA+ populations. Adopting such an approach in Australia 'would make the law involving HIV inconsistent with state and national HIV strategies and undermine other commitments to stigma reduction'.[359]

4.206. In relation to the final point, Australia's National Guidelines for Managing HIV Transmission Risk Behaviours state that:

> Prosecution of people for the transmission of HIV, or for risking the transmission of HIV to others, perpetuates and worsens negative stereotypes of people living with HIV. This occurs both within the criminal justice system, including within the police force, and in the general public via media reporting of the prosecution case. Such stereotypes add to HIV stigma and discrimination and reduce the effectiveness of public health programs to reduce HIV transmission by deterring people from being tested for HIV. There is extensive local and international literature which documents the greater public health harms that may be caused by criminalisation of HIV transmission.[360]

4.207. In response to criticisms of the approach taken by the Canadian courts, the Canadian Attorney-General has directed the Director of Public Prosecutions as follows:

> (a) The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.
>
> (b) The Director shall generally not prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
>
> (c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.

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353 Preliminary Submission 17 (Department of Health) 3

354 Preliminary Submission 10 (WAAC) 3.

355 Preliminary Submission 17 (Department of Health) 3

356 The importance of the shared responsibility model was emphasised in the Department of Health's preliminary submission: ibid 3.

357 PrEP (pre-exposure prophylaxis) is a highly effective medicine taken to prevent HIV. U=U (undetectable = untransmittable) means having an undetectable viral load. Where this is the case there is no risk of transmitting HIV.

358 Preliminary Submission 10 (WAAC) 3.

359 Ibid 4.

360 Australian Government, Department of Health, *National Guidelines for Managing HIV Transmission Risk Behaviours* (2018) 13.

(d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.[361]

4.208. The resolution of this issue requires a consideration, and balancing, of the conflicting rights of the participants.[362] That could involve the following options:

- Prioritise the interests of people with STIs, by explicitly providing that failing to disclose information about one's sexual health does not undermine consent.[363]
- Prioritise sexual autonomy, by explicitly providing that failing to disclose information about one's sexual health negates consent.[364] If this approach were adopted, it would be necessary to determine whether it would apply to all STIs or only serious diseases, and whether it would apply in all cases or only where there is a real risk of transmission.
- Do not specifically address the issue but retain a broad fraud provision. This was the approach taken by the NSWLRC. While it acknowledged the concerns raised by the Canadian approach, it was of the view that 'the law must offer protection to complainants who are fraudulently induced to participate in sexual activity'.[365]
- Only criminalise fraudulent or deceptive conduct which the complainant has made clear is materially important to them. In the current context this would require the complainant to have made it clear to the accused that they would not engage in a sexual activity with a person who does not disclose their sexual health status or who has a sexual health condition which is experienced by the accused.
- Specify that mere non-disclosure of a person's sexual health conditions is not sufficient to negate consent: that only active fraudulent misrepresentations which are deliberately intended to induce a person to engage in sexual activities negate consent. This would require the accused to have set out to deceive the complainant about their sexual health by words or actions.

4.209. There may be other ways in which this issue could be addressed. We would be interested in hearing your suggestions.

Seriousness of the fraud, deception or mistake

4.210. One of the main concerns that is raised when addressing sexual fraud, deception or mistake is that a broadly drawn provision may capture circumstances which should not be criminalised. For example, it may not be appropriate to criminalise deceptions or mistakes about seemingly trivial matters, such as a person's profession or wealth. The difficulty, however, is working out 'a way of ensuring that such persons incur no rape/sexual assault liability, while also giving proper protection to complainants' sexual autonomy'.[366]

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[361] Government of Canada, Office of the Director of Public Prosecutions, 'HIV Non-Disclosure Directive' (2018) 152(49) *Canada Government Gazette* <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>.

[362] See 'Balancing conflicting interests and public policy concerns' below.

[363] This approach was supported by the WAAC in their preliminary submission: Preliminary Submission 10 (WAAC) 8.

[364] This approach was supported by the Centre for Women's Safety and Wellbeing in its preliminary submission. It recommended the following provision be added to the list of circumstances: 'Where the person (victim) agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease': Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 2.

[365] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.189].

[366] Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159, 168.

4.211. The previous sections have suggested one way of approaching this issue: by explaining the types of misrepresentations or mistakes that should or should not be covered by the relevant provision. An alternative approach would be to focus on the seriousness of the misrepresentation or mistake rather than its content.

4.212. There are three main ways in which this could be done. First, the provision could be restricted to objectively serious frauds, deceptions or mistakes. This could be determined by considering whether the reasonable or ordinary person would consider the fraud, deception or mistake to have been serious, or by simply leaving it to the jury to determine.

4.213. This approach would have the benefit of flexibility: it would allow jurors to consider all of the relevant circumstances and make a determination about whether the accused's acts or the complainant's mistake were sufficiently serious to negate consent. It would also arguably reflect the community's views on whether a fraud, deception or mistake is so grave that the complainant should not be seen to have consented in the circumstances. However, it would not provide clear guidance to people about the scope of consent laws and could result in inconsistent decisions being made by different juries. In addition, by judging the seriousness of a matter from an objective perspective it disregards the complainant's experience of the matter. This may lead to great dissatisfaction with the criminal justice process and could result in an increased reluctance to report or prosecute cases due to fear that the fraud, deception or mistake will not be considered sufficiently serious.

4.214. A second possible approach would be to restrict the provision to subjectively serious frauds, deceptions or mistakes. This would be determined by considering whether the complainant considered it to be a serious matter. This could perhaps be ascertained by asking whether the complainant would have engaged in the sexual activity had they known the truth (i.e., was it a 'deal-breaker' for them).

4.215. This approach would address many of the concerns raised above: it takes the complainant's perspective seriously, allowing them to determine the bounds of their sexual autonomy. However, it raises other potential problems. For example, it may be difficult to determine whether a matter was considered serious by the complainant. In an attempt to disprove this, defence counsel may seek to rely on the complainant's prior sexual history which could increase the secondary traumatisation of the criminal justice process. It is also not clear whether this would place any significant limits on the scope of the provision, as a complainant could potentially consider any matter to be a deal-breaker.

4.216. A third possible approach would be to specify that the provision does not apply to trivial matters, or to specifically exclude certain trivial matters from its scope. For example, the Act could specify that the fraud provision does not apply to misrepresentations about a person's marital status or occupation.

4.217. This approach was considered by the NSWLRC, but it did not recommend adopting it for the following reasons:

> Fraud is a concept that is well understood in the civil and criminal law, and does not extend to cases of trivial or less serious deceits. The criminal law has historically distinguished between fraud and 'puffery' (for example, in general fraud offences). Our view is that deceits such as lies about a person's marital status or occupation would be most likely viewed as puffery, and therefore not within the concept of fraud, and unlikely to be charged or prosecuted in the first place.
>
> Case law from Australian states and territories also demonstrates that fraud provisions have been applied in cases involving serious conduct. We are not aware

> of any cases where these laws have criminalised conduct which would be considered trivial or not deserving criminal sanction.[367]

4.218. The NSW Government, however, took a different view. It its recent reforms to NSW's consent laws it explicitly excluded misrepresentations about a person's income, wealth or feelings from the scope of its fraud provision, by defining the term fraudulent inducement (which vitiates consent) to exclude those things.[368] In its second reading speech, the Government stated that these exclusions were not intended to be exhaustive: it was of the view that other matters, such as employment status or marital status, would also be excluded from the scope of the fraud provision.[369] The Government's intention was that the provision only cover serious deceptions. However, it is unclear to us whether that intention is achieved having regard to the exhaustive nature of the definition of fraudulent inducement.

4.219. Dyer has argued that there are good public policy reasons for preventing convictions for sexual offences where the accused has lied about matters such as their love for the complainant, their marital status or their wealth:

> In short, the public does not see persons of this kind as sex offenders. It sees such lies as being far too 'trivial' to give rise to criminal liability. And whether such intuitions are right or wrong, the courts would be foolish – and unlikely – to ignore them. The 'majoritarian' view among judges is that, as McHugh J has put it:
>
> > If a change in the … law would be rejected by the community, it should not be made, however much the judge thinks that the change is in the community's interest.
>
> Rightly so, too, because once the judges create new legal rules that run against the 'contemporary values of the community', they are apt to be seen to be deciding cases not 'on legal merit' but because of their own 'political or ideological sympathies'. They risk losing their reputation for impartiality, which Brennan CJ recognised to be so 'critical to the stability of … society.' In short, a conviction in a case of this sort would quite possibly bring the courts into disrepute. There would therefore be good grounds for not making it – even if the actual reasoning that the courts used to justify such an outcome focused more on the triviality of the accused's lie than on the proper limits of judicial power.[370]

4.220. One of the difficulties with this approach is determining which matters should be excluded: there are a vast number of matters which could be considered insufficiently serious. While the legislation could simply specify that the provision does not apply to trivial matters, the problem with this approach is that different people have different views about whether a matter is trivial. For example, some people may consider a lie about a person's marital status to be trivial, while others may consider it to be very serious.

Balancing conflicting interests and public policy concerns

4.221. An alternative way to address the problem of excessive breadth would be to broadly define the circumstances in which consent is negated due to fraud, deception or mistake (in order to protect people's sexual autonomy), but to provide that a person should not be convicted if their

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[367] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.180]-[6.181].

[368] *Crimes Act 1900* (NSW) s 61HJ(3).

[369] NSW, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7510 (Mark Speakman).

[370] Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159, 178.

interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern.[371]

4.222. The main advantage of such an approach is that it accepts that certain acts, such as failing to disclose one's HIV positive status, do negate consent (as they undermine the other participants' ability to make a free and voluntary choice about their sexual activities), while at the same time accepting that there may be countervailing reasons for nevertheless choosing not to criminalise such conduct. While sexual autonomy is an important interest, it may not be the only interest at stake in a particular case. For example, it may be appropriate for the court to also consider a person's privacy interests, or their interests in not being discriminated against, harassed or vilified. It may also be appropriate for the court to take into account public policy concerns, such as the public interest in not criminalising adultery. While such behaviour will often be deceptive, it is generally accepted that the criminal law should not play a role in enforcing fidelity.

4.223. The main disadvantages of this approach arise from the fact that it leaves it to the court to decide, on a case-by-case basis, whether the accused's interests outweigh the complainant's interests. This means that:

- People may not be able to determine, in advance, whether they are permitted to engage in a sexual activity;
- Police and prosecutors may not be sure whether an offence has been committed; and
- Juries may apply the law inconsistently, reaching different conclusions in relation to similar factual situations.

4.224. It may be possible to address some of these concerns through the drafting of the provision or the use of legislated examples. For example, the *Code* could provide the example of a person's privacy interests in keeping their gender history confidential outweighing another person's sexual autonomy interests in having that history disclosed to them prior to engaging in sexual activity with the first person. However, it is arguable that the provision of statutory examples may make ethical judgements that should be made on a case-by-case basis by the jury having knowledge of all the relevant facts.

Use of pressure

4.225. The third category of non-consensual sexual acts arises where a person is pressured into engaging in the act. In this section we consider whether the *Code* should address circumstances in which a person participates in a sexual act due to:

- The use of force;
- Threats, intimidation, coercion or blackmail;
- Harm;
- Fear of force or harm;
- Unlawful detention; or
- Abuse of a relationship of authority, trust or dependence.

4.226. We note that these circumstances are not mutually exclusive and will often overlap. This will especially be the case where an individual is experiencing circumstances of family violence.

[371] See ibid.

Use of force

4.227. Legislation in all Australian jurisdictions, including Western Australia, specifies that a person does not consent where they have participated in the sexual activity because of the use of force (see Table 4.4.5 below).

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person participates in the act because of the infliction of violence or force on the person, or another person, an animal or property; or participates in the act because of force.[372]
NSW	If the person participates in the sexual activity because of force to the person, another person, an animal or property, regardless of when the force occurs or whether it occurs as a single instance or as part of an ongoing pattern.[373]
NT, SA, Tas & Vic (current)	If the person submits because of the application of force to them or another person.[374]
Qld & WA	If the consent is obtained by force.[375]
Vic (new)	If the person submits to the act because of force, whether to that person or someone else or to an animal, regardless of when the force occurs or whether it is a single incident or is part of an ongoing pattern.[376]

Table 4.5: Australian approaches to the use of force

4.228. It can be seen that the Queensland and Western Australian provisions are broadly drawn: they simply state that a person does not consent if the consent is obtained by force. While it is clear that this applies to cases in which the complainant participates in a sexual activity because of the use of force against them personally, it is not clear whether it also extends to circumstances where force is used against another person, an animal or property.

4.229. By contrast, all other jurisdictions clarify which targets are covered by the provision. In all cases it includes force directed at another person. The ACT, NSW and new Victorian Acts include the use of force on animals. The ACT and NSW Acts also include the use of force on property. It would be possible for the *Code* to clarify the precise scope of the provision in this way.

4.230. The NSW and new Victorian Acts also make it clear that it does not matter when the force was used or whether a person participated in the sexual act due to one incident of force or an ongoing pattern of force: in both cases they have not consented. This approach has been taken to ensure that the provision is sufficiently broad to 'capture situations of domestic and

[372] *Crimes Act 1900* (ACT) ss 67(1)(b), 67(1)(f).

[373] *Crimes Act 1900* (NSW) s 61HJ(1)(e).

[374] *Criminal Code Act 1983* (NT) s 192(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Criminal Code Act 1924* (Tas) s 2A(2)(b); *Crimes Act 1958* (Vic) s 36(2)(a).

[375] *Criminal Code Act 1899* (Qld) s 348(2)(a); *Criminal Code Act Compilation Act 1913* (WA) s 319(2).

[376] *Crimes Act 1958* (Vic) s 36AA(1)(b), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

family violence, which is often characterised by repeated patterns of threatening, coercive or abusive behaviour (rather than a single incident)'.[377]

4.231. In this regard, it is important to note that sexual violence is often used as a form of family violence. For example, ABS data shows that in 2020 more than a quarter (27%) of sexual assaults in Western Australia were related to domestic or family violence.[378] In its preliminary submission, the Centre for Women's Safety and Wellbeing noted that Australian domestic and family violence workers estimate that '90-100% of their female clients have experienced intimate partner sexual violence'.[379]

4.232. There are various ways in which sexual violence and family violence may interact. For example, people may pressure their intimate partners to perform acts that they are not comfortable performing or to have sex when they do not want to.[380] This may form 'part of a larger pattern of coercive control that is intended to dominate, humiliate and denigrate'.[381] The use of sexual violence as a controlling sexual behaviour is considered in detail in the Background Paper.[382]

4.233. Some of the key features of sexual violence in a family violence context include 'multiple forms of sexual violence; a likelihood of repetition; and the fact that sexual violence is likely to be accompanied by other forms of violence'.[383] In such circumstances, it is argued that even if 'no violent acts are enacted on the victim-survivor prior to or during a sex act, the ongoing threat of harm creates a power imbalance whereby a victim-survivor cannot consent freely'.[384]

4.234. The NSW and new Victorian Acts seek to address this dynamic, by making it clear that there does not need to have been a particular incident that caused the complainant to participate in the sexual activity. They will not have consented if they participated due to the cumulative effects of a pattern of coercive and controlling behaviours. For example, a person who had previously been hit on multiple occasions for failing to consent may, as a result, agree to participate in a sexual activity on a subsequent occasion.

4.235. In recommending this approach, the NSWLRC mentioned that there was some concern that it extended the law too far, by including cases where there was a long delay between the use of force and the sexual activity. It noted, however, that the prosecution would still be required to prove that the person participated in the sexual activity because of the use of force. The NSWLRC was of the view that if this was the reason why they engaged in the activity, it should not matter when the conduct occurred.[385]

4.236. This approach was strongly endorsed by the Centre for Women's Safety and Wellbeing in its preliminary submission. It argued that the law is currently inadequate in this regard. It submitted that it 'would like to see better recognition of sexual violence in a domestic violence context and acknowledgement that the fear of harm, coercion, blackmail or intimidation can

[377] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.113].

[378] Australian Bureau of Statistics, *Recorded Crime – Victims* (Catalogue No 4510.0, 24 June 2021) (WA Specific data).

[379] Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 2.

[380] Ibid.

[381] Ibid 8. See also Preliminary Submission 12 (Sexual Health Quarters) 3.

[382] Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) [1.1].

[383] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [24.33].

[384] Preliminary Submission 12 (Sexual Health Quarters) 4.

[385] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.115]. See also Preliminary Submission 12 (Sexual Health Quarters) 3.

occur at any time and that there is no requirement to consider immediacy. This would recognise long-term patterns of abuse'.[386]

4.237. By contrast, while the QLRC noted that sexual offences commonly occur in a context of family violence, it did not consider it necessary to amend its laws to address this fact. It was of the view that Queensland's current provisions, which provide that a person's consent to an act is not freely and voluntarily given if it is obtained by force, threat, intimidation or fear of bodily harm, were sufficient to address this issue.[387]

Threats, intimidation and coercion

4.238. All Australian jurisdictions other than the NT include an explicit reference to threats or intimidation in their legislation (see Table 4.4.6 below).[388] Some jurisdictions, including Western Australia, also have a separate offence of procuring a sexual act by threats or intimidation.[389] This offence is addressed in Discussion Paper Volume 2.

[386] Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 6.

[387] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.223]-[6.226].

[388] While the Victorian Act does not currently include reference to threats or intimidation, a provision concerning coercion or intimidation will be added by the new Victorian provisions: *Crimes Act 1958* (Vic) s 36AA(1)(c), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

[389] See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 192; *Criminal Code Act 1899* (Qld) s 218; *Criminal Law Consolidation Act 1935* (SA) s 60; *Criminal Code Act 1924* (Tas) s 129; *Crimes Act 1958* (Vic) s 44.

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person participates because of: a threat to inflict violence or force on the person, or another person, an animal or property; extortion, coercion, blackmail or intimidation of the person or another person; or a threat to mentally or physically harass the person or another person.[390]
NSW	If the person participates because of coercion, blackmail or intimidation, regardless of when the coercion, blackmail or intimidation occurs, or whether it occurs as a single instance or as part of an ongoing pattern.[391]
NT & Vic (current)	Not addressed in legislation.
Qld & WA	If consent is obtained by threat or intimidation.[392]
SA	If the person agrees because of an express or implied threat of the application of force to the person or to some other person, or an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person.[393]
Tas	If the person agrees or submits because of a threat of any kind against him or her or against another person.[394]
Vic (new)	If the person submits to the act because of coercion or intimidation, regardless of when the coercion or intimidation occurs, or whether it is a single incident or is part of an ongoing pattern.[395]

Table 4.6: Australian approaches to threats or intimidation

4.239. Six key questions arise in this context. First, there is a question of what type of behaviour should be covered by this provision. The *Code* currently includes threats or intimidation. Other jurisdictions have extended this to include coercion, extortion or blackmail. In this regard, the NSWLRC noted that such forms of behaviour can be 'just as oppressive and influential as overt or violent threats or conduct'.[396]

4.240. The inclusion of a broad concept of coercive conduct is often seen to be particularly important given the relationship between sexual violence and family violence discussed above. It covers a much broader range of conduct than threats or intimidation. For example, the NSWLRC was of the view that it would cover 'verbal aggression, begging and nagging, physical persistence, social pressuring, and emotional manipulation'.[397]

4.241. The NSWLRC recommended that both coercion and blackmail be explicitly included in the list. In making this recommendation, it noted that it may not have been necessary to include the

[390] *Crimes Act 1900* (ACT) ss 67(1)(c)-(e).
[391] *Crimes Act 1900* (NSW) s 61HJ(f).
[392] *Criminal Code Act 1899* (Qld) s 348(2)(b); *Criminal Code Act Compilation Act 1913* (WA) s 319(2).
[393] *Criminal Law Consolidation Act 1935* (SA) ss 46(3)(a)(i)-(ii).
[394] *Criminal Code Act 1924* (Tas) s 2A(2)(c).
[395] *Crimes Act 1958* (Vic) s 36AA(1)(c), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
[396] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.107].
[397] Ibid [6.108].

term blackmail, as such behaviour would already be covered by the term coercion. However, it was of the view that there were significant community concerns about the use of blackmail to obtain consent to sexual activities. For example, several submissions and survey responses had referred to the practice of 'revenge porn', and the practice of threatening to release naked photos of a person if they do not agree to sexual activity. The NSWLRC concluded that an express reference to blackmail in the legislation would most clearly address this concern.[398]

4.242. In its preliminary submission to this reference, the Centre for Women's Safety and Wellbeing argued that the list should also explicitly refer to domestic or family violence:

> There is also the danger that when removed from the wider context of domestic and family violence, terms like coercion can be levelled at the victim by the perpetrator of domestic and family violence, creating a false impression of mutuality, rather than seeing the impact of coercion as part of 'a pattern of harmful behaviour'.
>
> As well as covering unwilling participation in sexual acts achieved through subtle emotional or psychological manipulation, by adding domestic or family violence into the legislation, the resulting law would be more effective in recognising non-consent when it involves humiliating, unwanted or painful sexual acts. In practical terms, adding this criterion would make it easier to identify non-consent when it includes pressure to perform sexual acts that the victim is not comfortable with, or to engage in acts at a time that they do not wish to do so.[399]

4.243. Secondly (and relatedly), there is a question of whether the nature of the threat or intimidatory behaviour should be specified. For example, the SA Act makes it clear that threats to apply force, degrade, humiliate, disgrace or harass are all covered. The ACT Act also includes threats to use force or harass, making it clear that the harassment may be physical or mental in nature. By contrast, the *Code* does not currently specify the type of threat or intimidation required. However, in *Michael* the Western Australian Court of Appeal made it clear that the current provision does not just cover threats of physical violence. Its terms are sufficiently broad to cover other types of threat, including threats of substantial economic harm or blackmail.[400]

4.244. In this regard, it should be borne in mind that threatening and coercive behaviour can take many forms. For example, in a submission to the NSWLRC, the Australian Queer Students' Network has argued the law should be broad enough to cover situations such as:

- The coercion of sexual acts in exchange for access to money, freedom, children, space, affection and medication;
- The threat of 'outing' someone as an LGBTIQA+ person, as someone of HIV+ status or as a sex worker; and
- The threat of limiting access to specific medications or medical assistance (such as hormones for gender affirmation or treatment for HIV).[401]

4.245. Other suggestions were made in three preliminary submissions that we received:

- Sexual Health Quarters contended that 'coercive tactics such as threatening to "out" someone publicly as a sex worker, or by blackmailing someone in relation to their

[398] Ibid [6.111]-[6.112].

[399] Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 8 (citations omitted).

[400] *Michael v State of Western Australia* (2008) 183 A Crim R 348, [74].

[401] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [4.50], quoting Australian Queer Students Network, Preliminary Submission PCO56, 7–8.

immigration status' should be addressed, as should 'using the financial dependence of a partner to elicit consent to sex acts'.[402]

- The Ethnic Communities Council of Western Australian noted that 'power dynamics can also be at play particularly in cultures from repressive regimes where the face of authority is viewed with fear – even in social contexts such as teachers and students, employer and employee, medical personnel and patient. In cases where there is proof of coercion, threat or nepotism/bribery, consent must be considered to be invalid'.[403]
- The Department of Health suggested that we 'consider the impact of more subversive and coercive behaviours that can occur as a consequence of power imbalances that exist between people in different types of relationships'.[404]

4.246. By contrast, defence counsel in *Michael* argued for limitations to be placed on the scope of this provision. They suggested, for example, that consent should not be negated where a person threatens to stop dating their partner if they do not have sex with them.[405] While the Court agreed that 'difficulties may arise if any threat is to suffice', it was of the view that Parliament had chosen 'to impose a subjective test which does not have regard to the nature of the threat except insofar as the jury is required to assess whether the victim's consent was in fact "obtained by" the threat or intimidation'.[406] Consequently, it appears that the current provision may cover any type of threat or intimidation, as long as it causes a person to participate in the sexual activity. This includes threats which are overwhelming to that person but would be of no significant consequence to anyone else.[407]

4.247. Thirdly, there is a question of whether the provision should specify to whom the behaviour must have been directed. For example, the Tasmanian Code and SA Act clarify that the threat need not be made against the complainant: it can be made against any person. The ACT Act extends this to threats to inflict violence or force on animals or property. By contrast, the *Code* provision does not address this issue. The Western Australian Court of Appeal has, however, indicated that the threat does not need to have been directed at the victim. A person will not have consented to a sexual activity if they participated due to a threat directed at another person, such as their spouse or sibling.[408]

4.248. Fourthly, there is a question of whether the provision should make it clear that the threat can be express or implied, as is the case in the SA Act. While this is not currently addressed in the *Code*, the wording of the provision appears sufficiently broad to cover both types of threat.

4.249. Fifthly, there is a question of whether the provision should address the timing of the conduct. For example, the NSW and new Victorian Acts state that it does not matter when the conduct occurred: what is important is whether that conduct caused the person to participate in the sexual activity. This issue is not currently addressed in the *Code*, although the Court has made it clear that the accused does not need to have threatened immediate harm: a person 'may be as much induced to consent by a threat of something that is to happen in the future as by something that will happen more immediately'.[409]

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402 Preliminary Submission 12 (Sexual Health Quarters) 5.
403 Preliminary Submission 18 (Ethnic Communities Council of Western Australia) 1.
404 Preliminary Submission 17 (Department of Health) 2.
405 *Michael v State of Western Australia* (2008) 183 A Crim R 348, [75].
406 Ibid [76].
407 Preliminary Submission 16 (ODPP) 4.
408 *Michael v State of Western Australia* (2008) 183 A Crim R 348, [68].
409 Ibid.

4.250. Sixthly, there is a question of whether the provision should specify that it does not matter if the conduct constitutes a single incident or is part of an ongoing pattern, as is the case under the NSW and new Victorian Acts. As discussed in the previous section, this approach has been taken to ensure that the provision is sufficiently broad to address sexual violence that occurs in the context of family violence. It makes it clear that that there does not need to have been a particular incident that caused the complainant to participate in the sexual activity. They will not have consented if they participated due to the cumulative effects of a pattern of coercive and controlling behaviours.

Harm

4.251. Another matter which could be included in the list of circumstances in which a person does not consent is where a person submits to a sexual act because of any type of harm. While similar to the circumstances discussed above, the focus here is not on the type of action that has been used against the complainant (for example, force or threats). It is on the way in which the complainant has experienced those actions.

4.252. The new Victorian Act is the only Australian Act to include harm in its list of circumstances.[410] It provides that there is no consent where a person submits to an act because of harm of any type, whether to that person or someone else or to an animal, regardless of when the harm occurs or whether it is a result of a single incident or part of an ongoing pattern. The Act provides the following examples of types of harm that can be done to a person:

(a) economic or financial harm;

(b) reputational harm;

(c) harm to the person's family, cultural or community relationships;

(d) harm to the person's employment;

(e) family violence involving psychological abuse or harm to mental health;

(f) sexual harassment.[411]

4.253. In explaining the reasons for the enactment of this provision, and the breadth of its scope, in its second reading speech, the Government stated:

> Harm is not just physical. It can include psychological and economic or financial harm and subtle emotional manipulation. These varied types of harm are particularly apparent in situations of family violence, where perpetrators may use coercive and controlling behaviours over an extended period of time. However, they are not exclusive to family violence, and may be a feature of sexual violence that occurs in other settings.
>
> The provision sets out a non-exhaustive list of examples of the type of harm that may cause a person to submit to a sexual act to give a sense of the breadth of harm that could be captured. Other types of harm that are not included in the examples can still be relied on in prosecutions. The examples of harm provided for in the legislation include:

[410] Other Acts refer to participation due to a fear of harm (see below), but not to participation due to the causing of harm.

[411] *Crimes Act 1958* (Vic) s 36AA(1)(b), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

- Economic or financial harm, such as loss or withdrawal of housing, food or other financial support.
- Reputational harm, which may include fear of public humiliation. For example, a person who submits to an act because the other person has threatened to release disparaging information or a person's sexual or gender history.
- Harm to a person's family, cultural or community relationships may cover a broad range of situations. For example, submitting to a sexual act because it is culturally expected or there would be repercussions if a person did not submit such as being cut off or ostracised from their community or family.
- Harm to employment, which may extend to loss of a job, a reduction in income or job prospects.
- Family violence involving psychological abuse or harm to mental health may include, for example, verbal aggression, emotional manipulation or controlling behaviour. This could also include threats to withdraw care or medication, or sponsorship for a visa.
- Sexual harassment, which includes when a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, or engages in any other unwelcome conduct of a sexual nature towards the other person.[412]

Fear of force or harm

4.254. Another matter which could be addressed in the list of circumstances is fear of force or harm. Unlike the matters addressed above, the focus here is on the complainant's apprehension that force will be used or harm will be caused in the future if they do not participate in the sexual activity.

4.255. All jurisdictions other than Western Australia include participation in a sexual activity due to fear in their list of circumstances in which a person does not consent (see Table 4.4.7 below).

[412] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 2022, 2901-02 (Sonya Kilkenny).

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person participates because of fear, including a fear of public humiliation or disgrace of the person or another person.[413]
NSW	If the person participates because of fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of when the conduct giving rise to the fear occurs, or whether it occurs as a single instance or as part of an ongoing pattern.[414]
NT	If the person submits because of fear of force, or fear of harm of any type, to himself or herself or another person.[415]
Qld	If the consent is obtained by fear of bodily harm.[416]
SA	If the person agrees because of a fear of the application of force to the person or to some other person.[417]
Tas	If the person agrees or submits because of a reasonable fear of force, to him or her or to another person.[418]
Vic (current)	If the person submits to the act because of the fear of force, whether to that person or someone else, or the fear of harm of any type, whether to that person or someone else or an animal.[419]
Vic (new)	If the person submits to the act because of a fear of force, or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of when the conduct giving rise to the fear occurs, or whether it is a result of a single incident or is part of an ongoing pattern. The section provides the following examples of possible types of harm: economic or financial harm; reputational harm; harm to the person's family, cultural or community relationships; harm to the person's employment; family violence involving psychological abuse or harm to mental health; sexual harassment.[420]
WA	Not addressed in legislation.

Table 4.7: Australian approaches to fear of force or harm

4.256. If fear is to be included in the list of circumstances, it will be necessary to determine precisely what the person must fear. It can be seen from Table 4.4.7 that various approaches to this issue have been taken across Australia:

- The ACT has the broadest approach, simply providing that a person does not consent where they participate because of fear. This includes a fear of public humiliation or disgrace.

[413] *Crimes Act 1900* (ACT) ss 67(1)(d), (f).
[414] *Crimes Act 1900* (NSW) s 61HJ(1)(e).
[415] *Criminal Code Act 1983* (NT) s 192(2)(a).
[416] *Criminal Code Act 1899* (Qld) s 348(2)(c).
[417] *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i).
[418] *Criminal Code Act 1924* (Tas) s 2A(2)(b).
[419] *Crimes Act 1958* (Vic) ss 36(2)(a)-(b).
[420] Ibid s 36AA(1)(b), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

- SA and Tasmania have restricted their provision to fear of force.
- Queensland has restricted its provision to fear of bodily harm.
- Provisions in NSW, NT and Victoria refer to fear of both force and harm. In relation to the fear of harm:
  - The NT and Victorian Acts cover fear of harm of any kind, whereas the NSW Act is limited to fear of serious harm.
  - The new Victorian Act makes it clear that harm is to be understood in the expansive way discussed in the previous section. While not made explicit in the NSW Act, this was also the intention behind the NSW provision.[421]

4.257. One issue to consider is whether the provision should be limited to reasonable fears, as is the case in Tasmania. This could help prevent the provision capturing situations where the complainant's fear is unjustified or unsubstantiated.[422] This approach was not, however, recommended by the NSWLRC, which concluded that:

- this would require fact finders to determine the reasonableness of a complainant's fear, when what matters is whether or not they participated because of fear
- some complainants, particularly those experiencing domestic violence, may participate in sexual activity because of fear that may seem trivial or 'unreasonable' on its face, but which is understandable in the broader context of a history of coercion and control, and
- in any event, the prosecution is still required to prove that the accused person knew the complainant participated 'because of' fear, and this will be difficult in cases where the fear is in fact unjustified or unsubstantiated.[423]

4.258. Other matters that could also be addressed in the provision include:

- Extension to fear of force or harm to other people, animals and/or property. This could help capture situations that often arise in the family violence context.[424]
- Clarification that the timing of the conduct that caused the fear does not matter.
- Specification to cover single incidents and acts that form part of an ongoing pattern.

Unlawful detention

4.259. All jurisdictions other than Western Australia and Queensland include unlawful detention in their lists of circumstances in which a person does not consent (see Table 4.4.8 below).

[421] See New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.103].

[422] Ibid [6.105].

[423] Ibid (citations omitted).

[424] See, eg, E Alleyne and C Parfitt, 'Adult-Perpetrated Animal Abuse: A Systematic Literature Review' (2019) 20 *Trauma, Violence and Abuse* 344; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.103].

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person is unlawfully detained or knows that another person is unlawfully detained.[425]
NSW & Tas	If the person participates because the person or another person is unlawfully detained.[426]
NT & Vic (current & new)	If the person submits because they are unlawfully detained.[427]
Qld & WA	Not addressed in legislation.
SA	If the person is unlawfully detained at the time of the activity.[428]

Table 4.8: Australian approaches to unlawful detention

4.260. While the *Code* does not explicitly address unlawful detention, a person who participates in a sexual activity due to unlawful detention may well not be considered to have given their consent freely and voluntarily. In addition, depending on the circumstances of the detention, there may be issues surrounding the use of force, threats or intimidation. However, it may be worth explicitly addressing unlawful detention in the list of circumstances.

4.261. There are various ways in which a provision on unlawful detention could be framed, as indicated by the different approaches taken by Australian and international jurisdictions:

- It could be limited to circumstances in which the complainant is detained (Victoria, SA, NT) or could be extended to include circumstances in which another person is detained (ACT, NSW, Tasmania). The NSWLRC recommended extending the provision in this way in order to 'cover situations when, for example, somebody participates in a sexual activity because a family member (a child, for example) is unlawfully detained. This may provide further protection to people who experience domestic and family violence'.[429]
- It could apply whenever a person engages in a sexual activity while unlawfully detained (ACT, SA), or it could require proof that the person participated in that activity because of the detention (NSW, Tasmania, NT, Victoria).
- It could be limited to circumstances in which the complainant was detained but the accused was not. This is the approach taken in the UK,[430] but is not the law in any Australian jurisdiction.
- It could be limited to circumstances in which the accused was responsible for the detention. This was recommended by the Scottish LC,[431] but is not the approach taken in any Australian jurisdiction.

[425] *Crimes Act 1900* (ACT) s 67(1)(o).

[426] *Crimes Act 1900* (NSW) s 61HJ(1)(g); *Criminal Code Act 1924* (Tas) s 2A(2)(d).

[427] *Criminal Code Act 1983* (NT) s 192(2)(c); *Crimes Act 1958* (Vic) s 36(2)(c); *Crimes Act 1958* (Vic) s 36AA(1)(d), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.

[428] *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b).

[429] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.124].

[430] *Sexual Offences Act 2003* (UK) s 75(2)(c); *The Sexual Offences (Northern Ireland) Order 2008* (NI) s 9(2)(c).

[431] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.70]-[2.72]. This recommendation has not been implemented.

Abuse of a relationship of authority, trust or dependence

4.262. Some jurisdictions include in their list of circumstances cases in which a person has abused a relationship of authority, trust or dependence (see Table 4.4.9 below).This may occur, for example, in a doctor and patient relationship. The *Code* does not currently include such a provision, although it does contain specific offences and harsher penalties for people who sexually offend against those who are in their care, supervision or authority.[432] We discuss these offences and their penalties in Discussion Paper Volume 2.

Jurisdiction	Circumstances in which a person does not consent
ACT	If the person participates as a result of an abuse of: • a relationship of authority, trust or dependence; or • a professional relationship.[433]
NSW	If the person participates because the person is overborne by the abuse of a relationship of authority, trust or dependence.[434]
NT, Vic (current), SA & WA	Not addressed in legislation.
Qld	If the consent is obtained by exercise of authority.[435]
Tas	If the person agrees or submits because they are overborne by the nature or position of another person.[436]
Vic (new)	If the person submits because the person is overborne by the abuse of a relationship of authority or trust.[437]

Table 4.9: Australian approaches to abuse of power

4.263. The aim of these provisions is to protect the sexual autonomy of people who are in some kind of relationship which may affect their ability to refuse to consent to sexual conduct.[438] Various approaches have been taken to specifying the nature of the relationship which must exist between the participants to the sexual activity:

- The Queensland Code requires there to be a relationship of authority.
- The new Victorian Act refers to a relationship of authority or trust.
- The NSW and ACT Acts both refer to a relationship of authority, trust or dependence. The ACT Act also refers to a professional relationship.

[432] *Criminal Code Act Compilation Act 1913* (WA) ss 322, 330.
[433] *Crimes Act 1900* (ACT) s 67(1)(k).
[434] *Crimes Act 1900* (NSW) s 61HJ(h).
[435] *Criminal Code Act 1899* (Qld) s 348(2)(d).
[436] *Criminal Code Act 1924* (Tas) s 2A(2)(e).
[437] *Crimes Act 1958* (Vic) s 36AA(1)(e), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
[438] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.19].

- The Tasmanian Code does not require there to have been a specific relationship, instead relying on a general assessment of the nature or position of the other person.

4.264. When the NSWLRC considered whether to address this issue in its list of circumstances, Cossins presented an alternative suggestion: the law should provide that a person did not consent if they were in 'a position of inequality with respect to another person, as a result of economic, social, cultural and/or religious reasons, or as a result of being groomed for sex'.[439] This approach was rejected by the NSWLRC, which considered it to be too broad. They were of the view that the law should specifically focus on relationships of authority, trust or dependence.[440]

4.265. The Australian jurisdictions which address this issue also differ in their framing of the way in which the accused must have used their position of authority, trust or dependence, as well as the effect this must have had on the complainant:

- In Queensland, it is sufficient if the complainant participated due to an exercise of authority.
- The ACT, NSW, Tasmanian and new Victorian Acts require the accused to have abused their relationship with the complainant.
- The NSW, Tasmanian and new Victorian Acts also require the complainant to have been overborne by the accused's abuse of the relationship. In recommending this requirement, the NSWLRC noted that some submissions had suggested that the term 'overborne' is not clear. However, it was of the view that 'the word is sufficiently well understood, and involves removing the ability freely and voluntarily to agree to engage in the sexual activity'.[441]

Reforming the list of circumstances

4.266. The list of circumstances contained in the Queensland Code is similar to that contained in the *Code*, although it is somewhat more expansive: it covers circumstances in which consent is obtained by force; threat or intimidation; fear of bodily harm; exercise of authority; false and fraudulent representations about the nature or purpose of the act; or a mistaken belief induced by the accused person that the accused person was the person's sexual partner.[442] In its 2020 review of consent laws, the QLRC considered whether this list should be expanded, to include some of the circumstances contained in other jurisdiction's lists. It did not, however, recommend making any changes for the following reasons:

> Section 348(2) has the advantage of flexibility. The list of circumstances is non-exhaustive and is expressed in broad terms. In this way, it is capable of covering many circumstances, including those which may not have been contemplated at the time of drafting. It can also adapt to relevant changes in community standards or expectations. It avoids the inflexibility (and potential unfairness) of narrowly drafted circumstances addressed to specific issues that may arise through case law from time to time. A more extensive and specific list might produce unsatisfactory

[439] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [4.68], quoting A Cossins, Preliminary Submission PCO33, 45. See also Cossins, 'Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 49(2) *UNSW Law Journal* 462.

[440] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.130].

[441] Ibid [6.133].

[442] *Criminal Code Act 1899* (Qld) s 348(2).

outcomes. A court's attention might be diverted from the essential issue—whether the complainant did not freely and voluntarily give consent—to:

- an argument about, for example, whether a particular situation amounted (in law and fact) to deprivation of liberty, bodily harm or grievous bodily harm;
- the erroneous view that the prosecution is required to prove that the facts of the case fell within a particular listed vitiating circumstance.

The Commission's view is that changes to section 348(2) are unnecessary.[443]

4.267. Another reason for retaining a list of circumstances which is broad and non-specific is that the social concerns addressed in the list may reduce or disappear over time, leaving the legislation to appear outdated and otiose. For example, if the list specified that deceiving a person about their sexual health was a sexual offence and over time most STIs became easily treatable universal infections, the law would become anachronistic. New social concerns may also arise that are not specifically listed and may therefore be thought not to negate consent.

4.268. When the Queensland Taskforce addressed this issue again in 2022, it reached a different conclusion than the QLRC. It was of the view that 'there would be real benefits to community education about consent if Parliament was more explicit as to its intentions by giving common examples'.[444] It considered that this was especially important in relation to the issue of intoxication, as research shows juries find the concept of consent difficult to apply where intoxication is involved, and judges sometimes misdirect them.[445] Consequently, it recommended that Queensland should expand its list of circumstances to include all of the following circumstances, which are contained in the NSW Act:[446]

(a) the person does not say or do anything to communicate consent

(b) the person does not have the capacity to consent to the sexual activity

(c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity

(d) the person is unconscious or asleep

(e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—

(i) when the force or the conduct giving rise to the fear occurs, or

(ii) whether it occurs as a single instance or as part of an ongoing pattern

(f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—

(i) when the coercion, blackmail or intimidation occurs, or

(ii) whether it occurs as a single instance or as part of an ongoing pattern

(g) the person participates in the sexual activity because the person or another person is unlawfully detained

443 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.31].

444 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 213.

445 Ibid.

446 *Crimes Act 1900* (NSW) s 61HJ.

(h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence

(i) the person participates in the sexual activity because the person is mistaken about—

(i) the nature of the sexual activity, or

(ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes

(j) the person participates in the sexual activity with another person because the person is mistaken—

(i) about the identity of the other person, or

(ii) that the person is married to the other person

(k) the person participates in the sexual activity because of a fraudulent inducement.

4.269. The Taskforce noted that while this reform was unlikely to change the law (as it was of the view that all of these circumstances are probably covered by the requirement that consent be freely and voluntarily given), including these circumstances in the *Code* would 'make it very clear how Parliament intended the law to be applied in what are some of the most frequently occurring scenarios in which sexual violence takes place'.[447]

Questions about circumstances in which there is no consent

4.270. We are interested to hear your views on whether the list of circumstances included in section 319(2) of the *Code* should be amended, and if so what circumstances should be listed.

4.271. We are aware that we have raised numerous issues in relation to each potential circumstance that could be included in the list. To reduce the number of questions we ask in this Discussion Paper, Question 11 is framed in broad terms. We are, however, interested to hear your views on the specific issues raised in relation to each matter. To assist you in this regard, we have included cross-references to the paragraphs in which each matter is discussed.

11. The *Code* currently provides that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. Should this list of circumstances be amended in any way? For example, should the *Code*:

- **a. Address cases in which a person is unconscious or asleep during a sexual act (see paras 4.80-4.83).**
- **b. Address cases in which a person participates in a sexual activity while intoxicated (see paras 4.84-4.98).**
- **c. Address other circumstances in which a person is incapable of consenting to a sexual act (see paras 4.70-4.79).**
- **d. Define the types of fraud or deceit which negate consent, such as fraud or deception about:**
  - **i. The nature or purpose of the act (see paras 4.129-4.132 and 4.138-4.142).**
  - **ii. The identity of the participants (see paras 4.133-4.137).**

[447] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 210.

iii. **The marital status of the participants (see paras 4.143-4.146).**

iv. **The use, disruption or removal of a condom or other device used to prevent pregnancy or sexually transmitted infections (see paras 4.147-4.174).**

v. **Payment for sexual services (see paras 4.175-4.183).**

vi. **The fertility of the participants (see paras 4.184-4.186).**

vii. **The sexual health of the participants (see paras 4.199-4.209).**

e. **Address cases in which a person has a mistaken belief about a matter, such as those listed in para d, which was not induced by the accused (see paras 4.120-4.128).**

f. **Limit the application of the fraud, deception or mistake provisions to objectively or subjectively serious frauds, deceptions or mistaken beliefs (see paras 4.210-4.220).**

g. **Exclude certain matters from the scope of the fraud, deception or mistake provisions, such as fraudulent or deceptive representations or mistaken beliefs about:**

i. **A person's sex, sexual characteristics, gender identity, gender history, sexual orientation (see paras 4.187-4.198).**

ii. **A person's sexual health (see paras 4.199-4.209).**

iii. **Matters which may be considered trivial, such a person's wealth, occupation or feelings for the other participant (see paras 4.216-4.220).**

h. **Provide that the fraud, deception or mistake provisions do not apply if the interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern (see paras 4.221-4.224).**

i. **Clarify the circumstances in which a person does not consent due to the use of force, threats or intimidation (see paras 4.227-4.250).**

j. **Address cases in which a person participates in a sexual activity due to other forms of pressure, such as coercive conduct or blackmail (see paras 4.227-4.250).**

k. **Address cases in which a person participates in a sexual activity due to having suffered harm (see paras 4.251-**Error! Reference source not found.**).**

l. **Address cases in which a person participates in a sexual activity due to fear of force or harm (see paras 4.254-4.258).**

m. **Address cases in which a person participates in a sexual activity during unlawful detention (see paras 4.259-4.261).**

n. **Address cases in which a person participates in a sexual activity with a person with whom they have a relationship of authority, trust or dependency (see paras 4.262-4.265).**

If the list of circumstances is to be amended, how should the included circumstances be defined?

Introductory language

4.272. The *Code* currently specifies various circumstances in which 'consent is not freely and voluntarily given'.[448] This phrasing states that consent was obtained, but it was not given freely and voluntarily (and so is statutorily negated). This may be the case in some circumstances, such as where the (apparent) consent was obtained by fraud. However, in other circumstances, such as where one of the participants was asleep or unconscious when the sexual activity occurred, it may be inaccurate. In those circumstances consent may never have been obtained at all.[449]

4.273. The terms 'negating' or 'vitiating' circumstances, which are sometimes used in this context, may also be misleading. As was noted by the NSWLRC, 'if a circumstance in the list exists, a person does not consent by definition. It is not the case that an otherwise valid consent is negated'.[450] The accuracy of this statement depends on the circumstances that are included in the list.

4.274. Given the NSWLRC's view that consent was not true consent if certain circumstances existed, it recommended that the introductory wording to the relevant provision should state 'A person does not consent to a sexual activity if–', and the heading section should refer to 'circumstances in which there is no consent'. This approach has been implemented in NSW and the ACT.[451] A similar approach is taken in most other Australian jurisdictions, which begin their list of circumstances with phrases such as 'a person does not freely agree to an act if…',[452] 'a person is not taken to freely and voluntarily agree to sexual activity if…' [453] or 'circumstances in which a person does not consent to an act include…'.[454]

4.275. We are interested to hear your views on the wording that should be used to introduce the list of circumstances.

12. Should the wording introducing the list of circumstances in which there is no consent be changed? If so, what wording should be used?

The timing of consent

4.276. The *Code* is currently silent about the timing of consent. It does not make it clear whether consent needs to be given at the time of the offence or if it can be given in advance. In its preliminary submission to this reference, the ODPP identified this as an issue that warrants consideration.[455]

4.277. This matter was addressed by the NSWLRC in its review of consent in relation to sexual offences. It noted that some stakeholders were of the view that people should be allowed to consent to sexual activity in advance. For example, it should be possible for a person to

[448] *Criminal Code Act Compilation Act 1913* (WA) s 319(2).
[449] Attorney General's Department of NSW Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 37.
[450] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.20].
[451] *Crimes Act 1900* (NSW) s 61HJ(1); *Crimes Act 1900* (ACT) s 67(1).
[452] *Criminal Code Act 1924* (Tas) s 2A(2).
[453] *Criminal Law Consolidation Act 1935* (SA) s 46(3).
[454] *Crimes Act 1958* (Vic) s 36(2). See also *Criminal Code Act 1983* (NT) s 192(2).
[455] Preliminary Submission 16 (ODPP) 2.

consent to another person having sex with them while they are asleep or very intoxicated.[456] To ensure that this type of situation is not inappropriately criminalised, these stakeholders suggested that the law should specify that consent must be given 'before or at the time of the sexual activity'.[457]

4.278. By contrast, the NSWLRC was of the view that the definition of consent should provide that consent must exist at the time of the sexual activity. It considered that this approach:

> reflects a key principle of the communicative model: that consent is an ongoing process throughout sexual activity, rather than a form of permission granted at a single moment. Consent can be changed or revoked. Therefore, consent must be assessed at the time that the sexual activity occurs. It cannot be presumed or implied because of a person's behaviour before that activity.[458]

4.279. The NSWLRC considered it necessary to address this issue in legislation, given that:

- Several stakeholders had informed it that evidence about a complainant's prior conduct, including their previous interactions on social media, was often adduced at trial to suggest there was consent;[459]
- An analysis of Victorian rape trials found that defence counsel often relied on the complainant's prior conduct, such as sitting near the accused person, to construct a narrative of consent;[460] and
- Mock jury research suggests that some jurors regard certain behaviours, such as inviting the accused person home and remaining in their company for a prolonged period of time, to imply a willingness to engage in sexual activity.[461]

4.280. This recommendation was adopted by the NSW Government. Section 61HI(1) of the NSW Act now states that a person consents to a sexual activity 'if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity'. A similar approach is taken in Canada, where the law specifies that 'consent must be present at the time the sexual activity in question takes place'.[462]

4.281. The NSW definition would not seem to prevent the jury from taking into account words and conduct at any time prior to the sexual activity. It could also be considered that the NSW definition does not change the present law which requires that the particular sexual activity the subject of the charge took place without consent.

4.282. We are interested to hear your views on whether the *Code* should specify when consent should be given and whether it should be permissible to give consent in advance.

13. Should the *Code* specify when consent should be given? If so, should it specify that consent must be given at the time of the offence, or should it be permissible to give consent in advance?

[456] See paras [4.80]-[4.83] and [4.90] above.

[457] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.28].

[458] Ibid [5.24] (citations omitted).

[459] Ibid [5.27].

[460] R Burgin and A Flynn, 'Women's Behaviour as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology & Criminal Justice* 334.

[461] See, eg, L Ellison and VE Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13 *New Criminal Law Review* 781, 791.

[462] *Criminal Code*, RSC, 1985, c C-46, s 273.1(1.1).

Withdrawing consent

4.283. The principle of sexual autonomy requires people to be free to refuse to engage in sexual activities at any time for any reason. This includes where they have previously consented to a sexual activity: they should be permitted to withdraw their consent and stop the activity.

4.284. The *Code* does not explicitly address the withdrawal of consent. However, this issue is implicitly addressed by the definition of sexual penetration. That definition sets out a range of ways in which a person can sexually penetrate another, including where they 'continue sexual penetration' in one of the defined ways.[463] This means that where a participant withdraws their initial consent to sexual penetration, it will be an offence for any other participants to continue the penetration. The Western Australian Court of Appeal has held that they must immediately cease the penetration upon the withdrawal of consent: it is not sufficient to stop within a reasonable time.[464]

4.285. A similar approach is taken in Tasmania and the NT. By contrast, all other Australian jurisdictions explicitly address the withdrawal of consent in their legislation (see Table 4.4.10 below).

[463] *Criminal Code Act Compilation Act 1913* (WA) s 319(1).
[464] *Ibbs v The Queen* [1988] WAR 91.

Jurisdiction	Approach to the withdrawal of consent
ACT	List of circumstances: A person does not consent if the person says or does something to communicate withdrawing agreement to the act either before or during the act.[465]
NSW	Definition of consent: A person may, by words or conduct, withdraw consent to a sexual activity at any time. Sexual activity that occurs after consent has been withdrawn occurs without consent.[466]
Qld	Definition of consent: If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.[467]
SA	Definition of rape: A person is guilty of the offence of rape if they engage, or continue to engage, in sexual intercourse with another person who has withdrawn consent to the sexual intercourse.[468]
NT	Definition of sexual intercourse: Sexual intercourse is defined to continue until the withdrawal of the relevant body part.[469]
Tas & WA	Definition of sexual intercourse/penetration: Sexual intercourse/penetration is defined to include continuing sexual penetration in one of the defined ways.[470]
Vic (current & new)	List of circumstances: A person does not consent if, having given consent to the act, the person later withdraws consent to the act taking place or continuing.[471]

Table 4.10: Australian approaches to the withdrawal of consent

4.286. In this section we address three issues relating to the withdrawal of consent:

- Whether the *Code* should explicitly address the issue;
- If so, whether the provision should require the withdrawal of consent to be communicated; and
- How the withdrawal provision should be framed.

Addressing withdrawal

4.287. In the NSWLRC and QLRC reviews of sexual offences, it was noted that it may be considered unnecessary to explicitly address the withdrawal of consent in legislation, given it is already an offence to continue sexual activity after consent has been withdrawn.[472] Consequently, any

[465] *Crimes Act 1900* (ACT) s 67(1)(a).
[466] *Crimes Act 1900* (NSW) ss 61HI(2)-(3).
[467] *Criminal Code Act 1899* (Qld) s 348(4).
[468] *Criminal Law Consolidation Act 1935* (SA) s 48(1)(b).
[469] *Criminal Code Act 1983* (NT) s 1 (definition of sexual intercourse).
[470] *Criminal Code Act 1924* (Tas) s 2B; *Criminal Code Act Compilation Act 1913* (WA) s 319(1).
[471] *Crimes Act 1958* (Vic) s 36(2)(m); *Crimes Act 1958* (Vic) s 36AA(1)(p), as inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5.
[472] See New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.38]; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.135].

change to legislation may be seen to be superfluous. In support of this argument, it was noted that where the issue of withdrawal of consent arises in a particular case, it can already adequately be addressed in jury directions.

4.288. However, the NSWLRC and the QLRC both considered it important for the legislation to make it clear that consent may be withdrawn at any time.[473] They saw this to be an important aspect of the law of consent which was worth stating explicitly. In addition, the NSWLRC suggested that greater clarity about the withdrawal of consent could 'empower people who have experienced sexual offending to report the incident to police'.[474] A similar provision was also recommended in recent reviews in Northern Ireland, Scotland and Hong Kong.[475]

Communicating withdrawal

4.289. If the withdrawal of consent is to be addressed in the *Code*, it will need to be decided whether the relevant provision should require the withdrawal to be positively communicated to the other participant. For example, the relevant provisions in NSW and Queensland state that a person may withdraw consent 'by words or conduct'.

4.290. In recent reviews addressing this issue, some stakeholders opposed the inclusion of such an expression.[476] They argued that under an affirmative model of consent, the accused should be required to actively seek ongoing consent throughout the course of the sexual activity: it should not be necessary for the complainant to demonstrate that they have withdrawn consent.[477] A provision which requires people to communicate their withdrawal of consent was seen to be particularly problematic for people who wish to withdraw from a sexual activity but 'freeze'.

4.291. These arguments were rejected by the NSWLRC and the QLRC, which both recommended that the relevant provision require the withdrawal of consent to be positively communicated.[478] The NSWLRC considered that 'fairness dictates that, if consent has been freely and voluntarily given, its withdrawal should be communicated before a person acting on the consent that had been given could be convicted of a criminal offence'.[479] The QLRC was also concerned about fairness, arguing that for an offence to occur in these circumstances, 'consent must have initially been given to the other person. As a matter of fairness, it is necessary that the other person is made aware that consent is withdrawn and given the opportunity to respond to that withdrawal by ceasing to engage in the relevant act'.[480] The QLRC also noted that for an offence to be prosecuted in these circumstances, 'it is necessary to be able to identify the

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[473] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.39]; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.136].

[474] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.40].

[475] Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [11.103]; Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.86]; Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) Final Rec 6.

[476] See, eg, Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.34]-[14.35]; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.43]-[5.44].

[477] See, eg, Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Submission 34 (Rape & Sexual Assault Research & Advocacy).

[478] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.146].

[479] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.45].

[480] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.144].

point at which the complainant withdrew their consent and communicated that withdrawal and to prove that the defendant did not cease the relevant act'.[481]

Framing the withdrawal provision

4.292. If withdrawal of consent is to be explicitly addressed in the *Code*, it will be necessary to determine the best way in which to do this. It can be seen from Table 4.4.10 above that three broad approaches have been taken to this issue in other jurisdictions:

- Including it alongside the definition of consent (NSW, Qld);
- Including it in the list of circumstances in which a person does not consent (ACT, Vic);
- Including it in the definition of rape (SA).

4.293. The NSWLRC and QLRC both recommended that the issue of withdrawal of consent be addressed alongside the definition of consent.[482] They were of the view that this would 'best achieve the aim of providing clarity in the law'.[483] This approach was adopted by the NSW and Queensland Governments.

4.294. The QLRC recommended that the section provide that 'if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent'.[484] It was of the view that such a provision would make it clear that a person can withdraw their consent any time before an act takes place or, if the act has already begun, during the act. However, it does not extend to circumstances in which consent is withdrawn after an act is completed. The QLRC considered that that would be 'inconsistent with the position that consent must exist at the time of the relevant act and would place the other person in the position of being unable to respond to the withdrawal'.[485]

4.295. We are interested to hear your views on whether the *Code* should explicitly address the withdrawal of consent and, if so, how this should be done.

14. Should the *Code* explicitly address the withdrawal of consent? If so, how should this be done? For example, should the provision require the withdrawal of consent to be communicated by words or conduct?

Application of the consent provision

4.296. The definition of consent in the *Code* only applies to offences in Chapter XXXI that require proof of non-consent, such as sexual penetration without consent.[486] It does not apply to:

- Any sexual offences that exist in other parts of the *Code* or other legislation; or

[481] Ibid [5.145].

[482] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.39]; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.137]-[5.138].

[483] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.137]-[5.138].

[484] Ibid [5.138].

[485] Ibid [5.141]. See also Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.85].

[486] *Criminal Code Act Compilation Act 1913* (WA) s 325.

- The child sexual offences[487] and the sexual offences against people who lack the capacity to consent,[488] as non-consent is not an element of these offences.

4.297. Although the offence of indecent assault in section 323 of the *Code* does not specifically include a reference to non-consent,[489] it has been held that the prosecution must prove that the conduct was non-consensual. This is because the definition of assault in section 222 of the *Code*, which requires (in part) proof that force was applied without consent, applies to that offence. The Court of Appeal has held that the definition of consent in section 319(2)(a) of the *Code* applies to all non-consensual offences created by Chapter XXXI, including the offence of indecent assault.[490]

4.298. We are interested to know if there is a need to amend the application of the consent provision in any way. For example:

- Are there any offences outside Chapter XXXI to which the definition of consent should be specified to apply?
- Should it be made clear that the definition applies to the offence of indecent assault, or is this unnecessary given it is already the accepted law?

15. Should the application of the consent provision be amended in any way?

Location of the consent provision

4.299. Currently, the consent provisions are contained in a section of the *Code* titled 'Terms Used'.[491] This section contains definitions of various terms that are included in Chapter XXXI of the *Code*, such as 'circumstances of aggravation', 'indecent act' and 'to sexually penetrate'.

4.300. The question arises as to whether it may be desirable to instead locate the consent provisions in a new section of the *Code* titled 'Consent'. Possible advantages of this approach include:

- It will make it easier for people who are unfamiliar with the *Code* to find the provisions.
- It may assist with the use of those provisions for educational purposes, as they will be easier for educational organisations to excerpt.
- It highlights the importance of the provisions to sexual offence laws.
- If the provisions are amended, it may make it easier to draft the new provisions in a clear, simple and logical fashion.

4.301. The main disadvantage of this approach is that it will separate the definition of consent from the other definitions contained in the *Code*, which may cause some confusion.

4.302. The NSWLRC recommended the creation of a new subdivision to deal with consent, which grouped the law dealing with the meaning of consent, the circumstances in which a person does not consent, and knowledge of non-consent, into distinct sections. It recommended that the sections on the meaning of consent and the circumstances in which a person does not

487 Ibid ss 320-322.
488 Ibid s 330.
489 Ibid s 323.
490 *Higgins v The State of Western Australia* [2016] WASCA 142 [5]-[7] (McLure P), [126] (Mazza JA), [166] (Corboy J).
491 *Criminal Code Act Compilation Act 1913* (WA) s 319.

consent appear before the section on knowledge of non-consent.[492] These recommendations were implemented by the NSW Government, which inserted a new Subdivision 1A into the NSW Act. The new subdivision is titled 'Consent and knowledge of consent'.

16. Should the consent provisions be put in a separate section of the *Code*?

[492] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 4.1.

5. When should the accused be excused?

Chapter overview

This Chapter considers the circumstances in which the accused should be excused, despite having committed a non-consensual sexual activity. Its main focus is on the mistake of fact defence. It explains the defence, sets out some perceived problems with the current approach, and considers possible reforms to the law. These include excluding the operation of the mistake of fact defence in sexual offence cases, providing legislative guidance on assessing the reasonableness of a mistaken belief, requiring the accused to take measures to ascertain the complainant's consent and reversing the onus of proof for the mistake of fact defence.

Introduction

5.1. It is a longstanding principle of criminal law that a person should only be convicted of a criminal offence if they have acted wrongfully.[1] This is largely due to the punitive nature of the criminal law: it is not considered to be fair to punish a person who has done nothing wrong, even if their conduct has harmed someone else.

5.2. On one view, it is arguable that any time a person participates in a sexual activity without the other participant's consent they have acted wrongfully. This is because they have violated the other participant's sexual autonomy, which is objectively wrongful. Consequently, it would not be unjust to punish them for their conduct.

5.3. From this perspective, an accused person should be convicted of a sexual offence solely upon proof that they engaged in the relevant conduct (for example, sexual intercourse) with the complainant, and the complainant did not consent to that conduct. Even if the accused believed the complainant was consenting, that should not matter.

5.4. However, this is not the approach that is taken across Australia. All Australian jurisdictions provide scope for the accused to argue that although they engaged in a non-consensual sexual activity, they should nevertheless be excused. This will be the case where, for example,

[1] See, eg, S Bronitt and B McSherry, *Principles of Criminal Law* (Thomson Reuters (Professional) Australia, 4th ed, 2017) 178.

the accused honestly and reasonably believed that the complainant was consenting.[2] This is known as the **mistake of fact defence**.[3]

5.5. This Chapter considers the circumstances in which the accused should be excused, despite having committed a non-consensual sexual activity.

The current law

5.6. As noted in Chapter 2, Australian jurisdictions can be divided into two broad categories:

- Jurisdictions in which sexual offences contain a mental state element (ACT, NSW, NT, SA, Vic). For example, in NSW the offence of sexual assault requires proof that (i) the accused had sexual intercourse with the complainant; (ii) the complainant did not consent; and (iii) the accused knew that the complainant was not consenting.[4] If the accused lacked such knowledge, they must not be convicted of the offence, even if the sexual intercourse was non-consensual.

- Jurisdictions in which sexual offences do not contain a mental state element (Qld, Tas, WA). For example, in Western Australia the offence of sexual penetration without consent only requires proof that (i) the accused sexually penetrated the complainant; and (ii) the complainant did not consent to that conduct. There is no need for the prosecution to also prove that the accused knew the complainant was not consenting.[5]

5.7. Although sexual offences in Western Australia, Queensland and Tasmania do not contain a mental state element, in these jurisdictions the accused's mental state is relevant to the mistake of fact defence.[6] In Western Australia this defence is set out in section 24 of the *Code*, which provides that:

> 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.

5.8. Unless excluded by law, this defence applies to all offences.[7] It allows an accused to be acquitted if they have made an honest and reasonable mistake about a key fact. In the context of sexual offences, it will most commonly be argued that the accused made a mistake about the complainant's consent. This is the mistake we will focus on in this Chapter.

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2 See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 24.

3 As noted in Chapter 2, there is a technical difference between 'defences' (which the accused must prove) and 'excuses' (which the prosecution must disprove). According to this categorisation, mistake of fact is technically an excuse. However, in practice it is often referred to as a defence. For this reason, as well as for the sake of simplicity, throughout this Paper we refer to it as the mistake of fact defence.

4 *Crimes Act 1900* (NSW) s 61I. The Act explains the circumstances in which the accused is taken to know there was no consent: ibid s 61HK.

5 *HES v The State of Western Australia* [2022] WASCA 151, [103]-[104].

6 *Criminal Code Act Compilation Act 1913* (WA) s 24; *Criminal Code Act 1899* (Qld) s 24; *Criminal Code Act 1924* (Tas) ss 14-14A.

7 *Criminal Code Act Compilation Act 1913* (WA) s 24.

5.9. The mistake of fact defence does not need to be considered in every case. It only needs to be addressed where the evidence justifies its consideration by the jury.[8] Where that is the case, the prosecution will need to disprove the defence beyond reasonable doubt.[9] It can do so in two ways: by proving that the accused did not honestly believe the complainant was consenting, or by proving that their belief was not reasonable.

5.10. The honesty component of the defence is known as the **subjective element**, as it relates to what was going on in the accused's mind at the time of the sexual activity. The accused must have held a positive belief that the complainant was consenting. The defence will not succeed if the accused simply failed to consider the issue.[10]

5.11. By contrast, the reasonableness component of the defence, although sometimes referred to as the objective element, is in fact a **mixed element**, as it contains both subjective and objective aspects. In the leading case of *Aubertin v The State of Western Australia* (*Aubertin*), the Supreme Court of Western Australia explained the mixed element as follows:

> The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself.[11]

5.12. It can be seen from this explanation that the jury is not required to consider whether the hypothetical reasonable person would have made the same mistake as the accused. Instead, it must put itself into the accused's shoes, asking whether it was reasonable for a person with their personal attributes and characteristics to make that mistake.

5.13. Importantly, however, the jury must only take into account those attributes or characteristics which were capable of affecting the accused's appreciation or perception of the circumstances in which they found themselves. The Court made it clear that this includes matters over which the accused has no control, such as 'age (maturity), gender, ethnicity, as well as physical, intellectual and other disabilities'.[12] However, it does not include their 'values, whether they be informed by cultural, religious or other influences'.[13] For example, it does not include 'values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn'.[14] The Court has held that such values:

> cannot positively affect or inform the reasonableness of an accused's belief. Values do not impact on the capacity to perceive or appreciate primary objective facts or the capacity to process that information. In any event, reasonableness must be judged in the light of generally accepted community standards and attitudes.[15]

5.14. Additionally, the jury must not consider any impairment arising from the accused's intoxication.[16] The Court noted that there are 'obvious public policy considerations' supporting

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8 There must be evidence from which it is open to the jury to infer that the accused had an honest and reasonable belief that the complainant consented: *Higgins v The State of Western Australia* [2016] WASCA 142. This evidence can be called by either the prosecution or the defence.

9 *McPherson v Cairn* [1977] WAR 28.

10 *GJ Coles v Goldsworthy* [1985] WAR 183; *Blenkinsop v Wilson* [2019] WASC 77.

11 *Aubertin v The State of Western Australia* (2006) 33 WAR 87 [43].

12 Ibid.

13 Ibid [46].

14 Ibid.

15 Ibid.

16 Ibid [44].

this approach.[17] It also saw the notions of 'reasonableness' and 'alcohol or drug-induced impairment' to be contradictory. Consequently, it concluded that 'self-induced impairment by alcohol or drugs can only be a negative or at best neutral factor in assessing whether the appellant's belief was reasonable. That is, reasonableness is not to be assessed by reference to the perception or appreciation of an alcohol or drug impaired accused'.[18]

5.15. The list of relevant personal attributes and characteristics set out in *Aubertin* was not intended to be exhaustive. Other matters which courts have held should be considered in assessing the reasonableness of the accused's belief include the accused's language disabilities and mental health problems.[19] In this regard, it has been held that:

> It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.[20]

Perceived problems with the current law

5.16. It has been suggested that the mistake of fact defence has the potential to undermine the law of consent, as well as the effectiveness of any future reforms in the area.[21] This is because even if the law makes it clear that certain factors have limited or no relevance to the jury's determination of consent, the accused is able to 'cite those factors as inducing or rationalising [their] mistaken belief as to consent'.[22] For example, although the law currently provides that a failure to offer physical resistance does not of itself constitute consent,[23] an accused could successfully argue that because the complainant did not resist they honestly believed they were consenting, and that in light of the lack of resistance their belief was reasonable.[24]

5.17. The mistake of fact defence may also allow misconceptions about consent and 'assumptions and stereotypes about sex, sexuality, race and gender to emerge in court'.[25] For example, an accused could argue that their belief in consent was reasonable given the clothes the complainant was wearing, or the complainant's tone of voice or flirtatious behaviour.[26] Such arguments may succeed if the accused's views are commonly held in the community (rather than being extreme views resulting from the accused's particular values). This is seen to be a particular problem given 'prevailing community attitudes … that minimise or dismiss sexual violence that occurs within a family and domestic violence relationship'.[27]

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17 Ibid. These policy considerations are discussed in the section 'Exclude consideration of intoxication' below.

18 Ibid.

19 See, eg, *R v Mrzljak* [2004] QCA 420; *R v Dunrobin* [2013] QCA 175.

20 *R v Mrzljak* [2004] QCA 420, [90].

21 Preliminary Submission 16 (ODPP) 3.

22 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [4.85].

23 *Criminal Code Act Compilation Act 1913* (WA) s 319(2).

24 It should be noted that such an argument would not necessarily succeed. The jury may, for example, find that a belief that is based solely on a lack of resistance is not a reasonable belief.

25 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [5.50]. See also New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.91]-[7.92].

26 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.40]; Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [11.17].

27 Preliminary Submission 11 (Women's Legal Service WA) 2.

5.18. Research provides some support for these concerns. For example, Finch and Munro conducted mock jury studies in England in which participants were asked to determine whether the accused's belief in consent was reasonable. They found that allowing the jury to consider the accused's circumstances as part of the assessment of reasonableness:

> generates an opportunity for the introduction into the jury room of a range of (ill-founded) views about 'appropriate' socio-sexual interaction, either on the basis that they are shared by jurors who are assessing the signals sent out by the complainant's conduct, or on the basis that the jurors, while not sharing these views themselves, nonetheless consider that they may have been harboured by the defendant and so may be relevant to the question of his reasonableness.[28]

5.19. It is also argued that the current law results in an undue focus being placed on the complainant's behaviour at trial.[29] For example, where the accused argues that the complainant's words, actions or level of intoxication reasonably led them to believe they were consenting, the jury will need to closely consider the complainant's conduct. This can lead to the inappropriate 'perception that it is the complainant's credibility, rather than the accused's culpability, that is on trial'.[30] It has been suggested that it would instead be preferable to focus on the steps the accused took to ascertain the complainant's consent.[31]

5.20. Concerns have also been raised about the breadth of attributes and characteristics that can be considered as part of the mixed element. While the purpose of this component of the defence is to ensure that the accused's belief was reasonable, it has been argued that the incorporation of so many personal matters removes much of its purported objectivity.[32] It is also not clear how a person's ethnicity may affect the reasonableness of their beliefs (as suggested in *Aubertin*), given the jury may not take into account the accused's cultural or religious values.[33]

5.21. These concerns are seen to be particularly significant, given the central role that the mistake of defence fact can play in a trial. In this regard, the preliminary submission from the ODPP noted that:

> The necessity for the State to disprove, beyond reasonable doubt, that an accused had an honest and reasonable but mistaken belief that the complainant was consenting – even if the State proves the complainant did not consent – is often the real difficulty in prosecuting sexual offences, particularly in the context of intimate partnerships.[34]

Possible reforms

5.22. If the law is to be reformed in this area, there are several options available. In this section we focus on the following five possible reforms to the law:

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28 E Finch and VE Munro, 'Breaking Boundaries – Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303, 318.

29 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [5.47].

30 Preliminary Submission 16 (ODPP) 2.

31 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.93]. This suggestion is examined in the section 'Require the accused to have taken measures to ascertain consent' below.

32 J Temkin and A Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328, 328; A Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 56.

33 *Aubertin v The State of Western Australia* (2006) 33 WAR 87 [43]-[46].

34 Preliminary Submission 16 (ODPP) 2.

- Excluding the operation of the mistake of fact defence in sexual offence cases.
- Making the mistake of fact defence more objective.
- Providing legislative guidance on assessing the reasonableness of a mistaken belief.
- Addressing the measures the accused took to ascertain the complainant's consent.
- Reversing the onus of proving the mistake of fact defence.

5.23. We note that although the mistake of defence applies to all criminal offences, our focus in this Chapter is solely on its application to sexual offences. Any recommended reforms will be limited to that context and will not apply to other offences.

5.24. Another possible option for reform would be to make the mistake of fact defence wholly subjective by removing the mixed element. This was previously the law in many common law jurisdictions, where an honest but unreasonable belief in consent was sufficient to negate criminal liability.[35] This approach has been progressively abandoned by legislatures around the country, as it fails 'to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour'.[36]

5.25. We do not discuss this option further in detail in the Discussion Paper. Our current sense is that, as well as being inconsistent with legal developments around Australia and internationally, such an approach would not accord with community standards. In this regard, we note that the Scottish LC has indicated that a purely subjective test:

> undermines respect for sexual autonomy. Moreover, allowing unreasonable belief about consent as a defence bolsters the legitimacy of myths and stereotypes about women and sexual choice. Further, the test sits uneasily with the general law of error in the criminal law, by which an error by the accused as to some essential element of a crime must be reasonable to elide *mens rea*.[37]

5.26. We are aware, however, that some people consider it to be unfair to punish a person who honestly believed that the other participant consented, even if their belief was unreasonable,[38] and we welcome submissions that support this option for reform.

Exclude operation of the mistake of fact defence in sexual offence cases

5.27. One option for reform would be to provide that the mistake of fact defence does not apply to sexual offences.[39] This would mean that even if the accused honestly and reasonably believed the complainant was consenting, they would be convicted if it can be proved that they engaged in a relevant sexual act without the complainant's consent.

5.28. This reform, which was supported by some preliminary submissions,[40] would address many of the perceived problems with the current law outlined above. For example, it would prevent the accused from relying on misconceptions about consent or gendered stereotypes to support

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35 See, eg, *DPP v Morgan* [1976] AC 182.

36 NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585.

37 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007).

38 See, eg, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.58], citing NSW Bar Association, Preliminary Submission PCO47, 5.

39 This could be done by specifically identifying the relevant offences or by providing that the defence does not apply to all of the offences in Chapter XXXI of the *Code*.

40 Preliminary Submission 9 (Sexual Assault Resource Centre and the Women's Health, Genetics and Mental Health Directorate); Preliminary Submission 12 (Sexual Health Quarters) 4.

their argument that they had an honest and reasonable belief in consent; and it would overcome any concerns about the breadth of the mixed element (which would be abolished).

5.29. This approach may also address the concern that the current law results in an undue focus being placed on the complainant's behaviour at trial, as it would no longer be necessary for the jury to decide whether the complainant's words and actions led the accused to reasonably believe that they were consenting. However, at a practical level, it may simply result in defence counsel shifting from cross-examining the complainant about what they did and said to cause the accused to have a mistaken belief about consent, to cross-examining the complainant about whether their words and actions were consistent with their claim that they were not consenting.

5.30. One criticism of this option for reform is that it may allow an accused to be convicted in circumstances where they could not have known that the complainant was not consenting. For example, it would make an accused liable to conviction where unknown to them the complainant was being coerced to engage in the sexual activity or lacked the capacity to consent. This would be the case even if the accused had repeatedly taken reasonable steps to ensure the complainant was consenting and had been convincingly assured that they were. The mere fact that they had engaged in a non-consensual sexual activity would be sufficient for a conviction. This is arguably unfair to the accused, who would be punished for behaviour which is not subjectively wrongful. It is also not considered to be useful 'to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness)'.[41]

5.31. In addition, this reform would mean that sex offences would be treated very differently from all other offences (including homicide offences), to which the mistake of fact defence would continue to apply. This arguably discriminates against people who are charged with sexual offences. It was for this reason that the QLRC rejected this suggested reform.[42]

17. Should the law provide that the mistake of fact defence does not apply to sexual offences?

Make the mistake of fact defence more objective

5.32. A second option for reform would be to provide that the jury should not take the accused's attributes and characteristics into account when determining whether their mistaken belief in consent was reasonable. Instead, it should decide whether the hypothetical reasonable person would have believed the complainant was consenting. In other words, the mixed element of the defence would be replaced by a purely objective element.

5.33. In this regard, the Irish Law Reform Commission (**ILRC**) has noted that a person who fails to realise that the complainant is consenting, when a reasonable person would have done so, may be considered sufficiently blameworthy to be held criminally liable:

> A failure to notice an obvious risk can show just as much of an insufficient concern for others as a conscious choice to disregard it. A failure to realise that the woman is not consenting to sexual intercourse where a reasonable person would have done so denotes a failure on the accused's part to adequately direct his mind to the woman's

[41] Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011).

[42] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.15]-[7.16].

consent. It may be argued that in a situation as intimate as sexual intercourse, there is an obligation to take the minimal step of ensuring that it is consensual.[43]

5.34. This option for reform would address the concern that the purported objectivity of the law is undermined by the incorporation of so many of the accused's personal attributes and characteristics.[44] It would help to ensure that a reasonable standard of care is taken, by setting a common standard which everyone is expected to meet. It would also arguably be easier for jurors to apply, as they would not need to try to place themselves in the accused's shoes, taking into account certain attributes and characteristics but not others. Instead, they would simply need to ask what a reasonable person would have believed in the circumstances.[45]

5.35. However, it is not clear that this reform alone would overcome concerns about the accused being able to rely on misconceptions about consent and gendered assumptions and stereotypes. This is because some misconceptions, assumptions and stereotypes are so widely held that, without further guidance, the jury may find they would have been held by a reasonable person.

5.36. It is also arguable that 'a test which assesses the accused's belief solely in terms of what a reasonable person would have believed … moves attention too far from the actual accused'.[46] It was for this reason that the Scottish LC favoured a mixed test rather than an objective test. Such a test avoids a purely subjective approach, but still appropriately directs its focus on the accused.[47]

5.37. In addition, this reform would mean that the jury would not be permitted to take into account a condition, such as a cognitive impairment, that meant that the accused was unable to meet the objective standard of reasonableness. It has been suggested that this would be unjust, as it would assess the accused's behaviour by reference to a criterion which they cannot possibly achieve.[48] It was for this reason that in their respective reviews of this issue, the NSWLRC, QLRC and Hong Kong LRC all favoured a mixed approach over a purely objective approach.[49] A mixed element approach was seen to strike 'an appropriate balance between the degree of social harm incurred by acts of non-consensual sexual activity and matters of fairness to a defendant at trial'.[50]

18. Should the mistake of fact defence be made more objective, by providing that the jury should not take the accused's attributes and characteristics into account when determining whether their mistaken belief in consent was reasonable?

43 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [2.80].

44 Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [11.16]-[11.17].

45 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [5.32].

46 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [3.76].

47 Ibid.

48 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.62].

49 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.71]; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.60]-[7.62]; Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) [2.84].

50 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.71].

Provide legislative guidance on the assessment of reasonableness

5.38. A third option for reform would be to retain the mixed element, but to provide legislative guidance on the assessment of reasonableness. This could either be done in a legislative provision which sets out the factors the jury may or may not take into account in determining whether the accused's belief was reasonable, or in legislated jury directions on the issue.[51]

5.39. This reform could help address concerns about the different ways that juries may understand the concept of reasonableness, and the possibility that they may rely on misconceptions, assumptions or stereotypes. Rather than leaving jurors to rely on their own views about reasonableness, they would be provided with specific guidance on what constitutes a reasonable belief, and what factors they may or may not consider in making their assessment.[52]

5.40. Such an approach was supported by the ILRC. It recommended that the relevant Irish legislation 'should provide that where the issue of reasonable belief arises in a trial, the jury shall have regard to a specific set of circumstances, and only those, which should be limited to relevant characteristics of the accused where these would affect the capacity of the accused to understand whether the woman was consenting'.[53] The specific circumstances the ILRC recommended the jury be permitted to have regard to were the accused's age or maturity, or any physical, mental or intellectual disability or mental illness the accused experienced.[54]

5.41. By contrast, the NSWLRC considered such an approach to lack flexibility.[55] It was of the view that if the law specified matters that the jury should not take into account in making their determination, the jury could be misled into thinking that the listed matters are exhaustive.[56] The NSWLRC suggested that this could result in them taking into account irrelevant matters which are not included in the list, due to a mistaken belief that anything that is not included in the list is potentially relevant. Such a view, however, challenges the assumption that jurors follow judicial directions.

5.42. The NSWLRC also suggested that attempts to provide guidance could also 'unintentionally reaffirm certain misconceptions by repeating them'.[57] It also noted the difficulty of defining reasonableness in legislation, and expressed the view that it should be for the jury to 'determine what is reasonable, informed by community standards, appropriate expert evidence and jury directions'.[58]

5.43. For these reasons, the NSWLRC did not support legislative reforms 'directed to qualifying, defining or explaining the concept of reasonableness'.[59] It instead recommended legislating non-mandatory jury directions on specific misconceptions and assumptions about consent and sexual conduct. We discuss jury directions in Chapter 6.

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51 The issue of jury directions is addressed in Chapter 6. For further discussion of jury directions on this issue, see paras 6.87-6.91. For consideration of arguments for and against legislating jury directions, see paras 6.48-6.59.

52 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.122]-[7.123].

53 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) Rec 3.03.

54 Ibid [3.63]. These factors are discussed in more detail below.

55 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.124].

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid [7.125].

5.44. It should also be borne in mind that the mistake of fact defence extends beyond sexual offences. This means that if this reform were implemented, the defence would operate differently depending on the offence charged:

- In sexual offence cases, the jury would be provided with specific guidance about how to assess the reasonableness of the accused's beliefs.
- In all other cases (including homicide offences), the jury would not be provided with any guidance on the assessment of reasonableness.

5.45. On one view, it may be considered inappropriate to have two different versions of the defence. In addition, difficulties may arise where the accused is charged with both sexual and non-sexual offences, and seeks to raise the mistake of fact defence in relation to both.

5.46. If guidance is to be provided on the assessment of reasonableness, it will be necessary to determine what factors should be addressed. Some possibilities are outlined below.

Legislate the *Aubertin* principles

5.47. As noted above, the factors which the jury may and may not currently take into account are set out in the case of *Aubertin*.[60] It is arguable that this lacks transparency, making it difficult for the ordinary person to know the bounds of the law.

5.48. One way to address this concern would be to legislate the relevant principles. For example, a provision could be added to the *Code* which states that, in determining whether an accused's belief in consent was reasonable, the jury:

- Must consider any attributes or characteristics of the accused which could affect their appreciation or perception of the circumstances in which they found themselves.
- Must not consider the accused's values, whether they be informed by cultural, religious or other influences.

5.49. The provision could also define the attributes or characteristics of the accused which could affect their appreciation or perception of the circumstances to include matters over which the accused has no control, such as their age, gender, ethnicity and disabilities.

5.50. A similar approach has been taken in Victoria, where counsel may request that the judge direct the jury that in determining whether the accused had a reasonable belief in consent, the jury may take into account any of the accused's personal attributes, characteristics or circumstances.[61] However, the judge does not need to give such a direction if the personal attribute, characteristic or circumstance:

a) did not affect, or is not likely to have affected, the accused's perception or understanding of the objective circumstances; or

b) was something that the accused was able to control; or

c) was a subjective value, wish or bias held by the accused, whether or not that value, wish or bias was informed by any particular culture, religion or other influence.[62]

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60 *Aubertin v The State of Western Australia* (2006) 33 WAR 87.

61 *Jury Directions Act 2015* (Vic) s 47(3)(e). The issue of jury directions is addressed in Chapter 6. For further discussion of jury directions on this issue, see paras 6.87-6.91. For consideration of arguments for and against legislating jury directions, see paras 6.48-6.59.

62 Ibid s 47(4).

5.51. The NSW Attorney General's Department has also previously recommended legislating on this issue. In a Discussion Paper on the law of consent and sexual assault it included a draft bill which stated that in determining whether a person had reasonable grounds to believe in consent, the jury was not to have regard to the 'personal opinions, values and general social and educational development' of the accused.[63] While this provision was never enacted, it has been suggested that it may have helped challenge stereotypes about consent.[64]

5.52. This reform would have the advantage of making the law clear. However, it would not address any of the perceived problems with the current law. It may also be considered to be unnecessary, given it would simply reflect the existing law and the directions that judges currently give juries.

Refine the scope of the matters the jury should take into account

5.53. Another option for reform would be to confine or expand the scope of the matters the jury may take into account when assessing the reasonableness of the accused's belief. For example, a restrictive approach could be taken, specifying that the jury should only take into account the accused's youth. This is the approach that is taken in determining whether the ordinary person could have been provoked by the complainant's actions in relation to the defence of provocation in jurisdictions where that defence applies.[65] Alternatively, a broader approach could be taken, specifying that any or all of the following matters (or others) should be considered: age or maturity; cognitive impairments; mental health problems; physical impairments such as visual or hearing impairments; language difficulties.

5.54. As noted above, the ILRC was of the view that such an approach should be taken. It recommended that the jury only be allowed to have regard to the following matters:

- Physical disability. For example, in relevant cases the jury should be allowed to take into account the fact that the accused had a visual impairment which meant they could not see the complainant's 'expression of fear or negative body language'.[66]
- Mental or intellectual disability. For example, in relevant cases the jury should be allowed to take into account the fact that the accused had a brain injury which meant that they were unable to understand consensual signals.[67]
- Mental illness. For example, in relevant cases the jury should be allowed to take into account the fact that the accused had a mental illness which impaired their ability to read subtle social signals.[68]
- Age and maturity. For example, in relevant cases the jury should be allowed to take into account that the accused's youth and immaturity affected their ability to understand that the complainant was not consenting.[69]

5.55. The ILRC was of the view that it did not matter if the accused's disability or mental illness was temporary or permanent. The jury should be permitted to take these matters into account if

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63 Attorney General's Department (NSW) Criminal Law Review Division, *The Law of Consent and Sexual Assault: Discussion Paper* (2007) Appendix 3.

64 See, eg, S Banks, 'An Honest but Mistaken Belief in London Legislation? Consent, Controversy and Sexual Offence Reform in New South Wales' (2008) 42 *The Law Teacher* 228; I Dobinson and L Townsley, 'Sexual Assault Law Reform in New South Wales: Issues of Consent and Objective Fault' (2008) 32 *Criminal Law Journal* 152.

65 *R v Stingel* (1990) 171 CLR 312.

66 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.68].

67 Ibid [3.74].

68 Ibid [3.80]. See also *R v B(MA)* [2013] EWCA Crim 3.

69 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.85].

they affected the accused's capacity to understand whether the complainant was consenting. However, the ILRC noted that it will often be the case that the accused's disability or mental illness will have no bearing on their capacity to comprehend the complainant's consent. In such circumstances, these matters should not be considered by the jury.[70]

5.56. The ILRC also noted that children mature at different ages, depending on their biology and life experiences. Consequently, it was of the view that 'chronological age is inadequate to assess maturity on its own', and that the jury should consider the accused's age in conjunction with their individual maturity (which could be expertly evaluated). Where either of these factors meant that the accused lacked the capacity to understand that the complainant was consenting, they should be taken into account.[71]

5.57. The ILRC argued that this approach has the merit of retaining a largely objective test, while also addressing the 'potentially harsh effects of holding someone with a disability, who did not have the capacity to understand whether the complainant was consenting, to the community standard of "reasonableness"'.[72] The IRLC considered it important to make an allowance in cases where there may be a lack of moral blameworthiness.[73]

Require the jury to consider community expectations.

5.58. Another possible reform would be to require the jury to consider the community's expectations when assessing the reasonableness of the accused's belief in consent. This is the case in Victoria, where counsel may request the judge direct the jury that it must 'consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent'.[74] The judge must give this direction unless there are good reasons for not doing so.[75]

5.59. This direction was designed 'to make clear that the jury should not assess what the accused himself or herself considered to be "reasonable", but what the general community would objectively consider to be reasonable to expect of its members'.[76]

5.60. In its review of consent laws, the NSWLRC did not recommend adopting this approach. While it appreciated the reason for the suggestion, it did not consider it to be workable. It was of the view that 'the concept of "community standards" is hard to define and may be difficult for fact finders to apply. It may also be an ineffective filter, as research reveals that certain misconceptions exist within the community'.[77] The NSWLRC's concern that jurors would find

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70 Ibid [3.66].

71 Ibid [3.92].

72 Ibid [3.73].

73 Ibid.

74 *Jury Directions Act 2015* (Vic) s 47(3)(d). The issue of jury directions is addressed in Chapter 6. For further discussion of jury directions on this issue, see paras 6.87-6.91. For consideration of arguments for and against legislating jury directions, see paras 6.48-6.59.

75 Ibid s 14. In deciding whether there are good reasons not to give a direction requested by the prosecution the judge must have regard to whether the direction concerns a matter not raised or relied on by the accused; and whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented their case. This means that if the direction was requested by the prosecution to balance the accused's idiosyncratic belief in consent, it is highly likely that the accused would strongly object to the direction being given. In light of that direction, and given the terms of the *Jury Directions Act 2015* (Vic), a trial judge may be reluctant to give the direction. The circumstances in which jury directions should be given are discussed in more detail in Chapter 6.

76 Criminal Law Review, '*Crimes Amendment (Sexual Offences) Act 2016*: An Introduction' (Report, 2017) 53.

77 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.145], citing Webster et al, 'Australians' Attitudes to Violence Against Women and Gender Equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)' (Research Report, ANROWS, March 2018).

it difficult to apply community standards is somewhat at odds with the notion that jurors represent the community.

Exclude consideration of intoxication

5.61. People often commit non-consensual sexual acts while they are intoxicated by alcohol or other drugs.[78] They may subsequently claim that, in their intoxicated state, they mistakenly believed the complainant was consenting. In such circumstances, it is necessary to determine what role (if any) their intoxication should play in the jury's assessment of the mistake of fact defence.

5.62. This issue is not currently addressed in the *Code*. However, case law makes it clear that:

- The jury may take an accused's intoxication into account in determining whether they honestly believed the complainant was consenting; but
- The jury may not take an accused's intoxication into account in deciding whether their belief was reasonable.[79]

5.63. This principle only applies to self-induced intoxication. This is because in such cases the accused has chosen to become intoxicated, and so 'should take responsibility for the harm they cause resulting from that choice'.[80] By contrast, if a person's intoxication came about involuntarily, or as a result of factors such as fraud or mistake, a different approach may be taken when assessing the reasonableness of the accused's belief.[81]

5.64. Assessing the reasonableness of an accused's belief from the perspective of a sober person 'reflects a basic policy decision that self-induced intoxication should not be allowed to lower the standards of acceptable conduct'.[82] It prevents an accused from using their intoxication as an excuse,[83] and avoids effectively giving people permission to commit sexual offences as long as they become intoxicated first.[84] In addition, non-consensual sexual activities are 'still criminal and harmful, regardless of the person's intoxication', and so are considered to merit criminal punishment.[85] It is also consistent with section 28 of the *Code*, which prevents an accused person from relying on self-induced intoxication to substantiate the insanity defence.

5.65. One possible reform would be to explicitly address this issue in legislation.[86] This has been done in various other Australian jurisdictions, as can be seen in Table 5.1 below.

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78 See, eg, Wall and Quadara, 'Under the Influence? Considering the Role of Alcohol and Sexual Assault in Social Contexts' (Issues No 18, Australian Centre for the Study of Sexual Assault, 2014).

79 *Daniels v The Queen* (1989) 1 WAR 435; *Aubertin v The State of Western Australia* (2006) 33 WAR 87, [44].

80 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.111].

81 This is implicit in the Court's reference to 'self-induced' intoxication in *Aubertin v The State of Western Australia* (2006) 33 WAR 87, [44].

82 Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 17.

83 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.177].

84 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.114].

85 Ibid [3.111].

86 Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 2.

Jurisdiction	Relevance of intoxication
NSW	For the purposes of making any finding about the accused's belief in consent, the trier of fact must not consider any self-induced intoxication of the accused person.[87]
NT	If a person's intoxication is self-induced, in determining whether a reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated. If a person's intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.[88]
Qld	In deciding whether a belief that another person gave consent to a sexual act was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.[89]
Tas	A mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated.[90]
Vic	In determining whether a person who is intoxicated has a reasonable belief at any time (a) if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time; and (b) if the intoxication is not self-induced, regard must be had to the standard of a reasonable person who is intoxicated to the same extent as that person and who is in the same circumstances as that person at the relevant time.[91]
ACT, WA	Not explicitly addressed.[92]

Table 5.1: Legislative relevance of intoxication to the accused's belief in consent

5.66. Enacting a provision that explains the relevance of intoxication to the mistake of fact defence would help achieve clarity in the law. It would also send a clear message to the community that self-induced intoxication does not provide an excuse for engaging in non-consensual sexual activities, which may operate to both frame understandings of appropriate behaviour and to encourage people to report incidents of sexual violence that involved intoxicated perpetrators.

5.67. In addition, such a reform may help ensure that appropriate directions are given to the jury in relevant cases. In its review of the mistake of fact defence, the QLRC found evidence that this was not occurring in Queensland in 2018. It analysed 32 trial transcripts in which the accused was intoxicated at the time of the sexual activity. It found that the mistake of fact defence was left to the jury in 28 of those trials (88%). However, in eight of those trials the jury was not

87 *Crimes Act 1900* (NSW) s 61HK(5)(b).
88 *Criminal Code Act 1983* (NT) s 43AU.
89 *Criminal Code Act 1899* (Qld) s 348A(3).
90 *Criminal Code Act 1924* (Tas) s 14A.
91 *Crimes Act 1958* (Vic) s 36B(1).
92 There is currently a Bill before the ACT Parliament which will address this issue. If enacted, it will provide that in deciding the accused person's knowledge or belief, or recklessness, about whether another person consented to an act mentioned in the provision, the trier of fact must not consider the accused person's self-induced intoxication: Sexual Assault Reform Legislation Amendment Bill 2022 (ACT) s 8, inserting a new s 67A into the *Crimes Act 1900* (ACT).

directed about the relevance of the accused's intoxication to the reasonableness of their belief.[93]

5.68. Consequently, while the QLRC was of the view that the law in the area was sufficiently clear, it considered it to be desirable to expressly address the issue in legislation to help ensure that appropriate directions are given.[94] It recommended enacting a provision that provides that 'in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance'.[95] This recommendation was implemented by the Queensland Government.[96]

5.69. If this issue is to be addressed in the *Code*, it will be necessary to determine how the provision should be framed. It can be seen from Table 5.1 above that two different legislative approaches have been taken to this issue:

- In NSW and Tasmania, the law provides that self-induced intoxication should not be taken into account in determining whether the accused's belief was either honest or reasonable.
- In the NT, Queensland and Victoria, the law provides that self-induced intoxication may be taken into account in assessing the honesty of the accused's belief. However, it may not be taken into account in determining whether that belief was reasonable. As noted above, this is currently the position in Western Australia.

5.70. In its recent review of sexual offences, the Queensland Taskforce was split on which of these approaches was preferable. The majority of the Taskforce preferred the approach taken in NSW and Tasmania. They noted that research indicated that people found the law in the area to be confusing, and considered it to be 'important for the community and the courts to be clear that the fact a person's behaviour was influenced by their voluntary intoxication should in no way be relevant in deciding whether their claimed mistake as to consent to sexual activity was a lawful excuse'.[97] Consequently, they recommended enacting a provision which states that 'no regard must be had to the voluntary intoxication of an accused person when considering whether they had a mistaken belief about consent to sexual activity'.[98]

5.71. By contrast, three members of the Taskforce[99] preferred the approach taken in the NT, Queensland and Victoria. They stated that:

> It is important that there is clarity in the law. The law should properly prevent the inebriated offender relying upon his intoxication as an excuse for his behaviour. The intoxicated condition of the perpetrator of sexual offending must not and should not be considered when assessing whether his mistaken belief was held reasonably. It is both common sense and a community expectation. However, the honesty of his belief (contrasted with whether his belief was reasonably held) is an assessment of his actual belief at the point in time in which it was held. The influence of intoxication may be relevant to and may inform his actual held belief (that is, it was held honestly, and this is separate consideration from the issue of whether it was held reasonably).

93 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [3.67].

94 Ibid [7.134].

95 Ibid Rec 7.2.

96 *Criminal Code Act 1899* (Qld) s 348A(3).

97 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 213.

98 Ibid Rec 43(d).

99 Alexis Oxley, Laura Reece and Philip McCarthy QC.

> Whilst the proposed amendment by the majority is limited in application to sexual offending, the provision has broader application than only that for mistaken belief as to consent in sexual offending, and the provision is applied to other mistaken factual beliefs held by perpetrators of offences. The law, as applied in those other cases of factual mistakes, similarly prevents the inebriated offender relying upon his intoxication as an excuse for his behaviour. In those other cases of factual mistakes, the law would still permit the influence of intoxication to be considered relevant to his actual held belief. It is inappropriate for there to be differing applications of the provision depending upon the character of the mistake made.[100]

5.72. The minority did, however, acknowledge that the Queensland provision was not sufficiently clear, and recommended that it should be amended to provide that 'no regard must be had to the voluntary intoxication of an accused person when considering whether they had a reasonable mistaken belief'.[101]

5.73. Different approaches have also been taken to defining self-induced intoxication. This concept is not defined in the NSW, Queensland or Tasmanian Acts. By contrast, in the NT and Victorian Acts, intoxication is defined to be self-induced unless it came about:

- Involuntarily;
- As a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force;
- From the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or
- From the use of a drug for which a prescription is not required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.[102]

5.74. However, intoxication that comes about in the final two circumstances is considered to be self-induced if the person using the drug knew, or had reason to believe, when taking the drug that it would significantly impair their judgement or control.[103]

5.75. In its review of consent laws, the NSWLRC considered enacting such a definition. It noted that 'setting out such matters could potentially guide fact finders as they undertake the difficult task of assessing knowledge in cases involving intoxication'.[104] However, it did not recommend doing so, as it was of the view that it 'would further complicate the task of fact finders'.[105]

5.76. If this issue is to be addressed, consideration should be given to cases in which the intoxication results from the combined use of licit and illicit intoxicants. It is not clear how such cases fit within the approach taken in the NT and Victoria.

Specify that a belief is not reasonable if it is based on certain assumptions

5.77. Another possibility for reform would be to specify that an accused's belief in the complainant's consent is not reasonable if it is based on circumstances that by community standards would indicate that consent was not given or could not be given. It could be made clear that this

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100 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 221.

101 Ibid.

102 *Criminal Code Act 1983* (NT) s 43AR; *Crimes Act 1958* (Vic) s 36B(2)-(3).

103 *Criminal Code Act 1983* (NT) s 43AR; *Crimes Act 1958* (Vic) s 36B(2)-(3).

104 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [5.102]-[5.104].

105 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.180].

includes assumptions which are informed by cultural, religious or other influences. Such an approach has been taken in Victoria, where counsel can ask the judge to direct the jury that:

> i. a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
>
> ii. a belief in consent based on a combination of matters including such a general assumption is not a reasonable belief to the extent that it is based on such an assumption.[106]

5.78. This approach may help ensure that people actively seek consent, rather than presuming that the other participant is consenting because of the circumstances. However, it may create difficulties for jurors who will be required to determine the extent to which the accused's belief is based on a general assumption about the circumstances in which people consent to a sexual act. It may also be unfair to an accused if their beliefs reflect reasonable community standards, or where the jury is of the view that the accused's belief was reasonable despite the fact that they relied on a general assumption.

5.79. Alternatively, the law could specify that a belief in consent is not reasonable if it is based on specific assumptions, such as:

- The complainant's style or state of dress.
- The fact that the complainant had consumed alcohol or other drugs.
- The complainant's silence or failure to physically resist.
- The fact that the complainant had previously engaged in sexual conduct with the accused or another person.[107]

5.80. This approach would help address the concern that the accused may rely on misconceptions about consent or gendered stereotypes to support their argument that their belief was reasonable. It would make it clear that they need to be able to point to other matters, such as the steps they had taken to ascertain consent, to ground their argument. The inclusion of specific assumptions in the legislation could also play an educative role, making it clear that it is not permissible to engage in sexual activities on the basis of such views.

5.81. However, as noted above, it has been argued that the jury could be misled into thinking that the listed matters are exhaustive.[108] This could result in the jury improperly taking into account other assumptions that are not included in the provision. It is also possible that by listing specific misconceptions, the law could unintentionally reaffirm those misconceptions.[109] The specification of numerous matters could also complicate and lengthen jury directions.

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[106] *Jury Directions Act 2015* (Vic) s 47(3)(c). The judge must give a direction unless there are good reasons not to do so: ibid s 14. The issue of jury directions is addressed in Chapter 6. For further discussion of jury directions on this issue, see paras 6.87-6.91. For consideration of arguments for and against legislating jury directions, see paras 6.48-6.59.

[107] Cossins, 'Why Her Behaviour is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 49(2) *UNSW Law Journal* 462.

[108] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.124].

[109] Ibid.

Specify that a belief is not reasonable if the complainant had not communicated consent

5.82. One potential reform that was raised in Chapter 4 was to amend the *Code* to require participants to say or do something to indicate their consent to a sexual activity. It would be possible to complement this reform with a provision that states that the jury should only find the accused's belief to be reasonable if it accepts that the complainant said or did something to indicate consent.

5.83. An approach similar to this has been adopted in Canada, where the *Criminal Code* precludes reliance on the mistake of fact defence where 'there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct'.[110] It is important to note that the focus of this provision is the complainant's words and conduct, not the measures the accused took to ascertain consent. That issue is addressed in a different provision in the Canadian *Criminal Code* (and is discussed below).

5.84. This reform would address the concern that the mistake of fact defence may undermine the law of consent, as well as the effectiveness of any future reforms. It would make it clear that the accused must refrain from engaging in sexual activities unless the complainant has actively communicated their consent. Any failure to do so would be considered unreasonable.

5.85. However, this approach could result in an accused being convicted in circumstances where they have a condition, such as a cognitive impairment, which means that they are unable to understand that the complainant was not consenting. This fact would not be taken into account in assessing their criminal liability: their belief in consent would be deemed unreasonable simply because there was no evidence that the complainant had said or done anything to indicate consent. The NSWLRC considered this outcome to be unjust, and so did not recommend adopting the Canadian approach.[111]

Specify that a belief is not reasonable if the accused was aware of a listed circumstance

5.86. In Chapter 4 we noted that the *Code* includes a non-exhaustive list of circumstances in which consent is not freely and voluntarily given: if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'.[112] We also considered various circumstances that could be added to the list. It would be possible for the *Code* to specify that an accused's belief is not reasonable if they knew or were aware of the existence of one of the listed circumstances.

5.87. This approach has been taken in Victoria, where counsel may request that the trial judge direct the jury that if they conclude that the accused knew or believed one of the listed circumstances existed, 'that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act'.[113] The judge must give this direction unless there are good reasons for not doing so.[114]

5.88. A similar result has been achieved in the ACT, although using a slightly different mechanism. Its Act includes a provision that explicitly allows the mental element of the sexual offences to

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[110] *Criminal Code*, RSC, 1985, c C-46 s 273.2(c).

[111] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.129].

[112] *Criminal Code Act Compilation Act 1913* (WA) s 319(2).

[113] *Jury Directions Act 2015* (Vic) s 47(3)(a). The issue of jury directions is addressed in Chapter 6. For further discussion of jury directions on this issue, see paras 6.87-6.91. For consideration of arguments for and against legislating jury directions, see paras 6.48-6.59.

[114] Ibid s 14.

be proven by establishing that the accused knew of, or was reckless about, the existence of one of the listed circumstances.[115]

5.89. This reform would help address the concern that that the mistake of fact defence may undermine the law of consent, as well as the effectiveness of any future reforms. For example, if the *Code* were to specify that a person cannot consent when they are asleep, such a provision would ensure that the accused could not argue that although they were aware the complainant was sleeping, they reasonably believed the complainant consented to the sexual activity.

5.90. If this approach were adopted, it would be necessary to decide whether:

- The accused would need to know that one of the listed circumstances existed, or whether it would be sufficient that they were aware of that possibility; and
- Whether it should apply to knowledge or awareness of all of the listed circumstances, or whether it should be limited to specific circumstances (for example, awareness that the complainant was consenting due to fraud).

Recklessness

5.91. When the accused participates in a sexual activity, they may be reckless about the complainant's consent. Such recklessness can be advertent or inadvertent. It will be advertent if the accused realised that it was possible that the complainant was not consenting but went ahead with the sexual activity anyway. It will be inadvertent if they failed to consider whether or not the complainant was consenting.[116]

5.92. In Tasmania and Canada, the law excludes the mistake of fact defence where the accused's belief was reckless:

- In Tasmania, the law provides that a mistaken belief is not honest and reasonable if the accused 'was reckless as to whether or not the complainant consented'.[117]
- In Canada, an accused's belief in consent does not excuse their behaviour if the belief arose from 'the accused's recklessness or wilful blindness'.[118]

5.93. Although broadly stated, it seems that these provisions will have no relevance in cases of inadvertent recklessness. This is because an accused person who has given no thought to the complainant's consent cannot hold a positive belief that they were consenting (as is required by the mistake of fact defence). However, they may apply in cases of advertent recklessness. This is because it is possible for an accused person to honestly believe that the complainant was consenting, while at the same time being aware of the possibility that they may not be.

5.94. In such cases, the jury may find that because the accused was aware of the possibility of non-consent, they did not have an honest belief in consent. Alternatively, they may find that the accused's belief was not reasonable in the circumstances. However, this will not necessarily be the case. It is possible that the jury may find that although the accused had some doubts about consent, on balance they did believe the complainant was consenting and that belief was reasonable in the circumstances.

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[115] *Crimes Act 1900* (ACT) s 67(3).
[116] See, eg, *Banditt v The Queen* (2005) 224 CLR 262.
[117] *Criminal Code Act 1924* (Tas) s 14A(b).
[118] *Criminal Code*, RSC, 1985, c C-46 s 273.2(a)(ii).

5.95. It would be possible to enact a provision which specifies that an accused's belief in consent is not reasonable if it arose from the accused's recklessness. Such an approach would make it clear that whenever the accused is aware of the possibility of non-consent, they must not continue with the sexual activity. They have an obligation to ensure, prior to doing so, that the complainant really is consenting. If they fail to do so, they are morally culpable and should not be permitted to escape criminal liability.

5.96. However, it is already likely to be the case that a jury will find that a person who is aware of the risk of non-consent does not hold a reasonable belief in consent. In fact, the QLRC has suggested that these two notions are incompatible: that, by definition, a belief in consent will not be reasonable if there is an awareness of the possibility of non-consent.[119] Consequently, the QLRC concluded that introducing 'the concept of recklessness as an additional express consideration to be taken into account in assessing whether a defendant acted under an honest and reasonable, but mistaken, belief would not serve to clarify the existing law, is unnecessary and could cause complications'.[120]

Questions about providing legislative guidance on the assessment of reasonableness

5.97. We are interested to hear your views on whether legislative guidance should be provided about the assessment of reasonableness, and if so, what guidance should be provided.

5.98. We are aware that we have raised numerous issues about the kind of guidance that could be provided. To reduce the number of questions we ask in this Discussion Paper, Question 19 is framed in broad terms. We are, however, interested to hear your views on the specific issues raised in relation to each matter. To assist you in this regard, we have included cross-references to the paragraphs in which each matter is discussed.

5.99. Some of the suggested reforms may require the judge to give specific jury directions. Before forming a view on the desirability of these reforms, we urge you to read Chapter 6 which sets out general information about jury directions, including a discussion of the advantages and disadvantages of legislating in this regard.

[119] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) 236.

[120] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [71].

19. Should the *Code* provide legislative guidance to assist juries to determine whether a mistaken belief in consent was reasonable? If so, what guidance should be provided? For example, should the *Code*:

- **Specify that, in determining whether an accused's belief in consent was reasonable, the jury:**
  - **Must consider any of the accused's attributes or characteristics which could affect their appreciation or perception of the circumstances in which they found themselves.**
  - **Must not consider the accused's values, whether they be informed by cultural, religious or other influences (see paras 5.47-5.52).**
- **Define the attributes or characteristics of the accused which the jury must consider (eg age, gender, disabilities, mental health problems) (see paras 5.53-5.57).**
- **Require the jury to consider the community's expectations in assessing the reasonableness of the accused's belief in consent (see paras 5.58-5.60).**
- **Prevent the jury from taking the accused's self-induced intoxication into account in determining whether the accused's belief was honest and/or reasonable (see paras 5.61-5.72).**
- **Define the circumstances in which the accused's intoxication will be considered self-induced (see paras 5.73-5.76).**
- **Specify that a belief in consent is not reasonable if it is based on general assumptions about the circumstances in which a person consents (see paras 5.77-5.78).**
- **Specify that a belief in consent is not reasonable if it is based on specific assumptions about consent, such as assumptions arising from the complainant's style or state of dress, consumption of alcohol or other drugs, silence or failure to physically resist, or previous engagement in sexual conduct with the accused or another person (see paras 5.79-5.81).**
- **Specify that a belief in consent is not reasonable if there is no evidence that the complainant said or did anything to indicate consent (see paras 5.82-5.85).**
- **Specify that a belief in consent is not reasonable if the accused knew or was aware of the existence of one of the listed circumstances in which consent is not freely and voluntarily given (see paras 5.86-5.90).**
- **Specify that a belief in consent is not reasonable if it arose from the accused's recklessness (see paras 5.91-5.96).**

Address the measures the accused took to ascertain the complainant's consent

5.100. Although not explicitly addressed in legislation, under the current Western Australian law the jury may consider any measures the accused took to ascertain the complainant's consent in determining whether their belief in consent was honest and reasonable. However, it is not required to do so. There is also no statutory requirement placed on the accused to demonstrate that they did or said anything to ascertain consent.

5.101. By contrast, as can be seen from Table 5.2 below, legislation in other Australian jurisdictions:

- Specifies that the accused's belief in consent is not honest (Tas) or reasonable (ACT, NSW, Tas, Vic (new)) if they did not take measures to ascertain consent; and/or
- Requires or permits the jury to consider anything the accused said or did when determining whether their belief was honest (Qld) or reasonable (NSW, Qld, Vic (current)).

5.102. It would be possible for the *Code* to adopt one or both of these approaches. They are discussed in turn below.

Jurisdiction	Relevance of Accused's Steps
ACT	Without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented.[121]
NSW	A belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.[122] This provision does not apply if the accused person shows that at the time of the sexual activity the accused person had a cognitive impairment or a mental health impairment, and the impairment was a substantial cause of the accused person not saying or doing anything.[123] It is for the accused person to establish these matters on the balance of probabilities.[124] For the purposes of making any finding about the accused's belief in consent, the trier of fact must consider all the circumstances of the case, including what, if anything, the accused person said or did.[125]
Qld	In deciding whether a belief that another person gave consent to a sexual act was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.[126]
Tas	A mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.[127]
Vic (current)	Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances. These include any steps that the person has taken to find out whether the other person consents to the act.[128]
Vic (new)	Whether or not a person (A) reasonably believes that another person (B) is consenting to an act depends on the circumstances. A's belief that B consents to an act is not reasonable if, within a reasonable time before or at the time the act takes place, A does not say or do anything to find out whether B consents to the act. This provision does not apply if A has a cognitive impairment or mental illness (other than the effects of intoxication that is self-induced) and that cognitive impairment or mental illness is a substantial cause of A not saying or doing anything to find out whether B consents to the act. A bears the burden of proving those matters on the balance of probabilities.[129]
NT, SA, WA	Not explicitly addressed in legislation.[130]

Table 5.2: Legislative relevance of the accused's steps to ascertain consent

[121] *Crimes Act 1900* (ACT) s 67(5).
[122] *Crimes Act 1900* (NSW) s 61HK(2).
[123] Ibid s 61HK(3).
[124] Ibid s 61HK(4).
[125] Ibid s 61HK(5)(a).
[126] *Criminal Code Act 1899* (Qld) s 348A.

Require the accused to have taken measures to ascertain consent

5.103. One possibility for reform would be to require the accused to have taken measures to ascertain the complainant's consent. For example, the law could specify that the accused's belief in consent should not be considered honest and/or reasonable unless the accused did or said something to find out whether the complainant was consenting. Such an approach has been implemented in NSW, Tasmania, the ACT and Victoria (see Table 5.2 above), as well as in Canada.[131]

5.104. This reform, which would implement an affirmative model of consent, is based on the idea that all participants to a sexual activity should respect the others' sexual autonomy, and they should all be equally active in reaching an agreement about their sexual activities:

> In determining whether agreement has been given to a particular sexual act a court or jury should look at the whole background circumstances. The primary question should be 'what did all the parties do to ensure that they participated in a fully consensual act?' The focus of enquiry would be not only on the behaviour of the victim but on the actions of the accused in the process of reaching agreement on consent.[132]

5.105. Underlying this approach is the belief that if a person wants to have sex with another person, it is their responsibility to obtain a clear, expressed indication of consent.[133] This is seen to require little effort on their behalf. Any additional burden placed on them may be considered to be warranted in light of the law's failure to protect people who have experienced sexual violence.[134]

5.106. Those who advance this model consider its advantages to include:

- It may encourage people to actively seek consent, rather than presuming its existence.
- It ensures a reasonable standard of care is taken to ensure a person is consenting, before engaging in potentially harmful behaviour.
- Where it is unclear whether or not the complainant consented, it should be for accused to take steps to resolve that ambiguity. Given how simple this is to do, there is no justification for failing to do so.[135]
- It justifiably criminalises people who make no effort to ascertain consent.[136]

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127 *Criminal Code Act 1924* (Tas) s 14A.

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

129 Ibid, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

130 While legislation in SA does not explicitly permit or require the jury to have regard to the measures the accused took to ascertain consent when determining whether their belief in consent was honest or reasonable, the required mental state for various sexual offences in SA includes reckless indifference. The definition of reckless indifference includes where a person is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed.

131 *Criminal Code*, RSC, 1985, c C-46 s 273.2(b) prevents the accused from relying on the mistake of fact defence if they 'did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting'.

132 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.24].

133 J Monaghan and G Mason, 'Communicative Consent in New South Wales: Considering *Lazarus v R*' (2018) 43(2) *Alternative Law Journal* 96, 97.

134 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.74].

135 E Dowds, 'Rethinking Affirmative Consent' in R Killean, E Dowds and A McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, 2021) 165, 169.

136 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.112], quoting EA Sheehy, 'Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration

- It moves away from the traditional passive model of male assertiveness and female acquiescence, towards a model of sexual relations based on mutuality and equality that better reflects modern Australian views.[137]
- It can help shift from a culture of entitlement in sexual interactions to a culture of respectful and equal sexual relationships.[138]
- It can help shift the focus of sexual offence trials from the current undue focus on the complainant's behaviour, and whether they clearly indicated non-consent, to the accused's responsibility to obtain consent and the actions they took.[139]
- It reduces the scope for the accused to argue that the complainant implicitly consented to the sexual activity, or to argue that their belief in consent was reasonable due to misconceptions, assumptions or stereotypes.[140]
- It can play an educative role, teaching people about their responsibilities prior to engaging in sexual activity and the importance of negotiating consent.[141]
- It does not place an unduly onerous burden on the accused, as it simply requires them to have said or done something to ascertain consent.[142]
- It would further the harmonisation of consent laws, by aligning with the approach taken in NSW, Tasmania, the ACT and Victoria.

5.107. This approach was recommended by the United Nations Division for the Advancement of Women in its *Handbook for Legislation on Violence Against Women*.[143] It was also supported by the ACT's Sexual Assault Prevention and Response Steering Committee, which argued that 'without having to seek consent, a perpetrator may see no risk in continuing with a sexual act where consent is simply presumed. If the law clearly stipulates that consent must be actively sought, the perpetrator is more likely to consider the risks of their actions if they cannot prove that consent was provided'.[144]

5.108. In its recent review of sexual offences, the VLRC also expressed support for this approach, recommending that the Victorian Government review its definition of consent 'with the aim of

Against Unconscious Women' in EA Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) 483, 492.

137 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.55].

138 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) [90]; Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 5.

139 Burgin and Flynn, 'Women's Behaviour as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology & Criminal Justice* 334; W Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria – What Do Stakeholders Think?' (2015) 15 *QUT Law Review* 30; Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.48].

140 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.49].

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

142 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.113].

143 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* (2009) 27.

144 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 78. This recommendation was implemented by the ACT Government: *Crimes Act 1900* (ACT) s 67(5).

moving towards a stronger model of affirmative consent'.[145] It was of the view that this could provide meaningful and effective change to the law of sexual offences'.[146] While it was not in a position to recommend specific changes given the scope of its inquiry, it recommended that the Government conduct further consultations to help it to 'formulate a requirement for a person to "take steps" to find out if there is consent'.[147] The Victorian Government has subsequently implemented this reform.[148]

5.109. Some support for this approach has also been expressed in preliminary submissions. For example, the preliminary submission from WorkSafe stated that:

> Under the current laws, the 'mistake of fact' defence remains open to alleged perpetrators of sexual assault. This is potentially problematic, as it could enable those accused of rape to argue that they had an honest and reasonable belief of consent but were mistaken. The defence could be used by defendants to claim that a person's behaviour – including flirting, what a person wore, or how they acted – could be mistakenly interpreted as consent. This defence has also been used in cases where a person freezes, did not offer verbal or physical resistance, where there are language barriers or alcohol involved, and where cases involve domestic violence and people with disabilities. Accordingly, WorkSafe supports amendments to the Code which narrow the use of the mistake-of-fact defence to instances only where the defendant can show they took positive and reasonable steps to obtain the other person's consent.[149]

5.110. The preliminary submission from the Centre for Women's Safety and Wellbeing also argued for the adoption of an approach that 'requires a defendant to prove that the defendant took reasonable steps to ascertain consent'.[150]

5.111. By contrast, this approach was not recommended in recent reviews conducted in NSW, Queensland, Ireland and Northern Ireland.[151] While these reviews acknowledged that there are valid arguments in favour of requiring the accused to take measures to ascertain consent, they found that these were outweighed by the strong opposing arguments. These include:

- It wrongly criminalises people who have a reasonable belief in consent but have not actively sought to ascertain the complainant's consent. This effectively turns very serious offences into absolute liability offences, which is contrary to fundamental criminal law principles. It may also result in unjust convictions.[152]

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[145] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 50.

[146] Ibid [14.68].

[147] Ibid Rec 50.

[148] *Crimes Act 1958* (Vic) s 36A, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

[149] Preliminary Submission 4 (Darren Kavanagh, WorkSafe Western Australia Commissioner) 2.

[150] Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 2.

[151] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.104]; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.102]; Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.108]; Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [11.58]-[11.61].

[152] A Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr' (2019) 7 *Griffith Journal of Law & Human Dignity* 17; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.91]; Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.52]; Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 211.

- It inappropriately criminalises people who are unable to take measures to ascertain the complainant's consent due to personal circumstances beyond their control, such as those who have a cognitive impairment.[153]
- It does not reflect the diversity of sexual practices that exist in the community. It will often be the case that people have sex consensually in the absence of explicit words or actions. These are not morally problematic.[154]
- It 'reduces what is spontaneous or nuanced human behaviour into an artificial transactional analysis of the behaviour'.[155]
- Evidence from jurisdictions where such an approach has been adopted indicates that it is unlikely to change trial practices. For example, research from Tasmania shows that 'misconceptions about sexual violence that are at odds with affirmative consent continue to play a role in trials. Prosecutors may not present theories of what occurred to the jury (case theories) that align with the affirmative model of consent, and judges may not direct the jury to correct any misconceptions'.[156]
- It unfairly shifts the onus to the accused to demonstrate that they took measures to ascertain consent, or to demonstrate that those measures were reasonable. This is unduly onerous and impinges on the presumption of innocence and the accused's right to a fair trial.[157] It could result in an accused person being convicted not because they committed the offence, but because they were unable to overcome the burden placed on them to demonstrate that they did not.[158]
- Even though people should take steps to ascertain consent, the role of the criminal law is not to promote good behaviour. Its role is to punish wrongs.[159]
- It is unlikely to be effective in achieving a cultural shift. The criminal law is an ineffective tool for achieving cultural change, especially in relation to sexual offences. Such change is better achieved through other means, such as community education.[160]

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153 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.114] (citations omitted).

154 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [5.93]; Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.54].

155 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) 91, citing A Kerr, 'Cups of Tea, Joyriding and Shaking Hands – The Vexed Issue of Consent' (2019) 7 *Griffith Journal of Law & Human Dignity* 17.

156 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.56], citing Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) 188-90, 200; Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria – What Do Stakeholders Think?' (2015) 15 *QUT Law Review* 30, 48.

157 Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26 *New Zealand Universities Law Review* 614; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.54]; Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) 91; Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 211.

158 ACT Legislative Assembly, Justice and Community Safety Committee (Legislation Scrutiny), *Scrutiny Report No 17*, 4 May 2018, 2.

159 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.51] citing Submission 25 (Dr Steven Tudor); W Larcombe, 'Limits of the Criminal Law for Preventing Sexual Violence' in N Henry and A Powell (eds), *Preventing Sexual Violence* (Palgrave Macmillan, 2014) 64.

160 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.55]-[3.61].

- It may make the law more complex and lead to more appeals. This has 'the potential to further traumatise complainants and add to delays'.[161]

5.112. The potential injustice this reform could cause to people with cognitive impairments has been emphasised by many stakeholders, including legal academic Andrew Dyer, who provides the following example:

> Take the accused with an intellectual disability … who has non-consensual intercourse with another person, in circumstances where that person was silent because s/he was scared and the accused has not deliberately caused such fright – but also has failed to 'find out' whether the other person is consenting. Should such an accused be convicted of sexual assault? If an affirmative consent provision were in force, s/he would be. … Because of such an accused's disability, however, it might not occur to him/her that there is a risk that the complainant is not consenting – or that there is any need to ask whether s/he is. It might be quite reasonable for him/her to believe that consent has been granted. Should we convict a person of a serious crime because s/he fell short of a standard that s/he was quite unable to reach?[162]

5.113. It is possible, however, to specifically address this concern in legislation. This has been done in NSW and Victoria, where legislation provides that the relevant provision does not apply if the accused has a cognitive impairment or mental illness, and that condition was a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to the sexual activity. It is for the accused to prove these matters on the balance of probabilities.[163]

5.114. Due to the various concerns outlined above, the QLRC did not recommend requiring the accused to have actively sought the complainant's consent. It was of the view that such a provision could operate unfairly, as 'not all situations where a defendant may honestly and reasonably believe that a complainant is giving consent will alert a defendant to the need to take steps to ascertain the fact of consent'.[164] It instead recommended enactment of a provision permitting the jury to have regard to anything the accused said or did to ascertain whether the complainant was consenting (see below).

5.115. In its subsequent review of sexual offences, the Queensland Taskforce noted that many stakeholders had expressed disappointment with the QLRC's approach to this issue, arguing that it had not gone far enough. Stakeholders considered the QLRC's approach to be 'limited and technical', and to pay insufficient regard to the needs and rights of victims.[165] However, the Taskforce acknowledged that there was a strong division about this issue between various stakeholder groups. Most of the legal stakeholders it consulted opposed any reform to the law, due to concerns about protecting an accused's person's right to a fair hearing in the criminal trial process. By contrast, almost all other stakeholder groups supported adopting a more affirmative model of consent.[166]

5.116. The Queensland Taskforce was split in this regard. The majority recommended enacting a provision that states that 'an accused person's belief about consent to sexual activity is not

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[161] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.59].

[162] Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr' (2019) 7 *Griffith Journal of Law & Human Dignity* 17, 26-7.

[163] *Crimes Act 1900* (NSW) s 61HK(3)-(4); *Crimes Act 1958* (Vic) s 36A, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

[164] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.102].

[165] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 207.

[166] Ibid 207.

reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consented to the sexual activity'.[167] They acknowledged that the practical effect of this model is 'that an accused person who claims that they mistakenly believed the victim was consenting will have to show that the accused person said or did something to justify that belief'.[168] This affects the presumption of innocence, and may effectively compel an accused person to give evidence. However, they were of the view that these limitations on the accused's rights were justified in the circumstances.

5.117. The majority noted that they had considered other possibilities that might place fewer limits on the accused's rights. For example, they 'considered whether the burden of proof could simply be reversed for an accused person seeking to claim that they had an honest and reasonable mistake of fact as to consent, either on its own or in combination with a requirement that regard must be had to anything the defendant said or did or did not say or do to ascertain consent'.[169] However, they concluded that this would be:

> less likely to achieve the rebalanced focus on the actions of the accused person and the need to promote equality in sexual relationships that so many people have told the Taskforce is needed. A reversal of the onus of proof could still simply see the focus remain on what the victim did or did not say or do to communicate a lack of consent, rather than what the accused person did or said to ensure there was consent. …
>
> This option would leave open the possibility that an accused person could argue that in all the circumstances their mistaken belief as to consent was honest and reasonable, regardless of them not being able to show that they took any type of step to ascertain consent. Whilst this may impose a lesser limitation on the rights of the accused person, it could also be seen as insufficient to reflect the community expectations that consensual sexual relationships will involve frank, open and honest communication between equals. It may not create enough of a shift in focus onto the behaviour of the accused person rather than the behaviour of the victim, to create real change in the way sexual offence matters are investigated, prosecuted and defended during the criminal justice process.[170]

5.118. The majority was concerned to ensure that this requirement not unfairly disadvantage any people whose ability to communicate is impaired. Consequently, they recommended the inclusion of a provision which states that the requirement 'does not apply if the accused person can show, on the balance of probabilities, that they have a cognitive impairment, mental impairment or another type of impairment that impacted on the accused person's ability to communicate and that impairment was a substantial cause of the person not doing or saying anything'.[171] This recommendation was modelled on the approach taken in NSW.[172] It is also the approach that will be taken when the new Victorian provisions come into effect.[173]

5.119. In recommending this approach, the majority noted that a similar model already exists in Victoria, NSW, the ACT and Tasmania. It considered harmonisation of the laws criminalising consent across jurisdictions to be desirable.

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[167] Ibid Rec 43(e).
[168] Ibid 207.
[169] Ibid.
[170] Ibid.
[171] Ibid Rec 43(f).
[172] *Crimes Act 1900* (NSW) s 61HK.
[173] *Crimes Act 1958* (Vic) s 36A, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

5.120. By contrast, two members of the Taskforce[174] provided a dissenting opinion in which they highlighted the complexity of sexual interactions and argued that 'any attempt to distil them into transactional interactions rather than ones based on autonomy and mutuality in our view risks criminalising otherwise consensual sexual activity'.[175] They provided the following examples of behaviours which could become inadvertently liable to criminal sanction:

- A young person whose inexperience causes him/her to think, reasonably for a person of his/her age, that his/her partner is consenting;
- The accused who, while kissing a person with whom he/she has recently engaged in consensual sexual activity, touches that person sexually, only to be told 'no' (and who then immediately desists);
- The accused who kisses, or attempts to kiss, a person in circumstances where he/she has reasonably but mistakenly developed a belief that the other person will welcome such attentions (and who, upon finding out that he/she was wrong, immediately desists);
- The person who, without warning, squeezes his/her regular sexual partner on the bottom; and
- The person who misinterprets the actions of his/her regular sexual partner as indicating consent, due to cultural or other highly individualised aspects or patterns of their relationship.[176]

5.121. The minority were also of the view that introducing this requirement would inappropriately limit the relevance of any previous intimate interactions between the accused and the complainant in the jury's assessment of the accused's belief about consent. They considered there to be 'clear potential for this to criminalise individuals who had no intention of committing a non-consensual sexual act, and to seriously limit the potential defence of mistake of fact'.[177]

5.122. The minority concluded that adopting a requirement for the accused to take measures to ascertain consent did not appropriately balance the tensions which exist between the rights of accused people and complainants, noting that:

> The right to a fair trial and the presumption that we are all innocent until proven guilty are fundamental principles that underpin the operation of the criminal justice system and the basic liberties of our civil society. They exist because of the serious consequences which flow to those who are convicted of crimes. They must be balanced carefully with the rights, needs and interests of a complainant and the community. It is a difficult but necessary process, as tipping the scales in either direction can create injustice.
>
> Significant reform of our criminal law should be undertaken with great care to avoid unintended consequences, or criminalising behaviour which is not morally culpable.[178]

5.123. The minority instead preferred the alternative model considered (and rejected) by the majority, which would (i) reverse the onus of proof for the mistake of fact defence, and (ii) require the

[174] Laura Reece and Alexis Oxley.
[175] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 223-4.
[176] Ibid 223.
[177] Ibid.
[178] Ibid 223-4.

jury to consider anything said or done by the accused to ascertain consent. These options are discussed below.

5.124. If a requirement to take measures to ascertain consent is to be introduced as part of the mistake of fact defence in Western Australia, it will be necessary to determine how the requirement should be framed. In this regard, there are at least four issues that should be considered:

i. Whether the accused's failure to take measures to ascertain consent should have a bearing on the jury's assessment of both the honesty and reasonableness of their belief, or whether it should only be relevant to the jury's assessment of reasonableness.

ii. Whether the *Code* should require the accused to take 'reasonable steps' to ascertain consent or to 'say or do something' to find out if the complainant consented.

iii. Whether the *Code* should refer to the timing of the accused's measures to ascertain consent.

iv. Whether the *Code* should make allowances for people whose capacity to actively seek consent may be impaired in some way.

5.125. There is a division in the way that Australian jurisdictions address the first issue. As can be seen in Table 5.2 above, legislation in the ACT, NSW, Tasmania and Victoria specifies that the accused's belief in consent is not reasonable if they did not take measures to ascertain consent. By contrast, the Tasmanian Code also specifies that the accused's belief in consent is not honest in such circumstances. In support of the Tasmanian approach, it could be argued that a person who did not say or do anything to ascertain consent could not have honestly believed that the other participant was consenting. On the other hand, it could be argued that the honesty component of the mistake of fact defence is purely subjective: that it relates solely to what was going on in the accused's head at the time of the relevant conduct. It is possible that even if the accused had taken no measures to ascertain consent, they nevertheless honestly believed the complainant was consenting. This will not, however, mean that the accused will be able to raise the mistake of fact defence successfully in such circumstances: their honest belief will be deemed to have been unreasonable, precluding their reliance upon it.

5.126. In relation to the second issue, the Tasmanian Code requires the accused to have taken 'reasonable steps' to ascertain consent.[179] A similar approach was previously taken in NSW, where the law required the jury to have regard to 'any steps' the accused took to ascertain consent.[180] The concept of a 'step' was interpreted to require the taking of a positive act.[181] However, this was not confined to verbal or physical actions: it was held to extend to 'a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives'.[182]

5.127. This broad definition of 'steps' was widely criticised.[183] It was considered to make the reference to steps redundant, and to undermine Parliament's objective of ensuring that people take verbal or physical steps to find out whether the complainant consents. Consequently, the NSWLRC recommended that the wording be amended to require the jury to consider what, if

[179] *Criminal Code Act 1924* (Tas) s 14A.

[180] *Crimes Act 1900* (NSW) s 61HE(3) (repealed).

[181] *R v Lazarus* [2017] NSWCCA 279 [147].

[182] Ibid.

[183] See New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.156]-[7.158].

anything, the accused person said or did.[184] This approach has been adopted in the ACT, NSW and Victoria, where the legislation provides that a mistaken belief is not reasonable if the accused did not 'say or do anything' to find out whether the complainant consented.[185]

5.128. In relation to the timing issue, the NSWLRC recommended that the relevant provision focus on the accused's words or conduct 'at the time of or immediately before' the sexual activity.[186] While it acknowledged that juries would already be able to take into account the timing of the accused's words or conduct, it considered that a specific reference to timing 'would highlight the importance of taking responsibility to ascertain consent at the time of each sexual activity'.[187] The NSW and new Victorian Acts both include a reference to timing, requiring the accused to have said or done something to ascertain consent 'within a reasonable time before or at the time' of the sexual activity.[188] There is an issue as to whether this places an unfair and unrealistic burden on long term sexual partners.

5.129. As noted above, the NSW and new Victorian Acts both also address concerns about the potential injustice this reform may cause to people who are unable to take steps to ascertain the complainant's consent due to personal circumstances beyond their control, such as those who have a cognitive impairment. They state that the relevant provision does not apply if the accused has a cognitive impairment or mental illness, and that condition is a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to the sexual activity. It is for the accused to prove these matters on the balance of probabilities.[189] Such a provision is not included in the ACT Act or Tasmanian Code.

20. Should the *Code* provide that a belief in consent is not honest and/or reasonable if the accused did not take measures to ascertain the complainant's consent? If so, how should this requirement be framed? For example, should the relevant provision:

- **Refer to both the honesty and reasonableness of the accused's belief, or focus solely on the assessment of reasonableness.**
- **Require the accused to have taken 'reasonable steps' to ascertain consent, or require them to have 'said or done something' to find out if the complainant consented.**
- **Refer to the timing of the accused's measures to ascertain consent. For example, it could specify that the accused must have said or done something to ascertain consent at the time of the sexual activity, or within a reasonable time before that activity.**
- **Make allowances for people whose capacity to actively seek consent may be impaired in some way. For example, it could specify that the provision does not apply if the accused has a cognitive impairment or mental illness, and that condition was a substantial cause of the accused not saying or doing anything to find out whether**

[184] Ibid [7.160]. This recommendation was made in the context of a provision which required the jury to have regard to the accused's words or conduct, rather than a provision which required the accused to have taken measures to ascertain consent. However, the same concerns arise in both contexts.

[185] *Crimes Act 1900* (ACT) s 67(5); *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1958* (Vic) s 36A, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

[186] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.165].

[187] Ibid [7.167].

[188] *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1958* (Vic) s 36A, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

[189] *Crimes Act 1900* (NSW) s 61HK(3)-(4); *Crimes Act 1958* (Vic) s 36A, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

the complainant consented to the sexual activity. The burden could be placed on the accused to prove these matters.

Require or permit the jury to consider any measures the accused took to ascertain consent

5.130. Another option for reform would be to enact a provision that requires or permits the jury, when determining whether the accused's belief in consent was honest and/or reasonable, to consider any measures the accused took to ascertain the complainant's consent. Such an approach is currently taken in NSW (reasonable), Queensland (honest and reasonable) and Victoria (reasonable)[190] (see Table 5.2 above), as well as in England and Wales.[191]

5.131. In NSW this provision complements the provision which requires the accused to have taken measures to ascertain consent. This means that if the accused did not say or do something to find out if the complainant consented, their belief will be considered unreasonable. However, if they did actively seek consent, the jury will need to consider whether what they said or did was adequate in the circumstances. If it was not, then the jury may find that their belief was not reasonable regardless of the measures they had taken.[192]

5.132. By contrast, in the other jurisdictions this provision acts as an alternative to the requirement for the accused to take measures to ascertain consent. This means that while there is no legal duty imposed on the accused to do or say anything to find out if the complainant consented, their (lack of) words and conduct will be a factor for the jury to consider when determining whether their belief in consent was reasonable.

5.133. When enacting the current Victorian provision in 2015, the Department of Justice and Regulation (Vic) noted that its aim was to provide 'helpful guidance to jurors by drawing attention to the importance of examining the accused's conduct in assessing the reasonableness of [their] beliefs'.[193] It was of the view that a failure by the accused to take active steps to ascertain consent would usually 'count strongly against the belief being a reasonable one', and that an accused was 'very unlikely to evade conviction' by arguing that, while they did not try to find out if the complainant was consenting, they assumed they were because they hadn't said or done anything to suggest otherwise.[194]

5.134. Under this approach, the jury's determination is likely to depend, in part, on the pre-existing relationship between the parties. For example, they may find that a belief formed on the basis of very subtle or non-verbal measures is reasonable in the context of a longstanding, intimate relationship, but that it is not reasonable if the parties have just met.[195]

5.135. It was noted above that recent reviews in NSW, Queensland (by the QLRC), Ireland and Northern Ireland did not recommend requiring the accused to take measures to ascertain consent. They instead recommended the adoption of this approach. They were of the view that enacting a provision that requires or permits the jury to have regard to anything the accused said or did to ascertain consent 'appropriately directs attention to the accused

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[190] While this is the current approach in Victoria, when the new legislation comes into force Victoria will instead require the accused to have actively sought consent: *Crimes Act 1958* (Vic) s 36A, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 8.

[191] *Sexual Offences Act 2003* (UK) s 1(2).

[192] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.169].

[193] Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 14.

[194] Ibid 17.

[195] Ibid. See also *R v XHR* [2012] NSWCCA 247 [62]; Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.107].

person's behaviour while also respecting fundamental criminal law principles'.[196] This approach was also favoured by the minority of the Queensland Taskforce,[197] for the reasons outlined in the previous section.

5.136. In recommending the enactment of a provision permitting the jury to have regard to anything the accused said or did to ascertain consent, the QLRC noted that this was already the law in Queensland (as it is in Western Australia). However, its analysis of trial transcripts indicated that judges were not directing the jury on this issue. Consequently, it considered it to be desirable to clearly express the law in its statute.[198]

5.137. The Gillen Review in Northern Ireland acknowledged that a potential weakness of this approach is that it does not tell the jurors what weight they should place on the measures the accused took to ascertain consent. It is possible that they will give little weight to the fact that the accused did not say or do anything to find out if the complainant consented, and find that their belief in consent was nevertheless reasonable.[199] However, it concluded that 'if we are to retain a jury system, we have to instil confidence in jurors to apply their own common sense and logic to the evidence as it emerges on a case-by-case basis'.[200]

5.138. It has been noted, however, that the introduction of this approach into Victoria did not shift the focus of trials from the complainant to the accused, as had been hoped. An analysis of transcripts from rape trials held after the 2015 reforms were implemented found that:

> Instead of questions about what the accused said or did to obtain consent, complainants continued to be questioned, for example, on whether they resisted verbally or physically by both prosecution and defence. In the rare cases where the accused gave evidence, the cross-examination did not feature questions about the steps they had taken to find out whether the complainant consented.[201]

5.139. If this approach is adopted, it will be necessary to determine how it should be framed. As noted above, in NSW the law previously required the jury to have regard to 'any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity'.[202] However, due to concerns about the broad way in which the word 'step' had been interpreted, the NSWLRC recommended that the provision be amended to require the jury to consider all the circumstances of the case, including what, if anything, the accused person said or did.[203] This wording, which accommodates both verbal and non-verbal forms of communication, has been enacted.[204]

5.140. As noted above, the NSWLRC also recommended that the provision refer to the timing of the accused's measures, to 'highlight the importance of taking responsibility to ascertain consent

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196 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.121]. See also Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [3.68]; [7.107]; Rec 7-1; Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [11.76]-[11.78]; Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.108].

197 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 223-4.

198 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [3.68]; [7.107]; Rec 7-1.

199 Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [11.77].

200 Ibid.

201 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) 302.

202 *Crimes Act 1900* (NSW) s 61HE(3) (repealed).

203 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.160].

204 *Crimes Act 1900* (NSW) s 61HK(5)(a).

at the time of each sexual activity'.[205] It recommended that the provision focus on anything the accused said or did 'at the time of or immediately before' the sexual activity.[206]

5.141. A slightly different approach was recommended by the QLRC.[207] It did not recommend that the jury be required to consider the accused's words or conduct. It instead recommended that the provision permit the jury to have regard to anything the accused said or did to ascertain the complainant's consent. This recommendation was implemented by the Queensland Government.[208] If a provision of this nature is to be enacted, it will be necessary to determine whether it should be framed in mandatory or discretionary terms.

21. Should the *Code* require or permit the jury to consider any measures the accused took to ascertain consent in determining whether their belief in consent was honest and/or reasonable? If so, how should this provision be framed? For example, should the relevant provision:

- **Require the jury to consider any measures the accused took to ascertain consent or simply permit them to have regard to those measures.**
- **Refer to the 'steps' the accused took to ascertain consent, or to anything the accused 'said or did' to find out if the complainant consented.**
- **Refer to the timing of the accused's measures to ascertain consent. For example, it could refer to anything the accused said or did at the time of, or immediately before, the sexual activity.**
- **Complement a provision requiring the accused to take measures to ascertain the complainant's consent or act as an alternative to such a provision.**

Reverse the onus of proving the mistake of fact defence

5.142. Under the current law, when the mistake of fact defence is raised in a trial, the prosecution has the burden of disproving that defence. This requires the prosecution to prove, beyond reasonable doubt, that the accused did not have an honest and reasonable belief in consent.[209]

5.143. One option for reform would be to instead place the burden for proving the defence onto the accused. This would mean that the accused would have to prove, on the balance of probabilities, that they had an honest and reasonable belief in consent.

5.144. This would not change the burden of proving the elements of any offences the accused has been charged with. It would still be for the prosecution to prove every element of those offences. However, if they were able to do so, the accused would be convicted unless they could prove the mistake of fact defence (or some other defence was available to them).

5.145. It is important to note that this differs from the suggestion raised above that the accused be required to take measures to ascertain the complainant's consent. While it has been noted that such a reform places an onus on the accused to demonstrate that they took such

[205] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.167].
[206] Ibid [7.165].
[207] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) Rec 7-1.
[208] *Criminal Code Act 1899* (Qld) s 348A.
[209] *McPherson v Cairn* [1977] WAR 28.

measures, this is an evidentiary onus rather than a legal onus. Where the accused raises evidence that they took such measures, the onus would remain on the prosecution to prove that they did not have an honest and reasonable mistake of fact. By contrast, if this reform were to be implemented, the accused would need to prove that their mistake of fact was honest and reasonable.

5.146. Although the prosecution usually has the burden of disproving defences and excuses, there are other instances in which this burden has been placed on the accused in the sexual offence context. For example, an accused person has a defence to a charge of persistent sexual conduct with a child under 16 if they believed, on reasonable grounds, that the child was over 16 and they were not more than 3 years older than the child. The onus has been placed on the accused to prove this defence.[210] The onus of proving the mistake of fact defence has not, however, been reversed in any Australian jurisdictions, nor in other common law jurisdictions such as England, Wales and Canada.

5.147. It has been suggested that it is appropriate to reverse the onus of proof for the mistake of fact defence as the accused is best placed to provide proof of their belief in the complainant's consent. Rather than requiring the prosecution to disprove what was going on in the accused's mind – which can be quite difficult, in the absence of any confessions or admissions – it may be considered preferable to place the responsibility on the accused to prove that they held such a belief.[211] It has been argued that doing so would 'lead to more clearly articulated claims of mistake of fact, which is fairer to all concerned including the jury'.[212]

5.148. Reversing the onus of proof may also prevent the accused from raising a spurious claim of belief in consent based on misconceptions, assumptions or stereotypes, and hoping that the prosecution is unable to disprove it. It would be necessary for the accused to provide sufficient support for their claim to persuade the jury of its veracity and reasonableness.

5.149. As noted above, the minority of the Queensland Taskforce supported this reform (alongside requiring the jury to consider anything said or done by the accused to ascertain consent). They stated that:

> The balancing feature of this model is that it does not require that something be said or done to ascertain consent in order for an accused person to establish that their belief in consent was reasonable. The reversal of onus is still a major shift in the law and, together with the requirement that regard must be had to anything they did or said to ascertain consent, it powerfully re-frames the question for the jury. Whether it was reasonable not to 'do or say something to ascertain consent' will then be a matter for their judgment, based on the evidence and their assessment of it.
>
> In our view, this model would be a robust response to the concerns raised in submissions and consultations conducted by the Taskforce, while stopping short of proscribing what is reasonable and what is not.[213]

5.150. This approach was not, however, recommended by the QLRC. It noted that the onus in this regard has not been reversed in any other Australian jurisdiction, and that 'justification for the reversal of such a fundamental and long-standing common law principle would need to be

[210] *Criminal Code Act Compilation Act 1913* (WA) s 321A(9).

[211] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) [193]; Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 4.

[212] Preliminary Submission 14 (Centre for Women's Safety and Wellbeing) 4.

[213] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 223-4. As noted above, the majority of the Taskforce instead favoured requiring the accused to have actively sought consent.

significant'.[214] It concluded that there was no adequate justification for taking this step, and that 'the interests of justice are best served by maintaining the status quo'.[215] In the QLRC's view the current approach 'strikes the right balance between the rights of the individual and the wider interests of the community'.[216]

5.151. In reaching this conclusion, the QLRC noted that reversing the onus of proof 'would increase the risk that a defendant might be wrongfully convicted'.[217] This was seen to be particularly problematic given the seriousness of sexual offences, both in terms of their penalties and the stigma that follows conviction.[218] The QLRC also noted that this reform would likely require the accused to give evidence at trial, to prove that they held an honest and reasonable belief. It considered this to be of some concern, as 'for many reasons, the giving of evidence in one's own defence in a criminal trial is not an easy task'.[219]

5.152. The QLRC acknowledged that the onus of proof has been reversed in certain cases, such as in relation to proof of mistake of age in child sexual offences. However, it noted that the victims of these offences 'fall into classes of special vulnerability', with that vulnerability justifying the shift in the onus of proof.[220] It also acknowledged that it can be difficult for the prosecution to prove that the accused did not have an honest belief in consent, as this requires proof of what was in the accused's mind at the time of the offence. However, it noted that the prosecution is often required to prove what was in the accused's mind at the time of the offence, which it can do by leading evidence of facts from which a relevant inference can be drawn.[221] In addition, even if the prosecution is unable to prove that the accused did not hold a mistaken belief, it can establish that the accused's belief was not reasonable by providing evidence of the surrounding circumstances.

22. Should the burden be placed on the accused to prove, on the balance of probabilities, that they honestly and reasonably believed the complainant was consenting?

23. Are there any other reforms that should be made to the mistake of fact defence?

[214] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.59].
[215] Ibid [7.60].
[216] Ibid.
[217] Ibid [7.48].
[218] Ibid [7.49].
[219] Ibid [7.56].
[220] Ibid [7.51].
[221] Ibid [7.53]-[7.55].

6. What should the judge tell the jury in a sexual offence trial?

Chapter overview

This Chapter considers what the judge should tell the jury in sexual offence trials. It outlines the approach that is currently taken to jury directions in Western Australia and examines the approach that is taken in some other jurisdictions. It considers the arguments for and against legislating jury directions and sets out various possible directions which could be legislated. It addresses the timing of directions, as well as two other methods of communicating with the jury: through juror education and the use of expert witnesses.

Introduction

6.1. As noted in Chapter 2, in Western Australia most sexual offence trials take place in the District Court before a judge and jury. The judge and jury each have a different role to play in the trial:

- The role of the judge is to make sure the trial is conducted according to law. They will make decisions about the evidence that may be admitted into court, ensure that proper procedures are followed and direct the jury about its role and the law it must apply in deciding its verdict. The judge may also make any observations about the evidence that they think necessary in the interests of justice.[1] If the accused is convicted, the judge will determine their sentence.

[1] *Criminal Procedure Act 2004* (WA) ss 106 and 112.

- The role of the jury is to decide whether the prosecution has proven the offence(s) charged beyond reasonable doubt. They are the sole judges of the facts. Their decision must be based solely on the evidence heard during the trial. Each juror takes an oath or makes an affirmation to give a 'true verdict according to the evidence upon the issues to be tried by me'.[2]

6.2. Jurors are randomly selected from the electoral rolls.[3] They are intended to serve as representatives of the community, in a system which is otherwise dominated by lawyers.[4] In this regard, the Law Commission of New Zealand (**LCNZ**) has observed that:

> A jury is not an expert in the law or in the conduct being tried before the court. Their function is to make a determination, from a layperson's perspective, on whether or not the conduct in question has been established to a criminal standard of proof. Juries are not to apply moral judgements to the people involved, but jurors are to bring their collective life experience and common sense to bear on the case before them.[5]

6.3. To help the jury carry out their role, the judge will give them directions. Judges in Western Australia typically make some introductory remarks to juries before the evidence begins, but they give the bulk of their directions immediately before the jury retires to consider its verdict. Judges may also choose to give directions about aspects of the evidence at any time during a trial. This includes giving a direction prior to, during or after the relevant evidence is given.

6.4. The High Court has held that the judge's 'fundamental' role in directing the jury is 'to ensure a fair trial of the accused'.[6] This requires the judge to instruct the jury about:

> so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of the judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should not reason or about particular care that must be shown before accepting certain kinds of evidence.[7]

6.5. The elements that make a trial fair are not absolute and cannot be listed exhaustively or comprehensively.[8] In determining the fairness of a trial, the interests of the accused, the victim and society all need to be taken into account.[9] In addition, the concept of a fair trial is not static: it evolves over time.[10] This means that the directions that are required to be given to a jury as part of a fair trial will also evolve over time.[11]

6.6. While juries must be given directions in every trial, it has been suggested that 'judicial directions may be particularly important in sexual violence cases to counteract stereotyped thinking or misconceptions about violence which individual jurors may bring with them into

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2 Ibid s 105.

3 *Juries Act 1957* (WA) s 4.

4 D Millon, 'Objectivity and Democracy' (1992) 67 *New York University Law Review* 51.

5 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [6.4].

6 *RPS v The Queen* (2000) 199 CLR 620, [41].

7 Ibid (citations omitted).

8 *Dietrich v The Queen* (1992) 177 CLR 292, 353 (Toohey J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 57.

9 Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, 2015) 5-6.

10 Ibid 5-6.

11 Ibid.

trial'.[12] It is contended that such directions can help jurors avoid basing their decision on the commonly held misconceptions that we raised in Chapter 1[13] and which are discussed in detail in the Background Paper.[14]

Current approach

6.7. In Western Australia, the content of judges' directions to juries in sexual offence trials is determined by a combination of legislation, common law and the experiences of trial judges.

6.8. To assist judges in drafting their directions, the District Court has a judges' bench book. This is an internal document compiled by District Court judges that contains, amongst other things, examples of directions that judges may give on particular topics in suitable cases. Judges are not obliged to follow the directions in the bench book, and whilst some do, others do not. The bench book is not publicly available.[15]

6.9. There are certain basic directions which judges provide to juries in all criminal trials regardless of the nature of the charged offence(s). These include:

- That all accused persons are presumed innocent[16] and that the prosecution is obliged to prove the charge(s) beyond reasonable doubt.[17]
- That the jury's role is to decide the facts in dispute and the judge's role is to give directions about the law which the jury is obliged to follow.[18]
- That the jury must reach its verdict(s) based solely on the evidence it has heard in court, and not based on any other material of which it may become aware (such as material reported in the media)[19] or on any feelings of sympathy or prejudice.[20]
- That the evidence consists of the answers given by witnesses, what the jury observes of witnesses' personalities and characteristics, and of any exhibits (for example, photographs or documents) produced by any witnesses.
- That the jury must assess the credibility and reliability of each witnesses' evidence, and is entitled to accept or reject all or some of a witness' evidence as it thinks fit.[21]
- That the jury's verdict(s) must be unanimous.[22]

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12 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [6.54].

13 See paras 1.31-1.36.

14 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 2. See, eg, E Henderson and D Harvey, 'Myth-busting in Sex Trials: Judicial Directions or Expert Evidence' [2015] *Archbold Review* 5.

15 By contrast, the NSW, Queensland and Victorian bench books are publically available: see https://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html; https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook; https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm.

16 *Woolmington v DPP* [1935] AC 462; *Howe v The Queen* (1980) 32 ALR 478.

17 *Woolmington v DPP* [1935] AC 462; *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Chugg v Pacific Dunlop* (1990) 170 CLR 249.

18 *R v Dao* (2005) 156 A Crim R 459; *R v Nguyen* [2006] VSCA 158; *Azzopardi v The Queen* (2001) 205 CLR 50.

19 *Glennon v The Queen* (1992) 173 CLR 592; *Murphy v The Queen* (1989) 167 CLR 94; *R v Vjestica* [2008] VSCA 47.

20 *Glennon v The Queen* (1992) 173 CLR 592.

21 *Cubillo v Commonwealth* (2000) 174 ALR 97.

22 *Criminal Procedure Act 2004* (WA) s 114; *Pearmine v The Queen* [1988] WAR 315. As noted in Chapter 2, in certain circumstances the jury will be permitted to give a majority verdict: see para 2.30.

6.10. In addition to these basic directions, the judge will give directions which are specifically tailored to the case being heard. This includes explaining the elements of the charged offence(s) and any relevant defences, and providing a summary of the respective cases for the prosecution and the defence.[23] It may also involve instructing the jury about the ways in which they may and may not use certain evidence that was given in the case.

6.11. This means that where the accused has been charged with an offence which requires proof of a lack of consent, the judge should explain the meaning of consent to the jury. There is no set way in which they must do so, but they will commonly be guided by the wording of section 319(2) of the *Code* (see Chapter 4). They will inform the jury that:

- Consent means a consent freely and voluntarily given.
- Consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means.
- 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.

6.12. In the sections below we discuss various other directions which may be permitted, mandated or prohibited in sexual offence cases. We note that these are not the only directions which will need to be given in such cases or which are prohibited. Some of the directions are also relevant to non-sexual offence cases. We have focussed on these directions because they are the directions which are most closely associated with sexual offence trials.

Uncorroborated evidence

6.13. Under the common law, judges were required to warn the jury:

- That it is dangerous to convict on the uncorroborated testimony of a complainant in a sexual offence trial. This was due to the view that such complainants may fabricate their evidence and it may be difficult to refute.[24]
- That it is dangerous to convict on the uncorroborated evidence of a child. This was due to children potentially being under the influence of others, apt to let their 'imaginations to run away with them' and apt to having imperfect powers of comprehension.[25]

6.14. Both of these rules have been abolished by statute. The *Evidence Act 1906* (WA) (the **Evidence Act**) now provides that:

- The judge is not required to warn a jury that it is unsafe to convict the accused on the uncorroborated evidence of one person, and a judge must not give such a warning unless satisfied that such a warning is justified in the circumstances.[26]
- The judge must not warn the jury or suggest in any way that it is unsafe to convict the accused on the uncorroborated evidence of a child.[27]

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23 *Criminal Procedure Act 2004* (WA) s 106; *McKell v The Queen* (2019) 264 CLR 307, [95]; *Galipo v The State Of Western Australia* [2019] WASCA 188, [45].

24 See, eg, *Riggall v The State of Western Australia* [2008] WASCA 69, [26].

25 *B v The Queen* (1992) 197 CLR 599, 616.

26 *Evidence Act 1906* (WA) s 50.

27 Ibid s 106D.

Delay and lack of complaint

6.15. It will often be the case that a complainant in a sexual offence case:

- Did not immediately make a complaint about the alleged incident of sexual violence to the police (**delayed complaint**); and/or
- Did not tell anyone else about that alleged incident (**absence of complaint**).

6.16. Where there is evidence that tends to suggest that this is the case, the judge must:

- give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and
- inform the jury that there may be good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence.[28]

6.17. The judge may, however, tell the jury that the complainant's delay in making a complaint, or the absence of complaint, is a factor that it can consider when assessing the complainant's credibility.[29]

6.18. It will sometimes be the case that the delay in making a complaint will have caused the accused to suffer a forensic disadvantage. For example, they may no longer be able to call relevant witnesses or obtain telephone records, bank statements or photographs. This may reduce their ability to test the complainant's allegations. Where there is evidence that suggests this is the case, the judge must instruct the jury that:

- Due to a substantial delay in the making of a complaint, the accused has lost the chance to adequately test the complainant's evidence and the chance to adequately marshal a defence; and
- Although it can convict the accused solely on the basis of the complainant's evidence, if it is satisfied beyond reasonable doubt of the truth and accuracy of their evidence, it must scrutinise their evidence with great care and take into account any facts and circumstances (including the forensic disadvantage suffered by the accused as a result of the substantial delay) which have a logical bearing on the truth and accuracy of that evidence (a **Longman warning**).[30]

Distress

6.19. Where there is evidence that the complainant was distressed after the alleged offending, that the distress was genuine and the distress was caused by the alleged offending, the judge may direct the jury that evidence of the complainant's distress is a factor they can use to bolster or corroborate the complainant's credibility.[31]

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28 Ibid s 36BD.

29 *Crofts v The Queen* (1996) 186 CLR 427.

30 *Longman v The Queen* (1989) 168 CLR 79; *Eravelly v The State of Western Australia* [2018] WASCA 139; *DWM v The State of Western Australia [No 2]* [2019] WASCA 143. The principles explained in *Longman* apply to all types of criminal cases, not just sexual offence cases. However, a Longman warning is particularly common in sexual offence trials.

31 *Azarian v The State of Western Australia* [2007] WASCA 249.

Family Violence

6.20. As noted in Chapter 4,[32] there is often an overlap between family violence and sexual violence. The Evidence Act sets out numerous directions that may be given in cases where family violence is an issue.[33] For example, the judge may direct the jury:

a) that family violence —
   i. is not limited to physical abuse and may, for example, include sexual abuse, psychological abuse or financial abuse;
   ii. may amount to violence against a person even though it is immediately directed at another person;
   iii. may consist of a single act;
   iv. may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

b) if relevant, that experience shows that —
   i. people may react differently to family violence and there is no typical, proper or normal response to family violence;
   ii. it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
   iii. it is not uncommon for a person who has been subjected to family violence not to report family violence to police or seek assistance to stop family violence;
   iv. decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by a variety of factors;
   v. it is not uncommon for a decision to leave an abusive partner, or to seek assistance, to increase apprehension about, or the actual risk of, harm;

c) in the case of self-defence, that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence in relation to the offence charged.[34]

6.21. In making such a direction, the judge may indicate that behaviour, or patterns of behaviour, that may constitute family violence may include (but are not limited to):

a) placing or keeping a person in a dependent or subordinate relationship;
b) isolating a person from family, friends or other sources of support;
c) controlling, regulating or monitoring a person's day-to-day activities;
d) depriving or restricting a person's freedom of movement or action;
e) restricting a person's ability to resist violence;
f) frightening, humiliating, degrading or punishing a person, including punishing a person for resisting violence;
g) compelling a person to engage in unlawful or harmful conduct.[35]

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[32] See paras 4.226-4.233.

[33] Family violence is defined as (a) violence, or a threat of violence, by a person towards a family member of the person; or (b) any other behaviour by the person that coerces or controls the family member or causes the member to be fearful: see *Evidence Act 1906* (WA) s 37; *Restraining Orders Act 1997* (WA) s 5A.

[34] *Evidence Act 1906* (WA) s 39F(1).

[35] Ibid s 39F(2).

6.22. If the judge gives a direction that relates to family violence, they may also indicate that decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by such things as the following:

a) the family violence itself;
b) social, cultural, economic or personal factors, or inequities experienced by the person, including inequities associated with (but not limited to) race, poverty, gender, disability or age;
c) responses by family, community or agencies to the family violence or to any help-seeking behaviour or use of safety options by the person;
d) the provision of, or failure in the provision of, safety options that might realistically have provided ongoing safety to the person, and the person's perceptions of how effective those safety options might have been to prevent further harm;
e) further violence, or the threat of further violence, used by a family member to prevent, or in retaliation to, any help-seeking behaviour or use of safety options by the person.[36]

Other jurisdictions

6.23. Other jurisdictions have dealt with jury directors in various ways. In this section we consider the approaches taken in four jurisdictions: Victoria, NSW, Queensland and New Zealand. We have selected these jurisdictions as they have each recently conducted comprehensive reviews of their sexual offence laws, and their laws demonstrate a diversity of possible approaches to jury directions.

Victoria

6.24. Victoria has partially codified its laws about jury directions. This step has been described as one of the most significant criminal law reforms in Victoria's history,[37] and 'arguably one of the most significant legislative reforms specifically aimed at improving jury directions, both in Australia and internationally'.[38]

6.25. The reform was preceded by two concerns: firstly, that Victorian judges' directions had become unduly lengthy and complicated[39] and secondly, that a significant number of convictions were being overturned on appeal due to mistakes in judges' directions.[40]

6.26. To address these concerns, a paper was written by a working group comprised of trial and appellate judges, prosecutors and defence lawyers and presented to the Victorian Attorney General.[41] The Attorney General referred the matter to the VLRC, which found that:

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36 Ibid s 39F(3).

37 Former Chief Justice Marilyn Warren, quoted in Andrea Petrie, 'Making Trials Easier to Follow', *The Sunday Age* (Melbourne), 30 June 2013, 6.

38 J Clough et al, *The Jury Project 10 Years On – Practices of Australian and New Zealand Judges* (Australasian Institute of Judicial Administration, 2019) 55.

39 It is estimated that prior to the reforms Victorian judges' directions were 30-50 percent longer than those in Queensland, Western Australia and South Australia and 50-75 percent longer than those in New Zealand: JRP Ogloff et al, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australasian Institute of Judicial Administration, 2006) 27, cited in G Byrne and C Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 184.

40 Victorian Law Reform Commission, *Jury Directions* (Final Report No 17, 2009) 151-152.

41 Byrne and Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 185-186.

> The law on jury directions has become complex, voluminous and uncertain within a relatively short period. The average duration of jury charges by Victorian judges thirty years ago was much shorter than today. The directions themselves were also generally far less complex. In a survey of Supreme Court and County Court judges, most judges felt that directions had become 'increasingly more complex, creating an "over-intellectualisation" of criminal law'. Many of the judges saw the complexity of the law as a 'major impediment to effective communication' with the jury.[42]

6.27. The VLRC was particularly concerned about the piecemeal way in which jury directions had been developed, and the difficulties this created for judges. It observed that:

> The law of jury directions, like any body of common law rules, is the product of unsystematic judicial development… Over time the common law has devised a number of highly particularised warnings drawn from the facts of those cases that come before appellate courts. The incremental development of the law in this way has produced a body of case law that is, in some areas, overly large and productive of technicality. …
>
> The law of jury directions flows from the common law obligation of courts to ensure that a person charged with a criminal offence has a fair trial. This is an important principle of generality that has defied attempts at organisation to assist with its practical application by trial judges. … In the absence of useful organising principles, trial judges must retain an encyclopaedic knowledge of the categories or circumstances in which the common law stipulates that a direction is required. …
>
> In some areas the law of jury directions has become even more complex because parliament has legislated to overcome shortcomings in the common law. At times, the courts have responded to legislative intervention by devising new and slightly different common law rules. It is often difficult for judges to identify and apply the legal rules that emerge from a body of entwined legislation and case law.[43]

6.28. To overcome this problem, the VLRC recommended that jury directions be consolidated in a single statute.[44] This recommendation was accepted by the Victorian Government, which enacted the *Jury Directions Act 2013* (Vic). This Act was 'the product of a collaborative law reform process over a number of years, involving judges, practitioners, academics and policy specialists within government' and had bipartisan political support.[45] The Act was subsequently replaced by the existing *Jury Directions Act 2015* (Vic) (the **Victorian Jury Directions Act**).

6.29. The Victorian Jury Directions Act has changed Victoria's general approach to jury directions in various ways. Relevantly, it imposes on counsel a statutory obligation to identify the issues which are in dispute[46] and to request the directions they wish the judge to give.[47] The judge must give the directions requested 'unless there are good reasons for not doing so'.[48] The

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42 Victorian Law Reform Commission, *Jury Directions* (Final Report No 17, 2009) 30.

43 Ibid 67.

44 Ibid 13.

45 Byrne and Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 181.

46 *Jury Directions Act 2015* (Vic) s 11.

47 Ibid s 12.

48 Ibid s 14. In determining whether there are good reasons for not giving a requested direction, the judge must have regard to the evidence in the trial and the manner in which the prosecution and the accused have conducted their cases. This includes considering whether the direction concerns a matter not raised or relied on by the accused, or whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented their case.

judge must not give a direction that has not been requested,[49] unless there are 'substantial and compelling reasons for doing so'.[50]

6.30. One of the main purposes of these reforms was to simplify jury directions, requiring the judge to give directions on 'only so much of the law as the jury needs to know to determine the issues in the trial'.[51] It was Parliament's intention that in giving such directions, judges 'avoid using technical legal language wherever possible', and that their directions be 'as clear, brief, simple and comprehensible as possible'.[52]

6.31. Although the Victorian Jury Directions Act significantly changed the way that jury directions are dealt with in Victoria, it did not completely codify Victorian jury directions.[53] Judges may still give directions which are not requested or included in the Act and may, in certain circumstances, be required to do so.[54] However, the Victorian Jury Directions Act is stated to apply 'despite any rule of law or practice to the contrary'.[55] This means that in the areas that it does address, its provisions replace any pre-existing common law rules or practices.

6.32. While many of the reforms made by the Victorian Jury Directions Act apply to all criminal trials, Part 5 of the Act specifically relates to sexual offence cases. This Part of the Act currently includes directions that a judge may (be required to) give in relation to consent,[56] reasonable belief in consent,[57] delay or lack of complaint[58] and differences in a complainant's account.[59] It also prohibits judges from giving certain directions in relation to complainants, delay and unreliability.[60]

6.33. Various changes have recently been made to Part 5 of the Victorian Jury Directions Act by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) (the **Justice Legislation Amendment Act**).[61] These include the addition of new directions about consent,[62] as well as directions about post-offence relationships and the showing of emotion or distress in court.[63] These amendments have been passed but have not yet been proclaimed. They will come into force no later than 30 July 2023.[64] We discuss the specific content of the Victorian Jury Directions Act, as it will be amended by the Justice Legislation Amendment Act (the **amended Victorian Jury Directions Act**), in the section 'Possible directions' below.

6.34. It is important to note that although the amended Victorian Jury Directions Act sets out various matters which the judge may need to direct the jury about, 'in giving a direction to the jury, the

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49 Ibid s 15.

50 Ibid s 16.

51 Ibid s 5(4)(a).

52 Ibid s 5(4)(b)-(c).

53 M Weinberg, 'Jury Directions on Trial – A Pathway Through the Labyrinth' (2014) *Victorian Judicial Scholarship* 10, [156]; Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (Report, 2012) 33.

54 *Jury Directions Act 2015* (Vic) s 10(2).

55 Ibid s 4.

56 Ibid s 46.

57 Ibid s 47.

58 Ibid ss 52-53.

59 Ibid s 54D.

60 Ibid s 51.

61 This Act enacted various reforms recommended in Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021).

62 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

63 Ibid s 56.

64 The relevant provisions are contained in the Justice Legislation Amendment Act. Although the Act has been assented to, the relevant provisions do not come into effect until they are proclaimed. If they do not come into operation before 30 July 2023, they come into operation on that day: *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 2.

trial judge need not use any particular form of words'.[65] The judge may tailor the direction to the particular circumstances of the case they are hearing.

6.35. To help judges construct their directions, the Judicial College of Victoria has published the Victorian Criminal Charge Book.[66] This publicly available bench book provides guidance to judges about the matters that should or should not be included in jury directions. It also includes sample directions which judges can tailor to fit the circumstances of a case, and sample written checklists which can be provided to the jury. The Victorian Criminal Charge Book is advisory only: it does not have the force of law.[67]

6.36. We note that the Royal Commission has recommended that all State and territory governments consider or reconsider the desirability of partial codification of judicial directions, now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.[68]

New South Wales

6.37. Until recently, most of the NSW jury directions related to sexual offence trials were derived from the common law. Legislation only set out two relevant types of jury direction: directions about differences in a complainant's account;[69] and directions about delay or lack of complaint.[70] The *Criminal Procedure Act 1986* (NSW) (the **NSW Criminal Procedure Act**) also prohibited judges from suggesting that complainants as a class are unreliable witnesses, or that there is a danger of convicting on the uncorroborated evidence of any complainant.[71]

6.38. In its review of consent in relation to sexual offences, the NSWLRC recommended that NSW 'introduce new directions to address common misperceptions about consensual and non-consensual sexual activity'.[72] The NSW Parliament implemented this recommendation in the *Crimes Legislation (Sexual Consent Reforms) Act 2021* (NSW), which commenced operation on 1 June 2022.[73] This Act amended the NSW Criminal Procedure Act to provide that a judge must give directions on the following matters if there is good reason to do so, or if requested by a party (unless there is a good reason not to give it):

- The circumstances in which non-consensual sexual activity occur.[74]
- Responses to non-consensual sexual activity.[75]
- Lack of physical injury, violence or threats.[76]

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65 *Jury Directions Act 2015* (Vic) s 6.

66 Judicial College Victoria, *Criminal Charge Book* (Online Manual, 14 May 2021). Available at https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm.

67 Judicial College Victoria, '3.1 Directions Under Jury Directions Act 2015', *Criminal Charge Book* (Online Manual, 14 May 2021); Women's Safety and Justice Taskforce (Qld), *Community Attitudes to Sexual Consent* (Research Report, July 2022), [1].

68 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Preface and Executive Summary* (Report 2017) 212.

69 *Criminal Procedure Act 1986* (NSW) s 293A.

70 Ibid s 294.

71 Ibid s 294AA.

72 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 8.

73 New South Wales, Commencement Proclamation under the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), No 208, 13 May 2022.

74 *Criminal Procedure Act 1986* (NSW) s 292A.

75 Ibid s 292B.

76 Ibid s 292C.

- Responses to giving evidence.[77]
- The behaviour and appearance of a complainant.[78]

6.39. We discuss the specific content of these directions in the section 'Possible directions' below. We note that judges are not required to use a particular form of words when giving these directions.[79]

6.40. The NSW Criminal Procedure Act does not purport to codify jury directions in NSW. The common law continues to apply to matters that are not addressed in the Act.[80]

6.41. Like Victoria, NSW also has a publicly available bench book, which provides guidance to judges and contains model directions.[81]

Queensland

6.42. Queensland's jury directions related to sexual offence trials are mostly derived from the common law, although some are contained in legislation. For example, the *Evidence Act 1977* (Qld) includes directions on witnesses who give evidence remotely or with the assistance of an intermediary;[82] children who give evidence via special measures;[83] and delayed prosecutions.[84] Like Victoria and NSW, Queensland has a publicly available bench book, which provides guidance to judges and contains model directions.[85]

6.43. In its recent review of sexual offence consent laws and mistake of fact, the QLRC considered whether additional jury directions were needed to address common misconceptions about sexual violence and consent. It did not, however, recommend legislating such directions. In reaching this conclusion it stated that:

> It is very difficult to determine whether false preconceptions have an effect upon jury verdicts. This has been an evolving area of research and understanding, but … recent research with jurors suggest that the influence of some of the 'rape myths' may be overstated.
>
> A strength of the jury system is that the jurors are chosen randomly from different backgrounds in society, in terms of their ethnicity, culture, age, gender, occupation, and socio-economic status, which helps ensure diversity. Usually, all 12 jurors must agree on a verdict and the deliberations on the evidence enable any false preconceptions held by a juror or jurors to be tempered by the collective decision-making process. Jurors are directed by the trial judge to put any preconceptions they might have to one side, to act impartially and to act only on the evidence before them…
>
> The Commission does not consider that the existence of false preconceptions or 'rape myths' being commonly held by jurors, or the conclusion that any such false preconceptions affect jury deliberation or verdicts, is strongly supported by the currently available research.

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77 Ibid s 292D.
78 Ibid s 292E.
79 Ibid s 292(3).
80 New South Wales Law Reform Commission, *Jury Directions* (Report No 136, November 2012) [1.29].
81 https://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html.
82 *Evidence Act 1977* (Qld) ss 21A(8), 21AZU, 21R.
83 Ibid s 21AW.
84 Ibid s 132BA.
85 See https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook.

> The Commission does not recommend any change to the existing law to deal with perceptions that jurors might harbour false preconceptions or that those false preconceptions might affect jury deliberations or verdicts.[86]

6.44. In its subsequent review of sexual offence laws, the Queensland Taskforce took a different view. It noted that:

> The research relied upon by the QLRC in support of this conclusion was a study undertaken by Professor Cheryl Thomas QC (Thomas) which involved a survey of jurors who had sat on juries in criminal trials (not necessarily for sexual offences) throughout England, Wales and Northern Ireland. … The findings were reported as revealing that 'claims of widespread 'juror bias' in sexual offence cases are not valid', casting doubt on the validity of previous research using mock juries. The QLRC noted the survey 'does not strongly support the concern that jurors commonly harbour false preconceptions or "rape myths", or that any such preconceptions affect jury deliberation or verdicts.' The findings of the research undertaken by Thomas have since been challenged by other academics who suggest there were methodological flaws in Thomas' study and that the interpretation of the results failed to consider the high levels of "myth-ambivalence" and the impact of this ambivalence.[87]

6.45. The Queensland Taskforce recommended that the *Evidence Act 1977* (Qld) be amended to include jury directions that address the following misconceptions about sexual violence:

- The circumstances in which non-consensual sexual activity occurs.
- Responses of a victim-survivor to non-consensual sexual activity when it occurs.
- Lack of physical injury to the victim-survivor, violence or threats made by the accused person.
- Victim-survivor responses to giving evidence about an alleged sexual offence at trial.
- Behaviour and appearance of a victim-survivor at the time of an alleged sexual offence.
- Perceived flirtatious or sexual behaviour (such as holding hands or kissing) implying consent to later sexual activity.[88]

6.46. The Queensland Government is currently considering these recommendations.[89]

New Zealand

6.47. A slightly different approach to giving jury directions in sexual offence trials has been taken in New Zealand. Rather than specifying a range of different directions that may be given (as is the case in NSW and Victoria), section 126A of the *Evidence Act 2006* (NZ) requires the judge to give any direction they consider 'necessary or desirable to address any relevant

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86 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [8.28]-[8.31].

87 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 346 (citations omitted).

88 Ibid Rec 77.

89 https://www.justice.qld.gov.au/initiatives/queensland-government-response-womens-safety-justice-taskforce-recommendations.

misconception relating to sexual cases'.[90] The provision sets out a non-exhaustive list of possible misconceptions that a judge may need or wish to address: see para 6.123 below.

The desirability of legislating sexual offence jury directions

6.48. It has been suggested that the unique nature of sexual offences means that jurors sitting on sexual offence trials are at a particular disadvantage. This is because:

> the field of sexual violence is one that is commonly misunderstood by people without training or education in the area. Research has revealed that widely held assumptions about how frequently sexual violence occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual violence … Although the jury is intended to apply combined common sense and life experience to ascertain the facts in a criminal case, one might suggest this function is inhibited when applied to an area of human conduct that is frequently subject to misconceptions and misunderstandings. …
>
> The problem is not necessarily individual juror prejudice and sexist views; rather, it is the idea that 'common sense' and experience can be applied to the facts of a specific form of criminal offending which, because of its distinctive features, is at risk of illegitimate reasoning and incorrect decision making when handled by people who have no prior experience in the area.[91]

6.49. These concerns were confirmed by research that the Queensland Taskforce commissioned into community attitudes towards sexual consent. The research found that:

> … on a conceptual level, most participants were able to articulate an understanding of sexual consent that was generally inconsistent with rape-myths. However, when it came to testing this understanding through scenarios, the influence of rape myths was more evident. For example, some appeared to be influenced by the myth that women's reports of sexual offences are often motivated by money or fame, or because they were regretful about a sexual encounter. The complexity of underlying power imbalances on a person's ability to consent, or withdraw consent, was not well understood by all participants, and the impact of intoxication challenged participants' application of their conceptual understanding of consent. There were also varied responses to how a person 'freezing' should be interpreted.[92]

6.50. One way to address the potential for the jury to hold these misconceptions is through jury directions. For example, the jury could be told that people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything.[93] This could help ensure that the jury does not infer, from the fact that the complainant did not resist or fight off the accused, that they consented to the sexual activity.

6.51. Even if it is thought that such a direction is desirable, that does not mean that it should be legislated. As noted above, under the current law Western Australian judges already give directions which are specifically tailored to the case they have heard and are required to properly explain the elements of the charged offence(s). This may include, in relevant cases, explaining to the jury that people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and that the complainant should

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90 *Evidence Act 2006* (NZ) s 126A(1).

91 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [6.12], [6.15].

92 Enhance Research, *Community Attitudes to Sexual Consent* (Women's Safety and Justice Taskforce (Qld), 2022).

93 *Criminal Procedure Act 1986* (NSW) s 292B.

not be assumed to have consented simply because they froze. Whether or not the judge gives such a direction will depend, to a certain extent, on the circumstances of the case and the judge's views about the relevance and importance of the issue. They may be guided in this regard by submission from the parties and by the directions that are included in the District Court bench book.

6.52. In this regard, we note that in the UK relevant directions have been included in the *Crown Court Compendium* (UK),[94] without the need for any legislative intervention. For example, the Compendium contains the following direction, which aims to address certain common misconceptions about sexual violence:

> It would be understandable if some of you came to this trial with assumptions about the crime of rape. But as a juror you have taken a legal oath or affirmation to try D based only on the evidence you hear in court. This means that none of you should let any false assumptions or misleading stereotypes about rape affect your decision in this case. To help you with this I will explain what we know about rape/sexual offences from experience that has been gained in the criminal justice system. We know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related. We also know that there is no typical response to rape. People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation. So all of you on this jury must make sure that you do not let any false assumptions or stereotypes about rape affect your verdict. You must make your decision in this case based only on the evidence you hear from the witnesses and the law as I explain that to you.[95]

6.53. An alternative approach would be to legislate jury directions. The relevant legislation could:

- Set out the required content of the direction.
- Require the judge to give the direction in certain circumstances or permit them to do so.
- Specify the circumstances in which the judge should or may give the direction.
- Specify the time at which the direction should or may be given.

6.54. There are several potential benefits to legislating sexual offence jury directions, including:

- It would enable parliament to require judges to dispel social myths that may exist about the nature of sexual violence and people's responses to it. This may help ensure that decisions are not made on the basis of misconceptions and assumptions.
- It may result in greater clarity, consistency and certainty about the directions that are to be given.[96] This may be seen as an improvement to the current system in Western Australia where parties are unable to access, before a trial, the particular wording of directions that a trial may give to the jury. It may be particularly advantageous where, as in Western Australia, there is no published bench book.
- It would result in modern directions being given that reflect current social norms; rather than the archaic views of common law judges enunciated sometimes centuries earlier.

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94 The *Crown Court Compendium* (UK) is akin to a bench book. The Judicial College produce the Compendium pursuant to the Lord Chief Justice's statutory responsibility to provide training to judges: *AG* [2018] EWCA Crim 1393.

95 Judicial College (UK), *Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College (UK), 2009) 20-5.

96 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) 449.

- It would bring to the judge's attention the directions that may usefully be given, ensuring that they do not overlook a relevant matter.
- It would allow judges to easily find the required content of a particular direction without having to sift through many appellate decisions.

6.55. However, there are also several potential disadvantages to legislating sexual offence jury directions, including:

- Legislation may lack the flexibility of the current system. For example, if a direction is mandated, it may result in it being given in cases in which it is not relevant or necessary. Even if a direction is discretionary, a judge may decide to err on the side of caution and give the direction, even though it is not required.
- Judges may tend to act on the assumption that if they give a direction in the form of the statutory words, they meet their obligations. This may result in directions becoming formulaic and less apt to meet the circumstances of individual cases.
- Template directions may not help the jury to fulfil their role as decision-makers and may not be effective at countering misconceptions about sexual violence.[97]
- Spelling out basic matters to the jury, such as that there is no typical or normal response to non-consensual sexual activity,[98] or that people may respond to non-consensual sexual activity in different ways,[99] may be considered insulting to their common sense. It is fundamental to the jury system that the community can rely on jurors to exercise practical, common sense judgement.
- Legislation may be less reactive to cultural change than the common law. While the common law may be slow to change, it does have the capacity to do so when cultural norms change. It also has the capacity to ensure that directions are given in the correct way, when appeals indicate that a direction is being given by trial judges in a manner that does not reflect the law, or a previous appellate judgment has failed to give sufficient clear guidance to trial judges about the content of a direction. An example of this winnowing process is the Longman warning, which over 30 years has been simplified and clarified by appellate courts. Arguably, this process could not have occurred as efficiently through legislative amendment.
- It may increase the complexity of the law. For example, the directions on sexual offences in the current Victorian Jury Directions Act occupy more than 11 pages, and the directions on sexual offences in the amended Victorian Jury Directions Act will occupy nearly twice that number of pages.
- Unless parliament codifies all jury directions, there would be inconsistency between directions given in sexual offence trials and directions given in other trials. In some circumstances, there may be no valid reason for differentiating between the directions which should be given in sexual offence trials and other trials that involve similar issues.

6.56. Legislating jury directions may also be considered unnecessary in the Western Australian context. In this regard, we noted above that Victoria's reforms were preceded by two concerns: that judges' directions had become unduly lengthy and complicated; and that a significant number of convictions were being overturned on appeal due to mistakes in the judge's

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97 J Finn, E McDonald and Y Tinsley, 'Identifying and Qualifying the Decision-Maker: The Case for Specialisation' in E McDonald and Y Tinsley (eds), *From 'Real Rape' to Real Justice: Prosecuting Rape in New Zealand* (Victorian University Press, 2011) 221, 237–239.

98 *Criminal Procedure Act 1986* (NSW) s 292B(a).

99 Ibid s 292B(b).

directions. There is no reliable Western Australia data to indicate that Western Australia has these problems to the same, or any, extent. It may be that the same problems exist in Western Australia but not to the same level as existed (or potentially still exist) in Victoria. The Commission welcomes submissions on that issue from those with relevant experience.

6.57. There may also be a matter of principle involved in legislating jury directions. Jury directions have historically been the province of the common law and judges, rather than the legislature. Some people may consider the legislature, as a political body open to acting according to the ideology of the party in government, to not be the appropriate body to determine the content of jury directions. That is, it may be thought that jury directions ought to be free of political influence, real or perceived. However, others may consider that the common law, being judge-made law, is not the appropriate avenue for developing jury directions, particularly in a sensitive area such as sexual offence trials. That is, it may be thought appropriate for jury directions to be prescribed by elected politicians who are answerable to the community through the electoral process.

6.58. In considering the specific directions we outline below we urge you to consider these general arguments for and against legislating jury directions. Even if you agree that judges should direct the jury about a specific matter, you may conclude that the direction should not be legislated for one or more of the listed reasons. Alternatively, you may form the view that legislation is essential.

6.59. Before considering the specific content of any potential directions, we would be interested to hear your view on whether Western Australia should legislate for jury directions in sexual offence trials at all.

24. Should Western Australia legislate jury directions for sexual offence trials? Why/why not?

When should a judge be required or permitted to give a legislated jury direction?

6.60. If specific jury directions are to be legislated, it will be necessary to determine when a judge should be required or permitted to give those directions. In this regard, there are two issues which should be borne in mind when considering the specific directions outlined below:

- Whether the direction should be mandatory or discretionary; and
- If the direction is discretionary, in what circumstances it should or should not be given.

6.61. In relation to the first issue, arguments in favour of mandatory directions include:

- It would ensure that consistent directions are given across cases.
- It would reduce the incentive for defence counsel to rely on misconceptions.
- It would increase community confidence that juries will be informed by accurate understandings of consensual and non-consensual sexual activity.[100]

6.62. By contrast, arguments against mandatory directions include:

[100] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.46].

- It would limit the judge's ability to tailor directions to the circumstances of the individual case.[101] This may result in a direction which does not fit the facts of the case, and which may highlight irrelevant facts.[102]
- It would increase the risk of misdirections and appeals.[103]
- It may represent an intrusion into the independence of the judiciary by the legislature.[104]

6.63. In relation to the second issue, various options are available. For example, legislation could specify that:

- A judge must give a direction if there are good reasons to do so.[105]
- A judge must give a direction that has been requested by a party unless there are good reasons for not doing so.[106]
- A judge must not give a direction which has not been requested by a party unless there are substantial and compelling reasons for doing so.[107]

Possible directions

6.64. In this section we discuss various jury directions that have been legislated in other jurisdictions and which could be enacted in Western Australia. In doing so, we outline the purported justifications for those directions and any concerns that relate specifically to them. These arguments should be considered in conjunction with the general arguments for and against legislating jury directions outlined above.

6.65. The directions discussed in this section are not comprehensive: it would be possible to legislate many other directions. We welcome submissions about other issues which could be addressed.

Consent

6.66. It would be possible to require a judge to direct the jury about the meaning of consent or the circumstances in which a person does not consent. For example, in Victoria the prosecution or defence may request that the judge inform the jury:

- That a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act.[108]

[101] Ibid.

[102] Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [6.93].

[103] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020).

[104] Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [6.94].

[105] See, eg, *Jury Directions Act 2015* (Vic) s 47C, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

[106] *Jury Directions Act 2015* (Vic) s 14. In determining whether there are good reasons for not giving a requested direction, the judge must have regard to the evidence in the trial and the manner in which the prosecution and the accused have conducted their cases. This includes considering whether the direction concerns a matter not raised or relied on by the accused, or whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented their case.

[107] Ibid s 16.

[108] Ibid s 46(3)(a).

- That where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place.[109]

- Of the relevant circumstances in which the law provides that a person does not consent to an act.[110]

6.67. The prosecution or defence may also request that the judge direct the jury that if it is satisfied beyond reasonable doubt that one of the circumstances in which the law provides that a person does not consent to an act existed in relation to the complainant (for example, the complainant was asleep or unconscious),[111] it must find that the complainant did not consent.[112]

6.68. As noted in the 'Current approach' section, Western Australian judges already direct the jury about the meaning of consent. It may therefore be thought that such a reform is unnecessary. However, legislating such directions may help ensure that the judge directs the jury about all relevant aspects of the law of consent, and does not give irrelevant directions. This may become more important if the law of consent is reformed in any way. In this regard, we note that in Chapter 4 we present various options for reforming the law of consent. Any legislated direction on consent will need to reflect any reforms which are implemented in this area.

25. Should there be a legislated jury direction about the meaning of consent in sexual offence cases and/or the circumstances in which a person does not consent? If so, what should that direction say? In what circumstances should it be given?

Responses to sexual violence

6.69. One of the common misconceptions about sexual violence that we raised in Chapter 1,[113] and which is discussed in the Background Paper,[114] is that 'real' victims of sexual violence will resist and fight off the offender. However, as the QLRC noted, there is:

> consistent research that shows traumatic events, particularly instances of sexual assault and rape, can illicit an involuntary 'freeze' or immobility response to fear which prevents the victim from physically or verbally resisting the attacker. Studies dating back to 1993 show a consistent reporting of a 'freeze' response in at least 37 percent of sexual assault and rape survivors who were surveyed.[115]

6.70. To address this misconception, the NSWLRC recommended that, where appropriate, judges be required to direct the jury that:

- There is no typical or normal response to non-consensual sexual activity;

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[109] Ibid s 46(3)(b).

[110] Ibid s 46(4)(a).

[111] See paras 4.80-4.83.

[112] *Jury Directions Act 2015* (Vic) s 46(4)(b).

[113] See paras 1.31-1.36.

[114] Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) section 2.3.

[115] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.85]. See also Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) 41.

- People may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything; and
- The jury must avoid making assessments based on pre-conceived ideas about how people respond to non-consensual sexual activity.[116]

6.71. This recommendation was implemented by the NSW Government.[117] A similar provision will be in the amended Victorian Jury Directions Act.[118] The enactment of such a provision was also recommended by the Queensland Taskforce.[119]

26. Should there be a legislated jury direction about the way in which people may respond to sexual violence? If so, what should that direction say? In what circumstances should it be given?

Absence of injury, violence or threat

6.72. Other common misconceptions about sexual violence that we raised in Chapter 1,[120] and which are also discussed in the Background Paper,[121] are that acts of sexual violence usually involve the use of physical force, and that 'real' victims of sexual violence will show signs of physical injury. However, various studies have found that that many perpetrators do not use physical force and that few people who experience sexual violence incur significant physical injury.[122]

6.73. It would be possible to address these misconceptions by legislating a jury direction about the absence of injury, violence or threat. For example, the NSW Criminal Procedure Act requires a judge, in an appropriate case,[123] to direct the jury that:

a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and

b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.[124]

6.74. A similar provision will be in the amended Victorian Jury Directions Act.[125] The enactment of such a provision was also recommended by the Queensland Taskforce.[126]

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116 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 8.4.

117 *Criminal Procedure Act 1986* (NSW) s 292B.

118 *Jury Directions Act 2015* (Vic) s 47E, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

119 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) Rec 77.

120 See paras 1.31-1.36.

121 Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) section 2.3.

122 See, eg, the studies cited in New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) 172 n 120.

123 A judge must give this direction if (i) there is good reason to do so; or (ii) it is requested by a party, unless there is a good reason not to give it: *Criminal Procedure Act 1986* (NSW) s 292(2).

124 Ibid s 292C.

125 *Jury Directions Act 2015* (Vic) s 47D, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

126 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) Rec 77.

27. Should there be a legislated jury direction about the absence of injury, violence or threat? If so, what should that direction say? In what circumstances should it be given?

Other sexual activity

6.75. One of the options for reforming the law of consent that we raise in Chapter 4 is for the *Code* to specify that a person does not consent to a sexual activity with another person simply because they had previously consented to:

- Sexual activity with that person or someone else; or
- Sexual activity of that kind or any other kind.

6.76. If this reform is implemented, it would be possible to accompany it with a legislated jury direction to this effect. Such a provision will be included in the amended Victorian Jury Directions Act. The provision requires the judge, where there are good reasons to do so, to inform the jury that:

> experience shows that people who do not consent to a sexual act with a particular person on one occasion may have, on one or more other occasions, engaged in or been involved in consensual sexual activity—
>
> a) with that person or another person; or
>
> b) of the same kind or a different kind.[127]

28. Should there be a legislated jury direction about the relevance of other sexual activities in which a person has engaged? If so, what should that direction say? In what circumstances should it be given?

Personal appearance and irrelevant conduct

6.77. Research suggests that some members of the public believe that consent to sexual activity may be assumed or inferred from the complainant's personal appearance or conduct. The characteristics by which a complainant may be judged include the type of clothing worn by the complainant, or the complainant's consumption of alcohol or drugs, or the complainant's attendance at a particular venue, for example, a nightclub.[128]

6.78. To address this issue, the amended Victorian Jury Directions Act will require judges, where there are good reasons to do so, to give a direction informing the jury that:

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[127] *Jury Directions Act 2015* (Vic) s 47F, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

[128] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.124], citing N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, 2013) 6; H McGee et al, 'Rape and Child Sexual Abuse: What Beliefs Persist about Motives, Perpetrators, and Survivors?' (2011) 26 *Journal of Interpersonal Violence* 3580, 3587–3588; J Temkin, '"And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13 *New Criminal Law Review* 710, 715.

it should not be assumed that a person consented to a sexual act just because the person—

a) wore particular clothing; or

b) had a particular appearance; or

c) drank alcohol or took any other drug; or

d) was present in a particular location; or

Examples

1 The complainant attended a nightclub.

2 The complainant went to the accused's home.

e) acted flirtatiously.

6.79. The NSW Criminal Procedure Act contains a similar provision, although without inclusion of the examples or reference to the person acting flirtatiously.[129] A provision to this effect was also recommended by the Queensland Taskforce.[130]

6.80. It is important to note that this direction does not tell the jury that the listed matters are irrelevant to their consideration of the complainant's consent. It simply provides that they should not draw assumptions about the complainant's consent solely on that basis. This is presumably in recognition of the fact that, in conjunction with other evidence, such matters may provide valid evidence of consent. For example, evidence of interactions between the complainant and the accused – including the complainant's flirtatious behaviour – will often be relevant to the jury's determination of consent. It may be thought that this undermines the strength or usefulness of this direction.

6.81. It is also important to note that this direction does not have a bearing on the jury's assessment of the mistake of fact defence. This means that the jury may be permitted to draw assumptions from the listed matters when determining whether the accused had an honest and reasonable belief in consent, but not when determining whether the complainant consented. This may create the possibility for confusion amongst jurors about how and when they can use evidence of this type. This problem could, however, be overcome by also prohibiting the jury from drawing such assumptions in the mistake of fact context: see the section on 'Reasonable belief' below.

6.82. Under current Western Australian law, judges will already be required to give such a direction in some cases. This is because judges are required to ensure that juries do not misuse evidence, by telling them how evidence can and cannot be used to prove certain matters, and by correcting any misstatements by counsel. Consequently, if defence counsel was, for example, to suggest to a jury that evidence of a complainant's clothing could be used as the sole basis on which to determine consent, a judge would be expected to correct such a submission. It may be thought that this sufficiently addresses the problem, without the need to legislate further.

[129] A judge must give this direction if (i) there is good reason to do so; or (ii) it is requested by a party, unless there is a good reason not to give it: *Criminal Procedure Act 1986* (NSW) s 292(2).

[130] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) Rec 77.

29. Should there be a legislated jury direction about the assumptions that may not be drawn from the complainant's personal appearance or conduct? If so, what should that direction say? In what circumstances should it be given?

Relationship between sexual offence perpetrators and victim-survivors

6.83. Other common misconceptions about sexual violence that we raised in Chapter 1,[131] and which are also discussed in the Background Paper,[132] are that acts of sexual violence are usually committed by strangers, and that 'real' victims of sexual violence would discontinue any relationship they have with the perpetrator. However, the reality is that most acts of sexual violence are committed by someone the victim-survivors knows, and that victim-survivors often stay in a relationship with their abusers for various reasons, such as fear or financial isolation.[133]

6.84. It would be possible to require judges to address these misconceptions. This has been done in Victoria, where the amended Victorian Jury Directions Act will require a judge, where there are good reasons to do so, to give a direction informing the jury that:

> a) there are many different circumstances in which people do and do not consent to a sexual act; and
>
> b) sexual acts can occur without consent between all sorts of people, including—
>
> i. people who know each other;
>
> ii. people who are married to each other;
>
> iii. people who are in a relationship with each other;
>
> iv. people who provide commercial sexual services and people for whose arousal or gratification such services are provided;
>
> v. people of the same or different sexual orientations;
>
> vi. people of any gender identity, including people whose gender identity does not correspond to their designated sex at birth.[134]

6.85. The amended Victorian Jury Directions Act will also require the following directions to be given where there is, or is likely to be, evidence of a 'post-offence relationship':[135]

> a) people may react differently to a sexual act to which they did not consent, and there is no typical, proper or normal response; and

[131] See paras 1.31-1.36.

[132] Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) sections 2.1, 2.9.

[133] Australian Institute of Family Studies and Victoria Police, 'Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners' (Resource, Australian Institute of Family Studies and Victoria Police, 2017).

[134] *Jury Directions Act 2015* (Vic) s 47H, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

[135] Evidence of a post-offence relationship is evidence that the complainant continued a relationship with the accused or otherwise continued to communicate with the accused: *Jury Directions Act 2015* (Vic) s 54G, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 56.

b) some people who are subjected to a sexual act without their consent will never again contact the person who subjected them to the act, while others—

i. may continue a relationship with that person; or

ii. may otherwise continue to communicate with them; and

c) there may be good reasons why a person who is subjected to a sexual act without their consent—

i. may continue a relationship with the person who subjected them to the act; or

ii. may otherwise continue to communicate with that person.[136]

6.86. The NSW Criminal Procedure Act also requires judges, in appropriate cases,[137] to direct the jury that non-consensual sexual activity can occur in many circumstances, and between different kinds of people including people who know one other, are married to one another, or are in an established relationship with one another.[138]

30. Should there be a legislated jury direction about the relationship between sexual offence perpetrators and people who experience sexual violence? If so, what should that direction say? In what circumstances should it be given?

Reasonable belief

6.87. In Chapter 5 we raise various options for reforming the mistake of fact defence. If any of these reforms are implemented, it would be possible to accompany them with a relevant statutory jury direction.

6.88. For example, one option we raise in Chapter 5 is to provide legislative guidance on the assessment of reasonableness.[139] One way in which this could be done is by requiring the judge to direct the jury about matters which they may or may not consider when determining whether the accused had an honest and reasonable belief that the complaint consented to the sexual activity. This has been done in Victoria, where the Victorian Jury Directions Act provides that the prosecution or defence may request that the judge direct the jury that:

- If it concludes that the accused knew or believed that [one of the circumstances in which the law provides that a person does not consent] existed in relation to a person, that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act.

- In determining whether the accused who was intoxicated had a reasonable belief at any time—

[136] *Jury Directions Act 2015* (Vic) s 54G, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 54H.

[137] A judge must give this direction if (i) there is good reason to do so; or (ii) it is requested by a party, unless there is a good reason not to give it: *Criminal Procedure Act 1986* (NSW) s 292(2).

[138] Ibid s 292A.

[139] See paras 5.38-5.99.

i. If the intoxication was self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as the accused at the relevant time.

ii. If the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the accused and who is in the same circumstances as the accused at the relevant time.

- In determining whether the accused had a reasonable belief in consent, the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent.
- In determining whether the accused had a reasonable belief in consent, the jury may take into account any personal attribute, characteristic or circumstance of the accused.[140]

6.89. A judge in Victoria must give the requested direction(s) unless there are good reasons for not doing so.[141] The Act provides that a good reason for not giving the last-mentioned direction is that the personal attribute, characteristic or circumstance:

- Did not affect, or is not likely to have affected, the accused's perception or understanding of the objective circumstances;
- Was something that the accused was able to control; or
- Was a subjective value, wish or bias held by the accused, whether or not that value, wish or bias was informed by any particular culture, religion or other influence.[142]

6.90. The amended Victorian Jury Directions Act will also provide that, where there are good reasons to do so, the judge must inform the jury that:

- A belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
- If a belief in consent is based on a combination of matters including a general assumption of that kind, then, to the extent that it is based on that general assumption, it is not a reasonable belief.[143]

6.91. The amended Victorian Jury Directions Act provides the following examples of the types of general assumptions it is referring to:

- A general assumption that a person who gets drunk and flirts with another person consents to a sexual act with that other person.

[140] *Jury Directions Act 2015* (Vic) s 47(3).
[141] Ibid s 14.
[142] Ibid s 47(4).
[143] Ibid s 47I, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

- A general assumption that a person who dresses in a way that is considered sexually provocative, and who visits another person's home, consents to a sexual act with that other person.[144]

6.92. Some of these directions will already be given in Western Australia. For example, as noted in Chapter 5,[145] the law in Western Australia currently provides that for the purpose of the current mistake of fact defence, a reasonable person is not intoxicated. Judges are expected to give this direction to the jury when there is evidence in a trial that the accused was intoxicated. Further, in determining whether the accused's belief was reasonable the jury may take into account the accused's sex, age and other personal attributes.

6.93. In determining whether a jury direction about reasonable belief should be legislated, consideration should be given to the various issues and arguments raised in Chapter 5. Any legislated direction on reasonable belief will need to be consistent with any reforms which are implemented in this area.

31. Should there be a legislated jury direction about the circumstances in which an accused's belief in mistake should not be considered reasonable? If so, what should that direction say? In what circumstances should it be given?

Delay

Effect of delay on the complainant's credibility

6.94. Another common misconception that was noted in Chapter 1,[146] as well as in the Background Paper,[147] is that 'real' victims of sexual violence would report their experience immediately, and if they delay, they are likely to be lying. However, 'research has discredited the assumption that delay in complaint of a sexual offence indicates a lack of credibility. Delay is common rather than unusual'.[148]

6.95. Despite this fact, at common law judges remain obliged to warn juries in sexual assault trials that, when deciding whether to believe the complainant, they can take into account the complainant's failure to complain at the earliest reasonable opportunity. Juries are entitled to conclude that failure to complain or delay in complaining casts doubt upon the reliability of the evidence given by the complainant. However, it does not necessarily do so, particularly where there was an explanation for the failure or delay.[149]

6.96. This problem has been addressed to some extent by the Evidence Act, which provides that where there is evidence that tends to suggest an absence of complaint or a delay in making a complaint, the judge must warn the jury that:

- Absence of or delay in complaining does not necessarily indicate that the allegation is false; and

[144] *Jury Directions Act 2015* (Vic) s 47I, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

[145] See paras 5.61-5.76.

[146] See paras 1.31-1.36.

[147] Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) section 2.6.

[148] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.21].

[149] *Kilby v The Queen* (1973) 129 CLR 460, 465, 472.

- There may be good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence.[150]

6.97. However, this provision does not relieve a judge from the obligation to direct the jury, where fairness and the interests of justice demand it, that the absence of a complaint or the delay in making one may be taken into account when evaluating the evidence of the complainant and in determining whether to believe them.[151]

6.98. This issue was considered by the Royal Commission, which recommended that legislation in every Australian jurisdiction should provide that:

- There is no requirement for a direction or warning that delay affects the complainant's credibility;
- The judge must not direct, warn or suggest to the jury that delay affects the complainant's credibility unless the direction, warning or suggestion is requested by the accused and is warranted on the evidence in the particular circumstances of the trial; and
- In giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.[152]

6.99. The Western Australian government has 'accepted in principle' each of these recommendations.[153] It has not yet, however, introduced a Bill to give effect to this in principle acceptance.

6.100. The NSW provision on this issue is similar to the Western Australian provision. However, the NSW Criminal Procedure Act also provides that the judge 'must not direct the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a direction'.[154]

6.101. By contrast, the Victorian Jury Directions Act prohibits the judge, prosecution and defence counsel from saying, or suggesting in any way, that 'complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants'.[155] The judge also must not say, or suggest in way, that because the complainant delayed in making a complaint, or did not make a complaint that:

- It would be dangerous or unsafe to convict the accused; or
- The complainant's evidence should be scrutinised with great care.[156]

6.102. The amended Victorian Jury Directions Act will also require the judge to inform the jury that experience shows that:

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150 *Evidence Act 1906* (WA) s 36BD.

151 *Crofts v The Queen* (1996) 186 CLR 427.

152 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 89.

153 Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse.

154 *Criminal Procedure Act 1986* (NSW) s 294(2)(c).

155 *Jury Directions Act 2015* (Vic) s 51(1)(c).

156 Ibid s 51(2).

- People react differently to sexual offences, and there is no typical, proper, or normal response to a sexual offence;
- Some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint;
- Delay in making a complaint in respect of a sexual offence is a common occurrence; and
- There may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence.[157]

32. Are the current warnings specified in section 36BD of the *Evidence Act 1906* (WA), which relate to the use the jury may make of evidence that the complainant failed to complain or delayed in making a complaint, sufficient? If not, what should the provision state?

Delay resulting in forensic disadvantage

6.103. In Western Australia, where there is evidence that suggests that the accused has suffered a forensic disadvantage as a result of a delay in a complaint being made, the judge may be required to give a Longman warning (see para 6.18 above).[158] This is a warning which originated from a sexual offence trial in which there was a 20-year delay in the complaint being made.

6.104. The warning is based on the recognition that 'had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial'.[159] However, due to the delay this is no longer possible, disadvantaging the accused.

6.105. The warning must be given 'as a direction which the jury is bound to follow – rather than a mere comment'.[160] Although there are no set words required, and there is no requirement to use the words 'dangerous to convict',[161] it is clear that:

> The language used must convey the warning in 'unmistakable and firm' or 'clear and emphatic' terms, given with the weight of the judge's office. It must convey the long experience of the courts that the impact of delay on the forensic process makes it dangerous or unsafe to convict on the uncorroborated testimony of a complainant unless the jury is completely satisfied of the veracity of that evidence, evaluated with an appreciation of the forensic disadvantages suffered by an accused where the trial occurs many years after the alleged offences.[162]

6.106. It will usually (although not always) be necessary for a judge to give examples of the way in which delay has hindered the accused's ability to test the complainant's evidence and mount a positive defence.[163] The disadvantages may be the loss of the chance to identify the occasion of the allegations with any specificity, the loss of the chance to identify or locate

[157] Ibid s 52, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 52.
[158] *Longman v The Queen* (1989) 168 CLR 79.
[159] Ibid [30].
[160] *C v The State of Western Australia* [2018] WASCA 101, [23].
[161] *Longman v The Queen* (1989) 168 CLR 79, [16]; *MB v the State of Western Australia* [2016] WASCA 160, [47]; *Kemp v The State of Western Australia* [2006] WASCA 6, [9].
[162] *MB v The State of Western Australia* [2016] WASCA 160, [47].
[163] Ibid [50]; *JJR v The State of Western Australia* [2018] WASCA 51, [40].

witnesses or documents, the loss of a chance of a medical or forensic examination of the complainant or the accused, and the loss of the chance to establish an alibi.

6.107. The Longman warning has attracted significant criticism over recent years, including that:[164]

- The combined effect of Longman and subsequent High Court cases[165] has been to 'give rise to an irrebuttable presumption that the delay has prevented the accused from adequately testing and meeting the complainant's evidence'[166] and, as a result, judges are required to give the warning irrespective of whether the accused has in fact been prejudiced or suffered a forensic disadvantage.
- Warning the jury in the terms that it would or may be 'dangerous or unsafe' to convict 'risks being perceived as a not too subtle encouragement by the trial judge to acquit',[167] thereby encroaching improperly on the fact-finding task of the jury.
- The length of delay which necessitates the giving of a Longman warning is unclear.[168]
- A practice has developed of giving the Longman warning to 'appeal-proof' judges' directions, even if it is unnecessary in the particular case.[169]
- The warning is given even where there is corroboration of the complainant's evidence.[170]

6.108. The Longman warning has also been criticised by the Western Australian Court of Appeal. For example, in *MB v The State of Western Australia,* then Chief Justice Martin noted that 'many appeals' have been made to the Court of Appeal on the basis of an allegedly inadequate Longman warning;[171] and in *Anderson v The State of Western Australia,* President McClure (with whom Mazza and Buss JJ agreed) stated:

> As substantial delay in complaining is frequently a factor in child sexual abuse cases, Longman warnings are routinely given. No doubt out of an abundance of caution, Longman type warnings are now being given after relatively short delays, as in this case. Trial judges have been permitted to soften the warning by omitting any reference to it being 'dangerous to convict': *Kemp v The State of Western Australia* [2006] WASCA 6 [9]. However, given the now proven magnitude of past sexual offending against children and the scepticism which allowed it to flourish, the time may have arrived to reassess the rationale for or terms of the warnings given in child sexual abuse trials.[172]

6.109. The Longman warning was considered by the Royal Commission. It referred to President McClure's comment in *Anderson*, stating that in its view 'the time' has arrived to reform the

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[164] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [28.37].

[165] *Dyers v The Queen* (2002) 210 CLR 285; *Doggett v The Queen* (2001) 208 CLR 343; *Robinson v The Queen* (1999) 197 CLR 162; *Crampton v The Queen* (2000) 206 CLR 161.

[166] *R v BWT* (2002) 54 NSWLR 241, [14]–[15].

[167] Ibid [34].

[168] Ibid [95]. See, eg, *R v Heuston* (2003) 140 A Crim R 422.

[169] Attorney General's Department of NSW Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 89–90. See also New South Wales Law Reform Commission, *Jury Directions* (Consultation Paper No 4, 2008) [7.49]–[7.54]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint* (Final Report No 8, 2006) [2.1.1]–[2.2.1], [2.3.1]–[2.3.2].

[170] A Cossins, 'Time out for Longman: Myth, Science and the Common Law' (2010) 34 *Melbourne University Law Review* 3.

[171] *MB v The State of Western Australia* [2016] WASCA 160, [29].

[172] *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

law in Western Australia.[173] It recommended that legislation in all Australian jurisdictions should provide that:

- There is no requirement for a direction or warning as to forensic disadvantage to the accused.
- The judge must not direct, warn or suggest to the jury that delay has caused forensic disadvantage to the accused unless the direction, warning or suggestion is requested by the accused and there is evidence that the accused has suffered significant forensic disadvantage.
- The mere fact of delay is not sufficient to establish forensic disadvantage.
- In giving any direction, warning or comment, the judge should inform the jury of the nature of the forensic disadvantage suffered by the accused.
- In giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.[174]

6.110. The Western Australian government has again 'accepted in principle' each of these recommendations,[175] but has not yet introduced a Bill to give effect to this in principle acceptance.

6.111. By contrast, various other states have legislated to address this issue. For example, the *Evidence Act 1995* (NSW) provides that if the judge is satisfied that the accused has suffered a 'significant forensic disadvantage because of the consequences of delay', they must 'inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence'.[176] However, in doing so they 'must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay'.[177] The Act makes it clear that a 'significant forensic disadvantage' is not established merely by the existence of a delay between the occurrence of and reporting of the alleged offence.[178] The factors that may be regarded as establishing a significant forensic delay include, but are not limited to, the fact that any potential witnesses have died or are not able to be located, and the fact that any potential evidence has been lost or is otherwise unavailable.[179]

6.112. The Explanatory Note to this provision states that:

> The section is intended to make it clear that (contrary to the tendency at common law following *Longman v The Queen* (1989) 168 CLR 79 for judges to routinely give warnings in relation to forensic disadvantage arising from delay) information about forensic disadvantage need only be given if a party applies for it, and should only be

[173] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts VII to X and Appendices, 2017) 192.

[174] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 89.

[175] Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse.

[176] *Evidence Act 1995* (NSW) s 165B(2).

[177] Ibid s 165B(4).

[178] Ibid s 165B(6).

[179] Ibid s 165B(7).

> given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time.[180]

6.113. Similar provisions exist in Victoria and Queensland.[181]

33. Should there continue to be a requirement for a Longman warning (warning the jury about the forensic disadvantages that have arisen from a delayed complaint) to be given in sexual offence trials? If so, should the terms in which the warning is given ben changed in any way?

Differences in the complainant's accounts

6.114. In criminal trials it is permissible for counsel to cross-examine a witness as to whether they have previously given a 'prior inconsistent statement' about a matter.[182] This is a common tactic in sexual offence trials, with one study suggesting that in sexual offence trials in Victoria, Queensland and NSW defence counsel questioned more than 90 percent of complainants about inconsistencies in the complainant's own evidence.[183]

6.115. In Western Australia, judges are currently required to direct the jury about how it can use evidence of a prior inconsistent statement.[184] The direction, which is given in any trial in which it is suggested that a witness has made a prior inconsistent statement, may include one or both of the following as is appropriate in the case: [185]

- Anything said by a witness out of court is not evidence in the trial that what the witness said on the previous occasion, which is inconsistent with their testimony in court, occurred.
- If the jury finds that, on a previous occasion, a witness said something which was inconsistent with the evidence the witness gave in court, the jury can take the inconsistency into account when assessing the witness' credibility and reliability.

6.116. This approach seems to imply that inconsistencies in a complainant's account make it inherently less credible or reliable. This coincides with the commonly held view that 'real' victims will always give a complete and consistent account of the offending.[186] However, research shows that:

> inconsistencies or differences are common. These include inconsistencies between accounts (for example, between the complainant's police statement and account at trial) and within accounts (for example, within the complainant's evidence at trial). A complainant may, for example, describe an alleged sexual offence differently because of the way the complainant retains and recalls memories, the context in which the disclosure is being made, or feelings of stress or embarrassment.[187]

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[180] Evidence Amendment Bill 2007 (NSW) Explanatory Note.

[181] *Jury Directions Act 2015* (Vic) ss 3, 38-40; *Evidence Act 1977* (Qld) s 132BA.

[182] *Evidence Act 1906* (WA) s 21.

[183] Royal Commission into Institutional Responses to Child Sexual Abuse, *An Evaluation of How Evidence is Elicited from Complainants of Child Sexual Abuse* (Report, 2016) 227.

[184] *Driscoll v The Queen* (1977) 137 CLR 517; *Job v The State of Western Australia* [2006] WASCA 186.

[185] *Job v The State of Western Australia* [2006] WASCA 186, [143].

[186] Byrne and Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43(3) *Criminal Law Journal* 180, 195.

[187] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.16].

6.117. In this regard, the Background Paper notes that:

> Many people who have experienced sexual violence are unable to give a thoroughly clear, coherent, detailed and specific account of the incident of sexual violence.
>
> Research has found that memories associated with a traumatic event, such as sexual violence, are often fragmented, disorganised and confused, inconsistent and lack internal coherence and specificity... Such memories are not stored in a narrative form, nor are they stored as verbal memories – often victims remember only sensations and emotions rather than specific details of the event. Some victims do not remember anything at all. Research also shows that people with Post Traumatic Stress Disorder (PTSD) (and PTSD is a common result of sexual violence) may have general deficits in memory.
>
> Given that memory can be so deeply affected by trauma, it cannot be assumed that inconsistency in recall is indicative of untruthfulness.[188]

6.118. It would be possible to legislate a direction that addresses this issue. For example, in NSW judges are required to inform juries, in appropriate cases, that:

> a) Experience shows that:
>
> i. People may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time;
>
> ii. Trauma may affect people differently, including affecting how they recall events;
>
> iii. It is common for there to be differences in accounts of a sexual offence; and
>
> iv. Both truthful and untruthful accounts of a sexual offence may contain differences.
>
> b) That it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.[189]

6.119. A similar direction is contained in the Victorian Jury Directions Act.[190]

34. Should there be a legislated jury direction about differences in the complainant's accounts? If so, what should that direction say? In what circumstances should it be given?

Complainant responses to giving evidence

6.120. Research indicates that complainants who appear calm or controlled in court are perceived as less credible than those who appear distressed. However, research has found that emotional demeanour is not a reliable indicator of honesty.[191] Complainants can respond to

[188] Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) 21.

[189] *Criminal Procedure Act 1986* (NSW) s 293A(2). A judge must give this direction if (i) there is good reason to do so; or (ii) it is requested by a party, unless there is a good reason not to give it: ibid s 292(2).

[190] *Jury Directions Act 2015* (Vic) s 54D.

[191] FT Nitschke, BM McKimmie and EJ Vanman, 'A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants: Does Complainant Distress Influence Credibility?' (2019) 145 *Psychological Bulletin* 953, 955–956.

the process of giving evidence in different ways: they may appear emotional and distressed, anxious and irritable, or numb and controlled.[192]

6.121. The NSW Criminal Procedure Act requires judges, in appropriate cases, to direct the jury that:

- Trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not; and
- The presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.[193]

6.122. A similar provision is contained in the amended Victorian Jury Directions Act.[194] The Queensland Taskforce also recommended that Queensland judges be permitted to direct juries about complainant responses to giving evidence.[195]

35. Should there be a legislated jury direction about the ways in which complainants may respond to giving evidence? If so, what should that direction say? In what circumstances should it be given?

Addressing misconceptions generally

6.123. As noted above, a slightly different approach to giving jury directions in sexual offence trials has been taken in New Zealand. Rather than specifying a range of different directions that may be given (as is the case in NSW and Victoria), section 126A of the *Evidence Act 2006* (NZ) requires the judge to give any direction they consider 'necessary or desirable to address any relevant misconception relating to sexual cases'.[196] The provision provides that:

> Misconceptions relating to sexual cases (all or any of which the Judge may consider relevant in the case) include, but are not limited to, misconceptions—
>
> a) about the prevalence or features of false complaints in sexual cases:
>
> b) that a victim or an offender in a sexual case has, or does not have, particular stereotypical characteristics:
>
> c) that sexual offending is committed only by strangers, or is less serious when committed by a family member (including, but not limited to, a spouse, civil union partner, or de facto partner) or by an acquaintance:
>
> d) that sexual offending always involves force or the infliction of physical injuries:

[192] Australian Institute of Family Studies and Victoria Police, 'Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners' (Resource, Australian Institute of Family Studies and Victoria Police, 2017) 13.

[193] *Criminal Procedure Act 1986* (NSW) s 292D. A judge must give this direction if (i) there is good reason to do so; or (ii) it is requested by a party, unless there is a good reason not to give it: ibid s 292(2).

[194] *Jury Directions Act 2015* (Vic) s 54K, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 56.

[195] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 347.

[196] *Evidence Act 2006* (NZ) s 126A(1).

e) that, in a sexual case, a complainant is less credible or more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant—

i. dressing provocatively, acting flirtatiously, or drinking alcohol or taking drugs:

ii. being in a relationship with a defendant, including a sexual relationship:

iii. maintaining contact with a defendant, or showing a lack of visible distress, after the alleged offending.[197]

36. Should there be a legislated jury direction allowing judges to address misconceptions about sexual violence generally? If so, what should that direction say? In what circumstances should it be given?

Unreliable witnesses

6.124. As noted in the 'Current approach' section, at common law, sexual offence complainants and children were considered to be classes of witness whose evidence should be treated with caution.

6.125. The Royal Commission has recommended that the law should be reformed in this regard. It has recommended that legislation in all Australian jurisdictions should provide that judges must not direct, warn or suggest to the jury:

- That sexual offence complainants or children as a class are unreliable witnesses;
- That it is 'dangerous or unsafe to convict' on the uncorroborated evidence of a sexual offence complainant or a child (**uncorroborated evidence warning**); or
- That the uncorroborated evidence of a complainant or a child should be 'scrutinised with great care' (**scrutinise with care warning**).

6.126. The Royal Commission has also recommended that judges be prohibited from giving a direction or warning about, or commenting on, the reliability of a child's evidence solely on account of the age of the child.[198]

6.127. The Western Australian government has 'accepted in principle' each of the Royal Commission's recommendations.[199] While it has not yet introduced a Bill to give full effect to this in principle acceptance, the common law rules have already been abrogated to the extent that judges are no longer required to give a warning to jurors in all cases involving sexual offence complainants. They may only give such a warning if they are satisfied that it is justified in the circumstances.[200] They are also prohibited from warning the jury, or suggesting in any way, that it is unsafe to convict on the uncorroborated evidence of a child because children

[197] Ibid s 126A(2).

[198] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 90.

[199] Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse.

[200] *Evidence Act 1906* (WA) s 50.

are classified by the law as unreliable witnesses.[201] However, Western Australian legislation is currently silent about scrutinise with care warnings. An example of a circumstance in which a judge may choose to give a scrutinise with care warning is where a person gives unsworn evidence.[202] Judges are also not currently prohibited from commenting on the reliability of a child's evidence based solely on the child's age.

6.128. In various other Australian jurisdictions judges are already prohibited from warning or suggesting to the jury that complainants or children as a class are unreliable witnesses, or that it is dangerous to convict on the uncorroborated evidence of a sexual offence complainant or a child.[203] Under the amended Victorian Jury Directions Act, the judge, prosecution and defence will also be prohibited from saying, or suggesting in any way, that:

- Complainants who provide commercial sexual services are, as a class, less credible or require more careful scrutiny than other complainants.
- Complainants who have a particular sexual orientation are, as a class, less credible or require more careful scrutiny than other complainants.
- Complainants who have a particular gender identity (including complainants whose gender identity does not correspond to their designated sex at birth) are, as a class, less credible or require more careful scrutiny than other complainants.[204]

37. Should the law prohibit judges from warning the jury that certain complainants are, as a class, less credible or require more careful scrutiny than other complainants? If so, which complainants should the prohibition address?

Timing of Directions

6.129. As noted above, judges in Western Australia typically make some introductory remarks to juries before the evidence begins, but they give the bulk of their directions immediately before the jury retires to consider its verdict. One possibility for reform would be to require judges to give certain directions earlier in the trial.

6.130. In this regard, research suggests that jurors tend to use a 'story model' of decision making:

> Jurors do not in fact absorb information like black boxes, piece it together and make sense of it at the conclusion of the trial. Instead, their approach to the evidence tends to confirm the 'story model' of jury decision-making: they actively process the evidence as it emerges, evaluating it and attempting to fit it into an evolving story which makes sense to them.[205]

6.131. Research also suggests that:

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[201] Ibid s 106D.

[202] See *Evidence Act 1906* (WA) s 100A.

[203] See, eg, *Criminal Procedure Act 1986* (NSW) s 294AA; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80; *Jury Directions Act 2015* (Vic) s 33.

[204] *Jury Directions Act 2015* (Vic) s 51(d)-(f), as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 51.

[205] W Young, Y Tinsley and N Cameron, 'The Effectiveness and Efficiency of Jury Decision Making' (2000) 24 *Criminal Law Journal* 89, 91 cited in Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, 2015) 9.

- Jurors' attitudes are strongly influenced by the opening addresses in the case.[206]
- Directions may be more effective in counteracting any assumptions or misconceptions that jurors may hold if those assumptions and misconceptions are addressed at an early stage of the trial.[207]
- Repetition of jury directions helps jury comprehension.[208]

6.132. The Royal Commission supported the giving of directions early in the trial. It recommended that:

> Each state and territory government should work with the judiciary to identify whether any legislation is required to permit trial judges to assist juries by giving relevant directions earlier in the trial or to otherwise assist juries by providing them with more information about the issues in the trial. If legislation is required, state and territory governments should introduce the necessary legislation.[209]

6.133. It does not seem that legislation would be required to permit Western Australian judges to give relevant directions earlier in the trial. While it is common practice for judges to give the bulk of their directions immediately before the jury retires, judges may choose to give directions about aspects of the evidence at any time during the course of a trial. This includes giving a direction prior to, during or after the relevant evidence is given. In Western Australia this has been increasingly common. No legislation was required to introduce the practice.

6.134. Legislation would, however, be required if judges were to be mandated to give directions at a specific time during the trial. Such legislation has previously been enacted in Western Australia. For example, where the accused has requested the judge give a direction on family violence,[210] the Evidence Act requires the judge to give the direction 'as soon as practicable after the request is made' (unless there are good reasons for not giving the direction).[211] The Act also empowers the judge to 'give the direction before any evidence is adduced in the trial'.[212]

6.135. Similar provisions have been enacted in Victoria. For example, the amended Victorian Jury Directions Act will provide that before evidence about a post-offence relationship with the accused is given, the trial judge must give the requisite statutory warning.[213]

6.136. This approach has the merit of ensuring that the direction is given in advance of the relevant evidence, which may make it more effective. However, it removes from the judge the ability to decide when a direction is best given. This could have the result of prejudicing the prosecution or defence case where it is wrongly anticipated that the relevant evidence will be given. It is

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[206] Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [6.49]-[6.50].

[207] E Henderson and K Duncanson, 'A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?' (2016) 39 *UNSW Law Journal* 750, 778, cited in New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.81].

[208] Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, 2015) 9.

[209] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 93.

[210] See paras 6.20-6.22.

[211] *Evidence Act 1906* (WA) s 39C(4)(a).

[212] Ibid s 39C(4)(b).

[213] *Jury Directions Act 2015* (Vic) s 54G, as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 54H. On the content of the relevant warning, see 'Relationship between the complainant and the accused' above.

therefore arguable that it may be best to wait until the evidence is adduced before giving the direction.

6.137. For the sake of clarity (if not necessity), it would also be possible to specify that a direction may be given at any point in the trial, and that it may be repeated. An example of this can be seen in the NSW Criminal Procedure Act, which sets out the direction a judge may give about differences in the complainant's account,[214] and states that:

> A judge may, as the judge sees fit—
>
> a) give a direction in this section at any time during a trial, and
>
> b) give the same direction on more than 1 occasion during a trial.[215]

6.138. One potential concern with this approach is that it may create uncertainty about whether judges are able to give other directions during the course of a trial, if legislation does not specifically state that judges may do so.

6.139. The Queensland Taskforce was split on the question of whether Queensland's legislation should specifically address the timing of jury directions:

> The Taskforce were evenly divided in their views about including a section in the legislation that outlines the timing in which a judge can give and repeat jury directions during the trial proceedings. This type of legislation would require that a judge give relevant directions to the jury at the earliest opportunity, ideally before the evidence is adduced. Further, the legislation would enable a judge to repeat the direction at any time during the trial. … The Taskforce acknowledged the benefit of giving directions to a jury about evidence at the time that it is being presented in court, so that they can consider the evidence in the proper context. … However, some members of the Taskforce questioned whether a section in the legislation was really required, and suggested it would represent too much change too quickly for Queensland.[216]

6.140. We welcome submissions, particularly from those with experience in the trial process, on whether legislation addressing the timing of directions is desirable, or whether the current system of leaving it to the judge to determine when to give a direction to a jury on a matter of evidence is working satisfactorily.

38. Should judges be required to given any directions at a specific time during the trial? If so, which directions should include a timing requirement? When should those directions be given?

Other methods of communicating with the jury

Juror Education

6.141. A possible alternative, or adjunct, to dispelling misconceptions through jury directions is to seek to achieve the same end via the education of jurors.

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[214] See 'Differences in the complainant's accounts' above.

[215] *Criminal Procedure Act 1986* (NSW) s 293A(2A).

[216] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 347-348.

6.142. The LCNZ noted the possibility of seeking to educate jurors:

> after they have been empanelled through the provision of information packs coving the difficult features that sometimes arise in sexual violence cases and what is or is not relevant to the fact-finding exercise. In a survey conducted by the New Zealand Ministry of Women's Affairs, those surveyed called for jurors to be educated on the nature of sexual violation, either by being given information before evidence is presented … [or] through a public education campaign.[217]

6.143. The LCNZ ultimately concluded:

> We make no recommendation on this. It may be that training and education, in order for juror education to be truly effective, needs to be given on an ongoing basis and that the people making the decisions need to build up some familiarity with the area. It has been noted that any information 'given without context before trial would need to be very carefully framed' so as to avoid possibly reinforcing false information or causing jurors to become biased against the defendant before the trial has begun.[218]

6.144. The Gillen Review in Northern Ireland recommended jurors be shown a pre-trial video aimed at dispelling common misconceptions.[219] It argued that 'a prescribed film from an authoritative source such as a number of judges in a video at the outset of the trial would have the benefit of uniformity' and would not involve 'an unwarranted increase in, or costly intrusion into, the length of the trial process. Presented to the jury at the start of the trial process it would allow for an informed and fair assessment of the evidence and would guide the approach of counsel in the case. It would represent a further confidence building factor for complainants and encourage public confidence in the criminal justice system'.[220]

39. Should jurors be provided with education specific to sexual offending? If so, what should be the content of such education? How and when should it be delivered?

Use of Expert Witnesses

6.145. In some jurisdictions, expert witnesses are permitted to give evidence on a range of issues relating to sexual offending. Several law reform commissions have recommended that, in conjunction with jury directions aimed at countering common misconceptions, experts be permitted to give evidence of this type. We discuss these laws and recommendations in more detail below.

Current approach: expert evidence about child behaviour and family violence

6.146. In Western Australia, at common law, persons with specialised knowledge in a recognised field of expertise are permitted to give opinions based on their expertise.[221] Sections 36BE

[217] Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [6.72].

[218] Ibid [6.72]-[6.73], quoting Finn, McDonald and Tinsley, 'Identifying and Qualifying the Decision-Maker: The Case for Specialisation' in McDonald and Tinsley (eds), *From 'Real Rape' to Real Justice: Prosecuting Rape in New Zealand* (Victorian University Press, 2011) 221, 240.

[219] Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [6.96].

[220] Ibid [6.99], [6.101].

[221] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [85].

and 39 of the Evidence Act confirm that expert evidence in sexual offence trials is admissible in two specific circumstances:

- In a case where it is relevant, an expert about child behaviour is permitted to give evidence about child development and behaviour generally, and child development and behaviour in cases where children have been the victims of sexual offences.[222]
- In a case where evidence of family violence is relevant to a fact in issue, an expert on family violence may give evidence in relation to any matter that may constitute evidence of family violence, including evidence about the nature and effects of family violence on any person, and evidence about the effect of family violence on a particular person who has been the subject of family violence.[223]

6.147. In the Uniform Evidence Act jurisdictions[224] there are also provisions which specifically allow courts to receive evidence of a person who has 'specialised knowledge of child development and child behaviour' as to 'the development and behaviour of children generally and the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences'.[225]

6.148. The Commission welcomes submissions about whether expert evidence of the types permitted by sections 36BE and 39 of the Evidence Act are ever given in Western Australian trials and if so, how often and in what circumstances.

Expert evidence about the nature and effects of sexual violence

6.149. In Victoria, in sexual offence proceedings, a court may receive evidence from an expert about the nature of sexual offences and the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that they have been the victim, of a sexual offence. This includes giving evidence about the reasons that may contribute to a delay on the part of the victim to report the offence.[226]

6.150. In its review of sexual offences, the VLRC that although such evidence is admissible, it is rarely given in practice.[227] It recommended that greater use be made of expert evidence in sexual offence trials, noting that such evidence 'may address the same topics as jury directions, as well as how memory works (including when and how people repress or recover memories); behaviours that may seem counterintuitive, such as a victim survivor maintaining a relationship with the accused; and the power dynamics and characteristics of family violence'.[228]

6.151. The VLRC also observed that 'expert evidence has some advantages over jury directions. It can be called when there is a topic that does not have a jury direction, and it can add context and detail beyond a jury direction. It can adapt to emerging research more quickly than jury directions, which require legislation'.[229]

6.152. The Gillen Review in Northern Ireland was somewhat more equivocal about the use of expert witnesses, noting that 'concerns around expert testimony, even where it can meet the criteria

[222] *Evidence Act 1906* (WA) s 36BE.
[223] Ibid s 39.
[224] The ACT, NSW, NT, Tasmania and Victoria.
[225] See, eg, *Evidence Act 2008* (Vic) s 79.
[226] *Criminal Procedure Act 2008* (Vic) s 388.
[227] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [20.59].
[228] Ibid [20.60].
[229] Ibid [20.61].

of "expert evidence", include that it could lead to a lengthy and costly "battle of experts"'.[230] However, it observed that 'the counter argument is that if the expert limits their testimony to minimal claims for which there is consensus in the scientific literature, this is unlikely to lead to such a battle'.[231]

6.153. In its review of consent and the mistake of fact defence, the QLRC did not support expanding the admission of expert evidence for sexual offences. While it acknowledged that expert evidence aimed at dispelling common myths about sexual offending may have an educative purpose, it was of the view that such evidence 'is general in nature and does not answer the questions that a jury may have to consider in a particular case. A jury may derive little additional benefit in terms of enhancement of their understanding and weighing of the specific evidence before them'.[232]

6.154. However, the Queensland Taskforce noted that the QLRC's conclusion was based on research which has since been criticised by some other academics.[233] It recommended the introduction of legislation that would allow for expert evidence to be given about the nature and effects of domestic and family violence and sexual violence, in similar terms to the Victorian approach.[234]

6.155. In New Zealand, some types of expert evidence are permitted under section 25 of the *Evidence Act* 2006 (NZ). The New Zealand Supreme Court has confirmed that this section permits the use of expert evidence to counter jurors' erroneous beliefs or assumptions in sexual violence cases. The Supreme Court has held that:

- Expert evidence should be limited to correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse.
- Expert evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. The witness should make it clear that they are not commenting on the facts of the particular case, and should make it clear that the evidence draws on generic research in cases of sexual abuse.
- The evidence must be relevant to a live issue in the case.
- The witness should make it clear to the jury that the purpose of the evidence is limited to neutralising misconceptions which may be held by the jury.
- Where counter-intuitive evidence is admitted, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.[235]

6.156. The LCNZ examined how expert evidence is used in practice in New Zealand, stating:

> There are currently variations in practice in the giving of counter-intuitive evidence throughout the country, which may be due in part to the availability of experts who are willing to give that counter-intuitive evidence. At present, as far as we are aware,

[230] Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [6.58].
[231] Ibid.
[232] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) 212.
[233] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 352.
[234] Ibid Rec 79.
[235] *DH v R* [2015] NZSC 35.

> this type of evidence has only been used in cases where the complainant is a child, or was a child at the time of the alleged offending…
>
> There is a shortage of people who are able and willing to give counterintuitive evidence. It is a big time commitment as the experts need to prepare at length…
>
> We do not think the giving of expert psychological evidence in person in court, as a means of addressing misconceptions in sexual violence cases, should be ruled out. Its use should be assessed on a case-by-case basis according to whether there is someone who is well-placed to do it and whether the prosecution thinks it is required. We make no recommendations to change the status quo in terms of the use of expert counter-intuitive evidence, but its use should be addressed in … prosecutorial guidance ... In addition, a government level initiative to undertake an expert evidence programme including resourcing, monitoring and staffing is worthy of consideration.[236]

6.157. If expert witnesses are to be more commonly relied upon, a question is raised about how they should be sourced. In this regard, the VLRC and the Queensland Taskforce both recommended the use of a panel of approved experts.[237] The VLRC said:

> The best way to make using experts accessible is through a panel drawn from a pool of approved experts. … It is important that whoever maintains the panel is independent in order to maintain the neutrality of the courts. … Experts will need to be approved and reviewed from time to time to ensure the evidence is of high quality. … We also recommend that, as the County Court of Victoria suggested, the prosecution, defence and, if there are good reasons to do so, the judge should be able to call on the expert panel. … The judge should have the power to call independent expert evidence on a relevant issue, such as counterintuitive behaviour. This may be useful where a party (usually the prosecution) has not called expert evidence but it would assist jurors and ensure a fair trial.[238]

40. Should expert evidence on issues relating to sexual offending be admissible in Western Australia? If so, what should be the purpose of such evidence and what topics should it be permitted to cover?

41. If expert evidence on issues relating to sexual offending is to be admissible, should the legislature provide for the creation of a panel of approved experts?

[236] Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [6.67]-[6.69].

[237] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [20.74]; Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) Rec 80.

[238] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [20.74]-[20.76].

7. Use of special verdicts in sexual offence trials

Chapter overview

This Chapter considers whether special verdicts should be used in sexual offence trials. It explains the current Western Australian laws relating to special verdicts and their use in other jurisdictions. It presents various possible options for reform.

What is a special verdict?

7.1 In a jury trial the jury is usually required to deliver one verdict on a charge, either guilty or not guilty. This is called a **general verdict**.

7.2 In certain circumstances,[1] the *Criminal Procedure Act 2004* (WA) (**Criminal Procedure Act**) also permits a judge to require the jury to deliver a verdict about a fact which is relevant to the charge. This is called a **special verdict**.[2]

7.3 General and special verdicts must both usually be unanimous. However, if a jury has been deliberating for more than three hours the judge may allow the jury to deliver a majority verdict.[3]

7.4 At common law, a jury has the right to return a special verdict.[4] There is uncertainty as to when a jury can be or should be required to deliver a special verdict that may reveal the jury's opinions on matters of fact.[5]

7.5 Special verdicts are different from alternative verdicts. An alternative verdict is a conviction for a different, and usually less serious offence, to that charged. Jurisdictions have statutory provisions regulating the alternative verdicts that may be returned in sexual assault trials. Alternative verdicts for sexual offences are discussed in Discussion Paper Volume 2.

7.6 At common law, after a jury has delivered a general guilty verdict, the judge may also require the jury to answer specific questions to ascertain the basis for the verdict.[6] The High Court in

1 See 'Western Australian laws relating to special verdicts' for a discussion of the current circumstances in which a special verdict may be given in Western Australia.
2 *Criminal Procedure Act 2004* (WA) s 113.
3 Ibid s 114.
4 *R v Spanos* [2007] SASC 409, [2].
5 *Chiro v The Queen* (2017) 260 CLR 425, [28]-[45], [60]-[67], [86]-[92]; *R v Spanos* [2007] SASC 409, [2], [33].
6 Ibid [33].

Chiro v The Queen (Chiro) emphasised that there is a difference at common law between a special verdict and a jury's answer to a judge's question, which is not a verdict at all.[7]

7.7 The Criminal Procedure Act does not necessarily oust all common law rules about special verdicts and it says nothing about the ability of a judge to require a jury to answer the judge's questions. However, it is the provisions in the Criminal Procedure Act about special verdicts, rather than the common law, which are routinely applied by courts in Western Australia. We understand that it would be very unusual for a judge in Western Australia to ask the jury a question which would require it to reveal its opinions about matters of disputed fact, other than by asking it to deliver a general or special verdict in accordance with the provisions of the Criminal Procedure Act.

Western Australian laws relating to special verdicts

7.8 Under the Criminal Procedure Act, a special verdict may be delivered in two circumstances.

7.9 First, if the accused is found not criminally responsible for an act or omission on account of unsoundness of mind,[8] the judge must direct the jury to return a special verdict to that effect.[9] In such cases, if the trial judge is of the opinion that the proper sentence or order to be imposed on the accused may depend upon a specific fact, the judge may also require the jury to give a special verdict on that fact. Special verdicts relating to accused persons who are found not criminally responsible on account of unsoundness of mind have no relevance to the Commission's Terms of Reference and so we will not discuss them further.

7.10 Second, if a jury delivers a general verdict of guilty of an offence and the trial judge 'is of the opinion that the proper sentence or order to be imposed on [the offender] may depend upon a specific fact, the judge may require the jury to give its verdict on that fact specifically'.[10]

7.11 It is this type of special verdict which could potentially be relevant in a sexual offence trial. For example, it would be possible for a judge to exercise their discretion to require a special verdict in a sexual offence trial in the following circumstances:

- If the accused unsuccessfully raised the mistake of fact defence, the judge could ask the jury to give a special verdict on whether it found that the offender's belief in consent was honest.
- If the accused is convicted of an offence of persistent sexual conduct with a child under 16 years, the judge could ask the jury to give a special verdict on whether a particular sexual act alleged by the prosecution was found proved.[11]

7.12 The jury's special verdict on these issues may affect the sentence that is imposed on the offender. However, if a special verdict on such issues is not given, it is the judge's responsibility to sentence an offender on the facts as they find them to be.[12] The judge will during their remarks on sentence state the facts that they have found for the purpose of sentencing.[13]

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7 Ibid [28], [96].

8 *Criminal Code Act Compilation Act 1913* (WA) s 27.

9 *Criminal Procedure Act 2004* (WA) s 113(1).

10 Ibid s 113(2).

11 It is possible for a special verdict of this kind to be delivered even though the judge cannot order the prosecution to give particulars of each sexual act relevant to the charge and the jurors do not have to all be satisfied beyond reasonable doubt that the same sexual acts occurred: *Criminal Procedure Act 2004* (WA) s 321; *Chiro v The Queen* (2017) 260 CLR 425.

12 *Cheung v The Queen* (2001) 209 CLR 1.

13 Preliminary Submission 1 (Her Honour Chief Judge Julie Wager, District Court of Western Australia) 3.

7.13 Special rules apply to the facts that are found by a judge for the purpose of sentencing.[14] The facts found by the judge must be consistent with the jury's verdict, but the judge must find the facts rather than speculate about the facts that may or may not have been found by the jury. On the other hand, the facts which are necessarily implicit in the verdict of guilty after trial must be accepted by the judge.[15]

7.14 If a trial judge decides to determine a disputed fact that was not determined by the jury as part of a general or special verdict, and if the disputed fact aggravates the offence, then the onus is on the prosecution to establish that fact beyond reasonable doubt.[16] If the disputed fact to be determined is a mitigating factor, the onus is on the offender to establish it on the balance of probabilities.[17]

7.15 If a judge finds a disputed fact for the purpose of sentencing the accused, then that fact will be stated publicly by the judge as part of their reasons for sentence. However, the parties and the victim will never know whether the jury had made the same finding about that fact.

Other jurisdictions' laws about special verdicts

Powers to take special verdicts in respect of any offence

7.16 Queensland, Tasmania and the NT are the only Australian jurisdictions which have general statutory provisions enabling the judge to request the jury to return a special verdict.

7.17 In Queensland and the NT the relevant provisions state that in any criminal trial:

> in which it appears to the court that the question whether an accused person ought or ought not to be convicted of an offence may depend upon some specific fact, or that the proper punishment to be awarded upon conviction may depend upon some specific fact, the court may require the jury to find that fact specially.[18]

7.18 This provision is limited to circumstances in which it appears to the court that the matter is relevant either to the question of whether the accused should be convicted, or to the sentence to be imposed. By contrast, the Tasmanian provision is more extensive. It provides:

> (1) Upon the trial of an indictment the jury may in any case –
>
> (a) … return a general verdict of 'guilty', or 'not guilty';
>
> (b) find specially upon all the facts necessary to enable the judge to pass judgment; or
>
> (c) if they return a general verdict, find specially upon any question submitted to them by the judge.
>
> (2) …
>
> (3) If in any case it appears to the judge that it is desirable that the jury should find specially upon all the facts necessary to enable him to give judgment, or upon any particular question, the judge may ask the jury to so find.

14 *Cheung v The Queen* (2001) 209 CLR 1, [5], [36].
15 Ibid [9]-[11].
16 *R v Olbrich* (1999) 199 CLR 270, [27].
17 Ibid.
18 *Criminal Code Act 1899* (Qld) s 624; *Criminal Code Act 1983* (NT) s 369.

(4) In any such case the judge shall inform the jury that it is their right to find a special verdict or to return a general verdict; and that they are not obliged to find specially upon any question (except … in the case of a person acquitted on the ground of insanity).[19]

7.19 It is notable that the Tasmanian provision allows the judge to ask the jury questions, but the jury is not required to 'find specially upon any question'.

7.20 South Australia does not have a statutory provision governing the power to take special verdicts.[20] The applicable common law principles are:

- An accused has a prima facie right to a general verdict, but a jury has the right to return either a general verdict or special verdict;
- Whether by way of general verdict or special verdict, in criminal trials both types of verdict are directed to the ultimate issue, namely whether the accused is guilty or not guilty of the offence(s);
- A special verdict, absent statutory provisions, arises in circumstances in which a jury, after making findings on specific facts, are uncertain as to whether such findings would, in law, amount to the offence. A special verdict is thus a combination of jury findings accompanied by a verdict in the light of a determination made by the court as to the legal consequences of the findings. In such a situation, the Judge directs a jury to return the relevant verdict, as a matter of the application of the law.[21]

7.21 In NSW, the ACT and Victoria, other than in circumstances where the accused was found not criminally responsible on account of unsoundness of mind (or its jurisdictional equivalent),[22] there are no statutory provisions relating to a general power of the jury to give a special verdict.

Powers to take special verdicts for sexual offences.

7.22 There have been two circumstances in which the issue of special verdicts has been specifically addressed in the context of sexual offences:

- In Victoria, it was previously possible for a jury to return a special verdict of 'rape with mitigating circumstances'.
- In Chiro, the High Court considered the use of special verdicts in the context of a charge of persistent sexual exploitation of a child.

7.23 We discuss these issues in turn below.

Rape with mitigating circumstances

7.24 In Victoria until 1981, the Victorian Act provided that a jury may return a special verdict of 'rape with mitigating circumstances'.

7.25 Taylor explains that this unique special verdict was introduced to avoid a situation where a jury would acquit an accused, not on the basis of reasonable doubt of their guilt, but because

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19 *Criminal Code Act 1924* (Tas) s 383.

20 *Criminal Procedure Act 1921* (SA) s 160 acknowledges that a jury may return a special verdict.

21 *R v Spanos* [1977] SASC 409, [33] (citations omitted).

22 See, eg, *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 30; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.

it was reluctant to convict a person of rape which, until 1 November 1949, carried the death penalty in Victoria.[23]

7.26 Taylor describes the reasons for introducing the mitigating circumstances verdict as 'solely practical and connected with the need to make it easier to get convictions'.[24] Despite the rationale for its introduction, Taylor's analysis of the cases is that the verdict was often returned in cases where matters such as drunkenness, the complainant's prior sexual conduct with the accused and the complainant's prior flirtatious behaviour were considered by the jury to be mitigating circumstances for the accused's rape of the complainant.[25]

7.27 While the death penalty for rape in Victoria was abolished in 1949, the statutory provision for the special verdict remained. Over time, the special verdict began to function as a means of avoiding a jury trial and facilitating plea bargains, in the light of the lower maximum penalty for rape with mitigating circumstances.

7.28 The Victorian verdict of rape with mitigating circumstances was abolished in 1981. We do not suggest that it would be appropriate to introduce a special verdict of rape with mitigating circumstances into Western Australia law. However, it illustrates how a special verdict in sexual offence trials can operate.

Persistent sexual exploitation of a child

7.29 In Chiro, the appellant had been convicted of an offence of persistent sexual exploitation of a child, contrary to the then section 50(1) of the SA Act. That provision made it an offence to commit more than one act of sexual exploitation over a period of not less than three days. An act of sexual exploitation was defined to mean an act that could be the subject of a sexual offence charge.

7.30 The prosecutor gave the jury a list of six alleged abusive acts, which ranged in seriousness from kissing in circumstances of indecency to unlawful sexual intercourse. The jury was asked to convict if it was unanimous that at least two of these acts occurred over a two-year period. The jury returned a general verdict of guilty. The judge sentenced the appellant on the basis that she was satisfied beyond reasonable doubt that the appellant had committed all the alleged acts of sexual exploitation.

7.31 On appeal, the appellant contended that the judge had erred in not taking a special verdict or asking questions of the jury after they returned the general verdict of guilt; specifically, to state which incidents they found had been proved. This argument was rejected by the Full Court of the Supreme Court of South Australia.

7.32 On appeal to the High Court, the appellant contended that in the absence of such information, his conviction was uncertain, or the trial judge should have sentenced him only for the two least serious acts alleged. The High Court unanimously held that the trial judge was right not to direct the jury to return a special verdict and that the jury's general verdict of guilty was not uncertain.[26] Perhaps because of the appellant's argument in the Court of Appeal,[27] the High Court did not spend a great deal of time discussing when a jury in South Australia could be required to return a special verdict. Instead, the Court dealt more fully with the trial judge's failure to question the jury following the return of its general guilty verdict.

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23 G Taylor, 'Rape with Mitigating Circumstances' (2005) 26 *Australian Bar Review* 331, 333, 335.

24 Ibid 337.

25 Ibid 340-346.

26 *Chiro v The Queen* (2017) 260 CLR 425, [46] (Kiefel CJ, Keane and Nettle JJ), [59]-[60] (Bell J), [82] (Edelman J).

27 Ibid [60] (Bell J).

7.33 On this issue, a majority of the High Court supported the trial judge's exercise of her discretion not to ask the jury, after it had returned its general verdict, to specify which of the particularised acts of sexual exploitation they were agreed had been proved.[28] However, in circumstances where Her Honour did not question the jury, it held the appellant should have been sentenced on the factual basis of the two least serious acts alleged.[29]

7.34 Following this decision, the South Australian Parliament repealed the offence in section 50 of the SA Act and replaced it with a new offence of persistent sexual abuse of a child.[30] The section now expressly provides that if the trier of fact is a jury, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.[31] It also provides:

> A court sentencing a person for an offence against this section is to sentence the person consistently with the verdict of the trier of fact but having regard to the general nature or character of the unlawful sexual acts determined by the sentencing court to have been proved beyond a reasonable doubt (and, for the avoidance of doubt, the sentencing court need not ask any question of the trier of fact directed to ascertaining the general nature or character of the unlawful sexual acts determined by the trier of fact found to be proved beyond a reasonable doubt).[32]

7.35 In the Parliamentary Debates on the amendment Bill, the following rationale was given for that amendment:

> In relation to trials in the future, the requirement to ask questions of the jury may create difficulties as to how the questions are framed, as well as creating difficulties for prosecutors when framing the charge at the outset. In particular, the jury's answers to questions may differ, depending on whether more than four hours have elapsed, when they can return a verdict by statutory majority. They may be unanimous as to some acts, and only have a statutory majority as to others.
>
> The answers to the questions will differ only on account of the time elapsed, but a proper and less consequential verdict could still be returned within four hours. The jury might simply not attempt to reach a verdict on the more serious acts once they reach a unanimous view on the two less serious acts. Answers to serious questions will likely, in many cases, provoke more questions, leading to a complex and unworkable sentencing process, and there would be a stark inconsistency between the approach of sentencing following a trial on the one hand and a plea of guilty on the other, where the necessary fact finding is the province of the sentencing judge.[33]

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28 Ibid [46] (Kiefel CJ, Keane and Nettle JJ), [67] (Bell J). Justice Bell's view was perhaps not as strongly put: her Honour considered that in section 50(1) cases, the exercise of the trial judge's discretion following the return of a verdict of guilty will usually favour asking the jury to identify those acts which it finds proved.

29 Ibid [53] (Kiefel CJ, Keane and Nettle JJ), [74] (Bell J). The joint judgment relied heavily on the nature of the offence in section 50(1), specifically the requirement of 'extended unanimity' on the specific underlying acts of sexual exploitation, to explain why it had diverged from the general view it had taken on this issue since *Cheung v The Queen* (2001) 209 CLR 1, and to answer the reasons given against the appropriateness of questioning a jury about the factual basis for its verdict in *R v Isaacs* (1997) 41 NSWLR 374 (see para 8.21 below).

30 *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) s 6.

31 *Criminal Law Consolidation Act 1935* (SA) s 50(4)(c). See South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8021.

32 *Criminal Law Consolidation Act 1935* (SA) s 50(11).

33 South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8022.

Powers to take special verdicts for non-sexual offences

7.36 In the ACT and the NT, a jury may return a special verdict that a required geographical nexus with the relevant jurisdiction does not exist.[34] In the NT there is also statutory power to return special verdicts where a person is charged with a property offence.[35] These special verdicts illustrate that statutory provisions providing for special verdicts are not unknown to the law.

The power to take a not proven verdict in Scotland

7.37 The Scottish criminal jury system differs from that in most other countries in that a jury may return one of three general verdicts: guilty, not guilty and not proven. If either a not proven or not guilty verdict is returned, the effect is the same in that the accused is acquitted.[36]

7.38 There is no generally accepted definition of the not proven verdict. Judges are discouraged from attempting to explain the difference between a not guilty and not proven verdict to juries.[37]

Possible reforms

A special verdict on any question of fact

7.39 A provision could be introduced in sexual offence trials similar to Tasmania's wide power enabling a judge to ask a jury to 'find specially on any particular question'.

7.40 One advantage of such a power may be that where there were material differences between a complainant's evidence and the accused's case on a particular issue, a judge could ask a jury to return a special verdict in relation to that issue. This would settle that issue, irrespective of the jury's general verdict.

7.41 Another advantage of such as power is that it would relieve the judge of the obligation to make a finding about the disputed fact for sentencing purposes, and so simplify the sentencing proceedings.

7.42 An example of where such a power may be used is where the accused's case was that the complainant consented to sexual activity between them and, in the alternative, the accused had an honest and reasonable but mistaken belief that the complainant consented. The judge could ask the jury to return a special verdict as to whether the jury found that the prosecution had proved that the complainant did not consent to the sexual activity and/or that a circumstance negating consent had been proved (for example, that the complainant was asleep). The advantages of a such a special verdict is that it would enable the parties and the victim to know whether the jury believed the victim's evidence that they did not consent to the sexual activity.

7.43 The disadvantages of empowering judges to request a jury to return a special verdict on any matter of fact in a sexual offence trial, many of which were considered by the New South Wales Court of Criminal Appeal in *R v Isaacs*,[38] include that it may:

- Distract the jury from determining the general verdict.

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34 *Criminal Code 2002* (ACT) s 66(2)(b); *Criminal Code Act 1983* (NT) s 43CC(2)(b).

35 *Criminal Code Act 1983* (NT) ss 384-385.

36 Scottish Government, *The Not Proven Verdict and Related Reforms* (Consultation Paper, December 2021) available at https://www.gov.scot/publications/not-proven-verdict-related-reforms-consultation/documents/.

37 Ibid, citing *MacDonald v Her Majesty's Advocate* 1996 SLT 723.

38 *R v Isaacs* (1997) 41 NSWLR 374, 379-380.

- Complicate jury deliberations by confusing juries about issues upon which unanimity is or is not required and about which issues are essential to a general verdict and which are not.
- Lengthen jury deliberations.
- Undermine the role of the jury, which is to determine whether the prosecution has proved a criminal offence; not to determine subsidiary questions relating to non-essential issues.
- Create different rules for sexual offences and non-sexual offences without good reason for doing so.
- Encourage juries to negotiate between themselves as to the special and general verdicts.
- Constrain a judge's sentencing discretion, especially where they do not agree with the special verdict.

7.44 The Victorian repealed rape in mitigating circumstances special verdict illustrates how introducing special verdicts can cause unforeseen complications similar to those specified above.

7.45 If such a provision is introduced, it will need to be decided whether the jury would be required to deliver a special verdict, or whether the judge should be required to inform the jury that they must return a general verdict but may choose not to return a special verdict.[39] The advantage of the latter approach may be that it would leave it to the jury to decide whether it was necessary and appropriate for it to return the special verdict in addition to a general verdict.

42. Should the *Code* empower judges to ask juries to return a special verdict in relation to any question that has arisen in a sexual offence trial? If so, should the provision permit juries to return a general verdict only and to decline to return a special verdict?

A special verdict on a specific fact relevant to conviction

7.46 Alternatively, a provision could be introduced for sexual offence trials similar to the special verdict provisions in Queensland and the NT.[40] These provisions empower a judge to require a jury to return a special verdict where the question of whether the accused should be convicted of the offence may depend upon a specific fact.

7.47 This would have similar application, advantages and disadvantages to the previous option for reform, but would only apply where the answer to the issue may determine whether the accused ought or ought not to be convicted. Thus, it would have to be a more important issue than one on which the accused and the complainant merely disagreed.

7.48 The Commission welcomes submissions providing examples of where it may be desirable for a judge to seek a special verdict on a specific fact relevant to conviction.

43. Should the *Code* empower judges to ask juries to return a special verdict on a specific fact relevant to conviction?

[39] *R v Spanos* [1977] SASC 409, [2].
[40] *Criminal Code Act 1899* (Qld) s 624; *Criminal Code Act 1983* (NT) s 369.

A special verdict of not guilty by reason of mistake of fact

7.49 A provision could be introduced in sexual offence trials enabling a judge to ask a jury which returned a general verdict of not guilty, to return a special verdict as to whether it found the accused not guilty by reason of mistake of fact.

7.50 An advantage of such a special verdict may be that if the accused raised the defence of mistake of fact and the jury found the accused not guilty, the parties and the complainant would know whether the jury's verdict of not guilty was because the prosecution had failed to prove that the accused did not have an honest and reasonable but mistaken belief that the complainant consented to the relevant sexual activity, or whether there was at least one other reason for the not guilty verdict. If the jury returned a verdict of not guilty by reason of mistake of fact it may give the complainant the comfort of knowing by inference that the jury believed their evidence on the issue of consent.

7.51 The disadvantages of empowering judges to request a jury to return a special verdict of not guilty by reason of mistake of fact are similar to those discussed above in relation to introducing a power to take a special verdict on any matter of fact.

7.52 If such a provision is introduced, it will need to be decided whether the jury would be required to deliver a special verdict or whether the judge should be required to inform the jury that they must return a general verdict but may choose not to return a special verdict.[41] The advantage of this approach may be that it would leave it to the jury to decide whether it was necessary and appropriate for it to return the special verdict in addition to a general verdict.

44. Should the *Code* empower judges to ask juries to return a special verdict of not guilty by reason of mistake of fact in a sexual offence trial? If so, should the provision permit juries to return a general verdict only and to decline to return a special verdict on this issue?

A special verdict of not proven

7.53 Another possibility would be to introduce a provision in sexual offence trials which empowers the jury to return a special verdict of not proven (rather than not guilty) in a sexual offence trial, as is the case in Scotland. This would be a novel and radical alteration to the rules in Western Australia, and Australia more broadly, about general and special verdicts.

7.54 While in Scotland judges are discouraged from attempting to explain the difference between a not guilty and not proven verdict to juries, this need not be the case. For example, it would be possible to specify that such a verdict should be given where the jury was not satisfied that the prosecution had proved each element of an offence beyond reasonable doubt, but was satisfied that the prosecution had proved each element of the offence on the balance of probabilities.

7.55 While the accused would still be acquitted in such circumstances, if a not proven verdict was given it may give a complainant the satisfaction of knowing that the jury was satisfied, on the balance of probabilities, that they were telling the truth. However, where the jury delivered a not guilty verdict, despite having the power to deliver a special verdict of not proven, it may give the accused the satisfaction of knowing that the prosecution had not satisfied even the lower standard of proof.

7.56 Possible disadvantages of a not proven verdict include:

[41] *R v Spanos* [1977] SASC 409, [2].

- It may undermine Western Australia's criminal justice system that requires proof beyond reasonable doubt of criminal offences and turn a sexual offence trial into something akin to a civil trial.
- It may stigmatise the accused as a sex offender, despite having been found not guilty of a sexual offence.
- It may encourage and/or allow jurors to compromise on a not proven special verdict rather than to deliberate conscientiously to a general verdict. This appears to have been the case in Scotland where not proven verdicts in rape cases are significantly higher than in other cases.[42]
- It may create different verdicts for sexual and non-sexual offence trials, without sufficient justification for doing so.

45. Should the *Code* empower judges to ask juries to return a special verdict of not proven in a sexual offence trial? If so, when should the jury be permitted to return such a verdict?

A special verdict on the acts proven for the offence of persistent sexual conduct with a child

7.57 A provision could be introduced to clarify whether a judge is permitted to ask a jury to return a special verdict directed to ascertaining which sexual acts alleged by the prosecution in a trial of an offence of persistent sexual conduct with a child under 16 years[43] had been proven beyond a reasonable doubt. There is some uncertainty about whether this is currently permissible.

7.58 Subsections 321A (8) and (11) of the *Code* may be thought to indicate that it is not appropriate for a trial judge to ask a jury to return a special verdict in such circumstances. However, section 113(2) of the *Code* seems to permit a judge to do so where the trial judge 'is of the opinion that the proper sentence or order to be imposed on [the offender] may depend upon a specific fact, the judge may require the jury to give its verdict on that fact specifically'.[44]

7.59 It may be desirable to provide that the trial of this offence is an exception to the general rule that a judge may ask a jury to return a special verdict, even if the judge is of the opinion that the proper sentence or order to be imposed on the offender may depend upon which sexual acts were found to have been proved. Alternatively, it may be thought desirable to clarify that the power in section 113(2) of the *Code* to request the jury to return a special verdict in relation to a fact relevant to sentencing applies, despite subsections 321A(8) and (11).

7.60 We note that the Western Australian Government has accepted in principle the Royal Commission's recommendation that this offence be reformed,[45] to enact an offence which focuses on the existence of a relationship rather than the occurrence of a number of unlawful

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42 Scottish Government, *The Not Proven Verdict and Related Reforms* (Consultation Paper, December 2021) Part 2.

43 *Criminal Code Act Compilation Act 1913* (WA) s 321A.

44 *Criminal Procedure Act 2004* (WA) s 113(2).

45 Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse.

acts.[46] This planned reform should be borne in mind when considering the possibility of this type of special verdict.

46. Should the *Code* specifically empower or prohibit a judge from requiring a jury to deliver a special verdict about which sexual acts alleged by the prosecution had or had not been proved in a trial for an offence of persistent sexual conduct with a child under 16 years, or is no reform necessary in this regard?

[46] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 74 and Rec 21.

8. How should the reforms be implemented and monitored?

Chapter overview

This Chapter considers the processes that should accompany any legal reforms. It looks at the design and development of an education or training program; the monitoring of any implemented reforms; and the collection of data about sexual offending and the associated criminal justice processes.

Education and training

8.1 In recent years, various reforms to sexual offence laws and procedures have been implemented across Australia and internationally. Despite this fact, 'conviction rates in sexual assault cases have remained consistently lower than for other offences and the experience of complainants at trial continues to be reported as being unsatisfactory'.[1] It has been suggested that one explanation for this is that:

> Legislative change alone may have a limited impact on the criminal justice system as a whole. The effectiveness of legislative reforms is also influenced by factors such as the availability of resources, institutional structures, and social and political conditions.
>
> In the context of sexual offence law, the culture, values and attitudes of participants in the criminal justice system can be particularly influential. If police officers, lawyers and judges do not apply sexual offence laws consistently with the laws' objectives, the intentions behind law reform may not translate into practice. Researchers point to a number of … places where this has occurred including Tasmania, New Zealand, England and Wales, and Canada.[2]

8.2 Of particular concern in the sexual offence context is the persistence of common misconceptions about sexual violence and consent.[3] It has been suggested that the persistence of such misconceptions 'makes sexual offences particularly vulnerable to a "justice gap" between the intended, and actual, effects of reforms'.[4]

8.3 One way to address this risk would be to provide education or training to participants in the criminal justice system and/or to the community generally. In its review of consent laws, the NSWLRC noted that several submissions had argued that 'education is the most effective way

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1 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.26]. See also paras 1.30; 1.37-1.40; Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 3.3.

2 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.27]-[10.28] (citations omitted).

3 See paras 1.31-1.36; Tarrant, Douglas and Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022) Part 2.

4 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.30], citing J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 1.

to transform culture and attitudes'.[5] In its inquiry into sexual offences, the VLRC also heard 'strong support … for improving education and training throughout the criminal justice system'.[6] For example, the County Court of Victoria submitted to the VLRC that:

> The criminal justice system has over recent decades matured in its understanding of sexual harm and attitudes towards complainants in sexual offending matters. There is of course always a need to continually improve the understanding of such matters. Continual and expanded training and education around sexual harm can assist with this, not only for those within the legal profession, but also the broader community.[7]

8.4 Consequently, the NSWLRC recommended that the NSW Department of Communities and Justice 'fund the design and delivery of a comprehensive education program' which should, at a minimum, be available to judges, prosecutors, criminal defence lawyers and police.[8] It recommended that the program 'explain the objectives of the reforms… and how the reforms change the law'.[9] The program could also:

- Include content about the social context of sexual assault, including its gendered nature.
- Explain what research says about trauma and how it affects responses to sexual assault (including the 'freeze' response).
- Explain what research says about the effects of intoxication on behaviour and memory.
- Explain particular effects of sexual assault on certain groups, including Indigenous people, people from culturally and linguistically diverse backgrounds and LGBTIQA+ people.
- Outline best practice, trauma-informed ways to communicate with complainants.
- Explain the ethical and legal limitations on examination and cross-examination of complainants (in the case of lawyers and judges).
- Identify and challenge misconceptions and assumptions about sexual offences.
- Include information on the nature and dynamics of domestic violence.[10]

8.5 The VLRC similarly recommended that the Victorian Government should fund the development and delivery of a program to educate and train police, lawyers, judges and magistrates on:

a. The nature and prevalence of sexual violence in the community.
b. The effects of trauma and how to reduce the risk of further trauma.
c. Barriers to disclosure and reporting sexual violence.
d. Identifying and countering misconceptions about sexual violence.
e. How to respond to diverse experiences and contexts of sexual violence.
f. Effective communication with and questioning of victim survivors, including children.

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5 Ibid [10.31].
6 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [18.41].
7 Ibid quoting Submission 59 (County Court of Victoria).
8 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.32]; Rec 10.2.
9 Ibid [10.33]; Rec 10.2.
10 Ibid (citations omitted).

g. Procedures related to ground rules hearings and the role of intermediaries.

h. Limits on improper questioning and judicial intervention.

i. Alternative arrangements for giving evidence, and special hearings for children and people with a cognitive impairment.

j. The therapeutic treatment order system.

k. Any reforms implemented from this report.[11]

8.6 The VLRC recommended that data on the take up of this program across each of the relevant agencies be published annually.[12]

8.7 In its review of consent laws the QLRC also acknowledged 'the importance of education about the law of consent and mistake of fact for both practitioners in the criminal justice system and the broader community'.[13] However, while it noted that changes to the law are 'sometimes complemented by educational and training material', it was of the view that 'the form and scope of any education program is a matter for the government and individual organisations'.[14] Consequently, it did not make any recommendations about education or training programs.

8.8 By contrast, the Queensland Taskforce made various recommendations about education and training, including that the Queensland Government:

> Develop and implement an adequately resourced primary prevention-focused community education campaign to improve awareness and understanding about sexual violence, including consent. The campaign will address societal and cultural barriers that contribute to low rates of reporting sexual violence. The campaign will aim to break down taboos about talking about sex and consent and embed community acceptance of the requirement for consent to be mutually agreed and discussed.
>
> The design of the Queensland campaign should build upon existing primary prevention and community education already underway as part of the *Prevent. Support. Believe: Queensland's framework to address sexual violence* and take into consideration similar campaigns implemented successfully in other jurisdictions. It will include targeted messaging and specific delivery modes for First Nations peoples as well as people from culturally and linguistically diverse backgrounds, people with disability and LGBTIQA+ people.[15]

8.9 The Taskforce recommended that the Bill containing the relevant amendments to its consent laws 'commence no sooner than six months after debate and passage of the Bill, to allow a comprehensive community education campaign to be undertaken'.[16]

8.10 We are interested to hear your views on whether we should make any recommendations about education or training. If we are to recommend the development of an education or training program, we are interested to hear who you think it should be targeted at, what it should address, and who should be responsible for its design, development and delivery.

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11 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 69.

12 Ibid Rec 70.

13 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [8.114].

14 Ibid.

15 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) Rec 1.

16 Ibid Rec 43.

47. What recommendations, if any, should the Commission make about education or training?

Monitoring

8.11 Due to its concern that sexual offence law reform may be particularly susceptible to implementation problems, the NSWLRC recommended that any reforms be accompanied by 'regular statutory reviews, which consider how the amended laws are being interpreted and what impact the changes are having on criminal justice outcomes'.[17] The VLRC was also of the view that the implementation of the reforms arising from its report, as well as any other sexual violence reforms, 'should be monitored to hold the Victorian Government, people and bodies accountable for their effective implementation'.[18]

8.12 The VLRC's recommendations in this regard were brief. It recommended that the Victorian Government should:

a) Report annually on the progress of implementing these reforms.

b) Consider establishing a monitoring function for sexual violence reforms, in light of the scope of future reforms.[19]

8.13 By contrast, the NSWLRC's recommendations about monitoring were much more comprehensive. It noted that community attitudes about sexual violence and consent can 'change rapidly and expert knowledge and opinion is produced and updated frequently'.[20] Consequently, it was of the view that regular (five-yearly) reviews of the reforms should be conducted, 'to ensure that the law continues to reflect experience and public expectations'.[21] It also recommended that the NSW Act require the reviews to be tabled in each House of Parliament within 12 months.[22]

8.14 Submissions to the NSWLRC had made various suggestions about who should conduct the reviews, such as ANROWS or an expert taskforce.[23] However, the NSWLRC was of the view that, consistent with common practice for statutory reviews, the reviews should be undertaken by the Minister responsible for the legislation.[24] It did, however, recommend that the Minister 'consult widely and draw on the expertise of such organisations in conducting the reviews'.[25] It was of the view that, at a minimum, the reviews should:

- Consider a wide range of perspectives from legal and non-legal sectors;
- Consider the experiences of complainants; and
- Be informed by research about sexual offences, including from NSW.[26]

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17 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.5].

18 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 91.

19 Ibid.

20 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.12].

21 Ibid.

22 Ibid Rec 10.1.

23 Ibid [10.13].

24 Ibid. The Minister currently responsible for the NSW Act is the NSW Attorney-General.

25 Ibid [10.14].

26 Ibid.

8.15 The NSWLRC recommended that in the reviews, the Minister should determine whether the policy objectives set out in the NSW Act 'remain valid and whether the terms of the provisions remain appropriate for securing those objectives'.[27] The reviews should consider issues such as whether the reforms have:

- Influenced the frequency with which arguments based on misconceptions about consensual and non-consensual sexual activity are used in sexual offence trials.
- Reduced the over-emphasis in trials on whether the complainant resisted or otherwise demonstrated a lack of consent.
- Enabled the law better to respond to situations in which a complainant 'freezes' and does not say or do anything to communicate consent.
- Improved the way the law treats sexual activity involving intoxicated complainants.
- Improved the way the law responds to non-consensual sexual activity occurring in the context of domestic and family violence.
- Led to a greater emphasis on whether the accused person took steps to ascertain consent and, if so, whether those steps were adequate.[28]

8.16 The NSWLRC noted that this list was not intended to be exhaustive: it was merely intended to provide an indication of some of the changes it sought to achieve through the implementation of the reforms.[29]

8.17 These recommendations were accepted by the NSW Government, which enacted section 583 of the NSW Act . This section applies to various definitions set out in the Act, such as 'sexual intercourse' and 'sexual touching', as well as to the provisions relating to consent and knowledge of consent (the reviewable provisions).[30] It provides that:

1) The Minister must conduct reviews of the reviewable provisions to identify if—
   a) the policy objectives of the reviewable provisions remain valid, and
   b) the terms of the reviewable provisions remain appropriate for securing the objectives.
2) In conducting the review, the Minister must consider the transcripts of criminal trials—
   a) conducted during the review period, and
   b) to which the reviewable provisions were applicable.
3) The first review must be commenced within 6 months after the period of 3 years after the commencement date.
4) Subsequent reviews must be commenced every 5 years after the end of the 6-month period.

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27 Ibid Rec 10.1.
28 Ibid [10.17].
29 Ibid [10.18].
30 The provision applies to sections 61H, 61HA, 61HB and 61HC of the *Crimes Act 1900* (NSW), as well as to the provisions contained in Part 3, Division 10, Subdivision 1A of that Act.

5) A report on the outcome of each review must be tabled in each House of Parliament within 1 year after the last day by which the review must be commenced.[31]

8.18 A similar provision was also enacted in relation to the sections of the *Criminal Procedure Act 1986* (NSW) which set out the jury directions which may be given in sexual offence cases.[32]

8.19 The NSW Government also enacted a provision directed at monitoring the training of relevant personnel. This provision states that:

> The Minister must, at least 6 months before each review, table in each House of Parliament a report on the training that has occurred during the review period in relation to communicative consent, detailing—
>
> a) the type of training provided, and
>
> b) the number and kinds of persons to whom it has been provided, including whether it has been provided to police officers, judicial officers or legal practitioners, and
>
> c) how effective the training has been.

8.20 We are interested to hear your views on whether we should make any recommendations related to the monitoring of any recommended reforms. If we are to do so, we are interested to hear what you think should be monitored, how frequently it should be monitored and by whom.

48. What recommendations, if any, should the Commission make about the monitoring of reforms?

Data collection

8.21 In its review of sexual offences, the VLRC clearly articulated the importance of data to the law reform process and the improvement of the criminal justice system more broadly:

> The challenges we faced in building an evidence base for our proposals demonstrate the need for more regularly published data. Without such data, it is difficult to know what is not working and how to deal with any problems. Such data will also improve transparency, enable a richer public debate about the criminal justice system, and provide a firmer foundation for reforms in the future. This could also improve the research base on the policing or prosecution of family, domestic and sexual violence.[33]

8.22 To improve the collection of data in the area, the VLRC recommended that an evaluation plan be developed during the early stages of reform implementation. The plan should address ways to collect data and to conduct research to measure the effectiveness of the reforms.[34]

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31 *Crimes Act 1900* (NSW) s 583.

32 *Criminal Procedure Act 1986* (NSW) s 368. This provision requires a review to be conducted in relation to sections 292–292E, 293A, 294, 294AA and 294CB of the Act. This includes consideration of the relationship between section 294CB of the *Criminal Procedure Act 1986* (NSW) and section 61HJ(1)(a) of the *Crimes Act 1900* (NSW).

33 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [6.71].

34 Ibid [6.98].

8.23 The VLRC also recommended that the Victorian Department of Justice and Community Safety 'establish a working group with a focus on improving information about the justice system's response to sexual offences'.[35] This working group should largely be comprised of people who work within the justice system, as such individuals are 'best placed to carry out functions that relate to their own organisations, such as identifying data needs'.[36] It recommended that the working group be involved in the design of key reforms, to ensure that they are designed 'with data collection in mind'.[37]

8.24 We are interested to hear your views on whether we should make any recommendations about data collection. If we are to make any recommendations, we are interested to hear what data you think should be collected, how it should be collected and by whom.

49. What recommendations, if any, should the Commission make about data collection?

Conclusion

8.25 Throughout this Discussion Paper we have presented various options for reform and asked numerous questions about the law of consent and the mistake of fact defence. We have also considered issues relating to objectives and guiding principles, jury directions, special verdicts, and the implementation and monitoring of reforms.

8.26 In Discussion Paper Volume 2 we will be focusing on the sexual offences that should be included in the *Code* and the penalties that should be set for those offences. We anticipate that Discussion Paper Volume 2 will be published on our website in February 2023.

8.27 It is not possible to comprehensively address all issues or reform possibilities, and you may think we have overlooked something important in the areas we have considered in this Discussion Paper. We welcome submissions on any matters we have not addressed.

50. Are there any issues or options for reform that have not been raised in the Discussion Paper that you think the Commission should consider?

[35] Ibid [6.72].
[36] Ibid.
[37] Ibid [6.73].

Appendix 1: List of Preliminary Submissions

1. Her Honour Chief Judge Julie Wager, District Court of Western Australia.
2. Office of Multicultural Interests.
3. Magenta.
4. Darren Kavanagh, WorkSafe Western Australia Commissioner.
5. Jacqueline McGowan-Jones, Commissioner for Children and Young People.
6. Council on the Ageing (WA).
7. Pride WA.
8. Health and Disability Services Complaints Office.
9. Sexual Assault Resource Centre and the Women's Health, Genetics and Mental Health Directorate.
10. WAAC.
11. Women's Legal Service WA.
12. Sexual Health Quarters.
13. The Law Society of Western Australia.
14. Centre for Women's Safety and Wellbeing.
15. WA Police.
16. ODPP.
17. Department of Health.
18. Ethnic Communities Council of Western Australia.

Appendix 2: List of Questions asked in the Discussion Paper

Chapter 1: Introduction

Terminology

1. What language should we use in our future publications to refer to incidents of sexual violence, the people who experience sexual violence, and the people who commit acts of sexual violence?

Commission's guiding principles

2. The Commission has identified six principles to guide its review:
    - Principle 1: Sexual offence laws should protect sexual autonomy and bodily integrity.
    - Principle 2: Sexual offence laws should protect people who are vulnerable to sexual exploitation.
    - Principle 3: Sexual offence laws should incorporate a model of shared responsibility.
    - Principle 4: Sexual offence laws should be non-discriminatory.
    - Principle 5: Sexual offence laws should be clear.
    - Principle 6: When reviewing sexual offence laws, the interests of complainants, accused people and the community must all be considered.

    Are these principles appropriate? Are there any other principles that should guide the Commission's review?

Chapter 3: Objectives and guiding principles

3. Should the *Code* specify objectives and/or guiding principles concerning sexual offending? Why/why not?
4. If the *Code* does specify objectives and/or guiding principles concerning sexual offending, how should the relevant provision(s) be framed?
5. If the *Code* does specify objectives and/or guiding principles concerning sexual offending, what should be included or excluded?

Chapter 4: Consent

Defining consent

6. Do any aspects of the current definition of consent give rise to particular concern or create problems in practice?
7. Should the *Code* define consent? If so, how should it be defined?

Communicating consent

8. Should the *Code* require participants to say or do something to indicate their consent to a sexual activity? If so, how should this requirement be framed?

Clarifying the meaning of consent

9. Should the *Code* clarify the meaning of consent in any way? For example, should it make it clear that a person does not consent only because they:
    - Failed to verbally resist;
    - Consented to a different act with the same person;
    - Had previously consented to a sexual activity with that person or someone else;
    - Had previously consented to a sexual activity of that kind or any other kind; and/or

- Had entered into an agreement for commercial sexual services?

If so, what matters should be addressed and how should they be addressed? For example, should they be addressed as part of the definition of consent and/or in jury directions?

10. Should the *Code* continue to list circumstances in which consent is not freely and voluntarily given, such as when it is obtained by force, threat or fraud? Why/why not?

Listing the circumstances in which consent is not freely and voluntarily given

11. The *Code* currently provides that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. Should this list of circumstances be amended in any way? For example, should the *Code*:
    a. Address cases in which a person is unconscious or asleep during a sexual act (see paras 4.80-4.83).
    b. Address cases in which a person participates in a sexual activity while intoxicated (see paras 4.84-4.98).
    c. Address other circumstances in which a person is incapable of consenting to a sexual act (see paras 4.70-4.79).
    d. Define the types of fraud or deceit which negate consent, such as fraud or deception about:
        i. The nature or purpose of the act (see paras 4.129-4.132 and 4.138-4.142).
        ii. The identity of the participants (see paras 4.133-4.137).
        iii. The marital status of the participants (see paras 4.143-4.146).
        iv. The use, disruption or removal of a condom or other device used to prevent pregnancy or sexually transmitted infections (see paras 4.147-4.174).
        v. Payment for sexual services (see paras 4.175-4.183).
        vi. The fertility of the participants (see paras 4.184-4.186).
        vii. The sexual health of the participants (see paras 4.199-4.209).
    e. Address cases in which a person has a mistaken belief about a matter, such as those listed in para d, which was not induced by the accused (see paras 4.120-4.128).
    f. Limit the application of the fraud, deception or mistake provisions to objectively or subjectively serious frauds, deceptions or mistaken beliefs (see paras 4.210-4.220).
    g. Exclude certain matters from the scope of the fraud, deception or mistake provisions, such as fraudulent or deceptive representations or mistaken beliefs about:
        i. A person's sex, sexual characteristics, gender identity, gender history, sexual orientation (see paras 4.187-4.198).
        ii. A person's sexual health (see paras 4.199-4.209).
        iii. Matters which may be considered trivial, such a person's wealth, occupation or feelings for the other participant (see paras 4.216-4.220).
    h. Provide that the fraud, deception or mistake provisions do not apply if the interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern (see paras 4.221-4.224).

i. Clarify the circumstances in which a person does not consent due to the use of force, threats or intimidation (see paras 4.227-4.250).

j. Address cases in which a person participates in a sexual activity due to other forms of pressure, such as coercive conduct or blackmail (see paras 4.227-4.250).

k. Address cases in which a person participates in a sexual activity due to having suffered harm (see paras 4.251-Error! Reference source not found.).

l. Address cases in which a person participates in a sexual activity due to fear of force or harm (see paras 4.254-4.258).

m. Address cases in which a person participates in a sexual activity during unlawful detention (see paras 4.259-4.261).

n. Address cases in which a person participates in a sexual activity with a person with whom they have a relationship of authority, trust or dependency (see paras 4.262-4.265).

If the list of circumstances is to be amended, how should the included circumstances be defined?

Timing of consent

12. Should the wording introducing the list of circumstances in which there is no consent be changed? If so, what wording should be used?

13. Should the *Code* specify when consent should be given? If so, should it specify that consent must be given at the time of the offence, or should it be permissible to give consent in advance?

Withdrawal of consent

14. Should the *Code* explicitly address the withdrawal of consent? If so, how should this be done? For example, should the provision require the withdrawal of consent to be communicated by words or conduct?

Application of the consent provision

15. Should the application of the consent provision be amended in any way?

Location of the consent provision

16. Should the consent provisions be put in a separate section of the *Code*?

Chapter 5: Mistake of Fact

Excluding operation of the mistake of fact defence

17. Should the law provide that the mistake of fact defence does not apply to sexual offences?

Making the mistake of fact defence more objective

18. Should the mistake of fact defence be made more objective, by providing that the jury should not take the accused's attributes and characteristics into account when determining whether their mistaken belief in consent was reasonable?

Providing legislative guidance on the assessment of reasonableness

19. Should the *Code* provide legislative guidance to assist juries to determine whether a mistaken belief in consent was reasonable? If so, what guidance should be provided? For example, should the *Code*:

    - Specify that, in determining whether an accused's belief in consent was reasonable, the jury:

- Must consider any of the accused's attributes or characteristics which could affect their appreciation or perception of the circumstances in which they found themselves.
- Must not consider the accused's values, whether they be informed by cultural, religious or other influences (see paras 5.47-5.52).

- Define the attributes or characteristics of the accused which the jury must consider (eg age, gender, disabilities, mental health problems) (see paras 5.53-5.57).
- Require the jury to consider the community's expectations in assessing the reasonableness of the accused's belief in consent (see paras 5.58-5.60).
- Prevent the jury from taking the accused's self-induced intoxication into account in determining whether the accused's belief was honest and/or reasonable (see paras 5.61-5.72).
- Define the circumstances in which the accused's intoxication will be considered self-induced (see paras 5.73-5.76).
- Specify that a belief in consent is not reasonable if it is based on general assumptions about the circumstances in which a person consents (see paras 5.77-5.78).
- Specify that a belief in consent is not reasonable if it is based on specific assumptions about consent, such as assumptions arising from the complainant's style or state of dress, consumption of alcohol or other drugs, silence or failure to physically resist, or previous engagement in sexual conduct with the accused or another person (see paras 5.79-5.81).
- Specify that a belief in consent is not reasonable if there is no evidence that the complainant said or did anything to indicate consent (see paras 5.82-5.85).
- Specify that a belief in consent is not reasonable if the accused knew or was aware of the existence of one of the listed circumstances in which consent is not freely and voluntarily given (see paras 5.86-5.90).
- Specify that a belief in consent is not reasonable if it arose from the accused's recklessness (see paras 5.91-5.96).

Addressing the measures the accused took to ascertain the complainant's consent

20. Should the *Code* provide that a belief in consent is not honest and/or reasonable if the accused did not take measures to ascertain the complainant's consent? If so, how should this requirement be framed? For example, should the relevant provision:
    - Refer to both the honesty and reasonableness of the accused's belief, or focus solely on the assessment of reasonableness.
    - Require the accused to have taken 'reasonable steps' to ascertain consent, or require them to have 'said or done something' to find out if the complainant consented.
    - Refer to the timing of the accused's measures to ascertain consent. For example, it could specify that the accused must have said or done something to ascertain consent at the time of the sexual activity, or within a reasonable time before that activity.
    - Make allowances for people whose capacity to actively seek consent may be impaired in some way. For example, it could specify that the provision does not apply if the accused has a cognitive impairment or mental illness, and that condition was a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to the sexual activity. The burden could be placed on the accused to prove these matters.

21. Should the *Code* require or permit the jury to consider any measures the accused took to ascertain consent in determining whether their belief in consent was honest and/or reasonable? If so, how should this provision be framed? For example, should the relevant provision:
    - Require the jury to consider any measures the accused took to ascertain consent or simply permit them to have regard to those measures.
    - Refer to the 'steps' the accused took to ascertain consent, or to anything the accused 'said or did' to find out if the complainant consented.
    - Refer to the timing of the accused's measures to ascertain consent. For example, it could refer to anything the accused said or did at the time of, or immediately before, the sexual activity.
    - Complement a provision requiring the accused to take measures to ascertain the complainant's consent or act as an alternative to such a provision.

Reversing the onus of proving the mistake of fact defence

22. Should the burden be placed on the accused to prove, on the balance of probabilities, that they honestly and reasonably believed the complainant was consenting?
23. Are there any other reforms that should be made to the mistake of fact defence?

Chapter 6: Jury Directions

Legislating jury directions

24. Should Western Australia legislate jury directions for sexual offence trials? Why/why not?

Directions about consent

25. Should there be a legislated jury direction about the meaning of consent in sexual offence cases and/or the circumstances in which a person does not consent? If so, what should that direction say? In what circumstances should it be given?

Directions about responses to sexual violence

26. Should there be a legislated jury direction about the way in which people may respond to sexual violence? If so, what should that direction say? In what circumstances should it be given?

Directions about the absence of injury, violence or threat

27. Should there be a legislated jury direction about the absence of injury, violence or threat? If so, what should that direction say? In what circumstances should it be given?

Directions about other sexual activity

28. Should there be a legislated jury direction about the relevance of other sexual activities in which a person has engaged? If so, what should that direction say? In what circumstances should it be given?

Directions about personal appearance and irrelevant conduct

29. Should there be a legislated jury direction about the assumptions that may not be drawn from the complainant's personal appearance or conduct? If so, what should that direction say? In what circumstances should it be given?

Directions about the relationship between perpetrators and victim-survivors

30. Should there be a legislated jury direction about the relationship between sexual offence perpetrators and people who experience sexual violence? If so, what should that direction say? In what circumstances should it be given?

Directions about reasonable belief

31. Should there be a legislated jury direction about the circumstances in which an accused's belief in mistake should not be considered reasonable? If so, what should that direction say? In what circumstances should it be given?

Directions about absent or delayed complaint

32. Are the current warnings specified in section 36BD of the *Evidence Act 1906* (WA), which relate to the use the jury may make of evidence that the complainant failed to complain or delayed in making a complaint, sufficient? If not, what should the provision state?

33. Should there continue to be a requirement for a Longman warning (warning the jury about the forensic disadvantages that have arisen from a delayed complaint) to be given in sexual offence trials? If so, should the terms in which the warning is given ben changed in any way?

Directions about differences in the complainant's accounts

34. Should there be a legislated jury direction about differences in the complainant's accounts? If so, what should that direction say? In what circumstances should it be given?

Directions about responses to giving evidence

35. Should there be a legislated jury direction about the ways in which complainants may respond to giving evidence? If so, what should that direction say? In what circumstances should it be given?

Directions about misconceptions

36. Should there be a legislated jury direction allowing judges to address misconceptions about sexual violence generally? If so, what should that direction say? In what circumstances should it be given?

Directions about unreliable witnesses

37. Should the law prohibit judges from warning the jury that certain complainants are, as a class, less credible or require more careful scrutiny than other complainants? If so, which complainants should the prohibition address?

Timing of directions

38. Should judges be required to given any directions at a specific time during the trial? If so, which directions should include a timing requirement? When should those directions be given?

Juror education

39. Should jurors be provided with education specific to sexual offending? If so, what should be the content of such education? How and when should it be delivered?

Use of expert witnesses

40. Should expert evidence on issues relating to sexual offending be admissible in Western Australia? If so, what should be the purpose of such evidence and what topics should it be permitted to cover?

41. If expert evidence on issues relating to sexual offending is to be admissible, should the legislature provide for the creation of a panel of approved experts?

Chapter 7: Special verdicts

Special verdicts on any question of fact

42. Should the *Code* empower judges to ask juries to return a special verdict in relation to any question that has arisen in a sexual offence trial? If so, should the provision permit juries to return a general verdict only and to decline to return a special verdict?

Special verdict on specific facts relevant to conviction

43. Should the *Code* empower judges to ask juries to return a special verdict on a specific fact relevant to conviction?

Special verdict of not guilty by reason of mistake of fact

44. Should the *Code* empower judges to ask juries to return a special verdict of not guilty by reason of mistake of fact in a sexual offence trial? If so, should the provision permit juries to return a general verdict only and to decline to return a special verdict on this issue?

Special verdict of not proven

45. Should the *Code* empower judges to ask juries to return a special verdict of not proven in a sexual offence trial? If so, when should the jury be permitted to return such a verdict?

Special verdict on the acts proven for the offence of persistent sexual conduce with a child under 16

46. Should the *Code* specifically empower or prohibit a judge from requiring a jury to deliver a special verdict about which sexual acts alleged by the prosecution had or had not been proved in a trial for an offence of persistent sexual conduct with a child under 16 years, or is no reform necessary in this regard?

Chapter 8: Implementation and monitoring

Education and training

47. What recommendations, if any, should the Commission make about education or training?

Monitoring of reforms

48. What recommendations, if any, should the Commission make about the monitoring of reforms?

Data collection

49. What recommendations, if any, should the Commission make about data collection?

Conclusion

50. Are there any issues or options for reform that have not been raised in the Discussion Paper that you think the Commission should consider?

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