THE LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Project 113
Sexual Offences

Final Report

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Contents

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Preface

Sexual violence is a widespread problem. The harmful effect of sexual violence is beyond dispute. It can have a profound impact on the health and wellbeing of those who experience it, as well as on their families and communities. The effects of sexual violence often impact all areas of a person's life and can be long-lasting. These effects can be particularly severe where sexual violence is experienced by children.

Sexual violence has become a topic of increasingly frequent public discourse, with much of that discussion centring on consent and what that means in the context of sexual activity. On an international scale, the #MeToo movement saw many victim-survivors share their experiences of sexual violence. In Australia, awareness of the prevalence and harm caused by sexual violence, and the push for change, has been further advanced by the considerable efforts of victim-survivor advocates. The Royal Commission into Institutional Responses to Child Sexual Abuse has also highlighted the vulnerability of children to sexual abuse, and the responsibility we each have as members of society to protect children from sexual abuse.

The need to effect meaningful law reform in this area and to reduce the incidence of sexual violence in our society has been recognised throughout Australia. By way of example, the various law reform bodies in a number of jurisdictions, including New South Wales, Queensland and Victoria have been tasked with considering law reform in this area. In May 2023, the Commonwealth Attorney General, the Hon Mark Dreyfus KC MP, announced a range of proposals to strengthen the way the criminal justice system responds to sexual assault and to prevent further harm to victims through the justice process, including the establishment of an Australian Law Reform Commission inquiry into justice responses to sexual violence, with a focus on law reform proposals to strengthen sexual assault laws and improve the outcomes and experiences of victims and survivors in the justice system.

In Western Australia, the primary legal framework governing sexual offending is Chapter XXXI of the Criminal Code. Chapter XXXI was inserted into the Criminal Code in 1985 as a response to a review undertaken by the late Hon Michael Murray QC AM in 1983. Prior to that, there was no specific chapter of the Criminal Code dealing with sexual offending (with offences instead being spread across other chapters of the Criminal Code and often expressed in gender specific terms), and no legislative definition of consent. Since the insertion of Chapter XXXI of the Criminal Code, only modest changes to the legislative framework for sexual offences have been made.

This Report reflects the Commission's review of Chapter XXXI of the Criminal Code and its recommendations for reform of those laws. This Report addresses how the criminal law can best deal with sexual violence by considering how our existing legal frameworks can be modernised and enhanced to better reflect community understanding and expectations in the area of sexual offending.

The criminal law is of course only one aspect of an effective approach to preventing and responding to sexual violence in society. Sexual violence is a complex and multifaceted issue, and properly addressing sexual violence requires an holistic approach to the social, cultural and systemic factors which underpin it.

In addition to this reference, the Attorney General has also asked the Office of the Commissioner for Victims of Crime to review the end to end criminal justice process for victim-survivors of sexual offending, and to lead the development of Western Australia's first Sexual Violence Prevention and Response Strategy. A draft of that strategy has, during the course of this reference, been released for public consultation by the Government. The Commission trusts that the recommendations contained in this Report will help guide the legal reform which is needed to complement that strategy and to ensure that Western Australia has in place the best frameworks possible to prevent and deter sexual violence, to hold accountable those who commit sexual violence and to ensure victim—survivors are supported throughout all aspects of the criminal justice process.

The issue of sexual violence in our communities is one that affects us all, yet there is no single, universal experience of sexual violence. With that in mind, the need for wide reaching public engagement on these issues has been at the forefront of the Commission's approach to this

reference. Law reform should be a public process, and especially so where the issues under consideration have specific implications for all individual members of the community. The Commission could not have fulfilled its responsibilities without members of the public investing their time and effort to contribute to this Report.

During the course of this reference, the Commission heard from a diverse cross section of the community. The Commission held a number of expert consultation forums with both legal and non-legal experts, from a variety of different backgrounds and experiences, and travelled to a range of regional locations across the State, including Albany, Kalgoorlie, Geraldton and Broome, to hear the specific viewpoints of those living in regional areas. We held a number of consultation sessions with individual organisations representing particular groups or interests, and held discussion forums with other Government and non-Government organisations who are involved in their day to day work in efforts to prevent sexual violence in Western Australia. The Commission invited submissions from the public, developed an online portal and survey and met with individual members of the public who wanted to contribute in person to this reference.

The Commission is grateful for the public's engagement in this reference, and for the commitment and dedication reflected both by participation in the consultation sessions, and in the many submissions received. In making its recommendations, the Commission has considered each of those consultations and submissions. The Commission particularly acknowledges the bravery of those victim-survivors who shared their own personal experiences of sexual violence, and their willingness to re-live very painful experiences to help inform the Commission's recommendations and bring about positive change.

The Commission is privileged to have received this reference from the Attorney General and to be given the opportunity to make recommendations to help guide effective reform in this area. The Commission recognises the significance of the responsibility that the Attorney General has entrusted to the Commission on behalf of the community, and has worked to ensure that this Report does justice to that responsibility.

Although the recommendations contained in this Report are those of the Commission, this Report reflects the contributions and hard work of many, each of whom are mentioned in our Acknowledgments. In particular, the immense contributions of Dr Jamie Walvisch and Amanda Blackburn, who have worked tirelessly and patiently with the three Commissioners over the course of the last 18 months to produce the Discussion Paper and this Report, cannot be overstated.

Implementation of the recommendations in this Report is a matter for the Government. It is our hope that the recommendations in this Report will ultimately form the basis for meaningful legislative change that supports and complements the Government's response to the Final Report of the Royal Commission into Institutional Responses to Child Sex Abuse and the Western Australian Sexual Violence Prevention and Response Strategy.

Hon. Lindy Jenkins

Dr Sarah Murray

Kirsten Chivers PSM

Recommendations

Consent

Defining consent

1. The *Code's* definition of consent should specify 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.
2. The term 'sexual activity' should be defined as an act of sexual penetration, an act of non-penetrative sexual touching, or a non-touching sexual act (regardless of whether there was an attempt or threat to touch).

Communicating consent

3. The *Code* should provide that a person does not consent to a sexual activity if they do not say or do anything to communicate that they agree to that activity. This should be included in the list of circumstances in which there is no consent to a sexual activity.

Negative indicators of consent

4. Section 319(2)(b) of the *Code* should be replaced by a provision which provides that 'a person does not consent to an activity with another person (the accused person) only because the person does not say or do something to resist or prevent the activity'.
5. The *Code* should provide that a person does not consent to a sexual activity with another person only because they consented to a sexual activity of the same type, or a sexual activity of a different type, with that person or any other person at any time.

Circumstances in which there is no consent

6. The *Code* should be amended to include an expanded list of circumstances in which, as a matter of law, there is no consent to a sexual activity.

Lack of capacity

7. The list of circumstances should provide that, as a matter of law, a child under 16 does not consent to a sexual activity. This provision should be made subject to a similar age defence if enacted. Section 319(2)(c) of the *Code* should be repealed.
8. The list of circumstances should provide that, as a matter of law, a person does not consent to a sexual activity if they are:
    - Asleep or unconscious;
    - So affected by alcohol or another drug as to be incapable of consenting to the activity or withdrawing consent to the activity; or
    - Incapable of understanding:
        - The physical nature or sexual character of the activity;
        - That they can choose whether or not to participate in the activity; or
        - That they can withdraw from the activity at any time.

Use of pressure

9. The list of circumstances should provide that, as a matter of law, a person does not consent to a sexual activity where the activity occurs because:
    - Force is used against that person, another person, an animal or property.
    - Explicit or implicit threats are made, by words or conduct, to cause serious harm of any kind to that person, another person, an animal or property.
    - Coercion, blackmail, extortion or intimidation are used in relation to that person or another person.
    - The person fears the use of force or the infliction of serious harm of any kind on that person, another person, an animal or property.
    - The person or another person is unlawfully detained.
    - The person is overborne by an abuse of a relationship of authority, trust or dependence.
10. The *Code* should provide that it does not matter when the relevant form of pressure is used, or whether it occurs as a single instance or as part of an ongoing pattern.

Lack of relevant information

11. The list of circumstances should provide that, as a matter of law, a person does not consent to a sexual activity where the activity occurs because the person had a mistaken belief about:
    - The nature of the sexual activity;
    - The identity of the other participant; or
    - The purpose of the relevant sexual activity, including a mistake about the sexual activity being for health, hygienic, cosmetic, religious or spiritual purposes.
12. The list of circumstances should not refer to sexual activity which is obtained by fraudulent or deceptive means. It should solely focus on sexual activity which occurs because of the complainant's mistaken belief.
13. The *Code* should not require the accused to have induced the mistaken belief or require the complainant's mistaken belief to have been reasonable in the circumstances.
14. The *Code* should make it clear that 'identity' is limited to who the person is. It does not refer to matters such as the person's sex, gender, gender history, profession or skill, or whether they have a particular attribute.

Non-consensual condom removal (stealthing)

15. The list of circumstances should provide that, as a matter of law, a person does not consent if they engage in a sexual activity on the basis that a condom is used, and either before or during the activity any other person involved in the activity intentionally removes the condom or tampers with the condom, or the person who was to use the condom intentionally does not use it.

Mistaken beliefs which do not negate consent

16. The *Code* should provide that consent is not negated only because a person had a mistaken belief about the other participant's income, wealth, age, feelings, marital status, sexual fidelity, race, ethnicity, cultural background, history of prior sexual activity, criminal record, gender history,

gender identity, birth sex, sexual orientation and/or that the other participant did not have an STI if there was no realistic risk that the STI could be transmitted during the sexual activity.

The timing of consent

17. The *Code* should require consent to be communicated at the time of the relevant sexual activity.

Withdrawal of consent

18. As part of the definition of consent, the *Code* should provide that a person may, by words or conduct, withdraw consent to a sexual activity at any time; and that sexual activity that occurs after consent has been withdrawn occurs without consent.
19. The withdrawal of consent provision should apply to all sexual offences that require proof of non-consent.

Mistake of Fact

Providing legislative guidance on the assessment of reasonableness

20. Legislative guidance should be provided about what constitutes a reasonable belief for the purposes of the mistake of fact defence in sexual offence cases.

Specifying relevant attributes and characteristics

21. The *Code* should specify an exhaustive list of the accused's attributes and characteristics that may be taken into account in assessing the reasonableness of a mistaken belief in consent.
22. The attributes and characteristics that may be taken into account in assessing the reasonableness of a mistaken belief in consent should be restricted to:
    - Intellectual disabilities;
    - Developmental disorders (including autism spectrum disorders and foetal alcohol spectrum disorders);
    - Neurological disorders;
    - Mental illnesses;
    - Brain injuries;
    - Dementia;
    - Physical disabilities; and
    - Where the offender is under 18, young age and immaturity.
23. The *Code* should specify that the effect that a listed attribute or characteristic had on the accused at the time of the relevant sexual activity may be taken into account in determining whether the accused's mistaken belief in consent was reasonable in the circumstances of the case.

Self-induced intoxication

24. The *Code* should provide that the jury should determine the reasonableness of a mistaken belief in consent according to the standards of a reasonable sober person, unless the person's

intoxication was involuntary.

Knowledge of listed circumstances of non-consent

25. The *Code* should provide that an accused did not have a mistaken belief in consent if they knew or believed in the existence of a circumstance included in the *Code's* list of circumstances in which there is no consent (including that the complainant had not said or done anything to communicate consent).

Taking measures to ascertain consent

26. The *Code* should provide that the accused's belief that the complainant consented to a sexual activity is not reasonable if the accused did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the complainant consented to that activity.
27. The *Code* should specify that the above provision does not apply if the accused can prove, on the balance of probabilities, that:
    - At the time of the relevant sexual activity, the accused had an intellectual disability, developmental disorder (including an autism spectrum disorder or foetal alcohol spectrum disorder), neurological disorder, mental illness, brain injury, dementia or physical disability, or the accused was under 18 and was young and immature; and
    - That attribute or characteristic was a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to that activity.
28. The *Code* should provide that when the jury considers all the relevant circumstances of the case to determine whether the accused's belief in consent was reasonable, it should consider what the accused said or did to find out whether the complainant consented to the relevant sexual activity.

Sexual offences involving adult victims

Reforming the penetrative offences

29. There should be two penetrative sexual offences: sexual penetration without consent and coerced sexual penetration.
30. The boundaries between the two penetrative sexual offences should be clarified so that:
    - The offence of sexual penetration without consent applies to all cases in which the accused and the complainant personally engage in a non-consensual act of sexual penetration, regardless of which party penetrates the other.
    - The offence of coerced sexual penetration applies to all cases in which the accused is a substantial cause of the complainant engaging in a non-consensual act of sexual penetration with a third party, an animal or themselves, regardless of which party penetrates the other.
31. It should be made clear that the *Code's* consent provisions apply to the offence of coerced sexual penetration.
32. There should be aggravated versions of the penetrative sexual offences.

Reforming the definitions of associated terms

33. The offence of sexual penetration without consent should be amended to apply where the accused 'engages in an act of sexual penetration' with the complainant without consent.
34. The offence of sexual coercion should be amended to apply where the accused substantially causes the complainant to 'engage in an act of sexual penetration' with a third party, an animal or themselves without consent.
35. The term 'to engage in an act of sexual penetration' should cover all penetrative sexual activity, regardless of whether:
    - The act involves the accused, a third party, an animal or the complainant alone.
    - The act involves an object or a body part.
    - The relevant person is the penetrating or penetrated party.
36. The term 'to engage in an act of sexual penetration' should be defined to mean:
    - The penetration, to any extent, of the genitalia or the anus by a body part or object; and
    - The application of the mouth or tongue to the genitalia or anus, regardless of whether there is any penetration.
37. Genitalia should be defined to mean:
    - Any area of the female genitalia inside the labia majora, or any similar part of an intersex person;
    - Any part of the male genitalia, including the penis and the scrotum, or any similar part of an intersex person; and
    - Any similar part of an animal.
38. The *Code* should specify that the definition of genitalia includes surgically constructed or altered genitalia.
39. The *Code* should provide that a person does not engage in an act of sexual penetration if the penetration is conducted solely for proper medical, hygienic or veterinary purposes.
40. The current definitions of 'to sexually penetrate' and 'to engage in sexual behaviour' should be repealed.

Renaming the sexual coercion offence

41. The offence of sexual coercion should be renamed ‘coerced sexual penetration’.

Reforming the non-penetrative offences

42. The offence of indecent assault should be replaced with two non-penetrative sexual offences:
    - Sexual act without consent, which should apply to all cases in which the accused and the complainant personally engage in a non-consensual non-penetrative sexual act, regardless of the role each party plays in that act.
    - Coerced sexual act, which should apply to all cases in which the accused is a substantial cause of the complainant engaging in a non-consensual non-penetrative sexual act with a third party, an animal or themselves, regardless of the role each party plays in that act.

43. The non-penetrative sexual offences should apply to all acts of:
    - Non-penetrative sexual touching; and
    - Non-touching sexual acts, regardless of whether there was an attempt or threat to touch.
44. For the purposes of the non-penetrative sexual offences, ‘sexual’ should be defined to refer to conduct that is carried out in circumstances where a reasonable person would consider it to be sexual. The *Code* should provide guidance on the matters that should be taken into account in making this assessment. These should include:
    - Whether the conduct involved a person's genital area, anal area or breasts;
    - Whether the person carrying out the conduct did so for the purpose of obtaining sexual arousal or sexual gratification; and
    - Whether any other aspect of the conduct, including the circumstances in which it was carried out, made it sexual.
45. For the purposes of the non-penetrative sexual offences, 'touching' should include touching a person with any part of the body or with anything else. It should include touching through anything, such as clothing.
46. The *Code* should provide that a person engages in a non-touching sexual act with another person if they do it in their presence.
47. Where it is alleged that the accused committed a non-touching sexual act, the offence of sexual act without consent should only apply if the accused intended that the act was seen or heard by the complainant.
48. The *Code* should provide that an act which is carried out solely for proper medical, hygienic or veterinary purposes is not a sexual act.
49. The *Code's* provisions concerning consent and the withdrawal of consent should apply to the non-penetrative sexual offences.
50. There should be aggravated versions of the non-penetrative sexual offences.

Reforming the offences involving adult lineal relatives

51. The sexual offences against adult lineal relatives should be separated from the sexual offences against child lineal relatives and de facto children.
52. The sexual offences against adult lineal relatives should be called sexual offences involving adult relative victims.
53. The sexual offences involving adult relative victims should be defined to protect adults from sexual offending by their adult:
    - Parents;
    - Grandparents;
    - Great-grandparents;
    - Children;
    - Grandchildren;
    - Great-grandchildren; or
    - Siblings.

54. The above relationships should be defined to include:
    - Genetic relationships;
    - Step-relationships;
    - De facto relationships; and
    - Adoptive relationships.
55. It should be a defence for the accused to prove, on the balance of probabilities, that at the time the offence was alleged to have been committed:
    - The accused was 18 or over;
    - The accused and the complainant's relationship was not a genetic or adoptive relationship; and
    - Neither party had ever been under the other party's care, supervision or authority.
56. The existing offences involving adult lineal relatives should be replaced with the following offences:
    - Sexual penetration by an adult involving an adult relative victim.
    - Coerced sexual penetration by an adult involving an adult relative victim.
    - Sexual act by an adult involving an adult relative victim.
    - Coerced sexual act by an adult involving an adult relative victim.
57. The offences against adult relative victims should be defined in identical terms to the revised general adult sexual offences, but with the following modifications:
    - The inclusion of a requirement that the complainant be an adult relative;
    - The inclusion of requirement that the accused be an adult;
    - The inclusion of a requirement that the accused knew the complainant was an adult relative; and
    - The removal of the requirement that the prosecution prove lack of consent.
58. There should be a defence to the offences involving adult relative victims which applies to cases in which the accused was sexually abused by the complainant when they were a child.
59. The presumptions in section 329(11) of the *Code* should continue to apply to the sexual offences involving adult lineal relatives.

Repealing the offence of procuring a person to be a prostitute

60. Section 191 of the *Code* (procuring a person to be a prostitute etc.) should be repealed.

Repealing the offence of procuring a person to have unlawful carnal knowledge by threat, fraud or administering drug

61. Section 192 of the *Code* (procuring a person to have unlawful carnal knowledge by threat, fraud or administering drug) should be repealed.

Enacting offences of obtaining sexual penetration by fraud and obtaining a sexual act by fraud

62. There should be two new offences of obtaining sexual penetration by fraud and obtaining a sexual act by fraud. The elements of these offences should be:
    - The accused made a false or misleading representation;
    - The false or misleading representation did not solely relate to the accused's income, wealth, age, feelings, marital status, sexual fidelity, race, ethnicity, cultural background, history of prior sexual activity, criminal record, gender history, gender identity, birth sex, sexual orientation and/or that the accused did not have an STI if there was no realistic risk that the STI could be transmitted during the sexual activity;
    - The accused knew or believed that the representation was false or misleading;
    - As a result of the representation, the complainant engaged in the relevant sexual activity (sexual penetration for the offence of obtaining sexual penetration by fraud; a non-penetrative sexual act for the offence of obtaining a sexual act by fraud); and
    - The accused intended that, as a result of the false or misleading representation, the complainant would take part in the relevant sexual activity.

Sexual offences involving child victims

Reforming the child sexual offences

63. The offences of sexual penetration of a child, procuring a child to engage in sexual behaviour, indecently dealing with a child and procuring a child to do an indecent act should be replaced by the following offences:
    - Sexual penetration involving a child victim.
    - Coerced sexual penetration involving a child victim.
    - Sexual act involving a child victim.
    - Coerced sexual act involving a child victim.
64. The child sexual offences should be defined in identical terms to the revised adult sexual offences, but with the following modifications:
    - The inclusion of an element relating to the complainant's age; and
    - The removal of the requirement that the prosecution prove lack of consent.
65. If a child grooming offence is not enacted, or is enacted other than in the form recommended by the Royal Commission, consideration should be given to retaining a version of the procuring offences.

Reforming the mistake of age defence

66. The requirement that the mistake of age defence is only available to accused persons who are within three years of the complainant's age should be removed.
67. The mistake of age defence should be amended to require the accused to prove, on the balance of probabilities, that:

- They took reasonable steps to ascertain the complainant's age;
- Their belief in the child's age was reasonable; and
- They honestly and reasonably believed that the complainant consented to the sexual activity in question.

Defining young person

68. For sexual offences involving children who are 16 or over the terms child or children should be replaced with young person or young people.

Defining care, supervision or authority

69. For the purposes of the sexual offences involving children who are 16 or over, the term 'care, supervision or authority' should be defined. The definition should be inclusive and should capture circumstances where, at the time of the sexual activity, the accused:
    - Was a teacher at a school or other educational institution, or a person with responsibility for students at a school or other educational institution, and the young person was a student at the school or other educational institution.
    - Had an established personal relationship with the young person in relation to the provision of religious, sporting, musical or other instruction, in which relationship the complainant was under the care, supervision or authority of the accused person.
    - Was the young person's employer.
    - Was the young person's youth worker.
    - Provided professional counselling to the young person.
    - Was a health service provider and the young person was the person's patient.
    - Was a carer for the young person if the young person had impaired decision-making ability.
    - Was an out-of-home carer.
    - Was employed in, or provided services in, an institution at which the young person was detained.
    - Was a police officer acting in the course of their duty in respect of the young person.
    - Had previously been in a relationship of care, supervision or authority with the young person, and the accused knew or ought to have known that was the case.

Enacting an offence of persistent sexual abuse of a young person

70. There should be a new offence of persistent sexual abuse of a young person. The elements of this offence should mirror the elements of section 321A of the *Code* (or any reformed offence involving children under 16) but should apply to children who are 16 or over and are under the accused's care, supervision or authority.

Reforming the sexual offences involving child lineal relatives and de facto children

71. The current sexual offences against child lineal relatives and de facto children should be amended so as to expressly protect children from sexual activity committed against them by their parents,

siblings, parents' siblings, grandparents, great-grandparents and great-great-grandparents, where the accused relative knows of the relationship.

72. The amended sexual offences against child lineal relatives and de facto children should be renamed 'Sexual offences involving child relative victims'.

73. The term 'child relative' should be defined to mean a child who is the accused's child, sibling, sibling's child, grandchild, great-grandchild or great-great-grandchild, where the relationship exists by reason of a:

    - Genetic relationship;
    - Step-relationship;
    - De-facto relationship;
    - Adoptive relationship;
    - Surrogate relationship; or
    - Foster relationship.

74. The definition of child relative should include relationships with a child which have ceased to exist at the time of the offending.

75. The existing offences involving child lineal relatives and de facto children should be replaced with the following offences:

    - Sexual penetration involving a child relative victim.
    - Coerced sexual penetration involving a child relative victim.
    - Sexual act involving a child relative victim.
    - Coerced sexual act involving a child relative victim.
    - Indecently recording a child relative victim.

76. The offences against child relative victims should have the same elements as the general child sexual offences, but should also require the prosecution to prove that:

    - The complainant was a child relative of the accused; and
    - The accused knew that the complainant was a child relative.

77. The presumptions in section 329(11) of the *Code* should continue to apply to the sexual offences involving child lineal relatives.

Repealing the offence of allowing a young person to be on premises for unlawful carnal knowledge

78. Section 186 of the *Code* (allowing a young person to be on premises for unlawful carnal knowledge) should be repealed.

Sexual offences involving vulnerable persons

Retaining sexual offences involving vulnerable persons

79. Specific offences against vulnerable persons should be retained.

Replacing incapable person with vulnerable person

80. All references in the *Code* to the term incapable person should be replaced with the term vulnerable person.

Defining vulnerable person

81. A vulnerable person should be defined as a person who, at the time of the relevant sexual activity:
    - Had an intellectual disability, developmental disorder (including an autism spectrum disorder or foetal alcohol spectrum disorder), neurological disorder, mental illness, brain injury and/or dementia; and
    - Due to one or more of those conditions, was incapable of:
        - Understanding the nature of the activity; or
        - Guarding themselves against sexual exploitation.
82. Mental illness should be defined in the same way that it is defined in the *Mental Health Act 2014* (WA).

Reforming the offences involving vulnerable persons

83. The offences of sexual penetration of an incapable person, procuring an incapable person to engage in sexual behaviour, indecently dealing with an incapable person and procuring an incapable person to do an indecent act should be replaced by the following offences:
    - Sexual penetration involving a vulnerable person.
    - Coerced sexual penetration involving a vulnerable person.
    - Sexual act involving a vulnerable person.
    - Coerced sexual act involving a vulnerable person.
84. The sexual offences should be defined in identical terms to the revised adult sexual offences, but with the following modifications:
    - The inclusion of an element requiring the victim to be a vulnerable person.
    - The inclusion of an element requiring the accused to have known, or ought to have known, that the complainant was a vulnerable person.
    - The removal of the requirement that the prosecution prove lack of consent.
85. If an offence of grooming a vulnerable person for sex is not enacted, consideration should be given to retaining a version of the procuring offences.

Enacting an offence of grooming a vulnerable person for sex

86. If Parliament enacts a broad grooming offence against children, we recommend that a new offence of grooming a vulnerable person for sex should be enacted. The offence should be framed in similar terms to the child grooming offence, but should apply to cases where the person groomed was a vulnerable person rather than a child.

Enacting an offence of persistent sexual conduct with a vulnerable person

87. There should be a new offence of persistent sexual abuse of a vulnerable person. The elements of this offence should mirror the elements of section 321A of the *Code* (or any reformed offence involving children under 16) but should apply to vulnerable persons. The offence should require proof that the accused knew or ought to have known the complainant was a vulnerable person.

Reforming the lawful marriage defence

88. The lawful marriage defence in section 330(10) of the *Code* should be repealed.

89. Should the lawful marriage defence in section 330(10) of the *Code* be retained, it should be expanded to refer to de facto partners as well as married persons.

Permitting vulnerable persons to engage in non-exploitative sexual activities

90. It should be a defence to a charge of a sexual offence against a vulnerable person for the accused to prove, on the balance of probabilities, that:

- The accused was also a vulnerable person;
- The complainant understood the nature of the relevant sexual activity;
- The complainant consented to the relevant sexual activity; and
- There was no sexual exploitation in the circumstances.

Aggravated offences and statutory alternatives

Reforming the statutory circumstances of aggravation

91. The circumstances of aggravation in section 319 of the *Code* should be amended to include the circumstance in which the complainant was under the accused's care, supervision or authority.

92. For the purposes of section 319 of the *Code*, the term 'care, supervision or authority' should be defined. The definition should be inclusive and should capture circumstances where, at the time of the sexual activity, the accused:

- Was a teacher at a school or other educational institution, or a person with responsibility for students at a school or other educational institution, and the complainant was a student at the school or educational institution.
- Had an established personal relationship with the complainant in relation to the provision of religious, sporting, musical or other instruction, in which relationship the complainant was under the care, supervision or authority of the accused person.
- Was the complainant's employer.
- Provided correctional services to the complainant in a correctional institution or the community.
- Provided professional counselling to the complainant.
- Was a health service provider and the complainant was the accused's patient.
- Was a carer for the complainant.
- Was employed in, or provided services in, an institution at which the complainant was

detained.

- Was a police officer acting in the course of their duty in respect of the complainant.

Statutory alternatives

93. The current approach to statutory alternatives should be applied to the reformed sexual offences, with appropriate modifications, including:
    - Adult sexual offences should be statutory alternatives to child sexual offences.
    - Sexual offences against adult lineal relatives should be statutory alternatives to sexual offences against vulnerable persons.
    - Assault should be a statutory alternative to the non-penetrative sexual offences.

Jury Directions

Jury directions about consent

94. There should be a legislated jury direction about consent which codifies the obligation of a judge to inform the jury of the *Code's* definition of consent.
95. There should be a legislated jury direction about the withdrawal of consent. The direction should inform the jury of the *Code's* approach to the withdrawal of consent.
96. There should be a legislated jury direction about the *Code's* listed circumstances in which there is no consent. The direction should:
    - Explain the relevant circumstance; and
    - Inform the jury that if it finds the circumstance has been proven beyond reasonable doubt, it must find the complainant did not consent to the relevant sexual activity.
97. There should be a legislated jury direction about the matters which the *Code* specifies do not negate consent. The direction should inform the jury that consent is not negated only because a person had a mistaken belief about the relevant matters.

Jury directions about responses to sexual violence

98. There should be a legislated jury direction about responses to sexual violence. The direction should:
    - Inform the jury that there is no typical or normal response to non-consensual sexual activity.
    - Provide relevant examples of typical or normal responses to non-consensual sexual activity, such as physically or verbally resisting the activity, freezing or not saying or doing anything, or saying or doing things that are co-operative or friendly.
    - Direct the jury that they must not draw conclusions from the evidence based on a view that there is a typical or normal response to a non-consensual sexual activity.

Jury directions about the absence of injury, violence or threat

99. There should be a legislated jury direction about the absence of injury, violence or threat. The direction should inform the jury that:

- 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
- 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.

Jury directions about the complainant's other sexual activities

100. There should be a legislated jury direction about a person's other sexual activities. The direction should inform the jury that a person does not consent to a sexual activity with another person only because they consented to a sexual activity of the same type, or a sexual activity of a different type, with that person or any other person at any time.

Jury directions about personal appearance and irrelevant conduct

101. There should be a legislated jury direction about personal appearance and irrelevant conduct. The direction should inform the jury that they must not reason that a person consented to a sexual activity only because the person:
    - Wore particular clothing;
    - Had a particular appearance;
    - Drank alcohol or took any other drug;
    - Was present in a particular location; or
    - Acted flirtatiously.

Jury directions about the relationship between perpetrators and victim-survivors

102. There should be a legislated jury direction about the relationship between perpetrators and victim-survivors. The direction should inform the jury that:
    - There are many different circumstances in which people do and do not consent to a sexual activity.
    - Sexual activity can occur without consent between all sorts of people, including—
        - People who know each other.
        - People who are married to each other.
        - People who are in a relationship with each other.
        - People who provide commercial sexual services and the people for whom they provide those services.
        - People of the same or different sexual orientations.
        - People of any gender identity.
    - It is not uncommon for people who are subjected to sexual violence to continue a relationship with or to continue to communicate with the perpetrator.

Jury directions about the mistake of fact defence

103. There should be a legislated jury direction about the mistake of fact defence in sexual offence

trials. The direction should codify the obligation of a judge, when there is evidence which raises the mistake of fact defence, to direct the jury in accordance with the *Code's* mistake of fact provisions.

Jury directions about inconsistent statements

104. There should be a legislated jury direction about inconsistent statements in sexual offence trials. The direction should:
    - Tell the jury that if it finds that a witness previously said something which was inconsistent with the evidence the witness gave in court, it can take the inconsistency into account when assessing the witness's credibility and reliability.
    - Inform the jury that:
        - People may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time.
        - Trauma may affect people differently, including affecting how they recall events.
        - It is common for there to be differences in accounts of a sexual offence.
        - Both truthful and untruthful accounts of an event may contain differences.
        - A 'difference' in an account means:
            - A gap in the account.
            - An inconsistency in the account.
            - A difference between the account and another account.

Jury directions about giving evidence

105. There should be a legislated jury direction about giving evidence. The direction should inform the jury that:
    - Trauma affects people differently. This means that a person who has experienced a traumatic event may or may not show obvious signs of emotion or distress when giving evidence.
    - Both truthful and untruthful accounts of an alleged sexual offence may be given with or without obvious signs of emotion or distress.

Jury directions about delayed complaint and credibility

106. The Government should give effect to the Royal Commission's recommendations on delayed complaint and credibility in sexual offence trials, which state that:
    - There should be 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.
    - 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'.

107. There should be a legislated jury direction in sexual offence trials about the reporting of complaints. The direction should provide that:

- 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.
- There may be good reasons why a person may not complain, or may delay complaining, about a sexual offence.

Jury directions about forensic disadvantage

108. There should be a legislative provision addressing forensic disadvantage which mirrors section 165B of the *Evidence Act 1995* (NSW), which states:

(1) This section applies in a criminal proceeding in which there is a jury.

(2) If the court is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge 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.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.

(6) For the purposes of this section:

(a) delay includes delay between the alleged offence and its being reported; and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

(7) The factors that may be regarded as establishing a significant forensic disadvantage include, but are not limited to, the following:

(a) the fact that any potential witnesses have died or are not able to be located;

(b) the fact that any potential evidence has been lost or is otherwise unavailable.

Jury directions about unreliable witnesses

109. There should be a legislative provision addressing unreliable witnesses in sexual offence trials which mirrors *Jury Directions Act 2015* (Vic) section 51(1), which provides that the trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury 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.
    - 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.

Circumstances in which jury directions should be given

110. Judges should be required to give the legislated jury directions:

    - If there is a good reason to do so; or
    - If requested by a party, unless there is a good reason not to give the direction.

111. Judges should not be required to use a prescribed form of words when giving a legislated jury direction.

Allowing expert evidence on sexual violence to be given in sexual offence trials

112. Legislation should provide that expert evidence on the subject of sexual violence is admissible in sexual offence trials. The relevant provision should be drafted in similar terms to section 39 of the *Evidence Act 1906* (WA), and should provide that:

    - Evidence given by the expert may include —
        - Evidence about the nature of sexual violence;
        - Evidence about the effects of sexual violence on any person; and
        - Evidence about the effects of sexual violence on a particular person who has been the subject of sexual violence.
    - An expert on the subject of sexual violence includes a person who can demonstrate specialised knowledge, gained by training, study or experience, of any matter that may constitute evidence of sexual violence.

Penalties

Care, supervision or authority

113. The *Code* should not specify that the maximum penalty for sexual offences against children 13 to under 16 or vulnerable people increases where the child or vulnerable person was under the

offender's care, supervision or authority at the time of the offence. This should be a matter that is taken into account as part of the general sentencing determination.

114. The base maximum penalties for sexual offences committed against children 13 to under 16 and vulnerable people should be increased, to provide judicial officers with sufficient flexibility to take the issue of care, supervision or authority into account in appropriate cases.

Child offenders

115. If a similar age defence is enacted that apples to offences against children 13 to under 16, the provisions which provide a lower maximum penalty for children convicted of those offences should be repealed.

Maximum penalties

Sexual offences involving adults

116. The maximum penalties for the penetrative sexual offences against adults should be as follows:
    - Sexual penetration without consent: 15 years' imprisonment.
    - Aggravated sexual penetration without consent: 20 years' imprisonment.
    - Coerced sexual penetration: 15 years' imprisonment.
    - Aggravated coerced sexual penetration: 20 years' imprisonment.
    - Obtaining sexual penetration by fraud: 10 years' imprisonment.
117. The maximum penalties for the non-penetrative sexual offences against adults should be as follows:
    - Sexual act without consent: 7 years' imprisonment.
    - Aggravated sexual act without consent: 10 years' imprisonment.
    - Coerced sexual act: 7 years' imprisonment.
    - Aggravated coerced sexual act: 10 years' imprisonment.
    - Obtaining a sexual act by fraud: 5 years' imprisonment.
118. The maximum summary conviction penalties for the non-penetrative sexual offences against adults should be:
    - 2 years' imprisonment for the base offences.
    - 3 years' imprisonment for the aggravated offences.

Sexual offences involving children

119. The maximum penalties for the penetrative sexual offences against children should be as follows:
    - Sexual penetration involving a child victim under 13: 22 years' imprisonment.
    - Sexual penetration involving a child victim 13 to under 16: 20 years' imprisonment.
    - Sexual penetration involving a child victim 16 or over who is under the offender's care, supervision or authority: 15 years' imprisonment.

- Coerced sexual penetration involving a child victim under 13: 22 years' imprisonment.
- Coerced sexual penetration involving a child victim 13 to under 16: 20 years' imprisonment.
- Coerced sexual penetration involving a child victim 16 or over who is under the offender's care, supervision or authority: 15 years' imprisonment.

120. The maximum penalties for the non-penetrative sexual offences against children should be as follows:
    - Sexual act involving a child victim under 13: 12 years' imprisonment.
    - Sexual act involving a child victim 13 to under 16: 10 years' imprisonment.
    - Sexual act involving a child victim 16 or over who is under the offender's care, supervision or authority: 7 years' imprisonment.
    - Coerced sexual act involving a child victim under 13: 12 years' imprisonment.
    - Coerced sexual act involving a child victim 13 to under 16: 10 years' imprisonment.
    - Coerced sexual act involving a child victim 16 or over who is under the offender's care, supervision or authority: 7 years' imprisonment.
121. The maximum penalties for indecently recording a child should be as follows:
    - Indecently recording a child under 13: 12 years' imprisonment.
    - Indecently recording a child 13 to under 16: 10 years' imprisonment.
    - Indecently recording a child 16 or over who is under the offender's care, supervision or authority: 7 years' imprisonment.

Persistent sexual abuse offences

122. The maximum penalties for the persistent sexual abuse offences should be as follows:
    - Persistent sexual abuse of a child under 16: 25 years' imprisonment.
    - Persistent sexual abuse of a vulnerable person: 25 years' imprisonment.
    - Persistent sexual abuse of a child 16 or over who is under the care, supervision or authority of the offender: 20 years' imprisonment.

Sexual offences involving relatives

123. The maximum penalties for the offences against child relatives should be as follows:
    - Sexual penetration of a child relative: 22 years' imprisonment.
    - Coerced sexual penetration of a child relative: 22 years' imprisonment.
    - Sexual act with a child relative: 12 years' imprisonment.
    - Coerced sexual act with a child relative: 12 years' imprisonment.
    - Indecently recording a child relative: 12 years' imprisonment.
124. The maximum penalties for each of the offences by adults against adult lineal relatives should be 3 years' imprisonment.

Sexual offences involving vulnerable persons

125. The maximum penalties for the offences against vulnerable people should be as follows:

- Sexual penetration of a vulnerable person: 20 years' imprisonment.
- Coerced sexual penetration of a vulnerable person: 20 years' imprisonment.
- Sexual act with a vulnerable person: 10 years' imprisonment.
- Coerced sexual act with a vulnerable person: 10 years' imprisonment.
- Indecently recording a vulnerable person: 10 years' imprisonment.
- Grooming a vulnerable person for sex: 10 years' imprisonment.

Sexual servitude and deceptive recruiting for commercial sexual services offences

126. The base maximum penalties for the sexual servitude and deceptive recruiting for commercial sexual services offences should be as follows:

- Sexual servitude: 15 years' imprisonment.
- Sexual servitude where the victim-survivor is a child or a vulnerable person: 22 years' imprisonment.
- Conducting a business involving sexual servitude: 15 years' imprisonment.
- Conducting a business involving sexual servitude where the victim-survivor is a child or a vulnerable person: 22 years' imprisonment.
- Deceptive recruiting for commercial sexual service: 10 years' imprisonment.
- Deceptive recruiting for commercial sexual service where the victim-survivor is a child or a vulnerable person: 22 years' imprisonment.

Mandatory penalties for aggravated home burglaries

127. The provisions mandating that specific penalties must be imposed if a sexual offence is committed during an aggravated home burglary should be repealed. The fact that a sexual offence is committed during an aggravated home burglary should instead be added to the list of statutory aggravating circumstances in section 319(1) of the *Code*.

Rebuttable sentencing presumptions

128. The *Code* should provide that a term of immediate imprisonment will be imposed for the following offences, unless there are exceptional circumstances:

- All penetrative sexual offences, other than the offence of obtaining sexual penetration by fraud.
- All persistent sexual abuse offences.
- All sexual servitude offences.

Implementation and monitoring

Education and training

129. The Government should develop and deliver a program to educate and train police, lawyers and judicial officers on:
    - The objectives of any implemented reforms; and
    - How the reforms change the law.
130. The Government should develop and deliver a program to educate and train police, lawyers and judicial officers on:
    - The nature and prevalence of sexual violence in the community, including the relationship between sexual violence and intimate partner violence;
    - The effects of trauma on victim-survivors of sexual violence, including the freeze and the befriend or fawn responses;
    - Ways of reducing the risks of further traumatising victim-survivors of sexual violence;
    - Barriers to disclosing and reporting sexual violence;
    - Identifying and countering misconceptions about sexual violence;
    - How to respond to diverse experiences and contexts of sexual violence; and
    - How to effectively communicate with and question victim-survivors of sexual violence, including children.

Monitoring

131. The Government should conduct a review within five years of implementing any reforms to determine the effectiveness of those reforms. In conducting this review, the Government should consider whether the reforms have:
    - Achieved the aims of modernising, simplifying and clarifying sex offence laws; and
    - Improved the criminal trial process for sexual offences.
132. The Government should conduct reviews every seven years after the first and subsequent reviews to determine whether Western Australia's sexual offence laws and related procedural statutory provisions should be:
    - Modernised, simplified and clarified; or
    - Amended to improve the criminal trial process for sexual offences.

Data collection

133. The Government should, at an early stage, develop and implement a plan for:
    - Collecting data and conducting research targeted at measuring the effectiveness of any implemented reforms; and
    - Collecting data about participants' (particularly victim-survivors') experiences of each stage of the justice system which can be used to guide future legal reform that may be required.
134. The Government should ensure that:

- Data is collected only for specifically identified purposes;
- The data collection process is sensitive to the independence of the judiciary and any other relevant independent agencies; and
- All collected data is de-identified, sensitive to the privacy of participants, and pays heed to the ethical requirements surrounding its collection.

List of Defined Terms

ABS	Australian Bureau of Statistics.
Absence of complaint	A failure by the complainant to tell anyone about an alleged incident of sexual violence.
Accused person / the accused	A person against whom criminal charges have been brought but not completed.
ACT	*Crimes Act 1900* (ACT).
Affirmative model of consent / affirmative consent	A model of consent where participants not only communicate consent, but also actively seek the consent of the other participant to a sexual activity.
AFLSWA	Aboriginal Family Legal Services of Western Australia.
Aggravated sexual offences	More serious versions of certain sexual offences, which have identical elements to the basic versions of the offences except they include an additional element that the prosecution must prove beyond reasonable doubt: that the offence was committed in a statutorily defined circumstance of aggravation. An aggravated sexual offence has a higher maximum penalty than the basic version of the same offence.
Aggravating factors	Factors identified for the purpose of sentencing an offender which make an offence more serious and weigh in favour of the imposition of a more serious sentence.
ALS	Aboriginal Legal Service of Western Australia Limited.
ANROWS	Australia's National Research Organisation for Women's Safety.
ALRC	Australian Law Reform Commission.
Background Paper	S Tarrant, H Douglas and H Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022).
Birth sex	The physical or biological characteristics with which a participant was born.
CWSW	Centre for Women's Safety and Wellbeing.
The *Code*	*Criminal Code Compilation Act 1913* (WA).

Code jurisdiction	Jurisdiction in which the criminal law has been codified, such as Western Australia and Queensland.
The Commission/we	The Law Reform Commission of Western Australia.
Common law jurisdiction	Jurisdiction which relies on a combination of the common law and statute law, such as Victoria and NSW.
Communicative model of consent	A model of consent where participants actively display their willingness to engage in a sexual activity by words or conduct.
Community Expert Group	An expert reference group formed to assist the Commission, consisting of non-legal professionals with expertise in social or cultural issues relevant to Project 113.
Communities	Department of Communities.
Complainant	The person against whom a sexual offence is alleged to have been committed. This term is used where a complaint of sexual violence has been made to the police, or a sexual offence charge has been laid.
Criminal Procedure Act	*Criminal Procedure Act 2004* (WA).
Delayed complaint	A complaint about an alleged incident of sexual violence where there is evidence that suggests that the complainant did not immediately make a complaint about the alleged incident of sexual violence.
Discussion Paper Volume 1	Law Reform Commission of Western Australia, *Sexual Offences: Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact* (Project 113, Dec 2022)).
Discussion Paper Volume 2	Law Reform Commission of Western Australia, *Sexual Offences*: *Discussion Paper Volume 2: Offences and Maximum Penalties* (Project 113, Dec 2022).
Discussion Paper	Volume 1 and Volume 2 of the Commission's Sexual Offences Discussion Paper.
Evidence Act	*Evidence Act 1906* (WA).
Fraud provision	The part of section 319(2) of the *Code* which states that consent is not freely and voluntarily given if it is obtained by deceit or any fraudulent means.
Functional approach	An approach to describing the victims to whom sexual offences against vulnerable people apply. According to the functional approach, the capacity to agree to engage in sexual activity is the ability, with suitable assistance if needed, to understand the nature and consequences of a

	decision within the context of the available range of choices; and to communicate that decision. The functional approach recognises that capacity or lack of capacity is not a permanent state but may fluctuate. It can be contrasted with the status approach.
Gender history	A participant's previous gender-related identity or identities.
Gender identity	A participant's current personal sense of their gender.
General verdict	A verdict after a trial of a criminal charge of guilty or not guilty.
ILRC	Irish Law Reform Commission.
Intimate partner sexual violence	Sexual violence committed within the context of an intimate relationship, including domestic partnerships and dates.
JIRS	Judicial Information Research System.
Lawful marriage defence	A defence which applies where the accused and the complainant were married to each other.
Legal Aid	Legal Aid Western Australia.
Legal Expert Group	An expert reference group formed to assist the Commission consisting of legal professionals and legal academics with experience relevant to Project 113.
LGBTIQA+	Lesbian, gay, bisexual, transgender, intersex, queer, asexual and other diverse sexual orientations and gender identities.
List of circumstances	Factual circumstances specified in sexual offences legislation; if the jury finds they existed, it means there was no consent to the sexual activity that is the subject of a charge. In Western Australia, these circumstances are currently listed in section 319(2) of the *Code*.
Longman warning / Longman direction	A common law requirement where there is evidence suggesting that the accused has suffered a forensic disadvantage as a result of a delay in making a complaint. The judge must instruct the jury that 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.
Mistake of age defence	A defence to a sexual offence that requires proof that the accused was mistaken about the age of a child complainant. In Western Australia there is a mistake of age defence in sections 321(9) and 321A(9) of the

	Code, which applies to charges under sections 321 and 321A of the *Code*. For the defence to succeed the accused must prove, on the balance of probabilities, that they believed on reasonable grounds that the child was 16 or over, and they were not more than three years older than the child.
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, the mistake most often raised is that the accused made an honest and reasonable mistake about the complainant's consent. Unless otherwise specified, references to the mistake of fact defence in this Report should be read as references to the mistaken belief in consent defence.
Mitigating factors	Factors identified for the purpose of sentencing an offender which make an offence less serious and weigh in favour of the imposition of a more lenient sentence.
Mixed element	The requirement of the mistake of fact defence that the accused's belief that the complainant consented was reasonable. It is referred to as the mixed element because it contains both subjective and objective elements.
NASASV	National Association of Services Against Sexual Violence.
National Plan	*National Plan to End Violence Against Women and Children 2022-2032*.
Negative indicators	Factual circumstances which sexual offence legislation specifies are not, of themselves, sufficient to constitute consent. The *Code* currently contains one negative indicator in section 319(2)(b).
NSW Act	*Crimes Act 1900* (NSW).
NSWLRC	New South Wales Law Reform Commission.
OCVOC	Office of the Commissioner for Victims of Crime, Western Australia.
ODPP	Office of the Director of Public Prosecutions for Western Australia.
Offender	A person who has been convicted of a sexual offence.
Online survey	An online portal which allowed individual and organisational stakeholders to respond to a series of questions drawn from Discussion Paper Volume 1.
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.

Project 113	The Commission's review of Western Australia's sexual offence laws.
Prostitution Act	*Prostitution Act 2000* (WA).
Public Health Act	*Public Health Act 2016* (WA).
Queensland Code	*Criminal Code Act 1899* (Qld).
QLRC	Queensland Law Reform Commission.
Queensland Taskforce	Queensland Women's Safety and Justice Taskforce.
RASARA	Rape and Sexual Assault Research and Advocacy Ltd.
Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse.
Sentencing Act	*Sentencing Act 1995* (WA).
Sex characteristics	The physical features relating to sex that a participant has at the time of the sexual activity.
Sexual activity	Depending on the context, includes an act of sexual penetration, an act of non-penetrative sexual touching, or a non-touching sexual act (regardless of whether there was an attempt or threat to touch). It may refer to a single act or a combination of acts, depending on the context. The terms sexual penetration, sexual touching and non-touching sexual act have the meanings recommended in Chapter 6 of this Report. In recommendations, sexual activity is used where the recommendation applies to a singular act of sexual penetration, non-penetrative sexual touching, or a non-touching sexual act the subject of a charge.
Sexual offences committed under the accused's care	Sexual offences for which the maximum penalties increase if the complainant was under the offender's care, supervision or authority.
Sexual orientation	A participant's emotional, affectional or sexual attraction to people of a different gender, the same gender or more than one gender.
Sexual violence	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 the use of physical force or aggression or resulted in bodily injury.
Similar age defence	A defence which exists in some jurisdictions which excuses an accused from criminal responsibility for charges against a child complainant on the basis they are close in age to the child.

Special verdict	A verdict about a fact relevant to the charge.
Statistical Analysis Report	J Clare, *Project 113: Sexual Offences Statistical Analysis Report* (Law Reform Commission of Western Australia, 2023).
Status approach	An approach to describing the victims to whom sexual offences against vulnerable people apply. According to the status approach a person is unable to agree to engage in sexual activity if they have a specified condition (for example, a mental impairment). It can be contrasted with the functional approach.
Statutory alternative	An offence which the *Code* or other legislation specifies that a jury may automatically consider if it finds that the accused is not guilty of the offence listed on the indictment.
Stealthing	A situation where a person consents to a sexual activity 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 activity.
STI	Sexually transmissible infection.
Subjective element	The requirement of the mistake of fact defence that at the time of the relevant sexual activity the accused must hold a positive belief that the complainant is consenting to the sexual activity.
Tasmanian Code	*Criminal Code Act 1924* (Tas).
Terms of Reference	The issues and areas of law that the Attorney General of Western Australia referred to the Commission to review as Project 113.
Transcript review project	A project undertaken by the Commission to analyse data from every sexual offence trial (after a plea of not guilty) which took place before the District Court of Western Australia in 2019.
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities.
Victim-survivor	A person who has experienced any type of sexual violence.
Victorian Jury Directions Act	*Jury Directions Act 2015* (Vic).
Victorian Act	*Crimes Act 1958* (Vic).
VLRC	Victorian Law Reform Commission.
WA Police	Western Australian Police Force.

WLSWA	Women's Legal Service of Western Australia.
Young Offenders Act	*Young Offenders Act 1994* (WA).
Young person	A child who is 16 or 17.

1. Introduction

Chapter overview

This Chapter explains the background to this project, explains the Commission's Terms of Reference and methodology, and sets out the structure of this Report.

Terms of Reference

1.1 In February 2022, the Law Reform Commission of Western Australia (the **Commission**) was asked by the Attorney General to review Chapter XXXI of the *Criminal Code Compilation Act 1913* (WA) (the ***Code***), as well as sections 186, 191 and 192 of the *Code*, and to 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.

1.2 In carrying out its review, the Commission was asked to 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.

1.3 In June 2023, these **Terms of Reference** were amended having regard to the in-principle support of the Western Australian Government to address certain matters arising out of the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (the **Royal Commission**). The amendment provided that we should not review or report on the following matters:

- Section 321A of the *Code* (persistent sexual conduct with a child under 16 years), including related evidentiary provisions and the maximum penalty for the offence.
- Similar age defence to Section 321 of the *Code* (sexual offences against a child over 13 but under 16 years).
- New offence of grooming a child or other person under whose care, supervision or authority the child is under, for sex.

- New offence of failing to protect a child from sexual abuse in an institution, and concealing and failing to report child sexual abuse.

1.4 As a consequence of the amendment this Report does not contain discussions or recommendations about the excised matters.

1.5 We note that some of the excised issues were canvassed in our Discussion Paper and that stakeholder submissions were made in relation to them prior to the amendment of the Terms of Reference. We appreciate the efforts of stakeholders to engage on those issues and their willingness to contribute to meaningful reform.

1.6 We also note that in some instances it has been necessary to explain certain assumptions that we have made about the likely substance of any proposed reforms that the Government may introduce as a consequence of its in-principle acceptance of the recommendations of the Royal Commission. These assumptions do not reflect any position that will be adopted by Government. We have tried to identify any assumptions that underpin recommendations made in this Report. If our assumptions are inaccurate, our recommendations on some issues might need to be modified accordingly.

1.7 While the Terms of Reference provided us with broad scope to consider Western Australia's sexual offence laws, there were some related offences we could not examine, such as child exploitation offences, pornography offences and other image-based offences. The Terms of Reference also did not permit us to examine the various other legal and non-legal measures that play a key role in the ways we respond to sexual violence. For example, we were not able to examine processes for reporting allegations of sexual offending, for investigating such allegations, or for charging and prosecuting perpetrators. We also were not able to consider inchoate offences (such as attempts), evidentiary issues (such as measures to protect **complainants**[1] in court), alternative justice avenues (such as the use of restorative justice mechanisms), or post-sentence measures (such as sex offender registration).[2]

1.8 We recognise that properly addressing sexual violence is a complex task requiring a holistic approach from government and the community to address the various social, cultural and systemic factors that allow sexual violence to thrive. We acknowledge stakeholder concerns about the narrow focus of our review and agree that simply changing the law 'will not improve outcomes for victim-survivors without significant and meaningful justice system reform'.[3] In this regard, however, we want to emphasise that while we were unable to examine these broader systemic issues, that does not mean that we consider them to be unimportant or that they have been overlooked by the Government. They are currently being addressed by the Office of the Commissioner for Victims of Crime (**OCVOC**) in a separate 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. The Attorney-General has also asked OCVOC to lead the development of Western Australia's first sexual violence prevention and response strategy.[4]

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1 A complainant is a person against whom a sexual offence is alleged to have been committed. This term is used where a complaint of sexual violence has been made to the police, or a sexual offence charge has been laid. See Chapter 2 for further discussion of this term.

2 For detailed information about the scope of the project, see Discussion Paper 1 (Law Reform Commission of Western Australia, *Sexual Offences: Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact* (Project 113, Dec 2022)), [1.46]-[1.55].

3 See, eg, Portal Submission P36 (WLSWA).

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

Background to this project

1.9 In this section we set out the background to this reference which explains why sexual offence law reform is necessary in Western Australia.

Sexual violence is a widespread problem

1.10 The Australian Bureau of Statistics (**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]

1.11 Recent findings by Australia's National Research Organisation for Women's Safety (**ANROWS**) suggest that these figures may under-estimate the extent of the problem: that 'women experience sexual violence at a much higher prevalence than has been previously reported at the national level, especially among younger women'.[6] ANROWS found that the lifetime prevalence of experiencing sexual violence was 51% of women in their twenties; 34% of women in their forties; and 26% of women aged 68 to 73.[7]

1.12 Data provided by the Western Australian Police Force (**WA Police**) indicates that sexual offending against children occurs at a greater rate than sexual offending against adults: between 2017 and October 2022, WA Police laid more than twice as many charges of sexual offences against child complainants than against adult complainants.[8] In 2019 the District Court of Western Australia tried[9] 121 charges of sexual offences against adults, compared with 624 charges of sexual offences against children.[10]

1.13 There is some evidence that sexual violence is increasing. The sexual assault rate across Australia increased from 69 victims per 100,000 persons in 1993 to 124 victims per 100,000 persons in 2022.[11] In the most recent ABS survey, the number of victims of sexual assault recorded by police increased by 3% between 2021 and 2022.[12] In 2022 sexual offences overtook drug offences as the dominant category of crime prosecuted by the Office of the Director of Public Prosecutions for Western Australia (**ODPP**).[13]

1.14 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, it is clear that there is a widespread incidence of sexual violence.

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5 ABS, *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 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' (Research Report No 14/2022, ANROWS, 2022) 8.

7 Ibid. It was suggested that the differences in prevalence by age 'may reflect generational differences in understanding, personal feelings about disclosing sexual violence and the time since the violence occurred': ibid.

8 Discussion Paper Volume 2 (Law Reform Commission of Western Australia, *Sexual Offences: Discussion Paper Volume 2: Offences and Maximum Penalties* (Project 113, Dec 2022), Appendix 2.

9 These statistics are for trials by jury or judge alone after a plea of not guilty. They do not include charges which were finalised by a guilty plea.

10 Statistical Analysis Report (J Clare, *Project 113: Sexual Offences Statistical Analysis Report* (Law Reform Commission of Western Australia, 2023)) Table 1.

11 ABS, *Recorded Crime – Victims* (Catalogue No 4510.0, 24 June 2021).

12 Ibid.

13 Email Submission E19 (ODPP).

Sexual violence is extremely harmful

1.15 It is especially important for the criminal justice system to address sexual violence given how harmful it is.[14] It can have a profound impact on the health and wellbeing of those who experience it, as well as on their families and communities.[15] 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 are often felt in all areas of a person's life and can be long-lasting.[16] These effects can be particularly severe when children are the victims of sexual violence.[17]

1.16 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.[18]

Sexual violence violates a victim-survivor's rights

1.17 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.[19] 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.[20]

Sexual violence disproportionately affects certain community members

1.18 Any member of the community can experience sexual violence. However, it is largely a gendered crime. Most people who experience sexual violence are female and most

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14 For a detailed discussion of the harmfulness of sexual offence, see Background Paper (S Tarrant, H Douglas and H Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022)) Part 1.

15 The severe and long-lasting impact that sexual violence can have on the victim-survivor, as well as on their friends and family, was frequently emphasised in consultations and submissions: see, eg, Email Submission E11 (Confidential); Email Submission E15 (Confidential); Email Submission E16 (Zonta Club of Bunbury); Email Submission E17 (Professor Hélène Jaccomard); Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

16 See, eg, Background Paper 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).

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

18 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.

19 *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.

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

perpetrators are male.[21] This makes sexual violence a form of gender-based discrimination, which can affect the lives and freedom of women and girls, even if they have not personally experienced sexual violence.[22]

1.19 Disproportionately high rates of sexual violence are also experienced by children, Aboriginal and Torres Strait Islander Peoples, people with disability, **LGBTIQA+** people,[23] young people in out-of-home care, people working in the sex industry and women from culturally and linguistically diverse backgrounds.[24] This is often a reflection of broader structures of discrimination or marginalisation.[25] 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'.[26]

1.20 Sexual violence may affect members of different communities in different ways. For example, the Women's Legal Service WA (**WLSWA**) notes that 'the experiences of First Nations victim-survivors are fundamentally different to the experiences of non-Indigenous women. Experiences of colonisation, dispossession of land, discrimination, forced child removal and the intergenerational impacts of resulting trauma impact on, and influence, First Nations women's experiences and responses to sexual violence'.[27]

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

1.21 Misconceptions about sexual violence (sometimes known as rape myths) are reported to be widespread.[28] Some commonly held misconceptions identified by researchers are outlined and addressed in Table 1.1 below.[29]

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21 In 2019-2020, 96.85% of sex offenders in Australia were male, 83.65% of sex offence victims were female. In 2016, 17% of women and 4.3% of men reported that they had been sexually assaulted since the age of 15: Background Paper n 50, citing data retrieved from the ABS *Sexual Assault – Perpetrators* (2 February 2022) and ABS, *Sexual Violence – Victimisation* (24 August 2021). In 2019, in charges of sexual offences against children tried by the District Court of Western Australia after a plea of not guilty, 84% of complainants were girls: Statistical Analysis Report 15.

22 On the gendered nature of sexual violence, see further Background Paper Part 1.2.

23 LGBTIQA+ people are people who are lesbian, gay, bisexual, transgender, intersex, queer, asexual or of other diverse sexual orientations and gender identities.

24 See, eg, Background Paper; ABS, *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).

25 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, ANROWS (December 2016) 12.

26 Background Paper 3.

27 Portal Submission P36 (WLSWA).

28 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 Report we have mainly used the term 'misconceptions about sexual violence' rather than 'rape myths' because there is no offence of rape in Western Australia. In addition, many of these misconceptions extend beyond the scope of the penetrative sexual offence (whatever it is called).

29 For further discussion of these common misconceptions, see Background Paper Part 2.

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 victim-survivors 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 them 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[30]

1.22 People also frequently misunderstand the law of consent. For example, some people wrongly believe that:[31]

[30] 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 Background Paper Part 2.

[31] See, eg, NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.43].

- A person who dresses in revealing attire or who acts flirtatiously consents to sex.
- A person who consents to an act of sexual penetration, an act of non-penetrative sexual touching, or a non-touching sexual act (regardless of whether there was an attempt or threat to touch) (**sexual activity**) consents to all sexual activity.
- A person who has previously consented to sex consents to sex in the future.
- A person who consents to sex with one person consents to sex with others.
- The use of drugs or alcohol is an indication of consent.

1.23 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.[32] 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.

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

1.24 Despite its harmful nature, sexual violence is significantly under-reported to police.[33] 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, 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.[34]

1.25 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.[35] For example, in Western Australia in 2021, 30 days after the report only about 12% of reports of sexual violence had resulted in a charge, compared to about 20% of reports of assaults and 70% of reports of homicides and related offences.[36] There are many reasons sexual offences may have a lower prosecution rate, or why it may take police longer to lay charges in such cases, including complex investigations, the police being unable to find the perpetrator, witnesses being unwilling to give evidence and prosecutors not believing the jury is likely to convict.[37] Police acceptance of misconceptions about sexual violence may also create obstacles.[38] Such misconceptions may influence the police's views about a complainant's credibility and potentially impact the way they exercise their discretion to investigate and pursue charges.[39] In addition, the person who experienced the sexual violence may 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.[40]

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32 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.

33 See, eg, ABS, *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); Background Paper 26.

34 See, eg, NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.13]; VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Table 1 (pp 26-9). For further discussion of barriers to reporting and disclosure, see Background Paper Part 3.1.

35 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.

36 Background Paper 45.

37 See, eg, NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.20]-[2.24].

38 Background Paper Part 3.2.

39 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.

40 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.31].

1.26 Matters that do proceed to court have lower conviction rates than other offences.[41] For example, in Western Australia in 2020-2021 sexual offences had an 80.34% conviction rate compared with the highest conviction rate of 99.82% for traffic and vehicle regulatory offences and the next lowest rate of 84.44% for homicide and related offences.[42] This may be due to a lack of physical evidence, the fact that there were no witnesses to the event 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. We acknowledge that a much higher conviction rate for traffic and regulatory offences is expected because of the lack of defences to these charges, the evidentiary provisions to facilitate proof of them, and the lower maximum penalties.

The response to reports of sexual violence is often poor

1.27 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 failed to meet their needs and was retraumatising rather than supportive.[43]

1.28 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.[44]

1.29 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 misconceptions about sexual violence 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.[45]

1.30 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'.[46]

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

1.31 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.

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41 Ibid [2.32].

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

43 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 (WLSWA); Email Submission E4 (National Association of Services Against Sexual Violence).

44 See, eg, NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [2.47].

45 Ibid [2.50]-[2.54]. For further discussion of the shortcomings of the trial process, see Background Paper Part 3.3.

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

1.32 One of the key issues that has been raised in recent years is how 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**. Such a model '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'.[47]

1.33 A second issue relates to the practice of **stealthing**. Stealthing occurs where a person consents to a sexual activity '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 activity.[48] 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.[49]

1.34 A third issue relates to the **mistake of fact defence**.[50] 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.[51]

1.35 In response to these concerns, many other jurisdictions around Australia and internationally have recently reviewed and reformed their laws and practices in this area.[52] By contrast, Western Australia's sexual offence laws have remained largely unchanged since 1992.[53]

Methodology

1.36 This project (**Project 113**) involved several steps leading to this Final Report. The Commission recognises that engagement with stakeholders, including members of the public, is central to any law reform process, and is particularly critical when dealing with reform to sexual offence laws. The Commission engaged interested members of the public and other stakeholders throughout this reference in a variety of ways, as outlined below.

1.37 This Final Report is informed by the Commission's consultations and stakeholder submissions, as well as its own research and analysis. The details of the process adopted by the Commission are set out below.

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47 Ibid 78.

48 QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper No 78, December 2019) 132.

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

50 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 this Report.

51 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; Preliminary Submission 14 (CWSW).

52 See, eg, Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019); ILRC, *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); QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020); NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020); VLRC, *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).

53 For a discussion of the history of Western Australia's sexual offence laws, see Discussion Paper Volume 2, [2.1]-[2.5].

Preliminary submissions

1.38 Project 113 was announced on 8 February 2022. Following that announcement, the Commission sent a letter to many organisational stakeholders informing them of the project and asking if they wanted to make any preliminary submissions to help guide the Commission's review.

1.39 We received 18 preliminary submissions, which are listed in Appendix 1. We thank the organisations involved for taking the time to provide us with such valuable feedback. The submissions helped us to identify key issues, and where relevant we incorporated the information provided to us into the Discussion Papers.

Gathering resources

1.40 The Commission engaged a number of contractors to enable it to fulfil its Terms of Reference. These included a project writer, project director, research officers and law student assistants.

1.41 We were also assisted by the Commission's executive manager and staff from the Department of Justice's media liaison team and the Office of the Attorney General.

1.42 We commissioned reports from academic experts, specifically, a background paper and a report relating to our transcript analysis project (see below).

1.43 WA Police and the ODPP provided us with statistics relating to the frequency with which the offences we were asked to review are charged and the outcomes of those charges. The District Court provided us with copies of the transcripts of sexual offence trials conducted in 2019 and access to facilities that enabled us to review those transcripts (see further below).

Background Paper

1.44 While the focus of this project 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 the **Background Paper**.[54]

1.45 The Background Paper, which was published on the Commission's website in December 2022, addresses various 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 also identifies relevant Western Australian data on sexual offending.

Discussion Paper

1.46 In December 2022 we published the first volume of a discussion paper (**Discussion Paper Volume 1**), which focuses on the law of consent in relation to sexual offences and the mistake of fact defence. It also considers issues relating to objectives and guiding principles, jury directions, special verdicts, and the implementation and monitoring of reforms.

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

1.47 In February 2023 we published the second volume of a discussion paper (**Discussion Paper Volume 2**), which focuses on the sexual offences that should be included in the *Code* and the penalties that should be set for those offences.

1.48 The discussion papers were published on the Commission's website. They raised various questions for consideration and called for submissions on those questions, or on any other matters relevant to the project. The closing date for submissions on Discussion Paper Volume 1 was 17 March 2023, and for Discussion Paper Volume 2 was 6 April 2023.

1.49 We advised every person and organisation on our extensive stakeholder list of the publication of the discussion papers and where to obtain copies of the two volumes. We also spoke about Project 113 at a number of events, and encouraged participants to make submissions.

1.50 Unless there is a reason to separately identify a specific volume of the discussion paper, throughout the remainder of this Report we refer to both its volumes collectively as the **Discussion Paper**. We use footnote references to identify the specific volume of the Discussion Paper in which relevant matters are addressed.

Issues Papers

1.51 At the same time as we published Discussion Paper Volume 1, we also published a series of short Issues Papers. Each Issues Paper provided a summary of a particular issue that arose in Discussion Paper Volume 1. We hoped that providing summaries of the key elements in the Discussion Paper would assist people to understand and respond to it.

1.52 We did not publish Issues Papers for Discussion Paper Volume 2, as we did not consider these necessary given the shorter length of that volume and the nature of the matters it addresses.

Media and other outreach efforts

1.53 After the publication of each volume of the Discussion Paper and the Background Paper we published advertisements in *The West* newspaper, as well as regional newspapers, notifying the community of the project, where to access the Discussion Paper and Background Paper, and inviting individuals and organisations to provide written submissions.

1.54 The Chair of the Commission wrote a feature-length opinion article which was published in *The West*. The Chair also participated in radio interviews on ABC radio and Youth Jam Radio on 13 February 2023 and 6 March 2023.

1.55 We were conscious that many of the review's significant stakeholders are of an age where they obtain news via social media rather than by traditional sources such as newspapers and radio. In order to target awareness of the project in these groups we arranged for the Department of Justice to publish posts on its Facebook and Instagram pages on the topics of the meaning of consent and stealthing. We paid to promote the posts to assist in reaching a broader audience than just those who had 'liked' or 'followed' the Department's pages.

1.56 We also contacted numerous stakeholder agencies and asked them to share our social media posts with their followers. We further requested stakeholder agencies to forward a notice to people and organisations on their email lists sharing links to the Discussion Paper and inviting individuals and organisations to provide submissions.

Online portal and stakeholder submissions

1.57 We developed an online portal which was accessible through the Commission's website. The online portal had two functions. First, it allowed individual and organisational stakeholders to upload a written submission responding to our Terms of Reference and to issues raised in the Discussion Paper. Second, it allowed individual and organisational stakeholders to respond to a series of questions drawn from Discussion Paper Volume 1 (the **online survey**). We also allowed stakeholders to directly email their submissions to us rather than uploading them via the online portal.

1.58 The online survey allowed stakeholders to answer any combination of questions they chose; it was possible to answer some questions and not others. Some questions involved selecting 'yes' or 'no' answers, and some questions gave the option of including reasons for the answer given. It was possible for stakeholders to complete the online survey anonymously. The only identifying information required was a valid email address.

1.59 The online portal was open from:

- 25 January 2023 to 30 April 2023 to receive submissions on issues raised in Discussion Paper Volume 1 and responses to the online survey.
- 10 February 2023 to 30 April 2023 to receive submissions on issues raised in Discussion Paper Volume 2.

1.60 Fifty-eight stakeholders used the online portal to respond to the online survey and/or upload written submissions. We received a further 27 submissions by email.

1.61 Stakeholders who sent written submissions or completed the online survey were from a variety of backgrounds, including:

- Legal and non-legal academics.
- Legal organisations such as the ODPP, Legal Aid Western Australia (**Legal Aid**), the Aboriginal Legal Service of Western Australia Limited (**ALS**), WLSWA and Aboriginal Family Legal Services of Western Australia (**AFLSWA**).
- Advocacy groups such as knowmore, Full Stop Australia and WAAC.
- Government bodies such as the Department of Communities of Western Australia (**Communities**) and the Commissioner for Children and Young People.
- Individuals, including victim-survivors, law students and police officers.

1.62 The individuals and organisations that provided submissions to the online portal or via email are listed in Appendix 1.

1.63 In total, the Commission received 85 written submissions and online survey responses from a wide range of stakeholders. Together with the stakeholder comments received during oral consultations, they allowed this Report to be prepared with the benefit of significant community input.

1.64 Due to the sensitivities involved in this area, people we consulted with or who wrote submissions often requested not to be identified. Therefore, frequently throughout the Report we refer to views 'of stakeholders' without specifically identifying the person who provided those views.

1.65 To aid the readability of the Report, where numerous stakeholders supported a particular position, the Commission has not cited individual submissions by name. However, where the

views of a single stakeholder have been referred to or quoted, the Commission has identified the particular submission received (unless the individual requested anonymity).

Expert reference group meetings

1.66 The Commission created two expert reference groups to advise us on the issues arising from our Terms of Reference. One was aimed at legal professionals or legal academics with experience relevant to Project 113 (the **Legal Expert Group**), and a second group consisted of non-legal professionals with expertise in social or cultural issues relevant to Project 113 (the **Community Expert Group**).

1.67 We invited a wide range of legal stakeholder groups to contribute representatives to the Legal Expert Group including WA Police, the ODPP, ALS, AFLSWA, Legal Aid, the WA Bar Association, the Criminal Lawyers Association of Western Australia, the Law Society of Western Australia, community legal centres and legal academics. We also invited a wide range of stakeholders to contribute representatives to the Community Expert Group, including the Sexual Assault Resource Centre, OCVOC, the Office of Multicultural Affairs, WAAC, Pride WA, People with Disabilities WA, the Youth Affairs Council, Magenta, Transfolk, and academics from non-legal fields such as gender and cultural studies. We did not exclude any person or organisation from contributing to the expert reference groups.

1.68 We held a series of meetings over the course of approximately two months with each of the expert groups on the following topics:

- Consent.
- Mistaken belief in consent.
- Special verdicts.
- Jury directions.
- Substantive offences.
- Penalties.

Regional visits

1.69 Commissioners and representatives of the Commission visited Albany, Geraldton, Broome and Kalgoorlie and conducted public consultations in each town. We contacted numerous stakeholder groups inviting them to send representatives. The consultations were also advertised via the Department of Justice's social media pages and flyers displayed in regional town libraries and courthouses.

1.70 Attendees included lawyers from Legal Aid, ALS, AFLSWA and private law firms, social workers, university students, local government representatives and health workers.

Other consultations

1.71 In the Discussion Paper we stated that we would be conducting consultations with stakeholders, including interested members of the public. We asked interested parties to contact us if they wanted to be involved in these consultations.

1.72 Two individuals contacted us and we conducted separate consultations with each individual. One was a victim-survivor, and one was a person convicted of child sexual offences.

1.73 We also conducted consultations with groups from individual agencies. These were WA Police, ALS, District Court and Supreme Court Judges, and the Sexual Violence Strategy Reference Group (which was established as a reference group for the OCVOC review).

1.74 WLSWA organised and invited a Commission representative to attend an online forum presented by representatives of women's legal centres and women's advocacy groups from around Australia. At this forum, speakers addressed the topic of 'proposed sexual offence reform – key learnings from other states and territories'.

1.75 At the invitation of the Piddington Society, Commission representatives participated in an online discussion panel with members of the legal profession and a Piddington Society moderator.

Obtaining sexual offence data and transcript analysis project

1.76 We were interested in obtaining data about issues such as the frequency with which various sexual offence charges are laid, the verdicts for those charges, the types of defences applied to different types of charges, the nature of the relationship between the accused and the complainant and the presence of factors that might be seen as negating consent, such as the intoxication of either party or the use of force.

1.77 WA Police provided us with data showing the number of times the offences covered by our review were charged between 2017 and 2022. This table formed Appendix 2 to Discussion Paper Volume 2. The ODPP also provided data showing the number of times the offences covered by our review were charged and the outcomes of each charge.

1.78 We made enquiries of WA Police, the ODPP, the District Court and the Department of Justice (Courts and Tribunal Services and the WA Office of Crime Statistics and Research) seeking more detailed data but were advised such data is not collected.

1.79 We decided to analyse the transcripts of every sexual offence trial that took place before the District Court in 2019 to obtain the relevant data (the **transcript review project**). We chose 2019 because it was before the COVID-19 epidemic, which significantly disrupted the operation of District Court trials in 2020 and 2021. We also considered it likely that any appeals relating to 2019 trials would have been determined prior to the beginning of the transcript review project.

1.80 At our request, the ODPP provided us with a list of every sexual offence trial that took place before the District Court in 2019 (with identifying information removed). We provided the list to the District Court which, after appropriate confidentiality undertakings were made, provided us with a copy of the transcript of each trial. The District Court also provided us with facilities so these transcripts did not leave the District Court building while we reviewed them.

1.81 We extracted data on various 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 raised, 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. We did not collect any personal identifying data.

1.82 We engaged criminologist Associate Professor Joe Clare to prepare a report analysing the data and answering various questions we provided to him. Where relevant, we have incorporated findings from Associate Professor Clare's report (which we refer to as the

Statistical Analysis Report) into the body of our Report. We will publish the Statistical Analysis Report soon after the Attorney General tables this Report.

Structure of this Report

1.83 This Report has been prepared to address the Terms of Reference. It summarises the issues raised by stakeholders in their submissions and the consultations and sets out the Commission's views and recommendations with respect to the matters raised by the Terms of Reference. In preparing this Report, the Commission has also conducted desktop research and used information obtained from academic, stakeholder and media publications. The laws described in this Report are current, to the best of our knowledge, as at 15 September 2023. We note that we have not included reference to recent revisions to the Northern Territory sexual offences,[55] as they had not commenced operation by that date.

1.84 This Report should be read in conjunction with the Discussion Paper, as it does not repeat its comprehensive summary of all of the issues it addresses. Throughout the Report we provide footnotes to the sections of the Discussion Paper where an issue is discussed more fully.

1.85 The remainder of the Report is structured as follows:

- Chapter 2 explains the language that is used in this Report and sets out the principles that have guided this review.
- Chapter 3 considers whether the *Criminal Code Compilation Act 1913* (WA) (**the *Code***) should contain any objectives or guiding principles.
- Chapter 4 addresses the issue of consent.
- Chapter 5 addresses the mistake of fact defence.
- Chapter 6 addresses sexual offences involving adult victims.
- Chapter 7 addresses sexual offences involving child victims.
- Chapter 8 addresses sexual offences involving vulnerable persons (whom the *Code* currently refers to as incapable persons).
- Chapter 9 considers the circumstances of aggravation that should be included in the *Code*, as well as the issue of statutory alternative offences.
- Chapter 10 addresses jury directions.
- Chapter 11 considers whether special verdicts should be used in sexual offence trials.
- Chapter 12 considers the penalties that should be available for sexual offences.
- Chapter 13 considers the way in which the sexual offences should be structured in the *Code*.
- Chapter 14 considers the way in which any reforms should be implemented and monitored.
- Appendix 1 provides a list of submissions.
- Appendix 2 sets out the structure of the offences we recommend throughout this Report and their recommended maximum penalties.

[55] See *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT).

- Appendix 3 contains a jurisdictional comparison of sentences imposed for the offence of sexual penetration without consent or its closest equivalent.

A note on our recommendations

1.86 Throughout this Report we make various recommendations for amending the *Code*. In making these recommendations we are not suggesting that the exact terminology we use be enacted. We are making recommendations about the substance of the matters we think should be addressed. Ultimately, it will be a matter for Parliamentary drafters and the legislature to determine the precise language used in the *Code*.

What happens next?

1.87 We will provide this Report to the Attorney General. After the Attorney General reviews the Report it will be tabled in Parliament. It is a matter for the Government to decide which of the Commission's recommendations it supports and whether it is appropriate to introduce a Bill for legislative amendments in response to those recommendations.

1.88 Parliament may enact legislation implementing some, all or none of our recommendations.

2. Preliminary matters

Chapter overview

This Chapter explains the language that is used in this Report and sets out the principles that have guided this review.

Language used in the Report

2.1 Many different terms are used by members of the community to describe the types of behaviour we have been asked to consider and the people who are involved. For that reason, it is important to be clear about the way in which language is used.

2.2 In the Discussion Paper we explained the language used in that Paper.[1] We sought views on whether this language was appropriate and should continue to be used in this Report.

Stakeholders' views

2.3 Most stakeholders were supportive of our approach to the use of language. There were, however, some submissions which proposed the use of alternative terminology. For example, it was suggested that:

- The terms sexual assault or sexual violation should be used rather than sexual violence, due to the association between violence and the use of physical force, aggression and bodily harm.
- The term injured party should be used instead of complainant, due to the technical nature of the term complainant, which is not widely understood, and the negative connotations associated with complaining.
- The term victim-survivor, rather than people who have experienced sexual violence, should be used to refer to the people who have experienced sexual violence.

2.4 Communities noted that the *National Plan to End Violence Against Women and Children 2022-2032* (**National Plan**)[2] 'proposes nationally consistent definitions be used to inform and support program design, public and private sector policies, as well as legislation across states and territories to ensure that all people in Australia have equal access to support and justice'.[3] It advised that the forthcoming *Sexual Violence Prevention and Response Strategy*, currently in development by Communities and the OCVC, will seek to align with the National Plan in this regard.

2.5 In line with the terminology used in the National Plan, Communities supported use of the following terms:

- Sexual violence: 'Sexual activity that occurs where consent is not freely given or obtained, is withdrawn or the person is unable to consent due to their age or other factors. Such

1 See Discussion Paper Volume 1, [1.5]-[1.14].

2 Department of Social Services Australia, *National Plan to End Violence against Women and Children 2022-2032* (Commonwealth of Australia, 2022), 34.

3 Portal Submission P49 (Communities).

activity includes sexualised touching, sexual abuse, sexual assault, rape, sexual harassment and intimidation and forced or coerced watching or engaging in pornography'.

- Victim, survivor or victim-survivor: 'Any individual who has experienced any physical or non-physical form of sexual violence'.
- Perpetrator: 'A person who commits an illegal, criminal or harmful act, including domestic, family or sexual violence, regardless of whether the matter has proceeded to court, or the individual has been found guilty'. However, Communities did not support using the term 'perpetrator' to refer to children displaying harmful sexual behaviours, or adults with a cognitive disability displaying inappropriate sexual behaviours.
- Accused person: A person who has been charged with an offence.
- Offender: A person who has been convicted of an offence.[4]

2.6 The National Plan contains definitions of sexual violence and perpetrator consistent with Communities' proposed definitions. The National Plan also contains a definition of victim, survivor or victim-survivor, but its definition encompasses survivors of all forms of violence. The National Plan does not contain definitions of accused or offender.

2.7 The Centre for Women's Safety and Wellbeing (**CWSW**) emphasised the importance of distinguishing between sexual violence that occurs within and outside the context of an intimate partner relationship:

> Sexual assault that occurs within the context of intimate partner relationships often forms part of a larger pattern of coercive and controlling behaviours that are intended to dominate, humiliate and denigrate. Domestic and family violence creates a climate of ongoing fear such that consent, arguably, cannot be freely given. In a relationship involving family and domestic violence, sexual assault is often part of a pattern of violence and controlling behaviour across multiple aspects of a victim-survivor's life. The fear of force or harm felt by a victim-survivor of family and domestic violence can be ongoing. It can be maintained by the accused through subtle and non-verbal ways, meaning that consent for sexual activity is not given freely and voluntarily.
>
> It is critical that our sexual assault laws consider the broader context of the relationship when determining free and voluntary consent to engage in sexual activity. In the context of sexual assault, domestic and family violence would most commonly be intimate partner violence, however, some women may participate in sexual activity under duress to protect other members of the family.[5]

2.8 Consequently, the CWSW advocated for the inclusion of the following definitions:

> Intimate partner violence: any behaviour by a man or a woman within an intimate relationship (including current or past marriages, domestic partnerships, familial relations, or people who share accommodation) that causes physical, sexual or psychological harm to those in the relationship. This is the most common form of violence against women.
>
> Non-partner sexual assault: sexual violence perpetrated by people such as strangers, acquaintances, friends, colleagues, peers, teachers, neighbours and family members.[6]

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4 Ibid.

5 Portal Submission P57 (CWSW).

6 Ibid.

The Commission's view

2.9 After considering the submissions, the Commission has refined some of the language used in the Discussion Paper for the purposes of this Report.

2.10 We acknowledge stakeholder concerns about the use of the term sexual violence, due to the association between violence and the use of physical force, aggression or bodily harm. We have continued to use the term for three key reasons: it recognises that sexual activity which violates a person's autonomy or exploits their vulnerabilities is inherently violent, even if force is not involved; it is a term which is commonly used by people who work in the area; and its use in this Report aligns with the definition of the same term in the National Plan.

2.11 We also understand stakeholder concerns about the term complainant, which is a technical legal term that may be perceived to indicate, in a negative way, that the affected person is complaining. However, we use this term in a very specific way: to refer not just to people who have experienced sexual violence but to those who have formally pursued a matter with the police or the courts. Given this legal context, we consider it appropriate to use the technical legal term where it applies.

2.12 Given the submissions demonstrated widespread support for the use of the term victim-survivor, and this is also a term which is used in the National Plan, we have used the term when discussing people who have experienced incidents of sexual violence in a general sense (rather than a legal sense). In adopting this terminology, we do not suggest that a person is defined by their status as a victim-survivor. Sexual violence is an experience: it does not define the individuals involved. We also recognise that people who have experienced sexual violence do not have one shared identity.

2.13 We accept Communities' view that while the term perpetrator should be used to refer to a person who commits an act of sexual violence, it should be used with caution in some cases, particularly when referring to young children who display harmful sexual behaviours.

2.14 We also acknowledge the importance of distinguishing between sexual violence that occurs within and outside the context of an intimate partner relationship. We have included a definition of intimate partner sexual violence in the glossary of key terms below.

2.15 Finally, we note that there was general support for the way in which we defined the communicative and affirmative models of consent in the Discussion Paper, and we will continue to use that approach. Under that approach we defined the communicative model of consent as a model which requires a participant to actively display their willingness to engage in a sexual activity: passively submitting to a sexual activity is insufficient to constitute consent. By contrast, an affirmative model of consent goes further and also requires a participant to actively seek the consent of the other participant to the sexual activity. In other words, in addition to displaying their willingness to engage in a sexual activity, a participant must take measures to ascertain that the other participant is consenting.

2.16 We acknowledge that this approach to defining communicative and affirmative consent is not universally accepted, and that there is wide variation amongst stakeholders and in the literature about what these terms mean. It is for this reason that we have sought to clearly define the way we use these terms in this Report. We encourage readers to take notice of our approach to this complex issue, and of the distinction we draw between the communicative and affirmative models of consent.

2.17 The Glossary below sets out our final approach to these key terms. Throughout the Report we occasionally define other key terms or acronyms. Where we do so we highlight the relevant

term or acronym in bold font. All of these terms are included in the list of defined terms at the beginning of the Report.

Glossary

Accused person / the accused: a person against whom criminal charges have been brought but not completed.

Affirmative model of consent / affirmative consent: A model of consent where participants not only communicate consent, but also actively seek the consent of the other participant to a sexual activity.

Communicative model of consent: A model of consent where participants actively display their willingness to engage in a sexual activity by words or conduct.

Complainant: the person against whom a sexual offence is alleged to have been committed. This term is used where a complaint of sexual violence has been made to the police, or a sexual offence charge has been laid.

Intimate partner sexual violence: sexual violence committed within the context of an intimate relationship, including marriages, domestic partnerships and dates.

Offender: a person who has been convicted of a sexual offence.

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.

Sexual violence: 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 the use of physical force or aggression or resulted in bodily injury.

Victim-survivor: a person who has experienced any type of sexual violence.

Our guiding principles

2.18 In the Discussion Paper we tentatively identified the following six principles to guide our 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: The interests of complainants, accused people and the community must all be considered.

2.19 We sought views on the appropriateness of the identified principles, and whether we should include any other principles.[7]

[7] Discussion Paper Volume 1, [1.75]-[1.90].

Stakeholders' views

2.20 Overall, there was broad support in the submissions and consultations for the identified principles. Most feedback was directed toward clarifying or expanding the principles. Some submissions provided suggestions for further principles to be added.

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

2.21 There was general support for Principle 1. No concerns with this principle were identified.

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

2.22 There was also broad support for Principle 2.

2.23 Some submissions suggested that Principle 2 could be broadened to explicitly highlight the vulnerable population groups who are most at risk of experiencing sexual violence, such as those identified in the Background Paper.[8] For example, several stakeholders suggested that specific reference be made to protecting children. In this regard, the Commissioner for Children and Young People emphasised that:

> Due to their age, children and young people are particularly vulnerable to sexual offences. There is a clear need to improve the way that children and young people are protected and prioritised throughout childhood, ensuring that they receive appropriate and supportive responses at the point of initial disclosures, through to ensuring that their needs and rights are upheld, and any further harm or trauma is prevented throughout any legal proceedings ...[9]

2.24 Similarly, knowmore noted that:

> The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) recognised that all children are vulnerable to child sexual abuse due to their dependence on adults.[10] The Royal Commission also recognised that 'some children are more vulnerable to abuse because of their increased exposure to certain risk factors'. This includes Aboriginal and Torres Strait Islander children, children with disability, and children from culturally and linguistically diverse backgrounds.[11]

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

2.25 Some submissions expressed concern that Principle 3 might be taken to suggest:

- That victim-survivors bear some responsibility for the sexual violence that is committed against them; and/or
- That complainants bear a responsibility to prove an absence of consent.

2.26 Suggestions for revising Principle 3 included:

- Rewording it to provide that 'sexual offence laws should incorporate a responsibility for all parties to confirm consent'.[12]

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8 Background Paper, Introduction and section 1.2.

9 Email Submission E10 (Commissioner for Children and Young People).

10 *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report: Nature and Cause* (Report, December 2017) vol 2, 180.

11 Email Submission E8 (knowmore).

12 Portal Submission P51 (S Porter).

- Elaborating on 'what constitutes non-consent under a shared responsibility model; and what are the implications of breaches of such a model'.[13]

Principle 4: Sexual offence laws should be non-discriminatory

2.27 There was general support for Principle 4.

2.28 One stakeholder suggested that it 'should be clarified that any person can commit an act of sexual violence and no one should be assumed to be incapable of committing an act of sexual violence on the grounds of gender or sexual orientation'.[14]

2.29 Other stakeholders suggested that the principle should be broadened, stating:

> Principle 4 should encompass other aspects of non-discrimination in policy. It is important to highlight the equality under the law which should be offered to LGBTIQA+ people, inclusion and equality should be broader than this. A potential proposal would be an additional subclause … addressing the role of non-discrimination based on age (i.e. children and elderly) which is a particularly pertinent issue in light of the Royal Commission into aged care. Further elaboration should also be added to ensure there is no discrimination on the grounds of disability to ensure that those without the cognitive capacity to give consent are protected under the law.[15]

Principle 5: Sexual offence laws should be clear

2.30 There was general support for Principle 5.

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

2.31 Various stakeholders suggested that priority should be given to protecting victim-survivors and the community, and that we should focus on improving legal processes for complainants. However, Principle 6 was also generally acknowledged to be appropriate: when considering reforms, the interests of complainants, accused people and the community must all be taken into account.

2.32 For example, one submission noted that 'while criminal proceedings are brought by the prosecution on behalf of public interest, sexual offences are unique in nature and require greater consideration of complainants' individual interests. This is because the law cannot operate effectively to protect sexual autonomy if victims choose not to report sexual violence'.[16] The submission also noted, however, that 'an accused's right to a fair trial presents a legitimate barrier to reform' and 'any legislative changes made to improve the criminal process for complainants and better protect sexual autonomy must first consider implications on accused persons'.[17]

Other possible guiding principles

2.33 Other matters that submissions suggested our guiding principles address included:

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13 Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

14 Portal Submission P11 (Anonymous).

15 Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

16 Portal Submission P25 (Aleisha Cash).

17 Ibid.

- Sexual offence laws should be 'guided and informed by evidence, current research and data'.[18]
- Sexual offence laws should address and combat common misconceptions about sexual violence and consent.[19]
- Sexual offence laws should take into account the circumstances in which sexual violence frequently occurs.[20]
- Sexual offence laws should provide simple pathways to identify criminal responsibility.[21]

The Commission's view

2.34 The Commission is of the view that the six guiding principles proposed in the Discussion Paper should be retained, but that they should be refined in the following ways to address the concerns raised in the submissions and consultations:

- The explanation of Principle 2 should include reference to additional groups of people who are vulnerable to sexual exploitation.
- Principle 3 should be clarified to provide that participants to a sexual activity have a mutual responsibility to ensure that the other participants are consenting to that sexual activity. This was the Commission's intended meaning of the principle. The Commission does not suggest that victim-survivors bear any responsibility for the sexual violence that is committed against them. The Commission wishes Principle 3 to be clear that they do not.
- The explanation of Principle 4 should include reference to other prohibited bases of discrimination.
- Principle 6 ought to refer to victim-survivors, rather than complainants, as the former is a broader term which includes complainants.

2.35 The Commission is also of the view that a further guiding principle (Principle 7) should be added, addressing the need to ensure that sexual offence laws are guided and informed by evidence, current research and data.

2.36 We have set out a revised version of our guiding principles below. It is important to note that these are simply the principles that have guided our approach to the issues raised in this project. They are not intended to be guiding principles for the law itself. We discuss objectives and guiding principles for the law in the next Chapter.

2.37 The principles outlined below are of equal importance and are not listed in order of priority.

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

2.38 Sexual offence laws should protect sexual autonomy. While sexual autonomy is a complex concept, at its core there are two key components:[22]

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18 Portal Submission P2 (Anonymous).

19 Background Paper, Part 2.

20 Background Paper, Part 2.1, 2.2, 2.3.

21 Portal Submission P35 (Confidential).

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

- People should generally be free to determine in which sexual activities they participate. 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. This includes withdrawing from sexual activities to which they have previously agreed.

2.39 Sexual offence laws should also protect bodily integrity. People should have the right not to have their body sexually touched or interfered with without their consent.[23]

2.40 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

2.41 Some people, including children and people with disabilities, may be particularly vulnerable to sexual exploitation. Sexual offence laws should protect such people from being sexually exploited.

2.42 We acknowledge that there is a possibility for conflict between Principles 1 and 2. For example, the law currently provides that, subject to the **mistake of age defence**[24], it is an offence to have sex with a child under 16, even if the child has the maturity to consent. If a child under 16 wishes to consent to a sexual activity, a conflict may arise between:

- The child's autonomy to choose freely and voluntarily 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: All participants to a sexual activity have a mutual responsibility to ensure that all other participants are consenting to that sexual activity

2.43 A participant to a sexual activity should not simply presume that another participant to that activity has consented, or rely on their failure to protest or resist as proof of consent. All participants to a sexual activity have a mutual responsibility to ensure that the other participants are consenting.

2.44 This principle should not be interpreted as indicating that victim-survivors bear any responsibility for the sexual violence that is committed against them, or that complainants should bear a responsibility to prove an absence of consent. It is about making it clear that

[23] 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; QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [4.16].

[24] A mistake of age defence is a defence to a sexual offence that requires proof that the accused was mistaken about the age of a child complainant. In Western Australia there is a mistake of age defence in sections 321(9) and 321A(9) of the *Code*, which applies to charges under sections 321 and 321A of the *Code*. For the defence to succeed the accused must prove, on the balance of probabilities, that they believed on reasonable grounds that the child was 16 or over, and they were not more than three years older than the child.

when a person engages in a sexual activity, they have an obligation to make sure that everybody involved is freely and voluntarily consenting.

Principle 4: Sexual offence laws should be non-discriminatory

2.45 All people can experience and perpetrate sexual offences, and everyone is equally deserving of the protection and sanction of the law. Consequently, sexual offence laws should be framed in a way that does not discriminate against people based on matters such as gender, age, race or disability.

2.46 This includes ensuring that the law offers equal protection to LGBTIQA+ people. Sexual offences should not involve arbitrary distinctions based on a participants' emotional, affectional or sexual attraction to people of a different gender, the same gender or more than one gender sexual orientation (**sexual orientation**), their current personal sense of their gender (**gender identity**), their previous gender-related identity or identities (**gender history**), the physical or biological characteristics the participant was born with (**birth sex**), the physical features relating to sex that a participant has at the time of the sexual activity (**sex characteristics**) or the types of sexual practice in which they engage.

Principle 5: Sexual offence laws should be clear and able to be easily understood and applied

2.47 People need to know when they must not engage in a sexual activity. Particularly, the law must make it clear what consent means, and what a person must do to make sure the other person is consenting to a sexual activity.

2.48 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 victim-survivors, accused people and the community must all be considered

2.49 When reviewing sexual offence laws, the interests of victim-survivors (including those who go on to become complainants), accused people and the community should all be considered.

2.50 Laws and procedures should properly take into account the experiences of victim-survivors. They 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.

2.51 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, post-imprisonment consequences such as sex offender reporting obligations, 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 only to be convicted on the basis of reliable evidence. These are all fundamental aspects of our criminal justice system.

2.52 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'.[25]

2.53 While these interests are often presented as conflicting with each other, this is not necessarily the case.[26] They each occupy important positions in the administration of the criminal justice system, and they should all be considered in developing a just approach to sexual offending.

Principle 7: Sexual offence laws should be guided and informed by evidence, current research and data

2.54 A sound evidence base is essential to the law reform process: recommendations for reform should be guided and informed by evidence, current research and data. This will help ensure that issues, challenges and impetuses for change are accurately identified and addressed.

2.55 This is particularly important in the context of this project, given the educative function of sexual offence reform and the need to combat misconceptions about sexual violence. A sound evidence base is the key to properly addressing such misconceptions.

[25] VLRC, *Sexual Offences* (Final Report, 2004) [1.10].

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

3. Objectives and guiding principles

Chapter overview

This Chapter considers whether the *Code* should contain any objectives or guiding principles.

Introduction

3.1. In enacting legislation, 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]

3.2. Parliament may also (or alternatively) set out principles which should guide the interpretation or application of the whole or part of an Act. 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.

3.3. At present, the *Code* does not include any objectives or guiding principles, either generally or specifically in relation to sexual offences. By contrast, sexual offence-specific objectives are included in legislation in Victoria, NSW and the ACT.[2] Victorian legislation also includes guiding principles.[3]

3.4. In the Discussion Paper we examined the use of objectives and guiding principles by other Australian jurisdictions and the arguments for and against including them in the *Code* for sexual offences.[4] Submissions were sought on this issue. Submissions were also sought as to the content and framing of objectives and guiding principles if they were to be included.

Stakeholders' views

Inclusion of objectives or guiding principles in the *Code*

3.5. There was broad support from stakeholders for including objectives or guiding principles in the chapter of the *Code* that deals with sexual offences. The following is a sample of the submissions received in support of the inclusion of objectives or guiding principles in the *Code*:

- Objectives or guiding principles may improve the clarity of the law on sexual offences. The use of such provisions could 'make it clear what the purpose of the intended laws are and who they are designed to protect'.[5]

1 D Berry, 'Purpose Sections: Why They Are a Good Idea for Drafters and Users' (2011) 2 *The Loophole* 49, 49.
2 *Crimes Act 1958* (Vic) s 37A; *Crimes Act 1900* (NSW) s 61HF; *Crimes Act 1900* (ACT) s 50A.
3 *Crimes Act 1958* (Vic) s 37B. See Discussion Paper Volume 1, [3.9].
4 Discussion Paper Volume 1, [3.8]-[3.29].
5 Portal Submission P2 (Anonymous).

- Guiding principles or objectives are important in preventing 'misinterpretations of the law and to guide proper and clear interpretation of the legislation'.[6]
- Objectives and guiding principles can assist police and other authorities to make decisions about alleged sexual offending.[7]
- The use of such provisions would 'make jurors' tasks clearer and, as a consequence, make tasks clearer for judges, prosecutors, defence lawyers, police officers, educators, and most importantly, the public'.[8]
- 'Setting clear precedents in the form of these objectives can be an easy point of reference for sexual offence reporting, education and support for survivors… Additionally, having a short list of guidelines is a much clearer way of communicating legal reforms and can make education and public engagement with the law simpler.'[9]
- 'There are still prevalent misunderstandings and "rape myths" that are influencing the interpretation and application of sexual offence laws and guiding principles will help to mitigate the effect of these rape myths on legal processes as well as on the mental health and wellbeing of victims.'[10]

3.6. The CWSW submitted:

> CWSW believes the Code should serve both a regulatory and educative function. As understandings of sexual consent and sexual assault within the community are often shaped by pervasive stereotypes, myths and misconceptions about rape, sexual violence, people who experience it, and people who perpetrate it, it is imperative that the Code clearly articulate guiding principles that factually correct myths and misconceptions about the nature of sexual assault and victim-survivors.
>
> The 2021 National Community Attitudes towards Violence against Women Survey by ANROWS reveals that more than one in three respondents (34 per cent) agreed that sexual assault is commonly used to get back at men, and almost one quarter (24 per cent) agreed that sexual assault allegations could be a response to a regretted sexual encounter.[11] International studies have similarly shown considerable mistrust in women's reports of sexual assault.[12] Such mistrustful attitudes impact whether victim-survivors report sexual violence and whether key stakeholders, including police, judges, and jurors believe victim-survivors in their accounts.
>
> There is overwhelming evidence that demonstrates that juror judgements in rape trials are influenced more by the attitudes, beliefs and biases about rape which jurors bring with them into the courtroom than by their evaluation of the evidence presented, and that these beliefs and attitudes affect verdict choices.[13]
>
> CWSW believes a statement of guiding principles will help counter false and prejudicial beliefs among jurors about what constitutes sexual violence and how genuine victims may act either at the time of the offence, reporting, or in the

6 Portal Submission P26 (Confidential).
7 Portal Submission P56 (Andrea Manno).
8 Portal Submission P12 (Anonymous).
9 Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).
10 Portal Submission P9 (Anonymous).
11 C Coumarelos et al, *Attitudes matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia*. (2023) (Research report ANROWS February 2023).
12 L McMillan, 'Police Officers' Perceptions of False Allegations of Rape' (2017) 27(1) *Journal of Gender Studies* 9–21.
13 F Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 23(3) *The International Journal of Evidence & Proof*, 255-279.

> courtroom. It would also give added weight to any directions or instructions that a judge gives to the jury. By providing accurate, objective information on sexual assault, the Code may assist both jury members and members of the judiciary in their decision-making with the potential to better secure justice outcomes for victim-survivors.[14]

3.7. Some submissions further noted that the inclusion of objectives or guiding principles would be consistent with joint recommendations by the Australian Law Reform Commission (**ALRC**) and New South Wales Law Reform Commission (**NSWLRC**), in recommending the adoption of the Victorian approach.[15]

3.8. Some submissions disagreed with the inclusion of objectives or guiding principles in the *Code*. For example, Legal Aid noted:

> A statement of objectives or guiding principles would not assist in the interpretation of statutory provisions unless the offence provisions are ambiguous. The objective should be to draft offence provisions which are simple and clear so they can be well understood and applied. The Code does not currently have any guiding principles.[16]

Content and framing of objectives or guiding principles in the *Code*

Content and framing of objectives

3.9. Various suggestions were made in submissions regarding the content of an objectives provision. Many of those submissions agreed broadly with the objectives that were specified in the Victorian, NSW and ACT Acts.

3.10. For example, one submission noted:

> The objectives/guiding principles … should enshrine the right of an individual to make informed autonomous decisions about their own choices in relation to sexual activity and that the decisions be respected. This includes the right to choose not to engage in sexual activity. It also includes the need to protect the rights of the child, or person with cognitive impairment, or a person with mental health disturbance from sexual exploitation. The principles must also ensure clarity around the fact that sexual activity must not be instigated without explicit, clear, affirmative consent from all participants.[17]

3.11. Submissions agreed broadly with the inclusion of objectives regarding the right of an individual to participate in a sexual activity and regarding protecting children and those with a cognitive impairment or mental illness from sexual exploitation.[18]

3.12. Several submissions recommended the inclusion of an objective that reflects the communicative model of consent, as recognised in the Victorian, NSW and ACT Acts. One such submission suggested:

> Describing consent as a free and ongoing mutual agreement that can be withdrawn at any point. Establishing that the onus is on the perpetrator to prove that consent

[14] Portal Submission P57 (CWSW)

[15] ALRC and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) Recs 25-8 and 25-9.

[16] Portal Submission P41 (Legal Aid).

[17] Portal Submission P26 (Confidential).

[18] Portal Submission P50 (Kristy Johnson).

> was present and given freely rather than on the victim to prove that consent was not given and the perpetrator was aware of this lack of consent.[19]

3.13. Other stakeholders suggested:

> Guidelines that shift the current definition of consent towards a more affirmative model would be a great improvement to the Criminal Code; as this model is supported by most sexual education programs both within the state and nationally.[20]

3.14. The CWSW proposed the following framework that is consistent with the four objectives specified in the Victorian, NSW and ACT Acts, but aligns with the Victorian legislation:

> 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;
>
> b) to protect children and persons with a cognitive impairment or mental illness from sexual exploitation;
>
> c) 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).[21]

Content and framing of guiding principles

3.15. Several submissions made contributions regarding what guiding principles ought to be included in the *Code*, including principles that acknowledge:

- The prevalence of sexual offending;
- The under-reporting of sexual offending;
- The circumstances in which sexual offending commonly occurs;
- The psychological impacts of sexual violence and the trauma responses that accompany it; and
- That sexual violence can occur to anybody, including those who are in non-heteronormative relationships.

3.16. It was also submitted by Legal Aid that should such principles be included in the *Code*, they should 'mirror what is to be included in a trial judge's directions to the jury in connection with sexual offending'.[22]

3.17. With respect to the framing of guiding principles provisions, the CWSW submitted the following framework:

> 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;
>
> b) sexual offences are significantly under-reported;

[19] Portal Submission P9 (Anonymous).

[20] Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

[21] Portal Submission P57 (CWSW).

[22] Portal Submission P41 (Legal Aid).

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;

d) sexual offenders are commonly known to their victims;

e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred;

f) sexual offences most frequently occur in residential locations;

g) sexual offences can occur in the context of intimate relationships.

In addition to the principles outlined in the Victorian Act, CWSW proposes two additional principles (f and g) that refer to sexual offending in the context of intimate partner violence. At present, intimate partner violence has been inadequately addressed by the Code. The value of including this terminology directly within interpretive principles is that it emphasises that sexual assault is also committed by intimate partners, that is, it can occur within the context of domestic violence.

…

CWSW believes that features of sexual assault that may be relevant to the circumstances of the case are better addressed in jury directions, including:

- Common misconceptions about sexual offending or consent;
- The various ways in which people may respond to sexual offending; and
- The harmfulness of sexual offending.[23]

3.18. It was noted by Communities that both guiding principles and objectives should:

Reflect the minimum statements outlined in the ALRC and NSWLRC Report (2010),[24] while highlighting the unique context of Western Australia with specific regard to the prevalence and impact of sexual violence against Aboriginal people. The National Agreement on Closing the Gap holds government to achieve advancement of Socio-economic Outcome 13 – *Aboriginal and Torres Strait Islander families and households are safe* which identifies sexual violence as an indicator within the scope of family violence. Consideration should be given to include the following:

- The prevalence and nature of sexual offending
- The relationship between sexual violence and intimate partner violence
- The under-reporting of sexual offending
- The circumstances in which sexual offending commonly occurs
- The population groups most at risk of experiencing sexual offences (women, children, Aboriginal people, culturally and linguistically diverse people, people with physical or cognitive disability, LGBTQIA+ communities)
- Colonisation as a driver of sexual violence against Aboriginal people
- The social, economic and psychological impacts of sexual offending
- Gender inequality as an underlying systemic driver of sexual offending.[25]

[23] Portal Submission P57 (CWSW).

[24] ALRC and NSW Law Reform Commission, *Family Violence – A National Legal Response* (Final Report, October 2010) Volume 1.

[25] Portal Submission P49 (Communities).

The Commission's view

3.19. After considering the arguments and stakeholder submissions for and against the introduction of objectives or guiding principles, the Commission has formed the view that objectives or guiding principles should not be introduced into the *Code*. The factors that have led us to that view are discussed below.

3.20. First, we agree with the reasons expressed by the Queensland Law Reform Commission (**QLRC**) when in 2020 it recommended against the inclusion of objectives or guiding principles in the *Criminal Code Act 1899* (Qld) (**Queensland Code**). In summary, the QLRC's reasons for doing so were that:

- Introducing such provisions into the *Code* could potentially create interpretive difficulties rather than resolve them;
- Under a rules-based approach to criminal law, where the law itself should be clearly expressed in a codified criminal law, there should be no need to rely on general contextual information or aims to interpret its offence provisions; and
- The inclusion of such provisions may be a distraction for juries, whose duty is to consider the evidence in proof of the elements of an offence. They should not be distracted by principles that do not bear on the evidence in that case.[26]

3.21. Second, we consider that the inclusion of objectives and guiding principles is potentially inconsistent with the nature and purpose of a codification approach to the criminal law. Codification has been defined as 'the setting out in one statute of all the law affecting a particular topic whether it is to be found in statutes or in common law'.[27] Criminal codes ought to be a 'collected and explicit statement of the criminal law'.[28]

3.22. Offences set out within the *Code* should be easily understood and, when read together with relevant definitions, should not require reference to other provisions of the *Code* to ascertain their meaning. The introduction of objectives or guiding principles for sexual offences would create inconsistency in interpretation of other parts of the *Code*, which do not currently contain such provisions. Furthermore, as noted by the QLRC, 'general contextual information or aims may be unhelpful in illuminating the "expression of the elements of an offence"'.[29]

3.23. The High Court relevantly observed in *Boughey v The Queen* that:[30]

> A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement. History would indicate that the codifier will never achieve the clarity and completeness which would obviate any need for subsequent interpretation or commentary ... The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of

[26] QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [8.98] – [8.102]; Discussion Paper Volume 1, [3.22]-[3.25].

[27] Justice Ronan Keane, '30 Years of Law Reform 1975–2005' (Speech, the 30th Anniversary of the Law Reform Commission of Ireland, Farmleigh House, Phoenix Park, Dublin, 23 June 2005) 9.

[28] Letter from Sir Samuel Griffith to the Attorney-General Queensland, 'Explanatory Letter to the Attorney-General Queensland with Draft Code' <https://digitalcollections.qut.edu.au/4777/1/Letter_SWGriffith_29Oct.pdf>.

[29] QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [228].

[30] [1986] HCA 29; (1986) 161 CLR 10 [16] (Mason, Wilson and Deane JJ).

> a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty.

3.24. While such warnings were made in the context of a court's directions to a jury, the Commission considers that they are of equal application to the inclusion of objectives or guiding principles in the *Code*.

3.25. Third, in the Commission's view, the limited circumstances in which objectives or guiding principles may assist a court with interpreting the law in the specific context of sexual offences also weighs against their introduction. The substantive sexual offence provisions primarily give rise to issues of fact which are to be proven by the prosecution, such as whether the alleged conduct took place. The interpretation of objectives will not guide such determinations.

3.26. Fourth, difficulty may be encountered in drafting objectives or guiding principles in a manner that is consistent with every sexual offence contained in the *Code*. For example, circumstances may be envisioned where an objective to ensure sexual autonomy may come into conflict with an objective to protect vulnerable persons. The application by courts of objectives or guiding principles that recognise both principles may give greater weight to one principle over another and thus disturb the balance between the two principles that Parliament resolved when it enacted the legislation.

3.27. Lastly, while objectives or guiding principles are intended to be contemporaneous with current societal norms and attitudes, they may become dated as those attitudes change. The Commission is of the view that ensuring the sexual offences themselves are up to date should be the priority of legal reform.

3.28. For these reasons, the Commission does not recommend the inclusion of either objectives or guiding principles for sexual offences within the *Code*.

3.29. The Commission notes that its view is consistent with the recommendation of the Queensland Women's Safety and Justice Taskforce (**Queensland Taskforce**). The Queensland Taskforce expressed concern that objectives or guiding principles would not fit within the structure of the Queensland Code and may lead to confusion in statutory interpretation.[31] We consider that the same concern arises in the context of the *Code*, which is similar in structure and operation to the Queensland Code.

3.30. The Commission notes that its recommendation does not mean that sexual offence laws should not reflect the objectives and guiding principles that have been put forward. Those objectives and principles should be reflected in the wording of the specific provisions of the *Code* themselves, and we have sought to achieve this by our recommendations in this Report.

3.31. In recommending against the introduction of objectives and guiding principles, we acknowledge stakeholder views as to the potential benefits and advantages of those provisions. Those views included submissions that emphasised the potential educative benefits, including for lawyers and judicial officers, and of clarity as to the underlying objectives and goals of sexual offence laws. In this regard, we note that the Queensland Taskforce suggested including the relevant information in a sexual assault bench book or a training program for lawyers and judicial officers.[32] The Commission supports attempts to improve the training of lawyers and judicial officers to understand the nature of sexual offending. We make some recommendations in Chapter 14 about the education of groups including lawyers and judicial officers.

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[31] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 353–4.

[32] Ibid. A benchbook is a publication which provides information to judicial officers. We discuss benchbooks in more detail in Chapter 10.

4. Consent

Chapter overview

This Chapter makes recommendations for reforming the law of consent.

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 characterised as a crime against the right to personal security and physical, sexual and psychological integrity and that the

[1] As noted in Chapter 2, there are some exceptions to this principle. For example, people should be prohibited from having sex with children.

> 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 the way in which it should be defined in the *Code*.

What are stakeholders' concerns with the *Code's* approach to consent?

4.5. 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.

4.6. In the Discussion Paper we sought views on whether any aspects of this definition give rise to particular concerns or create problems in practice.[4]

4.7. Stakeholders identified various concerns with the *Code's* current approach to consent. These included that it does not:

- Define consent in terms of a mutual agreement between participants or circumstances where the complainant agrees to the relevant sexual activity.
- Require consent to be enthusiastic rather than reluctant or hesitant.
- Explicitly require consent to be communicated.
- Make it clear that failing to verbally resist does not in itself constitute consent to the activity.
- Make it clear that consent to one activity does not constitute consent to another.
- Provide that a child under 16 is incapable of consenting to sexual activities.

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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 Report proceeds on this basis.

4 Discussion Paper Volume 1, [4.13].

- Adequately address all instances where consent may not be present, such as where the complainant lacked the capacity to consent due to sleep, unconsciousness, intoxication or disability.
- Define the terms force, threat, intimidation, deceit or any fraudulent means.
- Address the possibility of conditional consent.
- Explicitly provide that consent may be withdrawn at any time.

4.8. Several stakeholders emphasised the importance of ensuring that the *Code* contains a clear definition of consent. This was seen to be especially important given that in sexual offence trials 'every jury is given the definition verbatim'.[5] This project was considered to provide a good opportunity to 'improve the *Code's* definition of consent, promoting greater consistency and clarity in the explanations of consent given to juries, and thereby better assisting juries to apply the definition to different factual circumstances'.[6]

4.9. The Commission acknowledges stakeholders' concerns about the definition of consent. We consider each of the matters listed above in this course of this Chapter.

How should consent be defined?

4.10. 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.

5 Email Submission E19 (ODPP).
6 Ibid.

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.[7]
NSW	At the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.[8]
NT & Vic	Free and voluntary agreement.[9]
Qld	Consent freely and voluntarily given by a person with the cognitive capacity to give the consent.[10]
SA	The person freely and voluntarily agrees to the sexual activity.[11]
Tas	Free agreement.[12]
WA	Consent freely and voluntarily given.[13]

Table 4.1: Australian approaches to defining consent

4.11. It can be seen from Table 4.1 that all Australian jurisdictions other than Western Australia and Queensland define consent using the terminology of 'agrees' or 'agreement'. Such an approach has also been taken in various international jurisdictions, including Canada, England, Wales and Northern Ireland.[14]

4.12. In the Discussion Paper we sought views on whether Western Australia should define consent and, if so, how it should be defined.[15]

Stakeholders' views

4.13. Most stakeholders indicated their support for a definition of consent in terms of free and voluntary agreement. This approach was seen to properly reflect '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'.[16] It was also considered to align with the stance of ANROWS that:

> Sexual consent needs to be an ongoing and modifiable agreement between informed participants, and that initial consent to engage in any sexual activity does not mean or imply agreement to ongoing participation in any sexual activity. Ensuring ongoing positive consent is important as all individuals have the fundamental right to change

7 *Crimes Act 1900* (ACT) s 50B.
8 *Crimes Act 1900* (NSW) s 61HI(1).
9 *Criminal Code Act 1983* (NT) s 192(1); *Crimes Act 1958* (Vic) s 36(1).
10 *Criminal Code Act 1899* (Qld) s 348(1).
11 *Criminal Law Consolidation Act 1935* (SA) s 46(2).
12 *Criminal Code Act 1924* (Tas) s 2A(1).
13 *Criminal Code Act Compilation Act 1913* (WA) s 319(2).
14 *Criminal Code*, RSC, 1985, c C-46 s 273.1(1); *Sexual Offences Act 2003* (UK) s 74; *The Sexual Offences (Northern Ireland) Order 2008* (NI) s 3.
15 Discussion Paper Volume 1, [4.14]-[4.27].
16 ALRC and NSWLRC, *Family Violence – A National Response* (Final Report, October 2010) 68, quoted in Portal Submission P57 (CWSW).

> their minds at any time if they are no longer comfortable with any form of sexual activity. It is important to recognise that sexual consent is often negotiated in a context of gendered power disparities, expectations, norms and stereotypes around male aggression and female submission. A definition of consent based on an agreement between participants actively reinforces an affirmative model of consent.[17]

4.14. The ODPP noted that the current definition already implicitly requires there to be an agreement to the sexual activity, and advised the Commission that juries are often told that consent involves agreement. However, it was of the view that defining consent in terms of agreement was nonetheless desirable because it:

> Would make clearer that in order for consent to be genuine, it must be informed, at least to some extent. It requires that the person has the capacity to understand, and agree to, the physical act, including its sexual dimension. This would be consistent with the High Court's words about effective consent being 'comprehending and actual', and requiring 'a perception as to what is about to take place'.[18]

4.15. The ODPP also considered that defining consent in terms of free and voluntary agreement:

- Has the advantage of defining consent in positive terms, rather than simply setting out what does not constitute consent.[19]
- Better reflects the concept of mutuality and equality that should exist between the participants in a sexual activity. By contrast 'giving' can be a unilateral action.

4.16. Members of the Legal Expert Group were of the view that adopting the terminology of agreement was unlikely to make much practical difference, as there is little distinction between proving that the complainant gave consent and proving that the complainant agreed to a sexual activity. In addition, most cases do not hinge on whether or not the complainant consented: the key focus of sexual offence trials is usually on whether the alleged sexual activity occurred or whether the accused was mistaken about consent. This view was borne out by our transcript review project. Only 22% of the trials of adult sexual offences involved a defence of consent, whereas 68% of the trials of adult sexual offences involved a defence of no contact.[20] However, members of the Legal Expert Group generally supported the reform as they saw it to be symbolically important. They were of the view that defining consent in terms of agreement could help shift the focus solely from whether the complainant gave consent to the role that both participants played in the sexual conduct.

4.17. Communities noted that this model is also:

> Consistent with national school education on respectful relationships which promotes an affirmative conceptualisation of consent; with consent defined in the Australian Curriculum as 'informed and freely given agreement to engage in an activity, or permission for a specific thing to happen. This includes agreement and permission giving in online and offline situations'.[21]

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17 Email Submission E24 (Communities).

18 Email Submission E19 (ODPP).

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

20 Statistical Analysis Report, Table 4.

21 Email Submission E24 (Communities), quoting Australian Curriculum. F-10 Curriculum, Health and Physical Education. Foundation Year, Year 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. https://v9.australiancurriculum.edu.au/f-10-curriculum/learning-areas/health-and-physical-education/foundation-year_year-1_year-2_year-3_year-4_year-5_year-6_year-7_year-8_year-9_year-10?detailed-content-descriptions=0&hide-ccp=0&hide-gc=0&side-by-side=1&strands-start-index=0&subjects-start-index=1&view=quick.

4.18. Some stakeholders expressed concern that defining consent as something that is given by an individual creates a 'gatekeeper' model of sexual relations. This was seen to lead to 'problematic attitudes' such as:

- Seeing the onus of consent being on the woman/victim to deny rather than the man/perpetrator to obtain.
- Seeing consent as something to 'get' and providing justification or a grey area for the actions taken after that point that do not show an attempt to ensure consent is still present or respect a person's right to withdraw their consent.
- Prejudice towards male victims of sexual assault by female perpetrators, because it perpetuates the view that sex is something done by men to women, and not seen as something a woman can do to a man. It therefore leads to a lack of acknowledgment of men who do not consent to sex.[22]

4.19. Rather than inappropriately placing 'the onus of responsibility solely on possible victims to prove that they did not consent to an act',[23] the model which requires a person to agree was seen to properly place the onus on both parties to demonstrate that there was an agreement. It was noted that this aligns with the Commission's third guiding principle – that sexual offence laws should incorporate a model of shared responsibility.[24]

4.20. Adopting the terminology of 'agreement' or 'agrees' was also considered to have the benefit of advancing the goal of national harmonisation, as it would bring Western Australia in line with most other Australian jurisdictions. The National Association of Services Against Sexual Violence (**NASASV**) emphasised the importance of this goal, noting that its 'members' experience is that there are currently significant inconsistencies in the content and operation of consent laws across the different state jurisdictions, and that these inconsistencies result in confusion for complainants and a reduction in the capacity of the legal system to hold people accused of sexual violence accountable and provide justice for victims'.[25]

4.21. Some stakeholders thought the definition of consent should be more descriptive of the type of consent required. For example, it was suggested that the definition should include reference to an:

- 'Enthusiastic' agreement, as it 'more fully encompasses the spirit of how consent should be given and received, and would avoid more instances of unclear sexual conduct – prior to breaking of the law'.[26]
- 'Informed' agreement, to make it clear that participants must be informed about relevant matters such as the nature of the sexual activity, the identity of the participants and the use of contraception.
- 'Ongoing mutual' agreement between the participants, to make it clear that consent can be withdrawn at any time.

4.22. By contrast, some stakeholders opposed the adoption of an approach that refers to the agreement of the participants. In this respect, it was argued that:

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22 Portal Submission P9 (Anonymous).

23 Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

24 See Chapter 2 for a discussion of this principle.

25 Email Submission E4 (National Association of Services Against Sexual Violence).

26 Portal Submission P52 (Jessica Bruce).

- The approach is conceptually flawed, as a person can consent to sex without entering an agreement with the other participant.[27]
- The transactional notion of an 'agreement' does not properly reflect the nature of sexual interactions.
- 'The term "agreement" could be interpreted differently by individuals and has the potential for confusion. Some individuals may believe there was agreement, however it could have been reluctantly agreed upon due to other factors such as persuasion or fear etc., or just presumed due to prior general body language and interactions.'[28]
- 'Ambiguity concerning the concept of "free agreement" will ignite pre-existing juror assumptions and perceived stereotypes around rape and sexual assault'.[29]
- 'Additional definitions of consent are likely to confuse a jury and should not be reflected in the legislation.'[30]
- Adopting an agreement model could 'broaden the application of the criminal law to sexual activity with the effect of rendering a person no longer entitled to infer that the other party was in fact consenting to the sexual activity'.[31]
- Under the current approach, the issue of consent often will not be contentious. If the complainant states that they did not give consent, this will frequently be accepted by defence counsel, with their focus instead being on the issue of whether the accused mistakenly believed the complainant was consenting. By contrast, enacting this reform may result in an increased focus being placed on the complainant at trial, or on their prior sexual history, to ascertain whether there was an agreement.

4.23. Dr Andrew Dyer suggested that rather than referring to a free and voluntary agreement, the definition should provide that 'a person consents to sexual activity when he or she freely and voluntarily participates in that sexual activity'.[32]

The Commission's view

4.24. The Commission recommends that the *Code's* definition of consent specify 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. This is consistent with the NSW definition of consent.[33]

4.25. The current definition of consent is tautological.[34] Further, we share stakeholders' concerns that the definition inappropriately focuses on one party giving their consent to the other. We are of the view that defining consent in terms of a person agreeing to the sexual activity better reflects the concepts of mutuality and equality that should exist between the participants to a sexual activity. Such an approach also aligns better with the affirmative model of consent that we recommend, which requires participants to a sexual activity to communicate their willingness to engage in that activity.

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27 Email Submission E18 (Dr Andrew Dyer).
28 Portal Submission P55 (Anonymous).
29 Email Submission E22 (Australian Lawyers Alliance).
30 Preliminary Submission 1 (Her Honour Chief Judge Julie Wager, District Court of Western Australia).
31 Email Submission P22 (Australian Lawyers Alliance).
32 Email Submission E18 (Dr Andrew Dyer).
33 *Crimes Act 1900* (NSW) s 61HI(1).
34 *R v Makary* [2019] 2 QD R 528, [49].

4.26. We also share stakeholders' concerns that the current definition creates a gatekeeper model of sexual relations. As noted by the Queensland Taskforce, this 'makes them liable to be pressured by others to "give" or perhaps "give up" their consent'.[35] In our view all participants should play an equal role in sexual relationships: they should each agree to the activities in which they want to engage.

4.27. In addition, we see merit in:

- Defining the concept of consent in a clear, meaningful way, rather than circularly defining consent as 'consent freely and voluntarily given' and then describing the circumstances in which it will be invalid.
- Advancing the harmonisation of consent laws across Australia.

4.28. We are less persuaded by arguments that this reform will shift the focus of court proceedings from the complainant (and whether they gave consent) to the conduct of all participants. We agree with the Legal Expert Group that it is unlikely to make much difference in practice, given that most cases do not revolve around the issue of consent – and where they do, the distinction between giving consent or agreeing to the activity is unlikely to be significant. In fact, we have some concern that this reform may result in increased cross-examination of the complainant, for the reasons outlined above. However, on balance we consider the arguments in favour of this reform to outweigh those made against it.

4.29. In our view, it is preferable to define consent in terms of a person freely and voluntarily agreeing to the sexual activity (as is the case in NSW and SA) than to define it in terms of a free and voluntary agreement (as is the case in Victoria and the NT). We consider that this approach makes it clear that the key issue is whether the complainant subjectively agreed to participate in the relevant sexual activity, not whether the complainant and the accused made an objectively ascertainable agreement. While we acknowledge that in Victoria and the NT courts have interpreted the definition of consent as requiring agreement by the complainant to the relevant sexual activity (rather than requiring the formation of an agreement between the complainant and the accused),[36] to avoid any issues in this regard we think the NSW formulation is preferable.

4.30. The Commission does not recommend defining consent in terms of enthusiastic agreement. In our view, the principles of sexual autonomy and bodily integrity are sufficiently protected by ensuring that participants freely and voluntarily agree to the relevant sexual activity. Moreover, it is not clear when consent would (or should) be considered enthusiastic, creating problems of legal certainty; and requiring consent to be enthusiastic would be likely to significantly expand the scope of the criminal law, capturing conduct which we do not consider deserving of criminal sanction.

4.31. For similar reasons, the Commission does not recommend defining consent in terms of an informed agreement. While again, ideally, the participants to a sexual activity would be fully informed about all relevant matters, it is not clear when an agreement to participate in a sexual activity would (or should) be considered fully informed, creating problems of legal certainty. For example, would consent be undermined where a participant does not inform the other person about the nature of their employment or their level of wealth? Without further specification about the matters that a participant needs to be informed about, such an approach is likely to be overly broad, capturing conduct which should not be criminalised.

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

[36] *DPP (Vic) v Yeong* [2022] VSCA 179 [42]-[43] and [105]; *R v Senge* [2021] NTSC 80 [64].

4.32. We do agree, however, that there will be some circumstances in which a person's failure to disclose certain information will undermine consent. In our view, this issue is best addressed by specifically including those circumstances in the **list of circumstances** in which there is no consent.[37] We consider this issue later in the Chapter.

4.33. We recommend that the definition of consent, as well as the other statutory provisions which apply to all types of acts which may constitute sexual offences, use the term 'sexual activity'. This term should be defined as an act of sexual penetration, an act of non-penetrative sexual touching, or a non-touching sexual act (regardless of whether there was an attempt or threat to touch). In Chapter 6 we recommend definitions of these terms.

Recommendation

1. **The *Code's* definition of consent should specify 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.**
2. **The term 'sexual activity' should be defined as an act of sexual penetration, an act of non-penetrative sexual touching, or a non-touching sexual act (regardless of whether there was an attempt or threat to touch).**

Should the *Code* require participants to communicate consent?

4.34. While the law currently 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'.[38]

4.35. By contrast, legislation in various jurisdictions, including the ACT, NSW, Tasmania and Victoria,[39] requires the participants to a sexual activity to say or do something to indicate consent.

4.36. In the Discussion Paper we sought views on whether the *Code* should require participants to say or do something to indicate their consent to a sexual activity.[40]

Stakeholders' views

4.37. There was significant support amongst stakeholders for requiring participants to communicate their consent to a sexual activity. Seventy-nine per cent of respondents to the online survey portal supported this reform. It was also widely supported in the submissions and consultations.

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[37] This is a list of factual circumstances specified in sexual offences legislation which, if the jury finds existed, mean that there was no consent to the sexual activity that is the subject of a charge. In Western Australia, these circumstances are currently listed in section 319(2) of the *Code*.

[38] *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*.

[39] *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), s 36AA(1)(a).

[40] Discussion Paper Volume 1, [4.28]-[4.42].

4.38. Various reasons were given for enacting a communication requirement. For example, Full Stop Australia submitted that:

> The communicative model of consent… has been influential in reform to sexual assault laws across Australia, such as in the ACT, NSW and Victoria. This model responds to misconceptions held by jurors and the broader community relating to women's sexual behaviour and sexual relations, including views that women may say 'no' when they really mean 'yes', that women who are raped are 'asking for it', and that rape can be the result of men not being able to control their need for sex so their responsibility is removed. In addition to improving the criminal justice system, including it in law aids in the general community's understanding of consent. It encourages a person initiating a sexual act to ensure that consent is present before proceeding, making it an important policy measure to promote ongoing and mutual communication between parties, rather than relying on stereotypical presumptions about the presence of consent unless it is expressly negated. It also is designed to combat public perceptions that the legal system is biased against victims, promoting increased complaints to the police and increased convictions as a result.[41]

4.39. Other justifications put forward by stakeholders for adopting this requirement included that:

- 'It is not the current law that consent is a purely internal state of mind. The word "given" expresses the passage of *something* between the internal mind of one party and the understanding of the other. Requiring that *something* to be a communication by words or conduct, however small, however nuanced, however personal to the parties, is simply the next stage of clarifying in our Code what that something is.'[42]
- It will 'help remove ambiguity from sexual encounters and create a framework in which consent is positioned as an active construct'.[43] This is particularly important, given that 'some victim-survivors may remain silent or present the "freeze" response when they are in a situation of fear', making them 'unable to verbally or non-verbally indicate "no" or "stop" to the perpetrator'.[44]
- It is 'reflective of national momentum in support of the adoption of affirmative consent provisions, and broad social, legal and political support for communicative consent models'.[45]
- It has been successful in NSW, where it has resulted in some changes to policing decisions and social norms and expectation.

4.40. There was, however, also opposition to this proposed reform. For example, Dr Andrew Dyer submitted that:[46]

- Consent 'is a state of mind – it is not "a communicated state of mind" – and there are no good reasons for the law to depart from the correct moral position regarding this issue'.
- A person's sexual autonomy is not violated if they are internally willing to engage in a sexual activity, and they participate in it freely and voluntarily, but they do not communicate their consent to the other participant.

41 Email Submission E6 (Full Stop Australia).
42 Email Submission E19 (ODPP).
43 Portal Submission P57 (CWSW).
44 Ibid.
45 Email Submission E6 (Full Stop Australia).
46 Email Submission E18 (Dr Andrew Dyer).

- Enacting a communication requirement is unlikely to shift the focus of inquiry at trial. Regardless of this change, the jury will (and should) focus on what the complainant said and did to determine whether they consented.

4.41. The Australian Lawyers' Alliance further contended that:[47]

- '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'.
- The ambiguity of the phrase 'say or do anything to communicate consent … introduces a subjective element that is likely to be the subject of detailed cross-examination within a sexual assault trial, given that there is no normative or standardised way in which notions such as "consent" are communicated or understood. Given the ambiguity and lack of certainty in the definition of "consent" there is a heightened risk of extensive defence cross-examination of complainants in relation to their previous sexual history and how consent has been communicated in those instances … This may result in further trauma for complainants and a reduction in the reporting of sexual assaults'.
- While this reform does not technically shift the onus of proof, it 'will inappropriately shift the focus to the accused to demonstrate that consent had been communicated. In practice, this is likely to require the accused to give evidence'.

4.42. Legal Aid also considered this reform to be unnecessary. It noted that the word 'consent' in section 319(1) 'has the ordinary dictionary definition, namely – "permission for something to happen or agreement to do something"'. It expressed concern that 'requiring express words or action to indicate consent would limit how consent is given for the purposes of the law', arguing that 'it should be open to the jury to consider the full range of factual circumstances in considering whether permission or agreement was given or not'.[48]

4.43. While members of the ALS[49] did not oppose this reform, they were concerned to ensure that any reforms do not operate in a way that disadvantages Indigenous people who may use diverse methods of communication (such as verbal clicks).[50]

4.44. The ODPP anticipated many of the arguments outlined above, responding to them as follows:[51]

- Requiring consent to be communicated will not prevent consent being given in subtle ways, or from being evaluated against a pattern of past behaviour. It will simply require that there was at least something that was communicated by words or conduct.
- Adopting a communication requirement is 'extremely unlikely' to unduly criminalise a lot of consensual sexual activities. The jury will still be able to examine the context of a relationship to determine if consent was communicated. 'If anything, this change will require more scrutiny of contextual evidence of patterns of behaviour and modes of communication between the parties, in order that *proper* weight is given by the jury to (particularly) the nature of their relationship'.

47 Email Submission P22 (Australian Lawyers Alliance).

48 Portal Submission P41 (Legal Aid).

49 All references in the Report to the views of members of the ALS were obtained during an in person consultation with the Aboriginal Legal Service of Western Australia Ltd on 28 March 2023..

50 Consultation with Aboriginal Legal Service, 28 March 2023.

51 Email Submission E19 (ODPP).

- Even if the approach does not shift the focus of trials, this simply neutralises the reform – it does not make things worse. Moreover, it is appropriate to focus on what the accused claims constituted consent.

4.45. In the Discussion Paper we noted that if a communication requirement is to be included in the *Code*, it will be necessary to decide whether the relevant provision should require that the complainant 'indicate' consent (as is the case in Victoria) or 'communicate' consent (as is the case in NSW and Tasmania)?[52] Stakeholder views were mixed in this regard. For example, 52% of respondents to the online survey supported use of the word communicate; 43% supported use of the word indicate; and 5% did not know. The ODPP expressed a preference for the word communicate, as it is simple and connotes intentionality.

4.46. In the Discussion Paper we also asked whether the provision, if added, should simply refer to the complainant not saying or doing anything to communicate consent, or whether it should be framed more broadly.[53] For example, should it also say that a person who freezes or is unable to respond to a sexual activity does not consent to the sexual activity? Respondents to the online survey were generally supportive of a broad approach, with 83% stating that the *Code* should explicitly address the issue of freezing. However, no support for this broader approach was offered in the email submissions or consultations.

4.47. Finally, in the Discussion Paper we asked whether the provision should be included as part of the definition of consent (as is the case in the ACT) or in the list of circumstances in which there is no consent (as is the case in Victoria, NSW and Tasmania).[54] Stakeholder views were also divided on this issue: 52% of respondents to the online survey thought that it should be included in the definition of consent; 26% thought that it should be included in the list of circumstances; and 22% did not know. The ODPP was of the view that this requirement should be 'dealt with as a circumstance where there is no consent, because we think it should be caught by an amendment providing that if an accused knew of this circumstance, they are taken not to have an honest and reasonable belief in consent'.[55] However, it did not object to instead incorporating this 'communicative element' into the definition of consent, due to its significance.[56]

The Commission's view

4.48. It is the Commission's view that the *Code* should make it clear that a person does not consent to a sexual activity if they do not say or do something to communicate that they agree to engage in that activity.

4.49. In reaching this conclusion, we have been guided by the principles outlined in Chapter 2 of this Report. In our view these principles are best reflected by basing the *Code's* consent laws on an affirmative model of consent. Such a model includes requiring participants to actively demonstrate their willingness to engage in a sexual activity through words or conduct. Mere silence is not sufficient.

4.50. Incorporating a communication requirement into the *Code's* consent provision is particularly important given that people who experience sexual violence commonly freeze or cooperate with the perpetrator for good reasons. It will offer protection to people who are unable or

[52] Discussion Paper Volume 1, [4.42].
[53] Ibid.
[54] Ibid.
[55] This issue is discussed in Chapter 5.
[56] Email Submission E19 (ODPP).

unwilling to communicate that they do not agree, by making it clear that unless they have said or done something to indicate their assent to the sexual activity, it should not take place.

4.51. We agree with the NSWLRC that adopting this approach may also:[57]

- Help address the misconception that a person who does not consent to a sexual activity will physically or verbally resist, and that a person who fails to resist is consenting.
- 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.
- Assist with decisions to charge and prosecute cases in which the complainant did not say or do anything to indicate a lack of consent.
- 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'.[58]

4.52. We believe that incorporating a communication requirement into the *Code* may also provide a useful foundation for educational initiatives, as we were advised that consent educators commonly draw upon legal concepts and definitions when educating people about giving and seeking consent. In this regard, we agree with the ACT's Sexual Assault Prevention and Response Steering Committee that the law is a 'significant mechanism for community education and cultural change', and that by providing clarity about the bounds of consent this approach may help dispel myths and thereby 'contribute to the reduction of sexual violence'.[59]

4.53. While we recommend that the *Code* require people to communicate their willingness to engage in a sexual activity, we do not recommend that it specify the way in which this must be done. There are limitless ways that people can indicate they agree to participate in a sexual activity, and the Commission does not want to be prescriptive in this regard. What is important is *that* people communicate that they agree, not *how* they do so.

4.54. Consequently, we recommend that the *Code* allow the communication to be performed by verbal or non-verbal means. As communication can be contextual, the fact finder[60] should be permitted to consider all of the surrounding circumstances to determine if the complainant communicated their willingness to engage in the sexual activity.

4.55. We recommend that the relevant provision be framed in terms of the complainant 'communicating' that they agree rather than 'indicating' they agree. We consider this term to be clearer and to fit better with the affirmative model of consent (which builds upon the communicative model of consent: see Chapter 2). It also clearly requires the person to have intended to express that they agree. In addition, being the approach taken in most other jurisdictions that have included a communication requirement, it best advances the goal of national harmonisation.

4.56. For reasons of national harmonisation, we do not recommend that the provision state that a person who freezes or is unable to respond to a sexual activity does not consent to the sexual activity. While this is true, we think it preferable for the *Code* to adopt the formulation used in

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57 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.26]-[6.57]; Rec 6.2.

58 Ibid [6.41].

59 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 78.

60 This will be the jury for most cases heard in the District Court, and a magistrate for cases heard in the Magistrates Court. Because most sexual offence cases are heard in the District Court, throughout the remainder of this Report we will refer solely to juries (unless there is a reason to specifically refer to magistrates). However, many of the matters raised will equally apply to magistrates or to judges in a judge-alone trial.

other jurisdictions, which simply refers to the person not saying or doing anything to communicate that they agree. If relevant in the circumstances of the case, the judge can expand on this issue by directing the jury about common responses to sexual violence. We consider jury directions in Chapter 10.

4.57. For the reasons expressed by the ODPP, we are of the view that this provision should be included in the list of circumstances in which there is no consent. We discuss this list below. However, we do not object to incorporating it into the definition of consent if that is considered preferable.

4.58. We appreciate that our recommended approach conflicts with the views of those who consider consent to be an internal state of mind, which can exist without communication. However, like the Supreme Court of Ireland, we prefer the view that consent in this context is 'the active communication through words or physical gestures' of a person's internal willingness to engage in a sexual activity.[61] A similar conclusion was reached by the NSWLRC, which stated that consent is 'a communicated state of mind; that is, a permission that is given by one person to another'.[62]

4.59. We note that this is already the approach the *Code* implicitly takes, by requiring consent to be given. We agree with the ODPP that requiring consent to be communicated by words or conduct 'is simply the next stage of clarifying in our *Code*' what must be done before a sexual activity takes place.[63]

4.60. We do not share stakeholder concerns that, as people 'frequently engage in consensual sexual activities without expressly communicating their willingness to do so in words or actions', this approach will unduly expand the scope of the criminal law.[64] In our view:

- If a person has not communicated their willingness to engage in a sexual activity in any way (in a context where the means of communication may range from verbal expression to subtle body language), they have not consented to that activity: internal willingness in this context is different from consent. Consequently, the activity should properly be considered non-consensual and criminalised (and already would be, as consent will not have been 'given' as is required currently by the *Code*).
- If a person has in any way communicated to another participant that that they freely and voluntarily agree to engage in the sexual activity, the other participant's behaviour will not be criminalised. This will be the case even if the method of communication is subtle or not traditional, as no restrictions will be placed on the way in which a participant communicates that they agree to a sexual activity.

4.61. We consider that this last point also addresses:

- Concerns raised by members of the ALS concerning the diverse methods of communication that may be used by Aboriginal and Torres Strait Islander Peoples, such as verbal clicks. These methods of communicating will meet the requirement established by this provision.
- Concerns raised by stakeholders that the means by which consent can be given will be reduced under this approach.[65] This is not the case: under our recommended approach a

61 *DPP v O'R* [2016] IESC 64 [36], 3 IR 322 [42].
62 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.28].
63 Email Submission E19 (ODPP).
64 Email Submission P22 (Australian Lawyers Alliance).
65 See, eg, QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.54]-[5.55].

person can communicate that they agree by any means. The requirement simply prevents consent being inferred from mere silence.

4.62. It may seem odd to some that, under this approach, a person may be charged with a sexual offence even though the other participant was internally willing to engage in the relevant sexual activity (but did not communicate that willingness). However, if the other participant was genuinely internally willing to engage in the sexual activity, but for some reason did not communicate that willingness, the conduct is highly unlikely to come to the attention of the police or result in a criminal charge being laid. In any case, we think that the abovementioned arguments in favour of requiring the communication of consent outweigh any concerns raised by this unlikely possibility. In particular, we are of the view that it is more important to protect people from sexual violence (and from false complaints of sexual violence) by requiring consent to a sexual activity to be communicated in some way, than it is to frame the law in a manner which may result in participants to a sexual activity being uncertain whether an activity is consensual.

4.63. We acknowledge stakeholder concerns that adopting this approach may result in more extensive defence cross-examination of complainants to establish that they communicated consent. However, the experience of other jurisdictions which have introduced this reform is that it has not heightened the scrutiny of complainants at trial.[66] In addition, we agree with the ODPP that where consent is in issue, 'it is appropriate to draw attention to the conduct which the accused says signified consent at the time of the sexual act'.[67]

4.64. We also acknowledge stakeholder concerns that where there is evidence that the complainant did not say or do anything to communicate consent this reform will shift the focus to the accused to demonstrate that consent had been communicated, and that this may require the accused to give evidence. However, we note that in such a case the onus will remain on the prosecution to prove, beyond reasonable doubt, that the complainant did not consent. Where the prosecution presents evidence of a lack of communication of consent, this could be weakened in various ways by defence counsel without the accused having to give evidence. For example, they may be able to obtain this evidence by cross-examining the complainant or by relying on evidence given by other witnesses.[68]

Recommendation

3. The *Code* should provide that a person does not consent to a sexual activity if they do not say or do anything to communicate that they agree to that activity. This should be included in the list of circumstances in which there is no consent to a sexual activity.

What negative indicators of consent should be included in the *Code*?

4.65. There are two ways in which sexual offence laws around Australia clarify the meaning of consent:

[66] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.49].
[67] Email Submission E19 (ODPP).
[68] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.53]-[6.57].

- They provide a list of circumstances in which there is no consent. For example, the *Code* states that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'.[69]
- They specify matters which are not, of themselves, sufficient to constitute consent (sometimes called **negative indicators** of consent). For example, the *Crimes Act 1900* (NSW) (**NSW Act**) provides 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'.[70]

4.66. While on the surface these types of provisions may seem similar, they operate in different ways. Lists of circumstances establish the boundaries of valid consent, by making it clear that if one of the listed circumstances exists, by definition there was no consent. By contrast, negative indicators address common misconceptions about consent, by blocking 'the use of inference based on unacceptable stereotypes or social conventions'.[71] They do this by providing an example of a circumstance that people may mistakenly believe constitutes consent, and making it clear that taken alone it does not do so.

4.67. Once a negative indicator is included in the *Code,* defence counsel cannot suggest to the jury that the existence of the negative indicator alone is a basis for concluding that that the prosecution has failed to prove that the complainant did not consent to the relevant sexual activity. It also requires a judge to direct the jury, where it is relevant to do so, that as a matter of law they are prohibited from relying on the negative indicator alone to determine that the prosecution has failed to prove that the complainant did not consent to the relevant sexual activity.

4.68. In this section we consider the negative indicators that should be included in the *Code*. We consider the matters that should be included in the *Code's* list of circumstances later in the Chapter.

4.69. At present, the *Code* only includes one negative indicator: that 'a failure by that person to offer physical resistance does not of itself constitute consent to the act'.[72] In the Discussion Paper we sought views on whether any other negative indicators should be included in the *Code*.[73] For example, we suggested that the *Code* could make it clear that a person does not consent to a sexual activity only because they:

- Failed to verbally resist.
- Consented to a different activity 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.
- Had entered into an agreement for commercial sexual services.

4.70. We also sought views on whether, if any of these matters (or others) are to be addressed, this should be done as part of the definition of consent and/or in jury directions.

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69 *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).
70 *Crimes Act 1900* (NSW) s 61HI(5).
71 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.53].
72 *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(b).
73 Discussion Paper Volume 1, [4.43]-[4.59].

Stakeholders' views

4.71. There was widespread support for including additional negative indicators in the *Code*. These were seen to be a useful way of addressing commonly held misconceptions about consent. For example, Full Stop Australia submitted that:

> In undertaking a reform of its consent laws, WA has the opportunity to recognise and respond to common myths and misconceptions that continue to be held within the community. These include beliefs that consent to one activity is consent to any and all other sexual activities, or that a person is consenting unless they say no and actively physically resist. As the law plays an important part in not only protecting complainants navigating the justice system but also in defining community standards, it is beneficial to clearly provide guidance as to the presence or absence of consent in a standalone provision, rather than merely combining them with those relating to jury directions …
>
> Including express provisions of this nature is especially important in promoting the rights of vulnerable groups, such as Indigenous peoples, persons with a disability and the LGBTI+ community. These groups are often more susceptible to sexual assault, so articulating clear boundaries of consent will assist in protecting them.[74]

4.72. Other stakeholders expressed similar views. For example:

- Communities considered negative indicators to be important 'to 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'.[75]
- Members of the Community Expert Group expressed the view that negative indicators can help educate people with diverse needs about the meaning of consent.

4.73. Stakeholders were generally supportive of introducing each of the negative indicators raised in the Discussion Paper. These are discussed below. No other negative indicators were suggested.

Lack of verbal resistance

4.74. Seventy-three per cent of respondents to the online survey supported making it clear that a person does not consent only because they failed to verbally resist. Other stakeholders also widely supported this reform. For example, Full Stop Australia submitted:

> Importantly, in addition to its provision relating to the absence of physical resistance not indicating consent, the Code should make it clear that a failure to verbally resist does not reflect the granting of consent. Freeze and surrender responses are the two most reported responses by victims of sexual assault. In these circumstances, a victim may become unable to communicate their lack of consent during a sexual offence due to their fear. Where an accused has not taken steps to ascertain whether a person is consenting at the commencement of a sexual activity, a failure to physically or verbally resist should not be taken as implying consent.[76]

4.75. While Communities was also supportive of this approach, it cautioned against using the word 'failure' in the provision, as it 'can be taken to imply that the act (resistance) should have been

[74] Email Submission E6 (Full Stop Australia).
[75] Portal Submission P49 (Communities).
[76] Email Submission E6 (Full Stop Australia) (citations omitted).

done'.[77] The ODPP made a similar point, and also warned against using the term 'offer' resistance, as this 'connotes something being furnished which impliedly has value'.[78]

Consent to other sexual activity on other occasions

4.76. Eighty-two per cent of respondents to the online survey supported making the law clear that a person does not consent to a sexual activity with a person only because they had previously consented to a sexual activity with that person or someone else, or because they had previously consented to a sexual activity of that kind or any other kind. Eighty-five per cent of respondents supported making it clear that a person does not consent only because they consented to a different sexual activity with the same person. Other stakeholders also broadly supported these negative indicators.

4.77. Some attendees at the Piddington Society consultation noted, however, that depending on the circumstances, the fact that a person had consented to other sexual activity on the same or another occasion may legitimately affect the determination of consent (as well as the mistake of fact defence). Consequently, they were concerned to ensure that any provision only prevents the jury from drawing improper inferences based on the complainant's prior consent to other sexual activity. It should not prevent them from taking the complainant's prior consent into account if it is properly relevant to the circumstances of the case.

Agreement for commercial sexual services

4.78. Seventy-three per cent of respondents to the online survey supported making it clear that a person does not consent to a sexual activity only because they had entered into an agreement for commercial sexual services. Several other stakeholders also supported this reform. For example, WAAC submitted that:

> The Code should make it clear how the consent provisions operate when there is an agreement for commercial sexual services. We recommend the *Code* adopt an approach taken by section 9 of the *Sex Industry Act 2019* (NT):
>
> (1) Despite anything in a contract for sex work, a person may, at any time, refuse to perform or continue to perform sex work.
>
> (2) The fact that a person has entered into a contract for sex work does not of itself constitute consent for the purposes of the criminal law if the person does not consent, or withdraws the person's consent, to performing sex work.
>
> We submit that a provision of this nature would protect sex workers' right to sexual autonomy and bodily integrity.
>
> It is essential that consent to specific sexual services in the context of sex work is not understood to be consent to all forms of sexual services. As in non-sex work contexts, consent to one act should not be taken to imply consent to other acts. WAAC submits that the Code should include a provision, similar to that proposed by NSWLRC, 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'; and that this provision be applicable to both sex work and non-sex work contexts.[79]

[77] Portal Submission P49 (Communities).
[78] Email Submission E19 (ODPP).
[79] Portal Submission P58 (WAAC).

4.79. While SWEAR WA did not oppose this reform, it was of the view that it would not offer sufficient protection to people working in the sex industry. It submitted that 'the full decriminalisation of sex work is the only way to ensure the rights, safety and well-being of sex workers and the wider community'.[80]

Include negative indicators in the definition of consent and/or jury directions

4.80. There was widespread support for addressing the negative indicators in the definition of consent as well as in jury directions. For example, some attendees at the Piddington Society consultation expressed the view that putting these matters in the consent definition is clearer and more transparent than simply including them in jury directions. It has an important educational and declaratory aspect, explaining the law to the public. This may help prevent any misapprehensions about the relevance of certain circumstances to consent.

4.81. The ODPP suggested that the negative indicators should be 'included in a general provision on consent in Chapter XXXI along with the definition of consent, in the manner of s 61HI of the NSW Act'.[81]

4.82. However, Legal Aid was of the view that jury directions alone would be sufficient. It submitted that 'model jury directions should be provided dealing with different aspects of consent which a trial judge can draw upon based on what the individual issues in the case are. There is no need for further clarity in the meaning of consent in the *Code'*.[82]

The Commission's view

4.83. The Commission agrees with stakeholders that including negative indicators in the *Code* is a useful way of addressing commonly held misconceptions about consent. These indicators provide useful information to jurors about the relevance of specified circumstances to consent and can play an important role in educating the community.

4.84. We also agree with stakeholders that including these matters in the *Code* is clearer and more transparent than simply including them in jury directions. It allows anyone with an interest in the *Code's* consent provisions to readily understand that they cannot infer consent from the specified circumstances. It also provides a useful educational resource for consent educators.

4.85. The Commission recommends that the *Code* should include negative indicators about:

- The lack of physical and verbal resistance; and
- Consent to other sexual activity on other occasions.

4.86. We recommend that there should also be legislated jury directions on these topics. We address jury directions in Chapter 10.

4.87. We do not, however, believe that it is necessary for the *Code* to include a specific provision targeted at agreements for commercial sexual services.

4.88. Our recommendations in this regard are discussed in turn below.

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[80] Portal Submission P6 (SWEAR WA). WAAC also supported the full decriminalisation of sex work in its submission.

[81] Email Submission E19 (ODPP).

[82] Portal Submission P23 (Legal Aid).

Lack of physical and verbal resistance

4.89. As noted above, the *Code* already includes a provision stating that a failure by a person 'to offer physical resistance does not of itself constitute consent to the act'.[83] The Commission recommends expanding this provision to also include reference to verbal resistance.

4.90. 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 or cooperate with perpetrators for good reasons.

4.91. We note that several other Australian jurisdictions already include this negative indicator in their legislation.[84] Including it in the *Code* would thus also advance the goal of national harmonisation.

4.92. We accept stakeholder views that the relevant provision should not use the words 'failure' or 'offer', to avoid implying that the complainant should have resisted. We are also of the opinion that as the provision is to refer to verbal opposition to the sexual activity, it should refer to saying or doing something to *prevent* the act; not just to resist it. This will ensure that the language of the provision is relevant to a situation where the accused contends that the complainant should have known that the accused intended to perform a sexual activity, but the complainant did not say anything to indicate they did not agree to it prior to the act occurring. Consequently, we recommend that section 319(2)(b) be replaced with a provision similar to the ACT legislation, which provides that a person 'does not consent to an act with another person (the accused person) only because the person does not say or do something to resist the act', but with the addition of the words 'or prevent' after resist.[85]

Recommendation

4. Section 319(2)(b) of the *Code* should be replaced by a provision which provides that 'a person does not consent to an activity with another person (the accused person) only because the person does not say or do something to resist or prevent the activity'.

Consent to other sexual activity on other occasions

4.93. Under the affirmative model of consent that we recommend enacting throughout this Report, consent is activity-specific: it is 'required for every instance of sexual activity'.[86] In order to make this clear, the Commission recommends that the *Code* provide that a person does not consent to a sexual activity with another person only because they consented to a sexual activity of the same type, or a sexual activity of a different type, with that person or any other person at any time.

4.94. This provision would also help to address any false assumptions that:

- A person who consents to one sexual activity consents to all sexual contact.

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

84 *Crimes Act 1900* (NSW) s 61HI(4); *Crimes Act 1900* (ACT) s 67(2)(a); *Crimes Act 1958* (Vic) s 36(2).

85 *Crimes Act 1900* (ACT) s 67(2)(a).

86 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.88].

- A person who consents to sexual activity at one time consents to that activity again in the future.
- A person who engages in sexual activity with one person will consent always to engage in sexual activity with another person.[87]

4.95. We note that the purpose of this provision is simply to prevent the jury from drawing improper inferences based solely on the complainant's prior consent or consent to other sexual activity. It should not prevent the jury from properly taking those matters into account where they are relevant in the circumstances of the case.

Recommendation

5. The *Code* should provide that a person does not consent to a sexual activity with another person only because they consented to a sexual activity of the same type, or a sexual activity of a different type, with that person or any other person at any time.

Agreement for commercial sexual services

4.96. In Western Australia sex work is governed by the *Prostitution Act 2000* (WA) (**Prostitution Act**). This Act makes most sex work related activities illegal, although it not illegal for an adult without prescribed convictions to work in the sex industry.

4.97. 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.[88]

4.98. In Chapter 2 we noted that one of the guiding principles of this review is that sexual offence laws should be non-discriminatory: everyone is equally deserving of the protection and sanction of the law. This includes people working in the sex industry. The fact that an individual works in the sex work industry does not mean they have fewer rights to sexual autonomy or bodily integrity, or that they do not deserve to be protected from sexual exploitation.

4.99. Given the high levels of sexual violence experienced by people working in the sex industry, we see some merit in WAAC's proposal that the Western Australia Government adopt the approach taken by section 9 of the *Sex Industry Act 2019* (NT), making it clear that a contract for sex work does not of itself constitute consent for the purposes of the criminal law, and that a person working in the sex industry may withdraw consent at any time. However, in light of the other reforms recommended in this Report, we do not consider this reform to be necessary. We are of the view that those reforms will make it sufficiently clear that all people – including people working in the sex industry – must specifically consent to a sexual activity, and may withdraw that consent at any time. The existence of a contract for sex work will have no bearing on this issue.

4.100. Similarly, we do not think it is necessary to specify that a person working in the sex industry 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. As noted in the previous section, we recommend the enactment of a general provision stating that the complainant does not consent to a sexual activity with the accused only because they had consented to a sexual activity of the same or

[87] Ibid [5.51]-[5.59], [5.83].

[88] 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).

different type with the accused or another person at any time. This provision will not be limited in its application: it will apply to people working in the sex industry.

Should the *Code* list circumstances in which there is no consent?

4.101. Legislation in every Australian jurisdiction contains a provision specifying circumstances which either do not constitute consent or which negate any ostensible consent for the purposes of the relevant sexual offences.[89]

4.102. In the Discussion Paper we noted that while these non-exhaustive lists of circumstances are seen to be useful for numerous reasons,[90] some people consider them to be unnecessary, given the broad and flexible definition of consent. We sought views on whether the *Code* should continue to list circumstances in which consent is not freely and voluntarily given.[91]

Stakeholders' views

4.103. There was near unanimous support amongst stakeholders for continuing to non-exhaustively list circumstances in which there is no consent.[92] Arguments in support of such a list of circumstances included:

- It 'promotes clarity by specifying the common factual circumstances which are recognised to vitiate consent as a matter of law'.[93]
- It fosters 'consistent decision-making in common cases' and allows flexibility in others.[94]
- 'If the prosecution can prove the existence of a circumstance, it relieves it of needing to prove the absence of consent independently. That does not circumvent or remove any necessary element of proof of the accused's guilt beyond reasonable doubt. Rather, it sharpens the jury's focus on the specific issue for their determination'.[95]
- It helps 'protect victims navigating the criminal justice system, by preventing ambiguities that may be relied on by defence counsel to suggest that consent was present or could be implied, even when it was not freely or voluntarily given'.[96]
- It 'aligns with legislation in all other Australian jurisdictions' and 'provides guidance to police officers and prosecutors'.[97]

The Commission's view

4.104. The Commission agrees with stakeholders, for all the reasons listed above, that the *Code* should continue to include a list of circumstances in which there is no consent.

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89 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).

90 See Discussion Paper Volume 1, [4.61] for an overview of these reasons.

91 Ibid [4.61]-[4.63].

92 Legal Aid suggested that such a list may not be necessary, but it did not advocate for the removal of the list from the *Code*.

93 Email Submission E19 (ODPP).

94 Email Submission E5 (Dr Kelley Burton).

95 Email Submission E19 (ODPP), citing *DPP v Yeong (A Pseudonym)* [2022] VSCA 179 [45].

96 Email Submission E6 (Full Stop Australia).

97 Email Submission E24 (Communities).

Should the list of circumstances be amended?

4.105. 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.[98] This is the least exhaustive list in Australia: other jurisdictions include various other circumstances in their lists, such as sleep, unconsciousness and intoxication.

4.106. In the Discussion Paper we asked if the list of circumstances in the *Code* should be amended in any way.[99]

Stakeholders' views

4.107. There was widespread support for reforming the *Code's* list of circumstances. For example, one stakeholder submitted that:

> The purpose of the definition of consent in s 319(2) of the Code was to provide a broad definition so that it is not restrictive or limited in any way. However, … the list of circumstances in which consent is not 'freely or voluntarily given' pursuant to s 319(2)(a) of the Code is too broad and lacks clarity in its scope, which has resulted in conflicting judicial interpretations and can exacerbate jury misconceptions, biases and beliefs surrounding sexual offences …
>
> The broad list of circumstances should be amended to assist jurors in their judgments in sexual offence cases and alleviate the risk of jurors resorting to their own misconceptions, beliefs and stereotypes in making judgments. Moreover, amending the list of circumstances could help jurors better understand the meaning of consent.[100]

4.108. The ODPP was of the view that 'the emphasis of the vitiating factors listed in the current definition perpetuates the myth that the commission of a sexual offence can be expected to involve violence', and that consequently 'the State tends to prosecute cases which fit "master narratives" about sexual offences (ie, those which involve force or pressure)'.[101] It recommended that the list should be expanded to include cases where sexual violence is 'facilitated by an imbalance of power which allows the perpetrator to exploit the complainant's vulnerability', as well as cases which involve a 'lack of capacity (including from alcohol or drug intoxication), blackmail … or mistake about the purpose of the act'. It contended that this 'should improve the recognisability of criminal conduct which happens and yet is rarely prosecuted'.[102]

4.109. Numerous other stakeholders also supported the expansion of the list to include the matters identified by the ODPP, as well as other matters such as sleep and unconsciousness, coercive and controlling behaviour, stealthing, unlawful detention and abuse of a position of authority or trust. It was submitted that this would better reflect 'modern community standards',[103] and would bring Western Australia into line with other jurisdictions which have expansive lists, such as NSW and Victoria.

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98 *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).
99 Discussion Paper Volume 1, [4.64]-[4.271].
100 Email Submission E3 (Christie Mathews).
101 Email Submission E19 (ODPP).
102 Ibid.
103 Portal Submission P57 (CWSW).

4.110. Members of the Legal Expert Group suggested that a more expansive list would also be of greater benefit to the community, as it would allow them to read the *Code* and see what conduct was prohibited. In addition, it would assist with educating people about the law.

4.111. There was, however, some opposition to expanding the list. For example:

- Dr Glover was of the view that Western Australia's courts have 'repeatedly demonstrated their ability to address the nuances of each individual case flexibly, logically and fairly. The introduction into statute of any of the amendments proposed above add additional rigidity to what should be a discretionary judicial interpretation exercise'.[104]
- Legal Aid did not support attempting to 'exclusively define all possible permutations of consent not freely or voluntarily given'.[105] It preferred drafting model jury directions to address these matters, 'which can be drawn upon by the trial judge when relevant'.[106]

The Commission's view

4.112. It is the Commission's view that the list of circumstances should serve five key purposes. It should:

- Clearly declare the Government's intention that the listed matters do not constitute consent and that a person should not engage in sexual activities in those circumstances.
- Promote clarity in the law, making its scope clear to police, lawyers, judges, jurors and the community.
- Foster consistent decision-making in cases which commonly arise.
- Allow the prosecution to prove the absence of consent more easily where one of the listed circumstances arises.
- Provide a useful educational tool, collating common circumstances of non-consent into a single location.

4.113. It is the Commission's view that a more detailed and expansive list of circumstances would better meet these purposes. While we acknowledge that having a broadly drawn list has the benefit of flexibility, we consider that the current list suffers from a lack of coverage (for example, it does not address incapacity due to sleep, unconsciousness or intoxication) as well as a lack of clarity (for example, the scope of the phrase 'any fraudulent means' is unclear). Additionally, the current list refers only to circumstances that are the result of the accused's actions. This may imply that a person's purported consent to sexual activity can only be negated due to the accused's conduct, not because of the complainant's circumstances. This implied limitation is not justified.

4.114. In the sections below we address the various ways in which we recommend amending the list.

[104] Email Submission E23 (Dr Philip Glover).
[105] Portal Submission P23 (Legal Aid).
[106] Ibid.

Recommendation

6. The *Code* should be amended to include an expanded list of circumstances in which, as a matter of law, there is no consent to a sexual activity.

What circumstances should be included in the list?

4.115. While various matters could be included in the list of circumstances in which there is no consent, these largely fall into five categories:

- Cases where a person did not communicate consent.
- Cases where a person lacked capacity to consent (for example, where they were asleep or unconscious).
- Cases where a person was pressured into participating in the sexual activity (for example, where they were threatened or harmed).
- Cases where a person lacked relevant information about the sexual activity (for example, where they were defrauded or made a mistake).
- Cases involving non-consensual condom removal (stealthing).

4.116. We have already addressed the first category, recommending that the list of circumstances should include a provision which states that a person does not consent to a sexual activity if they do not say or do anything to communicate that they agree to that activity.[107] We examine the remaining categories in turn below.

Lack of capacity

4.117. 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.[108] 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[109] – 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'.

4.118. 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 below:

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

4.119. It should be noted that the *Code* contains specific offences for people who engage in sexual activities with individuals who lack the capacity to understand the nature of the activity or to guard themselves against sexual exploitation.[110] These offences are discussed in Chapter 8.

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[107] See 'Should the *Code* Require Participants to Communicate Consent?' above.

[108] 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.

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

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

Children

4.120. Western Australia is the only Australian jurisdiction to include a specific reference to children in its consent provision. All other jurisdictions have broader provisions providing that there is no consent where a person is incapable of understanding the nature of the activity or of consenting to it for some other reason (see 'General incapacity' below).

4.121. New South Wales previously included a reference to children in its consent provisions. However, this was removed on the recommendation of the NSWLRC, which did not consider the provision to be necessary, given that sexual offences against children do not require proof of non-consent.

4.122. In the Discussion Paper we asked whether section 319(2)(c) serves a useful role, or whether it should be repealed.[111]

Stakeholders' views

4.123. Some stakeholders suggested that section 319(2)(c) should be repealed. For example, Dr Dyer submitted that:

> Given the existence of the offences in s 320 of the Code,[112] it is hard to see why there is a need for s 319(2)(c), which provides that a child under the age of 13 is incapable of sexual consent. To use two examples, if a person sexually penetrates a 12 year-old, or 'procures, incites or encourages a 12 year-old' to penetrate him or herself, he is liable to 20 years' imprisonment. But those penalties are no higher than the penalties for, respectively, aggravated sexual penetration without consent and aggravated sexual coercion – offences for which, partly because of s 319(2)(c), this person also seems to be liable. In other words, there seems no need for s 319(2)(c). Even without its specification that the persons to whom it refers are not consenting, those persons are the victims of offences that are at least as serious as the non-consensual offences in the Code.[113]

4.124. However, other stakeholders were supportive of its retention. For example, Communities submitted that:

> Retaining the explicit inclusion of section 319(2)(c) … provides additional protections by defining the position that ANY sexual interaction with a child under 13 is an offence, irrespective of how that child may be perceived by the offender, to be providing consent.[114]

4.125. Several stakeholders suggested that the age listed in the provision should be increased to 15 or 16. For example, one respondent to the online survey submitted that:

> The current provision 'children under the age of 13 are incapable of consenting' is grossly inadequate and stands in stark contradiction to all other legal protections afforded to children such as children under 18 cannot enter into formal contracts (goods/finance), or children under 16 cannot consent to their own adoption, to name a couple. Children under 16 carry other vulnerabilities such as limited independent means, small stature and reliance on others for their safety and wellbeing. In my view,

[111] Discussion Paper 1, [4.76].

[112] Section 320 of the *Code* contains the sexual offences that relate to children under 13. These offences do not require proof of non-consent.

[113] Email Submission E18 (Dr Andrew Dyer).

[114] Email Submission E24 (Communities).

that must be raised to at least 15 years of age to address the complexity of underlying power imbalances on a person's ability to consent.[115]

The Commission's view

4.126. The Commission acknowledges that it is not technically necessary for the *Code* to specify that children are incapable of consenting. This is due both to the fact that the *Code's* sexual offences against children do not require proof of consent and the fact that children will likely be covered by the general incapacity provision we recommend enacting below.

4.127. However, the Commission is of the view that it is useful for the *Code* to retain a provision which makes it clear that a child cannot consent. We consider that such a provision serves an important educative and declaratory function: it clearly tells the community that it is not acceptable to engage in sexual activities with children.

4.128. We are concerned, however, that by referring to children under 13, section 319(2)(c) incorrectly implies that it is acceptable to engage in sexual activities with children above that age. This inference was drawn by several stakeholders in their responses to the online survey. To overcome this problem, we recommend that the provision instead refer to children under 16. This reflects the general approach to sexual offending taken by the *Code*, which makes it an offence for anyone to engage in sexual activities with a child under 16.

4.129. One consequence of this reform is that it will prohibit all sexual activity involving children under 16. This includes cases where a child willingly engages in sexual activity with another child of a similar age. It would be possible to address this issue by the enactment of a **similar age defence**.[116] Consideration of a similar age defence is excluded from our Terms of Reference. If Parliament does enact a similar age defence that requires the accused to prove that the complainant had consented to the relevant sexual activity, it will be necessary to ensure that this provision is made subject to those defences. This will ensure that a person will not be precluded from relying on the defence because the *Code* provides that children are incapable of consenting.

4.130. At present, the provision relating to children is a standalone provision. In our view it would be better located as part of the list of circumstances in which a person does not, as a matter of law, consent. We anticipate that this list, if reformed in the ways recommended below, will provide a useful guide to the various circumstances in which sexual activities are prohibited – which includes engaging in sexual activities with children under 16. This will aid judges to direct juries. In addition, in Chapter 5 we recommend that the *Code* be amended to provide that if an accused knows or believes a listed circumstance to be the case, they do not have an honest and reasonable belief in consent. This will mean that if the list includes a provision that states a person does not, as a matter of law, consent if they are under 16, the accused will be precluded from relying on the mistake of fact defence if they knew or believed the other participant was under 16.

Sleep and unconsciousness

4.131. Legislation in most Australian jurisdictions provides that a person does not, as a matter of law, consent if they are asleep or unconscious.[117] This is not, however, the case in Western

[115] Email Submission E11 (Confidential).

[116] A similar age defence is a defence which exists in some jurisdictions which excuses an accused from criminal responsibility for charges against a child complainant on the basis they are close in age to the child.

[117] *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).

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,[118] 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.[119]

4.132. In the Discussion Paper we sought views on whether the *Code* should address cases in which a person is unconscious or asleep during a sexual activity.[120]

Stakeholders' views

4.133. The ODPP noted that it frequently encountered cases in which it is alleged that the complainant was asleep or unconscious, and recommended inclusion of this circumstance in the list. This reform was supported by almost all other stakeholders, including 90% of respondents to the online survey.

4.134. Some stakeholders suggested that an exception should be made for cases where a person consents in advance to sexual activity while they are asleep or unconscious. We address this issue in the section 'Should the *Code* address the timing of consent?' below.

The Commission's view

4.135. The Commission is of the view that a person who is asleep or unconscious is incapable of consenting. While this may already be the law in Western Australia, we recommend making this clear in the *Code*. We believe that there is value in the law expressly declaring that this conduct is always unlawful. We also believe that the *Code's* list of circumstances, if reformed in the ways recommended in this Chapter, will provide a useful educational tool. It will provide clear guidance to the community about the various circumstances in which sexual activities are prohibited. In addition, we consider it beneficial to make Western Australian law consistent with the laws of most other Australian jurisdictions.

Intoxication

4.136. It is not uncommon that one or more of the people involved in acts of sexual violence have consumed alcohol or other drugs,[121] with data from one study showing that at least half of all complainants were intoxicated at the time of the alleged offence.[122] Our review of sexual offence trials that took place in the District Court in 2019 revealed that in 43% of charges against adults, the accused was intoxicated, and in 39% of charges against adults the complainant was intoxicated. 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.[123] Various reasons have been suggested for this finding, including that:

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

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

[120] Discussion Paper Volume 1, [4.80]-[4.83].

[121] 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.

[122] 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.

[123] 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.

- 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.[124]

4.137. In addition, research indicates that people are inclined to ascribe responsibility for sexual activity to an intoxicated complainant, unless there is evidence of other wrongdoing (such as drink spiking) on the part of the accused.[125]

4.138. Legislation in all Australian jurisdictions other than Queensland and Western Australia explicitly addresses the relevance of the complainant's intoxication to consent.[126] All of the provisions in these jurisdictions require 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 in these jurisdictions 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. This also is the law in Western Australia and Queensland, although it is not stated in these terms in the *Code*.[127]

4.139. The provisions in other jurisdictions 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.

4.140. In the Discussion Paper we sought views on whether the *Code* should address cases in which a person participates in a sexual activity while intoxicated and, if so, how they should be addressed.[128]

Stakeholders' views

4.141. There was stakeholder support for including intoxication in the list of circumstances. Fifty-seven per cent of respondents to the online survey supported its inclusion, with a further 24% stating that they did not know whether it should be included. Its inclusion was also broadly supported in the submissions and consultations.

4.142. WA Consent noted that it had been founded with the objective of 'raising awareness to the fact that WA is one of the only jurisdictions in Australia that does not acknowledge how intoxication affects a person's capacity to consent to sexual activity'.[129] It submitted that:

> The effects of intoxication on a person's ability to consent to sexual activity is not new information. Nor is it founded purely within a socio-political lens. The Alcohol and Drug

[124] NSWLRC, *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.

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

[126] *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36AA(1)(g)-(h). See Discussion Paper Volume 1, Table 4.3 for the wording of these provisions.

[127] *R v SAX* [2006] QCA 397, [20]-[21].

[128] Discussion Paper Volume 1, [4.84]-[4.98].

[129] Portal Submission P20 (WA Consent).

> Foundation, along with Healthline and several scientific journal articles … illustrate that there is a physiological impairment that can occur as a result of a high blood-alcohol level. This temporary impairment affects cognition, motor skills, and perception. Consequently, people with high blood-alcohol levels are not able to provide freely and voluntarily given consent as they have a diminished capacity to understand, and respond, to the circumstances. This information also extends to the effects of intoxication from other drugs which also impact a person's consciousness and understanding of their environment.
>
> The current state of 'consent' in WA's criminal code is not only behind other jurisdictions, but it also fails to recognise the scientific evidence involved with cognition, intoxication, and mental capacity. If the state of someone's blood-alcohol level can be considered when driving automobiles or committing an offence, it should also be considered when sexual acts occur. If a person is unable to speak or talk in a way they usually can, then they are unable to consent on both a social and scientific level.
>
> WA Consent recommends that legislation regarding sexual assault includes how intoxication can impact a person's ability to consent to sexual acts. Other jurisdictions acknowledge this by implementing a clause discussing circumstances where consent is not able to be freely and voluntarily given. WA Consent recommends that our legislation follows a similar format whereby intoxication is understood to be a mitigating factor to providing sexual consent.[130]

4.143. Several other stakeholders also expressed strong views on this issue. They advised the Commission that they knew people who had experienced sexual violence while intoxicated, and they alleged that criminal charges were not brought against the perpetrators due to that intoxication. They expressed the view that these cases would have been dealt with differently were intoxication included in the list of circumstances in which there is no consent, and they advocated for such reform.

4.144. Stakeholders also noted that there is a lack of consistency between 'current legislation and consent education and resources'.[131] Consent education teaches that there is 'never consent in circumstances where the victim is incapacitated in any way, be it through intoxication, lack of consciousness, or disability'.[132] By contrast, the *Code* does not explicitly 'provide protections to situations where victims lack capacity to give consent'.[133] It was argued that:

> This fundamental inconsistency between current WA legislation, and education which youths are basing the principles of their lives on, can and has had serious ramifications on victims of sexual assault, who are not able to seek justice. To ensure victims get the justice they are owed, legislation must reflect other Australian jurisdictions, as well as education by defining capacity-related consent-negating circumstances. This is crucial if an affirmative model of consent is to be implemented, as for holistic change to be made it is imperative that legislation reflects education.[134]

4.145. If this issue is to be addressed, it was submitted that:

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130 Ibid.

131 Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

132 Ibid.

133 Ibid.

134 Ibid.

- 'Mere impairment of the complainant's judgment or reduction of their inhibitions' should not be sufficient to vitiate consent.[135] The provision should require the complainant to have been 'so affected by alcohol or drugs that they lacked capacity to consent'.[136]
- The focus of the provision should be on 'the degree of intoxication rather than the cause'.[137] If the complainant was so affected by the alcohol or drugs that they did not have the capacity to consent, it should not matter whether they had become intoxicated voluntarily or involuntarily.

The Commission's view

4.146. The Commission is of the view that a person can become sufficiently intoxicated that they are no longer capable of consenting. Where this is the case, other people should be prohibited from engaging in sexual activity with them.

4.147. While this is already the law, we recommend this be made explicit in the *Code*. Stakeholders have made it clear that this is an issue of great concern to the community, and one that often arises in practice. We are of the view that it is important for the Parliament to declare that this conduct is unacceptable, and for the community to be educated on this. In addition, this reform will help further the goal of national harmonisation.

4.148. We recommend that the provision:

- Should apply regardless of the nature of the intoxicating substance. It should include intoxication due to the use of alcohol, licit or illicit drugs, or a combination of substances.
- Should apply regardless of whether the person became intoxicated voluntarily or involuntarily.
- Should apply to both the initial participation in a sexual activity and the continuation of that activity. If a person loses capacity during the course of a sexual activity, they should no longer be considered to be consenting, and the other participant must immediately stop.
- Should not apply to cases where the person's judgment or inhibitions were merely impaired by the intoxication. The person must have been so affected by the alcohol or other drug that they were incapable of consenting or withdrawing consent.

4.149. We are of the view that the Victorian law, which provides that there is no consent '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',[138] provides a useful model.

General incapacity

4.150. Western Australia is the only Australian jurisdiction to limit its reference to incapacity to the incapacity of 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 activity or of consenting to it for some other reason.[139]

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[135] Email Submission E19 (ODPP).

[136] Ibid; Email Submission E18 (Dr Andrew Dyer).

[137] Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

[138] *Crimes Act 1958* (Vic) ss 36AA(1)(g)-(h).

[139] *Crimes Act 1900* (ACT) s 67(1)(l); *Crimes Act 1900* (NSW) s 61HJ(1)(b); *Criminal Code Act 1983* (NT) s 192(2)(d); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Law Consolidation Act 1935* (SA) ss 46(3)(e)-(f); *Criminal Code Act 1924* (Tas) s 2A(2)(i); *Crimes Act 1958* (Vic) s 36AA(1)(i). See Discussion Paper Volume 1, Table 4.2 for the wording of these provisions.

4.151. 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 functional capacity to consent to a particular activity at a specific time.

4.152. 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.

4.153. On the surface, the other jurisdictions' provisions 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 they are incapable of understanding the (sexual) nature of the activity. It seems, however, that this is a difference of form rather than substance. This is because both concepts appear intended to replicate the common law principles that in order to establish lack of capacity, and that there was accordingly no consent, it must be proved that the complainant did not have sufficient knowledge or understanding to comprehend (a) the physical nature of the activity that will take place (for example, that a particular part of their body will be penetrated by a penis) or (b) the sexual character of the activity.[140]

4.154. 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;[141] and the SA Act refers to people who are unable to consent due to a 'physical, mental or intellectual condition or impairment'.[142] 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.[143]

4.155. In the Discussion Paper we sought views on whether the *Code* should address a general lack of capacity to consent to sexual activity.[144]

Stakeholders' views

4.156. There was widespread support for including a general incapacity provision in the list of circumstances in which there is no consent. Ninety per cent of respondents to the online survey supported the inclusion of such a provision, as did most stakeholders in the submissions and consultations.

4.157. The ODPP expressed a preference for the NSW and ACT approach of simply stating that a person does not consent if they do not have the capacity to consent to that activity:

> There is no reason to exclude certain incapacities, nor is it necessary to define capacity, other than to ensure it is clear that what is relevant is capacity to consent to the act, not consent to sexual acts generally. There are many forms of incapacity that make a person particularly vulnerable, and incapacity in one set of circumstances does not mean a person does not have the capacity to participate in consensual sexual acts at all.

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[140] *Papadimitropoulos v R* [1957] HCA 74; (1957) 98 CLR 249, 260-1; *R v Morgan* [1970] VR 337; *R v Mobilio* [1991] 1 VR 339; *R v Mueller* [2005] NSWCCA 47.

[141] *Criminal Code Act 1899* (Qld) s 348(1).

[142] *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e). See also *Crimes Act 1961* (NZ) s 128A(5).

[143] *Criminal Code Act 1899* (Qld) s 348(1).

[144] Discussion Paper Volume 1, [4.73]-[4.79].

> A formulation which specifies that a person does not consent if they are 'incapable of understanding the sexual nature of the act' may be drawing it too narrowly. A person may understand the sexual nature of an act without understanding what consent to a sexual act is, and that they are free to refuse to participate, or without understanding what the social significance of a sexual act is, or its potential consequences. A person may be able to demonstrate an understanding of the sexual nature of an act without understanding the context in which they are asked to participate.
>
> In such cases an expert would invariably assess the complainant and give evidence as to their intellectual functioning and their capacity to consent, including those matters which must be understood for a person to have capacity to consent.[145]

4.158. Dr Dyer also supported the approach taken in NSW and the ACT. However, as Western Australia is a **code jurisdiction**,[146] he suggested that 'it might be worthwhile to define capacity in the *Code* (in a manner that accords with the common law definition)'.[147]

4.159. While members of the Community Expert Group were supportive of including incapacity in the list of circumstances, they were concerned to ensure that it was based on a functional notion of incapacity (that the person was, at the time of the alleged activity, incapable of consenting to that activity) rather a status view (that the person had a specific type of impairment, such as a cognitive impairment).

The Commission's view

4.160. In the previous sections we recommended that the *Code* address specific circumstances in which a person may be incapable of consenting: where they are a child under 16, asleep or unconscious, or severely intoxicated. These situations do not entirely cover the field of incapacity: there are various other ways or reasons for which a person may be incapable of consenting. For the reasons outlined above, we recommend that the *Code* include a residual provision to capture such cases. We are of the view that such a provision will play a useful declaratory and educational role, and will help further the goal of national harmonisation.

4.161. We do not, however, believe that it would be useful to simply provide that a person does not consent if they do not have the capacity to consent. Not only is this obvious (as clearly a person who is incapable of consenting cannot consent), but it provides limited guidance to jurors or the community. We are of the view that it would be more beneficial to spell out the requisite nature of the incapacity in more detail. We also consider this to be important given that Western Australia is a code jurisdiction: in code jurisdictions it is better not to rely on common law concepts where possible.

4.162. Consistent with the common law, the key matters that a person must be capable of understanding to be able to consent are the physical nature of the activity and its sexual character. We are also of the view that they must be capable of appreciating that they can choose whether or not to participate in the activity and that they can withdraw from that activity at any time. We do not, however, think that they need to be able to understand all of the consequences of the sexual activity. We consider that including such a requirement would unjustifiably impinge on the sexual autonomy of people with certain cognitive impairments or mental health problems.

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[145] Email Submission E19 (ODPP) (citations omitted).

[146] A code jurisdiction is a jurisdiction in which the criminal law has been codified, such as Western Australia and Queensland.

[147] Email Submission E18 (Dr Andrew Dyer).

Recommendations

7. **The list of circumstances should provide that, as a matter of law, a child under 16 does not consent. This provision should be made subject to a similar age defence if enacted. Section 319(2)(c) of the *Code* should be repealed. to a sexual activity**
8. **The list of circumstances should provide that, as a matter of law, a person does not consent to a sexual activity if they are:**
    - **Asleep or unconscious;**
    - **So affected by alcohol or another drug as to be incapable of consenting to the activity or withdrawing consent to the activity; or**
    - **Incapable of understanding:**
        - **The physical nature or sexual character of the relevant activity;**
        - **That they can choose whether or not to participate in the relevant activity; or**
        - **That they can withdraw from the relevant activity at any time.**

Use of pressure

4.163. The third category of non-consensual sexual activity involves cases in which a person is pressured into engaging in the activity. At present, the *Code* includes three of these circumstances in its list: where consent is obtained by force, threat or intimidation.[148]

4.164. In the Discussion Paper we noted that other jurisdictions have much more expansive lists in this regard, which include matters such as coercion, blackmail, harm, fear of force or harm, unlawful detention and abuse of a relationship of authority, trust or dependence.[149]

4.165. The lists in other jurisdictions also tend to include more detail about the relevant circumstances.[150] For example, they may specify that:

- The relevant circumstance (for example, the use of force) does not need to have been targeted at the complainant personally: it could have been directed at another person, an animal or property.
- It does not matter when the relevant circumstance (for example, coercion) was used or whether the complainant participated in the sexual activity due to one specific incident or an ongoing pattern of conduct.
- The relevant circumstance (for example, a threat) must have been of a particular nature or expressed in a particular way.
- The relevant circumstance (for example, fear of harm) must have been reasonable.
- The complainant must have engaged in the sexual activity because of the relevant circumstance (for example, unlawful detention).

[148] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).
[149] Discussion Paper Volume 1, [4.227]-[4.265].
[150] Ibid.

4.166. In the Discussion Paper we sought views on the way in which the *Code* should address cases in which a person is pressured into engaging in a sexual activity.[151]

Stakeholders' views

4.167. There was widespread support for clarifying the circumstances in which a person does not consent to a sexual activity due to the use of pressure. For example, 63% of respondents to the online survey supported such a reform, with just 11% opposing it. The following comments are illustrative of the reasoning underlying this support:

- 'Force, threats, and intimidation can be subtle things where a power imbalance exists. Clarification around them is likely to help alleviate difficulties in interpreting the law.'[152]
- 'There are many ways in which force, threats or intimidation can be used to take away a person's autonomy. These include more than just physical circumstances. However, public perception of these circumstances is overwhelmingly limited to physical circumstances so it would be necessary to clarify these circumstances.'[153]
- 'To clarify that force also includes targets such as another person, an animal or property and that it doesn't matter when the force was used.'[154]

4.168. Respondents to the online survey were supportive of expanding the list to address cases in which a person participates in a sexual activity due to:

- Non-physical forms of pressure, such as coercive conduct or blackmail (87.5%).
- Fear of force or harm (90%).
- Having suffered harm (85%).
- Unlawful detention (92.5%).
- Abuse of a relationship of authority, trust or dependency (79%).[155]

4.169. Stakeholders in the written submission and consultations were also broadly supportive of including these matters in the list of circumstances. For example, Dr Dyer submitted that 'WA law should continue to provide that a person who participates in sexual activity because of "threat" or "intimidation" is not consenting', and that it should also provide that 'that there is no consent where a person engages in such activity because of "fear of harm", or "coercion", or because a person is unlawfully detained or overborne by the abuse of a position of authority, trust or dependence'.[156] In support of this approach, he argued that:[157]

- 'A person who participates in sexual activity because of force, or the threat or fear that force will be applied to her or another person, or most animals, is clearly not consenting. That is because she has either made no choice … or no "meaningful" one'.

[151] Discussion Paper Volume 1, [4.227]-[4.265].
[152] Portal Submission P51 (S Porter).
[153] Portal Submission P9 (Anonymous).
[154] Portal Submission P4 (Confidential).
[155] There appeared to be some confusion around the wording of this question in the online survey, with comments indicating that some respondents had taken the view that it would prevent all sexual activities with a person in a position of authority, trust or dependency, rather than just cases where the position of authority, trust or dependency was abused.
[156] Email Submission E18 (Dr Andrew Dyer).
[157] Ibid.

- A person who participates in sexual activity because of a threat or fear of harm has 'participated unwillingly in the sexual activity that took place', and so their consent is not free and voluntary.
- A person can be coerced or intimidated into participating in sexual activity without the use of the threat. Where this occurs, their 'participation is not free and voluntary'.
- The ability of a person who is unlawfully detained to choose to engage in sexual activity 'has been seriously constrained by fear (or some like emotion)'.
- Where there has been an abuse of authority, trust or dependence, the ability of the person to choose to engage in sexual activity 'has been seriously constrained by the overbearing conduct of a person upon whom the person depends in some way, or to whom she is in some way subordinate'.

4.170. Dr Dyer noted that the NSW list of circumstances uses the term blackmail rather than threat. However, he submitted that the word threat is preferable because it is broader: 'while it is certainly the case that a person who does X because of blackmail is not consenting to X, the same is true where there is a threat that does not amount to blackmail'.[158]

4.171. By contrast, other stakeholders supported the inclusion of the term blackmail. For example, it was suggested that the *Code* should include examples of matters that constitute threats or intimidation, and that these could include blackmail or 'threats of substantial economic harm'. It was submitted that 'such examples would clarify the extent of the types of threats or intimidation required in s 319(2)(a) and would directly affirm President Steytler's statement in *Michael* regarding the scope of "threat" and "intimidation" in s 319(2)(a)'.[159]

4.172. The ODPP also supported the inclusion of blackmail in the list of circumstances, along with force, fear of force, threat, intimidation, coercion, unlawful detention and abuse of a relationship of authority, trust or dependence. In the latter regard, it noted that:

> This circumstance may arise where an accused who was in a position of power or influence took advantage of that position to coerce the complainant into participating in sexual acts, particularly where the accused's conduct does not involve specific threats or conduct amounting to intimidation.
>
> The facts of *Stubley v The State of Western Australia* [2011] HCA 7 (Stubley) might be a paradigm case. It was said the complainants' evidence 'was capable of proving a pattern of sexual misconduct between the appellant, a psychiatrist, and younger, vulnerable, female patients' but that 'manipulating a person into sexual intercourse by exploiting that person's known psychological vulnerability would not, without more, vitiate their consent'. What this provision would make clear is that if the State proves the complainant was overborne by that exploitation or manipulation, their consent was vitiated. In Stubley, some complainants were threatened with institutionalisation, others were not, some gave evidence of intimidation, but others did not. Where an accused has systematically abused a relationship of authority, trust or dependency with multiple complainants, this circumstance would enable the prosecution case to proceed with a more coherent, unified narrative, fitting to the alleged conduct.[160]

4.173. However, the ODPP did not recommend including harm or fear of harm in the list of circumstances:

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[158] Ibid.

[159] Email Submission E3 (Christie Mathews).

[160] Email Submission E19 (ODPP) (citations omitted).

> Providing that any type of harm, or fear of any type of harm, vitiate consent is overly broad … We are not in favour of these circumstances being added because it remains open for the State to prove that the complainant did not 'freely and voluntarily' give consent due to any type of harm, or fear of harm. We would avoid the definitional issues this would raise and pursue consistency with the other jurisdictions (other than Victoria).[161]

4.174. By contrast, Dr Dyer was supportive of including fear of harm in the list. He was of the view that a person who participates in a sexual activity because of such a fear has not participated willingly, and so has had their sexual autonomy violated. He acknowledged, however, that:

> There is significant overlap between a provision that states that there is no consent where a person does X because of a 'fear of harm' and one that states that there is no consent where a person does X because of 'a threat'. In other words, generally where a person threatens another, that other person will fear whatever harm (i.e. setback to his or another's interests) is threatened. But because that might not always be the case, there seems to be utility in having the law provide separately that a person is not consenting where she participates because of 'fear of harm' or 'a threat'.[162]

4.175. CWSW was also supportive of including fear of harm in the list. It submitted that 'the list of circumstances should be amended to better reflect current Australian legal approaches to consent and modern community standards'.[163] It was of the view that the list should, at a minimum, include:

- Where a person submits because of force, or fear of force, against the complainant or another person.
- Where a person submits because of fear of harm of any type against the complainant or another person.
- Where a person submits because of threats to harm animals or property.
- Where a person submits because of an ongoing pattern of coercive and controlling behaviours causing fear.[164]

4.176. CWSW noted that this list 'slightly expands upon the non-exhaustive list of circumstances that may vitiate consent as recommended by the ALRC and the NSWLRC in their joint report, *Family Violence—A National Legal Response*'.[165] It advised that:

> Additional items include circumstances common within a family and domestic violence context, including ongoing coercive conduct and threats to harm animals and property. The consideration of the cumulative impact of coercive and controlling behaviours and the pattern of behaviour within the context of the relationship is crucial. This approach will support the prosecutor to assess effectively whether a pattern of behaviour amounts to fear that violence will be carried out such that a person engages in an unwanted sexual activity.
>
> Perpetrators may inflict or threaten to harm children, animals or property as a strategy to intimidate, coerce or control victim-survivors, and it is important that legislation provide illustrative examples of such circumstances. There is also the danger that

[161] Ibid.

[162] Email Submission E18 (Dr Andrew Dyer) (citations omitted). Dr Dyer made a similar point in relation to the overlap between unlawful detention and fear of harm.

[163] Portal Submission P57 (CWSW).

[164] Ibid.

[165] ALRC and NSWLRC, *Family Violence – A National Response* (Final Report, October 2010).

> 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'.[166]

4.177. Numerous other stakeholders, including members of the Legal and Community Expert Groups, also expressed concern about the *Code's* failure to address circumstances of coercive control and family violence which 'can, over many days, months and/or years, erode a victim's ability to provide true consent'.[167] WLSWA provided the following example from one of its case files (anonymised to protect the identity of the victim-survivor):

> In response to Sam's increasingly coercive and controlling and violent behaviour, Jessica left him. Jessica was on tenterhooks during this time but did not take out a Violence Restraining Order because she feared that this would exacerbate her situation since Sam frequently showed disregard for the law.
>
> After several weeks, Sam came to her home and insisted she have sex with him. Whilst Jessica did not explicitly refuse to do this, she felt she had no choice but to comply given his propensity to violence. She was also anxious for her dog's wellbeing, since Sam had often insinuated that he was willing to hurt her pet if she didn't do as he asked.[168]

4.178. WLSWA suggested that because of the law's failure to include coercion in the list of circumstances, this incident of sexual violence was not reported to police. It supported the enactment of legislation, such as exists in Victoria, which:

> Recognises that consent can be vitiated in the context of family and domestic violence (FDV), particularly where sexual activity is submitted to as a result of fear, harm, coercion or intimidation. Consent is generally seen as incident-based and contingent on proximity or the immediacy of force as evidence of sexual violence. This approach will not work for victim-survivors of family and domestic violence and intimate partner sexual violence (IPSV). Sexual violence in intimate partner relationships often occurs within the context of sexual routine, previous consensual activity and a presumption of ongoing consent. This can create situations where victim-survivors agree to unwanted sex or where asking for sex to stop is not felt as a possibility. It is essential that any definition of consent balances victim-survivor agency and autonomy to engage in consensual sexual activity, while also recognising the ways in which the abusive relationship context can undermine capacity to freely consent.
>
> To this end, we encourage a definition of consent that includes a single incident or is part of an ongoing pattern. This approach will benefit victim-survivors of FDV and IPSV, as the victim-survivor will not have consented if they participated due to the cumulative effects of a pattern of coercive and controlling behaviour. It may be useful to use existing FDV legislation as another avenue for victim-survivors of IPSV to access justice.[169]

4.179. Several other stakeholders also supported the inclusion of provisions that make it clear that it does not matter:

- When the circumstance (for example, the use of force) occurred, or whether it occurred as a single instance or as part of an ongoing pattern; or

[166] Portal Submission P57 (CWSW) (citations omitted).
[167] Portal Submission P52 (Jessica Bruce).
[168] Portal Submission P36 (WLSWA).
[169] Ibid (citations omitted).

- Whether the circumstance (for example, a threat) was targeted at the complainant personally, or was aimed at other people, animals or property.

4.180. The ODPP submitted that while these reforms would not significantly expand the law, they have 'the advantage of clarity … This would clearly address sexual violence that occurs within the context of intimate partner relationships, where repetitive force or coercion is used to dominate and control one party'.[170]

4.181. Dr Dyer was also of the opinion that the list should include coercion, but for a slightly different reason:

> There are cases where a person induces another to participate in sexual activity by using coercive or intimidatory means that cannot be characterised as a 'threat'. The most obvious example of coercion that does not amount to a threat is a coercive offer. For example, imagine that A is impoverished and needs very expensive treatment to save her son's life. Or imagine that B has lost her job, has no means to pay her mortgage and faces the loss of the modest house in which she is single-handedly bringing up her three children. If a wealthy person, C, were to tell A or B that, in exchange for sex, she was willing to pay for the medical treatment, or pay off the mortgage, she would have made no threat. Because her proposal would be to place the person to whom it was made in a better position, not a worse one, it would be an offer. Nevertheless, … because the offeree in such circumstances 'seems to have no real choice', it is 'reasonable to think' of the approach as 'entailing coercion'. And, for the same reason, it also seems that, if the offeree participates in the requested sexual activity because of such coercion, such participation is not free and voluntary.[171]

4.182. While Dr Dyer was of the view that there can be coercion without threats (and so the list should include coercion), he noted that the opposite may not be true: all threats seem to involve the use of coercion. Consequently, it would be possible for the list to simply include coercion and remove the reference to threats. However, he considered that:

> There is utility in the law's stating that, when a person participates in sexual activity because of 'a threat' or 'coercion', she does not consent. The word 'threat' is probably more readily understood by juries than the term 'coercion'; and there is no harm in the law's making it as clear as possible to all participants in the criminal justice system that consent is absent when a person participates in sexual activity because of a threat.[172]

Dr Dyer made a similar point in relation to the concept of intimidation.

4.183. Dr Dyer also suggested that it is worth making the scope of the term coercion clear. He noted that in the Discussion Paper, we stated that coercive conduct covers a much broader range of conduct than threats or intimidation.[173] We mentioned that the NSWLRC was of the view that it would cover 'verbal aggression, begging and nagging, physical persistence, social pressuring and emotional manipulation'.[174] Dr Dyer argued that while it is true that the NSWLRC thought this, their view in this regard was wrong:

> As the NSW Attorney General said in his Second Reading Speech for the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* (NSW), given the ordinary meaning of the words 'begging' and 'nagging', such conduct seems different from 'coercion' (or 'intimidation') … [In my view] 'coercion' exists where a person engages in sexual activity due to (a) a threat or (b) an offer that she has no real ability

[170] Email Submission E19 (ODPP).
[171] Email Submission E18 (Dr Andrew Dyer) (citations omitted).
[172] Ibid.
[173] Discussion Paper Volume 1, [4.240].
[174] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.108].

> to refuse. And … 'intimidation' exists where the accused, without issuing an explicit threat, creates a threatening situation. 'Begging' and 'nagging' would not normally satisfy such criteria – and the same would be true of much 'social pressuring' and 'emotional manipulation'. That said … there is much confusion over whether 'nagging' and 'begging' amounts to 'coercion'; and it would seem a good idea for the WA government to make it clear in the relevant extrinsic materials that it does not intend such conduct to 'reach the threshold of coercion … or intimidation' (as the NSW Attorney General did).[175]

4.184. By contrast, other stakeholders were of the view that 'a wide range of acts such as verbal aggression and emotional manipulation'[176] or 'being threatened with exposure to mockery and innuendo'[177] should be included within the scope of coercion.

4.185. While the ODPP did not comment on the desirability of defining the term coercion, it did not consider it necessary for the *Code* to explicitly address the required nature of threats or intimidatory behaviour, or to specify that such behaviour can be express or implied. It was of the view that the judgment in *Michael v Western Australia* (*'Michael'*)[178] 'provides a sound conceptual framework which focuses on the subjective effect of the threat and intimidation, and can be augmented as other factual circumstances fall for determination'.[179]

4.186. Members of the Community Expert Group were, however, concerned to ensure that the concept of a threat was sufficiently broad to extend to threats to withdraw support from vulnerable people if they refused to participate in sexual activities.

The Commission's view

4.187. As noted above, we are of the view that the purposes of the list of circumstances are best met by spelling out the relevant circumstances with specificity. The *Code* should make it clear precisely what conduct is covered, who that conduct must have been directed towards, the ways in which the conduct can be committed and the effects that the conduct must have had.

4.188. At present, the *Code* does not do this. While it appropriately identifies that a person does not consent where consent is obtained by force, threat or intimidation, it does not provide sufficient guidance on the meaning of these terms or what they cover. While we appreciate that there is merit in leaving these categories broad and flexible, we consider it to be preferable to ensure that their scope is clearly defined.

4.189. Consequently, we recommend that the *Code* make it clear that a person does not, as a matter of law, consent where they engage in a sexual activity because of:

- Force that is used against that person, another person, an animal or property.
- Threats to cause serious harm of any kind to that person, another person, an animal or property. The threat may be made by words or conduct and may be explicit or implicit.
- Coercion, blackmail, extortion or intimidation of the complainant or another person.
- Fear of force or serious harm of any kind to that person, another person, an animal or property.

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175 Email Submission E18 (Dr Andrew Dyer) (citations omitted).
176 Email Submission E3 (Christie Mathews).
177 Email Submission E11 (Confidential).
178 [2008] WASCA 66.
179 Email Submission E19 (ODPP).

4.190. We appreciate that there is some overlap in meaning between threats, coercion, blackmail, extortion and intimidation. However, we see no harm in listing all of these terms. It makes it clear to the community that a person does not, as a matter of law, consent to sexual activity that is obtained by any form of pressure.

4.191. We do not recommend defining the term 'coercion'. There are various ways in which a person can be coerced into engaging in a sexual activity, including by behaviour now recognised as coercive control.[180] We are concerned that any attempt to define this concept will unintentionally limit its scope. We agree with Dr Dyer, however, that this term should not be interpreted to include mere begging or nagging. In our view the concept of coercion involves something more: it entails some form of compulsion.

4.192. We have limited the final category to threats or fear of serious harm. We have done this to avoid the provisions being too wide in scope. This is the approach taken in NSW. We note that the term 'serious harm' appears in section 345 of the *Code*, which makes it unlawful to publish defamatory matter intending to cause serious harm. Under that provision, it is for the jury to determine what constitutes serious harm. We consider that the question of whether the complainant feared serious harm in the present context should similarly be a jury question.

4.193. We do not recommend including harm itself in the list of circumstances. We do not think it is necessary, given that when a person consents to a sexual activity in circumstances where they have been harmed, the prosecution will be able to rely on one of the other listed categories such as a threat or fear of serious harm.

4.194. Additionally, we are of the view that there are gaps in the current list of circumstances that should be addressed. While it will frequently be the case that pressure is brought to bear by the use of force, threats or intimidation, there are also other ways in which a person can be pressured into consenting. In particular, we recommend that the *Code* provide that a person does not, as a matter of law, consent where they are engaging in a sexual activity because:

- The person or another person is unlawfully detained.
- The person is overborne by the abuse of a relationship of authority, trust or dependence.

4.195. We do not recommend that the provision refer to the complainant 'participating' in the relevant sexual activity, as the word participate 'might be said to connote willingness'.[181]

4.196. It is important to note that our recommendation includes a causal requirement: the complainant must have engaged in the relevant sexual activity because of the specified form of pressure. Where this is the case, the complainant has not freely and voluntarily agreed to engage in the sexual activity. Their choice to engage in that activity has been overridden or constrained by the pressure that has been brought to bear on them.

4.197. In establishing that the complainant engaged in the relevant sexual activity because of the specified form of pressure, the matters the prosecution will need to prove will depend on the type of pressure alleged:

- Where it is alleged that the complainant engaged in the sexual activity because of the use of force, threats, coercion, blackmail, extortion, intimidation or unlawful detention, the prosecution will need to prove:

[180] ANROWS, *Defining and Responding to Coercive Control* (Policy Brief, ANROWS, January 2021) 1.
[181] Ibid.

- That the alleged conduct (for example, the use of force) occurred. This is predominantly an objective matter (to be determined by considering all the relevant circumstances).
- That the complainant engaged in the relevant sexual activity because of that conduct. This is to be decided by determining the complainant's state of mind at the time of the activity.

- Where it is alleged that the complainant did not consent because of the fear of force or serious harm, the prosecution will need to prove:
  - That the complainant feared the use of force or the infliction of serious harm. This has subjective and objective components. It requires consideration of what the complainant feared (subjective) and whether that was a fear of force or serious harm (objective).
  - That the complainant engaged in the relevant sexual activity because of their fear. This is to be decided by determining the complainant's state of mind at the time of the activity.
- Where it is alleged that the complainant did not consent because they were overborne by the abuse of a relationship of authority, trust or dependence, the prosecution will need to prove:
  - That the accused and complainant were in a relationship of authority, trust or dependence. This is an objective matter.
  - That the accused abused that relationship. This is also an objective matter.
  - That the complainant was overborne by that abuse, and as a result engaged in the relevant sexual activity. This is to be decided by determining the complainant's state of mind at the time of the activity.[182]

4.198. In addition, we recommend that the *Code* explicitly address circumstances of intimate partner sexual violence, which are 'often characterised by repeated patterns of threatening, coercive or abusive behaviour (rather than a single incident)'.[183] ABS data shows that in 2020 more than a quarter (27%) of sexual assaults in Western Australia were related to domestic or family violence.[184] Our review of sexual offence trials that took place in the District Court in 2019 revealed that in 49% of charges the complainant and the accused were in a family, domestic or romantic relationship. 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'.[185]

4.199. There are various ways in which sexual violence and family violence may interact. For example, people may pressure their intimate partners to perform acts they are not comfortable performing or to have sex when they do not want to.[186] This may form 'part of a larger pattern

[182] While it is perhaps arguable that whether or not someone is overborne by abuse of a relationship is an objective matter, we are of the view that a subjective approach to this issue is consistent with the natural meaning of the words. We also consider it just that a person who abuses a position of trust is criminally liable for the effect of that abuse on the victim-survivor.

[183] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.113].

[184] ABS, *Recorded Crime – Victims* (Catalogue No 4510.0, 24 June 2021) (WA Specific data).

[185] Preliminary Submission 14 (CWSW) 2.

[186] Ibid.

of coercive control that is intended to dominate, humiliate and denigrate'.[187] The use of sexual violence as a controlling sexual behaviour is considered in detail in the Background Paper.[188]

4.200. 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'.[189] It is argued, in such circumstances, 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'.[190]

4.201. The NSW Act and the *Crimes Act 1958* (Vic) (**Victorian Act**) 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.

4.202. 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 they engaged in the activity, it should not matter when the conduct occurred.[191] We agree with the NSWLRC in this regard, and recommend enacting provisions modelled on the NSW and Victorian approaches to this issue.

[187] Ibid 8. See also Preliminary Submission 12 (Sexual Health Quarters) 3.

[188] Background Paper, [1.1].

[189] ALRC and NSWLRC, *Family Violence – A National Response* (Final Report, October 2010) [24.33].

[190] Preliminary Submission 12 (Sexual Health Quarters) 4.

[191] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.115]. See also Preliminary Submission 12 (Sexual Health Quarters) 3.

Recommendations

9. **The list of circumstances should provide that, as a matter of law, a person does not consent to a sexual activity where the activity occurs because:**
    - **Force is used against that person, another person, an animal or property.**
    - **Explicit or implicit threats are made, by words or conduct, to cause serious harm of any kind to that person, another person, an animal or property.**
    - **Coercion, blackmail, extortion or intimidation are used in relation to that person or another person.**
    - **The person fears the use of force or the infliction of serious harm of any kind on that person, another person, an animal or property.**
    - **The person or another person is unlawfully detained.**
    - **The person is overborne by an abuse of a relationship of authority, trust or dependence.**
10. **The *Code* should provide that it does not matter when the relevant form of pressure is used, or whether it occurs as a single instance or as part of an ongoing pattern.**

Lack of relevant information

4.203. The fourth category of circumstances involves cases in which a person engaged in a sexual 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.

4.204. 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. At common law, consent to sexual activity is only negated by fraud related to the nature of the activity or the identity of the participant; and the concept of nature of the activity is limited to cases in which the person was defrauded about the fact that the activity was sexual in nature.[192] Deceptions about other matters, such as a participant's sexual health, are not included.

4.205. 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 4.2 below). The approaches taken vary widely between jurisdictions.

[192] *R v Clarence* (1888) 22 QBD 23; *Papadimitropoulos v R* [1957] HCA 74; 98 CLR 249. See Discussion Paper Volume 1, [4.100]-[4.105].

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.[193] If the person is mistaken about the identity of the other person.[194]
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.[195] 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.[196]
NT	If the person submits because of a false representation as to the nature or purpose of the act.[197] 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.[198]
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.[199]
SA	If the person is under a mistaken belief as to the identity of the other person,[200] or is mistaken about the nature of the activity.[201]
Tas	If the person agrees or submits because of the fraud of the accused.[202] If the person is reasonably mistaken about the nature or purpose of the act or the identity of the accused.[203]
Vic	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.[204] 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.[205]
WA	If the consent was obtained by deceit or any fraudulent means.[206]

Table 4.2: Australian approaches to fraudulent representations and mistaken beliefs

193 *Crimes Act 1900* (ACT) s 67(1)(i)-(j).
194 Ibid s 67(1)(h).
195 *Crimes Act 1900* (NSW) ss 61HJ(1)(k), 61HJ(3).
196 Ibid s 61HJ(1)(i)-(j).
197 *Criminal Code Act 1983* (NT) s 192(2)(g).
198 Ibid ss 192(2)(e)-(f).
199 *Criminal Code Act 1899* (Qld) ss 348(2)(e)-(f).
200 *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g).
201 Ibid s 46(3)(h).
202 *Criminal Code Act 1924* (Tas) s 2A(2)(f).
203 Ibid s 2A(2)(g).

4.206. As can be seen from Table 4.2, 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.[207]

4.207. 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.[208]

4.208. 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.[209]

Clarifying the fraud provision

4.209. It is not clear whether the fraud provision applies regardless of the nature of the false representation, or whether it is restricted in some way. The Court in *Michael* considered this matter,[210] with each judge drawing a different conclusion:

- Steytler P did not find it necessary to determine the issue but suggested that the provision covers consent obtained by any fraudulent representation.
- EM Heenan AJA stated 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.[211]
- Miller JA did not express a view about the precise scope of the provision but did not favour EM Heenan AJA's restrictive interpretation.

4.210. This issue was considered recently in *HES v Western Australia* (*HES*).[212] However, once more the judges did not clearly agree on the scope of the provision:

- Buss P said 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'.[213]

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204 *Crimes Act 1958* (Vic) ss 36AA(1)(m), 36AA(2).
205 Ibid ss 36AA(1)(j)-(n).
206 *Criminal Code Act Compilation Act 1913* (WA) s 319(2).
207 *HES v Western Australia* [2022] WASCA 151, [120] (Buss P); see also [217] (Mitchell JA).
208 Ibid [131] (Buss P); see also [137] (Mazza JA), [243] (Mitchell JA).
209 Ibid.
210 *Michael v Western Australia* (2008) 183 A Crim R 348.
211 Ibid [383]-[384].
212 [2022] WASCA 151.
213 Ibid [115].

- Mitchell JA noted the conflicting views taken in *Michael* but did not consider it necessary to deal with the issue.[214]
- Mazza JA did not address the matter.

4.211. Although in *Michael* Steytler P suggested 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,[215] 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'.[216]

4.212. 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.[217]

4.213. 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.[218]

4.214. In light of these concerns, in the Discussion Paper we sought views on whether the fraud provision should be limited or clarified in any way, or whether it is preferable to retain the current broad approach.[219]

Stakeholders' views

4.215. Most stakeholders were of the view that the fraud provision should be both clarified and limited in scope. They expressed concern about its breadth, as well as about conflicting judicial interpretations of the provision (and the consequent lack of clarity). For example, one respondent to the online survey submitted that:

> The conflicting interpretations [in *Michael* and HES] and lack of consensus on the scope of 'deceit or any fraudulent means' illustrate the need for legislation to clarify the scope of the provision rather than the judiciary … Thus, s 319(2)(a) could be amended to clarify and explain the types of fraudulent representations intended under the provision. The provision could state, for example, 'fraudulent means as to the nature and purpose of the act, the legal status of the person as a spouse or the identity of the participants' rather than simply 'any fraudulent means'. Such an

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214 Ibid [238]-[239].

215 N Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26 *University of Western Australia Law Review* 223.

216 *Michael v Western Australia* (2008) 183 A Crim R 348, [62] (Steytler P).

217 Ibid [89].

218 *HES v Western Australia* [2022] WASCA 151, [119].

219 Discussion Paper Volume 1, [4.99]-[4.117].

> amendment would minimise the risk of consent being negated by trivial fraudulent representations. It would also clarify the scope of deceit and fraudulent means.[220]

4.216. Similarly, Dr Dyer argued that 'the law in Western Australia should descend into greater particularity than it does about the circumstances in which a person who uses deceit to induce another person to participate in sexual activity, is guilty of a non-consensual sexual offence'.[221] He suggested that the provision should include a lengthy list of all areas in which fraud or mistake negate consent, which is based on all of the cases that have raised the issue to date. While he did not attempt to exhaustively list these, he suggested that it should include:

> Cases where the complainant was mistaken as to: the nature or purpose of the act; the identity of the accused (regardless of whether the person for whom the complainant mistook the accused was personally known to the complainant); whether the accused possessed a medical or like qualification; whether the complainant was married to the accused; whether the accused intended to provide a benefit to the complainant for engaging in the sexual activity; whether the accused was fertile; whether the accused had a grievous bodily disease that she posed a real risk of transmitting to the complainant; whether the accused was wearing a (non-sabotaged) condom during the sexual activity; whether the accused intended to ejaculate inside the complainant's body; whether the sexual activity was part of a traditional cultural practice; and whether the accused was investigating the complainant and/or an organisation or business to which she was connected.[222]

4.217. While Dr Dyer acknowledged that this a very prescriptive approach, he was of the view that:

> There will continue to be legal uncertainty unless the WA Parliament is willing to draw clear lines in this area. Such uncertainty is antithetical to the interests of accused persons. But it is also unhelpful to complainants. Probably because of persistent ideas that a fraudulently induced 'consent' is still, in most cases at least, a real consent, prosecutors in WA are seemingly not prosecuting sex-by-deception cases as frequently as they could. If there were a clear legislative statement that particular cases of fraudulent sexual activity were non-consensual, police and prosecutors would be given far more guidance than they currently are about the circumstances in which an accused who has used such means to induce participation in sexual activity, can be held liable for non-consensual sexual offending.[223]

4.218. By contrast, the ODPP did not consider it necessary to clarify the meaning of the fraud provision. It was of the view that 'expressly excluding some misrepresentations, and not addressing others, just invites further difficulty. We believe the courts should develop the framework recently established in *HES*, such that new factual situations can be dealt with flexibly as they arise'.[224]

The Commission's view

4.219. The Commission acknowledges that there are advantages to having a broadly defined fraud provision. It provides flexibility, allowing scope for the criminal law to address any type of fraudulent sexual activity that may occur. There is also merit in giving jurors, as the community's representatives, the ability to determine whether an act was fraudulent or

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[220] Email Submission E3 (Christie Mathews) 2.

[221] Email Submission E18 (Dr Andrew Dyer).

[222] Ibid (citations omitted).

[223] Ibid (citations omitted).

[224] Email Submission E19 (ODPP). The ODPP stated that this was subject to a caveat: 'if the Government's intention is that a person should not be charged with sexual penetration without consent for falsely representing, or not disclosing, their STI status, that should be expressed in the Explanatory Memorandum to any reform Bill'.

deceptive to the degree required to negate any apparent consent and to warrant a criminal sanction.

4.220. However, the Commission is of the view that these advantages are outweighed by the disadvantages associated with the provision's lack of clarity. As noted by Steytler P, it is potentially 'susceptible to an interpretation that is dramatic in its reach'.[225] This creates the possibility that it will capture conduct that should not properly be criminalised. Conversely, it is also susceptible to an overly narrow interpretation, which could prevent certain sexual frauds from being appropriately criminalised.

4.221. This lack of clarity means that the community cannot know, with any certainty, what conduct is prohibited. Decisions about whether a particular type of fraud is sufficient to negate consent (and so should be charged or tried) are often made by police or prosecutors. This means that they are required to make the decisions without express direction from Parliament and are sometimes relying on judicial decisions that are out of date. Different police officers or prosecutors may interpret the legislation differently, leading to a lack of consistency as to whether particular behaviour is prosecuted. In our consultations with WA Police, some police officers indicated that they have taken a conservative approach to this issue.[226] For example, some officers considered that misrepresentations about condom use do not necessarily fall within the scope of the current provision.[227]

4.222. In the Commission's view, the provision should capture conduct which should be criminalised, yet it should not be given an overly broad scope. To this end, the Commission recommends that its scope be clarified. This will also serve important declaratory and educational functions, making it clear to police, lawyers, judges, jurors and the community precisely what conduct is prohibited.

Fraud, deceit and mistake

4.223. 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 activity or the identity of the other participant (see Table 4.2 above).

4.224. In the Discussion Paper we sought views on whether the *Code* should address cases in which a person has a mistaken belief about a specific matter.[228] We also sought views on whether the provision, if implemented:

- Should be confined to mistaken beliefs that were induced by the accused (as is the case in Queensland) or should apply whenever the complainant held a relevant mistaken belief (as is the case in the other jurisdictions).
- Should require the complainant's mistaken belief to have been reasonable (as is the case in Tasmania) or should simply provide that a person does not consent if they were mistaken about the relevant matter (as is the case in the other jurisdictions).
- Should require the complainant to have participated in the sexual activity because of the mistaken belief (as is the case in NSW) or should simply require the complainant to have held the relevant belief (as is the case in the other jurisdictions).

[225] *Michael v Western Australia* (2008) 183 A Crim R 348, [89] (Steytler P).
[226] The consultees expressed their views as police officers. They did not speak on behalf of the WA Police.
[227] This does not mean that they will take the same approach in the future.
[228] Discussion Paper Volume 1, [4.120]-[4.128].

- Should focus solely on mistaken beliefs (as is the case in SA and Victoria)[229] or should refer to both fraudulent conduct and mistaken beliefs (as is the case in the ACT, the NT and Tasmania).

Stakeholders' views

4.225. Most stakeholders were of the view that the list should be extended to include specific mistaken beliefs. For example, the ODPP submitted that the *Code* should provide that 'a person does not consent if they are mistaken about the nature or purpose of the act, or about the identity of the other person'.[230] It noted that these circumstances 'have long been accepted as capable of vitiating consent'. It was of the view that the prosecution should be required 'to prove that the complainant would not have consented but for their mistaken belief', but it should not need to prove that the mistaken belief was reasonable:

> This could potentially exclude mistaken beliefs not widely held, but held by a vulnerable complainant because of their beliefs, values, cultural practices, or religion, for example. It may also exclude an intellectually impaired person in whom a mistaken belief is induced that was unlikely to be entertained by someone without any impairment.[231]

4.226. The ODPP did not recommend confining the provision to mistaken beliefs which are induced by the accused as 'to do so could allow an accused to wilfully exploit a person's mistaken belief.'[232] It would also render the provision 'coextensive with the vitiating circumstance of deceit or fraud'.[233] It also did not think that mistakes, deceptions or frauds induced by a third party should be excluded, as the complainant's consent has still been negated in such circumstances. If the accused did not have cause to suspect the complainant was acting under a mistaken belief, their conduct will be excused by the mistake of fact defence.

4.227. In recommending the addition of mistaken beliefs to the list, the ODPP noted that 'the necessity to prove the six facts identified by the Western Australian Court of Appeal in *HES* makes fraud cases complex and potentially difficult to prosecute. A circumstance addressing mistaken beliefs would ensure exploitative conduct that may not satisfy all six of these facts is nevertheless captured'.[234] It provided the following examples:

> This might be so where a representation was allegedly made in the course of 'grooming' conduct which lowered the complainant's guard and made them 'receptive' to it, such that it is difficult to prove a representation was intentionally made, and that it caused the complainant to participate or submit. In HES, the Court emphasised that there is no dishonesty involved in unintentionally making a representation that the maker, if they appreciated they had made the representation, would know to be false …
>
> A mistaken belief circumstance would also address a case where there was some evidence the accused themselves believed the act was to any degree effective for the bogus purpose… There may be cases where an accused actually believes what they are doing has some therapeutic or spiritual effect, while at the same time doing

[229] 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. *Criminal Law Consolidation Act 1935* (SA) s 60; *Crimes Act 1958* (Vic) s 45.

[230] Email Submission E19 (ODPP).

[231] Ibid.

[232] Ibid.

[233] Ibid.

[234] Ibid.

> it for sexual gratification and being aware the complainant is only participating because they believe in the bogus effect.[235]

4.228. Dr Dyer also recommended that the list be expanded to include mistaken beliefs, submitting that:

> In a case where a person has engaged in sexual activity because of a mistake or misapprehension, he is in fact not consenting, and the law should generally acknowledge this. In other words, in such a case, the accused should normally be guilty of the relevant non-consensual sexual offence in the Code unless she: (a) might reasonably have believed that the complainant was not materially mistaken; or (b) can successfully raise another defence or excuse.[236]

4.229. As noted above, Dr Dyer was of the view that the list should specify all areas in which fraud or mistake negate consent, which is based on the cases that have raised the issue to date.

4.230. By contrast, WAAC 'strongly opposed' including cases 'in which a person has a mistaken belief about a matter which was not induced by the accused'.[237] The reasons for its opposition included:

- It is unfair to convict a person for 'another person's mistaken belief despite playing no part in causing the mistaken belief'.
- If not limited in scope, it would apply to 'a potentially unlimited variety of mistaken beliefs'. This would 'draw many more people into the orbit of the criminal law system' and 'further stretch the resources of community legal services'.
- It would mean that a person who, after willingly engaging in a sexual activity, later discovers that the other participant 'holds some characteristic about which they harbour discriminatory attitudes', could claim they were sexually assaulted. It would allow such people 'to use the law as a "sword" to visit their prejudices upon their sexual partners in vulnerable and marginalised communities'.
- As most cases of sexual activity occur in private, 'most cases of mistaken belief will come down to one person's word against another's'. This is likely to have a disproportionate impact on marginalised communities 'such as sex workers, LGBTQI+ people, people who inject drugs, people experiencing homelessness and housing instability as well as Aboriginal and Torres Strait Islander people', as historically such people have been 'less likely to be believed by a Judge or Jury, regardless of the veracity of their words'.
- It is 'susceptible to abuse', as it will be 'difficult, if not impossible, to prove whether the accusations of mistaken belief are genuine or deployed for other reasons, such as relationship breakdown'. This is likely to be a particular problem for people with HIV, who are often the subject of complaints to the police 'made by disgruntled ex-partners seeking retribution'.
- Even if the accused can successfully establish that they did not know of the mistaken belief, and so avoid conviction, they still will have had to go through the trial process with its attendant stresses, costs and publicity.
- There is 'no suggestion that the current law in relation to mistaken belief is inadequate', so it should not be changed.

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[235] Ibid.

[236] Email Submission E18 (Dr Andrew Dyer).

[237] Portal Submission P58 (WAAC).

4.231. WAAC was particularly concerned that this approach would have a significant impact on people living with HIV who pose no risk of transmission. These people 'rely on mistaken belief as to HIV status daily in order to avoid stigma, discrimination and physical violence. The principal mechanism by which people with HIV protect themselves from those that would harm or discriminate against them is by keeping their HIV status a secret'.[238] Such individuals would not be protected by enacting a knowledge requirement, because 'it is precisely through knowing such a mistaken belief exists that people with HIV can protect themselves'.[239]

4.232. While WAAC was of the view that the 'law should not be amended to address situations not induced by the accused', it submitted that if this was not accepted 'an alteration to the *Code* should be drafted specifically so that the law is interpreted in the narrowest of ways. Mistaken belief known by the accused to be held by the accuser should only be relevant if it was the primary reason the accuser engaged in sexual intercourse'.[240]

The Commission's view

4.233. In considering the way in which the *Code* should address cases in which the complainant lacked information about the sexual activity in which they engaged, it is important to keep two issues separate. First, there is the question of whether, due to the lack of information, the complainant cannot be said to have truly consented to that activity. This question focuses on what the complainant knew at the time of the activity, and whether their mistaken beliefs were sufficiently serious to negate any purported consent.

4.234. Secondly, there is the question of whether the accused should be held criminally liable for engaging in a sexual activity with the complainant, given the complainant's mistaken beliefs. This question largely focuses on the accused's conduct, and on what they knew at the time of the sexual activity. If, for example, they had no awareness that the complainant held the mistaken belief, it will usually be considered inappropriate to hold them criminally liable.

4.235. These two issues will often be related. For example, if the accused defrauded or deceived the complainant about a significant matter (such as the purpose of the activity), then (i) the complainant will have lacked sufficient information to truly consent to the sexual activity; and (ii) the accused should be held responsible for engaging in the sexual activity, since they fraudulently induced the mistaken belief.

4.236. However, these issues will not always be related. For example:

- A complainant can lack sufficient information to consent to a sexual activity, even though the accused played no role in inducing their mistaken belief.
- The accused can deceive the complainant about a matter (such as their occupation) which may not be considered sufficiently serious to result in criminal liability.

4.237. This point was made emphasised by the High Court in *Papadimitropoulos v R*, where it stated that:

> In considering whether an apparent consent is unreal it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself. But if the mistake or misapprehension is not produced by the fraud of the man, there is logically room for the possibility that he was unaware of the woman's mistake so that a question of his *mens rea* may arise … For that reason it is easy to understand why the stress has been on the fraud. But

[238] Ibid.
[239] Ibid.
[240] Ibid.

> that stress tends to distract the attention from the essential inquiry, namely, whether the consent is no consent because it is not directed to the nature and character of the act … That accords with the principles governing mistake vitiating apparent manifestations of will in other chapters of the law.[241]

4.238. The Commission agrees that focusing on the accused's fraudulent or deceptive conduct when ascertaining whether or not the complainant consented confuses matters and distracts attention from the essential inquiry. We consider that it is preferable to keep the issues of consent and criminal liability separate. This will enable proper consideration to be given to questions such as whether:

- The accused should be held responsible for engaging in a sexual activity with a complainant who held a mistaken belief, even if they did not induce that belief.
- The accused should be held responsible for defrauding or deceiving the complainant about a matter, even if that fraud or deceit did not negate consent.

4.239. Consequently, we recommend that the list of circumstances be framed solely in terms of mistaken beliefs, rather than referring to fraudulent or deceptive conduct. This is because the purpose of the list of circumstances is to spell out situations in which a person does not consent to a sexual activity. That question relates solely to whether the person's decision to engage in the activity was based on insufficient information. It does not depend on whether they were defrauded or deceived. This is the approach that is taken in Victoria and SA.[242]

4.240. For similar reasons, we do not recommend restricting the provision to mistaken beliefs which have been induced by the accused or which are reasonable. A person who holds a mistaken belief about a significant matter (such as the purpose of the activity) does not consent, even if the accused played no role in the formation of that belief or the belief was unreasonably held. If the accused knew that the complainant held such a belief, they deserve to be convicted, as they have taken advantage of the accused's mistake, exploiting their vulnerability. By contrast, if they were unaware of the complainant's mistake, their conduct will be excused by the mistake of fact defence.

4.241. This does not mean that the accused's role in inducing the complainant's belief will be irrelevant. If the accused caused the complainant to hold the mistaken belief, due to fraud or deceit, they will be unable to successfully raise the mistake of fact defence.[243] The fact that they have engaged in fraudulent or deceptive conduct is also likely to be relevant to the penalty imposed.

4.242. To ensure that the scope of the list is clear and not overly broad, we recommend that it specify the types of mistaken belief that will negate any purported consent. These should only be mistaken beliefs about matters which are always fundamental to a sexual activity, such as mistaken beliefs about the nature or purpose of the activity or the identity of the participants. If a person engages in sexual activity knowing that the other person is consenting under a mistake belief that is not fundamental, their conduct may be deserving of criminal punishment, but it is not engaged in without the consent of the other person.[244] We make recommendations about fundamental mistaken beliefs that should be included in the list below.

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[241] *Papadimitropoulos v R* [1957] HCA 74; 98 CLR 249, 260-261.

[242] *Crimes Act 1958* (Vic) ss 36AA(1)(j)-(n); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g)-(h).

[243] This is because under the approach we recommend in Chapter 5, a mistaken belief in consent will not be considered reasonable if the accused knew or believed in the existence of a circumstance included in the Code's list of circumstances in which there is no consent. Where the accused induced such a belief they will be aware of its existence.

[244] *Papadimitropoulos v R* [1957] HCA 74; 98 CLR 249, 261.

4.243. We also recommend that the list require the complainant to have engaged in the relevant sexual activity because of the mistaken belief. This will ensure that an accused person is not liable to conviction simply because the complainant happened to hold a mistaken belief: the prosecution will need to demonstrate that there was a connection between the complainant's belief and their decision to engage in the relevant sexual activity.

4.244. While this approach restricts the listed circumstances to specified mistaken beliefs, we note that there is still scope for the prosecution to argue that a person did not consent because of an unlisted mistaken belief. It will simply be necessary to establish that, in the circumstances, they did not freely and voluntarily agree to the activity, rather than being able to rely on the shortcut of establishing a matter that is included in the list of circumstances.

4.245. We also note that where the accused defrauded or deceived the complainant about a matter which is not included in the list, they could be charged with obtaining sexual penetration by fraud or obtaining a sexual act by fraud (see Chapter 6). We have designed those offences to apply to cases where the complainant has been misled in some way, but the misrepresentation was not sufficient to negate consent.

4.246. We acknowledge WAAC's concerns about the impact this approach may have on people living with HIV. We address these concerns in the sections 'Sexual health' and 'Should the *Code* mistakes which do not negate consent?' below.

Nature of the activity

4.247. 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 activity is sexual in nature. For example, in *R v Williams*[245] the complainant was a teenager whose singing teacher told her that inserting his penis into her vagina would remedy her breathing and improve 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.

4.248. This issue is not specifically addressed in the *Code*. However, it will be covered by the current fraud provision if the accused falsely misrepresented the activity to be non-sexual. This is also the case 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 activity, regardless of the accused's role in inducing that mistake (see Table 4.2 above).

4.249. In its review of consent laws, the NSWLRC recommended that this issue be addressed in the NSW Act. 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.[246]

4.250. In the Discussion Paper we sought views on whether the *Code* should specify that fraud, deception or mistake about the nature of the activity negates consent.[247]

Stakeholders' views

4.251. Respondents to the online survey supported including fraud (76% yes; 12% no; 12% don't know) or mistake (57.5% yes; 20% no; 22.5% don't know) about the nature of the activity in the list of circumstances. Stakeholders in the written submissions and consultations unanimously agreed that a person does not consent where they are defrauded or mistaken

[245] [1923] 1 KB 340.
[246] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.143].
[247] Discussion Paper Volume 1, [4.129]-[4.132].

about the nature of the activity, and also generally supported the inclusion of this issue in the list of circumstances.

The Commission's view

4.252. The Commission is of the view that a person who engages in a sexual activity due to a mistaken belief about the nature of that activity does not consent. This has long been the case at common law. While in the modern era this situation may not often arise, the Commission recommends that it be addressed in the list of circumstances.

4.253. The Commission does not recommend that the provision require the accused to have induced the mistaken belief. The complainant will not have consented regardless of how they came to form that belief. However, if the accused was not aware that complainant was mistaken about the nature of the sexual activity, the mistake of fact defence should be available to them.

Identity of the participants

4.254. 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.[248] 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.

4.255. 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 in their lists of circumstances (see Table 4.2 above).

4.256. In the Discussion Paper we sought views on whether the *Code* should specify that fraud, deception or mistake about the identity of the participants negates consent.[249]

Stakeholders' views

4.257. Respondents to the online survey supported including fraud (71% yes; 12% no; 17% don't know) or mistake (55% yes; 20% no; 25% don't know) about the identity of the participants in the list of circumstances. Stakeholders in the written submissions and consultations unanimously agreed that a person does not consent where they are defrauded or mistaken about the identity of the participants, and generally supported the inclusion of this issue in the list of circumstances.

4.258. The ODPP suggested that this provision could be used as a tool for excluding certain matters from the scope of the fraud or mistake provisions. For example, if the Government does not want these provisions to cover matters such as a 'false claim to be a movie star', this could be done by defining 'identity' in a way that makes it clear that this is not included.[250] Similarly, if the Government intends to exclude coverage of matters such as fertility status, sex or gender identity, that could be done through the same definition:

> For example, 'identity of the other person' … could be defined to include 'the actual identity of the other person, and whether they are married to the person' but not to include 'whether they have an attribute, status, profession or skill, their sex, gender, gender history …' (or similar).[251]

[248] *Papadimitropoulos v R* [1957] HCA 74; 98 CLR 249.
[249] Discussion Paper Volume 1, [4.133]-[4.137].
[250] Email Submission E19 (ODPP).
[251] Ibid.

The Commission's view

4.259. The Commission is of the view that a person who engages in a sexual activity due to a mistaken belief about the identity of the other participant does not consent. This has also long been the case at common law and should be addressed in the list of circumstances.

4.260. We also recommend that the *Code* make it clear that identity should be understood in the same way that it is understood at common law: as referring to who the person is, and not to matters such as their sex, gender, gender history, profession, skills or whether they have a particular attribute. We address frauds, deceptions and mistaken beliefs about these broader matters below.

4.261. The Commission does not recommend that the provision require the accused to have induced the mistaken belief. The complainant will not have consented regardless of how they came to form that belief. However, if the accused was not aware that the complainant was mistaken about their identity, the mistake of fact defence should be available to them.

Purpose of the activity

4.262. 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. For example, they may mistakenly believe that the activity is being performed for medical reasons.[252]

4.263. 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 4.2 above).

4.264. In the Discussion Paper we sought views on whether the *Code* should specify that fraud, deception or mistake about the purpose of the activity negates consent.[253]

Stakeholders' views

4.265. Respondents to the online survey supported including fraud (76% yes; 12% no; 12% don't know) or mistake (57.5% yes; 20% no; 22.5% don't know) about the purpose of the activity in the list of circumstances. Stakeholders in the written submissions and consultations once again unanimously agreed that a person does not consent where they are defrauded or mistaken about the purpose of the activity, and generally supported the inclusion of this issue in the list of circumstances.

The Commission's view

4.266. The Commission is of the view that a person who engages in a sexual activity due to a mistaken belief about the purpose of the activity does not consent. While this was not the case at common law, it has arisen in several cases and should be addressed in the list of circumstances.

4.267. We do not recommend that the provision be limited to specific mistakes, such as that the sexual activity was for medical or hygienic purposes (as is the case in Victoria and the NT). Like the NSWLRC, we see 'no reason why some mistakes about the purpose of a sexual activity mean a complainant does not consent, but others do not'.[254]

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[252] See, eg, *R v Mobilio* [1991] 1 VR 339.

[253] Discussion Paper Volume 1, [4.138]-[4.142].

[254] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.150].

4.268. We do, however, think that it would be useful to provide examples of this type of mistake, 'to confirm its application to some common situations'.[255] This approach has been taken in the NSW Act.[256] We recommend that the *Code* contain an inclusive definition of this type of mistake that includes these following examples: where the person mistakenly believes the sexual activity is for health, hygienic, cosmetic, religious or spiritual purposes. This non-exhaustive list reflects the main types of cases which have arisen around Australia to date.

4.269. In making this recommendation we are not suggesting that a sexual activity which is engaged in due to its health benefits would be non-consensual. Our recommendation is targeted at circumstances in which a person mistakenly believes that the particular sexual activity is for a specific purpose, such as a health, hygienic, cosmetic, religious or spiritual purpose.

4.270. The Commission does not recommend that the provision require the accused to have induced the mistaken belief. The complainant will not have consented regardless of how they came to form that belief. However, if the accused was not aware that the complainant was mistaken about the purpose of the sexual activity, the mistake of fact defence should be available to them.

Marital status of the participants

4.271. In the case of *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.[257] 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.[258] No other Australian jurisdiction has explicitly addressed this issue.

4.272. In the Discussion Paper we sought views on whether the *Code* should specify that fraud, deception or mistake about the marital status of the participants negates consent.[259]

Stakeholders' views

4.273. Respondents to the online survey were somewhat supportive of including fraud about the marital status of the participants in the list of circumstances (50% yes; 31% no; 19% don't know). However, they were opposed to including mistakes about marital status in the list (39% yes; 44% no; 17% don't know). Legal Aid also opposed the inclusion of marital status in the list of circumstances, arguing that 'fraud or deceit to negate consent should be limited to fraud or deceit as to the nature or purpose of the act or the identity of the participants'.[260] No other submissions were received on this issue.

The Commission's view

4.274. The Commission agrees with stakeholders that the marital status of participants should not be included in the list of circumstances. We do not consider that a mistake of this nature is always so fundamental to a sexual activity that it necessarily negates consent. It is also unlikely to commonly arise, so we see little need to specifically address it in the *Code*.

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[255] Ibid [6.152].
[256] Ibid s 61HJ(1)(i)-(j).
[257] *Papadimitropoulos v R* [1957] HCA 74; 98 CLR 249.
[258] *Crimes Act 1900* (NSW) s 61HJ(1)(j).
[259] Discussion Paper Volume 1, [4.143]-[4.146].
[260] Portal Submission P23 (Legal Aid).

4.275. In reaching this conclusion, we note that it will be possible to argue, in appropriate cases, that consent was negated by a mistaken belief that the participants were married to each other. It will simply be necessary to establish that, in the circumstances, the complainant did not freely and voluntarily agree to the sexual activity, rather than being able to rely on the shortcut of establishing a matter that is included in the list of circumstances.

4.276. We also note that where the accused deceived the complainant about their marriage to each other, they could be charged with obtaining sexual penetration by fraud or obtaining a sexual act by fraud (see Chapter 6). We have designed those offences to apply to cases where the accused has defrauded or deceived the complainant in some way, but the misrepresentation has not negated consent.

Monetary exchange

4.277. 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'.[261] In the Discussion Paper we noted that 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 activity.[262]

4.278. 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.[263] This is because misrepresentations about payment are not seen to relate to the nature of the activity or the identity of the accused.

4.279. By contrast, it is possible that this type of conduct would be captured by the *Code's* current fraud provision. This was held to be the case in the ACT, which has a similarly broad provision.[264] In *Livas v R* the accused failed to pay a person engaging in sex work the agreed fee for the sexual activity in which they had engaged. He was convicted of rape, on the basis that her consent was negated by his fraudulent representation.[265] 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.[266]

4.280. Victoria is the only Australian jurisdiction to have addressed this issue in its legislation to date. Recently enacted 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'.[267] The Act provides that 'a

[261] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.177].
[262] Discussion Paper Volume 1, [4.175].
[263] *R v Linekar* [1995] QB 250.
[264] 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).
[265] *R v Livas* [2015] ACTSC 50.
[266] Ibid [34].
[267] *Crimes Act 1958* (Vic) s 36AA(1)(m).

false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit'.[268]

4.281. In the Discussion Paper we sought views on whether the *Code* should specify that fraud, deception or mistake about payment for sexual services negates consent.[269]

Stakeholders' views

4.282. Respondents to the online survey were somewhat supportive of including fraud (57% yes; 15% no; 28% don't know) or mistake (51% yes; 26% no; 23% don't know) about payment for sexual services in the list of circumstances.

4.283. This was also supported by some other stakeholders in submissions and consultations. For example, CWSW advocated for 'the *Code* to take the victimisation of sex workers seriously and offer protections to sex worker sexual assault victims as they would any other person, regardless of their occupation'.[270] It noted that 'sex workers discuss and negotiate services and costs with clients, consenting to mutually agreed upon terms', and quoted the following statement from sex worker reform advocates Magenta:

> When a client does something that wasn't agreed to, boundaries are broken and consent no longer exists. If a client changes the terms of the booking without talking to the sex worker, consent is broken. It doesn't matter whether this is done by deceit, fraud, force, threat or intimidation.[271]

4.284. Consequently, CWSW recommended that the *Code* include a provision that states that there is no consent 'where the person consents to a sexual act under a fraudulent representation/mistaken belief by the other person that there will be a monetary exchange in relation to the sexual act'.[272]

4.285. WAAC similarly submitted that:

> When a person is mistaken, deceived or defrauded about payment of sexual service and participates in a sexual activity because of the mistaken belief, deceit or fraud, there is no consent on the part of this person…
>
> As stated by Scarlet Alliance 'in sex work, a key aspect of consent for sexual services is payment for the services negotiated. If payment is not made or withdrawn, whether or not the sex worker is yet aware, consent is also withdrawn.' Normatively, it is the same as other circumstances whether there is no consent because of mistaken beliefs, deceit or fraud.[273]

4.286. The ODPP agreed that 'the targeting of sex workers with deceptions and violence to avoid paying them makes it important the law protects persons who are providing sexual services for money'.[274] However, while it considered that there should be a response to the concerns raised in the Discussion Paper, it did not make any suggestions in this regard. It expressed the view that developing this response 'may need to be part of a broader review, which includes other laws'.[275]

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[268] Ibid s 36AA(2).
[269] Discussion Paper Volume 1, [4.175]-[4.183].
[270] Portal Submission P57 (CWSW).
[271] Magenta, 'Sexual Assault: Not Stealthing' (2016). Accessed online: https://magenta.org.au/sexual-assault/. Quoted in ibid.
[272] Ibid.
[273] Portal Submission P58 (WAAC) (citations omitted).
[274] Email Submission E19 (ODPP).
[275] Ibid.

The Commission's view

4.287. The Commission agrees with stakeholders that it is important to take the victimisation of people who work in the sex industry seriously. Like any other people they are deserving of the protection of the law. The fact that they engage in sex work for money does not mean that they have given up their rights to sexual autonomy or bodily integrity: they are free to choose what sexual activity they engage in, with whom, and under what conditions. This includes agreeing to engage in a sexual activity on the condition that they are paid for that activity. If the other participant subsequently refuses to pay, they have breached the sex workers' sexual autonomy.

4.288. However, the Commission considers that it would be incongruous to specifically address this issue in the *Code*, given that in Western Australia, most sex work related activities are currently illegal. Consequently, we do not recommend adding this matter to the list of circumstances.

4.289. In reaching this conclusion, we note that it will still be possible to argue, in appropriate cases, that consent was negated by a mistaken belief about payment for sexual services. It will simply be necessary to establish that, in the circumstances, the complainant did not freely and voluntarily agree to the sexual activity, rather than being able to rely on the shortcut of establishing a matter that is included in the list of circumstances. As was noted above, this argument has been successful in other jurisdictions.[276]

4.290. In addition, we note that where the accused deceived the complainant about payment, they could be charged with obtaining sexual penetration by fraud or obtaining a sexual act by fraud (see Chapter 6). Those offences will not require the prosecution to prove that the fraud or deception negated consent.

Fertility

4.291. In the Discussion Paper we noted that 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*.[277] 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 English 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 activity; and
- It did not deprive the complainant of the freedom to choose whether or not to have sex.

4.292. 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 activity (pregnancy). In the Court's view, deception about the quality of the ejaculate (ie, whether it is capable of leading to pregnancy or not) is fundamentally different to deception about whether ejaculate will enter the vagina. 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 activity.[278]

[276] See, eg, *R v Livas* [2015] ACTSC 50.
[277] *R v Lawrence* [2020] EWCA Crim 971.
[278] Ibid [37].

4.293. In the Discussion Paper we sought views on whether the *Code* should specify that fraud, deception or mistake about the fertility of the participants negates consent.[279]

Stakeholders' views

4.294. Respondents to the online survey expressed some support for including fraud (55% yes; 27.5% no; 17.5% don't know) or mistake (44% yes; 36% no; 20% don't know) about fertility in the list of circumstances.

4.295. While few stakeholders addressed this issue in their submissions, there was some support for its inclusion in the *Code*. For example, it was noted that lying about fertility, in order to keep a woman 'pregnant and dependant on the perpetrator', is used as a form of control in circumstances of family and domestic violence, and so should be addressed.[280]

The Commission's view

4.296. The Commission does not recommend that mistaken belief about fertility be included in the list of circumstances. While the Commission acknowledges that a belief about a participant's fertility may well hold great significance for certain individuals, it does not consider that a mistake of this nature is always so fundamental to a sexual activity that it necessarily negates consent.

4.297. In reaching this conclusion, we note that it will still be possible to argue, in appropriate cases, that consent was negated by a mistaken belief about fertility. It will simply be necessary to establish that, in the circumstances, the complainant did not freely and voluntarily agree to the sexual activity, rather than being able to rely on the shortcut of establishing a matter that is included in the list of circumstances.

4.298. We also note that where the accused deceived the complainant about their fertility, they could be charged with obtaining sexual penetration by fraud or obtaining a sexual act by fraud (see Chapter 6). We have designed those offences to apply to cases where the accused has defrauded or deceived the complainant in some way, but the misrepresentation has not negated consent.

Sex, sex characteristics, sexual orientation, gender identity and gender history

4.299. In some cases, a person who engages in a sexual activity may lack information about the other participant's birth sex, sex characteristics, gender identity (including trans, gender-diverse and non-binary gender identities), gender history or sexual orientation. 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.[281] For example, in *R v McNally*[282] 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

[279] Discussion Paper Volume 1, [4.184]-[4.186].

[280] Email Submission E15 (Confidential); Email Submission E16 (Zonta Club of Bunbury); Email Submission E17 (Professor Hélène Jaccomard).

[281] See, eg, *R v McNally* [2013] EWCA Crim 1051; *R v Newland* (Unreported, Chester Crown Court, Dutton J, 12 November 2015).

[282] *R v McNally* [2013] EWCA Crim 1051.

> freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception.[283]

4.300. These cases have been strongly criticised.[284] 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 its preliminary submission, which 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'.[285]

4.301. In response, it could be contended 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.[286] She contends that trans people have a right not to disclose details of their sex or gender history to all prospective sexual partners.

4.302. In the Discussion Paper we noted that this issue is a particularly difficult one to resolve, given the conflicting rights of the participants.[287] 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. Different people may have different views on what information is 'relevant'. On the other hand, a person's privacy 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'.[288] In its preliminary submission, Sexual Health Quarters asserted that amending the *Code* in a way that required disclosure of such matters 'would be a catastrophic blow to human rights and human dignity'.[289]

4.303. In the Discussion Paper we noted that various approaches could be taken to addressing this issue, and set out four possible options:[290]

- Retain the current broad fraud provision, which arguably covers any fraud or deception about one's sex, sexual characteristics, gender identity, gender history or sexual orientation.
- Only criminalise fraudulent or deceptive conduct about sex, sexual characteristics, gender identity, gender history or sexual orientation if the complainant has made it clear that the relevant matter is materially important to them.
- 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 activity negate consent.

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283 Ibid, [26].

284 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.

285 Preliminary Submission 12 (Sexual Health Quarters).

286 A Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-consent' (2014) *Criminal Law Review* 207, 208.

287 Discussion Paper Volume 1, [4.191].

288 Preliminary Submission 12 (Sexual Health Quarters).

289 Ibid.

290 Discussion Paper Volume 1, [4.192]-[4.197].

- Provide that failing to disclose one's sex, sexual characteristics, gender identity, gender history or sexual orientation does not constitute fraud.

4.304. We sought views on whether the *Code* should address this issue and, if so, how it should be addressed.[291] This section addresses how these issues should be addressed in the list of circumstances in which there is no consent. Related issues are dealt with later in this Chapter under the heading 'Should the *Code* specify mistaken beliefs which do not negate consent?' and in Chapter 6 under the heading 'Should the offence of procuring sex by threats, intimidation, fraud or the administration of drugs be repealed?'

Stakeholders' views

4.305. Respondents to the online survey held mixed views on this issue. Some were of the view that a person's sexual autonomy is undermined if they are not informed about such matters, and so non-disclosure should be considered to negate consent; while others did not think that such information should have any relevance to the decision to engage in sexual activity and should not need to be disclosed.

4.306. Similarly mixed opinions were expressed in the submissions and consultations. For example, one stakeholder expressed the view that 'gender presentation… is core and immediate to the decision to engage in sexual activity. While not supporting criminalisation of any transgender diversity or identity, in my view failure to disclose is misleading, and carries potentially harmful impacts on the misled person, sufficient to negate consent'.[292]

4.307. By contrast, another stakeholder submitted that:

> Trans people do not conceal, omit, or even lie, about their surgical history or gender identity for the sake of fraudulently inducing another person into sex. They do it because to reveal that history is to expose themselves to great personal risk. Indeed, trans people (and particularly trans women) are at a higher risk of being the victim of sexual violence than their cisgender counterparts…
>
> The apparent focus on forcing trans people to make that disclosure reflects a kind of 21st century gay panic that will undoubtedly pose a risk to trans lives. In no uncertain terms, I am expressing a sincere hope that the LRC will not endorse any such suggestion.[293]

4.308. WAAC expressed similar views, arguing that:

> Non-disclosure of or misrepresentation of a person's sex or gender history does not violate the other participant's sexual autonomy… We recommend that there should be a complete carve out in any proposed changes to existing legislation, or new legislation, that proposes changes to the law of consent regarding sexual offences so that non-disclosure or misrepresentation of assigned gender at birth does not constitute a misrepresentation that vitiates consent, to make sure that '[c]isgender normativity, gender identity discrimination and transphobia [do] not influence an outcome of trial.'…
>
> We agree with Sexual Health Quarters' Preliminary Submission that 'disclosure of biological sex before, during, or after a sex act carries significant risk for trans and gender diverse people'. Nationally and internationally, there have been numerous and

[291] Ibid [4.187]-[4.198].
[292] Email Submission E11 (Confidential).
[293] Email Submission E12 (Confidential).

> far too many cases where transgender and gender diverse persons have lost their lives after they disclosed their sex to their sexual partner…
>
> If the law criminalises non-disclosure of or misrepresentation of sex or gender history, transgender and gender persons are often faced with a cruel predicament that they either disclose their sex or gender history and face the considerable risk of deadly violence, or do not disclose and risk the prospect of criminal prosecution for sexual assault. This constitutes cruel, inhuman and degrading treatment to an already marginalised community and violates transgender and gender diverse persons' rights to bodily autonomy and to life.[294]

4.309. The ODPP did not express a view on whether the *Code* should address this issue. It noted, however, that as the *Code* 'currently has no interest in representations or disclosures' about such matters, if it is expected that a charge should be open where a person makes a misrepresentation about such matters that would require express provision in the *Code*. Conversely, if it is not intended that a charge should be open in such circumstances, there are various ways to achieve that goal:

> We suggest that the vitiating circumstance of a 'mistaken belief about the identity of the other person' should expressly define the meaning of 'identity', if it is not to cover sex, gender, etc. If that is done it is likely to imply that 'false' representations about those matters are similarly not to be taken as representations as to a person's identity, for the purposes of 'deceit or any fraudulent means'.
>
> The Explanatory Memorandum to any reform Bill can record Government's intentions. This might be an effective way to prevent so-called 'gender fraud' cases, as the ACT aimed to do by stating that 'a body of a person of diverse gender expression is not inherently deceptive and their gender identity is their real and authentic identity'. Notably, the ACT Explanatory Memorandum refers only to an intention to exclude *non-disclosure* of gender history, not a false representation about gender history.
>
> Although there should not be undue reliance on prosecutorial discretion to impose proper limits on the operation of the law, the assessment of whether a prosecution is in the public interest will always have a role to play in this area.
>
> If an 'objects' provision is inserted into Chapter XXXI, it could be used to identify principles which are intended (or required) to guide the interpretation of 'fraudulent means' in these contexts, and also 'mistaken belief as to identity'.[295]

The Commission's view

4.310. It was clear from the consultations that the Commission conducted, as well as from the submissions we received, that people feel very strongly about this issue. It was also clear that views differ greatly: some people consider that having specific information about all of these matters is essential to sexual autonomy, while others consider this to be unnecessary, or that privacy and safety are preeminent principles. This makes addressing the issue especially complex.

4.311. We consider the appropriate starting point to be the general approach we have taken to all of the issues we have addressed in this section: that the list of circumstances should only include mistaken beliefs about matters which are always fundamental to a sexual activity. In other words, they should be matters which change the essential nature of the activity in which the complainant believes they are engaging.

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[294] Portal Submission P58 (WAAC) (citations omitted).

[295] Email Submission E19 (ODPP).

4.312. In our view, a relatively strict approach should be taken to this issue. For example, we do not consider that beliefs about a person's attributes (such as their occupation or wealth) qualify. It is only mistaken beliefs about matters such as the sexual nature of the activity, the purpose of the activity or the identity of the participant that should be considered fundamental to a sexual activity.

4.313. For this reason, we do not consider that mistaken beliefs about a person's gender history, gender identity, birth sex or sexual orientation should be included in the list of circumstances. Even if a person is mistaken about these matters, and thinks it is important to know them, that does not change the fact that they are aware of the physical and sexual nature of the relevant sexual activity, its purpose and the person with whom they are engaging in the activity. Their sexual partner's current or previous personal sense of their gender, the biological or physical characteristics they were born with, or the other people to whom they may be attracted, does not change the sexual activity in any way.

4.314. While in some circumstances a person's sex characteristics at the time of the sexual activity may be fundamental to that activity, that will not always be the case. For example, a person's sex characteristics may not be relevant to the specific sexual activity in which the participants are engaging or may not alter that activity in any way. Consequently, we also do not recommend adding mistaken beliefs about sex characteristics to the list of circumstances in which there is always no consent.

4.315. We note that our approach is consistent with the approach taken in other Australian jurisdictions, which also do not include gender history, gender identity, birth sex, sexual orientation or sex characteristics in their lists of circumstances.

4.316. Throughout this Chapter we have noted that the fact that a matter is not included in the list of circumstances simply prevents the prosecution from relying on the shortcut of establishing that matter to prove a lack of consent. The prosecution can still seek to establish that, because of the complainant's mistaken belief about a non-listed matter, the complainant did not consent to the relevant sexual activity. In our view, such an approach should not be permitted where the mistaken belief was only about a person's gender history, gender identity, birth sex or sexual orientation. We discuss this issue in the section 'Should the *Code* specify mistaken beliefs which do not negate consent?' below.

Sexual health

4.317. One of the earliest cases on sexual fraud involved the accused failing to disclose that he had a sexually transmissible infection (**STI**) (gonorrhoea).[296] 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 activity or the identity of the participants. Deception about a participant's sexual health was not considered a sufficient basis to negate consent.

4.318. 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. The transmission of diseases is, however, addressed by other areas of the law. For example:

- Under the *Public Health Act 2016* (WA) (**Public Health Act**), the Chief Health Officer may make a public health order in relation to a person with a notifiable infectious disease (which includes a range of sexually transmissible diseases), if they reasonably believe that the person may behave in a way that is likely to transmit the disease, and that will pose a

[296] *R v Clarence* (1888) 22 QBD 23.

material public health risk.[297] A person who fails to comply with a public health order without reasonable excuse faces 12-months' imprisonment or a $50,000 fine.[298]

- 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.[299]
- Where a person unlawfully causes a person to contract a serious disease, they can be convicted of unlawfully causing grievous bodily harm.[300]

4.319. It is important to note that these mechanisms have different areas of focus: the Public Health Act is concerned with stopping the spread of infectious diseases and the management of serious risks to public health; 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 agreed to a sexual activity where they lacked information about a participants' sexual health.

4.320. 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.[301]

4.321. 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.[302] 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.[303]

4.322. In the Discussion Paper we noted that addressing this issue requires a consideration, and balancing, of the conflicting rights of the participants. We raised the following options:[304]

- Do not specifically address the issue but retain a broad fraud provision which arguably covers any fraud or deception about one's sexual health.
- Provide that failing to disclose information about one's sexual health negates consent.
- Only criminalise fraudulent or deceptive conduct about sexual health if the complainant has made it clear that the matter is materially important to them.
- 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 activity negate consent.

297 Ibid s 116.
298 Ibid s 122.
299 *Criminal Code Act Compilation Act 1913* (WA) s 294(1)(h).
300 Ibid s 297; *Palmer v Western Australia* [2018] WASCA 225.
301 *Penal Code 1871* (Sg) s 376H.
302 *Criminal Code*, RSC, 1985, c C-46, s 265(3)(c).
303 *R v Mabior* [2012] 2 SCR 584; *R v Cuerrier* [1998] 2 SCR 371; *R v Gauthier* [2020] BCSC 146. See Discussion Paper Volume 1, [4.203]-[4.207].
304 Discussion Paper Volume 1, [4.208].

- Provide that failing to disclose information about one's sexual health does not negate consent.

4.323. In the Discussion Paper we sought views on whether the *Code* should address fraud, deception or mistake about the sexual health of the participants and, if so, how it should be addressed.[305] This section addresses how these mistakes about sexual health should be addressed in the list of circumstances in which there is no consent. Related issues are dealt with later in this Chapter under the heading Should the *Code* specify mistaken beliefs which do not negate consent?' and in Chapter 6 under the heading 'Should the offence of procuring sex by threats, intimidation, fraud or the administration of drugs be repealed?'

Stakeholders' views

4.324. WAAC strongly opposed the inclusion of sexual health in the list of circumstances, instead recommending that the *Code* provide that 'non-disclosure of HIV status or other STI status or misrepresentation of HIV status or other STI status does not constitute a misrepresentation that vitiates consent'.[306] In support of this view, it submitted that criminalising non-disclosure or misrepresentation of HIV status:[307]

- Is discriminatory in cases where there is negligible risk of transmission, and unnecessary in cases where there is actual transmission or a risk of transmission (as such behaviour is already addressed by the Public Health Act).
- Requires people living with HIV to choose between the serious negative consequence that may follow from disclosure of their HIV status (such as physical abuse or blackmail) or facing criminal prosecution for a sexual offence. This may 'violate their right to freedom from torture or cruel, inhuman or degrading treatment'.
- Is likely to have a disproportionate impact on 'people living with HIV that are also African diaspora heterosexual men, sex workers, trans and gender diverse people and people who inject drugs, as they often face the brunt of criminal prosecutions'.
- 'Facilitates abusive partners being able to hold the threat of a criminal prosecution against someone living with HIV if the abusive partner can point (even falsely) to an instance at the start of their relationship where the partner living with HIV did not disclose or misrepresented their HIV status.'
- Has 'the potential to shift the regulatory framework in Western Australia from a robust and exemplary health-based model that promotes public health toward a criminalised model that stigmatises people with HIV' and is 'counterproductive for the protection of public health'. For example, it may 'decrease engagement in testing, treatment and care'.

4.325. WAAC drew attention to Canada's experience in this regard, suggesting that it 'provides the pre-eminent example of what happens when a country with an otherwise high-quality public health response to HIV changes their laws so that nondisclosure or misrepresentation of HIV status can vitiate consent':[308]

> Since 1998, Canadian courts have upheld the view that nondisclosure of HIV status constitutes a fraud that vitiates consent to sexual intercourse. Canadian experts and activists have long criticised this interpretation of the law. A landmark consensus statement was published in 2014 by Canadian medical and scientific experts

[305] Ibid [4.199]-[4.209].
[306] Portal Submission P58 (WAAC).
[307] Ibid.
[308] Ibid.

> criticising the unscientific basis of the law. More recently, the Canadian government has acknowledged the problematic impact of the law, and issued a directive to federal prosecutors that people with HIV should not be prosecuted in most cases. Regardless of this directive and considerable investment from the Canadian government into the HIV response, the stigma attached to these laws contribute to poor public health outcomes. For example, in 2021, there were 1,722 new diagnosed cases of HIV (5.2% increase since 2020) compared to Australia where there were only 552 recorded transmissions of HIV (38% decline since 2019).[309]

4.326. WAAC's views were not, however, shared by most other stakeholders. For example, respondents to the online survey did not support excluding fraudulent representations about a person's sexual health from the scope of the fraud provision (18% exclude; 74% don't exclude; 8% don't know). To the contrary, they were generally of the view that fraud (86% yes; 10% no; 4% don't know) or mistake (67.5% yes; 20% no; 12.5% don't know) about sexual health should be included in the list of circumstances in which there is no consent.

4.327. This view was reflected in the comments to the survey. For example, respondents stated that:

> A person's medical privacy should be secondary to a person's right to make an informed choice. I.e. if person A does not disclose a sexually communicable disease on the grounds of medical privacy, person A's rights should not come before person B's right to make an informed choice about whether or not they engage in a sexual act with person A.[310]

and

> The victim has no control over someone else's sexual health, and holding that other person accountable for representations made about their sexual health is a way to protect a potential victim. STIs are likely to have detrimental effects on the victim's life. The person who carries the disease has a lot more control over the situation: they may treat their problem; they may simply abstain from the sexual act if they are firmly unwilling to disclose their STI status. It's like covid vaccine and employment: you are not forced to have the vaccine but you cannot hold certain jobs if you are unvaccinated. Same here: you are not forced to disclose your STIs but you cannot have consensual sex with someone if you don't do the right thing for them.[311]

4.328. Dr Dyer made similar arguments, proposing that the fraud provision should cover cases where the accused failed to disclose a serious bodily disease:

> In so proposing, I realise that many oppose the criminalisation of such activity. But many support it – and the arguments of those who oppose it are unprincipled and show a limited understanding of how human rights law operates. In particular, to say that a person's 'right to autonomy' makes it permissible for him to deceive his sexual partner(s) about his disease status – whether actively or passively – is to ignore the fact that there is a competing autonomy interest (that of the complainant) that must take priority in such circumstances. And similar comments apply to the defendant's 'right to privacy'. That right, where it exists, is a qualified right. Accordingly, while the state has an obligation to ensure that its citizens' privacy is not infringed, that obligation must give way, in the case of conflict, to its absolute obligation to ensure that its citizens are not treated in an inhuman or degrading way: e.g. by violating their sexual autonomy. If a person does not wish to disclose to her sexual partners that she has a serious bodily disease that she poses a real risk of transmitting to them, she should either take measures to reduce the risk that she poses or refrain from

[309] Ibid (citations omitted).
[310] Portal Submission P44 (Anonymous).
[311] Portal Submission P21 (Anonymous).

> having sex. If she instead chooses to breach the sexual autonomy of another person, she has acted very culpably and should be convicted of a serious sexual offence.
>
> Moreover, the argument that such criminalisation will deter people from undergoing testing for serious STIs, is speculative. What evidence is there that there would be such a deterrent effect? And why is the same deterrent effect not achieved by the criminalisation of those who actually culpably infect their sexual partners with a grievous bodily disease? Should that conduct also be non-criminal? No doubt, there are some who would deliver an affirmative answer to the final of these questions – but, because the conduct at issue is wrongful, culpable and causes serious harm, such an approach does not seem reasonable.[312]

4.329. However, Dr Dyer recommended that the provision not cover cases where the accused poses only a negligible risk of transmitting the disease, even if complainant would not have engaged in the sexual activity had they known the truth. He argued that while there has been a breach of sexual autonomy in such circumstances, 'if there were to be a prosecution in such circumstances, the law would be liable to fall into disrepute'.[313]

4.330. The ODPP did not take a stance on this issue, noting that it involves:

> Complex public policy considerations which span health, community services, and justice sectors, and in which different sections of the community will be heavily invested. Notwithstanding the significant difference between fraud and non-disclosure in terms of moral culpability, culpability in either scenario may be moderated by social, economic and/or health factors which should not be addressed by the application of prosecutorial discretion. This is properly an area for Parliament to consider and indicate its intention as to whether a charge of sexual penetration without consent is open in these circumstances.[314]

4.331. The ODPP did, however, make various comments on the issue. For example, it noted that:[315]

- The criminal law may intervene where an STI is transmitted and the *consequences* to the other person are a sufficiently serious level of endangerment or bodily harm, by providing a basis for a charge of intent to cause grievous bodily harm by doing any act likely to result in a person having a serious disease;[316] unlawfully causing grievous bodily harm;[317] or act causing bodily harm or danger.[318]
- Parliament's intention to criminalise the conduct of persons with STIs according to their *intent* and/or the *harm* (or *risk of harm*) which results weighs against the conclusion that 'any fraudulent means' is intended to cover this type of deceit. The Australian authorities in relation to transmission of STIs involve the infliction of grievous bodily harm.
- Prosecution for a sexual offence is most likely to be considered if a charge of grievous bodily harm is not feasible. This could be the case for various reasons: for example, the STI in question may not be considered a 'serious disease', the complainant may not have suffered grievous bodily harm, or the prosecution may not be able to prove that the complainant caught the STI from the accused.
- It is highly unlikely that a person could be successfully prosecuted on a charge of sexual penetration without consent where they merely did not disclose their STI status,

[312] Email Submission E18 (Dr Andrew Dyer) (citations omitted).
[313] Ibid.
[314] Email Submission E19 (ODPP).
[315] Ibid.
[316] *Criminal Code Act Compilation Act 1913* (WA) s 294(1)(h).
[317] Ibid s 297(1).
[318] Ibid s 304(1).

> as opposed to making a false representation. [This would require courts to accept that] non-disclosure, at law, is capable of being a positive representation as to the absence of an STI.

Regarding the latter matter, the ODPP also noted that it would require proof that the complainant engaged in the sexual activity because of the non-disclosure, which is likely to be difficult.[319]

The Commission's view

4.332. In the Commission's view this is a finely balanced issue. We believe that people should be able to determine the risks involved in their sexual activities, and that ensuring people inform their sexual partners of any STIs they have is a part of a person being able to properly determine those risks prior to sexual activity taking place. We acknowledge, however, that requiring people to disclose information about their sexual health carries its own risks. As outlined in the submissions, it could detrimentally affect the public health response to STIs, lead to interferences with personal privacy and may potentially result in publication of the information and people being subjected to discrimination, harassment or violence.

4.333. This picture is further complicated by the fact that many people have STIs but are not aware that is the case. This would mean that if the list of circumstances were to provide that a person does not, as a matter of law, consent if they engage in a sexual activity because they are mistaken about the other participants' sexual health, a lot of sexual activity would be considered non-consensual. While the accused would not be liable to conviction in such cases (due to their lack of awareness), we are concerned about extending the meaning of non-consensual sexual activity too far.

4.334. It would be possible to limit the extent of the provision by restricting it to cases where a person is mistaken that the other participant has a 'serious' disease, but this creates definitional problems. For example, what makes a disease serious? Is it the potential for the disease to cause serious harm? Should this be judged by considering the worst possible case or the most common case? What if the disease is serious but treatable?

4.335. It is also not clear that the key issue here relates solely to the potential consequences of disease transmission: the risk of transmission also appears relevant. The Commission agrees with stakeholders that failing to disclose a serious disease which cannot be transmitted does not constitute a sufficient violation of sexual autonomy to warrant criminalisation. However, if the disease is potentially very serious, and there is even a slight risk of transmission, there may be a sufficient violation of autonomy. This will, however, depend on complex considerations of the level of risk, the gravity of the potential injury and the treatability of the disease.

4.336. An alternative approach would be to identify specific serious diseases, such as HIV or Hepatitis C, and provide that a person does not consent if they engage in a sexual activity because they mistakenly believe the other person does not have that disease. However, this approach seems unjustifiable in light of the matters raised above. The mere fact that a person has such a disease does not mean that they pose a risk of transmission; and even if the disease is transmitted it may not have serious health consequences given available treatment. It is also likely to reinforce the prejudice and stigma associated with the listed diseases. Additionally, it runs the risk of becoming outdated over time, as some diseases are cured and new ones develop.

[319] Ibid.

4.337. In light of these concerns, we do not recommend that the list of circumstances include a specific reference to mistaken beliefs about sexual health. This is consistent with the approach taken in other Australian jurisdictions.

4.338. This does not mean, however, that it will not be possible to argue that consent was negated by a mistaken belief about a person's sexual health. It will simply be necessary to establish that, in the circumstances, the complainant did not freely and voluntarily agree to the relevant sexual activity, rather than being able to rely on the shortcut of establishing a matter that is included in the list of circumstances. This will mean that a failure to disclose could result in criminal liability, but only in a case where the failure was of such gravity that there was no free and voluntary agreement to the relevant sexual activity. As discussed below,[320] we do not consider this to be the case where there is no realistic risk of disease transmission.

Recommendations

11. The list of circumstances should provide that, as a matter of law, a person does not consent to a sexual activity where the activity occurs because the person had a mistaken belief about:

- **The nature of the sexual activity;**
- **The identity of the other participant; or**
- **The purpose of the relevant sexual activity, including a mistake about the sexual activity being for health, hygienic, cosmetic, religious or spiritual purposes.**

12. The list of circumstances should not refer to sexual activity which is obtained by fraudulent or deceptive means. It should solely focus on sexual activity which occurs because of the complainant's mistaken belief.

13. The *Code* should not require the accused to have induced the mistaken belief or require the complainant's mistaken belief to have been reasonable in the circumstances.

14. The *Code* should make it clear that 'identity' is limited to who the person is. It does not refer to matters such as the person's sex, gender, gender history, profession or skill, or whether they have a particular attribute.

Stealthing (non-consensual condom removal)

4.339. 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 activity on the basis that person B will use a condom but, without telling person A, person B does not do so or removes the condom part way through the sexual activity. 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 is mistaken about the sexual activity which is taking place: they believe they are engaging in sex with a functional condom when they are not. It is arguable that this mistake undermines their consent.

4.340. 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

[320] See 'Should the *Code* specify mistaken beliefs which do not negate consent?'

December 2017 found that 32% of women and 19% of men had experienced stealthing.[321] There appears to be a particularly high incidence of this behaviour in the sex industry.[322] For example, in its submission to the Victorian Law Reform Commission's (**VLRC**) 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'.[323] Despite the prevalence of such behaviour, research suggests that it is not commonly reported to the police.[324]

4.341. As a preliminary matter, we note that concerns have been expressed about the use of the term stealthing.[325] Some people consider that it glamourises or minimises the seriousness of the issue,[326] while others are concerned that it is an emotive and stigmatising term.[327] Consequently, it has been suggested that it would be preferable to use term such as non-consensual condom removal instead.

4.342. In the Discussion Paper we acknowledged these concerns but chose to use the term stealthing 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 did, however, welcome submissions on whether we should continue to use this term in our future publications.[328]

4.343. Most stakeholders did not express a view about this issue, and they generally used the term stealthing in the submissions and consultations. However, WAAC submitted that:

> 'Stealthing' is an emotive term which conjures up both guilty and innocent participants by its very invocation, long before a charge is made. WAAC therefore strongly advises that the term 'stealthing' not be used in any legislation and, more generally should not be used to describe the behaviour it purports to refer to. The act should be properly referred to as 'non-consensual condom removal' or 'condom removal without consent'.[329]

4.344. We acknowledge these concerns and agree that the term stealthing should not be used in any legislative provisions. Such provisions should be drafted in technical, non-emotive terms that explicitly spell out the conduct to be addressed. However, for the reasons outlined in the Discussion Paper we continue to use the term stealthing in this Report.

4.345. 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"'.[330]

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[321] 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.

[322] Ibid 13. See, eg, *R v Campos* [2021] NZDC 7422; *Campos v R* [2022] NZCA 311.

[323] VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.80], quoting Submission 50 (Project Respect).

[324] VLRC, *Improving the Response of the Justice System to Sexual Offences* (Issues Papers A-H, October 2020) C 32.

[325] Discussion Paper Volume 1, [4.148].

[326] 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.

[327] Preliminary Submission 10 (WAAC).

[328] Discussion Paper Volume 1, [4.148].

[329] Portal Submission P58 (WAAC).

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

4.346. The ODPP expanded on this view in its final submission. It noted that there are three bases on which stealthing may already be criminalised in Western Australia, but identified potential problems with each basis:

- Consent is not 'freely and voluntarily given' to penetration without a condom if a person indicates they will only consent to be penetrated with a condom. However, this could fail in two ways: if the removal of a condom is not considered an alteration to the 'nature' of the physical act (on the narrow view of consent) or if the expanded definition of consent is held not to encompass a person imposing a condition on their consent that the other person wear a condom.

- It is the law that consent to one sexual act is not consent to another sexual act: it could be argued that penetration with a condom is a different act to penetration without a condom. However, both the majority and minority in *Yeong*[331] rejected this basis.

- It could be argued that penetrating someone without a condom, when the person has communicated that they will only consent to penetration with a condom, is a deceit or fraud sufficient to vitiate consent. The deceit or fraud is that the perpetrator intentionally made a false representation, being their own consent to penetrate the victim with a condom, and not without one, which caused the complainant to consent. However, the difficulty with the 'deceit' basis is that it treats the accused's intention to not wear a condom as static – it is concerned with the accused knowingly making a false representation about wearing a condom. It may not coherently deal with a situation where the accused agrees to wear a condom and then their intention changes later and they remove it.[332]

4.347. The issue of stealthing has been considered by courts in various other jurisdictions, as discussed in detail in the Discussion Paper.[333] Courts in those jurisdictions have reached different conclusions about whether stealthing negates consent:

- In Victoria and the UK it has been held that stealthing does negate consent.[334]
- In Canada, it has been held that stealthing does not negate consent.[335]

4.348. In their recent reviews of sexual offences, the NSWLRC and the VLRC both recommended that stealthing should be explicitly addressed in legislation.[336] These recommendations were accepted by the NSW and Victorian governments, which have enacted provisions targeting stealthing.[337] The issue has also been legislatively addressed in the ACT and South Australia.[338]

4.349. By contrast, the QLRC did not recommend amending Queensland's consent provision to specifically address the issue.[339] However, a different approach was taken by the Queensland

[331] *DPP v Yeong (A Pseudonym)* [2022] VSCA 179.
[332] Email Submission E19 (ODPP).
[333] Discussion Paper Volume 1, [4.151]-[4.155].
[334] *DPP v Yeong (A Pseudonym)* [2022] VSCA 179; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R(F) v DPP(A)* [2013] EWCA 945 (Admin).
[335] *R v Hutchinson* [2014] SCR 346 (McLachlin CJ and Cromwell J for McLachlin CJ, Cromwell, Rothstein and Wagner JJ).
[336] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 5.5; VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 51. See Discussion Paper Volume 1, [4.156]-[4.159].
[337] *Crimes Act 1900* (NSW) s 61HI(5); *Crimes Act 1958* (Vic) s 36AA(1)(o).
[338] *Crimes Act 1900* (ACT) s 67(1)(j); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(ga).
[339] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [6.143]. See Discussion Paper Volume 1, [4.161].

Taskforce in its subsequent review of Queensland's sexual offence laws. It recommended that Queensland adopt the same approach as taken in NSW.[340]

4.350. In the Discussion Paper we sought views on whether the *Code* should address the issue of stealthing and, if so, how it should be addressed.[341]

Stakeholders' views

4.351. Respondents to the online survey were strongly supportive of including fraud (88% yes; 10% no; 2% don't know) or mistake (76% yes; 20% no; 4% don't know) about contraceptive use in the list of circumstances. Widespread support for criminalising stealthing was also expressed in the submissions and consultations.

4.352. Some respondents to the online survey spoke from personal experience, sharing with the Commission the grave impact that stealthing had on them. For example, we received the following submission:

> As someone who has experienced 'stealthing' I believe the laws regarding consent in Western Australia should be changed. I agreed to have sex with a condom not without one, stealthing negates consent therefore it is sexual assault and should be treated by the law as such. This experience impacted both my psychological and physical health as the non-consensual removal of a condom put me at risk of both pregnancy and sexually transmitted infections. I personally felt violated and disempowered after experiencing this type of sexual assault. The fact that by getting away with this, men can blur the legal validity of consent and deceive their sexual partners is disgusting. Stealthing is rooted in misogyny and maintaining male sexual supremacy. The consequences of non-consensual condom removal fall completely on women, whether that is the financial burden and humiliation of taking the morning after pill, something I had to do when I was stealthed. Or the shame and trauma surrounding not having your choices and body respected during sex. Men who do this have no regard for their sexual partners sexual autonomy. By making this illegal it will provide a peace of mind for me and people who have experienced this as this sex act doesn't just 'seem violent' it is.[342]

4.353. Another respondent noted that she had experienced a sexual encounter where the other participant had repeatedly tried to remove his condom against her explicit wishes. She stated that she did not want her daughter's generation to know how this experience felt; and if they do, she did not want them to be advised (as she was) that 'pressing charges for rape will not be worth their time'.[343]

4.354. Stakeholders frequently noted that a person who agrees to sex with a condom does not agree to sex without a condom, and thus has their sexual autonomy violated when stealthing occurs. They also often focussed on the potential adverse consequences of stealthing. For example, CWSW submitted that:

> The act of stealthing has implications for the sexual and reproductive health of all people involved. It puts people at risk of sexually transmissible infections, blood borne viruses and unwanted pregnancies. 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

[340] Women's Safety and Justice Taskforce (Qld), *Community Attitudes to Sexual Consent* (Research Report, July 2022) Rec 44. See Discussion Paper Volume 1, [4.162].

[341] Discussion Paper Volume 1, [4.147]-[4.174].

[342] Email Submission E1 (Confidential).

[343] Portal Submission P52 (Jessica Bruce).

> the transmission of sexually transmitted diseases, or for reasons of reproductive control. [344]

4.355. Concern was also expressed about the law's lack of clarity in this regard, and the way this could affect victim-survivors. For example, Full Stop Australia submitted that:

> The non-consensual tampering with or removal of a condom during sexual intercourse is an increasing practice that leads to a number of adverse consequences for victims, including the risk of STI transmission and unwanted pregnancy. However, in jurisdictions such as WA where this practice is not expressly criminalised, ambiguity in the law may lead to negative outcomes for victims navigating the justice system. While there is some consensus amongst academics that stealthing arguably vitiates consent, whether this practice constitutes sexual assault depends on the court's interpretation of current consent provisions which leads to inconsistencies in decision-making. For example, in Queensland which has comparable consent provisions to those in WA, the District Court at Southport rejected an argument by the defence that the practice of stealthing could not reasonably support a prosecution for rape, however the Queensland ODPP has also refused to proceed with an indictment for rape in a similar matter involving stealthing due to the difficulties in establishing the defendant's intention.[345]

4.356. In this regard, we note that in our consultation with WA Police we were advised by the consultees[346] that they consider stealthing to be an important issue, with people frequently seeking to report such conduct. At present, however, they were of the view that it is not covered by the *Code*. They did not consider it possible, under the current law, for consent to be conditional: they took the view that a person either consents to a sexual activity (regardless of condom use) or they do not. By contrast, as mentioned above, the ODPP has indicated that a prosecution for stealthing may be open on the current law. However, it considers the law in this area to be uncertain.

4.357. Other arguments made by stakeholders in favour of explicitly addressing stealthing in the *Code* included:

- 'The current ambiguity around the legality of stealthing may reinforce a survivor's feelings of guilt and shame … Law reform on stealthing will arm survivors with the language to describe what has happened to them and the knowledge that it was wrong.'[347]
- It will 'set clear standards in relation to tampering with a condom during sexual intercourse'.[348] This will help shape the community's understandings of acceptable sexual behaviours and will assist with consent education.
- It can help address circumstances of family and domestic violence, where stealthing may be 'used as a form of control', by intentionally 'keeping the woman pregnant and dependant on the perpetrator. The transmission of sexually transmitted infections through stealthing is another form of abuse'.[349]
- As several other jurisdictions have recently addressed this issue in their legislation, it advances the goal of national harmonisation.

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[344] Portal Submission P57 (CWSW).

[345] Email Submission E6 (Full Stop Australia) (citations omitted).

[346] The consultees expressed their views as police officers. They did not speak on behalf of the WA Police.

[347] Portal Submission P57 (CWSW).

[348] Email Submission E6 (Full Stop Australia).

[349] Email Submission E15 (Confidential); Email Submission E16 (Zonta Club of Bunbury); Email Submission E17 (Professor Hélène Jaccomard).

4.358. There was some limited opposition to including stealthing in the list of circumstances. For example, one respondent to the online survey stated:

> I expressly reject that the practice of stealthing could/should lead to a sexual assault offence. I think deception and fraud are better dealt with under those very names, through amendment to other legislation related to knowingly exposing a partner to HIV /STDs – to include pregnancy. In respect of the latter, undisclosed exposure to pregnancy is a matter of concern to both men and women and should be given a value. I would separate out consent to sexual engagement from the longer term consequences of that engagement. They are, in my view, very different things.[350]

4.359. WAAC noted that its members held diverse views about stealthing, so it did not take a position on whether or not it should be explicitly addressed in the *Code*. However, it made the following points in its submission:

> Laws criminalizing non-consensual condom removal should not leverage HIV stigma in order to justify their existence. People with HIV on effective treatment with an undetectable viral load cannot pass on HIV, even in the absence of a condom …
>
> Any regulation of sexual conduct between adults should be minimal, necessary and should be introduced incrementally to ensure that unforeseen negative consequences can be appropriately mitigated. Sex and the meanings we ascribe to it have long been contested and stigmatized. They are particularly vulnerable to moral panics in which non-existent threats to the 'moral fabric' of society are conjured up in order to justify oppressive policing of particular sections of the community (or particular sexual practices). History is replete with such examples. Legal regulation of sexual conduct should therefore be confined to the prevention of actual harms and not extend to the prevention of moral turpitude.
>
> Laws criminalising condom removal without consent will impact different communities differently. Care should be taken so that marginalised communities are protected from being disproportionately targeted for prosecution.
>
> Laws criminalising condom removal without consent should carry recommended sentences that are proportionate to the offence. Sexual assault occasioned by violence and/or force is generally of a significantly greater seriousness, with greater harms, than sex procured by misrepresentation that is not occasioned by force or violence. Recommended sentences should reflect this.[351]

4.360. The ODPP also did not express a view on whether stealthing should be explicitly addressed in the *Code*. However, it indicated that due to the uncertainty surrounding its status under the current law (as outlined above), if the Government wants to ensure that it is covered, it may be necessary to explicitly address it in the *Code*. This is due to the fact that 'if a reform Bill were not to expressly address it, that might be taken as an indication that the conduct is not intended to be criminalised'.[352]

4.361. The ODPP noted that the Australian jurisdictions which have enacted anti-stealthing provisions have done so differently, relying on each of the three bases discussed above:

> In Victoria, if a person engages in the act 'on the basis that a condom is used' and that 'condition' is not met, they are taken not to have consented. This is indicative of a broad conception of consent, which upholds a person's freedom to choose the

[350] Email Submission E11 (Confidential).
[351] Portal Submission P58 (WAAC).
[352] Email Submission E19 (ODPP).

> manner in which penetration is to occur by making their consent 'conditional' on the wearing of a condom.
>
> In the NSW Act (and the approach recommended by the Queensland Taskforce), stealthing is identified as an example of the provision that a person who consents to a particular sexual activity is not to be taken to consent to any other sexual activity…
>
> In the ACT and SA Acts, it is provided that if a person consents because of a misrepresentation as to the use of a condom, there is no consent.[353]

4.362. The ODPP stated that if stealthing is to be addressed in the *Code*, its preference is for the Victorian approach. It considered there to be 'an artificiality to the NSW Act's provision that stealthing changes the sexual activity that has occurred, and there are problems with dealing with stealthing as a deceit or fraudulent means of obtaining consent (although it may be)'.[354] It was of the view that 'the majority in *Yeong* framed the issue potently when they rejected the proposition that consent to protected sex must always carry with it consent to unprotected sex'.[355] It concluded that 'including stealthing separately in the "circumstances of non-consent provision", and making reference to the conditional nature of consent in this circumstance, properly captures the basis for stealthing to vitiate consent'.[356]

4.363. While most stakeholders supported the inclusion of stealthing in the list of circumstances in which there is no consent, some stakeholders suggested that a standalone stealthing offence should instead be enacted. For example:

- Some stakeholders were of the view that there is a fundamental difference between being forced or pressured to engage in a sexual activity and consenting under a misapprehension that someone is using contraception. It was submitted that this difference is best reflected in separate offences with different penalties. It was suggested that the stealthing offence could have a lower penalty, but could include circumstances of aggravation for cases where the complainant becomes pregnant or contracts an STI.
- Some members of the Community Expert Group suggested a standalone offence may be desirable given the broad spectrum of responses to stealthing, with some people feeling very violated by such conduct and others considering it to be less grave.
- Participants in the Albany consultation suggested that making stealthing a separate (but serious) offence would have a greater educative and deterrent effect: it would make it clearer that such behaviour is prohibited.

4.364. By contrast, members of the Legal Expert Group did not support making stealthing a standalone offence, as they thought it risked making the conduct seem less serious.

4.365. While stakeholders were generally supportive of addressing stealthing in the *Code*, there were mixed views on the appropriate scope of the relevant provision. For example, some members of the Legal and Community Expert Groups were of the view that it should cover misrepresentations about all forms of contraception, including the oral contraceptive pill. They considered that whenever a person lies about their contraceptive use, they have violated the other participant's sexual autonomy. By contrast, other members of the expert groups were of the view that the provision should be limited to misrepresentations about condom use. They contended that condoms are different from the contraceptive pill in key ways:

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353 Ibid.
354 Ibid.
355 Ibid, citing *DPP v Yeong (A Pseudonym)* [2022] VSCA 179 [93].
356 Email Submission E19 (ODPP).

- Condoms offer protection from STIs as well as pregnancy.
- Condoms are used at the time of the relevant sexual activity, rather than being used over a period of time leading up to that activity.
- A person can forget to take the contraceptive pill without realising, and thus unintentionally make a mistaken representation about its use. This is not the case for condoms.

4.366. Members of the Legal and Community Expert Groups, as well as participants in the Geraldton consultation, also expressed concern about extending the provision to cover the contraceptive pill, as they thought that some men might use such a provision as a mechanism of coercive control. For example, if a woman becomes pregnant despite stating that she is taking the pill, either because she has missed a dose or it has been ineffective, her partner could threaten to report her to the police unless she complies with his wishes. They were also concerned about how misrepresentations about taking the contraceptive pill would be proven, given the possibility that a person might accidentally miss a dose.

4.367. The ODPP did not consider there to be 'be any reason to distinguish between condoms and other physical barrier contraceptive devices'.[357] It suggested that '"condom" might be defined to include other physical devices, or it is likely to be interpreted to include them anyway'.[358]

The Commission's view

4.368. The Commission acknowledges that there are valid arguments for and against the inclusion of stealthing as a circumstance negating consent.

4.369. In Chapter 2 we noted that one of our guiding principles is that sexual offence laws should protect sexual autonomy and bodily integrity. People should generally be free to determine in which sexual activities they participate, and to refuse to engage in sexual activities at any time for any reason.

4.370. In our view, this includes choosing to engage in a sexual activity only if a condom is used. We consider agreement for condom use to be a fundamental aspect of a sexual activity. In this regard, we agree with Justices Abella, Moldaver and Karakatsanis of the Canadian Supreme Court that:

> 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.[359]

4.371. While the key issue here is the protection of sexual autonomy, it is also relevant that condom use can help protect a participant from the transmission of disease or from unwanted pregnancy. We are of the view that people should be able to insist that sexual activity is contingent on this protective measure being taken.

4.372. Consequently, we agree with stakeholders that stealthing constitutes a violation of sexual autonomy and should be criminalised. This is the case regardless of whether there is any risk of disease transmission or pregnancy, or whether such consequences arise. It occurs because

[357] Ibid.
[358] Ibid.
[359] Ibid.

the removal of the condom, 'takes an otherwise consensual sexual activity outside the scope of what has been consented to', depriving the participant 'of free and voluntary choice'.[360]

4.373. It is clear from the information received in submissions and consultations that stealthing can have a grave impact on people who experience it. It can affect their physical and psychological well-being and make them feel violated and disempowered. These consequences may be compounded by the failure of Western Australia's criminal justice system to properly address this issue. While we have been advised that it may be possible to charge a person with stealthing under the current law, there is a lack of certainty in this regard; and members of WA Police indicated to us that they do not think it is covered by the *Code's* consent provisions.[361]

4.374. To redress this situation, we recommend that stealthing be explicitly addressed in the *Code*. We are of the view that this would:

- Clearly declare Parliament's view that stealthing is wrongful.
- Make it clear that people have the right to insist on condom usage.
- Deter people from engaging in stealthing.
- Validate victim-survivors' views that stealthing constitutes a violation of their sexual autonomy.
- Encourage victim-survivors to report incidents of stealthing to the police.
- Encourage the police and the prosecution to charge and prosecute individuals who have engaged in stealthing.
- Assist community education programs aimed at preventing stealthing.
- Advance the goal of national harmonisation.

4.375. As we consider agreement for condom use to be a fundamental aspect of a sexual activity, we recommend that stealthing be addressed as part of the *Code's* consent provisions rather than as a standalone offence. In this regard, we share stakeholders' concerns that making stealthing a separate offence may risk making the conduct seem less serious. We do not consider this to be the case: we think it should be treated equivalently to the other listed circumstances in which there is no consent.

4.376. For the reasons expressed by the ODPP, we prefer the Victorian approach to this issue. Under that approach stealthing is addressed as part of the list of circumstances in which there is no consent. The relevant provision states that a person does not consent if the person 'engages in the act on the basis that a condom is used, and either (i) before or during the act any other person involved in the act intentionally removes the condom or tampers with the condom, or (ii) the person who was to use the condom intentionally does not use it'.[362]

4.377. There are four aspects of this approach that should be noted. First, it is restricted to condoms. While we acknowledge that similar issues may arise in relation to the use of other forms of contraception, we are of the view that this restriction is justified because of a combination of the following matters:

- Unlike oral contraceptives, condoms are a visible physical barrier between the participants at the time of the sexual activity and constitute a fundamental part of the sexual activity.

[360] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [5.68].

[361] The consultees expressed their views as police officers. They did not speak on behalf of the WA Police.

[362] *Crimes Act 1958* (Vic) s 36AA(1)(o).

- The main social problem that needs to be addressed relates to condom use, rather than the use of other forms of contraception, including oral contraceptives, barrier contraceptives and spermicides.

4.378. We also share stakeholders' concerns that if the provision were extended to cover the oral contraceptive pill, this could be used as a mechanism of coercive control.

4.379. We note, however, that if a person engages in similar conduct with a different form of contraception, it will still be possible to argue that there was no consent. It will simply be necessary to establish that, in the circumstances, the complainant did not freely and voluntarily agree to the sexual activity, rather than being able to rely on the shortcut of establishing a matter that is included in the list of circumstances. We also note that where the accused deceived the complainant about their contraceptive use, they could be charged with the offence of obtaining sexual penetration by fraud (see Chapter 6).

4.380. Secondly, the provision extends beyond non-consensual condom removal to include intentionally failing to use a condom or tampering with a condom. In our view these forms of conduct both constitute an equal violation of a person's sexual autonomy.

4.381. Thirdly, the provision does not require proof that the accused was intentionally deceptive when they initially agreed to use the condom. It applies even if the accused intended to properly use the condom at that time, but later changed their mind. This reflects the fact that the provision is not focussed on the issue of fraud or deception, but on a breach of the complainant's conditional consent. Regardless of what the accused intended initially, the complainant has only agreed to engage in the sexual activity on the basis that a condom is properly used. If it is not used, complainant has not consented to the sexual activity that has taken place.

4.382. Fourthly, the provision requires the accused to have intentionally removed the condom, tampered with it or not used it. Whilst non-intentional condom removal or non-use is possible, to render such conduct criminal subject to defences such as accident and unwilled act makes the law unnecessarily complex when it is intentional conduct which requires criminalisation.

Recommendation

15. The list of circumstances should provide that, as a matter of law, a person does not consent if they engage in a sexual activity on the basis that a condom is used, and either before or during the activity any other person involved in the activity intentionally removes the condom or tampers with the condom, or the person who was to use the condom intentionally does not use it.

How should the list of circumstances be framed?

4.383. The *Code* currently introduces the list of circumstances by stating that 'consent is not freely and voluntarily given' in the listed circumstances.[363] This phrasing indicates 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

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

unconscious when the sexual activity occurred, it may be inaccurate. In those circumstances consent may never have been obtained at all.[364]

4.384. 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'.[365] The accuracy of this statement depends on the circumstances that are included in the list and the way in which consent is understood.

4.385. Given the NSWLRC's view that consent is 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.[366] 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…',[367] 'a person is not taken to freely and voluntarily agree to sexual activity if…' [368] or 'circumstances in which a person does not consent to an act include…'.[369]

4.386. In the Discussion Paper we sought views on whether the wording introducing the *Code's* list of circumstances should be changed and, if so, how it should be amended.[370]

Stakeholders' views

4.387. There was widespread support amongst stakeholders for making it clear that the list of circumstances 'does not limit the grounds on which it may be established that a person does not consent'.[371] For example, the ODPP submitted that:

> The inclusion of a provision stating the list is non-exhaustive would not permit the Court to add in a 'new' circumstance as if it were included on the list; in that sense the list would be exhaustive. Rather, it means that the State must prove the complainant's consent was not free and voluntary without resort to the 'shortcut' of proving a circumstance negated consent.[372]

4.388. It contended that such an approach will ensure that unanticipated circumstances or new social concerns that arise over time can be properly addressed.

4.389. While several stakeholders advocated that the *Code* should include a list of circumstances similar to that contained in the NSW Act, these submissions did not specifically address the framing of the list. Only Legal Aid explicitly addressed this issue, submitting that the wording should not be changed.

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364 Attorney General's Department of NSW Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 37.

365 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [6.20].

366 *Crimes Act 1900* (NSW) s 61HJ(1); *Crimes Act 1900* (ACT) s 67(1).

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

368 *Criminal Law Consolidation Act 1935* (SA) s 46(3).

369 *Crimes Act 1958* (Vic) s 36(2). See also *Criminal Code Act 1983* (NT) s 192(2).

370 Discussion Paper Volume 1, [4.272]-[4.275].

371 Email Submission E19 (ODPP).

372 Ibid.

The Commission's view

4.390. Throughout this chapter we have recommended significant reforms to the definition of consent, the negative indicators of consent and the list of circumstances in which there is no consent. In Chapter 13 we make various suggestions about the way in which the *Code* should be structured to accommodate these reforms. This includes separating the definition of consent from the list of circumstances in which there is no consent.

4.391. We are of the view that the provision containing the list of circumstances in which there is no consent should be modelled on the NSW approach. Under that approach:

- The list is included in a provision titled 'circumstances in which there is no consent'.
- The provision states that 'a person does not consent to a sexual activity if–', and then separately lists each relevant circumstance.
- The list is explicitly stated to be non-exhaustive.

4.392. We consider that this approach is clear and transparent, and best achieves the declaratory and educative objectives of the list.

Should the *Code* specify mistaken beliefs which do not negate consent?

4.393. One of the main concerns that is raised when addressing sexual fraud, deception or mistake in the list of circumstances in which there is no consent 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'.[373]

4.394. The previous sections have addressed this issue by explaining the types of misrepresentations or mistakes that should or should not be included in the list of circumstances. In the Discussion Paper we noted that the *Code* could also restrict the scope of the fraud or mistake provisions in other ways. We identified four possibilities:[374]

- It could restrict the provisions to objectively or subjectively serious frauds, deceptions or mistakes.
- It could state that the provisions do not apply to specified trivial matters, or to trivial matters generally.
- It could broadly define the circumstances in which consent is negated due to fraud, deception or mistake (in order to protect people's sexual autonomy) but provide that a person should not be convicted if their interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern.
- It could specify that certain other matters do not negate consent, such as mistakes about a person's birth sex, sexual characteristics, gender identity, gender history, sexual orientation or STI status.

[373] A Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159, 168.
[374] Discussion Paper Volume 1, [4.187]-[4.224].

4.395. The NSW Government has recently adopted the second option, specifically excluding misrepresentations about a person's income, wealth or feelings from the scope of its fraud provision.[375]

4.396. In the Discussion Paper we sought views on whether the *Code* should restrict the scope of the fraud or mistake provisions in any of these ways.[376]

Stakeholders' views

4.397. There was limited support amongst respondents to the online survey for:

- Restricting the application of the fraud provision to objectively or subjectively serious frauds, deceptions or mistaken beliefs (28% yes; 56% no; 18% don't know);
- Providing that the fraud provision does not apply if the interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern (18% yes; 50% no; 32% don't know);
- Excluding fraudulent representations about a person's sex, sexual characteristics, gender identity, gender history or sexual orientation from the scope of the fraud provision (37.5% yes; 47.5% no; 15% don't know); or
- Excluding fraudulent representations about a person's sexual health from the scope of the fraud provision (18% yes; 74% no; 8% don't know.

4.398. By contrast, there was greater support for excluding matters which may be considered trivial from the scope of the fraud provision, such a person's wealth, occupation or feelings for the other participant (51% yes; 36% no; 13% don't know).

4.399. Dr Dyer also supported explicitly excluding trivial matters from the scope of the fraud or mistake provisions, as well as excluding matters which are based on irrational prejudice. He submitted that:

> The law would risk falling into disrepute if it were to permit convictions in cases where the complainant's mistake or misapprehension was: (a) insufficiently objectively serious to give rise to liability for a sexual offence; or (b) material for her because of her irrational prejudice. Accordingly, the law should provide that 'there is to be no conviction' for a non-consensual sexual offence in such cases. Further, the law should set out non-exhaustive lists of cases where the complainant's mistake or misapprehension was: (a) insufficiently objectively serious; or (b) material for her because of her irrational prejudice … These lists should be as lengthy as possible. That is because … it is only if Parliament is willing to go into some detail about this matter that there will be a proper degree of legal clarity in this area.[377]

4.400. While Dr Dyer did not attempt to exhaustively identify all matters that should be included in the list, he expressed the view that it should include cases where the material mistake was as to the accused's 'income or wealth; age; feelings; marital status; sexual fidelity to the complainant; race, ethnicity or cultural background; sexual history; sexuality; biological sex at birth; disease status (provided that she posed no real risk of transmitting a grievous bodily disease to the complainant); or criminal record'.[378]

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[375] *Crimes Act 1900* (NSW) s 61HJ(3).
[376] Discussion Paper Volume 1, [4.210]-[4.220].
[377] Email Submission E18 (Dr Andrew Dyer).
[378] Ibid (citations omitted).

4.401. Dr Dyer was also of the view that the law should establish a method for resolving cases which do not fall within one of the listed categories. He recommended that:

> The law should state that the jury must decide whether, in such a case, non-consensual sexual offence liability should be capable of arising – or whether, alternatively, the mistake or misapprehension 'concerned a matter that was insufficiently objectively serious to give rise to liability for a sexual offence' or was material for the complainant 'because of her irrational prejudice'. Because juries represent the community, it is more democratic to have them decide such matters than to have the trial judge do so. But, so as to ensure as far as possible that there is consistency in the application of the law – and to provide some measure of legal clarity – the discretion exercised by such juries should be a guided one. The law should state, that is, that when making the decision just noted, juries must, where relevant, have regard to:
>
> i. the lists of: (a) mistakes and misapprehensions that are insufficiently objectively serious to give rise to liability for a sexual offence and/or (b) cases where irrational prejudice had a decisive influence on the complainant's decision to participate in sexual activity;
>
> ii. any similarity between the person's mistake or misapprehension and any matter or matters on the above lists; and
>
> iii. whether there was a risk of serious consequences for the complainant if she were to engage in the sexual activity that actually occurred (and, if so, what those consequences were and how great that risk was).[379]

4.402. By contrast, the ODPP did not support the exclusion of trivial matters in the *Code*. It noted that such matters may already excluded, by virtue of the approach taken by the Western Australian Court of Appeal in *HES.*[380] It submitted that in that case:

> Mitchell JA appeared to suggest in obiter that many trivial lies about antecedent matters may be excluded on the basis that, even if a person would not have engaged in sexual activity *but for* such a lie, it would not be sufficiently connected to the physical act to be said to have caused the person to give consent. That reasoning admits an element of objectivity into the sixth fact to be proved (causation). Even if a person's subjective state of mind is, 'I would not have consented but for that person claiming to be a millionaire', at law the lie is not sufficiently connected with the penetration to be taken to have caused them to consent.[381]

4.403. The ODPP went on to state that 'an amendment to the *Code* which seeks to narrow the current formulation must perpetually chart a course between under-inclusion and over-breadth', and concluded that it would be 'unwise' to attempt to legislatively address the issue of trivial lies:

> The option referred to in the Discussion Paper Vol. 1 at [4.214], which suggests restricting fraud, deception or mistake to 'subjectively serious frauds' which 'could perhaps be ascertained by asking whether the complainant would have engaged in the sexual activity had they known the truth' is essentially the sixth fact identified in HES to prove the fraud, so a level of subjective significance is already required.
>
> 'Income, wealth and feelings' (the NSW Act formulation) is little guidance, and expressly excluding lies which are obviously trivial merely distorts the interpretative process of determining other finely-balanced scenarios. The WA Court of Appeal has

Note: After this report was tabled, the Office of the Director of Public Prosecutions for Western Australia has advised the Commission that it's quote in the main paragraph [4.403] on page 117 of the Final Report is derived from an article written by Jonathan Crowe, 'Fraud and consent in Australian rape law' (2014) 38 Crim U 236, 244.

379 Ibid.

380 *HES v Western Australia* [2022] WASCA 151.

381 Email Submission E19 (ODPP).

> signalled trivial lies may be knocked out at the causation stage of proving a fraud case.
>
> None of the provisions in other jurisdictions avoid the problem of vagueness and where the line is to be drawn.
>
> Attitudes to which dishonest representations should vitiate consent, and which should not, demonstrably change over time. To attempt to distinguish them in the Code would risk ossifying the law and preventing it keeping step with community attitudes.[382]

4.404. Views were mixed on whether, if the *Code* was to permit only serious frauds or mistakes to negate consent, seriousness should be judged from an objective or subjective perspective. For example, WAAC submitted that 'only fraud concerning objectively important facts should vitiate consent' and suggested that 'the question of what counts as objectively important can be answered by asking what important personal interest is to be protected by the application of the criminal law'.[383] Some members of the Legal Expert Group agreed that an objective approach should be taken, arguing that there is an important difference between objectively serious frauds (such as lying about sexual penetration being necessary for medical reasons) and objectively trivial frauds (such as lying about wealth). They also expressed a concern that a subjective approach may result in over-criminalisation.

4.405. By contrast, other members of the Legal Expert Group, as well as some respondents to the online survey, suggested that seriousness should be judged subjectively. They were of the view that such an approach better takes into account victim-survivors' experiences.

4.406. As discussed in detail above,[384] views in submissions and consultations were also mixed on how the issues of birth sex, sex characteristics, sexual orientation, gender identity, gender history and STI status should be addressed. Some stakeholders were of the view that a person's sexual autonomy is undermined if they are not informed about such matters, and so non-disclosure should be considered to negate consent; while others did not think that such information should have any relevance to the decision to engage in sexual activity, and the *Code* should specifically provide that mistakes about such matters do not negate consent.

4.407. Regardless of which approach is taken, members of the Legal Expert Group expressed concern about the complexity of determining whether the fraud, deception or mistaken was sufficiently serious to negate consent. They were hesitant to leave this issue to the jury to determine.

The Commission's view

4.408. The Commission agrees with stakeholders that it is important to limit the scope of the circumstances in which it is held that the complainant's lack of information means they did not consent to a sexual activity. It is for this reason that we have recommended that the list of circumstances specify the types of mistaken belief that in all cases will negate any purported consent, and have sought to limit the list to matters which are always fundamental to a sexual activity.

4.409. However, as the list of circumstances is non-exhaustive, it will remain open for the prosecution to argue that the complainant's consent was negated by a matter which is not included in the list. We consider this to be appropriate, to ensure that the *Code* is properly able to address

[382] Ibid.

[383] Portal Submission P58 (WAAC).

[384] See the sections 'Sex, sex characteristics, sexual orientation, gender identity and gender history' and 'Sexual health'.

new or unanticipated circumstances which may arise, as well as cases which do not fit neatly within any of the defined categories. The disadvantage of this approach, however, is that it provides scope for any kind of mistaken belief to be found to have negated the complainant's consent. In our view this is unacceptable. Sexual activities should not be considered non-consensual simply because the complainant held some kind of mistaken belief, no matter how trivial. Bounds should be set around the matters that can negate consent.

4.410. We agree with stakeholders, however, that this should not be achieved by simply providing that the list only applies to objectively serious mistakes. We do not think that would provide clear guidance to people about the scope of consent laws and could result in inconsistent decisions being made by different juries. For these reasons we also do not support limiting the scope of the list via a provision that states that a person should not be convicted if their interest in sexual autonomy is outweighed by a conflicting interest or a compelling public policy concern.

4.411. We also agree with stakeholders that the *Code* should not provide that the list only applies to subjectively serious matters. We are of the view that it is likely to 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 personal or 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.

4.412. We also do not recommend that the *Code* simply provide that trivial matters are excluded, as different people are likely to 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. In addition, people are likely to object to having matters which are important to them labelled 'trivial'.

4.413. In our view, the best way to approach this issue is by providing a list of mistaken beliefs that are not capable, by themselves, of negating consent. This will ensure that an accused person is not convicted simply because the complainant holds one of the listed beliefs. The nature of the matters included in the list would also provide an indication of the types of mistaken belief that are not considered sufficiently serious to negate consent. This may be of assistance in cases that raise matters which are neither included in the list of circumstances in which there is no consent nor in this list of mistaken beliefs which do not negate consent.

4.414. We agree with Dr Dyer that there are advantages to making this list somewhat expansive. This is because the list is excluding matters from an expansive list of mistakes that negate consent. The excluded list must ensure that there are bounds on the 'shortcut' means of proving that there was no agreement to engage in sexual activity. The limitations will also give an appropriate message to the public that the criminal law should not be used to ventilate relationship disputes about private matters.

4.415. We recommend that the list include mistaken beliefs about the following matters, which we do not consider sufficiently serious to negate consent: income, wealth, age, feelings, marital status, sexual fidelity, race, ethnicity, cultural background, history of prior sexual activity and criminal record.

4.416. We are also of the view that the list should include mistaken beliefs about gender history, gender identity, birth sex and sexual orientation. Although this is an issue on which people may have differing views, we do not consider that solely holding a mistaken belief about one of these matters is ever sufficiently fundamental to a sexual activity to negate consent. Such a belief relates to an attribute of the other participant, rather than to the nature of the sexual activity. In addition, requiring a person to disclose their gender history, gender identity, birth

sex or sexual orientation can result in potentially grave consequences, as outlined in the submissions.

4.417. We note that we have not recommended the inclusion of mistaken beliefs about sex characteristics in this list. This is because we are of the view, as noted above, that in some (but not all) circumstances a person's sex characteristics at the time of a sexual activity may be fundamental to that activity. We acknowledge that this creates a risk that mistaken beliefs about an intersex person's sexual characteristics[385] will be found to negate consent. For this to be the case, however, it will be necessary for the prosecution to establish that the complainant did not freely and voluntarily agree to the relevant sexual activity because of a mistaken belief about the accused's actual sexual characteristics. This will require the prosecution to prove that the accused's sexual characteristics were fundamental to the sexual activity that occurred and were the cause of the complainant agreeing to engage in that sexual activity. We are of the view that this is a factual situation which is unlikely to arise. If there is a concern about this result, it may be possible to address this issue in the *Code.*

4.418. We additionally recommend that the list include a mistaken belief the other participant did not have an STI, if there was no realistic risk that the STI could be transmitted during the sexual activity. We are of the view that failing to disclose a disease which cannot be transmitted does not constitute a sufficient violation of sexual autonomy to warrant criminalisation, even if that disease is serious. This includes failing to disclose a person's HIV positive status, where the viral load is undetectable. In such circumstances the risk of HIV transmission is negligible, and the law should not consider there to be a lack of consent simply because the other participant mistakenly believed they were HIV negative. Given the potentially grave negative consequences that can follow disclosure of one's HIV positive status, as outlined by WAAC, we are of the view that this should be explicitly addressed in the *Code*.

Recommendations

16. The *Code* should provide that consent is not negated only because a person had a mistaken belief about the other participant's income, wealth, age, feelings, marital status, sexual fidelity, race, ethnicity, cultural background, history of prior sexual activity, criminal record, gender history, gender identity, birth sex, sexual orientation and/or that the other participant did not have an STI if there was no realistic risk that the STI could be transmitted during the sexual activity.

Should the *Code* address the timing of consent?

4.419. 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.

4.420. In the Discussion Paper we noted that the timing of consent may be an issue in the context of sexual activity that occurs while a person is asleep, unconscious or severely intoxicated.[386] Ordinarily, such a person would lack the capacity to consent, so any sexual activity would likely be considered non-consensual. But what if they had consented in advance to the sexual activity? For example, what if they had asked their sexual partner to wake them up with a sexual act, or had chosen to take drugs with the intention of having sex while severely

[385] Law Reform Commission of Western Australia, *Review of the* Equal Opportunity Act 1984 *(WA)* (Report, May 2022) [4.2.26].

[386] Discussion Paper Volume 1, [4.81]-[4.83]; [4.98].

impaired? Should the consequent sexual activity be deemed non-consensual regardless of this fact?

4.421. In the Discussion Paper we sought views on whether the *Code* should specify when consent should be given and whether it should be permissible to give consent in advance.[387]

Stakeholders' views

4.422. Stakeholders were generally supportive of requiring the *Code* to specify when consent should be given. Sixty-one per cent of respondents to the online survey supported this reform, with a further 10% stating that they did not know. There was also strong support in the written submissions and consultations for specifying when consent should be given, although Legal Aid did not think this was necessary.

4.423. Comments to the online survey overwhelmingly indicated that consent should be required at the time of the act. This can be seen in the following illustrative selection:

- The Criminal Code should specify that consent by mutual agreement must be given at the time of the sexual act, and not necessarily assumed based on permission or agreement prior to the act, and that consent may be withdrawn at any time; the mutual agreement of consent should be considered at each step of the sexual act(s) through affirmative and communicative consent models that include both verbal, non-verbal and physical action that is understood with reasonable capacity during each act.[388]

- Consent should be given immediately prior to the sexual act as consent can be removed at any time, therefore, pre-determined consent (i.e. I'll meet you at the motel on Tuesday at 2pm) should not be considered to be an imperative right that sex will occur shortly after 2pm on Tuesday. Either party(ies) of the sexual act should be able to change their mind prior to the act occurring and have the right to stop during the act should they no longer wish to continue.[389]

- Consent should be given at the time of the act. If consent has been given prior to the circumstance, there is no harm in providing it again once the act begins.[390]

4.424. Many of the respondents' comments were based on the view that consent is an ongoing, active process that should be 'continually sought and received throughout sexual activity. Consent is part of the conversation of sex between partners and each new activity requires conversation'.[391] Conceiving of consent in this way was seen to 'help safeguard against individuals giving consent hours, days or weeks before the planned sexual activity, only to feel uncomfortable in the moment and not wish to continue. This is especially pertinent if consent was given before someone became intoxicated or fell asleep, where truly the individual's ability to now give consent should no longer apply'.[392]

4.425. There were, however, a few respondents who were of the view that consent could be given prior to the sexual activity. Flexibility was seen to be important, 'since emotional and sexual relationships can be expressed in very subtle and informal ways even in healthy consensual

[387] Ibid [4.276]-[4.282].
[388] Portal Submission P56 (Andrea Manno).
[389] Portal Submission P44 (Anonymous).
[390] Portal Submission P20 (WA Consent).
[391] Portal Submission P52 (Jessica Bruce).
[392] Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

relationships'.[393] However, they were all concerned to ensure that consent was maintained throughout the activity, and could be withdrawn at any time.

4.426. Similar views were expressed in the submissions and consultations. Most stakeholders were of the view that consent must be given at the time of the sexual activity. For example, Communities submitted that:

> In-line with the *Crimes Act 1900* (NSW), the definition of consent as an agreement should provide that consent must exist at the time of the sexual activity, irrespective of consent given in advance of the sexual activity. This is consistent with an affirmative model of consent, whereby consent is an ongoing process of informed agreement which can be revoked or withdrawn at any time.[394]

4.427. Full Stop Australia similarly submitted that:

> WA's consent laws should reflect the principle that consent is an ongoing process of mutual decision-making. There should be an obligation on all parties involved in a sexual activity to ensure that every person involved consents at the time of the act. In order to ensure that the law is clear and unambiguous, and prevent a defendant relying on misconceptions such as that consent can be implied from a person inviting another back to their room, the Code should specify that consent must be granted at the time of the act.[395]

4.428. The ODPP submitted that the *Code* should expressly provide, in the definition of consent 'that "free and voluntary agreement" must exist at the time of the act consented to'.[396] It stated that:

> It is important that the material time to consider whether consent has been given is the time at which penetration or sexual touching occurred, not, for example, earlier in the evening or in some earlier encounter. The NSW Law Reform Commission's conclusions, as set out in the Discussion Paper Vol. 1 at [4.279], are consistent with the ODPP's experience – evidence of the complainant's prior conduct is often adduced at trial to suggest there was consent, or to support an inference that the accused had reasonable grounds for a belief in consent.
>
> It would be repugnant to contemporary community expectations to allow an assertion that a complainant's earlier submission to 'unwelcome, but mild, sexual overtures' can accumulate or metamorphose, with the passage of time, into the giving of consent to sexual penetration.[397]

4.429. There was, however, some support amongst members of the Legal and Community Expert Groups for allowing people to consent in advance to sexual activity while asleep. This approach was seen to uphold their right to sexual autonomy, as they had agreed to participate in such activity. However, concerns were also expressed about the potential vagueness of communications of advance consent, and the difficulty of identifying with specificity the duration of the agreement. For example, does a statement that a person 'likes to be woken up with a sexual act' grant consent to all sexual activities while they are asleep, for all time, unless the statement is explicitly revoked?

4.430. This issue was addressed in some detail by Dr Dyer, who submitted that:

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393 Portal Submission P24 (Ken Devereux).
394 Email Submission E24 (Communities), citing *Crimes Act 1900* (NSW) ss 61HI(2)-(3).
395 Email Submission E6 (Full Stop Australia).
396 Email Submission E19 (ODPP).
397 Ibid, citing *R v Makary* [2019] 2 Qd R 528 [70].

> The only NSW incapacity provision that I have some difficulty with is s 61HJ(1)(d) of the Crimes Act, which provides that a person does not consent to a sexual activity if 'the person is unconscious or asleep'. As Temkin and Ashworth have pointed out, a provision such as the NSW one just noted, criminalises 'D … if he sexually touched his partner C while C was asleep even though D was in the habit of doing so and C had not objected to this in the past.' Those commentators argue that '[t]hose who are uncomfortable with the full implications of sexual autonomy' might think that this 'cast[s] … the law's net too wide.' Indeed, some might argue that, in fact, the sexual autonomy of at least some sleeping or unconscious complainants has not been violated. In *JA v The Queen*, for example, the minority of the Supreme Court of Canada said that, because the complainant there had 'said yes, not no' to penetrative sexual conduct while she was unconscious, she was consenting both in fact and as a matter of law.
>
> While the matter is finely balanced, I tend to support the view taken by the NSWLRC about sleep and unconsciousness. Because a person such as JA does say 'yes', it is on one view paternalistic for the law to hold her partner to have acted criminally. But even many liberals accept that there is some role for paternalism in the criminal law; and, in any case, it is not entirely clear that the prosecution in JA was paternalistic. Because the complainant did not say 'yes' at the time of the sexual activity, and because she lacked the freedom to modify or withdraw her 'consent' once she was unconscious, her sexual autonomy was arguably violated.[398]

The Commission's view

4.431. This is a finely balanced issue. On the one hand, we consider consent to be an active process that requires ongoing communication between participants to ensure that they always remain willing to engage in the relevant activity. This model of consent requires a person's agreement to engage in a sexual activity to be communicated at the time of that activity; prior consent is insufficient. On the other hand, the principle of sexual autonomy would seem to indicate that people should be permitted to consent in advance to specific sexual activities. As long as the subsequent sexual activities are kept within the bounds of what a participant agreed to, there does not seem to be any violation of their autonomy or any harm that is caused.[399]

4.432. The Commission is apprehensive, however, about the potential consequences of allowing consent to be given in advance. For example, a person who has agreed to sexual contact while asleep, unconscious or extremely intoxicated has no (or very limited) ability to monitor what is taking place or to withdraw their consent during the activity. This leaves them vulnerable to sexual exploitation.

4.433. In addition, we are concerned about the problem of specificity raised by members of our expert groups, and about the risks of people exceeding the bounds of what was agreed to. We are also concerned that permitting advance consent would provide greater scope for argument at trial about whether the complainant consented or the accused honestly and reasonably believed they did. It would allow defence counsel to present evidence of the complainant's prior conduct to suggest there was consent, or to support an inference that the accused had reasonable grounds for a belief in consent. We are of the view that it would be preferable for the trial to focus on whether the complainant was consenting at the time of the relevant sexual activity.

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398 Email Submission E18 (Dr Andrew Dyer) (citations omitted).

399 We have qualified this point because, as Dr Dyer points out, it is arguable that a person who has not communicated their consent at the time of the relevant sexual activity has had their sexual autonomy violated, even if they previously agreed to that activity.

4.434. For these reasons, we recommend that the issue of timing should be addressed in the *Code*. We consider section 61HI(1) of the NSW Act, which provides 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' to provide an appropriate model.

Recommendation

17. The *Code* should require consent to be communicated at the time of the relevant sexual activity.

Should the *Code* address the withdrawal of consent?

4.435. 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.

4.436. 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.[400] This means that where a participant withdraws their initial consent to sexual penetration, it will be an offence for the other participant 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.[401]

4.437. 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.[402]

4.438. In the Discussion Paper we sought views on whether the *Code* should explicitly address the withdrawal of consent and, if so, how this should be done.[403]

Stakeholders' views

4.439. There was broad support amongst stakeholders for explicitly addressing the withdrawal of consent in the *Code*. Ninety-three per cent of respondents to the online survey were supportive of this reform, as were almost all other stakeholders in the submissions and consultations. For example, CWSW submitted that:

> The Code should explicitly address the withdrawal of consent, to be in line with the majority of other Australian jurisdictions. It is important that legislation does not rely on implicit understandings, but rather makes it clear that consent initially given can be withdrawn by words or conduct at any time and that sexual activity that occurs after consent has been withdrawn occurs without consent.[404]

4.440. It was also generally agreed that the *Code* should require the withdrawal of consent to be communicated. For example, Full Stop Australia submitted that:

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400 *Criminal Code Act Compilation Act 1913* (WA) s 319(1).
401 *Ibbs v The Queen* [1988] WAR 91.
402 See Discussion Paper Volume 1, Table 4.10.
403 Discussion Paper Volume 1, [4.283]-[4.295].
404 Portal Submission P57 (CWSW).

> Consent laws must appropriately balance protections for victims and complainants with the rights of an accused person. Expressly providing that a withdrawal of consent after it was initially granted must be communicated precludes an internal withdrawal of consent in the complainant's own mind. There should be sufficient evidence that an accused knew that the complainant had withdrawn consent and therefore was no longer consenting.[405]

4.441. However, Dr Dyer contended that the withdrawal of consent should not need to be communicated. This is a result of his view (discussed above) that consent is an internal state of mind, which does not require communication. One consequence of this view is that consent to a sexual activity is withdrawn as soon as a person decides they no longer want to participate in that activity, regardless of their communication of that decision. Dr Dyer considers that this approach better protects people who change their mind about a sexual activity but freeze, and so are unable to communicate their withdrawal of consent.

4.442. In response to concerns that this approach could be unfair to the other participant, who may not realise that their sexual partner has withdrawn consent, Dr Dyer states:

> It must be recalled that, in a case where a person has developed an internal unwillingness to proceed with sexual activity, her partner will be liable to be convicted of a sexual offence only if the State can prove that he [lacked an honest and reasonable but mistaken belief that she was not consenting]. In some cases of frozen complainants, it would not be able to do that. In others, it probably would be able to do so. In none of these cases would there be unfairness. There would be no unfairness in the second kind of case, because, if a person proceeds with sexual activity despite lacking a reasonable belief that her partner is a willing participant anymore, she has a sufficiently culpable state of mind to be convicted of the relevant sexual offence. Liability without fault for a serious offence is objectionable. But liability with fault is not.[406]

4.443. Stakeholders who supported a communication requirement were generally of the view that the *Code* should permit withdrawal of consent by words or conduct. This was seen to be particularly important, given that some people 'may be afraid, intimidated or unable to verbally communicate a withdrawal of consent, but this could still be communicated through actual or attempted conduct'.[407] Communities suggested making it clear that a person may withdraw consent using physical actions or gestures, 'recognising that people communicate in different ways'.[408]

4.444. The ODPP was of the view that the provision should be modelled on the NSW approach, which provides that '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'.[409]

The Commission's view

4.445. The Commission is of the view that being able to refuse to engage in sexual activity at any time for any reason is an essential aspect of the principle of sexual autonomy, and that this should be made clear in the *Code*.

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[405] Email Submission E6 (Full Stop Australia).

[406] Email Submission E18 (Dr Andrew Dyer).

[407] Portal Submission P38 (Shannon Morgan); Portal Submission P39 (Heather Bytheway); Portal Submission P40 (Isabelle Hamer).

[408] Email Submission E24 (Communities).

[409] *Crimes Act 1900* (NSW) ss 61HI(2)-(3).

4.446. To ensure fairness to all participants to a sexual activity, we recommend that the *Code* require the withdrawal of consent to be communicated. While we acknowledge that this may cause difficulties for people who change their mind about a sexual activity but freeze, we do not think it is appropriate to potentially criminalise the conduct of a person who receives no indication that the other party has withdrawn consent that had been communicated previously. We also do not think it is appropriate to require such people to rely on the mistake of fact defence, as suggested by Dr Dyer.

4.447. To minimise the risks of people being unable to communicate their withdrawal of consent, we recommend that the *Code* allow a person to withdraw consent by words or conduct. This should include any type of physical action or gesture.

4.448. Given the significance of this issue, we are of the view that it should be addressed as part of the definition of consent, rather than as part of the definition of sexual penetration (as is currently the case).[410] It should be made clear that the withdrawal provision applies to all of the sexual offences that require proof of non-consent. We consider the NSW provision provides an appropriate model.

Recommendations

18. As part of the definition of consent, the *Code* should provide that a person may, by words or conduct, withdraw consent to a sexual activity at any time; and that sexual activity that occurs after consent has been withdrawn occurs without consent.

19. The withdrawal of consent provision should apply to all sexual offences that require proof of non-consent.

To which offences should the *Code's* consent provisions apply?

4.449. 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.[411] It does not apply to:

- Any sexual offences that exist in other parts of the *Code* or other legislation; or
- The child sexual offences[412] and the sexual offences against people who lack the capacity to consent,[413] as non-consent is not an element of these offences.

4.450. Although the offence of indecent assault in section 323 of the *Code* does not specifically include a reference to non-consent,[414] 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 Western Australian 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.[415]

[410] See Chapter 13 for further discussion of the way in which the sexual offences should be structured in the *Code*.
[411] *Criminal Code Act Compilation Act 1913* (WA) s 325.
[412] Ibid ss 320-322.
[413] Ibid s 330.
[414] Ibid s 323.
[415] *Higgins v Western Australia* [2016] WASCA 142 [5]-[7] (McLure P), [126] (Mazza JA), [166] (Corboy J).

4.451. In the Discussion Paper we sought views on whether it should be made clear that the *Code's* consent provisions apply to the offence of indecent assault, or whether there are any offences outside Chapter XXXI to which the definition of consent should be specified to apply.[416]

Stakeholders' views

4.452. Stakeholders were broadly of the view that the *Code* should make it clear that the consent provisions apply to the offence of indecent assault. While it was acknowledged that this is already the law, it was submitted that doing so will 'reinforce existing jurisprudence'.[417]

4.453. The ODPP further submitted that:

> If the definition of consent is changed for the purposes of Chapter XXXI, the meaning of consent in s 221BB should also be altered in the same terms, for the purposes of the offence of distributing an intimate image. If that is done, it should be considered whether a 'circumstances of non-consent provision' should apply in its entirety to consent to distribute an intimate image. Some circumstances may generate problems if it were to apply, since consent to the distribution of an intimate image can be given without a personal encounter.[418]

The Commission's view

4.454. In Chapter 6 we recommend replacing the offence of indecent assault with two non-penetrative sexual offences: sexual act without consent and coerced sexual act. We also recommend that the *Code's* provisions concerning consent and the withdrawal of consent should apply to these new sexual offences. Consequently, we do not need to make a recommendation about whether it should be made clear that the *Code's* consent provisions apply to the offence of indecent assault. We note, however, that had we not recommended this broader reform, we would have recommended that this be done. While it is already the law, we consider there to be benefit in clarifying that in the *Code*.

4.455. In Chapter 13 we make various suggestions about the way in which the sexual offences should be grouped in the *Code*. One of these suggestions is that the child exploitation material offences (currently in Chapter XXV) and the intimate image offences (currently in Chapter XXVA) should be moved to a new Part of the *Code* which is titled 'Sexual Offences'; and that the consent provisions should apply to all of the offences in that Part of the *Code*. We note, however, that our Terms of Reference do not allow us to consider these offences in detail. Further consideration will need to be given to the implications of this suggestion.

[416] Discussion Paper Volume 1, [4.296]-[4.298].
[417] Email Submission E24 (Communities).
[418] Email Submission E19 (ODPP).

5. Mistake of fact

Chapter overview

This Chapter makes recommendations for reforming the mistake of fact defence.

Introduction

5.1. There is no dispute that non-consensual sexual activity with another person is wrong, and if there are no extenuating circumstances offenders ought to be convicted and punished. However, as with all serious criminal offences, the *Code* currently provides circumstances in which such conduct will not result in a conviction. These circumstances, such as lack of will, accident and emergency, are generally called defences. Providing defences to what would otherwise be a criminal offence is one of the ways in which the State sets the limits of criminal blameworthiness. The prosecution carries the onus of proving beyond reasonable doubt that the 'defence' does not apply.

5.2. This Chapter focuses on the mistake of fact defence, which allows an accused person to be acquitted of an offence if they had an honest but reasonable mistaken belief in a relevant fact. In the context of sexual offences which require proof of non-consent, an accused can rely on this defence where they reasonably, but mistakenly, believed the complainant was consenting to the sexual activity.

5.3. This Chapter starts by explaining the current law and outlining some perceived problems with the present approach. It then considers the potential reforms to the law which were raised in the Discussion Paper.[1]

5.4. Before commencing our discussion of the mistake of fact defence, it is important to note two matters. First, although the mistake of fact defence applies to all criminal offences, our focus

[1] Discussion Paper Volume 1, [5.27]-[5.152].

in this Chapter is solely on its application to sexual offences. Our recommended reforms are limited to that context and are not intended to apply to other offences.

5.5. Second, although the mistake of fact defence allows an accused person to be acquitted where they held an honest, but mistaken, belief about any essential fact, our focus in this Chapter is solely on mistaken beliefs about the complainant's consent. Our recommended reforms are limited to mistaken beliefs about that matter and are not intended to apply to any other types of mistaken belief. This means that throughout this Report, unless otherwise specified, references to the mistake of fact defence should be read as references to the mistaken belief in consent defence.

The current law

5.6. In Western Australia, the mistake of fact 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.

5.7. Unless excluded by law, this defence applies to all offences.[2] It allows an accused to be acquitted if they have made an honest and reasonable mistake about a key fact. It is a recognition that it would be wrong for a person to be held criminally responsible under such circumstances. As noted above, in the context of sexual offences it will most commonly be argued that the accused made a mistake about the complainant's consent.

5.8. 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.[3] Where that is the case, the prosecution will need to disprove the defence beyond reasonable doubt.[4] 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.

5.9. 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, relevantly, at the time of the sexual activity. The accused must have held a positive belief that the complainant was consenting, and the belief must be honestly held. The defence will not succeed if the accused simply failed to consider the issue.[5]

5.10. 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 Western Australia* (*Aubertin*), the Western Australian Court of Appeal explained the mixed element as follows:

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

3 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 Western Australia* [2016] WASCA 142. This evidence can be called by either the prosecution or the defence.

4 *McPherson v Cairn* [1977] WAR 28.

5 *GJ Coles v Goldsworthy* [1985] WAR 183; *Blenkinsop v Wilson* [2019] WASC 77.

> 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.[6]

5.11. 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 ask whether it was reasonable for a person with the accused's personal attributes and characteristics to make that mistake.

5.12. Importantly, however, the jury must only take into account those attributes or characteristics 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'.[7] However, it does not include their 'values, whether they be informed by cultural, religious or other influences'.[8] 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'.[9] 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.[10]

5.13. Additionally, when assessing reasonableness, the jury must not consider any impairment arising from the accused's intoxication.[11] The Court noted that there are 'obvious public policy considerations' supporting this approach.[12] 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'.[13]

5.14. The list of relevant personal attributes and characteristics set out in *Aubertin* was not intended to be exhaustive. The Court said that it is not desirable to enumerate the personal characteristics of the accused that are relevant for the jury to take into account as 'there is a danger in that approach because it is not specifically adapted to the relevant facts of each case and may exclude relevant matters to which the jury ought to have regard or include irrelevant matters'.[14]

5.15. Other matters held by courts as needing consideration in assessing the reasonableness of the accused's belief include the accused's language disabilities and mental health problems.[15] In this regard, it has been held that:

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6 *Aubertin v Western Australia* (2006) 33 WAR 87 [43].
7 Ibid.
8 Ibid [46].
9 Ibid.
10 Ibid.
11 Ibid [44].
12 Ibid.
13 Ibid.
14 Ibid [47].
15 See, eg, *R v Mrzljak* [2004] QCA 420.

> 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.[16]

What are the perceived problems with the current law?

5.16. It has been suggested that the mistake of fact defence has the potential to undermine both the law of consent and the effectiveness of any future reforms in the area.[17] The reason for this is that 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 nevertheless able to 'cite those factors as inducing or rationalising [their] mistaken belief as to consent'.[18] For example, the law currently provides that a failure to offer physical resistance does not of itself constitute consent.[19] Yet an accused could potentially successfully argue that a lack of resistance in the complainant resulted in the accused honestly believing there was consent – and that in light of the lack of resistance that belief was reasonable.[20]

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'.[21] 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.[22] 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'.[23]

5.18. Research provides some support for these concerns. For example, in mock jury studies Finch and Munro conducted in England, 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.[24]

16 *R v Mrzljak* [2004] QCA 420, [90].

17 Preliminary Submission 16 (ODPP).

18 QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [4.85].

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

20 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.

21 NSWLRC, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [5.50]. See also NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.91]-[7.92].

22 VLRC, *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].

23 Preliminary Submission 11 (WLSWA).

24 E Finch and VE Munro, 'Breaking Boundaries – Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303, 318.

5.19. It is also argued that the current law results in an undue focus being placed on the complainant's behaviour at trial.[25] 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'.[26] It has been suggested that it would be preferable to focus instead on the steps the accused took to ascertain the complainant's consent.[27]

5.20. Concerns have also been raised about the breadth of attributes and characteristics that can be considered as part of the mixed element of the defence. 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.[28]

5.21. These concerns were seen by some stakeholders to be particularly significant in light of their understanding of both the frequency with which the mistake of fact defence is raised and the important role it can play in prosecutorial charging decisions. The ODPP noted that:

> While we have heard some defence counsel suggest it is 'rare', that is not so. Our estimate, based on experience and the trial survey, is that mistake of fact is left to the jury in approximately 15-20% of trials where consent is an element of the offence.[29] It is a significant enough proportion to inquire whether there should be legislative intervention in its application to sexual offences.
>
> It should also be borne in mind that the availability of s 24 is a factor the ODPP will consider when assessing the prospects of conviction, in deciding whether to continue a prosecution to trial. We noted in our discontinuance survey[30] that in 5 of the 13 cases (40%) a main reason for discontinuing a charge of sexual penetration without consent, or aggravated sexual penetration without consent, was the insufficiency of evidence to disprove mistake of fact.[31]

5.22. The Statistical Analysis Report shows that a mistaken belief in consent defence was involved in 7% of sexual penetration without consent charges and 2% of aggravated sexual penetration without consent charges tried before juries in the District Court in 2019. The mistaken belief in consent defence was not raised in the trials of other types of sexual offence charges.[32]

5.23. The ODPP also noted that where the mistake of fact defence is raised, it can play a crucial role in the outcome of the case:

> 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

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25 NSWLRC, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [5.47].

26 Preliminary Submission 16 (ODPP).

27 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.93].

28 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.

29 In preparing its submission, the ODPP conducted a survey of 40 trials of sexual offences (excluding child sexual offences) in the 2019 calendar year. It stated that it 'identified seven (7) where mistake of fact was raised (17.5%), which is about 40% of the cases where consent was the central issue (17). Three of the mistake cases resulted in conviction, four in acquittal': Email Submission E19 (ODPP).

30 In preparing its submission, the ODPP also conducted a survey of cases in which a charge under *Code* sections 325 or 326 (sexual penetration or aggravated sexual penetration without consent) was discontinued, in the six-month period 1 July 2022 to 31 December 2022. Thirteen cases were surveyed. The intention was 'to ascertain the reasons for the discontinuance in each case, and whether there were identifiable trends associated with those reasons': ibid.

31 Ibid.

32 Statistical Analysis Report, 3, 8.

> 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.[33]

5.24. In the following sections we consider five potential reforms which were raised in the Discussion Paper:[34]

- 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.

Should the mistake of fact defence be excluded for sexual offence cases?

5.25. One option for reform would be to provide that the mistake of fact defence does not apply to sexual offences.[35] This would mean that even if the accused honestly and reasonably believed the complainant was consenting, they would be convicted if it could be proved that they engaged in a relevant sexual activity without the complainant's consent (and no other defence was successfully raised).

Stakeholders' views

5.26. Stakeholders were divided on whether the mistake of fact defence should be excluded for sexual offences. For example, 52% of respondents to the online survey supported excluding the defence in sexual offence cases, 40% supported retaining the defence, and 8% did not know.

5.27. The Centre for Women's Safety and Wellbeing (**CWSW**) asserted that the defence should be excluded in sexual offence cases.[36] It referred to the defence as a 'loophole' allowing defendants to escape accountability and convictions. It contended that the defence has been inappropriately used to secure acquittals in circumstances where a victim 'freezes' during an assault, as well as where the complainant is vulnerable due to mental impairment, intoxication or language barriers.

5.28. CWSW also suggested that the use of the mistake of fact defence has led to unfair and unwarranted scrutiny of the complainant's actions prior to offending, including previous flirting or visiting a perpetrator's home. It noted that attempts to reform, but retain, the mistake of fact defence in Tasmania have not adequately addressed problems with it that accrue from entrenched cultural issues amongst juries and the judiciary. It concluded that:

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[33] Preliminary Submission 16 (ODPP).

[34] In Discussion Paper Volume 1, [5.24]-[5.26] we noted that it would also be possible to make the defence wholly subjective, as was previously the law in many common law jurisdictions (where an honest but unreasonable belief in consent was sufficient to negate criminal liability). Although we welcomed submissions supporting such an approach, we did not raise it as a specific option for reform. Our sense was that as well as being inconsistent with legal developments around Australia and internationally, such an approach would not accord with community standards. We received no submissions supporting this approach and do not address it further in this Report.

[35] 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*. See Discussion Paper Volume 1, [5.27]-[5.31] for discussion of this option for reform.

[36] Portal Submission P57 (CWSW).

> Excluding the operation of the mistake of fact defence in sexual offence cases would avoid serious injustices occasioned by the current Code, without compromising the defendant's right to a presumption of innocence or a fair trial. It would still fall on the prosecution to prove that the defendant did, or did not, do or say things to establish the complainant was consenting. A jury would still need to be convinced beyond all reasonable doubt.[37]

5.29. Full Stop Australia also support exclusion of the defence, arguing that:

> An accused's ability to rely on a mistake of fact defence where they have not taken steps to ascertain consent enables them to continue to rely on problematic narratives of implied consent based on myths and misconceptions. These stereotypical assumptions about women's sexual behaviour and sexual relations are part of the cause of low conviction rates for sexual offences.[38]

5.30. By contrast, most stakeholders from the legal community favoured retaining the mistake of fact defence. This included members of the Legal Expert Group, who contended that excluding the defence for sexual offences would:

- Result in sexual offences becoming strict liability offences, where no element of mental culpability is required to be proven. This was considered inappropriate given the seriousness of the charges alleged.
- Undermine the structure and integrity of the *Code,* as the mistake of fact defence is located within introductory sections related to criminal responsibility in Western Australia that apply to all offences.

5.31. Supporting the retention of the mistake of fact defence, Legal Aid maintained that 'this defence is needed to ensure a person who honestly and reasonably mistakenly believes there is consent to a sexual act is not convicted. Reasonableness ensures that the defence only applies where appropriate'.[39]

5.32. The ODPP agreed, arguing that removing the defence would constitute an 'extreme measure' and would likely result in miscarriages of justice.[40] While the ODPP acknowledged that retaining the defence makes prosecution of sexual offences more difficult, it considered that 'it would only be a supportable reform if there were never a circumstance in which an honest mistake as to another person's consent could be reasonable, which is not the case'.[41]

The Commission's view

5.33. The Commission does not recommend excluding the mistake of fact defence for sexual offences. We are of the view that:

- A person who honestly and reasonably believed that the other participant to a sexual activity was consenting has not acted wrongfully and is not deserving of the sanction of the criminal law.
- Subjecting people to significant criminal punishment for an action which they honestly and reasonably believed was permissible will not serve a deterrent purpose.

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37 Ibid.
38 Email Submission E6 (Full Stop Australia).
39 Portal Submission P23 (Legal Aid).
40 Email Submission E19 (ODPP).
41 Ibid.

- Excluding the defence for sexual offences would undermine the integrity of the *Code*.

5.34. We are particularly concerned that excluding the defence could result in an accused being unjustly convicted in circumstances where they could not reasonably have known about the complainant's lack of consent. For example, an accused would be liable to conviction in a case where the complainant was being pressured by a third party to engage in the sexual activity (and so was not consenting), but the accused was unaware of the pressure that was being exerted. If the defence were excluded, the accused could be convicted, even if they had actively sought the complainant's consent and been assured by the complainant that they were consenting. We do not consider this to be just.

5.35. 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.

5.36. We believe that concerns about the impacts of the present mistake of fact defence are better addressed by providing clear legislative guidance on the assessment of reasonableness in this context (discussed below), rather than by excluding the defence entirely.

Should the mistake of fact defence be made more objective?

5.37. A second option for reform would be to replace the current mixed element of the mistake of fact defence with a purely objective element. This would mean that the jury would not consider the accused's attributes and characteristics when determining whether their mistaken belief in consent was reasonable. Instead, they would consider whether a hypothetical 'reasonable person' would have believed the complainant was consenting.[42]

Stakeholders' views

5.38. There was some support for making the mistake of fact defence more objective in the online survey. Sixty-five per cent of respondents supported making the mistake of fact defence more objective, while 30% supported retaining the mixed element.

5.39. There was also some limited support for this proposal amongst other stakeholders. For example, some members of the Community Expert Group suggested that it would be desirable for the law to clearly specify an objective standard of reasonableness, as this would send a message to potential perpetrators that if they do not live up to that standard they will be charged with a criminal offence. However, it was acknowledged that there is presently insufficient community agreement about what constitutes an objectively reasonable belief to make this approach viable.

5.40. By contrast, most other stakeholders opposed this option for reform. For example:

- The ODPP advanced that it was appropriate for the jury to take certain attributes, including the accused's age, maturity, cognitive impairments, mental illness, or physical impairments, into account in determining whether the accused's belief was reasonable.[43]

[42] See Discussion Paper Volume 1, [5.32]-[5.37].

[43] Email Submission E19 (ODPP).

- Communities maintained that 'a mixed element approach ensures that a condition such as cognitive impairment can be taken into account, as opposed to assessing the accused's behaviour by reference to a standard of reasonableness which they cannot achieve'.[44]

5.41. Many other stakeholders also focused on the potential impact that a wholly objective standard might have on people with psychosocial disabilities or cognitive impairments. They were particularly concerned to ensure that due attention was given to the accused's cognitive capacities when assessing the reasonableness of their belief. For example, participants in the Broome consultation argued that it was important to consider the impact of Foetal Alcohol Spectrum Disorder on the accused when determining whether their belief was reasonable. They also contended that cultural factors should be taken into account.

5.42. Communities noted that retaining the mixed element for the defence was consistent with recommendations by the QLRC in 2019 and the NSWLRC in 2020. Both Commissions were of the view that fairness requires the jury to take into account the subjective and objective aspects of the accused's belief when assessing reasonableness.[45]

5.43. Dr Andrew Dyer noted that retaining the mixed element of the defence was also consistent with criminal law norms regarding 'reasonableness':

> Normally, when an accused's criminal liability depends on whether she has acted reasonably, the question will not be whether she has met the standards of a hypothetical reasonable person. It will instead be whether she has acted reasonably for her, taking into account her perceptions and any factor personal to her that has affected her ability to perceive events accurately. There is a very good reason for this. As the NSWLRC has indicated, it would not be just – and neither would it be rational – to hold a person criminally liable because of his failure to meet a standard of conduct that, because of a circumstance beyond his control, he was unable to meet. In other words, as with the proposal to take mistake of fact away from persons accused of sexual offending, the proposal to grant mistake of fact to a sexual offence accused only if the mistake he might have made, might also have been made by a reasonable person, could quite easily lead to the conviction of some morally innocent actors.[46]

The Commission's view

5.44. The Commission does not recommend replacing the current mixed element of the mistake of fact defence with a purely objective element. We are of the view that the mixed element should be retained, with the modifications discussed later in this Chapter.

5.45. We acknowledge that there would be some advantages to using a wholly objective test to determine the reasonableness of the accused's mistaken belief. It would send a clearer message to the community about the standard expected of people who engage in sexual activity. It would also be easier for jurors to apply, as they would not need to try to take into account certain of the accused's attributes and characteristics but not others.

5.46. However, we agree with stakeholders that it is appropriate for the jury to take into account some of the accused's attributes, such as their age and cognitive capacities, when assessing the reasonableness of their mistaken belief.[47] We do not believe that criminal liability should

[44] Email Submission E24 (Communities).

[45] Ibid.

[46] Email Submission E18 (Dr Andrew Dyer).

[47] We discuss the specific attributes that should be taken into account, and the circumstances in which they should be taken into account, below.

be imposed on a person who is unable to meet a legal standard because of a condition that is beyond their control.

5.47. We note that it was for this reason that, in their respective reviews of this issue, the NSWLRC, QLRC and Hong Kong Law Reform Commission all favoured a mixed approach over a purely objective approach.[48] 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'.[49] We agree with this view.

5.48. In addition, we are not convinced that making the mixed element of the mistake of fact defence purely objective 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 hypothetical 'reasonable person'. We are of the view that these problems are better addressed by providing legislative guidance on the assessment of reasonableness (as discussed below).

Should legislative guidance be provided on the assessment of reasonableness?

5.49. A third option for reform would be to retain the mixed element, but to provide legislative guidance on the assessment of reasonableness.[50] This could be done in a legislative provision setting out which factors the jury may or may not take into account in determining whether the accused's belief was reasonable and/or in legislated jury directions on the issue.[51]

Stakeholders' views

5.50. There was significant support amongst stakeholders for providing legislative guidance to juries on the assessment of reasonableness: 75% of respondents to the online survey supported this proposal and 21% opposed it.

5.51. Communities reasoned in support of this proposal, citing the potential for jurors to rely on myths regarding sexual violence if guidance was not provided.[52] Similarly, some members of the Legal Expert Group suggested that juror attitudes can sometimes lag behind community expectations, with legislative guidance providing appropriate 'signposts' for contemporary values on consent.

5.52. Rape and Sexual Assault Research and Advocacy Ltd (**RASARA**) asserted that legislative guidance was required to ensure an affirmative consent standard was upheld, by preventing an accused's ability to rely on passive non-resistance or past acts by the complainant to excuse behaviour.[53]

5.53. In contrast, Legal Aid did not support providing legislative guidance on the assessment of reasonableness, arguing that it should be for the judge to decide what directions to give about

[48] QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.71]; NSWLRC, *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].

[49] QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.71].

[50] See Discussion Paper Volume 1, [5.38]-[5.46].

[51] Jury directions are addressed in Chapter 10.

[52] Email Submission E24 (Communities).

[53] Portal Submission P28 (RASARA).

this matter.[54] Dr Dyer also did not support the provision of legislative guidance, apart from in cases involving self-induced intoxication.[55]

The Commission's view

5.54. The Commission recommends that there be legislative guidance about what constitutes a reasonable belief for the purposes of the mistake of fact defence in sexual offence cases. We are of the view that this will help clarify, for the jury and the community generally, what factors should not be taken into account when assessing whether there is a reasonable belief in consent to a sexual activity. We think that it will also help address concerns about the accused being able to rely on misconceptions about consent, gendered assumptions and stereotypes when raising the defence.

5.55. We acknowledge that the Court in *Aubertin* did not think it was desirable to list the personal characteristics of the accused that should be taken into account when assessing the reasonableness of the accused's belief that the complainant consented to the relevant sexual activity. It said that such a list would not enable a jury to take into account facts peculiar to the case being tried. However, since *Aubertin* was decided, there has been a shift in community feeling towards a view that the mistake of fact defence ought to be restricted in sexual offence cases. Such restrictions would prevent people who engage in sexual activity without consent from being able to avoid conviction due to mistaken beliefs about consent based on personal characteristics that are both within the accused's control and which result in their holding views not held by reasonable members of the community. Our approach takes into account that the mistake of fact defence excuses what would otherwise be criminal activity, and it is appropriate that the defence recognises prevailing community standards of behaviour.

5.56. We acknowledge that this will mean that sexual offences are treated differently from other offences, for which no such legislative guidance is provided. However, we believe this distinction is justified in light of research suggesting that misunderstandings of consent, along with misconceptions about sexual violence, are widely held and may improperly influence a jury's decision in a sexual offence trial.[56]

5.57. In the following sections we consider the matters which should be the subject of legislative guidance.

Recommendation

20. Legislative guidance should be provided about what constitutes a reasonable belief for the purposes of the mistake of fact defence in sexual offence cases.

What legislative guidance should be provided to the jury?

5.58. In the Discussion Paper we discussed various ways in which legislative guidance could be provided to the jury.[57] We raised the following possibilities for consideration:

- Legislating the *Aubertin* principles.

[54] Portal Submission P23 (Legal Aid).
[55] Email Submission E18 (Dr Andrew Dyer).
[56] See Discussion Paper Volume 1, [1.31]-[1.36] and Background Paper, Part 2.
[57] Discussion Paper Volume 1, [5.38]-[5.99].

- Defining the attributes or characteristics of the accused which the jury must take into account when assessing the reasonableness of the accused's belief.
- Requiring the jury to consider the community's expectations when assessing the reasonableness of the accused's belief.
- Preventing the jury from taking the accused's self-induced intoxication into account in determining whether their belief was honest and/or reasonable.
- Specifying that an accused's belief in consent is not reasonable if:
  - It is based on assumptions about consent.
  - There is no evidence that the complainant said or did anything to indicate consent.
  - The accused was aware of the existence of one of the matters included in the *Code's* list of circumstances in which there is no consent.
  - The accused's belief in consent arose from their recklessness.

5.59. We discuss each of these options for reform below.

Should the *Aubertin* principles be legislated?

5.60. One option for reform would be to legislate the *Aubertin* principles.[58] 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.

Stakeholders' views

5.61. There was little support for legislating the *Aubertin* principles amongst stakeholders. This option was opposed by 82% of respondents to the online survey, with just 18% indicating support. While very few written submissions specifically addressed this option, those that did were similarly unsupportive.

The Commission's view

5.62. The Commission does not recommend legislating the *Aubertin* principles. As discussed below, we are of the view that several problems with those principles exist. Consequently, we do not think that they should be enshrined in legislation.

Should the *Code* restrict the attributes and characteristics the jury can take into account?

5.63. As noted above, the jury must currently take into account certain attributes and characteristics of the accused when assessing the reasonableness of their belief. This includes matters over which the accused has no control, such as 'age (maturity), gender, ethnicity, as well as

[58] Ibid [5.47]-[5.52].

physical, intellectual and other disabilities'.[59] However, it does not include an accused's 'values, whether they be informed by cultural, religious or other influences'.[60]

5.64. Another option for reform would be to legislatively confine the scope of the attributes and characteristics the jury may consider when assessing reasonableness.[61] For example, the Irish Law Reform Commission (**ILRC**) has recommended that the jury only be allowed to consider four of the accused's attributes when making this assessment: physical disability; intellectual disability; mental illness; age and maturity.[62]

Stakeholders' views

5.65. Stakeholders' views were mixed on this issue. Fifty-three per cent of respondents to the online survey were opposed to legislatively confining the scope of the attributes and characteristics the jury may consider when assessing reasonableness, with 41% indicating support for the proposal. By contrast, most stakeholders in the written submissions and consultations were supportive of imposing further limitations.

5.66. Many members of the Legal Expert Group supported limiting the jury's consideration to key features of the accused, such as cognitive impairment, physical disability and young age. The current law's inclusion of ethnicity in the list of relevant attributes was seen to be particularly inappropriate, given the jury is not permitted to take into account culture or religion.

5.67. Several members of the Community Expert Group were also of the view that restrictions should be made to which attributes of the accused can be considered when assessing reasonableness. However, they were concerned to ensure that age and disability continue to be taken into account. Given the overrepresentation of Foetal Alcohol Spectrum Disorder amongst Aboriginal and Torres Strait Islander Peoples, these members were especially concerned to ensure the condition remains relevant. Similar concerns were expressed by participants in the Broome consultation. Some members of the Community Expert Group suggested that psychosocial disabilities, such as the impact of trauma on a person's decision-making, should also be taken into account.

5.68. There were conflicting views on whether the accused's culture should be a relevant consideration. Participants in the Broome consultation suggested that juries should be allowed to consider culture when assessing reasonableness. This was seen to be necessary to prevent non-Indigenous jurors from imposing their cultural norms on Aboriginal and Torres Strait Islander accused. By contrast, participants in the Albany consultation argued that it would be inappropriate for cultural norms to be considered as part of the mistake of fact defence.

The Commission's view

5.69. In *Aubertin*, the Court of Appeal noted that the reasonableness requirement 'imports an objective standard' into the mistake of fact defence.[63] Its aim is to prevent an accused person who genuinely believed the complainant was consenting – but should not have held that belief in the circumstances – from being able to rely on the defence. Such a person is considered to be blameworthy despite failing to understand that the complainant did not consent.

5.70. However, as noted above and emphasised by stakeholders, the strict application of this requirement could lead to injustice. If judged from a purely objective perspective, it could result

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59 *Aubertin v Western Australia* (2006) 33 WAR 87 [43].
60 Ibid [46].
61 Discussion Paper Volume 1, [5.53]-[5.57].
62 ILRC, *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019).
63 *Aubertin v Western Australia* (2006) 33 WAR 87 [43].

in a person being held criminally liable for failing to understand that the complainant did not consent when, due to certain personal attributes or characteristics, they were not capable of doing so. For example, a severe cognitive impairment might make them incapable of understanding the concept of consent. In our view, it is not appropriate to hold a person criminally liable in such circumstances.

5.71. Consequently, we believe that the defence should continue to make some allowance for certain of the accused's attributes or characteristics, although the number of attributes or characteristics should be strictly circumscribed. Allowing the jury to consider too many of the accused's attributes and characteristics would dilute the objective nature of the test, undermining its purpose.[64] The accused's beliefs should generally be judged against the standard of the hypothetical reasonable person, with limited exceptions.

5.72. In this regard, we are of the view that the jury should only be allowed to take into account attributes or characteristics which are:

- Beyond the accused's control; and
- Capable of affecting the accused's ability to understand that the complainant was not consenting.

5.73. In our view, it is the combination of these factors which provides the justification for allowing the accused to deviate from the ordinary objective standard: it is unfair to hold a person to a standard they were unable to reach, if they had no control over their ability to reach that standard. By contrast, if they had control over the relevant attribute or circumstance, it is appropriate to hold them accountable for failing to exercise that control (thus rendering them unable to meet the ordinary standard of reasonableness).

5.74. It would be possible for the *Code* to simply specify that the jury may only take into account attributes or characteristics which are both beyond the accused's control and able to affect their ability to understand that the complainant was not consenting – but we do not recommend such an approach. In our view, it is important that the law be clear in this area and that it prevent the jury from taking into account irrelevant attributes or characteristics. To ensure this, we recommend that the *Code* list which attributes and characteristics the jury may take into account. We recall that in *Aubertin* the Court suggested that such a list of attributes and characteristics may prevent a jury from taking into account relevant matters peculiar to the case being tried. After considering the various circumstances that may be relevant to this assessment, however, we have formed the view that it is only the attributes and characteristics that we have identified that are both beyond the accused's control and may affect their ability to understand that the complainant was not consenting. We therefore think it appropriate for them to be prescribed.

5.75. In Chapter 8, we recommend that the *Code* list the following conditions in the context of sexual offences against vulnerable persons:

- Intellectual disabilities;
- Developmental disorders (including autism spectrum disorders and foetal alcohol spectrum disorders);
- Neurological disorders;
- Mental illnesses;

[64] Temkin and 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) 342.

- Brain injuries; and
- Dementia.

5.76. In our view, these same conditions should be included in the list of attributes or characteristics the jury may take into account when assessing the reasonableness of an accused's mistaken belief. These are conditions beyond a person's control, which may affect their capacity to understand whether the complainant was consenting – for example, by making it difficult for an affected individual to understand the concept of consent or to interpret consensual signals.[65]

5.77. In Chapter 8 we recommend that mental illness be defined in the same way that it is defined in section 6 of the *Mental Health Act 2014* (WA). We make the same recommendation here.

5.78. We also recommend including physical disabilities in the list of attributes or characteristics the jury may consider when assessing reasonableness. While it will not often be the case that a physical disability will affect the accused's capacity to understand that the complainant is not consenting, this may occur in rare cases. For example:

> A person who has a visual impairment might not be able to comprehend a [person's] absence of consent, such as an expression of fear or negative body language. A person with impaired hearing might not be able to hear a [person's] objections to unwanted sexual intercourse.[66]

5.79. It will not always, and potentially not often, be the case that such an impairment will be determinative, as the communication of consent is not normally restricted to one medium. A person with a hearing impairment may be able to see that the other person is not consenting, and a person with a visual impairment may equally be able hear that fact. Furthermore, under the model of affirmative consent that we recommend enacting in this Report, accused people will generally have an obligation to take appropriate measures to ascertain consent. In the case of a person with a visual impairment, this would require them to take steps to ascertain consent using non-visual means. However, in those rare circumstances where a person with a physical disability was, as a result of their disability, incapable of understanding that there was a lack of consent, it would not be fair to hold them to the ordinary objective standard.

5.80. For each of the attributes and characteristics we have listed above, it should not matter whether the condition is permanent or temporary. The sole focus should be on (i) whether the accused had the relevant attribute or characteristic at the time of the sexual activity; and (ii) how it affected the accused's assessment of the complainant's consent in the circumstances.

5.81. The final matter which we recommend the jury be able to take into account is the accused's young age and immaturity. We recommend the inclusion of this factor for two reasons. First, young people's brains are not yet fully developed, and this may affect their capacity to understand whether there is consent to a sexual activity.[67] Second, a young person may, for reasons over which they have no control, lack the knowledge and maturity necessary to understand what does and does not constitute consent. For example, they may not be aware of social norms surrounding consent, or subtle signals that indicate a lack of consent; they may have been provided with no opportunity to learn these matters.[68]

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65 ILRC, *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.74]-[3.75].

66 Ibid [3.68].

67 On the developmental differences between juvenile and adult brains, and its relevance to sexual decision-making, see ibid [3.82]-[3.92].

68 While some adults may also lack this awareness, as a society we expect them to take steps to ensure that they are properly informed about such matters. If they do not do so, we consider them to be blameworthy.

5.82. It is important to note that this is not solely a question of the young person's age – it also relates to their maturity. In this regard, it is clear that people mature at different rates, depending on genetic and environmental factors. While a young person's maturity will generally develop in parallel with their age (for example, a 16-year-old will generally be more mature than a 10-year-old), this will not always be the case (for example, some 10-year-olds will be as mature as an average 16-year-old).[69] When applied to a sexual context, this means that although it is highly likely that a 10-year-old will be less able to determine consensual signals than a 16-year-old, this will not necessarily be the case. Consequently, it is necessary to consider the accused's age and maturity together.[70] However, this should be restricted to offenders who are under 18. In the absence of one of the other listed attributes or characteristics, we consider it appropriate to judge adults against the standard of the reasonable person.

5.83. In our view, subject to one possible exception (discussed below), these are the only attributes and characteristics the jury should be permitted to take into account. They should not be allowed to take into account matters such as the accused's gender, race, ethnicity, culture or religion.[71] We acknowledge that these factors may not be fully within the accused's control, and they may play a key role in the way that they understand the concept of consent – yet they cannot be understood to affect the accused's capacity to understand that the complainant was not consenting. In the absence of any of the other attributes or characteristics we have discussed above (such as intellectual disability), adults of all genders, races, ethnicities, cultures and religions are capable of understanding when a person consents. Consequently, it is appropriate to hold them responsible when they fail to meet the ordinary reasonableness standard.

5.84. The one possible exception is cultural factors relevant to Aboriginal and Torres Strait Islander Peoples. As noted above, in our stakeholder consultations there were conflicting views on whether such factors should be taken into account in assessing reasonableness. We did not, however, receive any written submissions on this issue, and it was only briefly addressed in consultations. Consequently, we are not in a position to make a formal recommendation in this regard. This is an issue for which it is critical that the views of Aboriginal and Torres Strait Islander Peoples be taken into consideration. In the absence of the Commission having received those views, we believe this issue should be further considered by the Government, with a view to determining whether the *Code* should also permit Aboriginal and Torres Strait Islander cultural factors to be taken into account when assessing the reasonableness of the accused's mistaken belief in consent.

5.85. It is important to note that under our recommended approach, the reasonableness standard is not removed or modified simply because the accused had one of the listed attributes or characteristics. It will still be necessary for the jury to determine whether their mistaken belief in consent was reasonable in all the circumstances of the case. However, in making this assessment the jury will be able to take into account a listed attribute or characteristic. The way in which the attribute or characteristic will affect the jury's determination (if it does) will depend on the specific circumstances. The jury will need to consider:

- The nature of the relevant attribute or characteristic, and the way that it was affecting the accused at the time of the relevant sexual activity;

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69 ILRC, *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.89].

70 Ibid [3.91]-[3.92].

71 This differs from the current law, where the jury may take into account the accused's gender and ethnicity: *Aubertin v Western Australia* (2006) 33 WAR 87 [43].

- The measures the accused had taken to ascertain consent, and how they were affected by the relevant attribute or characteristic;[72] and
- The complainant's words and conduct, and the way in which the accused's understanding of those words and conduct was affected by the attribute or characteristic.

5.86. It will be a matter for the jury to determine whether, in light of the existence of a relevant attribute or characteristic, the accused's mistaken belief in consent was unreasonable.

5.87. We note that this approach is consistent with 'the presumed capacity of adult persons, and the equality principle in the UN Convention on the Rights of Persons with Disabilities', according to which 'a person with a disability is presumed to have responsibility for their sexual acts'.[73] However, the approach also recognises that disabilities sometimes limit a person's capacities in various ways and makes appropriate allowances for that possibility.

Recommendations

21. The *Code* should specify an exhaustive list of the accused's attributes and characteristics that may be taken into account in assessing the reasonableness of a mistaken belief in consent.

22. The attributes and characteristics that may be taken into account in assessing the reasonableness of a mistaken belief in consent should be restricted to:

- **Intellectual disabilities;**
- **Developmental disorders (including autism spectrum disorders and foetal alcohol spectrum disorders);**
- **Neurological disorders;**
- **Mental illnesses;**
- **Brain injuries;**
- **Dementia;**
- **Physical disabilities; and**
- **Where the offender is under 18, young age and immaturity.**

23. The *Code* should specify that the effect that a listed attribute or characteristic had on the accused at the time of the relevant sexual activity may be taken into account in determining whether the accused's mistaken belief in consent was reasonable in the circumstances of the case.

Should the *Code* require the jury to consider community expectations?

5.88. Another option for reform would be to require the jury to consider community expectations when assessing the reasonableness of an accused's belief in consent.[74]

5.89. This approach has been taken in Victoria, where counsel may request the judge to direct the jury that it must 'consider what the community would reasonably expect of the accused in the

[72] We consider the requirement to take measures to ascertain consent below.

[73] ILRC, *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.67].

[74] See Discussion Paper Volume 1, [5.58]-[5.60].

circumstances in forming a reasonable belief in consent'.[75] When requested, the judge must give this direction unless there are good reasons for not doing so.[76]

Stakeholders' views

5.90. Respondents to the online survey were evenly split on this issue: 50% supported the idea of requiring the jury to consider community expectations when assessing reasonableness and 50% opposed it.

5.91. By contrast, there was little support for this proposal amongst other stakeholders. For example, the ODPP suggested that asking the jury to consider community expectations would be confusing and distracting, noting that 'a jury so instructed will inevitably ask what community expectations are, which is a fraught question. Jury directions which dispel misconceptions and common assumptions are a better avenue to the same end'.[77]

5.92. Some members of the Community Expert Group noted that harmful ideas about consent to sexual activity persisted in the community, which could be given license if this requirement were enacted. While other stakeholders were more optimistic about current community attitudes towards consent, members of the Legal Expert Group noted that requiring jurors to explicitly consider community expectations could result in their nevertheless finding that the accused's outdated views were reasonable (if they think other community members also hold those same views).

The Commission's view

5.93. The Commission does not recommend requiring the jury to consider community expectations when assessing the reasonableness of an accused's belief in consent. We are of the view that this requirement is more likely to confuse and distract the jury than assist it. We also do not think it is likely to be effective at addressing misconceptions about consent, as 'research reveals that certain misconceptions exist within the community'.[78] We believe that these misconceptions are better addressed through jury directions which address them directly.[79]

Should the *Code* exclude consideration of self-induced intoxication?

5.94. Currently, juries in Western Australia can take into account an accused's self-induced intoxication when deciding whether a mistaken belief was honestly held, but not when deciding whether the belief was reasonable.[80] The ILRC has noted that 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'.[81] 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.[82]

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75 *Jury Directions Act 2015* (Vic) s 47(3)(d).

76 Ibid s 14.

77 Email Submission E19 (ODPP).

78 NSWLRC, *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).

79 We consider jury directions in Chapter 10.

80 *Daniels v The Queen* (1989) 1 WAR 435; *Aubertin v Western Australia* (2006) 33 WAR 87, [44]; *R v Kusu* [1981] QR 136.

81 ILRC, *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [3.111].

82 This is implicit in the Court's reference to 'self-induced' intoxication in *Aubertin v Western Australia* (2006) 33 WAR 87, [44].

5.95. One option for reform would be to enact a provision which makes it explicit that self-induced intoxication cannot be taken into account in determining whether the accused's belief was honest and/or reasonable.[83]

5.96. Several other Australian jurisdictions have adopted such a course, although they have taken two different approaches to this issue:

- In NSW and Tasmania, the law provides that self-induced intoxication may not be taken into account in determining whether the accused's belief was either honest or reasonable (the NSW approach).[84]
- In Victoria, Queensland and the NT, the law provides that self-induced intoxication may not be taken into account in determining whether the accused's belief was reasonable, but it may be taken into account in assessing the honesty of that belief (the Victorian approach).[85]

5.97. If one of these approaches is taken, it will be necessary to decide whether the *Code* should also define the circumstances in which the accused's intoxication should be considered self-induced. For example, in the NT and Victoria, intoxication is stated 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.

5.98. 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.[86]

Stakeholders' views

5.99. There was widespread support amongst stakeholders for legislatively addressing the relevance of the accused's intoxication to the mistake of fact defence. This was supported by 89% of respondents to the online survey, as well as numerous other stakeholders in the submissions and consultations.

5.100. Views varied, however, on whether the NSW or Victorian approach should be adopted. For example, RASARA suggested adopting an approach similar to that taken in NSW. It recommended inserting a provision that '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'.[87]

5.101. The ODPP also saw some merit to the NSW approach, noting that it:

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[83] Discussion Paper Volume 1, [5.61]-[5.65].
[84] *Crimes Act 1900* (NSW) s 61HK(5)(b); *Criminal Code Act 1924* (Tas) s 14A.
[85] *Crimes Act 1958* (Vic) s 36B(1); *Criminal Code Act 1899* (Qld) s 348A(3); *Criminal Code Act 1983* (NT) s 43AU.
[86] *Criminal Code Act 1983* (NT) s 43AR; *Crimes Act 1958* (Vic) s 36B(2)-(3).
[87] Portal Submission P28 (RASARA).

> Would be advantageous in those cases (uncommon, but not rare) where the accused's account is that due to their intoxicated state, they believed the complainant was their spouse or regular sexual partner. Excluding intoxication from the assessment of honest belief would assist to negate this claim when it has 'an air of unreality'.[88]

5.102. However, despite this advantage, the ODPP recommended adoption of the Victorian approach. It reasoned: 'While public policy reasons are, appropriately, part of the rationale for excluding the accused's voluntary intoxication from an assessment of the reasonableness of their belief, those reasons are not relevant to assessing a subjective state of mind'.[89]

5.103. A similar view was expressed by Dr Dyer, who also recommended the Victorian approach:

> That is consistent with the current legal position and, where an accused has voluntarily reduced his capacity to perceive events accurately, it seems fair to hold him to the standards that a person of ordinary capacities could be expected to have reached. That said, it is fictitious to prevent juries from having regard to an accused's intoxication when assessing whether she might actually have believed in the existence of the relevant circumstance (i.e. consent). The current Western Australian legal position – that juries may take account of such intoxication when determining whether the accused might have believed in consent – should be maintained.[90]

5.104. While the ODPP was of the view that the jury should not be precluded from taking self-induced intoxication into account when assessing the honesty of the accused's mistaken belief, it was keen to ensure that it 'remain open to the State to seek to demonstrate the accused's intoxication meant it was less likely they formed a belief as to consent'.[91]

5.105. There was limited support amongst respondents to the online survey for defining the circumstances in which the accused's intoxication should be considered self-induced: 22% supported the inclusion of a definition, 56% opposed its inclusion, and 22% stated that they did not know. This issue was not addressed in the written submission or consultations.

The Commission's view

5.106. The Commission recommends enacting a provision that explains the relevance of intoxication to the mistake of fact defence. We are of the view that this 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 activity. Such a message might both frame understandings of appropriate behaviour and encourage people to report incidents of sexual violence that involved intoxicated perpetrators.

5.107. 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, finding 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 directed about the relevance of the accused's intoxication to the reasonableness of their belief.[92] Consequently, while the QLRC was of the view that the law in the area was sufficiently

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88 Email Submission E19 (ODPP).
89 Ibid.
90 Email Submission E18 (Dr Andrew Dyer).
91 Email Submission E19 (ODPP).
92 QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [3.67].

clear, it considered it to be desirable to expressly address the issue in legislation to help ensure that appropriate directions are given.[93]

5.108. We consider it important to ensure that adequate directions on this issue are given in Western Australia. We recommend adopting the Victorian approach, which only precludes the jury from taking self-induced intoxication into account when assessing the reasonableness of the accused's belief. As noted above, the honesty component of the defence is about the accused's subjective experience: it is about what was in their mind at the time of the relevant activity. In our view, this properly requires consideration to be given to all factors that were affecting the accused's mental processes at that time, including their intoxication. It would be artificial to prevent the jury from taking into account a specific factor in making their determination about the accused's subjective mental state.

5.109. This does not mean that the jury will need to conclude that, because the accused was intoxicated they must have honestly believed in consent. That will be a matter for the jury to determine based on all the circumstances of the case. It may well find that, despite their level of intoxication, the accused knew the complainant was not consenting. Alternatively, it may find that because of the accused's level of intoxication, they gave no thought to the question of consent, and so did not hold a positive mistaken belief in consent (as is required by the defence). Furthermore, even if the accused, in their intoxicated state, honestly believed that the complainant consented, that does not mean the mistake of fact defence will be successful. Given the jury is precluded from taking evidence of intoxication into account in assessing the reasonableness of the accused's belief, it may well find that the accused's belief was unreasonable in the circumstances.

5.110. We recommend that the new provision provide an exception for cases where the accused became intoxicated involuntarily. This will protect those accused who became intoxicated unknowingly and unintentionally. However, it should not protect people who knowingly consume an intoxicant in circumstances where a reasonable person would be aware of the risk that they would become intoxicated. We do not consider it necessary to define the circumstances in which intoxication is considered to be involuntary.

Recommendation

24. The *Code* should provide that the jury should determine the reasonableness of a mistaken belief in consent according to the standards of a reasonable sober person, unless the person's intoxication was involuntary.

Should the *Code* specify that a belief is not reasonable if the accused knew of a listed circumstance of non-consent?

5.111. In Chapter 4 we recommend that the *Code* provide that a person does not consent to a sexual activity if they:

- Do not say or do anything to communicate that they agree to that activity.
- Are under 16 at the time of the offence.
- Are asleep or unconscious.

[93] Ibid [7.134].

- Are so affected by alcohol or another drug as to be incapable of consenting to the activity or withdrawing consent to the activity.
- Are incapable of understanding:
  - The physical nature or sexual character of the relevant activity;
  - That they can choose whether or not to participate in the activity; or
  - That they can withdraw from the activity at any time.
- Engage in the sexual activity because:
  - Force is used against that person, another person, an animal or property.
  - Explicit or implicit threats are made, by words or conduct, to cause serious harm of any kind to that person, another person, an animal or property.
  - Coercion, blackmail, extortion or intimidation are used in relation to that person or another person.
  - The person fears the use of force or the infliction of serious harm of any kind on that person, another person, an animal or property.
  - The person or another person is unlawfully detained.
  - The person is overborne by an abuse of a relationship of authority, trust or dependence.
  - They are mistaken about the nature of the sexual activity, the identity of the other participant or the purpose of the sexual activity.
- Engage in the sexual activity on the basis that a condom is used, and either before or during the activity any other person involved in the activity intentionally removes the condom or tampers with the condom, or the person who was to use the condom intentionally does not use it.

5.112. Another option for reforming the mistake of fact defence would be to specify that an accused's mistaken belief in consent is not reasonable if they knew or believed in the existence of one of the listed circumstances in which there is no consent.[94]

5.113. Such an approach has been taken in Victoria. There, counsel may request that the trial judge direct the jury that, if it concludes that the accused knew or believed that 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'.[95] The judge must give this direction unless there are good reasons for not doing so.[96]

5.114. The *Crimes Act 1900* (ACT) similarly provides that if an accused person knows, or is reckless about whether, the consent of another person to a sexual activity has been caused by any of the listed circumstances, the accused person is taken to know that the other person does not consent to the act.[97] The deemed knowledge would preclude that accused from raising the mistake of fact defence.

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94 Discussion Paper Volume 1, [5.86]-[5.90].
95 Jury Directions Act 2015 (Vic) s 47(3)(a).
96 Ibid s14.
97 *Crimes Act 1900* (ACT) s 67(3).

Stakeholders' views

5.115. Most stakeholders were supportive of this reform. For example, 88% of respondents to the online survey favoured adopting such an approach, and none opposed it (12% did not know). It was also generally supported in written submissions and consultations. For example, attendees at the Piddington Society consultation argued that it is important for the consistency of law that if we recommend that the law state that 'X does not constitute consent' we recommend also that the law state that 'if you are aware of X, your belief in consent is not reasonable'.

5.116. The ODPP was also supportive of this approach, which it addressed at length in its submission, outlining the various ways in which the provision would operate:

> Generally speaking, the State is far more successful at negating mistake of fact in cases where the complainant alleges the accused used physical force, or unlawfully detained them. In those cases, the accused's account of what happened is usually entirely at odds with the complainant's account. However, where the complainant's evidence is that they were asleep, or so intoxicated they lacked capacity to consent, or some other vitiating circumstance is alleged, the State is far less successful at negating mistake of fact …
>
> The proposal to include a 'circumstances of non-consent provision' will assist to address this concern. To complement the introduction of a 'circumstances of non-consent provision', which the State may rely upon to prove that, because of the presence of a vitiating circumstance, a complainant did not consent, it should be expressly provided that if the accused knew of one of the vitiating circumstances, they cannot be taken to have had an honest and reasonable belief in consent …
>
> For the sake of discussing this reform option, we will refer to the circumstances listed in the NSW Act s 61HJ. It can be observed that the effect of such a provision would operate slightly differently depending on the vitiating circumstance.
>
> Circumstances (a), (b), (c), and (d) refer simply to the fact which engages the vitiating effect (the person does not say or do anything to communicate consent, the person does not have capacity to consent, the person is unconscious or asleep).
>
> Circumstances (e) to (k) involve a causative element – the person's 'apparent consent' is vitiated because of the circumstance (they participated because of force, because of blackmail, because they were overborne by the abuse of a relationship of authority, trust or dependence, etc).
>
> In relation to circumstance (a), we discussed above how the adoption of this 'communicative element' of consent has a correlative demand on mistake of fact. If non-consent is established where the complainant did not communicate consent, an accused cannot have an honest and reasonable belief that the complainant so communicated their consent where it is proven they knew the complainant did not say or do anything to communicate consent. In terms of what the State is required to prove to negate mistake of fact, it would be a complementary 'shortcut'.
>
> This is particularly so where the accused does not make any statement to police and does not give evidence: the State may more directly be able to prove that, in light of what the complainant said or did, the only available inference is that the accused knew they had not said or done anything to communicate consent. The provision would then be engaged to cut off any consideration of whether it was nevertheless reasonable for the accused to have formed a mistaken belief as to consent.

As to the circumstances in (b), (c) and (d), the proposed provision would operate in a straightforward manner. If the State can prove the accused knew the complainant:

- did not have capacity to consent; or
- was so affected by alcohol or another drug as to be incapable of consenting; or
- was unconscious or asleep;

then it has negated mistake of fact.

That is not to say it would be easy to prove the accused's knowledge. We have referred to the difficulties in proving beyond reasonable doubt that an accused knew the complainant was so affected by alcohol that they were incapable of consenting. The same difficulties may present in cases of general incapacity, however the accused's knowledge of vitiating circumstances would typically be pursued in cross-examination.

In respect of circumstances (e) to (k), the provision would not mean the State has negated mistake of fact if it has established the factual basis for the circumstance (physical force, the abuse of a relationship of authority etc), or further, that the accused knew of that fact. It would be necessary for the State to prove that the accused knew the circumstance had a vitiating effect on the complainant: that the accused knew it caused them to participate.[98]

The Commission's view

5.117. The Commission recommends that the *Code* specify that, as a matter of law, an accused did not have a mistaken belief in consent if they knew of the existence of one of the listed circumstances in which there is no consent (including that the complainant had not said or done anything to communicate consent), or they believed that one of those circumstances existed. We consider that such a provision is necessary to ensure that the mistake of fact defence does not undermine the reforms to the law of consent we recommend in Chapter 4. For example, it will prevent an accused from being able to argue that although they knew the complainant was asleep, they nonetheless honestly and reasonably believed they were consenting.

5.118. We consider this provision to be a key component of the affirmative model of consent we recommend in this Report. Under that model, the *Code* will provide that a person does not consent if they do not say or do anything to communicative consent, and that they must freely and voluntarily agree to the relevant sexual activity.[99] This provision will make it clear that an accused did not have a mistaken belief in consent if they knew that the complainant had not said or done anything to communicate consent, or if they knew that consent had been communicated in circumstances where the complainant's agreement was not free and voluntary.

5.119. We agree with the ODPP's analysis of the way in which this provision would operate. That is, where the relevant listed circumstance is constituted by an objective fact (for example, that the complainant was asleep), the accused will not be able to rely on the defence if the prosecution can prove the existence of the relevant fact, and that the accused knew of that

[98] Email Submission E19 (ODPP).

[99] Under our recommended model of affirmative consent, to successfully rely on the mistake of fact defence the accused will also generally need to have taken measures to ascertain consent: see below.

fact or believed it to be the case. For example, in the illustration provided, the prosecution would need to prove that:

- The complainant was asleep at the time of the relevant sexual activity; and
- The accused knew the complainant was asleep or believed that to be the case.

However, if the accused mistakenly believed the complainant was awake at the relevant time, they would be able to raise the mistake of fact defence.

5.120. By contrast, where the relevant listed circumstance includes subjective factors (for example, the complainant engaged in the sexual activity because they were mistaken about the identity of the other participant), the prosecution will also need to prove that the accused knew of the effect the circumstance had on the complainant. For example, in the illustration provided, the prosecution would need to prove that:

- The complainant was mistaken about the accused's identity;
- The accused knew that the complainant was mistaken about their identity or believed that to be the case; and
- The accused knew that the complainant was engaging in the relevant sexual activity because of that mistake or believed that to be the case.

5.121. We also agree with the ODPP that this provision is likely to:

> Expose specious reliance on evidence that could not rationally support an inference that the accused believed the complainant had communicated consent, such as evidence of where they were ('the location had that romantic atmosphere'), evidence of the accused's actions ('he called her 'pretty' and 'honey' and she did not chastise him'), and evidence of omissions of the complainant ('she did not call for help or complain when nearby security guards were talking to her').[100]

5.122. In the Discussion Paper we considered this issue in the context of the reasonableness requirement of the mistake of fact defence, asking whether the *Code* should provide that an accused's belief in consent was not reasonable if they knew of or believed in one of the listed circumstances.[101] We took this approach because the honesty of an accused's belief is a subjective matter, which would not be affected by their knowledge of a listed circumstance. We therefore considered that if the issue was to be addressed, it would be best addressed as part of the jury's assessment of the reasonableness of the accused's belief.

5.123. However, after consulting on this issue, we have formed the view that it is more appropriate for the *Code* to simply provide that the accused, as a matter of law, does not have a mistaken belief in consent in such circumstances. This is a logical consequence of the approach we have taken to consent in Chapter 4. In that Chapter we have recommended that the *Code* provide that a person does not, as a matter of law, consent in the listed circumstances. Consequently, if the accused knows that one of the listed circumstances existed, by definition they must know that there is no legal consent (and thus not have a mistaken belief in consent). While any belief the accused has about the complainant's agreement to participate in the relevant sexual activity would also be unreasonable in the circumstances, that is not the central issue: which is that the accused does not have a mistaken belief in consent as defined by the law.

[100] Email Submission E19 (ODPP).

[101] Discussion Paper Volume 1, [5.86]-[5.90].

Recommendation

25. The *Code* should provide that an accused did not have a mistaken belief in consent if they knew or believed in the existence of a circumstance included in the *Code's* list of circumstances in which there is no consent (including that the complainant had not said or done anything to communicate consent).

Should the *Code* specify that a belief is not reasonable if consent had not been communicated?

5.124. Another option for reform would be to provide that a mistaken belief in consent is not reasonable if there is no evidence that the complainant said or did something to indicate consent.[102] This approach 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'.[103]

5.125. This is very similar to the option for reform presented in the previous section, which (in part) provides that a mistaken belief in consent is not reasonable if the accused knew or believed that the complainant had not said or done anything to communicate consent. However, it does not focus on the accused's knowledge or belief concerning communication: its focus is solely on whether there is evidence that consent was communicated.

Stakeholders' views

5.126. Respondents to the online survey were generally supportive of this option for reform: 88% were in favour and just 6% were in opposition.

5.127. RASARA also indicated support for this option. It was of the view that such an approach would be particularly useful in circumstances where the complainant was intoxicated, and it recommended the enactment of a provision stating that a mistaken belief is not honest or reasonable if 'the complainant was in a state of intoxication and did not clearly and positively express his or her consent to each act'.[104] However, RASARA was of the view that 'a strong case could be made for adopting such a requirement across the board. This would assist clarity and avoid disputes about whether the complainant was intoxicated'.[105]

5.128. This issue was not addressed by other stakeholders in their submissions or in the consultations.

The Commission's view

5.129. The Commission does not recommend providing that a mistaken belief in consent is not reasonable if there is no evidence that the complainant said or did something to indicate consent. In light of the other recommendations we have made in this Report for implementing an affirmative model of consent, we view such a provision as unnecessary. These recommendations include providing that:

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[102] Ibid [5.82]-[5.85].
[103] *Criminal Code*, RSC 1985, c C-46 s273.2(c).
[104] Portal Submission P28 (RASARA).
[105] Ibid.

- The complainant did not consent if they did not say or do anything to communicate consent.
- A mistaken belief in consent is not reasonable if the accused knew or believed that the complainant had not said or done anything to communicate consent.
- A mistaken belief in consent is not reasonable if the accused had not said or done anything to find out whether the complainant had consented to the sexual activity.

5.130. We are also concerned that this approach could result in an accused being convicted in circumstances where they have a condition, such as a cognitive impairment, rendering them 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. We agree with the NSWLRC that this outcome would be unjust[106] and do not recommend adopting this approach.

Should the *Code* specify that a belief is not reasonable if it is based on certain assumptions?

5.131. Another option for reform would be for the *Code* to specify that an accused's belief in the complainant's consent is not reasonable if it is based solely on a general assumption about the circumstances in which people consent to sexual activity. 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.[107]

5.132. Alternatively, the *Code* 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.[108]

5.133. In the Discussion Paper we sought views on whether the *Code* should specify that a belief is not reasonable if it is based on such general or specific assumptions.[109]

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[106] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.129].

[107] *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.

[108] 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.

[109] Discussion Paper Volume 1, [5.77]-[5.81].

Stakeholders' views

5.134. Respondents to the online survey were strongly supportive of legislatively specifying that a belief is not reasonable if it is based on general or specific assumptions: 88% of respondents supported enacting a provision about general assumptions and 100% of respondents supported enacting a provision about specific assumptions.

5.135. By contrast, no explicit support was given to this proposal in the written submissions: this option for reform was not addressed by any stakeholders.

The Commission's view

5.136. In this Chapter we recommend that the *Code* should provide that a mistaken belief in consent is not reasonable if:

- The accused knew or believed that the complainant had not said or done anything to communicate that they agree to the relevant sexual activity (see above).
- The accused did not say or do anything to find out whether the complainant consented to the sexual activity (see below).

5.137. If these recommendations are enacted, we do not think there is a need to legislatively specify that a mistaken belief is not reasonable if it is based on the types of general or specific assumptions outlined above. This is because the accused will be prohibited from solely relying on such assumptions to ascertain consent: they will need to have taken active measures to find out whether the complainant was consenting, and be able to point to something that the complainant said or did to communicate agreement to the specific sexual activity. Consequently, we do not recommend enacting such a provision.

5.138. On a related matter, we note that in Chapter 10 we recommend legislating various jury directions for sexual offence trials, including directions which inform the jury that:

- They must not reason that a person consented to a sexual activity just because the person wore particular clothing, had a particular appearance, drank alcohol or took any other drug, was present in a particular location or acted flirtatiously.
- A person does not consent to a sexual activity with another person only because they consented to a sexual activity of the same type, or a sexual activity of a different type, with that person or any other person at any time.
- They must not draw conclusions from the evidence based on a view that there is a typical or normal response to a non-consensual sexual activity.

Should the defence be excluded if the accused was reckless about consent?

5.139. 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.[110]

5.140. In Tasmania and Canada, the law excludes the mistake of fact defence where the accused's belief in consent was reckless:

[110] See, eg, *Banditt v The Queen* (2005) 224 CLR 262.

- 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'.[111]
- 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'.[112]

5.141. 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 is consenting, while at the same time being aware of the possibility that they may not be.

5.142. 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.

5.143. In the Discussion Paper we sought views on whether the *Code* should include a provision which specifies that an accused's belief in consent is not reasonable if it arose from the accused's recklessness.[113]

Stakeholders' views

5.144. Respondents to the online survey were generally supportive of specifying that an accused's belief in consent is not reasonable if it arose from the accused's recklessness: 88% were in favour and just 6% were in opposition.

5.145. Some support for this option was also expressed in the submissions and consultations. For example, Communities cited approvingly the submission of ANROWS to the Queensland review of consent laws, which recommended such an approach;[114] and in our consultations with WA Police, some members suggested that it could be helpful in cases where the complainant is intoxicated.[115]

5.146. In contrast, most members of the Legal Expert Group were not supportive of this option for reform. They maintained that:

- This reform is unnecessary, as 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.
- Requiring juries to consider the issue of recklessness is likely to confuse them.
- Recklessness is not a concept that currently forms part of the *Code's* criminal offences, and it would be unwise to introduce it in this context.

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111 *Criminal Code Act 1924* (Tas) s 14A(b).
112 *Criminal Code*, RSC 1985, c C-46 s 273.2(a)(ii).
113 Discussion Paper Volume 1, [5.91]-[5.96].
114 Email Submission E24 (Communities).
115 The consultees expressed their views as police officers. They did not speak on behalf of the WA Police.

The Commission's view

5.147. For each of the reasons expressed by the members of the Legal Expert Group, the Commission does not recommend specifying that an accused's belief in consent is not reasonable if it arose from the accused's recklessness. We consider such a reform to be unnecessary and likely to confuse the jury. We are also of the view that such an approach would be inappropriate, given the concept of recklessness is alien to the *Code*.

Should the accused be required to take measures to ascertain consent?

5.148. Although not explicitly addressed in legislation, under the current law in Western Australia 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 only required to do so if the circumstances are relevant to the accused's mistaken belief. There is also no statutory requirement placed on the accused to demonstrate that they did or said anything to ascertain consent.

5.149. 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.[116] For example, the ACT provides that, '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'.[117]

5.150. This reform, which would implement an affirmative model of consent, is based on the idea that all participants to a sexual activity should respect others' sexual autonomy, and they should all be equally active in reaching an agreement about their sexual activity:

> 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.[118]

5.151. 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.[119] 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 potentially grave consequences of engaging in a non-consensual sexual activity.

5.152. In the Discussion Paper we outlined various advantages and disadvantages of this approach and sought views on whether it should be adopted in Western Australia.[120]

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[116] *Crimes Act 1900* (NSW) s 61HK(2)-(5); *Criminal Code Act 1924* (Tas) s 14A; *Crimes Act 1900* (ACT) s 67(5); *Crimes Act 1958* (Vic) s 36A. See Discussion Paper Volume 1, Table 5.2 for a summary of the different approaches to this issue taken across Australia.

[117] *Crimes Act 1900* (ACT) s 67(5).

[118] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [2.24].

[119] J Monaghan and G Mason, 'Communicative Consent in New South Wales: Considering *Lazarus v R*' (2018) 43(2) *Alternative Law Journal* 96, 97.

[120] Discussion Paper Volume 1, [5.103]-[5.123].

Stakeholders' views

5.153. Most respondents to the online survey supported requiring the accused to have taken measures to ascertain consent: 84% were of the view that such a requirement should be introduced, with 16% opposing this proposal. This option for reform was also supported by numerous stakeholders in written submissions and consultations, including Communities, Full Stop Australia, NASASV, RASARA and WLSWA.

5.154. For example, Full Stop Australia submitted that:

> Without express legislation requiring an accused's knowledge to be based on positive steps they took to ascertain whether a person is consenting to sexual intercourse, an accused is likely to be able to continue to rely on problematic narratives of implied consent founded on misconceptions about women's behaviours. The cumulative effect of reasonable belief provisions without complete affirmative consent requirements is that an individual does not necessarily have to take steps to ascertain consent, which undermines the goal of implementing a communicative model and the principles underpinning free and voluntary consent, as it does not place the appropriate responsibility on perpetrators to ensure that consent is mutual and ongoing.[121]

5.155. A number of stakeholders were of the view that such a measure was needed in order to 'alter the direction of sexual violence trials to focus on whether the perpetrator said or did anything to ascertain consent, as opposed to putting the victim-survivors' actions on trial'.[122] It was seen to provide a useful mechanism by which to 'redistribute responsibility from victims towards alleged offenders, in relation to establishing whether sexual activity was consensual'.[123]

5.156. However, several stakeholders, including Legal Aid, the ODPP and Dr Dyer, did not support the enactment of such a requirement. While the ODPP recognised the 'legitimate aims pursued by the jurisdictions that have adopted this "affirmative" component',[124] it was of the view that:

> Such a provision imposes an obligation on an accused which affects their fundamental right to a presumption of innocence, without there yet being clear evidence that the encroachment is justified.
>
> It is an unfair standard to expect of people who, due to their age, immaturity, cognitive impairment or mental illness, did not recognise the need to do or say something to ascertain consent. This option would have a significant impact on the Children's Court jurisdiction. We acknowledge it may be possible to deal with this by exceptions.
>
> It would produce unfair outcomes in 'paradigm' cases of honest and reasonable belief, where it is not the accused who has made a fraudulent misrepresentation or induced a mistaken belief in the complainant. Mistake of fact must be available to an accused who is entirely innocent of a misrepresentation or inducement made by another person. Again, we acknowledge this could feasibly be dealt with by exceptions, but it demonstrates that such a provision corrupts the rationale behind s 24.
>
> We consider it unlikely to achieve significant change since, in an overwhelming majority of cases where consent is in issue, the accused asserts they did say or do

[121] Email Submission E6 (Full Stop Australia).
[122] Portal Submission P36 (WLSWA).
[123] Portal Submission P25 (Aleisha Cash).
[124] Email Submission E19 (ODPP).

> something to ascertain consent. As a result, our view is that a provision requiring the jury to consider what the accused did or said to ascertain consent will probably go a long way to achieving the outcome desired from this option.[125]

5.157. This approach was also not supported by Dr Dyer for various reasons. He contended that the main problem with such a provision is that:

> Morally innocent persons are liable to be convicted of very serious offences. For example, the accused with an intellectual disability might, because of that disability, fail to realise that it is necessary to ask by word or gesture whether her partner is consenting to sexual activity. This accused person's reduced ability to perceive events accurately might lead her to think that consent has already clearly been granted. If such a person were then to engage in non-consensual sexual activity, she would not be culpable and it would be wrong to convict her of a serious offence.[126]

5.158. Dr Dyer acknowledged that it may be possible to avoid this problem, by enacting a provision which allows the accused to prove that, at the time of the relevant sexual activity, they had a cognitive or mental health impairment that was a substantial cause of their failure to say or do anything.[127] However, he queried why they should be required to do so:

> Why should she have to prove this? It is true that the party who seeks to raise the defence of insanity must prove that defence. It is also true that Australian legislatures seem to be creating reverse onuses in criminal proceedings with increasing regularity. But the reverse onus for insanity has been persuasively criticised; the more serious the offence is, the harder a reverse onus is to justify; and it is not convincing to argue that the reverse onus … is justified by any 'tremendous difficulty' the Crown would encounter in disproving the matters referred to. … That is because, especially if independent experts were required to provide reports about whether accused persons really might have had a 'cognitive impairment' or 'mental health impairment' that was a substantial cause of their failure to seek 'affirmative consent', it would actually be quite difficult for an undeserving accused person to create a reasonable possibility that this was so. The idea that it is easy for an accused person to fake a 'mental health impairment' or 'cognitive impairment' is not accurate.
>
> Moreover, a provision like [this] creates the potential for a morally innocent person to be held liable for serious offending. Consider, for example, the person who might have had a 'cognitive impairment' or a 'mental health impairment' that was a substantial cause of his failure to 'seek affirmative consent'. If this accused were unable to prove this on the balance of probabilities, it might be that he would be convicted in spite of a reasonable doubt as to his guilt.[128]

5.159. Dr Dyer was additionally of the view that a provision which requires a person to take measures to ascertain consent is 'conservative and takes an unrealistic approach to how some morally unproblematic sexual activity occurs':[129]

> When sex occurs, the participants often perform a large number of acts. And a person is undoubtedly culpable if, during such activity, he notices, or ought to notice, that the other person is uncomfortable and continues with sexual activity even so. But, in the absence of such a sign of discomfort – which in many cases would be obvious – I do not accept that it is always blameworthy, during sexually penetrative activity, for a person to fail to 'do or say something' to ascertain whether her partner is consenting

[125] Ibid.
[126] Email Submission E18 (Dr Andrew Dyer).
[127] See, eg, *Crimes Act 1900* (NSW) s 61HK(3)-(4); *Crimes Act 1958* (Vic) s 36A.
[128] Email Submission E18 (Dr Andrew Dyer) [citations omitted].
[129] Ibid.

> to all acts that take place. Women and men frequently do not seek consent before performing certain such acts. And, in my view, such conduct will be acceptable more frequently than some would concede.[130]

5.160. A similar point was made by another stakeholder, who agreed with Kirby J in *DPP (NT) v WJI*[131] that:

> In a society where much sexual activity occurs consensually, it is not realistic to expect all sexual encounters to observe specific verbal formalities. In many cases … it does involve verbalising consent. However, … it is not realistic for the law to prescribe a particular verbal formula on activity which is so intimate, individual, and private. Instead, conduct and implication may adequately indicate a person's consent. In these situations, a person does not 'take steps' or follow a rigid process to ascertain consent: they ascertain consent by interpreting non-verbal indications.[132]

5.161. Like the ODPP, Dr Dyer was of the view that, rather than specifying that a mistaken belief is not honest and/or reasonable if the accused did not take measures to ascertain consent, the *Code* should instead specify that the jury must consider what the accused did or said when deciding whether their belief was reasonable.[133] He suggested that such a provision would be likely to achieve many of the same benefits, but 'without creating any of the injustice that those provisions are apt to produce (or the complexity that they do produce)'.[134]

The Commission's view

5.162. The Commission recommends that an accused be precluded from relying on the mistake of fact defence if they have not taken measures to ascertain the complainant's consent. We consider this to be an essential component of the affirmative model of consent that we recommend in this Report.

5.163. In our view, there are numerous advantages to enacting such a requirement:

- 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 to the accused whether or not the complainant consented, it should be for the 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 deprives people of an excuse for engaging in sexual activity without the consent of another participant where they have made no effort to ascertain consent.[136]

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130 Ibid. See also 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.

131 (2004) 219 CLR 43, 75.

132 Email Submission E13 (Confidential).

133 Email Submission E19 (ODPP).

134 Email Submission E18 (Dr Andrew Dyer).

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 NSWLRC, *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 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.

- It reflects 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 may 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 would further the harmonisation of consent laws, by aligning with the approach taken in NSW, Tasmania, the ACT and Victoria.

5.164. We note that this approach has also been recommended by the United Nations Division for the Advancement of Women in its *Handbook for Legislation on Violence Against Women*,[142] as well as by various Australian law reform bodies and committees.[143] It was also supported by most stakeholders in the submissions and consultations.

5.165. We acknowledge, however, that there was not universal support for this approach. In particular, it was considered to be unjust to impose this requirement on people who, due to their age, immaturity, cognitive impairment or mental illness, are unable to recognise the need to do or say something to ascertain consent. We share these concerns but hold the view that they can be appropriately addressed through a well-crafted exception to the requirement that the accused take measures to ascertain consent. We address this issue below.

5.166. Our recommendation does not require people to embark on a formal negotiation before engaging in a sexual activity or even require words to be spoken. Some stakeholders were concerned that requiring an accused to take measures to ascertain consent may not reflect the diversity of sexual practices in the community, which sometimes do not require explicit words to be spoken or actions to be taken to ascertain consent. While we understand these concerns, we note that the recommended position simply prevents an accused from being able to rely on the mistaken belief in consent defence to excuse non-consensual sexual activity – unless they have said or done something to ascertain consent. In circumstances where it is

[137] NSWLRC, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.55].

[138] QLRC, *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] R Burgin and A 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; VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.48].

[140] VLRC, *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] United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* (2009) 27.

[143] See, eg, Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 78; Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) Rec 43; VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 50.

not clear whether a participant consents, it is a relatively simple matter for a person to take such measures, and it is preferable to ensure that they do so than to risk engaging in non-consensual sexual conduct. Our recommended approach ensures that all participants share responsibility during sexual activity to ascertain consent before engaging in potentially harmful behaviour. This is both an appropriate and ethical model of sexual consent which should be adopted in Western Australia.

5.167. In the following sections we consider how the requirement to take measures to ascertain consent should be framed.

How should the requirement to take measures to ascertain consent be framed?

5.168. If (as recommended above) a requirement is to be introduced to take measures to ascertain consent before the mistaken belief in consent defence can be raised, it will be necessary to determine how that requirement should be framed. In this regard, there are four key questions that must be answered:

- What kind of measures should the accused be required to have taken?
- When should the accused be required to have taken those measures?
- How should the failure to take the relevant measures affect the mistake of fact defence?
- Should any allowance be made for people whose capacity to take those measures was impaired?

5.169. We address each of these issues in turn below.

What kind of measures should the accused be required to have taken?

5.170. The first issue to determine is precisely what measures the accused should be required to have taken in order to be able to raise the mistake of fact defence.

5.171. The *Criminal Code Act 1924* (Tas) (**Tasmanian Code**) requires the accused to have taken 'reasonable steps' to ascertain consent.[144] 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.[145] The concept of a 'step' was interpreted to require the taking of a positive act.[146] 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'.[147]

5.172. This broad definition of 'steps' was widely criticised as making the reference to steps redundant and thus undermining Parliament's objective.[148] Consequently, the NSWLRC recommended that the wording be amended to require the jury to consider what, if anything, the accused person said or did.[149] This approach has been adopted in the ACT, NSW and

[144] *Criminal Code Act 1924* (Tas) s 14A.
[145] *Crimes Act 1900* (NSW) s 61HE(3) (repealed).
[146] *R v Lazarus* [2017] NSWCCA 279 [147].
[147] Ibid.
[148] See NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.156]-[7.158].
[149] 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.

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.[150]

5.173. In the Discussion Paper we sought views on which approach should be taken.[151]

Stakeholders' views

5.174. Respondents to the online survey were split on this issue: 53% favoured requiring the accused to have taken reasonable steps to ascertain consent, and 47% favoured requiring the accused to have said or done something to find out if the complainant consented.

5.175. By contrast, stakeholders in the written submissions and consultations unanimously supported requiring the accused to say or do something to ascertain consent. For example, the ODPP considered that 'the formulation "say or do something" to "find out" if the complainant consented is the simplest and addresses the concern that a "step" may be satisfied by some internal evaluation of the complainant's conduct by the accused'.[152]

5.176. RASARA similarly recommended 'the wording "say or do anything" from the New South Wales, Australian Capital Territory and Victorian amendments. This avoids potentially contentious disputes about what counts as a "reasonable step"'.[153]

The Commission's view

5.177. The Commission recommends that the provision require the accused to say or do something to find out whether the complainant consented before they can rely on the mistake of fact defence. We agree with stakeholders that this is the simplest phrasing, and it overcomes concerns about the breadth of the term 'step'. It also furthers the goal of national harmonisation, as it is the approach currently taken in the ACT, NSW and Victoria.

When should the accused be required to have taken the relevant measures?

5.178. The second issue to determine is whether the *Code* should refer to the timing of the accused's measures to ascertain consent, and if so, what the provision should state. In this regard, the NSW and Victorian Acts both require the accused to have said or done something to ascertain consent 'within a reasonable time before or at the time' of the sexual activity.[154]

5.179. In the Discussion Paper we sought views on how the issue of timing should be addressed.[155]

Stakeholders' views

5.180. Only three stakeholders addressed this issue, and they each expressed different views:

- The ODPP did not consider it necessary for the provision to refer to the timing of the accused's measures. However, it submitted that if this issue were to be addressed, it should be provided that 'consent must be given at or immediately before the act consented to'.[156]

[150] *Crimes Act 1900* (ACT) s 67(5); *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1958* (Vic) s 36A.
[151] Discussion Paper Volume 1, [5.126]-[5.127].
[152] Email Submission E19 (ODPP).
[153] Portal Submission P28 (RASARA).
[154] *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1958* (Vic) s 36A.
[155] Discussion Paper Volume 1, [5.128].
[156] Email Submission E19 (ODPP).

- RASARA considered that 'some reference to timing is important, since it is commonly suggested in rape trials that words or actions by the complainant a significant period before the sexual interaction could give rise to a mistaken belief in consent'.[157] It suggested the provision refer to the accused taking measures to ascertain consent 'within a reasonable time before or at the time of each sexual act'.[158]
- Communities was opposed to specifying that the measures must be taken within a reasonable time before the activity. It asserted that if consent is to be defined as an ongoing agreement that can be withdrawn at any time, 'it is important to ensure that consent is given/sought at the time of the sexual activity, irrespective of a prior agreement of consent'.[159]

The Commission's view

5.181. The Commission recommends that the *Code* address the issue of timing. While we acknowledge that this may not be technically necessary, as the jury will already be able to take into account the timing of the accused's words or conduct, we agree with the NSWLRC that a specific reference to timing 'would highlight the importance of taking responsibility to ascertain consent at the time of each sexual activity'.[160]

5.182. While consent must be ascertained for each sexual activity, and may be withdrawn at any time, we do not believe that this means it is necessary to specify that the measures be taken at the exact time that the relevant sexual activity takes place. We believe there must be some leeway to account for the different ways in which consent is sought and expressed.

5.183. However, we also do not believe that it should be sufficient for the accused to rely on consent which was obtained on a prior occasion or significantly before the relevant sexual activity took place. It must have been obtained within reasonably close proximity to that activity.

5.184. We are of the view that the approach taken by the NSW and Victorian Acts, which require the accused to have said or done something to ascertain consent 'within a reasonable time before or at the time' of the sexual activity, strikes an appropriate balance in this regard. Consequently, we recommend the adoption of this approach. This will also have the benefit of advancing national harmonisation in the area.

How should the failure to take measures affect the mistake of fact defence?

5.185. The third issue to determine is 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 in the complainant's consent – or whether it should only be relevant to the jury's assessment of reasonableness.

5.186. There is a division in the way that Australian jurisdictions address this issue. Legislation in the ACT, NSW and Victoria specifies that the accused's belief in consent is not reasonable if they did not take measures to ascertain consent.[161] By contrast, the Tasmanian Code specifies that the accused's belief in consent is neither honest nor reasonable in such circumstances.[162]

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157 Portal Submission P28 (RASARA).
158 Ibid.
159 Email Submission E24 (Communities).
160 Ibid [7.167].
161 *Crimes Act 1900* (ACT) s 67(5); *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1958* (Vic) s 36A.
162 *Criminal Code Act 1924* (Tas) s 14A.

5.187. In the Discussion Paper we sought views on which approach should be taken.[163]

Stakeholders' views

5.188. Respondents to the online survey favoured limiting the relevance of the accused's failure to take measures to the assessment of reasonableness. This approach was supported by 50% of respondents, with 28% of respondents stating that it should be relevant to both honesty and reasonableness and 22% of respondents stating that they did not know.

5.189. The ODPP was also of the view that the accused's failure to take measures to ascertain consent should only have a bearing on the reasonableness of their belief. It reasoned that 'to extend it to the honesty of their belief is likely to confuse that part of the jury's assessment, which is otherwise a straightforward inquiry into the accused's subjective state of mind'.[164]

5.190. By contrast, RASARA recommended that the provision refer to both the honesty and reasonableness of the accused's belief:

> Honesty is a subjective notion, whereas reasonableness is objective. However, juries may sometimes have difficulty distinguishing these ideas. Our proposal seeks to maximise clarity by providing that a mistaken belief is 'not honest or reasonable' if it does not meet these conditions.[165]

5.191. Although RASARA advocated making the provision refer to both honesty and reasonableness, it acknowledged that 'it could be contended that it is more consistent with the existing law to place the focus on reasonableness'.[166]

The Commission's view

5.192. We recommend that the *Code* should specify that the accused's belief in consent is not reasonable if they did not take measures to ascertain consent. It should not specify that the accused's belief is not honest in such circumstances.

5.193. As noted above, the honesty component of the defence is about the accused's subjective experience: it is about what was actually going on in their mind at the time of the relevant sexual activity. While a person who took no measures to ascertain the complainant's consent may well not have formed an honest belief in consent, this will not necessarily be the case: it is possible that they did have such a belief. In our view it would be inappropriate for the law to suggest otherwise (as well as potentially being confusing for the jury).

5.194. By contrast, we consider it to be entirely appropriate for the law to provide that the accused's belief in consent is unreasonable where they have not taken measures to ascertain consent. For the reasons expressed above, we are of the view that people who engage in sexual activity should take mutual responsibility to ensure that the other participant consents to the activity. Where it is the case that that one party did not consent, the other party should not be excused from criminal liability unless they have said or done something to satisfy themselves that the other participant consents. If they fail to do so their belief in consent should be considered unreasonable.

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[163] Discussion Paper Volume 1, [5.125].
[164] Email Submission E19 (ODPP); Email Submission E18 (Dr Andrew Dyer).
[165] Portal Submission P28 (RASARA).
[166] Ibid.

Should allowance be made for people whose capacity to take measures is impaired?

5.195. The fourth issue to determine is whether the *Code* should make allowances for people whose capacity to take measures to ascertain consent is impaired in some way.

5.196. Different approaches have been taken to this issue by the jurisdictions which require the accused to take measures to ascertain consent before they can rely on the mistake of fact defence:

- The NSW and Victorian Acts both state that the requirement to ascertain consent 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.[167]
- Legislation in the ACT and Tasmania does not make any allowance for people with impaired capacity.

5.197. In the Discussion Paper we sought stakeholders' views on this issue.[168]

Stakeholders' views

5.198. Respondents to the online survey were strongly opposed to making allowances for people whose capacity to take measures to ascertain consent was impaired in some way: this option for reform was only supported by 16% of respondents, with 74% in opposition.

5.199. This approach was also opposed by RASARA, which stated:

> We submit that an exception of this kind is not necessary. … Creating an exception to the requirement to seek consent is not the most appropriate way to deal with cognitive differences in relation to a seriously harmful act such as rape. It is arguably inconsistent with the law in relation to other serious criminal offences. We would therefore recommend following Tasmania and the Australian Capital Territory in not creating an exception for cognitive impairment.[169]

5.200. RASARA did acknowledge, however, that 'the New South Wales and Victorian approach of including exceptions is also a reasonable response'.[170]

5.201. While the ODPP did not think the *Code* should require the accused to take measures to ascertain consent, it was of the view that if such a requirement was introduced, it should 'include exceptions for cognitively impaired people'.[171] NASASV and WLSWA also offered cautious support for this option, as long as any exceptions 'do not excuse alleged perpetrators from being held accountable'.[172] In this regard, NASASV recommended that:

- The exception be limited to cases where there is a proven cognitive, mental or other type of impairment that impacted the accused's ability to communicate and was a substantial cause of their not doing or saying anything to ascertain consent (as was recommended by the Queensland Taskforce).

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[167] *Crimes Act 1900* (NSW) s 61HK(3)-(4); *Crimes Act 1958* (Vic) s 36A.
[168] Discussion Paper Volume 1, [5.129].
[169] Portal Submission P28 (RASARA).
[170] Ibid.
[171] Email Submission E19 (ODPP).
[172] Email Submission E4 (National Association of Services Against Sexual Violence); Portal Submission P36 (WLSWA).

- There should be an expert assessment to determine the defendant's capacity to understand consent and whether their level of impairment was the substantial cause of their lack of communication about consent.[173]

The Commission's view

5.202. As noted above, the reasonableness requirement 'imports an objective standard' into the mistake of fact defence.[174] It prevents an accused person who genuinely believed the complainant was consenting – but should not have held that belief in the circumstances – from being able to rely on the defence. Such a person is considered to be blameworthy for failing to understand that the complainant did not consent.

5.203. By recommending that the *Code* specify that an accused's belief in consent is not reasonable if they did not say or do anything to find out whether the complainant was consenting, we are making it clear that a person who fails to take such measures is blameworthy and criminally liable for their actions. Given the relative ease with which it is possible to take measures to ascertain consent, and the potentially grave consequences that can follow a failure to do so, we consider this to be appropriate.

5.204. However, as noted by some stakeholders, the strict application of this requirement could lead to injustice. It could result in a person being held liable for failing to take measures to ascertain consent when, due to certain personal attributes or characteristics, they did not realise that they needed to do so. For example, they may have a severe cognitive impairment which makes them incapable of understanding that such measures are necessary. In our view, it is not appropriate to hold a person to account for failing to do something they did not comprehend.

5.205. Consequently, we recommend that allowance be made for people whose capacity to take measures to ascertain consent is impaired. However, we think that this exception should be strictly circumscribed. If a person wants to rely on the mistake of fact defence, we think it should ordinarily be necessary that they have taken measures to ascertain consent, with limited exceptions.

5.206. In our view, the NSW and Victorian Acts take an appropriate approach to this issue. They provide that the requirement to say or do something to find out if the complainant was consenting does not apply if the accused person had a cognitive impairment or mental illness that was a substantial cause of their failing to do so.[175] In our view, this approach properly delineates the group of people who should be exempted from the relevant requirement: people whose attributes or characteristics were a key reason for their failure to take measures to ascertain consent.

5.207. However, we recommend that the provision not refer to cognitive impairments and mental illnesses. Instead, it should refer to the same attributes and characteristics that may be taken into account in assessing the reasonableness of a mistaken belief in consent: intellectual disabilities, developmental disorders, neurological disorders, mental illnesses, brain injuries, dementia, physical disabilities and (where the offender is under 18) young age and immaturity. In our view, these are all attributes and characteristics beyond a person's control that may be a substantial cause of their not saying or doing anything to find out if the complainant consented.

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[173] Email Submission E4 (National Association of Services Against Sexual Violence), citing Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) Rec 43.

[174] *Aubertin v Western Australia* (2006) 33 WAR 87 [43].

[175] *Crimes Act 1900* (NSW) s 61HK(3)-(4); *Crimes Act 1958* (Vic) s 36A

5.208. In line with the NSW and Victorian Acts, we recommend that the onus should be on the accused to prove, on the balance of probabilities, that:

- At the time of the alleged offence they had a relevant attribute or characteristic; and
- The attribute or characteristic was a substantial cause of their not saying or doing anything to find out if the complainant consented.

5.209. We consider this to set an appropriately high threshold for exemption from the ordinary requirement to take measures to ascertain consent for the purposes of relying on the mistake of fact defence. That requirement is important and relatively easy to fulfil. Consequently, we are of the view that any accused wishing to be relieved of the need to have said or done something to ascertain consent should be required to demonstrate how their personal attributes or characteristics make that appropriate.

5.210. It is important to emphasise that this will be a situation-specific decision. The jury will need to determine whether, in the specific circumstances of the case, the relevant attribute or characteristic was a substantial cause of the accused not saying or doing anything to find out if the complainant was consenting. This will require the jury to consider matters such as:

- The nature of the relevant attribute or characteristic and how it was affecting the accused at the time of the relevant sexual activity; and
- The complainant's words and conduct and how the accused's understanding of those words and conduct was affected by the attribute or characteristic.

5.211. It is also important to emphasise that the mistake of fact defence will not necessarily succeed, even if the accused can demonstrate having a relevant attribute or characteristic that was a substantial cause of their not saying or doing anything to determine whether the complainant consented. The jury will still need to assess the honesty and reasonableness of the accused's mistaken belief. However, they will not be directed to conclude that, if the accused failed to take measures to ascertain consent, their belief is considered unreasonable by law.

Recommendations

26. The *Code* should provide that the accused's belief that the complainant consented to a sexual activity is not reasonable if the accused did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the complainant consented to that activity.

27. The *Code* should specify that the above provision does not apply if the accused can prove, on the balance of probabilities, that:

- **At the time of the relevant sexual activity, the accused had an intellectual disability, developmental disorder (including an autism spectrum disorder or foetal alcohol spectrum disorder), neurological disorder, mental illness, brain injury, dementia or physical disability, or the accused was under 18 and was young and immature; and**
- **That attribute or characteristic was a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to that activity.**

Should the jury be required to consider the measures the accused took?

5.212. In the previous sections we have recommended providing that an accused's belief in consent is not reasonable if they did not say or do anything to find out whether the complainant consented. To complement this provision, it would be possible for the *Code* also to specify that, when determining whether the accused's belief was reasonable, the jury should consider all the circumstances of the case, including what the accused said or did. This approach has been taken in NSW.[176]

5.213. In the Discussion Paper we sought views on whether such a provision should be enacted.[177]

Stakeholders' views

5.214. Where this issue was addressed in the written submissions, there was unanimous support for enacting a provision which requires the jury, when determining whether the accused's belief was reasonable, to consider all the circumstances of the case, including what the accused said or did.

The Commission's view

5.215. The Commission recommends enacting a provision that specifies that, when determining whether the accused's belief in consent was reasonable, the jury should consider all the circumstances of the case, including what the accused said or did.

5.216. In our view, such a provision provides an essential complement to our recommendation that the accused take measures to ascertain consent. It makes it clear to the jury that, in addition to considering whether the accused said or did anything to ascertain the complainant's consent, they also need to consider what they said or did (as well as any other relevant circumstances, including why the accused said or did these things). All of these matters can have a bearing on whether the accused's mistaken belief in consent was reasonable.

[176] *Sexual Offences Act 2003* (UK) s 1(2).

[177] Discussion Paper Volume 1, [5.130]-[5.141].

Recommendation

28. The *Code* should provide that when the jury considers all the relevant circumstances of the case to determine whether the accused's belief in consent was reasonable, it should consider what the accused said or did to find out whether the complainant consented to the relevant sexual activity.

Should the onus of proving the mistake of fact defence be reversed?

5.217. Under the current law, when the mistake of fact defence is raised at 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.[178]

5.218. In the Discussion Paper we suggested that it would be possible instead to place the burden for proving the defence onto the accused.[179] 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.

5.219. 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).

5.220. 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. It has been suggested that such a reform places an onus on the accused to demonstrate that they took such measures, but that 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 make 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.

5.221. Although the prosecution usually has the burden of disproving defences and excuses, there are other instances in the sexual offence context where this burden has been placed on the accused. 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.[180] The onus of proving the mistake of fact defence has not, however, been reversed in any Australian jurisdictions, nor in other common law countries such as England, Wales and Canada.

Stakeholders' views

5.222. Stakeholder views on reversing the onus of proof were mixed. Seventy-four per cent of respondents to the online survey supported reversing the onus, with 22% opposing the reform.

[178] *McPherson v Cairn* [1977] WAR 28.
[179] Discussion Paper Volume 1, [5.142]-[5.152].
[180] *Criminal Code Act Compilation Act 1913* (WA) s 321A(9).

There was also some support for this proposal in the submissions and consultations. For example, one stakeholder contended that:

> There is a lack of balance in the existing legislation and judicial system in relation to the onus of proof whereby the accused currently has a 'right to silence' and the onus is on the complainant to submit evidence to demonstrate non-consent. ... In terms of an honest and reasonable belief of consent, the burden of proof should be on the accused to prove that they had sufficient evidence such as knowledge and affirmation of consent from the complainant.[181]

5.223. A similar point was made by another stakeholder, who noted that 'it is relatively rare to encounter defendants who take the stand in their own defence'.[182] This means that it 'is simply not possible to test their assertions as to reasonableness and mistake of fact' as they cannot be cross-examined.[183] Reversing the onus of proof was seen to have the advantage of effectively requiring an accused who wishes to raise the defence to subject themselves to cross-examination.

5.224. Some members of the Community Expert Group also supported reversing the onus of proof; however, they did express concerns that this could result in the risk of wrongful convictions.

5.225. By contrast, most legal stakeholders opposed reversing the onus of proof for the mistake of fact defence. For example, members of the Legal Expert Group argued that reversing the onus of proof undermined fundamental legal principles and raised a real risk of injustice; and participants in the ALS consultation contended that it would severely burden Aboriginal and Torres Strait Islander accused, who may encounter difficulty in giving evidence should the onus be reversed. The ODPP also did not support the reform. While it was of the view that steps needed to be taken to address problems with the current defence, it favoured 'mechanisms which maintain the structural integrity of the *Code* and do not modify the onus of proof'.[184]

5.226. Dr Dyer argued that the onus should remain with the prosecution for reasons relating to procedural fairness. He submitted that:

> The more serious the offence is, the more difficult it is to justify a reverse onus – it is objectionable to allow a person to be convicted of a serious offence despite the existence of a reasonable doubt as to his guilt – and, as Lawton LJ noted in *R v Edwards*,[185] if it were acceptable to reverse the onus of proof simply because the accused was 'best placed to provide proof' of the relevant matter, 'anyone charged with doing an unlawful act with a specified intent would find himself having to prove his innocence'.[186]

The Commission's view

5.227. The Commission does not recommend reversing the onus of proof for the mistake of fact defence. We agree with members of the Legal Expert Group that this would increase the risk that a defendant might be wrongfully convicted, which we consider to be particularly problematic given the seriousness of sexual offences, both in terms of their penalties and the stigma that follows conviction.

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[181] Portal Submission P56 (Andrea Manno).
[182] Email Submission E11 (Confidential).
[183] Ibid.
[184] Email Submission E19 (ODPP).
[185] [1975] 1 QB 27, 35.
[186] Email Submission E18 (Dr Andrew Dyer).

5.228. We also note that the onus in this regard has not been reversed in any other Australian jurisdiction, and agree with the QLRC that 'justification for the reversal of such a fundamental and long-standing common law principle would need to be significant'.[187] We further agree with the QLRC's conclusion that there is no adequate justification for taking this step, and that 'the interests of justice are best served by maintaining the status quo'.[188] We consider the current approach 'strikes the right balance between the rights of the individual and the wider interests of the community'.[189]

[187] QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [7.59].
[188] Ibid [7.60].
[189] Ibid.

6. Sexual offences involving adult victims

Chapter overview

This Chapter makes recommendations for reforming the *Code's* sexual offences against adults.

Introduction

6.1. Our Terms of Reference require us to review all the offences within Chapter XXXI of the *Code* as well as the offences created by sections 186, 191 and 192 of *Code*.[1] We have listed these offences in Table 6.1.

[1] For a discussion of the history of these provisions, see Discussion Paper Volume 2, [2.1]-[2.5].

Code section	Offence Description
186	Occupier or owner allowing a young person to be on premises for unlawful carnal knowledge.
191	Procuring a person to be a prostitute.
192	Procuring a person to have unlawful carnal knowledge by threat, fraud or administering a drug.
320	Sexual offences against a child under 13.
321	Sexual offences against a child 13 to under 16.
321A	Persistent sexual conduct with a child under 16.
322	Sexual offences against a child of or over 16 to under 18, where the child is under the offender's care, supervision or authority.
323	Indecent assault.
324	Aggravated indecent assault.
325	Sexual penetration without consent.
326	Aggravated sexual penetration without consent.
327	Sexual coercion.
328	Aggravated sexual coercion.
329	Sexual offences against relatives.
330	Sexual offences against incapable persons.
331B	Sexual servitude.
331C	Conducting a business involving sexual servitude.
331D	Deceptive recruiting for commercial sexual servitude.

Table 6.1: Offences included in the Terms of Reference.

6.2. There are other sexual offences in the *Code* and in other legislation that are beyond the scope of what we can review under the Terms of Reference. These include: committing obscene or indecent acts in public,[2] child exploitation material (child pornography) offences,[3] intimate

[2] *Criminal Code Act Compilation Act 1913* (WA) ss 202-204.

[3] Ibid ss 217A-221B.

image offences,[4] electronic communication offences,[5] showing offensive material to children[6] and prostitution offences.[7] Accordingly, we do not discuss these offences in this Report.

6.3. In this Chapter we consider the ways in which the sexual offences against adults should be reformed. We start by examining the general penetrative and non-penetrative offences. We then look at the sexual offences against adult lineal relatives, the sexual servitude and deceptive recruiting offences, and the offences of procuring a person to become a prostitute and procuring sex by threats, intimidation, fraud or the administration of drugs. We conclude by considering whether any other sexual offences against adults should be added to the *Code*.

Penetrative sexual offences

6.4. The *Code* currently includes two general penetrative sexual offences:[8]

- Sexual penetration without consent.[9] This offence broadly applies to cases in which the accused sexually penetrated the complainant or physically caused the complainant to sexually penetrate the accused.
- Sexual coercion.[10] This offence broadly applies to cases in which the accused compelled the complainant to sexually penetrate a person, an animal or themselves.

6.5. The meaning of sexual penetration in the context of the *Code* is discussed later in this chapter.

6.6. There are aggravated versions of both of the general penetrative sexual offences.[11] We discuss aggravated versions of offences in Chapter 9.

6.7. The maximum penalty for the base version of both offences is 14 years' imprisonment, and for the aggravated version is 20 years' imprisonment. We discuss maximum penalties in Chapter 12.

6.8. Between January 2017 and October 2022, 1,067 people were charged with sexual penetration without consent in Western Australia, and 1,023 people were charged with aggravated sexual penetration without consent.[12] By contrast, between 2017 and 2022 only five charges of sexual coercion and 90 charges of aggravated sexual coercion were laid.

Elements and definitions

Sexual penetration without consent

6.9. Section 325(1) of the *Code* states:

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

6.10. This offence has two elements that the prosecution must prove beyond reasonable doubt:

- The accused sexually penetrated the complainant; and

4 Ibid ss 221BA-BF.
5 Ibid s 204B.
6 Ibid s 204A.
7 Ibid s 190; *Prostitution Act 2000* (WA).
8 The *Code* also has various specific penetrative sexual offences, such as sexual offences against children or relatives.
9 *Criminal Code Act Compilation Act 1913* (WA) s 325.
10 Ibid s 327.
11 Ibid ss 326, 328.
12 Discussion Paper Volume 2, Appendix 2.

- The complainant did not consent to the sexual penetration.

6.11. Unlike many other Australian jurisdictions,[13] in Western Australia the prosecution is not required to prove that the accused knew or believed that the victim did not consent or was reckless as to whether the victim consented. That knowledge may, however, be relevant to proof of any defences, such as the defence of mistake of fact.[14]

6.12. The *Code* defines the term 'to sexually penetrate' to mean:

> (a) to penetrate the vagina (which term includes the labia majora), the anus, or the urethra of any person with —
>
> (i) any part of the body of another person; or
>
> (ii) an object manipulated by another person,
>
> except where the penetration is carried out for proper medical purposes; or
>
> (b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the labia majora), the anus, or the urethra of the offender by part of the other person's body; or
>
> (c) to introduce any part of the penis of a person into the mouth of another person; or
>
> (d) to engage in cunnilingus or fellatio; or
>
> (e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).[15]

6.13. This definition is broad, covering cases where:

- The accused penetrates the complainant's vagina, anus or urethra with a body part or an object.
- The accused physically forces the complainant to penetrate the accused's vagina, anus or urethra with one of their body parts.
- The accused and the complainant engage in oral sex (cunnilingus or fellatio), regardless of which party performs which aspect of the sexual act.

6.14. However, the definition is not comprehensive: it does not cover all penetrative sexual activity. For example, it does not cover cases where:

- The accused, by non-physical means (such as a threat), compels the complainant to penetrate the accused with a body part or an object.
- The accused compels the complainant to penetrate themselves with a body part or an object.
- The accused compels the complainant to participate in an act of sexual penetration with a third party or an animal.

6.15. With some exceptions, these penetrative acts are addressed by the offence of sexual coercion, which is discussed below.

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[13] For a discussion of this issue, see Discussion Paper Volume 1, [2.16]-[2.20]; [5.6]-[5.7].

[14] The mistake of fact defence is address in Chapter 5.

[15] *Criminal Code Act Compilation Act 1913* (WA) s 319(1).

Sexual coercion

6.16. Section 327(1) of the *Code* states:

> A person who compels another person to engage in sexual behaviour is guilty of a crime and is liable to imprisonment for 14 years.

6.17. This offence has two elements that the prosecution must prove beyond reasonable doubt:

- The complainant engaged in sexual behaviour; and
- The accused compelled the complainant to engage in the sexual behaviour.

6.18. The *Code* provides that a person 'engages in sexual behaviour' if the person:

> (a) sexually penetrates any person; or
>
> (b) has carnal knowledge of an animal; or
>
> (c) penetrates the person's own vagina (which term includes the labia majora), anus, or urethra with any object or any part of the person's body for other than proper medical purposes.[16]

6.19. This definition includes the term sexual penetration, which we discuss above. Consequently, it applies whenever the complainant penetrates another person in any of ways mentioned.

6.20. This definition also includes the term carnal knowledge. At common law, carnal knowledge meant any degree of penetration of a woman by the penis.[17] Section 6 of the *Code* states:

> When the term carnal knowledge or the term carnal connection is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration. Penetration includes penetration of the anus of a female or male person.

6.21. The common law and section 6 definitions both relate to human sexual interactions. Notwithstanding that, the *Code* refers to carnal knowledge of an animal, which is somewhat at odds with those definitions. It seems likely that in the context of the *Code*, it relates to penile penetration of an animal, although that is not clear.

6.22. It is important to note that this offence is limited to cases where the complainant is compelled to penetrate another person, an animal or themselves. It does not extend to cases where the accused compels the complainant to be sexually penetrated by a third party or an animal.[18]

6.23. Section 327 does not explicitly require proof that the complainant did not consent to engaging in the sexual behaviour. However, the word 'compels' indicates that the behaviour in which the complainant was required to engage must have been non-consensual.

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16 Ibid s 319(4).

17 *R v Lines* (1844) 1 Carr & K 393; *R v Randell* (1991) 53 A Crim R 389; *Holland v The Queen* (1993) 117 ALR 193; *PGA v The Queen* [2012] HCA 21; (2012) 245 CLR 355.

18 Where the accused compels the complainant to be penetrated by a third party, the accused may be charged with sexual penetration without consent (s.325) on the basis that they counselled or procured the third party to commit the offence: see *Criminal Code Act Compilation Act 1913* (WA) s 7(d). Depending on the circumstances, they may also be charged with sexual servitude (s 331B) or procuring sex by threats, intimidation, fraud or the administration of drugs (s 192).

Should the *Code* differentiate between penetrative and non-penetrative sexual activity?

6.24. The *Code* currently differentiates between penetrative and non-penetrative acts of sexual violence against adults.[19] In Western Australia, the latter are referred to as indecent assaults.[20] They have a significantly lower maximum penalty,[21] which reflects the fact that they have historically been considered less serious in nature.

6.25. Not all jurisdictions maintain a distinction between penetrative and non-penetrative sexual activity. For example, in Canada penetrative and non-penetrative acts of sexual violence both fall within the scope of the offence of sexual assault.[22] Accordingly, one option for reform would be to remove the distinction between penetrative and non-penetrative sexual activity, merging the offences of sexual penetration without consent and indecent assault.

6.26. Various arguments have been made in favour of such an approach,[23] including:

- All sexual violence constitutes a violation of the victim-survivor's sexual autonomy, regardless of the degree of physical interference. It is thus all equally wrongful, and this should be recognised by the courts.
- Penetrative sexual activity is not necessarily more harmful than non-penetrative sexual activity, so there is no good reason for differentiating between them in the *Code*. The specific harmfulness of a particular activity is better addressed in the sentencing process.
- Focusing on the specific type of physical act committed (that is, penetrative vs non-penetrative) can lead courts to underemphasise the harm that all forms of sexual violence can cause to victim-survivors. Non-penetrative sexual acts of sexual violence can cause extremely grave emotional and psychological harm to victim-survivors.
- Drawing a distinction between penetrative and non-penetrative sexual activity requires arbitrary lines to be drawn. For example, depending on how 'penetration' is defined, it may result in different consequences for non-consensually touching a person's labia majora or their labia minora.
- Drawing a distinction between penetrative and non-penetrative sexual activity can lead to invasive, embarrassing and potentially traumatic questioning of complainants by police and lawyers to establish whether penetration occurred. This may be a particular problem in cases involving child complainants.

6.27. In the Discussion Paper we sought views on whether the distinction between penetrative and non-penetrative acts of sexual violence should be removed.

Stakeholders' views

6.28. There was some support in the submissions and consultations for removing the distinction between penetrative and non-penetrative sexual activity. For example, Dr Philip Glover noted

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19 As noted above, the *Code's* definition of 'sexual penetration' is not limited to acts which involve the penetration of the vagina, anus or urethra: it includes engaging in fellatio and cunnilingus, even if there is no penetration of the genitalia. For the purposes of this section, we consider these to be penetrative sexual acts. We consider the question of whether non-penetrative sexual acts should continue to be included in the definition of 'sexual penetration', and the way in which that term should be defined, below.

20 *Criminal Code Act Compilation Act 1913* (WA) s 323. We discuss the offence of indecent assault below.

21 The maximum penalty for sexual penetration without consent is 14 years' imprisonment; the maximum penalty for indecent assault is 5 years' imprisonment. We discuss maximum penalties in Chapter 12.

22 *Criminal Code*, RSC, 1985, c C-46 s 271 and definition of 'assault' in s 265.

23 See Discussion Paper Volume 2, [4.14]-[4.21].

that the harm caused by non-penetrative sexual activity involving the use of restraints or instruments (such as flagellation devices and electric shock devices) can be 'at least as traumatic and invasive' as penetrative sexual activity, and argued that any non-consensual interference with any of the body's erogenous zones should be labelled 'sexual assault'.[24] Other stakeholders agreed that non-penetrative sexual activity can cause significant harm, and were also concerned about the highly intrusive questioning that results from the current approach.[25]

6.29. Most stakeholders, however, opposed this option for reform. It was argued that penetrative acts of sexual violence constitute a distinctive type of attack which is 'more seriously intrusive than non-penetrative conduct'[26] and generally causes more harm. It was submitted that this should continue to be reflected in the *Code*.

6.30. It was acknowledged that some non-penetrative sexual activity is particularly grave and cause serious harm. However, it was contended that this can be appropriately reflected in the sentence imposed. Penalties can be 'adequately calibrated at sentencing to recognise the spectrum of wrongfulness and seriousness both within and across offence types'.[27]

6.31. In the consultation with the Legal Expert Group, it was accepted that complainants sometimes face invasive questioning about the nature of the alleged conduct. However, some members argued that this problem would not be overcome by removing the distinction between penetrative and non-penetrative sexual activity. It was suggested that police would still ask the same type of questions, in order to establish what had occurred and to obtain sufficient evidence to charge the accused; that the prosecution would still require explicit details to frame the indictment with sufficient specificity; and that defence counsel would still need to be provided with enough information about the alleged conduct to be able to defend the allegations.

6.32. In addition, some members of the Legal Expert Group saw the risk of invasive questioning to only be a potential problem in limited circumstances: where there is a dispute over whether the relevant conduct constituted penetration, where the case involved children, and where the child involved would be embarrassed or potentially traumatised by providing specific details about the alleged conduct. It was not considered to be a problem in most cases involving adults, as adults are usually able to clearly explain whether penetration occurred.

6.33. Members of the Legal Expert Group also maintained that removing the distinction would be a problem if the current mandatory sentencing provisions remain in place, as it could result in a significant penalty being imposed for a minor indecent assault.

6.34. In regional consultations concerns were also raised about jurisdiction. Under the current approach, charges of sexual penetration without consent must be heard in the District Court, whereas charges of indecent assault can be heard in the Magistrates' Court. If the distinction between penetrative and non-penetrative sexual activity was removed, this could either result in:

- All adult sexual offences being eligible to be heard in either the District Court or the Magistrates' Court. If this were the case, the range of matters that could be heard in the Magistrates' Court would be significantly expanded. Concerns were raised about resourcing impacts, including current capacity for police prosecutors to manage these

[24] Email Submission E23 (Dr Philip Glover).
[25] Consultation with District Court Judge, 23 April 2023; Portal Submission P49 (Communities).
[26] Email Submission E18 (Dr Andrew Dyer).
[27] Email Submission E19 (ODPP).

additional matters, which would increase in number and complexity; and for victim-survivors to be adequately supported in the Magistrates' Court.

- All adult sexual offences being heard in the District Court. This would substantially increase the workload of the District Court, as it would need to hear all the indecent assault matters that are currently heard in the Magistrates' Court.

The Commission's view

6.35. The Commission believes that all sexual violence constitutes a violation of the victim-survivor's sexual autonomy and is wrongful, regardless of whether penetration has occurred. We also believe that all forms of sexual violence may be seriously harmful, and that non-penetrative sexual activity can be just as detrimental to a victim-survivors' wellbeing as penetrative sexual activity.

6.36. However, the Commission does not recommend removing the distinction between penetrative and non-penetrative sexual activity (as defined in the *Code*).[28] We consider there to be something distinctive about penetrative acts of sexual violence that should continue to be reflected in the *Code's* offence definitions. Such acts typically constitute a greater violation of the victim-survivor's bodily integrity; they were seen by many stakeholders to be more serious, and they can be more harmful (although this will not always be the case). In those cases where a non-penetrative sexual activity is especially harmful, this can be adequately reflected in the penalty imposed. In this regard, we note that in Chapter 12 we recommend increasing the maximum penalty for the non-penetrative sexual offences.

6.37. A key factor in reaching our decision was the limited support shown in the submissions and consultations for this reform option. While a few stakeholders strongly argued for this approach, most people were of the view that there is a key distinction between penetrative and non-penetrative acts of sexual violence that should be maintained in the law. This is likely to be reflective of the broader community's views on this issue.

6.38. We acknowledge that differentiating between penetrative and non-penetrative sexual activity requires lines to be drawn, and can result in more invasive, embarrassing and potentially traumatic questioning of complainants. We are of the view, however, that the need for such questioning can be negated to some extent by refining the definition of 'sexual penetration'. We address this issue below.

Should the *Code* differentiate between different forms of penetration?

6.39. While the *Code* currently differentiates between penetrative and non-penetrative acts of sexual violence, it does not differentiate between forms of penetration (for example, penile penetration, oral penetration and digital penetration).

6.40. In the Discussion Paper we asked whether the *Code* should differentiate between forms of penetration.[29] For example, separate offences of penile and non-penile penetration without consent could be enacted.

[28] As noted above, the *Code* includes some non-penetrative acts within its definition of sexual penetration. As discussed below, we recommend that it should continue to do so.

[29] Discussion Paper Volume 2, [4.22]-[4.25].

Stakeholders' views

6.41. There was very little support in the submissions and consultations for differentiating between forms of penetration. Only Legal Aid endorsed this approach, arguing that the distinction between penile and non-penile penetration 'is important because penile sexual assault may be considered to carry more risks to the victim than non-penile penetration, such as risk of disease transmission and pregnancy'.[30]

6.42. By contrast, all other stakeholders who addressed this issue were of the view that the nature of the penetration is unimportant: what matters is simply whether or not there was an act of penetration. For example, Communities submitted that 'all acts of non-consensual sexual penetration, whether penile or non-penile, are similarly severe violations of a person's sexual autonomy and dignity and should be understood as conceptually and practically the same in terms of nature and impact of violation'.[31]

The Commission's view

6.43. The Commission does not recommend differentiating between forms of penetration. We agree with Communities that penile and non-penile penetration constitute equally serious violations of the complainant's sexual autonomy and bodily integrity and may be equally harmful. We acknowledge that an offence constituted by penile penetration may, in some circumstances, be more serious than other types of sexual penetration because of the factors raised by Legal Aid. We are of the view that the wrongfulness and seriousness of an offence should be determined by all of the circumstances of the case, not by reference to the particular form of penetration.

Should the boundaries between the penetrative offences be amended?

6.44. The *Code* currently includes two penetrative sexual offences: sexual penetration without consent and sexual coercion.[32] These offences largely capture different forms of sexual violence. Sexual penetration without consent applies to cases in which the accused:

- Sexually penetrated the complainant with a body part or an object; or
- Physically caused the complainant to sexually penetrate the accused with a part of the complainant's body.

6.45. By contrast, sexual coercion applies to cases in which the accused:

- Compelled the complainant to sexually penetrate a person;
- Compelled the complainant to penetrate an animal with their penis;[33] or
- Compelled the complainant to penetrate themselves.

6.46. In the Discussion Paper we noted that there is an overlap between these two offences: both cover cases in which the accused physically forces the complainant to penetrate the accused's vagina, anus or urethra with a part of the complainant's body. This overlap arises because:

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30 Portal Submission P41 (Legal Aid).

31 Email Submission E24 (Communities).

32 *Criminal Code Act Compilation Act 1913* (WA) ss 325, 327.

33 As noted above, the *Code* refers to 'carnal knowledge of an animal'. While it is unclear precisely what this phrase means, it seeems likely that it requires penile penetration of an animal.

- 'Sexual penetration' is defined to include 'to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the *labia majora*), the anus, or the urethra of the offender by part of the other person's body'.[34]
- To 'engage in sexual behaviour' is defined to include circumstances in which the complainant 'sexually penetrates any person'. This does not appear to be limited to people other than the accused.[35]

6.47. We suggested that there were two main ways in which this overlap could be addressed:

- The *Code* could be amended to provide that the offence of sexual coercion does not apply where the accused manipulates a part of the complainant's body to cause it to penetrate the accused. This would mean that such conduct would solely be treated as a form of sexual penetration without consent.
- The aspect of the definition of 'to sexually penetrate' which refers to the manipulation of the complainant's body to cause penetration of the accused could be repealed. This would mean that such conduct would solely be treated as a form of sexual coercion.

6.48. We sought views on whether there is a need to address this potential overlap, and if so, how it should be addressed. We also sought views on whether the offence of sexual coercion should be amended to make it clear that the sexual behaviour must have been non-consensual, or whether the penetrative offences should be reformed in any other way.

Stakeholders' views

6.49. Views were divided on the need to address the overlap between the penetrative offences and, if the overlap is to be addressed, the best way in which to address it. For example:

- Legal Aid and the ODPP did not think the issue needed to be addressed. While the ODPP noted that cases in which the accused physically forces the complainant to penetrate the accused's vagina, anus or urethra with a part of the complainant's body are not unlikely to arise, it did not consider this to be 'a problem that requires a solution'.[36]
- Communities suggested amending the *Code* to provide that the offence of sexual coercion does not apply in such circumstances.
- Dr Glover suggested limiting the definition of sexual penetration to cases in which the accused penetrated the complainant themselves. He was of the view that cases in which the accused compelled the complainant to penetrate the accused are conceptually different from cases in which the accused penetrates the complainant and should be labelled sexual coercion.

6.50. While the ODPP did not think this issue needed to be addressed, it was of the view that if it were to be addressed, amending the *Code* to provide that the offence of sexual coercion does not apply in such circumstances is 'vastly preferable' to amending the definition of sexual penetration.[37] This is because:

> The paragraph (b) definition of 'to sexually penetrate' in s 319 is primarily directed at female accused. To repeal that paragraph, and charge female accused with sexual coercion instead of sexual penetration without consent, would be to create a gendered distinction that doesn't presently exist. It would falsely imply that females

[34] *Criminal Code Act Compilation Act 1913* (WA) s 319(1).
[35] Ibid s 319(4).
[36] Email Submission E19 (ODPP).
[37] Ibid.

> can only (vaginally) sexually offend by 'compelling' another, whereas other genders can offend by penetrating without consent.[38]

6.51. Although the ODPP considered this to be the 'least worst' way of addressing this issue (if it is to be addressed), it suggested that it 'would not seem to be sensible to distinguish the accused who manipulates part of the complainant's body to penetrate the accused from the accused who manipulates part of the complainant's body to penetrate themselves (the complainant)'.[39]

6.52. In addressing this issue, the ODPP identified what it considered to be another 'more significant' overlap between the two penetrative offences:

> An accused who compels a complainant to fellate their penis has committed sexual penetration without consent, by introducing their penis into the complainant's mouth. They have also compelled the complainant to engage in sexual behaviour by engaging in fellatio (sexually penetrating the accused).[40]

6.53. Once again, however, the ODPP did not think it necessary to address this overlap. It was of the view that 'the appropriate charge will be fact-dependent, and there is no observable confusion, presently, about which charge is appropriate in any given case'.[41]

6.54. The ODPP did, however, think that it was worth addressing a gap in the current scheme, which appears to limit sexual coercion involving animals to penile penetration of the animal. It was of the view that the offence of sexual coercion should be extended to penetrating the animal or having the animal penetrate a person in any way that would be sexual penetration with a person (as is the case in Victoria). This would 'ensure that forcing a person to participate in a sexual act with an animal which does not involve penile penetration could be prosecuted' as a penetrative sexual offence.[42]

6.55. There was also widespread support for amending the sexual coercion offence to make it clear that the sexual behaviour must have been non-consensual and that the *Code's* consent provisions apply to this offence.

The Commission's view

6.56. In the Commission's view, the penetrative offences should be defined in a way that makes it clear whether the appropriate charge should be sexual penetration without consent or sexual coercion. At present, this is not the case. It is unclear which charge should be used when it is alleged that the accused:

- Physically forced the complainant to penetrate the accused's vagina, anus or urethra with a part of the complainant's body;
- Compelled the complainant to fellate the accused's penis; or
- Compelled the complainant to perform cunnilingus on the accused.

6.57. While the ODPP may be correct that there is currently no observable confusion about which charge is appropriate, it would be preferable to avoid the possibility of any confusion by defining the offences in a way which does not overlap.

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38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.

6.58. The Commission is also of the view that the penetrative sexual offences should cover all circumstances in which a person is non-consensually sexually penetrated or caused to sexually penetrate another person, an animal or themselves. This is not currently the case. For example, the following acts do not readily fall within the scope of either offence:

- The accused substantially causes the complainant to fellate an animal or be penetrated by an animal.
- The accused substantially causes the complainant to be penetrated by a third party.[43]

6.59. Additionally, we find the current division between the two offences – which requires consideration to be given to whether the complainant is penetrating or being penetrated, whether the penetration involves a body part or an object, and the means used to compel the penetration – to be somewhat arbitrary and confusing. For example, it is not clear why:

- An accused who by fraud deceives the complainant into being penetrated by the accused should be convicted of sexual penetration without consent, while an accused who deceives the complainant into penetrating the accused should be convicted of sexual coercion.
- An accused who uses physical means to compel the complainant to penetrate them with a body part should be convicted of sexual penetration without consent, while an accused who uses physical means to compel the complainant to penetrate them with an object should be convicted of sexual coercion.
- An accused who uses physical means to compel the complainant to penetrate them with a body part should be convicted of sexual penetration without consent, while an accused who uses non-physical means (such as threats) to compel the complainant to penetrate them with a body part should be convicted of sexual coercion.

6.60. In our view, it would be preferable to redefine the boundary between the penetrative offences in the following way:

- The offence of sexual penetration without consent should cover all cases in which the accused and the complainant personally engage in a non-consensual act of sexual penetration, regardless of which party penetrates the other.
- The offence of sexual coercion should cover all cases in which the accused does not personally engage in the act of sexual penetration, but causes the complainant to engage in a non-consensual act of sexual penetration with a third party, an animal or themselves.

6.61. The offence of sexual coercion should not be restricted to cases in which the accused 'compelled' the act of sexual penetration: it should apply whenever the accused 'caused' the complainant to engage in a non-consensual act of penetration. It should be made clear that the accused does not need to have been the sole cause of the complainant engaging in the act – it will be sufficient if they were a substantial cause of the complainant's conduct. It should also be made clear that the *Code's* consent provisions apply in this context.

6.62. The use of the word compels carries an implication of physical force or pressure. By contrast, the word cause does not have such an implication, as a person can cause something by using physical or non-physical conduct. The preferred terminology will include 'conduct that is aimed at dominating and controlling another'.[44] Thus it will include what is considered to be coercive

[43] Depending on the circumstances, it may be possible to charge the accused with sexual penetration without consent (s.325) on the basis that they counselled or procured the third party to commit the offence: see *Criminal Code Act Compilation Act 1913* (WA) s 7(d). However, this will not always be possible. For example, the third party may have been unaware that the accused compelled the complainant to engage in the act of sexual penetration with them.

[44] ANROWS, *Defining and Responding to Coercive Control* (Policy Brief, ANROWS, January 2021) 1.

control but it will not require the prosecution to prove that the accused intended to dominate and control. The prosecution will only be required to prove that the accused's conduct caused the complainant to engage in non-consensual sexual penetration in which the accused is not personally a participant. The accused's conduct must negate the complainant's freedom to choose whether or not to participate in the relevant sexual activity.

6.63. The penalty for both offences should be the same. In our view, it is just as wrongful for the accused to compel the complainant to engage in a non-consensual act of sexual penetration with a third party, an animal or themselves as it is for the accused to personally engage in a non-consensual act of sexual penetration with the complainant. There should also continue to be aggravated versions of both offences. We discuss aggravated offences in Chapter 9.

6.64. Table 6.2 below summarises the ways in which various acts are currently categorised, and shows how they would be categorised under the revised approach.

Non-consensual act of sexual penetration	Current offence	Recommended offence
The accused penetrates the complainant with a body part or an object	Sexual penetration without consent	Sexual penetration without consent
The accused, by physical manipulation, substantially causes the complainant to penetrate the accused with the complainant's body part	Sexual penetration without consent or sexual coercion	Sexual penetration without consent
The accused, by physical manipulation, substantially causes the complainant to penetrate the accused with an object	Sexual coercion	Sexual penetration without consent
The accused, by non-physical means (eg, threats or deceit), substantially causes the complainant to penetrate the accused with the complainant's body part or an object	Possibly sexual coercion*	Sexual penetration without consent
The accused performs an act of non-penetrative oral sex (ie, fellatio or cunnilingus) on the complainant	Sexual penetration without consent	Sexual penetration without consent
The accused substantially causes the complainant to perform an act of non-penetrative oral sex on the accused	Sexual penetration without consent or possibly sexual coercion*	Sexual penetration without consent
The accused substantially causes the complainant to penetrate themselves with one of their own body parts or an object	Possibly sexual coercion*	Sexual coercion
The accused substantially causes the complainant to sexually penetrate a third party	Possibly sexual coercion*	Sexual coercion
The accused substantially causes a third party to sexually penetrate the complainant	Possibly sexual penetration without consent**	Sexual coercion
The accused substantially causes the complainant to penetrate an animal	Possibly sexual coercion*	Sexual coercion
The accused substantially causes an animal to penetrate the complainant	Not covered***	Sexual coercion
The accused substantially causes the complainant to perform non-penetrative oral sex on an animal	Not covered	Sexual coercion
The accused substantially causes an animal to perform non-penetrative oral sex on the complainant	Not covered	Sexual coercion

Table 6.2: Classification of non-consensual penetrative acts

* This will depend on the means used to cause the penetration (eg, threats or deceit) and whether that conduct is considered to be a form of compulsion (see below). Acts which are not covered by the sexual coercion offence may be covered by a lesser offence, such as procuring a person to have unlawful carnal knowledge by fraud: ibid s 192.

** This will depend on whether it is possible to rely on the parties provisions in sections 7-9 of the *Code* (see below).

*** This is based on the assumption that the phrase 'has carnal knowledge of an animal' in the *Code* s.319 is limited to penetrating an animal. If it also includes being penetrated by an animal, this will possibly be sexual coercion (depending on the means used to cause the complainant to be penetrated by the animal).

6.65. This approach has seven key advantages over the current scheme. First, it is more conceptually coherent. It differentiates acts in which the accused personally and physically participated in the act of penetration from those in which they did not. This distinction is important to identify, as it affects the matters which the prosecution will need to prove:

- Where the accused personally participated, the prosecution will simply need to prove that the act of sexual penetration took place and that the complainant did not consent.
- Where the accused did not personally participate, the prosecution will also need to prove that the accused caused the complainant to engage in the act of sexual penetration with the third party, the animal or themselves.

6.66. By contrast, we do not consider there to be any good reason for the law's current approach of differentiating between acts of non-consensual penetration in which the complainant penetrates the accused or is penetrated by the accused; a body part or an object is used; or the accused compels the act by physical or non-physical means. In all of these cases there has been an equal violation of the complainant's sexual autonomy and bodily integrity.

6.67. Secondly, this revised approach avoids the problem of overlap that exists in the current law. This is because the categories are mutually exclusive: an act of penetration either involves the accused personally (in which case the appropriate offence is sexual penetration without consent) or it does not (in which case the appropriate offence is sexual coercion).

6.68. Thirdly, it makes it much simpler to determine the appropriate offence to charge. Rather than needing to consider numerous matters, such as whether the complainant was being penetrated or committing the act of penetration, whether the penetration involved a body part or an object, and whether the complainant's consent was negated by physical force or any other means, it will simply be necessary to ascertain which parties participated in the act of sexual penetration. If it was the accused and the complainant themselves, the appropriate offence would be sexual penetration without consent; if the accused did not directly participate in the act of penetration, the appropriate offence would be sexual coercion.

6.69. Fourthly, the revised approach addresses gaps in the current law. For example, the offence of sexual coercion would cover cases in which the accused compels the complainant to be penetrated by an animal or a third party. In this regard, we acknowledge that where the accused compels the complainant to be penetrated by a third party it may also be possible, depending on the circumstances, to charge them with sexual penetration without consent, relying on the parties provisions in sections 7-9 of the *Code*. However, we are of the view that such conduct is more appropriately addressed as a case of sexual coercion. That label more accurately reflects the gravamen of the conduct, which is that the accused coerced the complainant into being sexually penetrated by another person. In addition, we note that the parties provisions are complex and often difficult to rely upon. Consequently, we consider it preferable for the prosecution to be able to directly charge the accused with sexual coercion in such cases.[45]

6.70. Fifthly, it addresses the gender disparity that exists under the current law. This disparity arises because a female accused who, by non-physical means (for example, threats), compels a male complainant to engage in an act of penile-vaginal penetration will be guilty of sexual coercion, while a male accused who does the same to a female complainant will be guilty of

[45] While the prosecution will be able to choose which charge to rely on, we do not consider this to be a problem, as the maximum penalty for both offences is the same. Given that it is likely to be easier to prove a charge of sexual coercion than to rely on the parties provisions to prove a charge of sexual penetration without consent, we anticipate that in these circumstances the prosecution would generally use the sexual coercion offence.

sexual penetration without consent. This will not be the case under the revised approach: in both cases the appropriate charge would be sexual penetration without consent.

6.71. Sixthly, the revised approach makes it clear that the offence of sexual coercion involves non-consensual conduct, and that the *Code's* consent provisions apply.

6.72. Finally, under the current law it is not clear whether an accused who deceives the complainant into penetrating a third party, an animal or themselves would be guilty of sexual coercion. This is because it is not clear whether they would (or should) be considered to have compelled the relevant conduct.[46] By contrast, the situation would be clear under the revised approach: the accused will be guilty of the offence if the deception negated the complainant's consent (in accordance with the *Code's* consent provisions) and that deception was a substantial cause of the complainant engaging in the act of sexual penetration with a third party, an animal or themselves.

Recommendations

29. There should be two penetrative sexual offences: sexual penetration without consent and coerced sexual penetration.

30. The boundaries between the two penetrative sexual offences should be clarified so that:

- **The offence of sexual penetration without consent applies to all cases in which the accused and the complainant personally engage in a non-consensual act of sexual penetration, regardless of which party penetrates the other.**
- **The offence of coerced sexual penetration applies to all cases in which the accused is a substantial cause of the complainant engaging in a non-consensual act of sexual penetration with a third party, an animal or themselves, regardless of which party penetrates the other.**

31. It should be made clear that the *Code's* consent provisions apply to the offence of coerced sexual penetration.

32. There should be aggravated versions of the penetrative sexual offences.

Should the definition of sexual penetration be amended?

6.73. In the Discussion Paper we raised various issues concerning the ways in which the terms 'to sexually penetrate' and 'to engage in sexual behaviour' are currently defined in the *Code*.[47] For example, we noted that:

- The term 'to sexually penetrate' is not limited to acts which involve the penetration of the vagina, anus or urethra. It includes engaging in fellatio (oral stimulation of the male genitals) and cunnilingus (oral stimulation of the female genitals) even if there is no penetration of the genitalia.

[46] Depending on the circumstances, the accused may be convicted of procuring a person to have unlawful carnal knowledge by fraud: *Criminal Code Act Compilation Act 1913* (WA) s 192. The penalty for this offence is significantly lower than the penalty for sexual coercion: 2 years' imprisonment.

[47] Discussion Paper Volume 2, Chapter 3.

- The *Code* definition of 'vagina', which includes the labia majora, is anatomically inaccurate. The labia majora is part of the vulva (the female external genitals), whereas the vagina is 'the passage leading from the uterus to the vulva'.[48] While the Macquarie Dictionary acknowledges that in non-technical use the word vagina is used to refer to the female external genitalia (that is, the vulva),[49] in this regard the definition is incomplete. In addition to the labia majora, the vulva includes the mons pubis, labia minora, clitoris, urethra, vulva vestibule, vestibular bulbs, Bartholin's glands, Skene's glands and vaginal opening.[50] It is not clear whether all of these parts of the vulva are also included in the *Code's* definition of vagina.
- It is unclear whether references to the vagina, penis and urethra are limited to the body parts that a person is born with, or whether they extend to surgically constructed or altered body parts.
- While the definition of sexual penetration includes oral stimulation of the male and female genitals (fellatio and cunnilingus) it does not include oral stimulation of the anus (analingus).
- It is unclear precisely what is encompassed by the phrase 'has carnal knowledge of an animal', given that the concept of carnal knowledge traditionally refers to human sexual interactions.

6.74. We sought views on whether the definitions of the terms 'to sexually penetrate' or 'to engage in sexual behaviour' (or their associated components) should be amended in any way.

Stakeholders' views

Non-penetrative acts

6.75. Dr Glover argued that 'as a matter of conceptual logic' there was a problem with including non-penetrative sexual acts (such as non-penetrative fellatio) within the definition of sexual penetration.[51] He was of the view that the definition should be confined to penetrative acts.

6.76. By contrast, no other stakeholders expressed any concern with the fact that the definition of sexual penetration encompasses non-penetrative fellatio and cunnilingus.

Vagina

6.77. Although it was generally acknowledged that defining vagina to include the labia majora is anatomically inaccurate, views were divided on whether it is necessary to rectify this inaccuracy and, if it is to be addressed, how this should be done. For example:

- Legal Aid and the ODPP did not advocate for reform. The ODPP indicated that it did not have any difficulties with the current definition, given it is interpreted in a non-technical fashion.
- Dr Glover suggested deleting the reference to the labia majora, due to its anatomical inaccuracy. He also saw the inclusion of this definitional gloss as being inconsistent with the approach taken to the penis and anus, which are not explained in any way.

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48 Macquarie Dictionary (online) 'vagina'; *Holland v The Queen* (1993) 117 ALR 193, [11].

49 Ibid.

50 JD Nguyen and H Duong, 'Anatomy, Abdomen and Pelvis: Female External Genitalia', *StatPearls* (July 2022) <https://www.ncbi.nlm.nih.gov/books/NBK547703/>.

51 Email Submission E23 (Dr Philip Glover).

- Communities supported expanding the definition of vagina to 'include the vulva (labia majora and labia minora), the vaginal opening and the urethra opening'.[52]

Penis

6.78. The ODPP noted that it is unclear whether the term 'penis' in section 319(1)(c) includes the scrotum. While it expected that the courts would interpret penis in a non-technical manner to include the scrotum, it suggested that this should be made clear.

Surgically constructed or altered body parts

6.79. Stakeholders were generally supportive of including specific reference to surgically constructed or altered body parts in the *Code*. It was noted that such an approach has been adopted in other jurisdictions and may help protect trans people.

6.80. However, Dr Glover opposed this suggestion on the basis that it 'seems unthinkable that any court would distinguish between surgically reconstructed or altered body parts (particularly sex organs). The case being advanced for this seems driven more by activism than by any identified lacunae in the law'.[53] While the ODPP agreed that surgically constructed or altered body parts would already be covered, it had no opposition to making this clear in the *Code*.

Fellatio and cunnilingus

6.81. Some submissions noted that the *Code* does not currently define the terms fellatio or cunnilingus, and that this results in a lack of clarity. For example, it is not clear whether the term fellatio includes licking the penis.

6.82. To address this uncertainty, the ODPP suggested that these terms could be defined to mean 'oral stimulation of any part of the vagina or the male genitals'.[54] Dr Glover, however, cautioned against using the word 'stimulation', due to its association with the concepts of arousal or excitement. He suggested that if fellatio and cunnilingus continue to be included in the definition of sexual penetration, the words touch or assault by mouth be used instead.

Analingus

6.83. There was general support amongst stakeholders for expanding the definition of sexual penetration to include analingus. It was submitted that performing analingus without consent is as wrongful as performing fellatio or cunnilingus without consent, and that incorporating analingus into the definition of sexual penetration would align with 'evolving societal views regarding sexual activity'.[55] It was further contended that failing to expand the scope of sexual penetration in this way may lead to an unjustifiable 'disparity in outcomes and protections between homosexual and heterosexual members of society'.[56]

6.84. There was, however, limited opposition to this approach. For example, Dr Glover noted that penetrative analingus is already covered by the current definition, as it involves penetrating the anus with a part of the body (the tongue). As discussed above, he was of the view that the term 'sexual penetration' should be confined to penetrative acts, and so did not support extending it to include non-penetrative acts of analingus.

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52 Email Submission E24 (Communities).
53 Email Submission E23 (Dr Philip Glover).
54 Email Submission E19 (ODPP).
55 Email Submission E24 (Communities).
56 Email Submission E13 (Confidential).

Carnal knowledge

6.85. There was widespread support for replacing the term carnal knowledge with sexual penetration. The term was considered to be archaic, confusing and inappropriately gendered.

Slight penetration

6.86. Dr Glover suggested that any amendments to the *Code's* definitions 'should include expressly clarifying that penetration means penetration to the slightest degree'.[57]

The Commission's view

6.87. In the previous section we recommended that the boundaries between the offences of sexual penetration without consent and sexual coercion be redrawn. To facilitate our recommended reforms, it will be necessary to amend the *Code's* definitions of 'to sexually penetrate' and 'to engage in sexual behaviour'.

6.88. Underlying our recommendations in this regard is our view that non-consensual acts of sexual penetration are equally wrongful and harmful regardless of who is involved (for example, the accused or a third party), what role each participant plays (for example, penetrator or penetrated), what is used to perform the penetration (for example, a body part or an object), or how the complainant was caused to engage in the penetrative act (for example, by physical or non-physical means). We believe that this should be simply and clearly expressed in the *Code's* offence elements and the associated definitions.

6.89. In our view, the best way to achieve this objective is to:

- Provide that the offence of sexual penetration without consent applies where the accused 'engages in an act of sexual penetration' with the complainant without consent (rather than defining it in terms of one person sexually penetrating another).
- Provide that the offence of sexual coercion applies where the accused substantially causes the complainant to 'engage in an act of sexual penetration' with a third party, an animal or themselves without consent (rather than defining it in terms of engaging in sexual behaviour).
- Define the term 'to engage in an act of sexual penetration' broadly, to include all penetrative acts. This includes cases in which:
  - The act involves the accused, a third party, an animal or the complainant alone.
  - The act involves an object or a body part.
  - The relevant person is the penetrating or penetrated party.
- Remove the definitions of 'to sexually penetrate' and 'to engage in sexual behaviour' from the *Code* (as they will no longer be needed).

6.90. Determining the appropriate charge will be much simpler and clearer under this approach. It will no longer be necessary to consider what role each participant played, what was used to perform the penetration, how the complainant was caused to engage in the penetrative act, and how these matters fit with the overlapping and complex definitions of 'to sexually penetrate' and 'to engage in sexual behaviour'. Instead, it will simply be necessary to ascertain (i) whether the complainant engaged in a non-consensual act of penetration, in any capacity with anyone; and (ii) whether the accused personally participated in the act (sexual penetration

[57] Email Submission E23 (Dr Philip Glover).

without consent) or whether the act involved a third party, an animal or the complainant alone (sexual coercion).

6.91. This approach also addresses the gaps and uncertainties in the current scheme that we have outlined above. For example, it makes it clear that the offence of sexual coercion would apply where the accused causes the complainant to be penetrated by a third party or an animal. In addition, it avoids reference to the archaic, gendered concept of 'carnal knowledge'.

6.92. We recommend that the provision refer to the penetration, to any extent, of the genitalia or anus. This is the approach that is taken in the ACT, NSW and Tasmania.[58] It should be made clear that this extends to surgically constructed or altered genitalia.[59] To address some of the concerns raised by stakeholders, we are of the view that it would be useful to clarify the scope of the term genitalia. We recommend that it be defined to mean:

- Any area of the female genitalia inside the labia majora, or any similar part of an intersex person;
- Any part of the male genitalia, including the penis and the scrotum, or any similar part of an intersex person; and
- Any similar part of an animal.

6.93. Defining genitalia in this way avoids the anatomical inaccuracy of the current approach to vagina and clarifies that the term includes the scrotum. It also makes it clear that the definition applies to trans and intersex people, providing them with important legal protection.

6.94. We further recommend that the definition continue to include non-penetrative acts of oral sex. It is our view that such acts should be considered to be acts of sexual penetration, even though they do not technically involve penetration of the genitalia, for two main reasons:

- Non-consensual, non-penetrative acts of oral sex are just as wrongful, and potentially harmful, as non-consensual, penetrative sexual acts. They constitute an equally serious, highly intrusive invasion of a person's sexual autonomy and bodily integrity. This can clearly be seen to the case when comparing penetrative and non-penetrative forms of cunnilingus: it is difficult to see how cases in which the accused's tongue slightly entered the vagina are any different from cases in which the accused licked the complainant's genitalia, but the tongue did not penetrate the vagina to any extent.
- Including non-penetrative forms of oral sex within the definition of sexual penetration helps avoid the need for intrusive questioning to determine whether there was actual penetration of any part of the genitalia.

6.95. In this regard, we do not consider there to be any difference between fellatio, cunnilingus and analingus. We consider the non-consensual oral stimulation of the anus to be just as wrongful and harmful as the non-consensual oral stimulation of the genitalia, and recommend that they all be included in the definition of engaging in sexual penetration.

6.96. We do not, however, recommend that the term analingus be used in the *Code*. This term is not widely used and is not well-understood in the community. It would be preferable to use words that clearly outline the scope of the relevant conduct. In this regard, we are also of the view that the words fellatio and cunnilingus should be replaced with a description of the relevant conduct. We recommend that the definition should refer to the application of the

[58] This term is used in the ACT, NSW and Tasmania: see *Crimes Act 1900* (ACT) s 50(1)(a); *Crimes Act 1900* (NSW) s 61HA; *Criminal Code 1924* (Tas) s 2B(1)(b).

[59] See, eg, *Crimes Act 1900* (ACT) s 50(1)(a); *Crimes Act 1900* (NSW) s 61H(4); *Crimes Act 1958* (Vic) s 35(3).

mouth or tongue to the genitalia or anus, regardless of whether there is any penetration of the genitalia or anus.[60]

6.97. There are two aspects of this recommendation that it is worth noting. First, it avoids the problems that Dr Glover identified with the using the word stimulation, by instead referring to the application of the mouth or tongue to the relevant body parts. This would include kissing, licking or sucking those body parts. Secondly, it makes it clear that there does not need to be any penetration of the genitals or anus. This is important, given it will be part of the definition of engaging in an act of sexual penetration.

6.98. We also recommend that the definition makes it clear that 'to engage in an act of sexual penetration' includes continuing one of the listed acts. This will ensure that the offence provisions address cases in which the complainant originally consented to the relevant act of sexual penetration but later withdrew their consent.

6.99. Finally, it should be made clear that penetration conducted solely for proper medical, hygienic or veterinary purposes, or otherwise authorised by law, is not included in the scope of the definition.

[60] Similar wording is used in the NSW definition of sexual intercourse, which includes 'the application of the mouth or tongue to the female genitalia': Crimes Act 1900 (NSW) s 61HA(1).

Recommendations

33. **The offence of sexual penetration without consent should be amended to apply where the accused 'engages in an act of sexual penetration' with the complainant without consent.**
34. **The offence of sexual coercion should be amended to apply where the accused substantially causes the complainant to 'engage in an act of sexual penetration' with a third party, an animal or themselves without consent.**
35. **The term 'to engage in an act of sexual penetration' should cover all penetrative sexual activity, regardless of whether:**
    - **The act involves the accused, a third party, an animal or the complainant alone.**
    - **The act involves an object or a body part.**
    - **The relevant person is the penetrating or penetrated party.**
36. **The term 'to engage in an act of sexual penetration' should be defined to mean:**
    - **The penetration, to any extent, of the genitalia or the anus by a body part or object; and**
    - **The application of the mouth or tongue to the genitalia or anus, regardless of whether there is any penetration.**
37. **Genitalia should be defined to mean:**
    - **Any area of the female genitalia inside the labia majora, or any similar part of an intersex person;**
    - **Any part of the male genitalia, including the penis and the scrotum, or any similar part of an intersex person; and**
    - **Any similar part of an animal.**
38. **The *Code* should specify that the definition of genitalia includes surgically constructed or altered genitalia.**
39. **The *Code* should provide that a person does not engage in an act of sexual penetration if the penetration is conducted solely for proper medical, hygienic or veterinary purposes.**
40. **The current definitions of 'to sexually penetrate' and 'to engage in sexual behaviour' should be repealed.**

Should the names of the penetrative offences be changed?

6.100. In the Discussion Paper we sought submissions on whether the penetrative sexual offences should be renamed.[61]

[61] Discussion Paper Volume 2, [4.26]-[4.29]; [5.11]-[5.12].

Stakeholders' views

6.101. There was some support for changing the name 'sexual penetration without consent' to 'rape'. For example, WLSWA and Full Stop Australia submitted that:[62]

- The term rape appropriately reflects the seriousness of the offence. It 'sends an unequivocal message that a profoundly violating, dehumanising and heinous crime has been committed'. These stigmatic effects play an important role in labelling a particular form of wrongdoing. By not using the word, the seriousness of the offence is downgraded.
- The current name 'suggests that it is possible for sexual intercourse to be in some sense "non-consensual" but short of amounting to a sexual violence offence'. It may make victim-survivors feel that the conduct is not taken as seriously in Western Australia as in other jurisdictions.
- Naming the crime rape will carry 'profound weight for victim-survivors'. It may also encourage greater reporting of sexual violence, as it 'has a clear and readily understood meaning, and distinct sense of reprehensibility attached to it'.
- Jurisdictions where the offence is termed 'rape' impose higher penalties. Using the term rape 'will create momentum' to increase the penalties for this offence in Western Australia.
- It would be a step towards harmonisation of terminology, given it is the term that is currently used in four other Australian jurisdictions.

6.102. However, most stakeholders wanted to retain the current name. It was noted that the term 'rape' means 'to spoil or ruin', and implicitly reinforces the myth that the victim-survivor has become less of a person.[63] It is also historically associated with male-female penile-vaginal penetration, whereas the current offence is much broader in scope.[64] It was argued that the current name more clearly articulates the elements of the offence,[65] and appropriately labels it by accurately reflecting the offender's conduct and the harm the victim-survivor suffers.[66]

6.103. Few submissions were received concerning the name of the sexual coercion offence. Communities suggested adopting the English approach of naming the offence 'causing a person to engage in sexual activity without consent'. This name was seen to have the merit of clearly articulating the relevant conduct with reference to the concept of consent. However, other stakeholders opposed a name change.

The Commission's view

6.104. The Commission does not recommend changing the name of the offence of sexual penetration without consent. This name has been used for many years in Western Australia and is well understood by those who work in the area and by the community more broadly. It is more modern than the term rape, is gender-neutral and accurately describes the elements of the offence and the wrongfulness of the conduct.

6.105. We acknowledge the force of the arguments made in favour of changing the name to rape. We agree that it is essential that the offence be treated seriously and would be concerned if the perceived gravity of the offence was undermined by its name. However, we are not persuaded that this is the case. This view was not advocated by most stakeholders, who were

62 Portal Submission P46 (WLSWA); Supplementary Email Submission E27 (Full Stop Australia).
63 Consultation with the Legal Expert Group, 31 March 2023.
64 See, eg, Email Submission E24 (Communities); Email Submission E13 (Confidential).
65 See, eg, Email Submission E19 (ODPP); Email Submission E24 (Communities).
66 See, eg, Email Submission E13 (Confidential).

broadly supportive of the current name; and we received no indication that members of the community generally consider 'sexual penetration without consent' to differ in any meaningful way from 'rape'.

6.106. Moreover, we are concerned about the historical association of the term rape solely with penile-vaginal penetration. The bounds of the offence that we have recommended enacting extend far beyond this scope. We do not want to risk giving any impression that the offence is limited in this way or create any confusion by a change of name.

6.107. We also do not accept the argument that it is useful to name the offence rape in order to create momentum for increased penalties. We are of the view that if penalties are to be increased, this should be done by amending the sentencing framework surrounding the offence. We consider the issue of penalties in more detail in Chapter 12.

6.108. We do, however, recommend changing the name of the sexual coercion offence. A change is necessary because of our recommendation that a new, non-penetrative version of the sexual coercion offence also be enacted (see below). In order to differentiate the two offences, we recommend calling the penetrative version 'coerced sexual penetration' and the non-penetrative version 'coerced sexual act'.

6.109. In this regard, we note that there is no logical problem with adopting the English approach of labelling the penetrative offence 'causing a person to engage in sexual penetration without consent', as this does accurately describe the prohibited conduct. However, we consider that 'coerced sexual penetration' is preferable due to its accuracy and brevity.

Recommendation

41. The offence of sexual coercion should be renamed 'coerced sexual penetration'.

Non-penetrative sexual offences

6.110. The *Code* currently contains one main non-penetrative sexual offence: indecent assault. This offence is contained in section 323 of the *Code*. Section 324 of the *Code* also contains an aggravated indecent assault offence. We discuss aggravated versions of offences in Chapter 9.

6.111. The maximum penalty for indecent assault is 5 years' imprisonment, and for aggravated sexual penetration without consent is 7 years' imprisonment. We discuss maximum penalties in Chapter 12.

6.112. Between 2017 and 2022, 1,623 people were charged with indecent assault, and 365 people were charged with aggravated indecent assault.[67]

Elements and definitions

6.113. Section 323 of the *Code* states:

> A person who unlawfully and indecently assaults another person is guilty of a crime and liable to imprisonment for 5 years.

6.114. This offence has four elements that the prosecution must prove beyond reasonable doubt:

[67] Discussion Paper Volume 2, Appendix 2.

- The accused assaulted the complainant;
- The complainant did not consent to the assault or their consent was obtained by fraud;
- The assault was committed in circumstances of indecency; and
- The assault was unlawful.

6.115. Assault is defined in section 222 of the *Code* as follows:

> A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.
>
> The term *applies force* includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.[68]

6.116. It can be seen from this definition that an assault does not require physical contact: it can be committed by threatening or attempting to touch or apply force. For example, it may be an assault for a person to expose their genitals and walk towards someone while making sexually suggestive comments.[69]

6.117. Where an assault is committed by the application of force, it has been held that there is no need for the prosecution to prove that the accused intended to apply force.[70] However, if the assault is committed by the attempted or threatened application of force, the prosecution must prove that the accused either intended to use force or to cause the complainant to apprehend the use of force.[71] An accused may also raise the defence of unwilled act.[72]

6.118. It can be seen from the definition of assault in section 222 of the *Code* that the assault, absent fraud, must have been committed without the complainant's consent. The definition of consent in section 319 applies to this offence.[73]

6.119. The assault must have been committed in circumstances of indecency. The *Code* does not define the concept of indecency: it relies on definitions provided through case law.

6.120. Case law provides that indecency is to be given its ordinary meaning: that which offends against currently accepted standards of decency.[74] It is not sufficient that the conduct was merely unbecoming or offensive.[75] It is a matter for the jury to determine in each case whether the circumstances were indecent.

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68 *Criminal Code Act Compilation Act 1913* (WA) s 222.

69 *Rolfe* (1952) 36 Cr App R 4.

70 *Hayman v Cartwright* (2018) 53 WAR 137, [81]. This was a case of general assault rather than indecent assault. However, it seems likely that the same principles would apply to the offence of indecent assault.

71 *Rossi v Carter* [2000] WASCA 321, [12].

72 *Drago v The Queen* (1992) 8 WAR 488.

73 *Higgins v Western Australia* [2016] WASCA 142.

74 See generally LexisNexis Australia, *Carter's Criminal Law of Queensland* [352.20] (September 2013) and [210.20] (October 2017), citing *R v Dunn* [1973] 2 NZLR 481; *A-G v Huber* (1971) 2 SASR 142; *Harkin v The Queen* (1989) 38 A Crim R 296. See also *R v BAS* [2005] QCA 97, [15]–[17], [50] and *R v Jones* (2011) A Crim R 379 as to the element of 'indecency' in the *Criminal Code Act 1899* (Qld) ss 210(1)(a) and 352(1)(a).

75 *R v Bryant* [1984] 2 Qd R 545; *R v McBride* [2008] QCA 412.

6.121. Indecency refers to the involvement of the human body, bodily actions or bodily functions in a sexual way.[76] Consequently, to be indecent the conduct must have a sexual connotation. The sexual character of an activity is determined objectively.[77] An act may have a sexual connotation due to the area of the body involved, such as the genitals, anus or breasts.[78] If this is the case, the act should be considered indecent regardless of the accused's motivation for the conduct.[79] If an act does not have a clear sexual connotation (for example, a kiss on the cheek) it must be accompanied by an intention to obtain sexual gratification. Outwardly innocent acts may be indecent because of the motive for them or their purpose.[80]

Should the indecent assault offence be reformed?

6.122. In the Discussion Paper we sought views on whether the offence of indecent assault should be reformed in any way.[81]

Stakeholders' views

6.123. Stakeholders were largely in agreement about two changes that should be made:

- It should be made clear that the *Code's* consent provisions apply to the offence.
- The *Code* should provide that the offence is committed where the accused continues to indecently touch or threaten the complainant after consent has been withdrawn.

6.124. By contrast, there were mixed views on the merits of defining the concept of indecency. Some stakeholders were opposed to the idea, on the basis that the common law can better adapt to shifting community standards of what is indecent; and some were concerned that any attempt to define the word in terms of sexual conduct would narrow its scope. However, other stakeholders were supportive of including a definition of indecent in the *Code*. There was general agreement that if the term were to be defined, it should retain both objective and subjective elements: it should capture conduct which offends community standards as well as conduct which the accused does for a sexual purpose.

6.125. There were also mixed views about changing the name of the offence. For example, the ODPP supported retaining the current name, as it 'emphasises the nature of the offence as an act of violence, especially considering the current offence of indecent assault is not restricted to involving physical contact: it also applies to force which is attempted or threatened'.[82] By contrast, Dr Glover, who was of the view that 'indecent assault fails to do justice to the conduct in question', recommended using the term 'sexual assault' instead.[83] Communities suggested that consideration should be given to broadening the name of the offence 'to include the terms "without consent" to afford further clarity'.[84]

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76 *Drago v The Queen* (1992) 8 WAR 488.

77 Ibid.

78 *Western Australia v Jackson* [2019] WASCA 118, [56]; *HTD v Western Australia (No 2)* [2019] WASCA 39, [19]; *Harkin v The Queen* (1989) 38 A Crim R 296.

79 *Western Australia v Jackson* [2019] WASCA 118, [57]; *Drago v The Queen* (1992) 8 WAR 488, 492; *HTD v Western Australia (No 2)* [2019] WASCA 39, [19].

80 *Drago v The Queen* (1992) 8 WAR 488 (Murray J); *Harkin v The Queen* (1989) 38 A Crim R 296; *R v Harkin* [2019] WASC 84, [16].

81 Discussion Paper Volume 2, [6.19]-[6.31].

82 Email Submission E19 (ODPP).

83 Email Submission E23 (Dr Philip Glover).

84 Email Submission E24 (Communities).

6.126. In relation to the issue of non-penetrative sexual offending more generally, some members of the Legal Expert Group recommended that the offence of sexual coercion be extended to cover such conduct. As noted above, at present this offence is limited to cases in which the accused compels the complainant to engage in penetrative sexual behaviour.

The Commission's view

6.127. In the Commission's view, all non-consensual non-penetrative sexual acts are wrongful, regardless of whether:

- The conduct involves physical contact or no touching.
- The accused commits the relevant act or causes the complainant to commit the act.
- The accused personally engages in the act or causes the complainant to engage in the act with a third party, an animal or themselves.

6.128. In each of these cases there has been a violation of the complainant's sexual autonomy which deserves to be denounced by the criminal law.

6.129. At present, however, the law does not address all of these matters – there are significant gaps in the coverage of the indecent assault offence. In particular, it does not apply where:

- The accused causes the complainant to indecently touch the accused. For example, it does not apply where the complainant is compelled by threats to masturbate a male accused.[85]
- The accused causes the complainant to engage in a non-penetrative sexual act with a third party, an animal or themselves. This is because the offence of sexual coercion is currently limited to penetrative sexual conduct.
- Non-consensual sexual activity which does not involve physical contact or a threat or attempt to apply force is committed in the presence of the complainant. This would include acts such as intentionally masturbating in front of the complainant without their consent.

6.130. In the Commission's view, the best way to address these gaps is to replace the offence of indecent assault with two new offences: 'sexual act without consent' and 'coerced sexual act'. The structure of these offences should replicate the revised structure of the penetrative sexual offences recommended above. This means that:

- The offence of sexual act without consent should cover all cases in which the accused and the complainant personally engage in the relevant conduct, regardless of their role.
- The offence of coerced sexual act should cover all cases in which the accused does not personally engage in the relevant conduct, but substantially causes the complainant to engage in it with a third party, an animal or themselves.

6.131. The relevant conduct for both offences should be engaging in a non-consensual sexual act. The term 'sexual act' should be defined to cover:

- Non-penetrative sexual touching; and
- Non-touching sexual acts, regardless of whether there was an attempt or threat to touch.

6.132. The term 'touching' should include touching a person with any part of the body or with anything else. It should also include touching through anything, such as clothing worn by the accused

[85] Where a female accused commits such conduct this is likely to constitute sexual coercion, due to the potentially penetrative nature of the sexual act.

or the complainant. A useful model in this regard is provided by section 61HB(1) of the NSW Act.

6.133. This approach would expand the scope of criminal law to include sexual acts which do not involve attempted or threatened physical contact. We note that such an approach has already been taken in the ACT and NSW.[86]

6.134. The *Code* should provide that a person engages in a non-touching sexual act with another person if they do it in their presence. It is important to ensure, however, that this does not inadvertently capture people who innocently engage in a sexual activity which happens to be seen or heard by another person. Consequently, where it is alleged that the accused committed a sexual act that did not involve touching, the offence should only apply if the accused intended that the act was seen or heard by the complainant.

6.135. As these will be new offences, we are of the view that it would be a good opportunity to replace the word 'indecent' with the word 'sexual', both in the name of the offence and its elements. In our view this word better articulates the wrongfulness of the conduct, which is that it involves a non-consensual sexual act rather than an act which is morally objectionable. The word 'sexual' should, however, be defined similarly to the way in which 'indecent' is currently understood. It should cover acts which are objectively sexual, as well as acts which are not objectively sexual but which the accused committed for the purpose of sexual gratification.

6.136. This is the approach that has been taken in NSW, where a 'sexual act' is defined to mean an act that is 'carried out in circumstances where a reasonable person would consider the act to be sexual'.[87] The NSW Act specifies the matters to be taken into account in deciding whether a reasonable person would consider an act to be sexual to include:

> (a) whether the area of the body involved in the act is a person's genital area, anal area or breasts—
>
> (i) whether or not the breasts are sexually developed, and
>
> (ii) regardless of the person's gender or sex, or
>
> (b) whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification, or
>
> (c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual.[88]

6.137. The NSW Act also provides that an 'act carried out solely for proper medical or hygienic purposes is not a sexual act'.[89] The Commission recommends adopting a similar approach to defining a sexual act in Western Australia.

6.138. The new non-penetrative sexual offences should not, in any way, rely on the complex definition of assault in section 222 of the *Code*.[90] They should be entirely contained within the sexual offence division of the *Code*.[91] This will overcome any concerns about whether the *Code's*

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86 *Crimes Act 1900* (ACT) s 60; *Crimes Act 1900* (NSW) ss 61HC.

87 *Crimes Act 1900* (NSW), s 61HC(1).

88 Ibid s 61HC(2).

89 Ibid s 61HC(3).

90 We note that section 222 is currently expressed in gendered terms. While it is beyond the scope of this reference to recommend changes to this provision, we are of the view that the Government should consider making it gender-neutral.

91 See Chapter 13 for our recommendations concerning the location of the sexual offences within the *Code*.

consent provisions apply to these offences:[92] it will be clear that they do.[93] It will also ensure that the provisions concerning the withdrawal of consent, that we recommend in Chapter 4, will apply to these offences. This is consistent with the principles of sexual autonomy and bodily integrity, which provide that people should be free to refuse to engage in sexual activity at any time for any reason, and should have the right not to have their body sexually touched or interfered with without their consent.

6.139. In naming the offences, we recommend using the term sexual 'act' rather than 'assault'. This reflects the fact that the offences cover all non-touching sexual acts, not just those which involve the attempted or threatened use of force. We are also of the view that there is value in naming the offences in a manner which is consistent with the penetrative sexual offences. Under our recommended approach, there will be:

- Two base offences which apply when the accused and the complainant are personally involved in the sexual conduct: sexual penetration without consent and sexual act without consent.
- Two base offences which apply when the accused causes the complainant to engage in sexual conduct with a third party, an animal or themselves: coerced sexual penetration and coerced sexual act.

6.140. The penalty for sexual act without consent and coerced sexual act should be the same. In our view, it is just as wrongful for the accused to compel the complainant to engage in a non-consensual sexual act with a third party, an animal or themselves as it is for the accused to personally engage in that act with the complainant. There should also be aggravated versions of both offences.

[92] See Discussion Paper Volume 2, [6.24]-[6.26].

[93] If the offence of indecent assault is retained, the Commission is of the view that the *Code* should make it clear that the provisions concerning consent and the withdrawal of consent apply to it.

Recommendations

42. The offence of indecent assault should be replaced with two non-penetrative sexual offences:

- **Sexual act without consent, which should apply to all cases in which the accused and the complainant personally engage in a non-consensual non-penetrative sexual act, regardless of the role each party plays in that act.**
- **Coerced sexual act, which should apply to all cases in which the accused is a substantial cause of the complainant engaging in a non-consensual non-penetrative sexual act with a third party, an animal or themselves, regardless of the role each party plays in that act.**

43. The non-penetrative sexual offences should apply to all acts of:

- **Non-penetrative sexual touching; and**
- **Non-touching sexual acts, regardless of whether there was an attempt or threat to touch.**

44. For the purposes of the non-penetrative sexual offences, 'sexual' should be defined to refer to conduct that is carried out in circumstances where a reasonable person would consider it to be sexual. The *Code* should provide guidance on the matters that should be taken into account in making this assessment. These should include:

- **Whether the conduct involved a person's genital area, anal area or breasts;**
- **Whether the person carrying out the conduct did so for the purpose of obtaining sexual arousal or sexual gratification; and**
- **Whether any other aspect of the conduct, including the circumstances in which it was carried out, made it sexual.**

45. For the purposes of the non-penetrative sexual offences, 'touching' should include touching a person with any part of the body or with anything else. It should include touching through anything, such as clothing.

46. The *Code* should provide that a person engages in a non-touching sexual act with another person if they do it in their presence.

47. Where it is alleged that the accused committed a non-touching sexual act, the offence of sexual act without consent should only apply if the accused intended that the act was seen or heard by the complainant.

48. The *Code* should provide that an act which is carried out solely for proper medical, hygienic or veterinary purposes is not a sexual act.

49. The *Code's* provisions concerning consent and the withdrawal of consent should apply to the non-penetrative sexual offences.

50. There should be aggravated versions of the non-penetrative sexual offences.

Sexual offences against adult lineal relatives

6.141. Section 329 of *Code* contains two sexual offences that a person can commit against an adult lineal relative:[94]

- Section 329(7) provides that it is an offence to sexually penetrate a person over 18 years knowing that person is a lineal relative; and
- Section 329(8) provides that it is an offence for a person aged over 18 years to consent to sexual penetration by a person who they know is their lineal relative.

6.142. The maximum penalty for these offences is 3 years' imprisonment. We discuss maximum penalties in Chapter 12.

Elements and definitions

6.143. For a person to be convicted of an offence under section 329(7), the prosecution must prove the following four matters, beyond reasonable doubt:

- The accused was 18 or over;
- The accused sexually penetrated the complainant;
- The complainant was a lineal relative of the accused; and
- The accused knew the complainant was their lineal relative.

6.144. For a person to be convicted of an offence under section 329(8), the prosecution must prove the following five matters, beyond reasonable doubt:

- The accused was 18 or over;
- The accused was sexually penetrated by the complainant;
- The accused consented to the sexual penetration;
- The complainant was a lineal relative of the accused; and
- The accused knew the complainant was their lineal relative.

6.145. A lineal relative is defined to mean a person who is:

> A lineal ancestor, lineal descendant, brother, or sister, whether the relationship is of the whole blood or half blood, whether or not the relationship is traced through, or to, a person whose parents were not married to each other at the time of the person's birth, or subsequently, and whether the relationship is a natural relationship or a relationship established by a written law.[95]

6.146. Sexual activity, other than sexual penetration, between adults who are lineal relatives is not prohibited.

6.147. Unlike the section 329 offences which involve children (see Chapter 7), these offences do not apply to de facto parents and children: they only apply to lineal relatives.

Should consensual sexual activity between adult lineal relatives be decriminalised?

6.148. The sexual penetration offences created by sections 329(7) and 329(8) criminalise what would otherwise be lawful sexual activity between consenting adults. It is arguable that the criminal law should not interfere in such activity. To justify prohibition there needs to be some other aspect of moral wrong or harm.

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[94] Section 329 also contains five sexual offences which can be committed against a child lineal relative or de facto child. We discuss these offences in Chapter 7.

[95] *Criminal Code Act Compilation Act 1913* (WA) s 329(1).

6.149. Traditionally, this prohibition has been justified on the basis that there is a higher risk of genetic disabilities amongst offspring.[96] However, the criminal law does not prohibit sexual activity between other persons who have a greater than standard chance of producing a child with a genetic disability.[97] Further, the broad definition of sexual penetration means that sexual activity other than just penile-vaginal intercourse is prohibited.[98]

6.150. Other arguments that have been identified in support of retaining sexual penetration offences between consenting adult lineal relatives include:

- Sexual activity between related adults may be considered contrary to religious teachings.
- Allowing sexual relationships between close relatives would be disruptive of society's structures. Society is based on a structure whereby family relationships should remain non-sexual, caring and supportive throughout life. This structure is buttressed by criminal laws that deter close family members (even once they are adults) from viewing each other as a possible sexual partner. Offences of this type therefore do not contain a lack of consent element; the sexual activity is prohibited even if both parties consent to it.
- Patterns of sexual abuse against children commonly involve the offending behaviour commencing when the complainant is a child but continuing into adulthood. Decriminalising consenting sexual activity involving sexual penetration between lineal adult relatives would leave such complainants with no protection, 'even though the consent of the young adult was very much vitiated by the long standing abuse that occurred while the child was under the age of consent'.[99]

6.151. In the Discussion Paper we sought views on whether sexual activity between consenting adults who are related should be prohibited and, if so, which types of sexual activity should be prohibited.[100]

Stakeholders' views

6.152. There was no support in the submissions or consultations for decriminalising sexual activity between adult lineal relatives. Particular concern was expressed about the pattern of sexual abuse described above, and the fact that decriminalising this conduct would leave the abused party with no legal protection.

6.153. Rather than decriminalising such behaviour, Communities suggested that consideration should be given to expanding the offences to include non-penetrative sexual behaviours. It argued that 'doing so will maintain that any type of sexual activity, penetrative or not, does not meet accepted community standards of familial relations'.[101] It will also provide protection to people who were sexually abused when they were children, and who continue to be sexually abused in a non-penetrative way as adults.

The Commission's view

6.154. The Commission does not recommend decriminalising sexual activity between adult lineal relatives. While we place a high value on the principle of sexual autonomy, we are also of the

96 See, eg, C Farrelly, 'The Case for Re-thinking Incest Laws' (2008) 34(9) *Journal of Medical Ethics* e11.

97 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person* (Report, 1999) 191.

98 Ibid.

99 Ibid.

100 Discussion Paper Volume 2, [9.24]-[9.27].

101 Email Submission E24 (Communities).

view that sexual offence laws should protect people who are vulnerable to sexual exploitation. In our view, this includes family members. The nature of family dynamics is such that there is always a risk of an imbalance of power which could be exploited by one party. To prevent this from occurring, we are of the view that the law should continue to prohibit sexual activity between lineal relatives, even once they become adults. We also agree with the arguments about protecting relationships of lineal relatives within a family as non-sexual, caring and supportive elements of society.

6.155. Our conclusion in this regard has also been prompted by stakeholder concerns about the impact that decriminalisation may have on cases in which sexual abuse starts in childhood but continues after the abused party becomes an adult. We believe that it is appropriate for criminal sanctions to be imposed in such circumstances.

6.156. At present the sexual offences against adult lineal relatives are contained in the same section of the *Code* as the sexual offences against child lineal relatives and de facto children, which is titled 'relatives and the like, sexual offences by'. We recommend that these two distinct groups of offences be separated into two different sections titled 'sexual offences involving child relative victims' and 'sexual offences involving adult relative victims'. We consider that this approach more clearly labels the nature of the criminal conduct. It will also assist with clarifying the scope of the relevant provisions, as discussed below and in Chapter 7.

Recommendations

51. The sexual offences against adult lineal relatives should be separated from the sexual offences against child lineal relatives and de facto children.

52. The sexual offences against adult lineal relatives should be called sexual offences involving adult relative victims.

Should any other changes be made to the sexual offences against adult lineal relatives?

6.157. In the Discussion Paper we sought views on whether any other changes should be made to the sexual offences against adult relatives.[102] We did not receive any submissions in this regard.

6.158. We note, however, that it is necessary to consider how our recommendations concerning reforms to the definition of lineal relative in Chapter 7 will affect the sexual offences involving adult relative victims. It is also necessary to consider whether the substantial structural reforms to the general adult sexual offences we recommend above should flow through to the offences against adult relative victims. We address these issues in turn below.

Reforming the definition of lineal relative

6.159. In Chapter 7, in the context of sexual offences against child relative victims, we recommend replacing the complex and outdated definition of lineal relative with a modern, broad, simplified definition. As that definition defines the relevant relationships from the perspective of the child victim, largely focusing on lineal ancestors (for example, parents and grandparents), it cannot readily be transplanted to the current context, where the accused may also be a lineal

[102] Discussion Paper Volume 2, [9.18]-[9.20].

descendant. Consequently, it will be necessary to enact a specific definition that applies in relation to the sexual offences involving adult relative victims.

6.160. In our view, adults should be prohibited from engaging in sexual activity with their adult children, adult grandchildren, adult great-grandchildren, adult siblings, parents, grandparents and great-grandparents.

6.161. Given our justification for retaining offences involving adult relatives, the offence should cover the following relationships between such parties:

- Genetic relationships;
- Step-relationships;
- De facto relationships; and
- Adoptive relationships.

6.162. We do not recommend extending the definition to extended cultural family and kinship relationships. It seems to us that such a definition would be difficult to draft fairly and clearly. We did not receive any submissions which suggested how such a definition should be drafted. We also consider that including such relationships would mean introducing a very broad spectrum of people into the definition.

6.163. Unlike in the context of child relatives,[103] we do not recommend extending this definition to include people who are no longer in the relevant relationship. We also do not think it should apply to step-relationships or de facto relationships where there was never a relationship of care, supervision or authority between the parties. Consequently, we recommend enacting a defence which provides that a person does not commit an offence if, at the time the offence was alleged to have been committed:

- The accused was 18 or over;
- The accused and the complainant's relationship was not a genetic or adoptive relationship; and
- Neither party had ever been under the other party's care, supervision or authority.

[103] See Chapter 7.

Recommendations

53. The sexual offences involving adult relative victims should be defined to protect adults from sexual offending by their adult:

- **Parents;**
- **Grandparents;**
- **Great-grandparents;**
- **Children;**
- **Grandchildren;**
- **Great-grandchildren; or**
- **Siblings.**

54. The above relationships should be defined to include:

- **Genetic relationships;**
- **Step-relationships;**
- **De facto relationships; and**
- **Adoptive relationships.**

55. It should be a defence for the accused to prove, on the balance of probabilities, that at the time the offence was alleged to have been committed:

- **The accused was 18 or over;**
- **The accused and the complainant's relationship was not a genetic or adoptive relationship; and**
- **Neither party had ever been under the other party's care, supervision or authority.**

Reforming the scope of the relevant sexual activity

6.164. Earlier in this Chapter we recommend substantial structural reforms to the general adult sexual offences. Specifically, we recommend:

- Replacing sexual penetration without consent and sexual coercion with two penetrative sexual offences: sexual penetration without consent and coerced sexual penetration.
- Replacing the offence of indecent assault with two non-penetrative sexual offences: sexual act without consent and coerced sexual act.
- Amending the definitions associated with these offences.

6.165. In the Commission's view, the sexual offences involving adult relative victims should reflect this revised offence structure, creating a cohesive set of sexual offences throughout the *Code*. This will require:

- The existing offences in sections 329(7) and (8) to be repealed.
- New offences of sexual penetration involving an adult relative victim, coerced sexual penetration involving an adult relative victim, sexual act involving an adult relative victim and coerced sexual act involving an adult relative victim to be enacted.

- These offences to be defined in identical terms to the adult offences, but with the following modifications:
    - The inclusion of a requirement that the complainant be an adult relative (as defined above).
    - The inclusion of a requirement that the accused be an adult (to avoid the possibility of child relative victims being charged with these offences).
    - The inclusion of a requirement that the accused knew the complainant was an adult relative.
    - The removal of the requirement that the prosecution prove lack of consent.

6.166. In making this recommendation we are mindful of the fact that we are expanding the scope of these offences, which are currently limited to penetrative acts. However, given the basis for criminalising this conduct is the risk of sexual exploitation, we see no good reason for limiting the provisions in this way. Our recommended approach will make it clear that any type of sexual activity, penetrative or not, is prohibited in relation to adult relatives. In doing so, it will also help protect people who were sexually abused when they were children, and who continue to be sexually abused in any way as adults.

6.167. We are also mindful of the fact that this approach will capture both parties who engage in the sexual activity: they could both be convicted of this offence.[104] This will not be appropriate in cases where one of the parties was sexually abused as a child and the sexual conduct continued into adulthood. In such cases, the abused party should not be liable to conviction for this offence. We recommend that a defence be enacted to address this issue.

6.168. We note that under the current law the accused is required to know of the relevant relationship. However, it is presumed, in the absence of evidence to the contrary, that:

- The accused knew they were related to the complainant; and
- People who are reputed to be related to each other are in fact related to each other in that way.[105]

6.169. We do not recommend changing the law in this regard.

[104] This is also the case under the current law.

[105] *Criminal Code Act Compilation Act 1913* (WA) s 329(11).

Recommendations

56. The existing offences involving adult lineal relatives should be replaced with the following offences:

- **Sexual penetration by an adult involving an adult relative victim.**
- **Coerced sexual penetration by an adult involving an adult relative victim.**
- **Sexual act by an adult involving an adult relative victim.**
- **Coerced sexual act by an adult involving an adult relative victim.**

57. The offences against adult relative victims should be defined in identical terms to the revised general adult sexual offences, but with the following modifications:

- **The inclusion of a requirement that the complainant be an adult relative;**
- **The inclusion of requirement that the accused be an adult;**
- **The inclusion of a requirement that the accused knew the complainant was an adult relative; and**
- **The removal of the requirement that the prosecution prove lack of consent.**

58. There should be a defence to the offences involving adult relative victims which applies to cases in which the accused was sexually abused by the complainant when they were a child.

59. The presumptions in section 329(11) of the *Code* should continue to apply to the sexual offences involving adult lineal relatives.

Sexual servitude and deceptive recruiting offences

6.170. The *Code* contains three offences relating to the forced provision of sexual services:

- Sexual servitude (section 331B).
- Conducting a business involving sexual servitude (section 331C).
- Deceptive recruiting for a commercial sexual service (section 331D).

6.171. These offences were enacted in the context of Australia's international obligations to prohibit servitude and the trafficking in persons for the purpose of sexual exploitation.[106] They are modelled on the Commonwealth legislation.[107] Their elements and definitions are outlined in the Discussion Paper.[108]

6.172. The maximum penalties for these offences range from 7 years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it is committed. We discuss maximum penalties in Chapter 12.

[106] Under instruments which include the 1979 *Convention on the Elimination of all Forms of Discrimination Against Women*, the 1989 *Convention on the Rights of the Child* and the 1948 *Universal Declaration of Human Rights*.

[107] *Criminal Code Act 1995* (Cth) ss 270.5-270.5.

[108] Discussion Paper Volume 2, [10.5]-[10.15].

6.173. These offences are rarely used. Between 2017 and 2022, only four people were charged with sexual servitude in Western Australia, and no people were charged with conducting a business involving sexual servitude or deceptive recruiting for commercial sexual services.[109]

Should the deceptive recruiting for a commercial sexual service offence be repealed?

6.174. In its preliminary submission, Magenta noted that there are already laws which address deceptive recruiting at the Commonwealth level. It was of the view that:

- The duplication between the Commonwealth and Western Australian laws can result in poor outcomes for victims of deceptive recruiting for sexual services.
- The Commonwealth laws provide better outcomes for victims of deceptive recruiting for sexual services than the offences in section 331D.
- Where a case under the Commonwealth law involves sexual servitude or non-consensual sex, that can appropriately be dealt with as an aggravating factor.

6.175. Consequently, Magenta argued that section 331D should be repealed.

6.176. In the Discussion Paper we sought views on whether the offence of deceptive recruiting for a commercial sexual service should be repealed.[110]

Stakeholders' views

6.177. There was no support expressed in final submissions or consultations for repealing the offence of deceptive recruiting for a commercial sexual service. The most detailed submission in this regard came from the ODPP, which noted that while section 331D has never been used, it did not consider it to be redundant:

> While there may be overlap between *Code* s 331D and the Commonwealth offence of deceptive recruiting for labour or services (s 270.7 of the *Criminal Code Act 1995* (Cth)), there are important differences. Those differences are particularly acute where the victim is under 18 years of age, or an 'incapable person'.
>
> Where the victim is a child or incapable person, the maximum penalty in the *Code* is 20 years' imprisonment. In the case of an aggravated offence under s 270.7 (which includes where the victim is under 18 years) the maximum penalty is 9 years' imprisonment. Section 331D(2) requires the State to prove an accused's knowledge of the facts in subsection (2)(b), but not their intention or that the victim was deceived.
>
> An element of the Commonwealth offence is that the accused's conduct causes the complainant to be deceived about the fact of sexual services being involved in an engagement, or the nature of the sexual services to be provided. Section 331D(1) merely requires the State to prove the accused did not disclose to the adult complainant at the time of making the engagement offer that they would be asked or expected to provide a commercial sexual service.[111]

The Commission's view

6.178. The Commission does not recommend repealing the offence of deceptive recruiting for a commercial sexual service. While we acknowledge that the offence has rarely been used, we

[109] Discussion Paper Volume 2, Appendix 2.
[110] Ibid [10.16]-[10.18].
[111] Email Submission E19 (ODPP).

agree with the ODPP that it is not redundant. It is meaningfully different from the Commonwealth offence in the ways described by the ODPP and consequently should be retained.

Procuring a person to be a prostitute

6.179. Section 191 provides that it is an offence to procure a person to become a prostitute. The maximum penalty for this offence is 2 years' imprisonment. We discuss maximum penalties in Chapter 12.

6.180. This offence is rarely used: between 2017 and 2022, only one person was charged.[112]

Elements and definitions

6.181. Section 191(1) of the *Code* provides that:

> Any person who —
>
> (a) Procures a girl or woman who is under the age of 21 years, and is not a common prostitute or of known immoral character to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or
>
> (b) Procures a woman or girl to become a common prostitute either in Western Australia or elsewhere; or
>
> (c) Procures a woman or girl to leave Western Australia, with intent that she may become an inmate of a brothel, elsewhere; or
>
> (d) Procures a woman or girl to leave her usual place of abode in Western Australia, such place not being a brothel, with intent that she may, for the purposes of prostitution, become an inmate of a brothel, either in Western Australia or elsewhere; or
>
> (e) Procures a man or boy for any of the above purposes;
>
> is guilty of a crime, and is liable to imprisonment for 2 years.

6.182. There are four ways in which this offence can be committed:

- By procuring a person under 21 to have unlawful carnal connection with a man.
- By procuring a person to become a prostitute.
- By procuring a person to leave Western Australia to become an inmate of a brothel.
- By procuring a person to leave their usual residence to become an inmate of a brothel.

6.183. There is no need for the prosecution to prove a lack of consent. The *Code* explicitly provides that it is not a defence that the complainant consented to the relevant act.[113]

6.184. If the accused is charged with procuring a person under 21 to have unlawful carnal connection with a man (section 191(a)), ignorance of age or mistake as to age is not a defence.[114]

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[112] Discussion Paper Volume 2, Appendix 2.

[113] *Criminal Code Act Compilation Act 1913* (WA) s 191(2).

[114] Ibid s 205.

Should the offence of procuring a person to become a prostitute be repealed?

6.185. In the Discussion Paper we noted that we had received a number of preliminary submissions suggesting that section 191 should be repealed. For example, Magenta submitted that it was archaic, unnecessary, and served to endanger sex workers:

> Existing offences which apply to all persons, including laws related to sex without consent, and advertising codes which prevent lascivious advertising material in many public places, already adequately protect sex workers and the public on the issues covered by these sections. … On the other hand, these offences have considerable negative impacts on sex workers, making it more difficult for sex workers to work safely or to seek support from services, such as the Police or health services. These offences related to sex work push sex work underground unnecessarily, contradicting the way sex work is dealt with in Western Australia – it is totally legal to be a sex worker in WA and federally, so the laws in the Code which mention sex workers are totally out-of-date and out of step with our contemporary approaches to the industry.[115]

6.186. We sought views on whether the provision should be repealed.[116]

Stakeholders' views

6.187. Most stakeholders agreed that section 191 of the *Code* should be repealed. It was argued that:

- Its wording is outdated and stigmatising, incorrectly implying that sex work is both illegal and immoral; and
- The conduct addressed by the provision is already sufficiently addressed by other provisions, either in the *Code* or the Prostitution Act. Consequently, the provision is unnecessary.

6.188. There were, however, some reservations about simply repealing the provision. For example, it was noted that procurement for the purposes of prostitution is most commonly done for the financial gain of the person procuring and is disempowering for the person procured.[117] Consequently, there may be a justification for maintaining an offence of procuring a person to become a sex worker.

6.189. It was generally agreed that if the offence is retained:

- It should be moved to the Prostitution Act, as it relates to the regulation of prostitution.
- The terms 'common prostitute' and 'of known immoral character' should be replaced, as they are stigmatising, offensive and archaic. It was noted that 'terms "sex work" and "sex worker" are recognised globally as the preferred terminology over "prostitute" and "prostitution"; which are outdated terms that have connotations of criminality and immorality and deny sex workers agency over their profession'.[118]

[115] Preliminary Submission 3 (Magenta) 2, 4-5.
[116] Discussion Paper Volume 2, [11.26]-[11.31].
[117] Email Submission E24 (Communities).
[118] Portal Submission P6 (SWEAR WA); Portal Submission P58 (WAAC).

The Commission's view

6.190. The Commission agrees with stakeholders that section 191 should be repealed. The provision is rarely used, as indicated by its use on one occasion between 2017 and 2022.[119] Its wording is archaic and stigmatising. It also does not address a genuine legal need. If a person procures an adult to engage in sex work without their consent, they will be guilty of the relevant sexual offence as a principal or party to the offence. If the conduct they have procured is lawful, they should not be convicted of a criminal offence.[120] Similar conduct against children is punishable under child sexual offences.

6.191. In the Commission's view, if aspects of this offence are to be retained, for example to deter the exploitation of the powerless, they might more appropriately be moved to the Prostitution Act given the offence relates to the regulation of sex work and the low maximum penalty. It might best be considered and addressed in the context of other laws specifically targeted at the sex work industry. A detailed consideration of that issue is beyond the scope of the Terms of Reference.

Recommendation

60. Section 191 of the *Code* (procuring a person to be a prostitute etc.) should be repealed.

Procuring sex by threats, intimidation, fraud or the administration of drugs

6.192. Section 192 of the *Code* provides that it is an offence to procure sex by threats, intimidation, fraud or the administration of drugs. The maximum penalty for this offence is 2 years' imprisonment. We discuss maximum penalties in Chapter 12.

6.193. This offence is rarely used: between 2017 and 2022, only two people were charged.[121]

Elements and definitions

6.194. Section 192 of the *Code* provides that:

> 1) Any person who —
>
> (a) By threats or intimidation of any kind procures a woman or girl to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or
>
> (b) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or
>
> (c) Administers to a woman or girl, or causes a woman or girl to take, any drug or other thing with intent to stupefy or overpower her in order to enable any man, whether a particular man or not, to have unlawful carnal knowledge of her; or

[119] Discussion Paper Volume 2, Appendix 2.
[120] *Criminal Code Act Compilation Act 1913* (WA) s 7(d).
[121] Discussion Paper Volume 2, Appendix 2.

(d) Does any of the foregoing acts with respect to a man or boy;

is guilty of a crime, and is liable to imprisonment for 2 years.

6.195. This provision sets out two ways in which it is an offence to procure 'unlawful carnal connection with a man':

- By threatening or intimidating the complainant.
- By using false pretences on the complainant.

6.196. The offence sets out a third way in which it can be committed: by administering a drug to the complainant with the intent of stupefying or overpowering them so that a man can 'have unlawful carnal knowledge' of them.

6.197. It is unclear whether there is a difference between the terms carnal connection and carnal knowledge. Given the history of the term carnal knowledge, both may be limited to penile penetration, but if that were so, it would not explain why carnal connection is used rather than carnal knowledge.

6.198. The person with whom the complainant is procured to have unlawful carnal connection or knowledge may be either the accused or a third party.[122] It appears that this person must be a man: it is not unlawful to procure a person to have unlawful carnal connection with a woman. The complainant may, however, be either a man or a woman.

6.199. There is no need for the prosecution to prove a lack of consent. The *Code* explicitly provides that it is not a defence that the complainant consented to the relevant act.[123]

Should the offence of procuring sex by threats, intimidation, fraud or the administration of drugs be repealed?

6.200. In the Discussion Paper we outlined various concerns with the scope and terminology of section 192 and sought views on whether this offence should be repealed.[124]

Stakeholders' views

6.201. There was some support in the submissions and consultations for repealing section 192. For example, Dr Dyer argued that people who participate in a sexual activity due to threats, intimidation or fraud have not consented to that activity. He submitted that:

> if such persons are to be convicted of a criminal offence, that offence should be a non-consensual one. The criminal law should apply a label to such persons' wrongdoing that accurately reflects what they have done …
>
> It is true that the s 192(1) offence covers a third scenario. That is, in addition to dealing with threats and fraud, s 192(1) provides that it is criminal for a person to administer to another person, or to cause that person to take, 'any drug or other thing with intent to stupefy or overpower' that person so that a man might 'have unlawful carnal knowledge of [him or] her'. But it is hard to see the need for this. If the 'carnal knowledge' were actually to take place, the man who penetrated the complainant would normally be guilty of the far more serious offence of sexual penetration without consent. Or, where the person who administered (etc) the drug (etc) to the complainant was a person other than the man who penetrated her, the person would

[122] *R v Lloyd* (1904) 6 WALR 160, 161.
[123] *Criminal Code Act Compilation Act 1913* (WA) s 192(2).
[124] Discussion Paper Volume 2, [11.32]-[11.41].

> normally also be guilty of that crime. If the 'carnal knowledge' were not actually to take place, the person who administered (etc) the drug (etc) would usually be guilty of the very serious offence created by s 293 of the *Code*, namely, administering or attempting to administer a 'stupefying or overpowering drug or thing to a person' 'with intent to commit or to facilitate the commission of an indictable offence.' And even where he was not guilty of that crime – as would be the case, for example, where he 'cause[d]' the complainant to take the drug or thing, but did not administer it to the complainant – he would often be guilty of attempting to commit an indictable offence (sexual penetration without consent) or, in a case where he had acted so as to enable another to have 'unlawful carnal knowledge' of the complainant, conspiracy to commit an indictable offence (again, sexual penetration without consent).[125]

6.202. The ODPP reached a similar conclusion. In relation to sexual activity that is procured by threats, intimidation or fraud, it noted that some commentators consider the provision to have a role to play where the relevant threat, intimidation or fraud was not sufficiently serious to vitiate consent:

> In the twentieth century, Australian courts, influenced by English authorities, developed a 'two-tiered' approach to fraudulently induced sexual penetration. It has been observed that during the process of expanding 'significantly' the circumstances in which consent would be vitiated, in 1985, the Western Australian government failed to clarify its intentions with respect to the procurement offence.[126]
>
> Currently, where a complainant's consent to sexual penetration was vitiated by threat, intimidation, 'deceit or any fraudulent means', or stupefaction, a charge under ss 325 or 326 may lie against both the accused who sexually penetrated the complainant (unless they were innocent of the vitiating circumstance) and also, where applicable, against a co-accused who aided or enabled that offence by threatening, intimidating, deceiving or administering a drug to the complainant … The question is: would repealing s 192 create a hiatus of conduct which should be criminal, but falls outside a charge under ss 325 or 326?
>
> Ultimately, we can't identify one, and it would be better to clarify that the scope of the circumstances which vitiate consent is not to be narrowed by the presence of a procurement offence in the Code. Recently, the WA Court of Appeal in *HES* prescriptively set down the six matters that the State must prove where the charge is sexual penetration without consent on the basis that a fraudulent representation vitiated consent. Those matters do not include any reference to the character or content of the fraudulent representation. That would appear consistent with the addition, in 1992, of the word 'any' (any fraudulent means). The decision in HES further undermines a 'two-tiered' approach to fraudulently induced sexual penetration, and s 192 should be repealed …[127]

6.203. The ODPP noted, however, that if we were to recommend narrowing the types of deceits or fraudulent means that are capable of vitiating consent for the purposes of the sexual offences, we should consider whether a subsidiary offence of this nature is necessary to fill the gap. It submitted that if this were to be done, the scope of the offence should be made clear by substantially reforming it, and it should be moved into Chapter XXXI.

6.204. The ODPP was also unable to identify any need for the aspect of section 192 that relates to the administration of drugs to facilitate carnal knowledge. In this regard, it stated that it 'is

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[125] Email Submission E18 (Dr Andrew Dyer) (citations omitted).

[126] Jianlin Chen, 'Two is a Crowd: An Australian Case Study on Legislative Process, Law Reform Commissions and Dealing with Duplicate Offences' (2021) 42(1) *Statute Law Review* 70, 75–76.

[127] Email Submission E19 (ODPP).

difficult to identify conduct which would not give rise to liability on the basis of enabling or aiding, or on the basis of a common intention having been formed to prosecute an unlawful purpose (sexual penetration without consent)'.[128]

6.205. By contrast, Legal Aid and Communities were of the view that section 192 should be retained. Communities submitted that 'the scope of the offence should be extended to other forms of sexual activity. The actions which constitute offences should include coercive control, meaning a pattern of controlling behaviour'.[129]

6.206. It was generally agreed that if section 192 is retained its language should be modified. In particular:

- It should be made gender neutral, so that 'sex or gender of the victim and perpetrator is immaterial to the provisions'.[130]
- The terms 'common prostitute' and 'of known immoral character' should be replaced, as they are stigmatising, offensive and archaic.

The Commission's view

6.207. Having considered the submissions and consultations, the Commission has formed the view that section 192 should be repealed. The language used in the provision is archaic and stigmatising, it overlaps with various other offences in the *Code*, and in its current terms it does not adequately identify conduct which should be the subject of criminal sanction.

6.208. In relation to the conduct addressed by section 192(1)(a) (threats or intimidation), we note that a person who participates in a sexual activity due to threats or intimidation has not consented to that activity; and a person who uses threats or intimidation to procure a sexual activity is liable to conviction for a relevant non-consensual sexual offence (for example, sexual penetration without consent). Consequently, this aspect of section 192 has no role to play.

6.209. In relation to the conduct addressed by section 192(1)(c) (administering a drug), we agree with the ODPP and Dr Dyer that it is difficult to foresee a case which is not already addressed by:

- The substantive sexual offence provisions (if the complainant was stupefied or overpowered and the accused personally engaged in the sexual activity);
- The parties provisions[131] (if the complainant was stupefied or overpowered and a third party engaged in the sexual activity);
- The offence of stupefying in order to commit an indictable offence[132] (if the accused administered the drug but the sexual activity did not take place);
- An attempted sexual offence (if the accused administered the drug or caused the complainant to take it, with an intention of personally engaging in the sexual activity, but the sexual activity did not take place); or
- Conspiracy to commit an indictable offence[133] (if the accused administered the drug or caused the complainant to take it, with the intention of facilitating another person to engage in the sexual activity, but the sexual activity did not take place).

[128] Ibid.
[129] Email Submission E24 (Communities).
[130] Portal Submission P58 (WAAC)
[131] *Criminal Code Act Compilation Act 1913* (WA) ss 7-8.
[132] Ibid s 293.
[133] Ibid s 558.

6.210. Given this overlap, we see little reason to retain section 192(1)(c) or to enact a modernised version of the offence.

6.211. In reaching this conclusion, we are particularly influenced by the existence of section 293, which makes it an offence to administer a drug to commit an indictable offence. This section provides:

> Any person who, with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, administers, or attempts to administer any stupefying or overpowering drug or thing to any person, is guilty of a crime, and is liable to imprisonment for 20 years.

6.212. This offence is very broadly drawn:

- It applies whenever a person administers a drug in order to commit an indictable offence. This includes all of the sexual offences under review (as they are all indictable offences).
- It does not just apply when the accused personally intends to commit the relevant offence. It also applies where they intend to facilitate the commission of that offence by another person.
- It does not just apply where the accused actually administers the drug to the complainant. It also applies where the accused attempts to administer the drug.

6.213. Given the breadth of this offence, we are of the view that it would capture almost all cases where a person administered a drug with the intention of facilitating a sexual offence, leaving little scope for a sexual offence-specific provision. An exception is that it may not apply to cases where the accused caused the complainant to take the drug but did not personally administer it.[134] While we do not consider this to be of particular concern, as such conduct could be addressed by charging the accused with an attempted sexual offence or conspiracy to commit an indictable offence (as discussed above), the Government may wish to amend section 293 to make it clear that it also applies to cases where the accused causes the complainant to take the drug. We do not, however, make a formal recommendation in this regard as this is beyond the scope of our Terms of Reference.

6.214. By contrast, we are of the view that section 192(1)(b) does identify some conduct that should continue to be criminalised: obtaining sexual activity by fraud. However, we consider that section 192(1)(b) should be repealed and new offences of obtaining sexual penetration by fraud and obtaining a sexual act by fraud should be enacted. We discuss this reform below.

Obtaining sexual penetration or a sexual act by fraud

6.215. In Chapter 4 we recommend several reforms to the list of circumstances in which a person does not consent. These include replacing the current reference to consent obtained by deceit and fraudulent means[135] with a reference to consent based on specific mistaken beliefs. These beliefs relate to matters which are fundamental to a sexual activity: the nature of the sexual activity, the identity of the other person or the purpose of the sexual activity. However, as the list of circumstances is non-exhaustive, it is possible for other mistaken beliefs also to negate consent, if they are sufficiently serious.

6.216. Where the complainant holds a relevant mistaken belief, it does not matter whether it was fraudulently induced by the accused – the complainant will not have consented to the sexual

[134] This will depend on how the term 'administer' is understood by the courts.

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

activity. That does not, however, mean that the accused's role in inducing the complainant's belief will be irrelevant. If the accused caused the complainant to hold the mistaken belief, due to fraud or deceit, they will be unable to successfully raise the mistake of fact defence.[136] The fact that they have engaged in fraudulent or deceptive conduct is also likely to be relevant to the penalty imposed.

6.217. Under this approach, although the list of circumstances does not specifically refer to fraudulent or deceptive conduct, it will capture any successful acts of fraud or deceit that relate to matters which are fundamental to a sexual activity (as they will result in a mistaken belief about the relevant matter). It will not, however, capture acts of fraud or deceit that induce a person to engage in a sexual activity, if the fraud or deception related to matters which are not fundamental to a sexual activity. Consequently, and given the diversity of views expressed in *Michael* and *HES* (discussed in Chapter 4), some frauds or deceits currently viewed as negating consent are probably not covered by the scheme recommended in Chapter 4.

6.218. We believe that this gap should be addressed. We consider that where a person has been induced to participate in a sexual activity due to fraud or deceit, their sexual autonomy has been infringed. This is the case even if the fraud or deception related to a matter which is not considered to be fundamental to a sexual activity, and so does not negate consent under our recommended approach. Consequently, subject to the conditions and exceptions outlined below, we consider it appropriate for such conduct to be criminalised. We note that such an approach has been taken in Queensland, SA, Tasmania and Victoria.[137]

6.219. In our view, it should not matter whether the accused has induced the complainant to engage in penetrative or non-penetrative sexual activity: in both cases there has been a violation of their sexual autonomy. However, such conduct should only be criminalised where:

- The accused knowingly made a false or misleading representation for the purpose of inducing the complainant to engage in the relevant sexual activity. This is what makes the conduct sufficiently wrongful to justify its criminalisation even though the misrepresentation did not relate to a fundamental matter – the accused was actively trying to deceive the complainant into engaging in a sexual activity that they otherwise would not have engaged in. It is not sufficient for the accused to have made that misrepresentation unwittingly or for a different reason.
- The complainant engaged in the relevant sexual activity because of the accused's false or misleading representation. If the complainant would have engaged in the sexual activity regardless of the misrepresentation, their sexual autonomy has not been breached.

6.220. In addition, for reasons similar to those discussed in Chapter 4,[138] we do not believe that a person should be held criminally liable for a sexual activity which was induced by false or misleading representations (which could be explicitly or implicitly made) which are about trivial matters, matters which are not sufficiently related to the relevant sexual activity, or matters which, if disclosed, may expose a person to a risk or threat of harm. To ensure clarity in this regard, we are of the view that the *Code* should specify the matters which cannot provide a basis for liability for these offences. We acknowledge that there will be different views about the matters that should be included in such a list. After considering the various matters which

[136] This is because under our reformed approach a mistaken belief in consent is not reasonable if the accused knew or believed in the existence of a circumstance included in the Code's list of circumstances in which there is no consent. Where the accused induced such a belief they will be aware of its existence.

[137] *Criminal Code Act 1899* (Qld) s 218(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 60; *Criminal Code Act 1924* (Tas) s 129; *Crimes Act 1958* (Vic) s 45.

[138] See the sub-sections of the ' 'Sex, sex characteristics, sexual orientation, gender identity and gender history', 'Sexual health' and 'Restricting the scope of the provision' in the section 'What circumstances should be included in the list?'.

have been referred to in cases, the academic literature and by stakeholders, we recommend that the *Code* provide that a person should not be held criminally liable where the relevant misrepresentation was solely about their income, wealth, age, feelings, marital status,[139] sexual fidelity, race, ethnicity, cultural background, history of prior sexual activity, criminal record, gender history, gender identity, birth sex, sexual orientation and/or that the accused did not have an STI if there was no realistic risk that the STI could be transmitted during the sexual activity.

6.221. We note that our recommendation in this regard only excludes false or misleading representations which are solely about one or more of the listed matters. It is possible that one of these matters, in combination with a non-listed matter, could provide a basis for conviction of these offences.

6.222. Consequently, we recommend enacting two new offences: obtaining sexual penetration by fraud and obtaining a sexual act by fraud. These offences should apply where:

- The accused made a false or misleading representation;
- The false or misleading representation did not solely relate to the accused's income, wealth, age, feelings, marital status, sexual fidelity, race, ethnicity, cultural background, history of prior sexual activity or criminal record, gender history, gender identity, birth sex, sexual orientation and/or that the accused did not have an STI if there was no realistic risk that the STI could be transmitted during the sexual activity;
- The accused knew or believed that the representation was false or misleading;
- As a result of the representation, the complainant engaged in the relevant sexual activity (sexual penetration for the offence of obtaining sexual penetration by fraud; a non-penetrative sexual act for the offence of obtaining a sexual act by fraud); and
- The accused intended that, as a result of the false or misleading representation, the complainant would take part in the relevant sexual activity.[140]

6.223. The relevant sexual activity should be defined in the same way as for the general penetrative and non-penetrative sexual offences.

6.224. We do not consider that the recommended offences are too broad or will result in trivial complaints. The offences capture narrower conduct than the current 'deceit, and any fraudulent means' provision in the *Code's* current definition of circumstances which negate consent, if the opinions of Steytler P in *Michael* and Buss P in *HES* are correct. Further, they require proof that the accused intended that as a result of the false or misleading representation, the complainant would take part in the relevant sexual activity. This is not an element of the current law (see Chapter 4).

[139] This would not exclude a misrepresentation that the complainant and the accused were married to each other.

[140] This offence is modelled on *Crimes Act 1958* (Vic) s 45.

Recommendations

61. Section 192 of the *Code* (procuring a person to have unlawful carnal knowledge by threat, fraud or administering drug) should be repealed.

62. There should be two new offences of obtaining sexual penetration by fraud and obtaining a sexual act by fraud. The elements of these offences should be:

- **The accused made a false or misleading representation;**
- **The false or misleading representation did not solely relate to the accused's income, wealth, age, feelings, marital status, sexual fidelity, race, ethnicity, cultural background, history of prior sexual activity, criminal record, gender history, gender identity, birth sex, sexual orientation and/or that the accused did not have an STI if there was no realistic risk that the STI could be transmitted during the sexual activity;**
- **The accused knew or believed that the representation was false or misleading;**
- **As a result of the representation, the complainant engaged in the relevant sexual activity (sexual penetration for the offence of obtaining sexual penetration by fraud; a non-penetrative sexual act for the offence of obtaining a sexual act by fraud); and**
- **The accused intended that, as a result of the false or misleading representation, the complainant would take part in the relevant sexual activity.**

Should any other sexual offences against adults be added to the *Code*?

6.225. In the Discussion Paper we sought views on whether any other offences should be added to the *Code*. We discussed the possibility of adding two new sexual offences against adults: breach of conditional consent; and committing non-assaultive offences with the intention of committing a sexual offence. We consider these offences below. No additional adult sexual offences that fall within our Terms of Reference[141] were suggested by stakeholders.

6.226. Although not squarely within our Terms of Reference, in the course of conducting research for this project we became aware of a gap in Western Australia's legislative provisions that the Government may wish to consider addressing: the indecent recording of adults without consent. At present, the *Code* contains provisions that prohibit indecently recording children,[142] and that prohibit the distribution of intimate images without the consent of the person depicted;[143] but it contains nothing that prevents a person from making an indecent recording of an adult without their consent. While such conduct may be covered by the broad prohibition on recording private activities contained in section 6 of the *Surveillance Devices Act 1998* (WA) (which prohibits installing, using, maintaining or causing to be installed an

[141] Our Terms of Reference only allow us to consider offences that should be added to Chapter XXXI of the *Code*. We cannot consider offences that properly belong in other Acts or other parts of the *Code*. This includes prostitution offences (which are addressed in the Prostitution Act); child exploitation offences (which are addressed in Chapter XXV of the *Code*) and intimate image offences (which are addressed in Chapter XXVA of the *Code*).

[142] *Criminal Code Act Compilation Act 1913* (WA) ss 320(6), 321(6), 322(6).

[143] Ibid s 221BD.

'optical surveillance device' to visually record a private activity), to the Commission's knowledge this provision is not commonly used to prosecute this type of activity.

6.227. By contrast, other jurisdictions have specifically addressed the indecent recording of adults. For example:

- NSW prohibits a person from intentionally recording an intimate image of another without that person's consent and with knowledge or recklessness as to their lack of consent.[144]
- Queensland prohibits visually recording another person without consent in circumstances where a reasonable adult would expect to be afforded privacy and the other person is in a private place or is engaging in a private act.[145]
- South Australia prohibits filming a humiliating or degrading act[146] or engaging in indecent filming.[147]

6.228. As we have not been tasked with reviewing the intimate image offences in Chapter XXVA of the *Code*, we do not make any recommendations in this regard.

Breach of conditional consent

6.229. It will sometimes be the case that a person only agrees to engaging in a sexual activity on certain conditions. For example, they may only agree to have sex with a person if they will marry them. A question arises as to what consequences (if any) should follow if the other party engages in the sexual activity but fails to comply with the condition.

6.230. In the Discussion Paper we noted that one way to address this situation would be to create a specific offence of breach of conditional consent. This option was suggested by Magenta in its preliminary submission. It referred to the examples of a person who fails to comply with a condition to use or condom or pay for sexual services, and argued that:

> Both of these examples are appropriate to be dealt with under sexual offences, as they are both offences done with sexual intent and in a sexual context, and have an effect on the victims of these offences similar to other sexual offences. We believe it is important that both of these types of conditional consent are dealt with under sexual offences, rather than another type of fraud.
>
> It is our position that creating a new sexual offence to include these types of offending would be the best option. These offences do not meet the seriousness of some of the current sexual offences of 'sexual penetration without consent' while exceeding the seriousness of 'indecent assault'.[148]

6.231. In the Discussion Paper we sought views on whether an offence of breaching conditional consent should be enacted.[149]

Stakeholders' views

6.232. Stakeholders generally accepted that a person who breaches conditional consent violates the other participants' sexual autonomy and has acted wrongfully. There was, however, little support for enacting an offence of breaching conditional consent. Most stakeholders who

[144] *Crimes Act 1900* (NSW) s 91P.
[145] *Criminal Code Act 1899* (Qld) s 227A.
[146] *Summary Offences Act 1953* (SA) s 26B.
[147] Ibid s 26D.
[148] Preliminary Submission 3 (Magenta).
[149] Discussion Paper Volume 2, [13.22]-[13.26].

addressed this issue were of the view that it would be better addressed by either modifying the *Code's* consent provisions (to make it clear that consent has been negated in such situations) or reforming the offence of procuring sex by fraud.

The Commission's view

6.233. The Commission does not recommend enacting an offence of breach of conditional consent. While we agree that such conduct is wrongful, we consider that it is adequately addressed by the reforms we have recommended to the *Code's* consent provisions, and by our recommendation for the enactment of the offences of obtaining sexual penetration by fraud and obtaining a sexual act by fraud.

Committing non-assaultive offences with an intent to commit sexual activity

6.234. Under current Western Australian law, it is an offence to assault another person with the intention of committing or facilitating the commission of a crime.[150] This includes assaulting a person with the intention of committing a sexual offence.

6.235. One possibility for reform would be to add a new provision which provides that it is a crime to commit other, non-assaultive offences with the intention of committing or facilitating the commission of a sexual offence. This could be limited to specific offences (for example, burglary) or extended to the commission of all offences.

6.236. Such an approach has been taken in the UK, which has:

- A general offence of committing an offence with intent to commit a sexual offence;[151] and
- A specific offence of trespassing with intent to commit a sexual offence.[152]

6.237. Although Western Australia does not have a comparable offence, a number of sexual offences have a mandatory minimum sentence if the offence is committed in the course of a home burglary. We discuss this sentencing requirement in Chapter 12.

6.238. In the Discussion Paper we sought views on whether the *Code* should provide that it is a crime to commit a non-assaultive offence with the intention of committing or facilitating the commission of a sexual offence.[153]

Stakeholders' views

6.239. This proposal was not addressed in detail by any stakeholders. Some submissions supported the introduction of the offence, while others opposed it. No reasoning was given for these positions.

The Commission's view

6.240. The Commission does not recommend enacting this offence. We are of the view that non-assaultive offending behaviour that is committed with an intention to commit or facilitate a sexual offence can be adequately addressed under the current law. Depending on the circumstances, when an accused commits such conduct, their intention to commit a sexual

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150 *Criminal Code Act Compilation Act 1913* (WA) s 317(a).
151 *Sexual Offences Act 2003* (UK) s 63.
152 Ibid s 62.
153 Discussion Paper Volume 2, [13.27]-[13.32].

offence could either be taken into account during their sentencing for the non-assaultive offence, or they could be convicted of an attempted sexual offence.

Should the sexual offences include a mental state requirement or negligent sexual offences?

6.241. In the Discussion Paper we noted that there is an important distinction between **common law jurisdictions** (jurisdictions which rely on a combination of the common law and statute law such as Victoria and NSW) and code jurisdictions.[154] In common law jurisdictions, the prosecution must generally prove that the accused had a specific mental state as part of the offence. For example, in Victoria 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).[155]

6.242. By contrast, sexual offences in code jurisdictions do not usually contain a mental state requirement.[156] 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.[157]

6.243. Although sexual offences in Western Australia do not contain a mental state element, the accused's mental state is relevant to the mistake of fact defence.[158] As discussed in Chapter 5, unless excluded by law, this defence applies to all offences.[159] 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.

6.244. In the Discussion Paper we raised the possibility of introducing a mental state requirement into the *Code's* sexual offence provisions.[160] For example, it could be provided that an accused should only be convicted of sexual penetration without consent or sexual coercion if they knew that the complainant was not consenting or were aware of that possibility.

6.245. We noted that this reform option would require a significant restructuring of the offence provisions as well as the mistake of fact defence. Depending on how the mental state requirement is defined, it may also make little substantive difference to the law. For example, in Victoria and NSW the prosecution can establish that the accused had the necessary mental state by proving that they did not reasonably believe the complainant was consenting.[161]

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154 See Discussion Paper Volume 1, [2.16]-[2.21].

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

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

157 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.

158 *Criminal Code Act Compilation Act 1913* (WA) s 24; *Criminal Code Act 1899* (Qld) s 24; *Criminal Code Act 1924* (Tas) ss 14-14A.

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

160 Discussion Paper Volume 2, Chapter 12.

161 See, eg, *Crimes Act 1958* (Vic) s 38; *Crimes Act 1900* (NSW) s 61HK.

6.246. In the Discussion Paper we identified some possible benefits to this approach.[162] For example, it would allow the *Code* to draw a distinction between:

- A more serious form of the offence, where the accused knew that the complainant was not consenting but proceeded regardless (intentional sexual offences).
- A less serious form of the offence, where the accused was not aware that the complainant was consenting but should have been (negligent sexual offences).

6.247. We sought views on whether a mental state requirement be added to any of the *Code's* sexual offence provisions, or whether the *Code* should include negligent sexual offences.[163]

Stakeholders' views

6.248. There was no support in the submissions or consultations for introducing a mental state requirement into any of the *Code's* sexual offence provisions or for enacting negligent sexual offences. Negligent sexual offences were seen to be 'at odds with an affirmative model of consent' and to 'risk indicating that some forms of sexual assault are not as serious as others'.[164] It was also argued that they fail to recognise the impact that sexual violence can have on a victim-survivor, which can be equally severe regardless of the perpetrator's state of mind.

The Commission's view

6.249. The Commission does not recommend drawing a distinction between intentional and negligent sexual offences. While in some cases negligently committed sexual offences may be less wrongful or harmful than intentionally committed offences, in other cases they will be just as wrongful and harmful. Consequently, we believe that this is a distinction best considered at the sentencing stage, where the judge can take into account all of the circumstances of the case. It should not make a difference to the offence for which the accused is convicted.

6.250. In reaching this conclusion, we note that we agree with stakeholders that drawing a distinction between intentional and negligent sexual offences also conflicts with the affirmative consent model proposed in Chapters 4 and 5. It also risks indicating that some non-consensual sexual activity is not as serious as others, and in doing so may be seen to devalue the harmful consequences that a negligent sexual offence may have on a victim-survivor.

6.251. We also do not recommend that the sexual offences be amended to include a mental state requirement. This would require a significant restructuring of the *Code's* offence provisions, as well as the mistake of fact defence, for little gain. As noted above, the main benefit of adopting such an approach is that it would allow a distinction to be drawn between intentional and negligent sexual offences. However, as we do not recommend introducing such a distinction into the *Code*, we see no value in enacting a mental state requirement.

[162] Discussion Paper Volume 2, [12.7].
[163] Discussion Paper Volume 2, Chapter 12.
[164] Email Submission E24 (Communities).

7. Sexual offences involving child victims

Chapter overview

This Chapter makes recommendations for reforming the *Code's* sexual offences involving child victims.

General sexual offences involving child victims

7.1. In this Chapter we consider the ways in which the sexual offences involving child victims should be reformed. We start by providing an overview of the offences and outlining their elements and associated definitions. We then examine the general penetrative and non-penetrative offences involving child victims, before looking at the sexual offences involving child lineal relatives, the sexual servitude and deceptive recruiting offences, and the offence of allowing a young person to be on premises for unlawful carnal knowledge.

Overview of offences

7.2. Chapter XXXI of the *Code* contains the general sexual offences against children.[1] These are divided into four categories:

- Section 320 contains sexual offences against children under 13.
- Section 321 contains sexual offences against children 13 to under 16.[2]
- Section 322 contains sexual offences against children 16 or over.[3]
- Section 321A contains the offence of persistent sexual conduct with a child under 16.

[1] *Criminal Code Act Compilation Act 1913* (WA) ss 320, 321, 321A, 322. The *Code* also contains other sexual offences that only apply to lineal relatives or de facto children. We address these offences later in this Chapter.

[2] This refers to children aged of or over 13 and under 16. We use this terminology throughout the Report.

[3] These offences can only be committed by a person who has care, supervision or authority over the child.

7.3. The offences in sections 320, 321 and 322 require proof that the accused committed one (or more) of the following acts against a child of the relevant age:

- Sexual penetration.
- Procuring, inciting or encouraging sexual behaviour.
- Indecent dealing.
- Procuring, inciting or encouraging an indecent act.
- Indecent recording.

7.4. By contrast, the offence in section 321A criminalises persistent sexual conduct with a child. This requires proof that the accused committed certain sexual conduct on at least three occasions on different days. Having regard to the Government's acceptance in-principle to address certain matters arising out of the Royal Commission, our Terms of Reference do not permit us to review or make recommendations in relation to section 321A of the *Code*, including related evidentiary provisions and the maximum penalty for the offence. However, it is necessary for us to refer to the offence as it forms part of the suite of child sexual offences.

7.5. The offences in sections 320-322 of the *Code* do not require proof of lack of consent: they are established simply by proving that the accused committed the relevant conduct and that the complainant was of the relevant age. In the *Code,* children under 13 are deemed incapable of consenting.[4] This issue is addressed in Chapter 4.

7.6. The maximum penalties for sexual offences against children range from four years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it was committed. We discuss maximum penalties in Chapter 12.

7.7. The child sexual offence provisions also set out certain sentencing requirements that must be complied with in specific circumstances, such as where the offence is committed in the course of an aggravated home burglary or by a juvenile offender. We also discuss these statutory sentencing requirements in Chapter 12.

7.8. In Western Australia, since 2017, 5,941 people have been charged with sexual offences against children under 13; 3,843 people have been charged with sexual offences against children 13 to under 16; 278 people have been charged with sexual offences against children 16 or over; and 347 people have been charged with persistent sexual conduct with a child under 16.[5]

7.9. The Statistical Analysis Report shows that 83% of the sexual offence charges that were tried in the District Court in 2019 were child sex offences.[6] About half of these resulted in a guilty verdict. This was a higher percentage than for adult sex offences. In 97% of the charges for offences committed against children the accused was known to the complainant, and in 61% of the charges the relationship between the accused and complainant was family or domestic.[7] In charges involving child victims, the accused were 99% males and the complainants were 84% female.[8] Unfortunately, because of the manner in which the data was recorded, in 38% of the charges we were unable to ascertain the age gap between the complainant and the accused. In the cases where the age gap was ascertainable, 85% of the charges involved an

4 *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(c).
5 Discussion Paper Volume 2, Appendix 2.
6 Statistical Analysis Report, Tables 1 and 2.
7 Ibid Table 7.
8 Ibid Table 11.

age gap of over 10 years. Of these, 70% involved an age difference of over 20 years.[9] This indicates the vast power imbalance between the complainants and the accused in sexual offending involving child victims.

Elements and definitions

Child

7.10. The *Code* defines a child to be:

> (a) any boy or girl under the age of 18 years; and
>
> (b) in the absence of positive evidence as to age, any boy or girl apparently under the age of 18 years.[10]

7.11. This means that where it is alleged that the accused committed a sexual offence against a child who was 16 or over,[11] the prosecution must generally prove that at the time of the alleged act the complainant was under 18. If, however, there is no positive evidence of the complainant's age, it will be sufficient for the prosecution to prove that the complainant appeared to be under 18 at that time.

7.12. As the definition of child extends beyond the context of sexual offences, it is beyond our Terms of Reference to recommend changes. We note, however, that the language of this provision is gendered. There appears to be little reason for retaining this gendered terminology: the term 'boy or girl' could readily be replaced by the term 'person'. We suggest that when amending the *Code* to implement the other reforms recommended in this Report, consideration be given to making this definition gender neutral.

Sexual penetration of a child

7.13. There are separate offences of sexually penetrating a child who is under 13,[12] 13 to under 16,[13] or 16 or over and under the care, supervision or authority of the accused.[14]

7.14. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

- The accused sexually penetrated the complainant; and
- The complainant was of the relevant age at the time of the sexual penetration.

7.15. We discuss the definition of sexual penetration, and make recommendations for its reform, in Chapter 6.

7.16. If the accused is charged with committing a sexual offence against a child who is 16 or over,[15] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of this term below.

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9 Ibid Table 12.

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

11 These offences can only be committed by a person who has care, supervision or authority over the child.

12 *Criminal Code Act Compilation Act 1913* (WA) s 320(2).

13 Ibid s 321(2).

14 Ibid s 322(2).

15 Ibid.

Procuring, inciting, or encouraging a child to engage in sexual behaviour

7.17. It is an offence to procure, incite or encourage a child to engage in sexual behaviour. There are separate versions of this offence for children who are under 13,[16] 13 to under 16,[17] and over 16 and under the care, supervision or authority of the accused.[18]

7.18. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

- The accused procured, incited or encouraged the complainant to engage in sexual behaviour; and
- The complainant was of the relevant age at the time of the procurement, incitement or encouragement.

7.19. The *Code* defines the word 'incites' to include 'solicits and endeavours to persuade'.[19] The *Code* does not define the terms 'procures' or 'encourages'. However, some guidance on the meaning of these terms was provided in *NDA v Western Australia*,[20] in which the Court of Appeal said:

> The word 'procures' appears in both s 321(3) and s 321(5). Both of those sub-sections create an offence and use the word in the same way, together with the words 'incites' and 'encourages'. The words 'procures', 'incites' and 'encourages' do not have the same meaning. In particular, a person may encourage another to do something without the necessity for that thing to have occurred. In the case of procuring, a person charged under s 321(5) must do something with the intention of causing a child to do an indecent act, that indecent act must have occurred and there must be a causal connection between the conduct of the person charged and the occurrence of the indecent act.[21]

7.20. We discuss the definition of sexual behaviour, and make recommendations for reform, in Chapter 6.

7.21. If the accused is charged with procuring, inciting, or encouraging a child who is 16 or over to engage in sexual behaviour,[22] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of this term below.

Indecently dealing with a child

7.22. There are separate offences of indecently dealing with a child who is under 13,[23] 13 to under 16,[24] or 16 or over and under the care, supervision or authority of the accused.[25]

7.23. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

- The accused indecently dealt with the complainant; and

16 Ibid s 320(3).
17 Ibid s 321(3).
18 Ibid s 322(3).
19 Ibid s 1.
20 [2023] WASCA 50.
21 Ibid [47].
22 *Criminal Code Act Compilation Act 1913* (WA) s 322(3).
23 Ibid s 320(4).
24 Ibid s 321(4).
25 Ibid s 322(4).

- The complainant was of the relevant age at the time of the indecent dealing.

7.24. The *Code* defines 'deal with' to include 'doing any act which, if done without consent, would constitute an assault'.[26] We discuss the meaning of assault in Chapter 6.

7.25. The *Code* provides that indecently dealing with a child includes:

- Procuring or permitting the child to deal indecently with the person;
- Procuring the child to deal indecently with another person; or
- Committing an indecent act in the presence of the child or incapable person.[27]

7.26. We discuss the meaning of indecent, and make recommendations for reform, in Chapter 6.

7.27. If the accused is charged with indecently dealing with a child who is 16 or over,[28] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of this term below.

Procures, incites or encourages a child to do an indecent act

7.28. It is an offence to procure, incite or encourage a child to do an indecent act. There are separate versions of this offence for children who are under 13,[29] 13 to under 16,[30] and 16 or over and under the care, supervision or authority of the accused.[31]

7.29. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

- The accused procured, incited or encouraged the complainant to do an indecent act; and
- The complainant was of the relevant age at the time of the procurement, incitement or encouragement.

7.30. We discuss the meaning of the phrase procures, incites or encourages earlier in this Chapter.

7.31. The phrase indecent act is not defined. However, the *Code* provides that it includes an indecent act which is:

- Committed in the presence of or viewed by any person; or
- Photographed, videotaped, or recorded in any manner.[32]

7.32. We discuss the meaning of indecent, and make recommendations for reform, in Chapter 6.

7.33. If the accused is charged with procuring, inciting, or encouraging a child who is 16 or over to do an indecent act,[33] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of this term below.

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26 Ibid s 319.
27 Ibid s 319(3).
28 Ibid s 322(4).
29 Ibid s 320(5).
30 Ibid s 321(5).
31 Ibid s 322(5).
32 Ibid s 319(1).
33 Ibid s 322(5).

Indecently records a child

7.34. There are separate offences of indecently recording a child who is under 13,[34] 13 to under 16,[35] or 16 or over and under the accused's care, supervision or authority.[36]

7.35. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

- The accused indecently recorded the complainant; and
- The complainant was of the relevant age at the time of the indecent recording.

7.36. The *Code* defines 'to indecently record' to mean 'to take, or permit to be taken, or make, or permit to be made, an indecent photograph, film, video tape, or other recording (including a sound recording)'.[37]

7.37. We discuss the meaning of indecent, and make recommendations for reform, in Chapter 6.

7.38. If the accused is charged with indecently recording a child who is 16 or over,[38] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of this term below.

Persistent sexual conduct with a child under 16

7.39. It is an offence to persistently engage in sexual conduct with a child under the age of 16.[39]

7.40. This offence is different from the other sexual offences against children contained in Chapter XXXI of the *Code*. Those offences are targeted at individual acts that take place on specific occasions. By contrast, this offence is targeted at conduct that occurs over a period of time.

7.41. This offence was previously titled 'having a sexual relationship with a child under 16'. Its name was changed in 2008 due to a view that the word 'relationship' inappropriately implied mutuality and consent.[40]

7.42. The prosecution must prove the following two elements beyond reasonable doubt:

- The accused did a relevant sexual act in relation to the child on at least three occasions on different days;[41] and
- The complainant was under 16 at the time the acts were done.

7.43. The *Code* defines the relevant sexual acts to be:

- Sexually penetrating, or attempting to sexually penetrate, the complainant.
- Indecently dealing with, or attempting to indecently deal with, the complainant.
- Procuring, inciting or encouraging the complainant to engage in sexual behaviour, where the complainant in fact engages in sexual behaviour.[42]

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34 Ibid s 320(6).
35 Ibid s 321(6).
36 Ibid s 322(6).
37 Ibid s 319(1).
38 Ibid s 322(6).
39 Ibid s 321A(4).
40 Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006 (WA), cl 10.
41 *Criminal Code Act Compilation Act 1913* (WA) s 321A(2).
42 Ibid s 321A(1).

7.44. We consider reforms to the definitions of sexual penetration, sexual behaviour and indecency in Chapter 6.

7.45. The prosecution does not need to prove that the sexual acts were of the same type. They do not need to have all taken place in Western Australia, although at least one of them must have.[43]

7.46. If there is evidence of sexual offences having been committed on more than three occasions, the jury does not have to unanimously agree as to which three acts comprise the persistent sexual conduct. It simply needs to be satisfied that the accused did a relevant sexual act in relation to the child on at least three occasions on different days.[44]

7.47. A charge for this offence must specify the period during which it is alleged that the sexual conduct occurred. However, it does not need to specify the dates or in any other way particularise the circumstances of the sexual acts alleged to constitute the sexual conduct.[45] A court cannot order the prosecution to provide particulars of the sexual acts alleged.[46]

7.48. These provisions were a legislative response to *S v R,*[47] in which the High Court overturned convictions for incest where the complainant's evidence was that her father had frequently had intercourse with her, but she 'blanked them all out' and was unable to give details of specific occasions on which sexual activity took place. The provisions were designed to allow the prosecution to bring charges where the nature and effect of the repetitive sexual conduct is that the complainant cannot recall or distinguish particular incidents.[48]

7.49. An indictment for this offence must be signed by the Director of Public Prosecutions or the Deputy Director of Public Prosecutions.[49]

7.50. The Royal Commission has recommended reforming provisions of this nature across Australia. It has recommended that the States and Territories should:

- Amend their relevant offence to largely mirror the comparable Queensland offence,[50] but with additional provisions stating that the offence applies retrospectively to sexual activity that was unlawful at the time it was committed.[51]
- Consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.
- Consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.[52]

7.51. The Queensland offence is titled 'Maintaining a sexual relationship with a child'. The Royal Commission expressed concern about the use of the word relationship given the exploitative

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43 Ibid s 321A(3).

44 Ibid s 321A(11). This provision was expressly intended to overcome the decision of the High Court in *KBT v The Queen* (1997) 191 CLR 417, which required a jury to be unanimous about which of the alleged offences occurred: Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006 (WA), cl 10.

45 *Criminal Code Act Compilation Act 1913* (WA) s 321A(5).

46 Ibid s 321A(8).

47 *S v R* (1989) 168 CLR 266.

48 Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006 (WA), cl 10.

49 *Criminal Code Act Compilation Act 1913* (WA) s 321A(7).

50 *Criminal Code Act 1899* (Qld) s 229B.

51 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 74.

52 Ibid, Recs 23 and 24.

nature of child sexual abuse. However, the Royal Commission ultimately recommended an offence with the same title.

7.52. The *actus reus* of the Queensland offence is the maintaining of an unlawful sexual relationship with a child. All members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship involving unlawful sexual activity existed. The jury must be satisfied that more than one unlawful sexual act occurred, but the prosecution does not have to particularise the acts. The jury need not be satisfied of the particulars of any act and jury members need not be satisfied about the same unlawful sexual activity.

Care, supervision or authority

7.53. Section 322 of the *Code* creates sexual offences against children who are 16 or over and under the accused's care, supervision or authority.

7.54. The *Code* does not define the phrase 'care, supervision or authority'. The meaning of this phrase has also not been considered by the Western Australian Court of Appeal.

7.55. The words in the phrase are to be read disjunctively but the section creates only one offence; not three.[53] In *R v Howes*,[54] a Victorian case considering identical wording in the Victorian Act, it was held that the words are to be given their ordinary dictionary meaning and the trial judge should explain those meanings to the jury. Justice Brooking suggested that the trial judge could:

- Give the jury a dictionary definition of authority, this being 'power to influence the conduct and actions of others; personal or practicable influence';[55] and
- Tell the jury that the reason behind the legislation is to prevent 'exploitation by persons in a position of care, supervision and authority', and that the legislation is designed to protect young people, often from themselves.[56]

7.56. In *Lydgate v The Queen*,[57] another Victorian case considering identical wording in the Victorian Act, it was held that evidence the accused previously had care, supervision or authority of the complainant may be relevant to whether the accused was in such a position at the time of the alleged sexual activity, but will not be proof of the relationship on its own.

Mistake of age defence

7.57. Where the accused is charged with a sexual offence against a child 13 to under 16, or with persistent sexual conduct with a child under 16, they may raise the mistake of age defence.[58]

7.58. For this defence to succeed the accused must prove, on the balance of probabilities, that:

- They believed on reasonable grounds that the child was 16 or over; and
- They were not more than three years older than the child.

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53 *R v Howes* [2000] VSCA 159; *Lydgate v The Queen* [2014] VSCA 144; *Anderton (a pseudonym) v The Queen* [2019] VSCA 290.

54 [2000] VSCA 159.

55 Ibid.

56 Ibid.

57 [2014] VSCA 144.

58 *Criminal Code Act Compilation Act 1913* (WA) ss 321(9), 321A(9).

7.59. The mistake of age defence is not available if the child was under the care, supervision or authority of the accused.[59]

7.60. The *Code* provides that:

- It is not a defence to a charge under section 320 (a sexual offence against a child under 13) that the accused did not know the victim's age or believed the victim was 13 or over.[60]
- It is not a defence to a charge under section 322 (a sexual offence against a child 16 or over) that the accused believed, on reasonable grounds, that the child was 18 or over.[61]

Lawful marriage defence

7.61. Where the accused is charged with a sexual offence against a child who is 16 or over, they may raise a **lawful marriage defence**.[62] This is a defence which applies where the accused and the complainant were married to each other.

7.62. In relation to the section 322 offences, for this defence to succeed the accused must prove, on the balance of probabilities, that they were lawfully married to the child.

7.63. The lawful marriage defence is not available in relation to any of the other sexual offences involving child victims contained in Chapter XXXI of the *Code*.[63]

Should the child sexual offences scheme be changed?

7.64. In Chapter 6 we suggest substantial structural reforms to the adult sexual offences. Specifically, we recommend:

- Replacing sexual penetration without consent and sexual coercion with two penetrative sexual offences: sexual penetration without consent and coerced sexual penetration.
- Replacing the offence of indecent assault with two non-penetrative sexual offences: sexual act without consent and coerced sexual act.
- Amending the definitions associated with these offences.

7.65. Appendix 2 summarises the revised offence structure that we recommend.

7.66. In the Commission's view, the child sexual offences should reflect this revised offence structure, creating a cohesive set of sexual offences throughout the *Code*. This will require:

- The existing offences of sexual penetration of a child, procuring a child to engage in sexual behaviour, indecently dealing with a child and procuring a child to do an indecent act to be repealed.
- New offences of sexual penetration involving a child victim, coerced sexual penetration involving a child victim, sexual act involving a child victim and coerced sexual act involving a child victim to be enacted.
- These offences to be defined in identical terms to the adult offences, but with the following modifications:

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59 Ibid s 321(9a).
60 Ibid s 331.
61 Ibid s 322(7).
62 Ibid s 322(8).
63 A lawful marriage defence is available in relation to offences against vulnerable persons: see Chapter 8.

- The inclusion of an element relating to the victim's age.
- The removal of the requirement that the prosecution prove lack of consent.

7.67. We do not recommend amending the offence of indecently recording a child, which does not currently have an adult equivalent.[64] The Government may, however, wish to consider grouping this offence with the other intimate image offences, which are currently contained in Chapter XXVA of the *Code*.[65]

7.68. In the Discussion Paper we discussed the possibility of adding two new sexual offences involving child victims: a broad grooming offence; and failing to protect a child within an institution. However, in light of the Government's in-principle acceptance of the Royal Commission's recommendations in these areas, our Terms of Reference were subsequently amended to exclude consideration of these offences from the scope of our review. Consequently, we do not make any recommendations in this regard.

7.69. We note, however, that our recommendation concerning the repeal of the procuring offences proceeds on the assumption that the Government will give effect to the Royal Commission's recommendation that a broad grooming offence be enacted. The offence recommended by the Royal Commission would prohibit an adult from using words or conduct to facilitate a child engaging in or being involved in the commission of a sexual offence. Such an offence would capture much of the behaviour currently captured by the procuring offences. Any other offending behaviour currently caught by these offences is likely to be captured by the revised offences of coerced sexual penetration involving a child victim, coerced sexual act involving a child victim, or the parties provisions in sections 7-9 of the *Code*.[66] If a grooming offence is not enacted, or is enacted other than in the form recommended by the Royal Commission, consideration may need to be given to retaining the procuring offences.

[64] As noted in Chapter 6, we suggest that the Government consider introducing an adult version of this offence.

[65] In Chapter 13 we suggest that it may be desirable for all of these offences to be grouped under a new Part of the *Code*, titled Sexual Offences.

[66] These provisions allow people who had involvement in an offence to be charged with committing the offence, including people who commit the relevant acts, people who aid or enable the commisson of the offence, people who counsel or procure another to commit the offence and people who form an unlawful common purpose to commit the offence.

Recommendations

63. The offences of sexual penetration of a child, procuring a child to engage in sexual behaviour, indecently dealing with a child and procuring a child to do an indecent act should be replaced by the following offences:

- **Sexual penetration involving a child victim.**
- **Coerced sexual penetration involving a child victim.**
- **Sexual act involving a child victim.**
- **Coerced sexual act involving a child victim.**

64. The child sexual offences should be defined in identical terms to the revised adult sexual offences, but with the following modifications:

- **The inclusion of an element relating to the complainant's age; and**
- **The removal of the requirement that the prosecution prove lack of consent.**

65. If a child grooming offence is not enacted, or is enacted other than in the form recommended by the Royal Commission, consideration should be given to retaining a version of the procuring offences.

Should the age of consent be changed?

7.70. The effect of the child sexual offence provisions in Western Australia is that it is illegal to engage in a sexual activity with a child under 16.[67] All comparable jurisdictions criminalise sexual activity with children below a certain age regardless of the child's subjective attitude towards the activity. Generally, in Australia the age of consent is 16, but it is 17 in Tasmania[68] and South Australia.[69]

7.71. Sections 320 and 321 of the *Code* were introduced in 1992. In his Second Reading speech introducing the amending legislation the then Attorney General said:

> There have been many complaints about the pressure put on young girls in sexual abuse cases to make them say that they have consented to the offence. The new section 321 is designed so that an adequate penalty can be imposed in a serious case without the need to prove that the child did not consent ... Where a charge is laid under the new section 321, the offence would cover both consensual and non-consensual acts, but the question of consent would only be relevant to the issue of penalty. These provisions will considerably reduce the trauma for child witnesses, and remove any need for questioning them about intimate details of what actually occurred.[70]

7.72. In *Marris v The Queen*, Justice Wheeler explained that consent is not an element of sexual offences involving children under the age of 16 for the following reasons:

> A child is not in a position to assess fully the meaning and consequences of sexual activity. It is clear that Parliament understood that both for that reason, and because of the disparity in power (physical, social, emotional and so on) which exists between

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67 The relevant age is 18 if the child is under the accused's care, supervision or authority.

68 See, eg, *Criminal Code Act 1924* (Tas) s 124.

69 *Criminal Law Consolidation Act 1935* (SA) s 49(3).

70 Western Australia,*Parliamentary Debates*, Legislative Council, 6 May 1992, 1803 (Joseph Berinson).

> a child and an adult, the concept of a child's 'consenting' to sexual intercourse with an adult should not find a place in the legislation.[71]

7.73. The Court of Appeal elaborated on this point in *Cross v Western Australia*:

> Part of the purpose of section 321 of the *Code* is to protect children. That purpose is not only to protect children from sexual predators, but also to protect children from themselves. Section 321 reflects a recognition that a person aged less than 16 may have very limited capacity to resist moral, social, emotional or other pressure, particularly from a person more mature than themselves.
>
> Section 321 also reflects the view of the legislature that it is undesirable that young people should embark upon sexual activity at an age at which they may be unable to fully comprehend or cope with its social and emotional consequences. Parliament has delineated that age as 16; that must be respected by the courts regardless of the level of maturity and sexual experience of a particular complainant. In a sense, Parliament has chosen to protect children under 16 by depriving them of the capacity to consent, in a legally effective manner, to sexual conduct. That can be seen as reflecting a judgment that children under 16 are not in a position to give true or real or informed consent to the conduct criminalised in section 321. Even where a young person aged less than 16 appears to wish to engage in sexual activity, there is, in effect, a duty cast upon others to refrain from acting on, or encouraging, those wishes.[72]

7.74. In *Riggall v Western Australia,*[73] Justice Wheeler expressed the view that there was a degree of arbitrariness in using 16 as the age at which a person could consent to sexual activity. Her Honour noted that views on the age at which a person could give consent ranged from 15-21 and she acknowledged that some children under 16 had the capacity to consent to sexual activity.[74] Her Honour further expanded on this concept in *Western Australia v SJH*: [75]

> As I have noted, the lines drawn by the provisions of Ch XXXI of the Code reveal a legislative desire not to lump all sexual offences against children into one category, but to identify factors which are likely to affect a child's ability to understand, and to consent to or to resist, sexual contact with another. However, the substantive criminal law necessarily deals in the drawing of arbitrary lines, in most cases. Conduct must be able to be clearly identified as either an offence or not an offence. There are no 'partial' offences.
>
> Sentencing, however, is a different matter. It is at that point that close attention to the legislative purpose, the interests of the community in protecting children, the interests of the victim of an offence, and the real culpability of the offender, ought to be reflected in a sentence which is appropriate to all of the circumstances of the case.
>
> …
>
> It follows, in my view, not only from the legislative structure, the pre-existing legal context and the Parliamentary Debates, but also from what can be derived from materials objectively analysing the actual experiences of young people, that, while sexual experiences containing an element of 'abuse' may be very harmful and should receive a sentence of significant severity, not all sexual contact is experienced as abusive or harmful. There are young people who consider, sometimes (although not

71 *Marris v The Queen* [2003] WASCA 171, [12].
72 *Cross v Western Australia* [2018] WASCA 86 [43]-[44].
73 [2008] WASCA 69.
74 Ibid [21], [43].
75 [2010] WASCA 40, [63]-[64], [76].

always) correctly, that they are 'ready' to engage in sexual conduct with a particular partner, and either to initiate sexual contact or to give an informed and voluntary consent to such contact, notwithstanding that they are under 16. In those circumstances, the gravamen of the criminality of the offending partner lies in disregard of the law, rather than in the particular circumstances of the case. There may be substantial variations in what is the appropriate punishment, depending on the circumstances.

7.75. In the Discussion Paper we sought views on whether 16 is the appropriate age below which all sexual activity with children should be prohibited regardless of a child's subjective attitude towards the activity.[76]

Stakeholders' views

7.76. Views were divided on this topic. Some stakeholders, including Legal Aid and participants in the Broome consultation, argued that the age of consent should be reduced to 14, for reasons including that:

- The current age of consent of 16 criminalises existing social behaviour, as many young people engage in sexual activity with one another at a much younger age than 16. Within some cultural and ethnic groups and in some areas of Western Australia it is not uncommon for children as young as 12 to engage in sexual activity.
- Marriages pursuant to Aboriginal and Torres Strait Islander Peoples' customary laws and traditions, which may include sexual relations, occur in some communities between children under 16.[77]
- Anecdotally, since the starting age for high school was lowered to include children who are 12, there has been an increase in children of that age engaging in sexual activity with older students from their school.
- The current age of consent creates risks for young people who may be prosecuted, convicted and declared reportable offenders for engaging in sexual activity with another willing young person. It was noted this is particularly undesirable for Aboriginal peoples, as there are high numbers of Aboriginal reportable offenders who accrue further convictions for failing to meet their reporting obligations in minor ways. Further, there may be community or cultural consequences of being labelled a sex offender, such as payback, threats and violence.
- Where two people under 16 willingly engage in sexual activity with one another, both participants are guilty of an offence, yet generally only one child will be charged. The child who is not charged is usually the one whose parents reported the matter to the police. In such cases the only option for the accused is to make a submission to the ODPP to discontinue the prosecution on public interest grounds. In these circumstances it is unfair to label one participant an offender when they are too young to consent to sexual activity – and may also have been the victim of child sexual abuse on another occasion.
- Lowering the age of consent could be accompanied by an education program for young people about how to have healthy, safer sexual relationships and how to communicate consent.

[76] Discussion Paper Volume 2, [7.69]-[7.76].

[77] See also ALRC, *Recognition of Aboriginal Customary Laws* (Report 31, 2010) [223]-[225].

7.77. By contrast, other stakeholders, while acknowledging that many young people under 16 engage in sexual activity (including penile/vaginal penetration) with one another, maintained that 16 is the appropriate age of consent, as children under that age are unlikely to understand the possible consequences of their behaviour. In addition, it was argued that:

- The purpose of the age of consent is to protect children who are not capable of making serious decisions for themselves. The age of consent being 16 is consistent with the age at which the law says that children can start making other serious decisions; for example, they can start learning to drive and may be competent to consent to medical treatment.
- There is no evidence that definitively identifies an age as being the appropriate age at which a child is capable of independently deciding to engage in sexual activity with another person.
- While there is no uniform age of consent in all Australian jurisdictions, 16 is on par with other parts of the country, so should not be changed unless there is a good reason to do so.
- Although some people may be engaging in sexual activity when they are younger than 16 this is not a good reason on its own to change the age of consent (although it may provide a reason for enacting a similar age defence).

7.78. Some members of the Community Expert Group thought that perhaps there should not be a fixed age of consent at all: that the age at which it is permissible for a person to have sex should be defined in a capacity-based way. They argued that this would recognise that there is such a vast array of experience, maturity levels, communication skills, behavioural functioning and decision-making ability that age as a number is meaningless. However, it was also acknowledged that having a fixed age limit allows people (particularly people who are neurodiverse) to know when it is permissible to have sex with another person – that is, a fixed age of consent is a more accessible way of understanding one's rights and the rights of others. They also acknowledged that there is a strong impetus to harmonise sexual offence laws across Australia, and not having a fixed age of consent would put Western Australia radically out of step with other Australian jurisdictions.

The Commission's views

7.79. Having considered the different views expressed by stakeholders the Commission does not recommend changing the age of consent in Western Australia for the following reasons:

- Western Australia's current age of consent is the same as that in most Australian jurisdictions. That fact is a justification for retaining 16 as the age of consent when there is no evidence to justify moving to a different age.
- Setting the age of consent at 16 appropriately recognises the community's standard that, under that age, childhood is a time for education and personal development. This standard helps to ensure that children are sufficiently emotionally mature and educated to be able to engage in intimate personal relationships if they choose to do so, and to deal with the possible consequences of those relationships.
- Although there are some children who are emotionally and intellectually capable of consenting to sexual activity prior to 16, we consider that many do not have the capacity to do so. It is preferable for the law to protect the interests of the more vulnerable group.

7.80. Our Terms of Reference exclude consideration of the similar age defence. The Commission acknowledges that if there is no similar age defence, some of the difficulties that are identified

above, and which might weigh in favour of lowering the age of consent, remain unaddressed. In some cases, but not all, those difficulties might be managed through prosecutorial discretion. Nonetheless, the Commission does not consider that those factors justify changing the age of consent even in the absence of a similar age defence.

Should the age categories be changed?

7.81. Western Australia currently distinguishes sexual offences involving child victims both by the type of sexual activity and the child's age. The maximum penalty available for engaging in a sexual activity of a particular type with a child victim in the younger age category is higher than that available for engaging in the same type of sexual activity with a child victim in the older age category.

7.82. For example, section 320(2) makes it an offence to sexually penetrate a child under 13; the maximum penalty is 20 years' imprisonment.[78] Section 321(2) creates a distinct offence of sexually penetrating a child 13 to under 16; the maximum penalty is 7 to 20 years' imprisonment (depending on whether the child is under the offender's care, supervision or authority and on whether the offender is also a child).[79]

7.83. Other jurisdictions vary in their approach to this issue. For example:

- The ACT and NSW take the same as approach as Western Australia. They have distinct offences for each type of sexual activity based on the child's age, with higher maximum penalties available for offending against child victims in the lower-age category.[80]
- Victoria has separate offences for sexually penetrating a child under 12 and sexually penetrating a child under 16, with a higher maximum penalty for sexually penetrating a child under 12.[81] However, Victoria only has a single offence of sexually assaulting a child under 16 and does not provide different maximums based on the child's age.[82]
- Queensland has only one offence of penile penetration of a child under 16, but provides different penalties based on the child's age.[83]
- SA has only one offence of unlawful sexual intercourse with a child, but different penalties based on the child's age.[84] However, its penalty for the offence of committing an act of gross indecency involving a child victim is the same regardless of the child's age.[85]

7.84. In the Discussion Paper we sought views on whether the age categories should be changed.[86] We did not receive any submissions on this issue, other than in relation to the availability of different maximum penalties for offending involving child victims of different ages (which we consider in Chapter 12).

7.85. In light of the lack of support for changing the approach taken in the *Code*, we do not recommend making any changes in this regard. While we are of the view that all sexual offending against children is abhorrent, we consider it appropriate for the *Code* to continue to mark out offences against very young children as the most heinous, given they are committed

78 *Criminal Code Compilation Act 1913* (WA) s 320(2).
79 Ibid s 321(2) and (7).
80 *Crimes Act 1900* (ACT) ss 55A, 61; *Crimes Act 1900* (NSW) ss 66A, 66C, 66DA, 66DB.
81 *Crimes Act 1958* (Vic) ss 49A, 49B**.**
82 Ibid s 49D.
83 *Criminal Code Act 1899* (Qld) s 215.
84 *Criminal Code Compilation Act 1935* (SA) s 49.
85 Ibid s 58.
86 Discussion Paper Volume 2, [7.77]-[7.81].

against the most vulnerable members of the community. Where an offender has committed a sexual offence against a very young child, we are of the view that their criminal record should reflect that fact, alongside the type of sexual offence they have committed.

7.86. We note that to some extent, the setting of the relevant age categories is arbitrary, with no evidence-based reason for selecting a specific age at which to differentiate between offences. This is reflected in the different approaches taken to this issue by the other Australian jurisdictions. Given the lack of consensus in the area, and the absence of significant community support for reforming the law, the Commission is of the view that the current age groupings should be retained. We consider it to be appropriate to continue to differentiate between offences involving children under 13, children 13 to under 16, and children 16 or over.

Should the mistake of age defence be reformed?

7.87. For child sex offences in section 321 of the *Code*, where the child complainant must be 13 to under 16, it is a defence for the accused to prove, on the balance of probabilities,[87] that:

- They believed on reasonable grounds that the child was 16 or over; and
- They are not more than three years older than the child.[88]

7.88. In the Discussion Paper we summarised the approaches taken to the mistake of age defence around Australia and in some international jurisdictions.[89] We noted that none of these jurisdictions limits the defence to cases where the accused is not more than three years older than the child. We sought views on whether the mistake of age defence should be reformed, including by removing the requirement that the accused not be more than three years older than the child; requiring the accused to prove that the child consented to the sexual activity; and making the defence available to charges where the child is under the accused's care, supervision or authority.[90]

Stakeholders' views

7.89. Stakeholders held mixed views about whether the mistake of age defence should be reformed.

7.90. Communities noted that there is currently no clear evidence as to which iteration of the mistake of age defence ensures better outcomes for children or increases community safety.

7.91. A number of stakeholders supported removing the age difference limitation, including Legal Aid, participants in the ALS and Broome consultation, and some members of the Legal Expert Group. Arguments expressed by these stakeholders included:

- The three year age limitation has the potential to cause injustice, because it prevents the defence from being raised by an older accused even though they held a reasonable belief that the child with whom they engaged in sexual activity was over 16 (for example, based on the child's appearance or what the child told them about their age) or had taken reasonable steps to ascertain the child's age (for example, asking the child for identification and being provided with fake documentation).
- People of all ages may have difficulty determining the age of children, particularly if the child makes an effort to look and behave in a way that suggests they are older. Some

87 *Indich v The Queen* [1999] WASCA 146, [14].
88 *Criminal Code Act Compilation Act 1913* (WA) s 321(9).
89 Discussion Paper Volume 2, Appendix 3.
90 Ibid [7.82]-[7.93].

teenagers look very mature. It may be harder for persons who are older to accurately judge age the age of a child, as they may less frequently interact with young people.

- The three-year age limit is especially likely to cause injustice to people who suffer from cognitive impairments or developmental disorders (such as foetal alcohol spectrum) who may be poor judges of age.
- There are severe consequences for convicting a person of an offence of engaging in sexual activity with a child 13 to under 16, even though the accused may have had a reasonable but mistaken belief that the child was 16 or over. These consequences may include imprisonment, significant social stigma and a declaration that the offender is a reportable offender.
- The accused should be able to rely on the honest and reasonable mistake of fact defence regardless of the age difference between the accused and the complainant. The jury should be permitted to assess whether the mistake was reasonable based on the particular facts, rather than restricting the availability of the defence based on an arbitrarily set age gap.

7.92. The Commission received a submission from an individual stakeholder which provides a case study of the effect of the current mistake of age defence.

7.93. The stakeholder told us that when he was 31, he was charged with, and pleaded guilty to, sexual penetration of a child 13 to under 16. He advised us that he met the victim on a dating website for adults only. He said that the victim told him that they were 18 and that they appeared physically mature in online images. The offender said he collected the victim from a public place at night, and on the drive back to the offender's house the victim showed the offender what appeared to be a genuine form of identification which stated they were 18. In person the victim also appeared to be older than 16. At the offender's house the victim initiated intimate physical contact with the offender and then participated in consensual sexual activity. The next day, which was a weekday, the offender dropped the victim home. The offender said that the victim spent the night with him on what would have been a school night, and this contributed to his belief that the victim was not of school age. Several days later the offender learned the victim was only 15 and indicated he felt horrified at this discovery. He said he pleaded guilty on the basis of legal advice: having admitted that the sexual activity in question occurred, that the victim was 15, and that he was more than three years older than the victim, he was told he did not have a defence.

7.94. The sentencing judge accepted that both parties were willing participants in the sexual activity, that it did not involve force or coercion, and that the victim lied to the offender about their age.[91] The sentencing judge also found that the offender was unsophisticated and socially isolated. His Honour imposed an 18-month term of imprisonment, suspended for 12 months. As a result of the conviction, His Honour was obliged to declare the offender a reportable offender. The offender said that he never would have had sex with the victim if he had known the victim's true age. In essence, he believed that his understanding that the victim was 18 was both genuine and reasonable in the circumstances, and that he was tricked. The offender believed it was unfair he was unable to raise the mistake of age defence.

7.95. While the offender was not sentenced to an immediate term of imprisonment, he indicated that since being prosecuted he has remained isolated from normal social contact. This is due to a fear of inadvertently communicating online with the victim or other children, communicating

[91] The Commission read the sentencing transcript after providing appropriate undertakings as to confidentiality of personal information contained within it.

with other people charged with child sex offences (and the same victim, in particular), and avoiding having to disclose his conviction to other people, especially potential employers.

7.96. The ODPP and some members of the Legal Expert Group did not support removing the three-year age limitation. They asserted that the limitation in the availability of the defence was introduced to address the problem of men in their mid-20s having sex with girls of around 14 and then claiming that the complainant had told them that they were 16 or older. They further submitted that it is difficult to obtain a conviction in such circumstances, especially when, by the time the trial occurs, the complainant is older than they were at the time of the events in question and the jury is required to imagine how they appeared several years earlier.

7.97. The ODPP and Communities both maintained that any reforms to the defence should not include making the defence available for charges where the complainant was under the accused's care, supervision or authority, as it should be presumed that a person who holds a position of such responsibility will be aware of the child's age.

7.98. Communities and some members of the Legal Expert Group submitted that the accused should be required to prove that they took reasonable steps to establish whether the child was 16 or over.

7.99. We received limited submissions on the issue of whether the accused should be required to prove that the complainant consented to the sexual activity. Legal Aid supported such a reform.

7.100. Some participants in the Broome consultation also queried the limitation of the mistake of age defence to charges involving child victims of 13 or over. They described a case in which the complainant was 12 and the accused 15, where the accused genuinely believed the complainant was over 16 because they told him an incorrect age and were physically mature. However, he did not have a defence because the mistake of age defence does not apply where the complainant is under 13.

The Commission's views

7.101. The Commission agrees that the way the mistake of age defence is currently framed has the potential to cause injustice. In particular, we consider that injustice can result from the defence only being available to an accused who is within three years of the complainant's age. We note that the three-year age gap limitation on the defence was enacted in 2002, and it appears to have been a compromise resulting from the introduction of broader reforms equalising the rights of homosexual and heterosexual people.[92] We also note that no other comparable jurisdiction has such a limitation to its mistake of age defence.

7.102. We consider that if an accused person has taken reasonable steps to ascertain the child's age it is fair that the defence be available, regardless of the accused's age. This does not mean that an accused who raises the defence will be acquitted. It will remain a question for the jury as to whether the defence applies. We therefore recommend that the mistake of age defence be amended to remove the requirement that it is only available to accused persons who are within three years of the complainant's age.

7.103. We recommend, however, that the onus should be placed on the accused to prove, on the balance of probabilities, that:

- They took reasonable steps to ascertain the child's age; and

[92] See Discussion Paper Volume 2, [7.85]-[7.87].

- They had a reasonable belief that the complainant was 16 or over.

7.104. We consider these requirements to be appropriate balancing measures to take into account the vulnerability of children, as well as stakeholder concerns that it is easy for an accused to assert, but hard for the prosecution to disprove, a belief that a child was 16 or over. What are reasonable steps in any case will be up to the jury to decide taking into account the facts of the case. A jury may well find that an accused who is significantly older than the complainant needs to take more, or different, steps than a younger accused in order to establish a reasonable belief.

7.105. We do not recommend requiring proof that the complainant consented. As discussed in Chapter 4, it is our view that the *Code* should provide that children under 16 are incapable of consenting to sexual activities. However, we recommend that the mistake of age defence be amended specifically to require the accused to prove, on the balance of probabilities, that they honestly and reasonably believed that the complainant consented to the sexual activity. We also consider this to be an appropriate balancing measure. It ensures not only that the accused was mistaken about the complainant's age, but that they were mistaken about the existence of consent.

7.106. We agree with the ODPP and Communities that any reforms to the defence should not include making the defence available for charges where the complainant was under the accused's care, supervision or authority, as it should be presumed that a person who holds a position of such responsibility will be aware of the child's age or in a strong position to ascertain the age.

7.107. Neither do we recommend making the mistake of age defence available in respect of sexual offences involving child victims under 13. We consider that children under 13 are too vulnerable to sexual abuse and exploitation to introduce the defence for victims of that age, even where the accused is not more than three years older than the complainant.

Recommendations

66. The requirement that the mistake of age defence is only available to accused persons who are within three years of the complainant's age should be removed.

67. The mistake of age defence should be amended to require the accused to prove, on the balance of probabilities, that:

- **They took reasonable steps to ascertain the complainant's age;**
- **Their belief in the child's age was reasonable; and**
- **They honestly and reasonably believed that the complainant consented to the sexual activity in question.**

Should the lawful marriage defence be repealed?

7.108. Lawful marriage is a defence to charges in section 322 of the *Code* involving sexual activity with a child 16 or over who is under the accused's care, supervision or authority. In the Discussion Paper we asked whether this should continue to be a defence and, if so, whether it should be extended to other types of relationships or be amended in any other way.[93]

[93] Discussion Paper Volume 2, [7.97]-[7.103].

Stakeholders' views

7.109. There was some support for retaining the lawful marriage defence in this context. Legal Aid and Communities submitted that the defence exists solely for the purposes of situations where a child 16 or over marries an adult. Without it, any time the married couple engaged in sexual activity, the adult would be offending: it would criminalise all sexual interactions between two married people.

7.110. WLSWA advocated repealing the defence. The following points may be extrapolated from its submission:

- Allowing the defence indicates that it is acceptable to have sex with children, when ordinarily this would be considered non-consensual. We should not send the message that marriage makes otherwise non-consensual sex acceptable.
- The defence can provide protection to perpetrators of intimate partner sexual violence in forced marriages.
- Victim-survivors may be unwilling to report the violence due to the availability of the defence.

The Commission's views

7.111. Currently, the operation of the section 322(8) lawful marriage defence is limited: it is only available to charges of sexual activity with children of 16 or over pursuant to section 322 of the *Code*. Marriage is not a defence to charges of non-consensual sexual activity involving adults.[94] Consequently, if it is alleged that a person engaged in sexual activity with their 16- or 17-year-old spouse without the spouse's consent, the person could be charged with, and convicted of, one of the adult sexual offences which contain lack of consent elements, such as sexual penetration without consent.

7.112. We acknowledge the arguments extrapolated from the WLSWA submission. However, under the *Marriage Act 1961* (Cth) it is possible for an adult to legally marry a child of 16 or 17 in certain circumstances. Given that the community accepts that married persons of any age may engage in sexual activity, we consider that lawful marriage must continue to remain a defence to charges against the offences in section 322 of the *Code*. Our conclusion also takes into account that in comparable jurisdictions which have sexual offences involving child victims of 16 or over, being lawfully married to the child is a defence to those charges.[95]

7.113. We have considered whether, if the defence is to remain, it should be extended to persons in de facto relationships with children of 16 or over, rather than just persons who are married to 16- or 17-year-olds. We are conscious that:

- The defence makes permissible sexual activity that would otherwise be unlawful.
- The circumstances in which a child 16 or over will be able to marry are 'unusual and exceptional' and require the consent of both a judge or magistrate and the child's parents.[96]
- The category of persons who may be considered to be in de facto relationships with a child 16 or over is likely to be much wider than the category of legally married persons,

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94 A lawful marriage defence is, however, available in relation to offences against vulnerable persons: see Chapter 8.

95 *Crimes Act 1900* (ACT) ss 55A(3) and 61A(2); *Crimes Act 1900* (NSW) ss 73(5) and 73A(2); *Criminal Code Act 1983* (NT) s 128(4); *Criminal Law Consolidation Act 1935* (SA) s 49(8); *Criminal Code 1924* (Tas) s 125A(3); *Crimes Act 1958* (Vic) s 49Y(1).

96 *Marriage Act 1961* (Cth) ss 11-13.

and the commencement of a de facto relationship with a child 16 or over does not require permission from a judge or magistrate (and in some cases may not even require the permission or consent of the child's parents).

7.114. In these circumstances we consider it preferable to give effect to the protective principle to reduce the risk that children 16 or over will be sexually abused or exploited by their partners or others. On that basis we do not consider that the defence should be extended to people in de facto relationships with children 16 or over.

Should the phrase care, supervision or authority be changed or defined?

7.115. Section 322 of the *Code* creates sexual offences involving child victims who are 16 or over and under the accused's care, supervision or authority. The *Code* does not define the phrase care, supervision or authority. Courts have provided some assistance in the meaning of the phrase. For example:

- The words in the phrase are to be read disjunctively and the expression does not create a genus.[97]
- The words in the phrase are ordinary English words, to be given their ordinary grammatical meaning.[98]
- The expression is 'aimed at those who, by virtue of an established and on-going relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of that relationship'.[99] Such a relationship will subsist so long as there exists a standing relationship which gives rise to a capacity in the accused to exploit or take advantage of the influence which the relationship of care, supervision or authority provides and 'so long as there exists the need … to protect the child from … exploitation', whether or not the occasion on which the sexual activity took place was connected with or arose out of the relationship.[100]

7.116. The rationale of these offences, as in Victoria, seems to be that while children 16 or over are generally capable of deciding whether or not to consent to sexual activity, they should still be protected from exploitation by those who are in a position of care, supervision or authority and from exploitation where there is a power imbalance.[101]

7.117. These offences do not require the child's consent to the sexual activity to have been influenced by the relationship of care, supervision or authority. The offence is complete if sexual activity is proved and the relevant relationship of care, supervision or authority is established.[102]

7.118. In the Discussion Paper we sought views on whether the phrase care, supervision or authority should be replaced by another descriptor.[103] For example, in the ACT, NSW and the NT, the relevant legislation instead refers to a young person being under the 'special care' of the accused. Some jurisdictions, for example the ACT and NSW, also use the phrase 'young person' rather than 'child' to describe people in this age group.[104]

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97 *R v Howes* [2000] VSCA 159.

98 Ibid.

99 Ibid [143]-[144].

100 Ibid.

101 Ibid; *Lydgate v The Queen* [2014] VSCA 144; *Anderton (a pseudonym) v The Queen* [2019] VSCA 290; LexisNexis Australia, *Criminal Law Western Australia* [322.10] (October 2022).

102 *R v Howes* [2000] VSCA 159.

103 Discussion Paper Volume 2, [7.62]-[7.68].

104 *Crimes Act 1900* (ACT) s 55A(2); *Crimes Act 1900 (*NSW) s 73(3).

7.119. In the Discussion Paper we also sought views on whether the *Code* should define the phrase care, supervision or authority and, if so, how it should be defined.[105]

Stakeholders' views

7.120. We received limited submissions on these issues. Legal Aid suggested that the phrase care, supervision or authority should be replaced with another phrase, but also said that the meaning of the present phrase is clear and does not require a statutory definition. Communities did not support changing the terminology, nor did it see the need for it to be defined. It argued that any definition would need to be broad, to incorporate a wide range of circumstances where care, supervision or authority could be applied and interpreted. The ODPP and the Zonta Club said that the phrase should be defined.

7.121. The ODPP noted that the circumstance of a victim being under the accused's care, supervision or authority has a relatively limited field of application, having been applied to an accused who is the complainant's employer or work manager,[106] a foster parent,[107] a person who has assumed the position of a de facto parent or guardian,[108] and a teacher.[109]

7.122. The ODPP submitted that it is unclear whether an accused who was previously in a position of authority, but was not at the time of the offending (notwithstanding that their relationship with the complainant was cultivated in that context) could be charged with being in a position of care, supervision or authority. The ODPP noted that in *CJ v Western Australia*[110] the accused was not charged with having committed the offences while the complainant was under her care, supervision or authority, although she was a primary school teacher who had taught the complainant some years earlier.

The Commission's views

7.123. The Commission sees benefit in referring to children 16 or over as young persons, as they are a discrete subset of children. Doing so would help distinguish this age group from children under 16 who are deemed incapable of consenting in any circumstances. On a practical level it would make the *Code* easier to understand.

7.124. There did not appear to be any appetite amongst stakeholders to change the phrase care, supervision or authority and we do not see any need to use a differently worded phrase.

7.125. However, we agree with the ODPP that there is currently a lack of clarity around the meaning of the phrase. We also note that most other Australian jurisdictions have inclusive definitions of the phrase, or similar terms, in their legislation.[111] These definitions help to identify persons who fall within the meaning of the phrase, and help to educate the community about the people who must not engage in sexual activity with young persons. The list makes it plain that it is the nature of the relationship, whether that be of a standing nature or occurring on specific occasions, that is important in determining whether a child is under the accused's care, supervision or authority; not the occasion on which the sexual activity occurred.

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105 Discussion Paper [7.62]-[7.68].

106 *State Director of Public Prosecutions v Rao* [2019] WASCA 93; *Ellis v R* unreported (Supreme Court of Western Australia Court of Criminal Appeal) CCA 104 of 1994, 26 September 1997; *Fletcher v R* unreported (Supreme Court of Western Australia Court of Criminal Appeal) CCA 158 of 1996, 27 March 1997.

107 *MGP v Western Australia* [2012] WASCA 52.

108 *RST v Western Australia* [2016] WASCA 59; *JDF v Western Australia* [2016] WASCA 221.

109 *JAF v Western Australia* [2008] WASCA 231.

110 [2009] WASCA 42.

111 *Crimes Act 1900* (ACT) s 55A(2); *Crimes Act 1900 (*NSW) s 73(3); *Criminal Code Act 1983* (NT) s 128(3); *Criminal Law Consolidation Act 1935* (SA) s 50(13); *Crimes Act 1958* (Vic) s 37.

7.126. For these reasons we see benefit in an inclusive statutory definition of the term, which includes circumstances where, at the time of the sexual activity, the accused:

- Was a teacher at a school or other educational institution, or a person with responsibility for students at a school or other educational institution, and the young person was a student at the school or other educational institution.
- Had an established personal relationship with the young person in relation to the provision of religious, sporting, musical or other instruction, in which relationship the complainant was under the authority of the accused person.
- Was the young person's employer.
- Was the young person's youth worker.
- Provided professional counselling to the young person.
- Was a health service provider and the young person was the person's patient.
- Was a carer for the young person if the young person had impaired decision-making ability.
- Was an out-of-home carer.
- Was employed in, or provided services in, an institution at which the young person was detained.
- Was a police officer acting in the course of their duty in respect of the young person.
- Had previously been in a relationship of care, supervision or authority with the young person (such as those outlined above), and the accused knew or ought to have known that was the case.

7.127. We consider it important to include the last-mentioned circumstance because if a relationship of care, supervision or authority exists while a person is a child, the power imbalance is likely to continue even after the care, supervision or authority ceases, at least until the child becomes an adult. For example, it is likely that an accused who was formerly a young person's high school teacher, but who has ceased to be by the time of the alleged sexual activity, will have power and influence over the young person. We therefore consider that while the complainant remains a young person, sexual activity between the young person and a person who was previously in a position of care, supervision or authority in respect of the young person ought to be a criminal offence so as to protect the young person. This provision will prevent an accused who was in a position of authority over a child before they turned 16, but who ceased to be when they turned 16, avoiding conviction for this offence because the complainant consented to the sexual activity. Such consent would not amount to a truly free and voluntary agreement to participate in sexual activity because the complainant was groomed for the sexual activity when they were a child under 16.

7.128. For the last-mentioned circumstance we have included the requirement that the accused knew or ought to have known that they had previously been in the role of care, supervision or authority to avoid capturing situations where the role of care, supervision or authority was fleeting or in the distant past. The onus will be on the prosecution to prove the knowledge element. Where the relationship of care, supervision or authority was substantial or recent this is unlikely to be difficult. We consider that the knowledge requirement is necessary to balance the interests of accused people with the need to protect vulnerable young people.

7.129. The inclusion of this circumstance will also avoid any uncertainty about the admissibility, relevance of and use that can be made of evidence of a former relationship of care, supervision or authority in a charge of this nature.[112]

7.130. We note that this list does not include family members. This is because there are separate offences for cases involving child relatives, which we discuss below. In our view, where an offence is committed against a child relative, it is preferable for the offender to be convicted of one of those specific offences, as it more appropriately labels the gravamen of the conduct. The definition of care, supervision or authority is inclusive: in the event that a sexual offence is alleged to have been committed by a family member who is not captured by the offences involving child relatives,[113] the prosecution will still be able to argue that, in the circumstances, the complainant was in the accused's care, supervision or authority.

[112] *Lydgate v The Queen* [2014] VSCA 144.

[113] As noted below, we recommend that the child relative offences apply to sexual activity committed by parents, siblings, uncles, aunts and lineal ancestors (grandparents and great-grandparents). They will not apply to more distant familial relationships.

Recommendations

68. For sexual offences involving children who are 16 or over the terms child or children should be replaced with young person or young people.

69. For the purposes of the sexual offences involving children who are 16 or over, the term 'care, supervision or authority' should be defined. The definition should be inclusive and should capture circumstances where, at the time of the sexual activity, the accused:

- **Was a teacher at a school or other educational institution, or a person with responsibility for students at a school or other educational institution, and the young person was a student at the school or other educational institution.**
- **Had an established personal relationship with the young person in relation to the provision of religious, sporting, musical or other instruction, in which relationship the complainant was under the care, supervision or authority of the accused person.**
- **Was the young person's employer.**
- **Was the young person's youth worker.**
- **Provided professional counselling to the young person.**
- **Was a health service provider and the young person was the person's patient.**
- **Was a carer for the young person if the young person had impaired decision-making ability.**
- **Was an out-of-home carer.**
- **Was employed in, or provided services in, an institution at which the young person was detained.**
- **Was a police officer acting in the course of their duty in respect of the young person.**
- **Had previously been in a relationship of care, supervision or authority with the young person, and the accused knew or ought to have known that was the case.**

Should a new offence of persistent sexual conduct with a child of or over 16 be enacted?

7.131. It is outside our Terms of Reference to review the offence of persistent sexual conduct with a child under 16 in section 321A of the *Code.* However, the Government has accepted in-principle the recommendation of the Royal Commission that the offence ought to be amended so that relevantly:

- The actus reus is the maintaining of an unlawful sexual relationship.
- An unlawful sexual relationship is established by more than one unlawful sexual act.

- The jury must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed, but the jurors need not be satisfied of the same unlawful sexual acts.
- The offence applies retrospectively, but only to sexual acts that were unlawful at the time they were committed.

7.132. In this section we assume that section 321A will be amended to reflect the Government's in-principle acceptance of these recommendations.

7.133. The offence in section 321A is different from the other sexual offences involving child victims contained in Chapter XXXI of the *Code*. Those offences are targeted at individual acts that take place on specific occasions. By contrast, this offence is targeted at conduct that occurs over a period of time.

7.134. The offence in section 321A of the *Code* only applies to child victims under 16: it does not apply to people who engage in persistent sexual conduct with children 16 or over. Presumably, this is because Parliament considered that a child 16 or over should be able to recall sufficient detail of individual sexual offences committed against them to be able to prove individual offences. The Royal Commission's recommendation does not touch on the age of the children to whom the offence applies.

7.135. However, given that such persistent sexual conduct may occur soon after a child turns 16, and may consist of many instances that would be difficult for anybody to recall individually, we suggested in the Discussion Paper that it may be desirable to enact a similar offence which applies to persistent sexual conduct with a child 16 or over, who is under the care, supervision or authority of the accused. We sought views on whether such an offence should be added to the *Code*.[114]

Stakeholders' views

7.136. The submissions we received on this issue unanimously supported the creation of the offence.[115] Arguments put in favour of the offence included:

- Although 16- and 17-year-olds are over the age of consent, they remain vulnerable to abuse by people in positions of care, supervision or authority.
- Such an offence would align with other sections acknowledging that sexual offences perpetrated by a person responsible for the care, supervision or in authority of a child are particularly severe in respect to the emotional and psychological impact on the victim-survivor.
- It would strengthen the trauma-informed approach to legislating in this area, by recognising that offences perpetrated by this cohort of offenders are likely to occur in the complainant's 'regular environment' (such as their home, school or other places they attend frequently within their usual schedule of activities). This factor may impact the child's recall, in reference to their ability to differentiate between specific events and timelines.
- Including such situations is consistent with the Royal Commission's recommendations and the approach taken in the ACT and SA.

7.137. In its submission, knowmore recommended the name of the offence refer to the persistent sexual abuse of the child. It argued that titles that refer to a sexual relationship with a child, or sexual conduct with a child, 'sanitise the nature of the offending … They also feed into victim-

[114] Discussion Paper Volume 2, [13.4]-[13.7].

[115] Portal Submission P41 (Legal Aid); Email Submission E16 (Zonta Club of Bunbury); Email Submission E19 (ODPP); Email Submission E25 (knowmore); Portal Submission P49 (Communities).

blaming attitudes by retaining the word "with", which implies sexual activity being engaged in by a child and an adult together, as opposed to sexual abuse being perpetrated by an adult against a child'.[116]

7.138. The ODPP suggested that it be made clear that where the persistent sexual conduct spans a period during which the child turned 16, the uncertain dates legislation[117] can apply to allow a charge covering the entirety of the conduct.

The Commission's views

7.139. We agree with stakeholders that there is currently a gap in the legislation which should be filled by an offence of this type. In particular, we agree that there is no reason why the logic underlying the enactment of an offence of this type for children under 16 should not be applied to children 16 or over where the child is under the accused's care, supervision or authority.

7.140. We recommend that the elements of the offence mirror those in the offence in section 321A, or in an amended or substituted offence that applies in relation to children under 16, with the additional element that the child must have been under the accused's care, supervision or authority.

7.141. In relation to the name of the offence, we note that in the context of offences committed against children under 16, the Royal Commission expressed concern at the use of the word relationship given the exploitative nature of child sexual abuse. However, despite this concern, it decided not to recommend deviating from this language, primarily because Queensland's provision has been considered and found valid by Queensland's Court of Criminal Appeal and the High Court.[118]

7.142. Since the Royal Commission's Report was published, Queensland has addressed concerns about the use of the word relationship in the name of the offence, by renaming the offence 'repeated sexual conduct with a child'.[119] South Australia has also renamed its offence 'sexual abuse of a child',[120] following a campaign led by sexual abuse survivor Grace Tame.[121] In both of these cases it was just the name of the offence that was changed: the elements of the offence remained the same.

7.143. We agree with the concerns expressed by the Royal Commission and knowmore about the use of the word relationship in the name of the offence. Consequently, we recommend that this offence be called persistent sexual abuse of a young person. The Government may wish to consider adopting a similar naming convention for the offence where it involves a child under 16.

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116 Email Submission E25 (knowmore).

117 *Criminal Code Compilation Act* (WA) 1913 Chapter IIB.

118 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 73.

119 *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) s 16.

120 *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 2023* (SA) s 3.

121 Changes to South Australian child sex abuse law, 4 May 2023, https://www.premier.sa.gov.au/media-releases/news-items/media-release40.

Recommendation

70. There should be a new offence of persistent sexual abuse of a young person. The elements of this offence should mirror the elements of section 321A of the *Code* (or any reformed offence involving children under 16) but should apply to children who are 16 or over and are under the accused's care, supervision or authority.

Should the prosecution be permitted to charge a course of conduct as a single count?

7.144. In some jurisdictions legislation permits the prosecution to charge what would otherwise be multiple counts of the same sexual offence as a single count on the indictment. For example, in Victoria the *Criminal Procedure Act 2009* (Vic) allows an indictment to charge a course of conduct as a single count on the indictment.[122] Similar provisions exist in the UK[123] and New Zealand.[124]

7.145. Western Australia does not have a course of conduct provision for child sexual offences. However, the concept is similar to that in the *Criminal Procedure Act 2004* (WA) (**Criminal Procedure Act**), which allows for multiple counts of assault, illegal possession of an object or stealing to be charged as one offence.[125]

7.146. The Victorian course of conduct provisions require that a single course of conduct can only incorporate incidents of the same type of offence (for example, sexual penetrations or indecent dealings) that all relate to the same complainant.[126]

7.147. The Royal Commission considered that course of conduct provisions may be helpful where the repeated sexual abuse was of the same kind (for example, all penetrative sexual offences or all indecent assaults), as it may 'address the difficulties where abuse has been repeated so often and in such similar circumstances as to make the identification of individual occasions impossible for the complainant'.[127]

7.148. The Royal Commission noted that the Queensland offence of maintaining an unlawful sexual relationship with a child and the Victorian course of conduct charge provision focus on different aspects of the problem of persistent child sexual abuse and how complainants remember and give evidence. It concluded that it is preferable that jurisdictions have both provisions available 'so that the prosecution could choose which one to use on a case-by-case basis and having regard to the evidence that was available in the case'.[128]

7.149. The Western Australian Government has accepted, in principle, the Royal Commission's recommendation but has not yet introduced a Bill to give effect to this in-principle acceptance.[129]

7.150. In the Discussion Paper we asked whether, in relation to offending involving child victims, the *Code* should permit the prosecution to charge a course of conduct as a single count on the

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[122] *Criminal Procedure Act 2008* (Vic) sch 1 cl 4A.

[123] *Criminal Procedure Rules 2010* (UK) rule 14.2(2).

[124] *Criminal Procedure Act 2011* (NZ) s 20.

[125] *Criminal Procedure Act 2004* (WA) sch 1 rule 8.

[126] *Criminal Procedure Act 2008* (Vic) sch 1 cl 4A(2).

[127] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 67.

[128] Ibid 70.

[129] 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.

indictment.[130] To the extent that it relates to section 321A, this issue has been excluded from our Terms of Reference. However, as this issue has potential relevance to other offences, we discuss this option for reform below.

Stakeholders' views

7.151. There was some support for this reform. For example, knowmore asserted that in cases of ongoing offending it would assist the prosecution to select which charge is most appropriate on a case-by-case basis.

7.152. Communities stated that Western Australia may wish to consider whether Victoria has established an evidence-base or statistics that indicate whether the current framing of this permission is working effectively in practice.

7.153. Legal Aid was concerned to ensure that, if charging in this way is permitted, the prosecution should still be required to provide sufficient particulars to enable the accused to identify the alleged conduct, time period and the frequency of the conduct.

7.154. The ODPP saw little merit in this proposal if section 321A is amended to criminalise the relationship, rather than providing for the prosecution of a person who has committed a number of offences, only some of which can be particularised. In its view a course of conduct charge would be more restrictive than a charge alleging the conduct of an unlawful sexual relationship. However, the ODPP submitted that if section 321A is maintained in its current form, there is room for a course of conduct charge, in the sense that a prosecution could then occur in relation to a victim who cannot remember any (or at least, fewer than three) particular incidents, but can say that a particular type of offence occurred regularly. The ODPP also submitted that a course of conduct charge should not be a statutory alternative to a section 321A charge.

The Commission's view

7.155. This is a procedural matter rather than one relating specifically to any of the offences we have been directed to examine in the Terms of Reference.

7.156. We see disadvantages to charging sexual offences by way of a single course of conduct provision, including that it changes the balance between the accused and prosecution significantly in favour of the prosecution, as it abrogates the accused's usual rights to receive particulars of each incident.

7.157. If the recommended persistent sexual abuse offences are enacted consistently with the Royal Commission's recommendations, we agree with the ODPP that there is not a significant legislative gap that could be filled by charging a series of incidents as a single course of conduct. We did not seek submissions on this issue in relation to charges involving adult victims (given that the Royal Commission's recommendations related only to charges in respect of child victims). We received limited submissions on this issue, suggesting it is not an issue of great concern to stakeholders.

7.158. If Government wishes to pursue this issue separately to this review, then it may wish to consider expanding Schedule 1 Rule 8 of the Criminal Procedure Act, which currently allows what would otherwise be multiple counts of assault, illegal possession of an object or stealing to be charged as one offence.

[130] Discussion Paper Volume 2, [7.124]-[7.134].

Should the names of the offences be changed?

7.159. In the Discussion Paper we sought views on whether there should be any changes to the terminology used to describe child sexual offences.[131]

7.160. We did not receive any submissions specifically about the name of child sexual offences.

7.161. We are of the opinion that for clarity and ease of use, the names of and terminology used in child sexual offences should mirror, as far as possible, the names of and terminology used in adult sexual offence. These names and terminology are outlined elsewhere in this Report and summarised in Appendix 2.

Other reforms

7.162. In the Discussion Paper we sought views on whether any other changes should be made to the general sexual offences involving child victims.

7.163. We did not receive any submission suggesting any reforms that we do not address elsewhere in this Chapter.

Sexual offences involving child lineal relatives and de facto children

7.164. Section 329 of *Code* contains various sexual offences that a person can commit involving their child lineal relative or de facto child.[132]

7.165. The maximum penalties for sexual offences involving child lineal relatives and de facto children range from 5 years' imprisonment to 20 years' imprisonment, depending on the offence committed and the circumstances in which it is committed. We discuss maximum penalties in Chapter 12.

7.166. Since 2017, 4,166 people have been charged with sexual offences involving lineal relatives or de facto children.[133] The number of charges laid significantly decreased in 2022. In the Discussion Paper we expressed an interest in hearing if there is a reason for this change, but we did not receive any submissions on this issue.

Elements and definitions

Offences involving child relatives

7.167. Section 329 of the *Code* contains five sexual offences which can be committed involving a child whom the accused knows is their lineal relative or de facto child:

- Sexual penetration.
- Procuring, inciting or encouraging sexual behaviour.
- Indecent dealing.
- Procuring, inciting or encouraging an indecent act.
- Indecent recording.

[131] Ibid [7.135]-[7.137].

[132] Section 329 also contains two offences that a person can commit against adult lineal relatives. These offences are discussed in Chapter 6.

[133] Discussion Paper Volume 2, Appendix 2. This figure includes offences committed against adult lineal relatives.

7.168. These are the same five types of sexual activity that are prohibited in relation to children generally. The definitions of these terms, and some possible reforms, are outlined earlier in this Chapter.

7.169. To establish one of these offences, the prosecution must prove the following four matters beyond reasonable doubt:

- The accused committed the relevant sexual activity (for example, sexual penetration);
- The complainant was a lineal relative or de facto child of the accused;
- The accused knew the complainant was their lineal relative or de facto child; and
- The complainant was a child at the time of the sexual activity.

7.170. A lineal relative is defined to mean a person who is:

> A lineal ancestor, lineal descendant, brother, or sister, whether the relationship is of the whole blood or half blood, whether or not the relationship is traced through, or to, a person whose parents were not married to each other at the time of the person's birth, or subsequently, and whether the relationship is a natural relationship or a relationship established by a written law.[134]

7.171. A de facto child is defined to mean a step-child of the accused, or a child or step-child of a de facto partner of the accused.[135] The offence was expanded to include de facto children as part of the broad reforms of sexual offences which were enacted in 1992. The reason for this reform was explained in the second reading speech, as follows:

> The *Criminal Code* already makes it an offence to have sexual relations with a lineal relative. In today's society many children are being brought up in households where there is a step parent or a de facto partner of the parent living in the household. Children are just as vulnerable to exploitation by such people as they are to exploitation by blood relatives, and the new provision extends the prohibition on sexual misconduct to these people.[136]

7.172. A child is a person who is under 18 or who, in the absence of any positive evidence as to age, is apparently under 18.[137]

7.173. It is not a defence to a charge under section 329 to prove that the accused did not know the complainant was under 18 or believed they were over that age.[138]

7.174. The offences in section 329 do not depend on proof of absence of consent; they will be committed regardless of whether the sexual activity was consensual.[139]

Evidentiary presumptions

7.175. For all offences in section 329 of the *Code* it is presumed, in the absence of evidence to the contrary, that:

- The accused knew they were related to the complainant;[140] and

[134] *Criminal Code Act Compilation Act 1913* (WA) s 329(1).
[135] Ibid s 329(1).
[136] Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 May 1992, 2767 (Phillip Smith).
[137] *Criminal Code Act Compilation Act 1913* (WA) s 1.
[138] Ibid s 331.
[139] *Western Australia* [2012] WASCA 239.
[140] *Criminal Code Act Compilation Act 1913* (WA) s 329(11).

- People who are reputed to be related to each other are in fact related to each other in that way.[141]

Should the sexual offences against child lineal relatives or de facto children be repealed?

7.176. In the Discussion Paper we noted that it is unlikely to be controversial that sexual activity involving children committed by their family members should remain illegal. However, it is less clear whether such acts should be the subject of separate offences, given that:

- Sections 320-322 already prohibit the same types of sexual activity involving child victims if they are under 16, or if they are 16 or over and under the accused's care, supervision or authority.
- The offences in sections 320-322 carry significant maximum penalties.
- It is highly likely that a judge would consider the fact that the offender was related to the child to be a factor which aggravates an offence under sections 320-322, warranting a higher penalty.[142]

7.177. In the Discussion Paper we sought views on whether sexual activity involving child victims by a relative should continue to be dealt with as a separate offence under section 329 of the *Code*, or whether they should they be dealt with under the general child sexual offences currently in sections 320-322 of the *Code*.[143]

Stakeholders' views

7.178. The ODPP and Communities opposed repealing the specific offences against child lineal relatives and de facto children, arguing that their existence:

- Emphasises the heinousness of the breach of trust and the harm that is likely to occur from such offences and enables the attraction of different penalties.
- Maintains the community's acceptance of this conduct as particularly abhorrent and harmful behaviour.

7.179. However, Legal Aid supported repealing the specific offences and instead dealing with behaviour of this type by way of the general sexual offences involving child victims.

The Commission's view

7.180. The Commission accepts the submissions of the ODPP and Communities and considers that there should continue to be separate offences for sexual activity involving child victims by their lineal relatives or de facto parents. Offences by people in these categories represent a different type of offending involving children that should be identified by the existence of separate offences.

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[141] Ibid.

[142] Aggravating factors are discussed in Chapter 12.

[143] Discussion Paper Volume 2, [9.21]-[9.27].

Should the definitions of lineal relative or de facto child be reformed?

7.181. In the Discussion Paper we sought views on whether the definitions of lineal relative and de facto child in section 329 of the *Code* should be amended in any way.[144]

Stakeholders' views

7.182. There was support amongst stakeholders for expanding the definition to include adopted children, foster children and surrogate relationships.[145] The ODPP noted that people in these categories can sensibly be brought within the *Code's* definition of lineal relative since that term already includes 'a person who is a lineal descendant … whether the relationship is a natural relationship or a relationship established by the written law' (ie, not only 'biological' parent-child relationships). Communities also supported extending it to cover the extended family and kinship relationships and structures that exist in some communities.

7.183. Legal Aid did not support any expansion of the definitions.

The Commission's view

7.184. In Chapter 6 we recommend that the sexual offences against adult lineal relatives should be separated from the sexual offences against child lineal relatives and de facto children. If this is done, it will be necessary to reform the associated definitions so that they only capture the appropriate class of people. In doing so, we recommend that these definitions be modernised and simplified. For example, references to 'whole' and 'half' blood should be removed, as these terms are not used often in modern society.

7.185. As the new section will only apply to offences committed against children, we recommend that it be named 'Sexual offences involving child relative victims'. The relevant familial relationships should be defined using the single term 'child relative'. We do not see any value in this context in continuing to differentiate between de facto children and lineal relatives.

7.186. In our view, the community expects the criminal law to expressly protect children from sexual activity committed against them by their parents, siblings, parent's siblings, grandparents, great-grandparents and great-great-grandparents. It should not matter whether those relationships are genetic or arise in some other way. Consequently, we recommend that the term 'child relative' should be defined to mean a child who is the accused's child, sibling, grandchild, great-grandchild, great-great-grandchild, or sibling's child, where the relationship exists by reason of a:

- Genetic relationship;
- Step-relationship;
- De facto relationship;
- Adoptive relationship;
- Surrogate relationship; or
- Foster relationship.

7.187. This definition should include relationships with a child which have ceased to exist. For example, it should include de facto parents where the relationship between the parents ended prior to the sexual activity, and relationships between foster siblings where the fostering

[144] Ibid [9.18]-[9.20].

[145] Email submission E19 (ODPP); Portal submission P49 (Communities).

arrangement has ended. In our view children should continue to be protected expressly from any sexual activity involving these former family members, despite the ending of the legal relationship. When the victim is 18 or over the protection provided by offences against child relatives will cease, and the protections offered by the adult sexual offences will apply.

7.188. We do not, however, recommend extending the definition to extended cultural family and kinship relationships. It seems to us that such a definition would be difficult to draft fairly and clearly. We did not receive any submissions which suggested how such a definition should be drafted. We also consider that including such relationships would mean introducing a very broad spectrum of people into the definition.

7.189. We note that under the current law the accused is required to know of the relevant relationship. However, it is presumed, in the absence of evidence to the contrary, that:

- The accused knew they were related to the complainant; and
- People who are reputed to be related to each other are in fact related to each other in that way.[146]

7.190. We do not recommend changing the law in this regard.

[146] *Criminal Code Act Compilation Act 1913* (WA) s 329(11).

Recommendations

71. The current sexual offences against child lineal relatives and de facto children should be amended so as to expressly protect children from sexual activity committed against them by their parents, siblings, parents' siblings, grandparents, great-grandparents and great-great-grandparents, where the accused relative knows of the relationship.

72. The amended sexual offences against child lineal relatives and de facto children offences should be renamed 'Sexual offences involving child relative victims'.

73. The term 'child relative' should be defined to mean a child who is the accused's child, sibling, sibling's child, grandchild, great-grandchild or great-great-grandchild, where the relationship exists by reason of a:

- **Genetic relationship;**
- **Step-relationship;**
- **De-facto relationship;**
- **Adoptive relationship;**
- **Surrogate relationship; or**
- **Foster relationship.**

74. The definition of child relative should include relationships with a child which have ceased to exist at the time of the offending.

Should the offences against child lineal relatives and de facto children be reformed in any other way?

7.191. In the Discussion Paper we sought views on whether any other changes should be made to the sexual offences against lineal relatives and de facto children. We did not receive any submissions on this issue.

The Commission's view

7.192. For the purposes of consistency, we recommend that the offences involving child relative victims should replicate the reformed general child sexual offences that we have recommended elsewhere in this Chapter. That is, there should be the following offences involving child relatives:

- Sexual penetration involving a child relative victim.
- Coerced sexual penetration involving a child relative victim.
- Sexual act involving a child relative victim.
- Coerced sexual act involving a child relative victim.
- Indecently recording a child relative victim.[147]

[147] The Government may wish to consider grouping this offence with the other intimate image offences, which are currently contained in Chapter XXVA of the Code. In Chapter 13 we suggest that it may be desirable for all of these offences to be grouped under a new Part of the Code, titled Sexual Offences.

7.193. These offences should have the same elements as the general child sexual offences, but should also require the prosecution to prove that:

- The complainant was a child relative of the accused; and
- The accused knew that the complainant was a child relative.

7.194. As noted above, we do not intend that the presumptions set out in section 329(11) of the *Code* be altered in any way.

Recommendations

75. The existing offences involving child lineal relatives and de facto children should be replaced with the following offences:

- **Sexual penetration involving a child relative victim.**
- **Coerced sexual penetration involving a child relative victim.**
- **Sexual act involving a child relative victim.**
- **Coerced sexual act involving a child relative victim.**
- **Indecently recording a child relative victim.**

76. The offences against child relative victims should have the same elements as the general child sexual offences, but should also require the prosecution to prove that:

- **The complainant was a child relative of the accused; and**
- **The accused knew that the complainant was a child relative.**

77. The presumptions in section 329(11) of the *Code* should continue to apply to the sexual offences involving child lineal relatives.

Allowing a young person to be on premises for unlawful carnal knowledge

7.195. In addition to the offences in Chapter XXXI, we have been asked to review sections 186, 191 and 192 of the *Code*. These sections are located in Chapter XXII, which is titled Offences against morality. In this Chapter we address section 186, as it can only be committed against children. We address sections 191 and 192, which can be committed against adults or children, in Chapter 6.

7.196. Section 186 is rarely used: since 2017, our inquiries indicated that only one person has been charged.[148] In the Discussion Paper we expressed interest in hearing if there is a reason for the limited use of this offence, and about the circumstances in which it is used.[149] We did not receive any submissions in response to this question.

Elements and definitions

7.197. Section 186 of the *Code* provides that:

[148] Discussion Paper Volume 2, Appendix 2.
[149] Discussion Paper Volume 2, [11.4].

> Any person who, being the owner or occupier of any premises, or having or acting or assisting in the management or control of any premises, induces or knowingly permits any child of such age as in this section is mentioned to resort to or be in or upon such premises for the purpose of being unlawfully carnally known by any person, whether a particular person or not is guilty of a crime, and;
>
> (a) if the child is under the age of 16 years, is liable to imprisonment for 2 years; and
>
> (b) if the child is under the age of 13 years, is liable to imprisonment for 20 years.

7.198. This offence has two elements that the prosecution must prove beyond reasonable doubt:

- The accused owned, occupied, managed, controlled or assisted in the management of certain premises; and
- The accused induced or knowingly permitted a child under 16 to be on the premises for the purpose of being unlawfully carnally known by a person.

7.199. We discuss the definition of carnal knowledge, and make some recommendations for reform, in Chapter 6.

7.200. There is no need for the prosecution to prove a lack of consent. The *Code* explicitly provides that it is not a defence that the child consented to the sexual activity.[150]

7.201. The accused may raise a mistake of age defence.[151] For this defence to succeed the accused must prove, on the balance of probabilities, that they believed on reasonable grounds that the child was of or above the age of 16.

7.202. It is unclear whether the accused can raise the mistake of fact defence in relation to other mistakes they may have made.[152] For example, they may have been mistaken about the purpose for which the child was on the premises. In the Discussion Paper we welcomed submissions on this issue but did not receive any submissions in response to this question.

Should section 186 be repealed?

7.203. It is arguable that the conduct addressed by section 186 is already adequately covered by the child sexual offences in Chapter XXXI of the *Code*[153] or by offences in the Prostitution Act.[154] Consequently, in the Discussion Paper we sought views on whether the provision should be repealed.[155]

Stakeholders' views

7.204. Communities supported retention of the offence and said that it should be extended to other forms of sexual activity, such as indecent assault.

7.205. Legal Aid, the ODPP and members of the Legal Expert Group thought the offence should be repealed, for reasons including:

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150 *Criminal Code Act Compilation Act 1913* (WA) s 186(3).
151 Ibid s 186(2).
152 The mistake of fact defence is set out in ibid s 24. It is addressed in Chapter 5.
153 See, eg, ibid s 321(3).
154 See, eg, *Prostitution Act 2000* (WA) ss 16, 17, 20, 21.
155 Discussion Paper Volume 2, [11.21]-[11.25].

- Currently, if any person, including an owner or occupier of premises, has enabled or aided another person to engage in sexual activity with a child, they could be prosecuted as a principal offender liable for one of the child sexual offences in Chapter XXXI.
- The maximum penalties available for the offence in section 186 sit uneasily amongst the maximum penalties for other sexual offences involving child victims. For example, currently, the owner or occupier of premises who knows a child 13 to under 16 is on the premises for the purpose of being penetrated by a person (B) is subject to a maximum penalty of two years' imprisonment, whereas if B sexually penetrated the child 13 to under 16, B would be subject to a maximum penalty of 14 years' imprisonment. If the same offences occurred in respect of a child under 13, both the owner or occupier and B would be subject to the same maximum penalty of 20 years' imprisonment. The offences in the Prostitution Act relating to children carry maximum penalties of 14 years' imprisonment.
- In general, section 186 needs to be rationalised against the sexual offences involving children in Chapter XXXI and the prostitution offences relating to children in the Prostitution Act.
- If this conduct is to be retained, it should be dealt with in the Prostitution Act.

The Commission's view

7.206. The Commission agrees with the submissions in favour of repealing section 186. We consider that the behaviour criminalised by this section is criminalised by other offences. For example, it is caught by the child sexual penetration offences, when they are read with section 7 of the *Code* (aiding a principal offender). It may also be covered by the sexual servitude or sexual coercion provisions. If the behaviour involves payment, then it may also be captured by various sections of the Prostitution Act. We consider it generally undesirable that the same behaviour should be capable of being charged as different offences where those offences have different maximum penalties.

Recommendation

78. Section 186 of the *Code* (allowing a young person to be on premises for unlawful carnal knowledge) should be repealed.

8. Sexual offences involving vulnerable persons

Chapter overview

This Chapter makes recommendations for reforming the *Code's* sexual offences against persons who, at the time of the sexual activity, have a mental impairment which renders them incapable of understanding the nature of the sexual activity or of guarding themselves against sexual exploitation (vulnerable persons).

Introduction

8.1. Section 330 of *Code* contains sexual offences that can be committed against a person whom the *Code* refers to as an incapable person. The *Code* uses this term to refer to a person who, at the time of the relevant sexual activity, had a mental impairment which rendered them incapable of understanding the nature of the sexual activity or of guarding themselves against sexual exploitation.

8.2. As discussed later in this Chapter, the terminology of incapable person in the *Code* is inappropriate. We recommend that the term incapable person in the *Code* be replaced with vulnerable person.

8.3. In this Chapter we use the term vulnerable person rather than incapable person, other than when we refer to an existing section of the *Code* which uses the latter term.

8.4. The current maximum penalties for sexual offences against incapable persons range from 7 years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it is committed. Some of the offences have minimum mandatory sentences of imprisonment. In Chapter 12 we discuss and recommend maximum penalties for the sexual offences we recommend against vulnerable persons.

8.5. In Western Australia, between 1 January 2017 and 17 October 2022, only 55 charges against section 330 were laid. This was less than 0.3% of the sexual offence charges laid in that period. However, the annual count of charges pursuant to section 330 shows a significant increase in the number of charges, over the same period. For example, in the first two years of that period a total of 9 charges were laid. In the last two years of the period, 36 charges were laid.[1]

[1] Discussion Paper Volume 2, Appendix 2.

Elements and definitions

8.6. Section 330 of the *Code* currently contains the following five sexual offences which can be committed against an incapable person:

- Sexual penetration.
- Procuring, inciting or encouraging sexual behaviour.
- Indecent dealing.
- Procuring, inciting or encouraging an indecent act.
- Indecent recording.

8.7. These are the same five types of sexual activity which are prohibited in relation to children. We discuss the meaning of these terms in Chapter 7, and some of the associated definitions in Chapter 6.

8.8. For each offence under section 330, the prosecution must prove the following elements beyond reasonable doubt:

- The accused committed the relevant sexual activity (for example, sexual penetration);
- The complainant was an incapable person; and
- The accused knew or ought to have known that the complainant was an incapable person.

8.9. An incapable person is defined as:

> a person who is so mentally impaired as to be incapable —
>
> (a) of understanding the nature of the act the subject of the charge against the accused person; or
>
> (b) of guarding himself or herself against sexual exploitation.[2]

8.10. The *Code* defines mental impairment to mean 'intellectual disability, mental illness, brain damage or senility'; and mental illness to mean 'an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but [it] does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli'.[3]

8.11. The Court of Appeal has implicitly accepted that the phrase 'guarding against sexual exploitation' should be given its ordinary everyday meaning, which incorporates being capable of taking the appropriate precautions against or resisting being taken advantage of by someone for the perpetrator's own sexual gratification.[4]

8.12. The prosecution is not required to prove that the complainant did not consent to the sexual activity. Lack of consent is not an element of any of the offences created by section 330.

8.13. It is a defence to all offences in section 330 for the accused to prove that they were married to the incapable person.[5]

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2 Ibid s 330(1).
3 *Criminal Code Act Compilation Act 1913* (WA) s 1.
4 *Cox v Western Australia* [2011] WASCA 30.
5 *Criminal Code Act Compilation Act 1913* (WA) s 330(9).

Should the specific offences against vulnerable persons be repealed?

8.14. The protective principle, which is Principle 2 of the guiding principles we identify in Chapter 2, provides a reason for criminalising sexual offences against vulnerable persons.

8.15. The prevalence of sexual abuse against vulnerable persons also provides a reason to criminalise such behaviour as it demonstrates a need for deterrent measures.[6] Numerous studies have recognised that people with disabilities are at greater risk of sexual abuse than the general population.[7] For example, the ABS Personal Safety Survey found that after the age of 15, 21% of people with disability report experiencing sexual violence, compared to 10% of people without disability; and in the 12 months preceding the survey, people with disability were at 2.2 times the risk of sexual violence in comparison to people without disability.[8] Canadian studies have found that women with a disability are two to ten times more likely to be the victim of a sexual assault than women without a disability.[9] As with sexual assault generally, women with disabilities are more likely than men with disabilities to be sexually assaulted, although the rate of sexual assault against men with mental disabilities is also higher than for other men.[10] Additionally, it is generally accepted in the literature that sexual abuse against people with disabilities is under-reported.[11]

8.16. The Statistical Analysis Report shows that 13% of sexual offence charges tried before juries in the District Court in 2019 involved a complainant who had a disability.[12] However, none of the sexual offence trials that took place in the District Court in 2019 involved charges against section 330.[13]

8.17. While the protective principle and the prevalence of sexual abuse against vulnerable persons provide reasons to criminalise sexual activity involving such persons, prohibiting vulnerable people from engaging in sexual activity arguably conflicts with the principle of autonomy, which is Principle 1 of the guiding principles we identified in Chapter 2.

8.18. Commentators have identified the need to recognise the rights of vulnerable persons to engage in sexual activity and promote their sexual autonomy as far as possible.[14] For example, Burton, Crofts and Tarrant have noted that 'there are deep difficulties … in concluding that any intercourse with a person with an intellectual impairment is rape. To do so is to deprive such a person of the expression of their sexuality, without any consideration of the extent of the impairment'.[15]

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6 ILRC, *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [1.19].

7 Ibid.

8 Centre of Research Excellence in Disability and Health (CRE-DH), 'Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia ' (Research Report for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, March 2021) 9.

9 J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief' (2007) 52 *McGill Law Journal* 243, 255.

10 Ibid 255; Centre of Research Excellence in Disability and Health (CRE-DH), 'Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia ' (Research Report for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, March 2021) 10.

11 ILRC, *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [1.35].

12 The Statistical Analysis Report defines disability broadly, to include learning, physical and psychological disabilities. Such disabilities would not necessarily mean the complainant could be classified as an incapable person under the *Code's* definition.

13 Statistical Analysis Report, 3, 17.

14 See, eg, Home Office (UK), *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office, 2000) [4.1.3].

15 K Burton, T Crofts and S Tarrant, *Criminal Codes: Commentary & Materials* (Thomson Reuters (Professional) Australia Pty Ltd, 7th ed, 2018) [5.200].

8.19. The VLRC observed that 'the difficulty for the legal system in striking an appropriate balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interest and knowledge'.[16]

8.20. When legislating in a way that limits a person's right to engage in sexual activity or protects people from sexual abuse, it is also necessary to consider Australia's obligations as a ratifier of the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**). Relevant articles of the UNCRPD oblige ratifying countries to:

- Prohibit discrimination on the basis of disability (while recognising that measures which are necessary to achieve de facto equality of disabled persons are not discrimination);
- Ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law;
- Ensure access to justice for persons with disabilities; and
- Take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

8.21. In the Discussion Paper we noted that it has been argued that separate sexual offences for sexual activities involving vulnerable persons are not required because:

- Such persons are afforded sufficient protection by the general law (for example, if the sexual activity that took place was sexual penetration, and a person lacks capacity to consent, then the sexual activity is without consent and the perpetrator can be prosecuted for the offence of sexual penetration without consent).
- Specific offences limit the sexual freedom of people with restricted decision-making capacity.
- It is discriminatory (particularly in light of the UNCRPD) to target a group and treat them differently from the general population.[17]

8.22. Consequently, we sought views on whether Western Australian law should continue to include separate sexual offences against vulnerable persons.[18]

Stakeholders' views

8.23. Most stakeholders supported retaining separate sexual offences against vulnerable persons. For example, the ODPP maintained that 'the offences in s 330 have an important place in protecting persons with mental impairments who are particularly vulnerable to sexual offending and, critically, they obviate the need in many cases for the complainant to give evidence'.[19]

8.24. However, there were some members of the Legal Expert Group who queried the need for specific offences if the *Code* is amended to include incapacity in the list of circumstances in

[16] Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning* (Report No 15, 1988) 3.

[17] NSWLRC, *People with an Intellectual Disability and the Criminal Justice System* (Report No 80, 1996) [8.17].

[18] Discussion Paper Volume 2, [8.62]-[8.74].

[19] Email Submission E19 (ODPP).

which there is no consent to sexual activity.[20] They also noted the tension between having laws that protect vulnerable people from sexual exploitation and recognising their sexual autonomy. They suggested it was important to think about how best to protect the autonomy and dignity of vulnerable people, allowing them to make decisions about their sexual pleasure.

8.25. Other members of the Legal Expert Group were of the view that, even if the list of circumstances in which there is no consent includes incapacity, these offences remain necessary. This is because they address situations where a vulnerable person is an apparently willing participant in the sexual activity, but their vulnerability has been exploited. They also suggested that problems could arise if the specific sexual offences against vulnerable people were repealed and the general sexual offences were used instead: a complainant who lacks capacity might only appear to have consented, or due to their vulnerability they might be led in evidence to say that they consented. The jury is likely to acquit in such circumstances.

The Commission's view

8.26. The Commission is of the view that separate sexual offences against vulnerable persons should be retained. Such offences have, and should continue to have, a specific function in protecting vulnerable persons from sexual exploitation.

8.27. The retaining of specific offences is consistent with Article 16 of the UNCRPD, which entitles vulnerable persons to freedom from exploitation, violence and abuse. This provision obliges state parties to take all appropriate legislative measures to protect vulnerable persons from all forms of abuse.[21] In particular, Article 16.5 reads:

> States Parties shall put in place effective legislation and policies, … to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.[22]

8.28. In the Commission's view, the use of specific provisions can promote the importance of protecting the autonomy and dignity of vulnerable persons, as well as their freedom from sexual exploitation. General criminal prohibitions on non-consensual sexual activity may on their face be non-discriminatory, but they may not be adequate for the purpose of guarding a vulnerable person's freedom from exploitation.

8.29. How the conflicting principles of autonomy and protection are best balanced against one another will depend on the content of such specific provisions. This is addressed below.

Recommendation

79. Specific offences against vulnerable persons should be retained.

Should the language used in the provision be changed?

8.30. The Western Australian model of specific sexual offences against vulnerable persons is not the same as that in all Australian jurisdictions. Nevertheless, all jurisdictions use similar terminology to provide additional protections of some kind to people with relevant

[20] See Chapter 4.

[21] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), Article 16.

[22] Ibid.

vulnerabilities. Table 8.1 indicates the terms used in other jurisdictions, whether they be used in specific offences or in other ways.

Jurisdiction	Term
ACT	Vulnerable person.[23]
NSW and SA	Person with a cognitive impairment.[24]
NT	Mentally ill or handicapped person.[25]
Queensland	Person with an impairment of the mind.[26]
Tasmania	Person with mental impairment.[27]
Victoria	Person with cognitive impairment or mental illness.[28]
Western Australia	Incapable person.[29]
Canada	Person with disability.[30]
UK	Person with a mental disorder.[31]
New Zealand	Person with significant impairment.[32]

Table 8.1: Alternative terminology to incapable person

8.31. The *Code* should use terminology that is respectful, and not insulting or demeaning. We are aware of efforts in literature and policy formation to encourage the use of positive language (for example: ability rather than disability and capacity not incapacity).[33] We are also aware of what has been referred to as 'the euphemism treadmill' – that is, language which appears at a time to be respectful, but which eventually comes to have a derogatory meaning.[34]

8.32. In the Discussion Paper we sought views on whether the *Code* should use a different term to incapable person and, if so, what term should be used.[35]

23 *Crimes Act 1900* (ACT) s 36A.
24 *Crimes Act 1900* (NSW) s 66F; *Criminal Law Consolidation Act 1935* (SA) ss 49(6), 51.
25 *Criminal Code 1983* (NT) s 130(2).
26 *Criminal Code 1899* (Qld) s 216(1).
27 *Criminal Code 1924* (Tas) s 126.
28 *Crimes Act 1958* (Vic) ss 52B-E.
29 *Criminal Code Compilation Act 1913* (WA) s 330.
30 *Criminal Code RSC 1985* (Can) C-46 s 153.1
31 *Sexual Offences Act 2003* (UK) ss 30-33, 34-37, 38-41.
32 *Crimes Act 1961* (NZ) s 138.
33 ILRC, *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) 1.
34 Ibid.
35 Discussion Paper Volume 2, [8.13]-[8.17].

Stakeholders' views

8.33. There was strong support in consultations and submissions for using alternative terminology to incapable person in the *Code*.

8.34. Members of the Community Expert Group noted that incapacity exists on a continuum that varies according to context and circumstances, and therefore it is wrong to say an individual is incapable as if that were an unchangeable state of being. Further, to label a complainant as such could be a strong deterrent to people reporting offences to police: they may not report offences for fear of being labelled incapable or being required to identify as incapable.

8.35. Members of the Legal Expert Group were of the view that the term incapable person was offensive, and noted that it did not align with contemporary approaches to disability. Further, it was suggested that such a term is inconsistent with the UNCRPD, which presumes that incapacity is a continuum, and that people have differing capacities and needs, rather than having full capacity or no capacity at all. They noted that current approaches to disability focus on promoting the autonomy and capacity of vulnerable persons, with research on supported decision-making demonstrating that vulnerable persons can make decisions if adequately supported to do so. Hence, they argued that there is a need to change terminology to avoid suggesting a person is generally incapable.

8.36. Various stakeholders made suggestions for alternative terminology to replace incapable person. Some of those suggestions included 'person with disability',[36] 'person with vulnerability',[37] and 'person incapable of providing consent'.[38]

8.37. The ODPP was in favour of changing the term incapable person; however, it made further comments regarding the difficulty of introducing an alternative term:

> The term incapable person should be removed from s 330, since it pejoratively suggests that everything about the person is incapable. In this context, it might be taken to imply that all persons to whom the section applies cannot ever engage in consensual sexual activity.
>
> A reference to an incapable person in s 330 is a reference to a person who is 'so mentally impaired as to be incapable' of the matters in s 330(1)(a) or (b). The words 'so … as to be' indicate the mental impairment/s of the complainant must be causative of either incapacity in (1)(a) or (1)(b). Thus, the State must prove the complainant had a mental impairment within the s 1 meaning of the term, and that it caused them to lack the (a) or (b) capacity. The difficulty with introducing an alternative term such as vulnerable person or 'person with disability' is that these are not terms that are part of the elements of the offences.
>
> That difficulty is germane because the element of the offences that will often be in issue is whether the accused knew or ought to have known the complainant was an incapable person. It will be put to the accused in a police interview that they knew the complainant was an incapable person. An accused will often make admissions that they knew a complainant was 'slow', 'like a child', 'not smart', 'different', etc. At the same time, they will usually reject propositions suggesting they knew the complainant didn't want to engage in the sexual activity, or didn't understand the nature of the activity.

[36] Email Submission E24 (Communities).
[37] Ibid.
[38] Portal Submission P41 (Legal Aid).

> Our suggestion is to abandon the 'label' approach: subsection (1) could define the complainant's status and incapacities in the current manner, and the offences could be formulated to apply to 'a person who the offender knows or ought to know lacks a capacity under subsection (1)'.
>
> Alternatively, a 'person-first' term such as 'person who lacks capacity' should be preferred, or the term vulnerable person could be defined to apply to persons within the current definition.[39]

The Commission's view

8.38. The Commission agrees with stakeholders that the term incapable person does not adequately promote the autonomy and dignity of persons with disabilities or acknowledge their varying capacities and needs. We acknowledge that the term is out of step with contemporary attitudes and approaches to disability, as expressed in the literature as well as at international law. For these reasons, the term should be replaced.

8.39. Article 12 of the UNCRPD reaffirms that persons with disabilities have the right to equal recognition before the law. Relevantly, Article 12.2 states that State parties must recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.[40]

8.40. The Committee on the Rights of Persons with Disabilities explains Article 12.2 as follows:

> Article 12, paragraph 2, recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles the person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes the person as an agent who can perform acts with legal effect.[41]

8.41. The Committee on the Rights of Persons with Disabilities also made the following comments regarding the distinction between mental and legal capacity:

> Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Under Article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.
>
> In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of a disability (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). In all these

[39] Email Submission E19 (ODPP).

[40] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), Article 12.

[41] Committee on the Rights of Persons with Disabilities, *General Comment on Article 12: Equal recognition before the* law, 11th sess, UN Doc UNCRPD/C/4/2 (25 November 2013), paragraph 11.

> approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but rather requires that support be provided in the exercise of legal capacity.[42]

8.42. The conflation of mental capacity and legal capacity may impermissibly result in the discriminatory denial of legal capacity for persons with disabilities. Relevantly, the use of the term incapable person in the *Code* engages in that very conflation and should not be maintained.

8.43. The Commission recommends that the term incapable person be replaced with vulnerable person. Being a vulnerable person does not place a person in a closed group of people of who can never agree to engage in consensual sexual activity. A vulnerable person may be able to consent to sexual activity in some circumstances but not different circumstances; or at some times but not at other times.

8.44. Project 113 is specifically concerned with the protection of people who are vulnerable to sexual abuse and exploitation. As noted in the Background Paper, persons with disabilities are especially vulnerable to sexual violence:

> People living with a disability of any kind are more likely to experience sexual violence than those who are not living with a disability. People who are living with a cognitive or psychological disability are at an even higher risk of experiencing sexual violence.
>
> From the age of 15, 46 percent of women who are living with a cognitive disability and 50 percent of women living with a psychological disability have experienced sexual violence, compared to 16 percent of women who are not living with a disability. Women who are living with a disability are twice as likely to experience sexual violence over one year compared to women who are not living with a disability. As noted earlier (section 2.12), men living with a psychological or cognitive disability are sexually assaulted at the same rates as all Australian women. Consistent with the fact that sexual violence usually occurs in a private residential space (section 2.1), people who are living with an intellectual impairment are at heightened risk of experiencing sexual violence from a co-habiting partner.[43]

8.45. While disability is a key indicator of vulnerability, we note that there is a range of mental and cognitive impairments which may render a person similarly vulnerable to sexual exploitation, including mental illness, brain injury and dementia.

8.46. We consider the term vulnerable person to be an inclusive one that emphasises the primary purpose of such provisions; that is, to protect those who are most vulnerable to sexual abuse and exploitation. Further, it recognises the range of impairments which may create vulnerability to sexual abuse and exploitation, and that the list of persons who may seek protection from these provisions is not closed.

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[42] Ibid, paragraph 12 – 13.

[43] Background paper, [2.13].

Recommendation

80. All references in the *Code* to the term incapable person should be replaced with the term vulnerable person.

How should 'vulnerable person' be defined?

8.47. Different jurisdictions define the terms used in their legislation in different ways. The approaches taken by the other Australian jurisdictions and some international jurisdictions are summarised in the Discussion Paper.[44]

8.48. When criminalising sexual activity with vulnerable persons, two broad approaches have been taken to describe the victims to whom the offences apply.

8.49. The first is the **status approach**, which simply asks whether the person meets the definition of whichever term is used, such as a person with a mental impairment. If they do, they are deemed unable to consent to sexual activity in any circumstances.[45]

8.50. The second is the **functional approach** which focuses on the person's mental functioning at the relevant time. This approach:

> Recognises that a person whose capacity is limited may be capable of making decisions in one area but may not have the requisite capacity to understand the nature and consequences of making a decision in another area or be able to communicate their decision on the matter. Thus, it rejects the idea that once capacity has been established in one area it is seen as conclusive proof of capacity in other areas regardless of the circumstances. The functional approach defines capacity as the ability, with suitable assistance if needed, to understand the nature and consequences of a decision within the context of the available range of choices; and to communicate that decision. It also recognises that capacity or lack of capacity is not a permanent state but may fluctuate.[46]

8.51. There are advantages and disadvantages to both types of approach. The advantage of using a pure status approach is that once the appropriate status category is set by the legislature, juries only need to decide whether the evidence at trial proves that the victim falls within that category. Because the status categories set by legislatures are often medical or psychiatric conditions, this can often be achieved by relying on expert evidence rather than by testing the victim in evidence.

8.52. However, the status approach may consequently be viewed as being less likely to produce a just result, as the determination of whether a complainant has the relevant status will not necessarily reflect their functional capacities. Further, a pure status test may insult people with the specified statuses, as the statutory assumption that people with a specified status require additional protections because they cannot guard themselves against sexual abuse or understand the nature and quality of a sexual activity may be wrong in particular instances.

8.53. The advantage of using a pure functional approach is that it is unnecessary for the legislature to attempt to define all the conditions that may cause the relevant incapacity. The legislature need only state the functions to be satisfied, the absence of which will trigger the application of the protective laws. It is then for juries to determine whether the evidence adduced at trial

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44 Discussion Paper Volume 2, Appendix 4.

45 ILRC, *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [1.08].

46 Ibid [1.09].

proves that the relevant incapacity exists. If it does, the victim will meet the test for the added protections in the law.

8.54. However, deciding the question of function may be difficult. Individuals the test seeks to capture may have varying degrees of functioning, depending on the nature of the task in question, their familiarity with the task and the environment in which they are called on to exercise that function. To rely solely on a functional approach may also require the individuals to give evidence, be cross-examined and endure stressful court process, so that their relevant functioning can be determined.

8.55. The *Code's* definition of incapable person combines the status and functional approaches. It requires the complainant to meet a status requirement (having a mental impairment) and for that condition to have caused a functional impairment (making the person incapable of understanding the nature of the relevant sexual activity or of guarding themselves against sexual exploitation). In the Discussion Paper we sought views on whether this was appropriate, or whether a different approach should be adopted. We also sought views on whether, if a status aspect is to remain part of the *Code's* approach, the current status category (mental impairment) should be reformed in any way.[47]

Stakeholders' views

8.56. There was support in submissions for retaining the current hybrid approach when defining a vulnerable person. For example, the ODPP stated that:

> The current approach in the Code to defining an incapable person both by reference to their status as a person with a mental impairment, and their functional capacity, should be retained.
>
> The disadvantage of not adopting a purely functional approach, as identified at [8.29] of the Discussion Paper Vol. 2, is addressed in the Code by the availability of a consent-based charge. If a complainant was suffering from a transient form of incapacity, which is not within the meaning of mental impairment, it remains open to the State to prove they lacked capacity to consent. It is true that in such cases the State may face an additional hurdle of negating that the accused held an honest and reasonable belief the person was consenting.
>
> Relevantly, ss 106HA and 106HB of the Evidence Act 1906 permit a visually recorded interview of a person with a mental impairment to be admitted as their evidence in chief, usually obviating the need for them to give further evidence. If the 'status' part of the definition of incapable person (requiring a mental impairment) changed, this evidentiary rule would need to be reviewed.
>
> The ODPP will inevitably rely on an expert's assessment of the complainant's capacities, which will involve the application of various standardised tests and scales, including as to intelligence, executive and adaptive functioning, decision-making, social cognition and language skills, emotional or physical deficits, and other functions.
>
> The complainant's capacity to understand the nature of the act will be assessed by reference to the complainant's understanding of:
>
> - the physical mechanics of the sexual act (ability to recognise body parts and different acts involved in sexual behaviour);

[47] Discussion Paper Volume 2, [8.18]-[8.33].

- appropriate sexual behaviour;
- the right to choose to participate or not participate – and the right of others to consent or not consent; and
- risks including pregnancy (if applicable), sexually transmitted disease, and of other potentially adverse physical or emotional consequences of sexual activity.

The complainant's capacity to guard themselves against sexual exploitation will be assessed by reference to a range of factors such as their:

- suggestibility, and whether they are easily led;
- ability to recognise potentially abusive or high-risk situations;
- ability to communicate and be assertive about their choices;
- ability to resist inducements; and
- knowledge about protective measures including contraception and ability to adopt them.

It might be observed that while parts of the above assessments concern the complainant's capacity to consent – generally and in respect of the act/s the subject of charge – other parts involve a broader inquiry into factors of susceptibility and vulnerability to exploitation, for the purposes of the (1)(b) definition. The two limbs of the definition are not directly referable to consent because consent is inapt in this context. It follows that we consider the three capacities preferred by the Irish Law Reform Commission, … to be cast too narrowly.[48]

8.57. There was also some support among stakeholders for using a purely functional approach. For example, a member of the Legal Expert Group noted that the use of a functional approach would be consistent with how capacity is approached in health law, which focuses on cognitive processes and whether the nature of the sexual activity is understood. It would appropriately ensure that the law's focus in this area is on whether the person understood that the activity was an intimate and sexual activity.

8.58. Communities also supported a more functional approach. However, it noted that 'any resultant requirement for the victim to give evidence may mean the victim needs a support person or, for example, accessible resources to assist their participation in court procedures'.[49]

8.59. With respect to the definition of mental impairment, Communities suggested that:

> Any development of the definition of 'mental impairment' should consider and/or be consistent with the reforms introduced by, and relevant definitions in, the Criminal Law (Mental Impairment) Bill 2022 (Bill) as currently progressing through Parliament. The Department of Justice is leading the Bill reforms and should be consulted in this regard.[50]

8.60. We note that this Bill has now been passed by Parliament. Although the majority of the substantive provisions of the *Criminal Law (Mental Impairment) Act 2023* (WA) are yet to come into operation, Part 1 has been proclaimed and contains the following relevant definitions:

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48 Email Submission E19 (ODPP).
49 Email Submission E24 (Communities).
50 Ibid.

In this Act-

…

mental illness has the meaning given in the *Mental Health Act 2014* section 4;

mental impairment means any of, or a combination of, the following —

(a) an intellectual disability;

(b) a mental illness as defined in *The Criminal Code* section 1(1);

(c) an acquired brain injury;

(d) dementia;…[51]

8.61. In relation to the definition of mental impairment, the Legal Expert Group noted that mental illness encompasses a wide range of neurodiversity, with new forms constantly being described. It stated that while it would not be helpful to exhaustively list them, statutory examples could be given for guidance. It was of the view that doing so would acknowledge that capacity is decision-specific, operates on a spectrum and can be affected by a range of factors.

The Commission's view

Retain a hybrid status-functional approach

8.62. The Commission recommends retaining a hybrid status-functional approach to sexual offences against vulnerable people. We are of the view that a purely status approach risks inappropriately including people who fall within the status category, but who at the time of the sexual activity are capable of understanding the nature of the sexual activity and of protecting themselves from sexual exploitation. This would be an infringement of their autonomy. Such an individual should be permitted to engage in consensual sexual activity. If, in the circumstances, they do not actually consent, protection will be offered by the general sexual offences.

8.63. While we acknowledge that the functional approach aligns more closely with current understandings of disability, which conceive of capacity not as a permanent state but one which may fluctuate over time, we are of the view that a purely functional approach would be overly broad. Rather than being restricted to people with specified mental health conditions, it would include any person who was found to have been incapable of understanding the sexual nature of the activity or of guarding themselves against sexual exploitation, regardless of the cause of that incapacity. For example, it would include people who were intoxicated and consequently vulnerable to sexual exploitation. While such individuals are deserving of the protection of the law, they will already be offered protection by the consent provisions for the general sexual offences (which address issues relating to intoxication and incapacity: see Chapter 4). They do not need the added protection of the vulnerable person offences, which aim to provide special protections to people with specific mental health conditions.[52]

8.64. We do not agree with the view of some commentators that a hybrid approach breaches the UNCRPD as it compromises the legal capacity of vulnerable people by treating them

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51 *Criminal Law (Mental Impairment) Act 2023* (WA), s 9(1). Part 1 of the Act, which contains the defintions, came into force on 13 April 2023. The operative parts of the Act are yet to commence.

52 We discuss the relevant mental health conditions below.

differently from people without the specified disabilities.[53] Consistent with Articles 12.4 and 16.1 of the UNCRPD, if a hybrid approach does this, it is only to 'provide for appropriate and effective safeguards to prevent abuse' of vulnerable people who are unable to protect themselves from sexual exploitation.[54] We consider this to be an important and symbolic aspect of the law of a caring and protective society.

8.65. Further, a purely functional approach could create evidentiary difficulties. It is unclear whether a complainant's alleged functional incapacity would need to be determined on the basis of their personal testimony, expert evidence, or some combination of the two. It is possible that under such an approach, a greater focus would be on the complainant to demonstrate, at trial, that they were functionally affected in the relevant way at the time of the sexual activity. This may be unfair and burdensome for a vulnerable person, who may have difficulties understanding the concept of free and voluntary agreement or giving evidence in court. It is a problem that may be avoided by using the hybrid approach.

8.66. In our view, a hybrid status-functional approach overcomes these disadvantages. By including a functional component, it avoids the problem of inappropriately including people who fall within the relevant status category, but who were capable, at the relevant time, of engaging in the sexual activity. By including a status component, it limits the classes of persons to which the specific offences can apply and the circumstances in which a person's functioning becomes relevant. This overcomes the overly broad nature of the functional approach.

8.67. In the sections below we outline how we recommend framing the functional and status components.

The functional component

8.68. The functional component of section 330 currently requires the complainant to have been incapable of:

- Understanding the nature of the activity the subject of the charge against the accused person; or
- Guarding himself or herself against sexual exploitation.[55]

8.69. In our view, both of these components are appropriate. We are of the view that special protections should continue to be offered to a person who, because of their mental health condition, is unable to understand the nature of the relevant activity to guard themselves against being sexually exploited. We do, however, recommend amending the wording of the second component to make it gender neutral.

8.70. We considered whether the functional aspect of the test should be expanded to also cover a person who is incapable of understanding the physical consequences of the activity (for example, that it may involve a risk of pregnancy or disease transmission). However, we do not recommend doing so. We note that the potential physical consequences of a sexual activity may be quite complex, depending on factors such as the disease status of the participants, the contagiousness of a sexual disease, the immunity of the participants, the fertility of the participants, the use of contraception and the sexual activity in which the participants engage.

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[53] A Arstein-Kerslake, Y Maker, A Deutchsmann and S Richardson, 'Criminalisation of Sex with Disabled People with Cognitive Impairments in Commonwealth Countries' (2023) 3.2 *International Journal of Disability and Social Justice* 10.

[54] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), Article 12.4.

[55] *Criminal Code Act Compilation Act 1913* (WA) s 330(1).

We are of the view that it would encroach too far on the sexual autonomy of vulnerable persons to require an understanding of all these matters.

8.71. In this regard, we note that a person who is incapable of understanding the physical consequences of a sexual activity is likely to be covered already by the offence provisions. This is because it is likely that a jury would find that such a complainant lacks an understanding of the nature of the activity or is incapable of guarding themselves against sexual exploitation.

The status component

8.72. The status component of section 330 currently refers to a person who is 'mentally impaired'. The *Code* defines mental impairment as 'intellectual disability, mental illness, brain damage or senility'; mental illness is defined as 'an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but [it] does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli'.[56]

8.73. As a starting point, we note that the concept of mental impairment also operates in the context of the insanity defence in the *Code*, where its purpose is to define the category of people who should not be held criminally responsible for their behaviour. As a result of that context, the meaning of the term has been circumscribed, so as to limit the scope and availability of the defence.

8.74. By contrast, in the present context, the purpose of the status category is to define the group of people who should be offered special protection from sexual exploitation. Given the protective nature of the context, a more expansive and inclusive definition of the relevant conditions seems appropriate.

8.75. Given these conflicting purposes, we recommend that the term mental impairment no longer be used to define the conditions that are relevant to the sexual offences involving vulnerable people. We do not see any advantage to using the same term that is used in the insanity context. Such an approach is unhelpful, and risks conflating different concepts.

8.76. Instead, we recommend that the sexual offence provision directly refer to the relevant status conditions. We acknowledge that we are not medical experts and so may not have the expertise to correctly identify or name the conditions that should be included in the list of status conditions. We also did not receive any submissions from experts on this issue. Mindful of our lack of medical qualifications, in arriving at the below list we have taken into account the conditions that are currently included in the definition of mental impairment, the conditions that are included in the legislation of other Australian jurisdictions,[57] and the terminology that is currently used by those working in the sector.[58]

8.77. We consider it important to broadly capture conditions which may negate a person's capacity to understand the nature of the relevant sexual activity or to guard themselves against sexual exploitation. We are aware that there may be some overlap in some of the conditions listed below, but we do not see that this is a problem in this context as it is more important to ensure that there are no gaps in the coverage. The Government may choose to obtain medical advice before drafting the relevant provisions.

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56 Ibid s 1.

57 See *Crimes Act 1900* (ACT) s 36A; *Crimes Act 1900* (NSW) s 61H; *Criminal Code 1983* (NT) s 126; *Criminal Code 1899* (Qld) s 1; *Criminal Law Consolidation Act 1935* (SA) s 51(5); *Criminal Code 1924* (Tas) s 126(4); *Crimes Act* 1958 (Vic) s 52A.

58 See, eg, People with Disability Australia, *PWDA Language Guide: A guide to Language about Disability* (August 2021).

8.78. In our view, the conditions that are relevant to the sexual offences involving vulnerable people are:

- Intellectual disabilities;
- Developmental disorders (including autism spectrum disorders and foetal alcohol spectrum disorders);
- Neurological disorders;
- Mental illnesses;
- Brain injuries; and
- Dementia.

8.79. The Commission considers that the protective nature of the vulnerable person provisions requires that these conditions be broadly interpreted, rather than strictly circumscribed. To this end, we recommend that the term mental illness be defined in the same expansive way that it is defined in the *Mental Health Act 2014* (WA). Section 6 of that Act provides that:

> (1) A person has a mental illness if the person has a condition that —
>
> (a) is characterised by a disturbance of thought, mood, volition, perception, orientation or memory; and
>
> (b) significantly impairs (temporarily or permanently) the person's judgment or behaviour.
>
> (2) A person does not have a mental illness merely because one or more of these things apply —
>
> (a) the person holds, or refuses or fails to hold, a particular religious, cultural, political or philosophical belief or opinion;
>
> (b) the person engages in, or refuses or fails to engage in, a particular religious, cultural or political activity;
>
> (c) the person is, or is not, a member of a particular religious, cultural or racial group;
>
> (d) the person has, or does not have, a particular political, economic or social status;
>
> (e) the person has a particular sexual preference or orientation;
>
> (f) the person is sexually promiscuous;
>
> (g) the person engages in indecent, immoral or illegal conduct;
>
> (h) the person has an intellectual disability;
>
> (i) the person uses alcohol or other drugs;
>
> (j) the person is involved in, or has been involved in, personal or professional conflict;
>
> (k) the person engages in anti-social behaviour;
>
> (l) the person has at any time been —
>
> i. provided with treatment; or

ii. admitted by or detained at a hospital for the purpose of providing the person with treatment.

(3) Subsection (2)(i) does not prevent the serious or permanent physiological, biochemical or psychological effects of the use of alcohol or other drugs from being regarded as an indication that a person has a mental illness.

(4) A decision whether or not a person has a mental illness must be made in accordance with internationally accepted standards prescribed by the regulations for this subsection.[59]

8.80. We note that there is currently a statutory review of the *Mental Health Act 2014* (WA) under way. In the event that this review leads to the definition of mental illness being amended, consideration should be given to adopting that revised definition. This will help to ensure consistency between the frameworks.

8.81. In some cases it may be unclear which category a complainant falls into. For example, it may not be clear whether they have a developmental disorder, a neurological disorder or both. It is essential to ensure that this does not create a barrier to prosecution. It should be sufficient for the prosecution to prove that the complainant has one of the relevant conditions, even if it is not clear *which* condition they have.

8.82. Similarly, it will often be the case that a complainant will have more than one of the listed conditions. This should also not create a barrier to prosecution. The prosecution should not be required to prove that it was a specific condition (for example, the accused's intellectual disability rather than their mental illness) that caused the functional incapacity. It should be sufficient for the prosecution to establish that at least one of the listed conditions was a substantial cause of that incapacity.

8.83. Finally, we note the ODPP's comments on the current operation of the hybrid approach in Western Australia, and specifically that the current practice of the ODPP is to rely on an expert's assessment of the complainant's capacities. This alleviates the need for a vulnerable complainant to give evidence. We acknowledge also that sections 106HA and 106HB of the *Evidence Act 1906* (WA) (**Evidence Act**) enable the prosecution to tender a visually recorded interview of a complainant who has been declared a special witness[60] as their evidence in chief. Where a vulnerable person must give evidence, this provision obviates the need for them to be examined in chief and can mitigate the stress they might experience participating in court proceedings.

8.84. The Commission considers that these provisions are of great utility in supporting the capacity of vulnerable people to give evidence where appropriate, and their operation should be maintained. It is not our intention in making our recommendations to change the effect of these provisions in any way that will compromise the protections currently given to vulnerable people in criminal proceedings.

[59] *Mental Health Act 2014* (WA) s 6.

[60] *Evidence Act 1906* (WA) s 106R.

Recommendations

81. A vulnerable person should be defined as a person who, at the time of the relevant sexual activity:

- **Had an intellectual disability, developmental disorder (including an autism spectrum disorder or foetal alcohol spectrum disorder), neurological disorder, mental illness, brain injury and/or dementia; and**
- **Due to one or more of those conditions, was incapable of:**
  - **Understanding the nature of the activity; or**
  - **Guarding themselves against sexual exploitation.**

82. Mental illness should be defined in the same way that it is defined in the *Mental Health Act 2014* (WA).

Does the accused need to have known that the complainant was a vulnerable person?

8.85. Currently, it is a requirement of the *Code's* sexual offences against incapable people that, at the time of the relevant sexual activity, the accused 'knows or ought to know' that the complainant was an incapable person.[61] This element of the offences was inserted in 1985 as a consequence of a recommendation of the Murray Report.[62]

8.86. This knowledge element may be satisfied by proof either that the accused had the requisite knowledge, or that a reasonable person in the accused's position ought to have known that the complainant was an incapable person.

8.87. In the Discussion Paper we asked whether the law should require the prosecution to prove that the accused knew the complainant was a vulnerable person. We also asked whether the answer to this question should depend on whether the offence was committed by a carer or a non-carer.[63]

Stakeholders' views

8.88. We received few submissions on this issue. Legal Aid expressed the view that the prosecution should always be required to prove that the accused knew the complainant was a vulnerable person. It did not think the answer to this question should depend on whether the person was a carer or a non-carer.[64]

8.89. By contrast, Communities submitted that the law should require non-carers to have such knowledge, but that carers should be presumed to know that the person they are caring for is a vulnerable person.[65]

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61 *Criminal Code Compilation Act* (1913) (WA) s 330(4)-(6).

62 MJ Murray, *The Criminal Code: A General Review* (Attorney General's Department, Western Australia, 1983).

63 We discuss the issue of carers and non-carers in more detail below.

64 Portal Submission P41 (Legal Aid).

65 Email Submission E24 (Communities).

The Commission's view

8.90. The Commission recommends retaining a requirement that the accused knew or ought to have known that the complainant was a vulnerable person. We consider this requirement to be a safeguard which is fair to the accused. The sexual offences against vulnerable people are serious offences that carry high penalties. It would not be in the interests of justice to allow a person to be convicted of such an offence if they were unaware of the complainant's vulnerability and had no reasonable basis on which to be aware of it.

8.91. We do not recommend drawing a distinction between carers and non-carers in this regard. We are of the view that it is always appropriate to require the prosecution to prove that the accused knew, or ought to have known, that the complainant was a vulnerable person. However, where the accused is the complainant's carer, it is unlikely to be difficult to prove this element (given the accused's knowledge of the complainant's circumstances).

8.92. We note that we considered removing this mental state element, and instead requiring accused people who claim to have been unaware of the complainant's vulnerability to rely on the mistake of fact defence.[66] However, given we received no submissions recommending this course of action, and no complaints about how the knowledge element currently operates, we do not recommend adopting this approach. In reaching this conclusion, we have also taken into account the fact that sexual offences against vulnerable persons may be alleged to have been committed by other people with disabilities. It may be unfair to require such accused to bear the burden of raising this defence.

Should the vulnerable persons sexual offences scheme be changed?

8.93. There are differences between Australian jurisdictions in the protections that the criminal law provides to vulnerable people. In the Discussion Paper we collated various Australian and international approaches to this issue.[67]

8.94. As noted at the beginning of this Chapter, in Western Australia the same five types of sexual activity which are prohibited in relation to children are also prohibited in relation to vulnerable persons. Similar sexual activity with vulnerable persons is prohibited in Queensland. Other Australian jurisdictions have more limited status-based protections, which often apply only where the accused provides care or services to the vulnerable victim. However, many of these jurisdictions provide additional functional protections to vulnerable people through their definitions of consent and the list of circumstances in which there is no consent.

8.95. In the Discussion Paper we sought views on the following matters:[68]

- Do Western Australia's laws protecting vulnerable persons provide appropriate protection?
- Should the types of sexual activity against vulnerable persons that are criminalised be changed? If so, how?
- Should Western Australia distinguish between offences against vulnerable persons committed by carers and those committed by non-carers?
- If a special offence is to be created for carers how should 'carer' (or another suitable term) be defined?

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66 We discuss the mistake of fact defence in Chapter 5. While in that Chapter our focus is on mistaken beliefs about consent, the defence would also apply to mistaken beliefs about vulnerability.

67 Discussion Paper Volume 2, Appendix 5.

68 Discussion Paper Volume 2, [8.34]-[8.49].

Stakeholders' views

8.96. There was little support for changing the types of sexual activity that are criminalised. Most stakeholders who addressed this issue were of the view that the current law offers appropriate protection. For example, the ODPP noted that the sexual activity in section 330 of the *Code* is consistent with the other offences in Chapter XXXI,[69] and submitted that this consistency should be maintained as far as practicable.

8.97. There was, however, some support for creating a special offence for carers. For example, Communities contended that the trust and dependency placed on carers justified the creation of a separate offence;[70] and some members of the Community Expert Group suggested that a separate offence would appropriately acknowledge the particular role that carers pay in this area, and the fact that a large number of perpetrators are carers, support workers and providers.

8.98. The ODPP did not support restricting the application of the offences to carers, as has been done in some other jurisdictions. It stated:

> Section 330 should not be amended to only apply to carers. The current aggravating circumstance where the complainant is 'under the care, supervision, or authority' of the accused appropriately imposes a higher maximum penalty on carers; there is no need for a separate offence.
>
> Offences under s 330 are commonly prosecuted against accused persons who are not carers: they are neighbours, acquaintances, family members, strangers – anyone. In a survey of prosecutions conducted by our office in the last decade of s 330 charges, in only 2 of 13 cases was the aggravating circumstance pleaded. It is difficult to see any persuasive rationale for confining the offences in s 330 (as they are) to carers, because:
>
> - While carers have unique access to, knowledge of, and, potentially, power over, the persons in their care, other persons can also have access, and develop knowledge and power or influence, via other avenues. Consider: the taxi driver who transports persons with disabilities, alone and unsupervised, and including by moving them onto or out of the vehicle; the family members or neighbours who visit often but do not have caring responsibilities; and the church pastor.
>
> - An emerging trend is for online communications and social media to be used to facilitate access to persons with disabilities. The ODPP has prosecuted s 330 matters where complainants with intellectual disabilities, who enjoyed participating in basic 'chats' or sharing emojis with people they had not met, were essentially groomed via these interactions to allow a physical meeting, during which the complainant was sexually assaulted.[71]

8.99. On the issue of a separate offence for carers, members of the Legal Expert Group made the following points:

- If section 330 is retained, a special offence for carers is not needed, as it is sufficiently covered by the circumstances of aggravation. However, if section 330 is repealed, a specific offence for carers should be created.

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69 Email Submission E19 (ODPP).

70 Email Submission E24 (Communities).

71 Email Submission E19 (ODPP).

- Carers are not commonly prosecuted under section 330. It seems to be stepfathers who groom the vulnerable adult children of their partners who are most commonly prosecuted.
- There is merit in the NSW approach, which applies not just to carers but also to people who intended to take advantage of vulnerable persons. Such an approach would cover stepfathers who knew of the complainant's vulnerability.

8.100. In relation to how a carer ought to be defined, Communities suggested giving consideration to the definition used in the *Carers Recognition Act 2004* (WA). It also recommended that the definition 'should recognise and encompass both unpaid carers / informal supports and paid carers / formal supports / service providers. All types of carers provide invaluable support for people with disability or vulnerability, but this also creates a relationship of dependency'.[72]

The Commission's view

8.101. In the Commission's view, the sexual offences against vulnerable persons should not be restricted to offences involving carers. We are of the view that vulnerable persons should be protected from sexual abuse and exploitation from everyone, regardless of the relationship between the parties. While the fact that the accused was acting in the role of a carer may make the offence particularly heinous, this matter is appropriately dealt with in sentencing. We consider maximum penalties in Chapter 12.

8.102. In addition, we note that offences under section 330 are prosecuted against people who are not carers, such as neighbours, acquaintances and family members. While it would be possible to prosecute such individuals using the general sexual offence provisions, we are of the view that it is preferable to be able to rely on specific provisions that have been designed to protect vulnerable people from sexual exploitation.

8.103. In Chapters 6 and 7 we suggest substantial structural reforms to the sexual offences involving adults and children. We also recommend that the adult and child sexual offences broadly adopt the same structure and terminology, with the aim of producing a cohesive set of sexual offences throughout the *Code.*

8.104. Specifically, in Chapter 7 in respect of sexual offences against children we recommend that:

- The offences of sexual penetration of a child, procuring a child to engage in sexual behaviour, indecently dealing with a child and procuring a child to do an indecent act should be replaced by the offences of sexual penetration involving a child victim, coerced sexual penetration involving a child victim, sexual act involving a child victim and coerced sexual act involving a child victim.
- These offences be defined in identical terms to the adult offences, but with appropriate modifications (relating to proof of the victim's age and the removal of the consent element).
- The offence of indecently recording a child be retained.

8.105. For consistency and clarity, we recommend that the same structure and terminology be enacted in relation to the sexual offences against vulnerable persons. This will require:

- The existing offences of sexual penetration of an incapable person, procuring an incapable person to engage in sexual behaviour, indecently dealing with an incapable person and procuring an incapable person to do an indecent act to be repealed.

[72] Email Submission E24 (Communities).

- New offences of sexual penetration involving a vulnerable person, coerced sexual penetration involving a vulnerable person, sexual act involving a vulnerable person and coerced sexual act involving a vulnerable person to be enacted.
- These offences to be defined in identical terms to the adult offences, but with the following modifications:
    - The inclusion of an element requiring the victim to be a vulnerable person (as defined above).
    - The inclusion of an element requiring the accused to have known, or ought to have known, that the complainant was a vulnerable person (as discussed in the previous section).
    - The removal of the requirement that the prosecution prove lack of consent.
- Retaining an appropriately modified indecent recording offence.[73]

8.106. Later in this Chapter we also recommend the creation of a new offence of grooming a vulnerable person for sex. This offence would mirror, for the protection of vulnerable persons, the Royal Commission's recommendation that Australian jurisdictions enact an offence of grooming for sex a child or other person under one's care, supervision or authority. It would prohibit an adult from using words or conduct to facilitate a vulnerable person engaging in or being involved in the commission of a sexual offence.

8.107. We note that our recommendation concerning the repeal of the procuring offences proceeds on the assumption that this offence will be enacted. Such an offence would capture much of the behaviour currently captured by the procuring offences. Any other offending behaviour currently caught by the procuring offences is likely to be captured by the revised offences of coerced sexual penetration involving a vulnerable person, coerced sexual act involving a vulnerable person, or the parties provisions in sections 7-9 of the *Code*.[74] If a grooming offence for the protection of vulnerable people is not enacted, consideration may need to be given to retaining the procuring offences.

8.108. Later in this Chapter we also recommend the creation of a new offence of persistent sexual abuse of a vulnerable person.

8.109. Appendix 2 summarises the revised offence structure we recommend across all sexual offences, including those for the protection of vulnerable people.

[73] The Government may wish to consider grouping this offence with the other intimate image offences, which are currently contained in Chapter XXVA of the Code. In Chapter 13 we suggest that it may be desirable for all of these offences to be grouped under a new Part of the Code, titled Sexual Offences.

[74] These provisions allow people who were involved in an offence to be charged with committing the offence, including people who commit the relevant acts, people who aid or enable the commisson of the offence, people who counsel or procure another to commit the offence and people who form an unlawful common purpose to commit the offence.

Recommendations

83. The offences of sexual penetration of an incapable person, procuring an incapable person to engage in sexual behaviour, indecently dealing with an incapable person and procuring an incapable person to do an indecent act should be replaced by the following offences:

- **Sexual penetration involving a vulnerable person.**
- **Coerced sexual penetration involving a vulnerable person.**
- **Sexual act involving a vulnerable person.**
- **Coerced sexual act involving a vulnerable person.**

84. The sexual offences should be defined in identical terms to the revised adult sexual offences, but with the following modifications:

- **The inclusion of an element requiring the victim to be a vulnerable person.**
- **The inclusion of an element requiring the accused to have known, or ought to have known, that the complainant was a vulnerable person.**
- **The removal of the requirement that the prosecution prove lack of consent.**

85. If an offence of grooming a vulnerable person for sex is not enacted, consideration should be given to retaining a version of the procuring offences.

Should there be a new offence of grooming a vulnerable person for sex?

8.110. Grooming refers to a preparatory stage of child sexual abuse where an adult gains the trust of a child (and potentially other significant people in the child's life) in order to take sexual advantage of the child.[75] However, the term is not limited to this situation, and there is no reason why it cannot apply equally to a preparatory stage of sexual abuse of a vulnerable person, where an adult gains the trust of the vulnerable person (and potentially other significant people in the vulnerable person's life) in order to take sexual advantage of the vulnerable person. In this section we consider whether to recommend an offence of grooming a vulnerable person for sex.

8.111. In the context of children, the Royal Commission recommended that each Australian jurisdiction[76] should have a broad grooming offence that captures:

- Any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence; and
- The grooming of persons who may facilitate an offender gaining access to the child for the purpose of involving the child in a sexual offence.[77]

8.112. One example of a broad grooming offence is section 49M of the Victorian Act, which requires proof that:

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75 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 75.

76 Other than Victoria which already had a broad grooming offence at the time of the Royal Commission.

77 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 97, Recs 25 and 26.

- A person communicated with a child under 16 or a person who has care, supervision or authority over the child; and
- The person intended that the communication facilitate the child engaging or being involved in the commission of a sexual offence by the person or by another adult.

8.113. Another example of a broad grooming offence is section 67 of the *Sexual Offences Act 2003* (UK), which requires proof that:

- An adult communicated with a child;
- The purpose of the communication was the adult's sexual gratification; and
- The communication was sexual or intended to encourage the child to make a communication that is sexual.

8.114. Following the conclusion of the Royal Commission, Queensland also enacted a broad grooming offence.[78] The Queensland provision requires proof that:

- A person engaged in conduct in relation to a child, or a person who had the care of a child; and
- They intended that the conduct would facilitate the child engaging in a sexual act; or
- They intended that the conduct would expose the child to any indecent matter.

8.115. Western Australia does not have any broad grooming of children offences. However, the Western Australian Government has given in-principle acceptance to the Royal Commission's recommendation in relation to enacting a broad grooming offence for the protection of children.[79] In those circumstances, our Terms of Reference do not include consideration of such an offence against children.

8.116. We are of the view that there is currently a gap in the *Code's* protection of vulnerable people, in that it does not address grooming behaviour directed towards them. Due to their vulnerability, such people may not be aware that an adult is grooming them, or may not be aware of the purpose for which they are being groomed. Consequently, they may be unable to guard themselves against the subsequent sexual exploitation. We therefore recommend that if Parliament enacts a broad grooming offence against children, a new offence of grooming a vulnerable person for sex should be enacted. The offence should be framed in similar terms to the child grooming offence, but should apply to cases where the person groomed was a vulnerable person rather than a child.

[78] *Criminal Code Act 1899* (Qld) s 218B.

[79] 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.

Recommendation

86. If Parliament enacts a broad grooming offence against children, we recommend that a new offence of grooming a vulnerable person for sex should be enacted. The offence should be framed in similar terms to the child grooming offence, but should apply to cases where the person groomed was a vulnerable person rather than a child.

Should there be a new offence of persistent sexual conduct with a vulnerable person?

8.117. As discussed elsewhere in this Report, it is outside our Terms of Reference to review the offence of persistent sexual conduct with a child under 16 in section 321A of the *Code.* However, the Government has accepted in-principle the recommendation of the Royal Commission that the offence ought to be amended so that, relevantly:

- The actus reus is the maintaining of an unlawful sexual relationship.
- An unlawful sexual relationship is established by more than one unlawful sexual act.
- The jury must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed, but the jurors need not be satisfied of the same unlawful sexual acts.
- The offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed.

8.118. Assuming that the Government will propose an amendment to section 321A to give effect to its in-principle acceptance of these recommendations, in Chapter 7 we recommend a new offence of persistent sexual abuse of a young person. The offence will mirror the persistent sexual abuse of a child under 16 offence, but will protect children 16 or over who are under the care, supervision of authority of the accused.

8.119. For similar reasons to those we gave for recommending that offence, we also recommend that a new offence of persistent sexual abuse of a vulnerable person be enacted. We are of the view that there is currently a gap in the legislation which should be filled by an offence of this type. There is no reason that the logic underlying the enactment of an offence of this type in relation to children should not be applied to vulnerable persons who, at the time of the relevant sexual activity, were incapable of understanding the nature of the activity or guarding themselves against sexual exploitation.

8.120. As with other sexual offences against vulnerable people, we recommend that the offence contain an element requiring the prosecution to prove that at the time of the relevant sexual conduct, the accused knew or ought to have known that the victim was a vulnerable person.

Recommendations

87. There should be a new offence of persistent sexual abuse of a vulnerable person. The elements of this offence should mirror the elements of section 321A of the *Code* (or any reformed offence involving children under 16) but should apply to vulnerable persons. The offence should require proof that the accused knew or ought to have known the complainant was a vulnerable person.

Should the lawful marriage defence be reformed?

8.121. It is a defence to a charge under section 330 of the *Code* that the accused was lawfully married to an incapable person.[80] The rationale for this defence is that in many situations a person who lacks capacity is cared for by their partner, and that where a person retains some capacity it would be wrong and unreasonable to intrude into such couples' private lives.

8.122. In the Discussion Paper we sought views on whether marriage should continue to be a defence to charges involving sexual activity with vulnerable persons and, if so, whether the defence should be extended to other types of relationships or be amended in any other way.[81]

Stakeholders' views

8.123. Few stakeholders addressed this issue, and where they did views were mixed. For example, the ODPP submitted:

> We are not aware of a prosecution under s 330 where this defence has been raised. Significant caution would no doubt be exercised in prosecuting the spouse of a complainant for an offence under s 330, to be certain it was in the public interest.
>
> However, marriage does not (and should not) remove a person's entitlement to bodily autonomy and to choose not to engage in sexual activity. The rationale for the defence is not that marriage authorises a person to have sex with their spouse regardless of their capacities. The rationale is – particularly where illness or injury supervenes after marriage and affects a person's capacities in relation to sexual activity which has been ongoing and consensual – a marriage may be a sufficiently trusting and safe environment that a person who might lack capacity to guard against being exploited by other persons, still retains the capacity to enjoy intimacy with their spouse.
>
> Consideration might be given to removing this defence, if it were found that it was incentivising perpetrators of sexual violence to seek to marry persons with impairments specifically in order to exploit their vulnerability. We do not think there is a risk that would result in injustices.
>
> If the defence is retained, there doesn't seem to be any justification for confining it to marriage, and excluding de facto partnerships. However, caution should be exercised to ensure it doesn't exclude a prosecution in a factual scenario involving gross and continuing exploitation of the complainant.[82]

[80] *Criminal Code Act Compilation Act 1913* (WA) s 330(9).
[81] Discussion Paper Volume 2, [8.50]-[8.58].
[82] Email Submission E19 (ODPP).

8.124. By contrast, while Communities also supported the extension of the defence (if retained) to de facto and same-sex partners, it thought the defence should be limited to cases where the complainant retained capacity to consent to the sexual activity:

> Communities supports the availability of the defence of marriage being premised on whether the incapable person has / continues to have capacity to consent to the marriage and ongoing relationship and sexual activity with their spouse. If this capacity no longer exists, the defence should not be available.[83]

The Commission's view

8.125. The Commission recommends that the lawful marriage defence in section 330(10) of the *Code* be repealed. We are of the view that vulnerable people should be protected from sexual exploitation, even within the bounds of marriage.

8.126. There are strong policy reasons as to why marriage should not be seen as a safe haven for perpetrators of sexual abuse. Such is consistent with recent developments in the law on intimate partner violence, where there is growing recognition of the need to protect women in particular from violence from intimate partners in domestic situations.

8.127. Retaining the lawful marriage defence in this context also presents a conflict with Principle 1 of our guiding principles, which requires all parties to ensure that the other person is consenting at the time of the sexual activity. Where a person with a disability was capable of consenting and did consent at the time of the sexual activity, this defence would have no application. Where a vulnerable person was not capable of consenting or was incapable of protecting themselves from sexual exploitation, sexual offence laws should intervene.

8.128. Principle 2 of our guiding principles states that sexual offence laws should protect people who are vulnerable to sexual exploitation. Such laws are intended to have a wide application and offer the broadest protection possible to vulnerable persons. It is inconsistent with such a purpose to confine the application of sexual offence laws to situations other than marriage.

8.129. While the provision is intended to provide some protection for loving partners in marriages with vulnerable people, such a provision may inappropriately send a message that non-consensual sexual activity within the confines of marriage is permissible at law. As such, the Commission considers that such a provision may also be susceptible to abuse, and that removing this defence would guard against this possibility.

8.130. If the lawful marriage defence in section 330(10) is removed, and it is thought that a defence should be available for people who engage in sexual activity with their vulnerable partners where there is truly no element of exploitation, it would be possible to expand the defence recommended in the following section to address that circumstance.

8.131. Should the defence be retained, the Commission considers that it should be expanded to refer to de facto partners as well as married persons. Considerations of equality dictate that there is no reason to distinguish between married persons and de facto partners in this context.

[83] Email Submission E24 (Communities).

Recommendations

88. The lawful marriage defence in section 330(10) of the *Code* should be repealed.

89. Should the lawful marriage defence in section 330(10) of the *Code* be retained, it should be expanded to refer to de facto partners as well as married persons.

Should the *Code* permit sexual activity between vulnerable persons?

8.132. The offences in section 330 of the *Code* currently criminalise sexual activity between two people who both meet the *Code*'s definition of an incapable person. Both participants would be liable for engaging in sexual activity, unless they were held not to be criminally responsible due to the *Code's* criminal responsibility provisions.[84] This may be considered to unduly compromise the right of such persons to engage in intimate relationships and to be a breach of their sexual autonomy. People living in institutions or in assisted living situations may have little opportunity to develop relationships with people from outside their living situation,[85] and denying such people the opportunity to develop sexual relationships may be perceived as particularly wrong.

8.133. To address this concern, the ILRC recommended that 'a relationship between two relevant persons … should not in itself be prohibited where … there is no exploitation or abuse of either relevant person'.[86] The ILRC recommended that 'exploitation or abuse' in this context should be defined widely so as to include physical, sexual or emotional elements.[87]

8.134. A contrary argument is that vulnerable people should be protected by the criminal law from people committing sexual activity against them, and that the protection should exist no matter the character or motivation of the other participant. If a person deserves to be relieved of criminal responsibility for engaging in a sexual activity with a vulnerable person, then they should rely on the standard defences and excuses available to them and any other accused, such as mistake of fact or insanity.

8.135. In the Discussion Paper we sought views on whether Western Australian law should permit sexual activity between two people who both meet the definition of vulnerable persons and, if so, how the *Code* should be amended to enable this to occur.[88]

8.136. We note that there is also a broader issue as to whether the law should ever permit sexual activity between a person who meets the definition of a vulnerable person and a person who is not a vulnerable person. However, we did not raise this as an issue in the Discussion Paper. While it was mentioned by some stakeholders in consultations, we have not consulted broadly on the issue and so make no recommendations in this regard. If the Government wishes to it may consult with stakeholders on this broader issue. This would also allow for the Government to address the issue raised above in relation to the repeal of the lawful marriage defence, which would have the (perhaps undesirable) effect of prohibiting non-exploitative sexual activity between a vulnerable person and their partner.

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84 *Criminal Code Act Compilation Act 1913* (WA) Chapter V.

85 J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief' (2007) 52 *McGill Law Journal* 243.

86 ILRC, *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [1.17].

87 Ibid.

88 Discussion Paper Volume 2 [8.59]-[8.61].

Stakeholders' views

8.137. Some stakeholders expressed cautious support for the creation of an exception to allow vulnerable persons to engage in sexual activity. For example, some members of the Community Expert Group were supportive of such an exception, if the circumstances in which the sexual activity took place were non-abusive and non-exploitative.

8.138. However, other stakeholders were opposed to amending the *Code* to permit sexual activity between vulnerable persons. For example, the ODPP noted:

> It would be problematic if the Code disregarded the sexual rights of persons with disabilities, including their right to experience their sexuality and to have consensual sexual relationships. Our position is that these 'positive' rights are not oppositional to other 'negative' rights of persons with disabilities, which include their right to be free from all forms of sexual exploitation, violence and abuse. Consistently with the United Nations Convention on the Rights of Persons with Disabilities, legislators should take steps to prevent the targeting of persons with mental impairments for sexual exploitation specifically because of their vulnerabilities. To the extent that part of the functional definition in s 330 is concerned with a person's capacity to 'guard against sexual exploitation', these offences are entirely consistent with that obligation …
>
> We do not consider it is necessary or appropriate to amend s 330 to expressly permit consensual sexual activity by persons who are within the definition of incapable person.
>
> All capacity is decision-specific, and focuses on a particular time when a decision has to be made and on the particular subject matter of the decision. Thus, the assessment that someone lacks capacity to guard against sexual exploitation contemplates a range of exploitative or predatory behaviours that a person might be exposed to, but does not deem them incapable of consenting to sexual acts with sufficient education, support and supervision (if appropriate) to preserve their agency. Section 330 does not preclude relationships which are developed in that context.
>
> The ODPP has prosecuted a charge under s 330 which involved an accused and a complainant who were both residents in a respite care facility for people with disabilities. It would be problematic, for example, to introduce a consent-based defence based on this type of circumstance. If an accused has a mental impairment which is causative of the offending, that will be dealt with by the application of the *Criminal Law (Mentally Impaired Accused) Act* 1996 or by heavy mitigation at sentencing.[89]

8.139. Communities was also of the view that sexual activity between two vulnerable persons should be prohibited where there are circumstances of abuse or exploitation of either person.[90]

The Commission's view

8.140. Consistent with our guiding principles, the Commission believes that people with vulnerabilities should be protected from sexual exploitation. This principle applies even if a person who is themself vulnerable engages in sexually exploitative behaviour with the other person.

8.141. However, we acknowledge the importance of promoting the sexual autonomy of vulnerable people, and the varying capacities and functionalities that may enable them to freely engage

[89] Email Submission E19 (ODPP).

[90] Email Submission E24 (Communities).

in sexual activity with another person and engage in sexual relationships. We are of the view that the *Code* should ensure that vulnerable people are not precluded from engaging in sexual activity with each other if there is no element of abuse or exploitation.

8.142. We note that the Queensland Code contains a defence to charges of abuse of persons with an impairment of the mind, which is in the following terms:

> It is a defence to a charge of an offence defined in this section to prove—
>
> …
>
> (b) that the doing of the act or the making of the omission which, in either case, constitutes the offence did not in the circumstances constitute sexual exploitation of the person with an impairment of the mind.[91]

8.143. We recommend the enactment of a similar defence to the sexual offences against vulnerable persons. The defence should be available if the accused can prove, on the balance of probabilities, that:

- The accused was also a vulnerable person;
- The complainant understood the nature of the relevant sexual activity;
- The complainant consented to the relevant sexual activity; and
- There was no sexual exploitation in the circumstances.

8.144. If the defence is limited in these ways, it will be limited to cases in which the accused and the complainant were vulnerable people. It will only apply where the complainant's vulnerability was due to their inability to guard themselves against sexual exploitation. It should not apply to cases where the complainant was incapable of understanding the nature of the activity. Such individuals should be protected from sexual abuse regardless of the absence of exploitative conduct.

Recommendation

90. It should be a defence to a charge of a sexual offence against a vulnerable person for the accused to prove, on the balance of probabilities, that:

- **The accused was also a vulnerable person;**
- **The complainant understood the nature of the relevant sexual activity;**
- **The complainant consented to the relevant sexual activity; and**
- **There was no sexual exploitation in the circumstances.**

[91] *Criminal Code 1899* (Qld) s 216(4).

9. Aggravated offences and statutory alternatives

Chapter overview

This Chapter makes recommendations about the circumstances of aggravation that should be included in the *Code*. It also considers the issue of statutory alternative offences.

Aggravated offences

9.1. Under current Western Australian law, particularly serious instances of sexual offending are addressed in three ways. First, the *Code* contains **aggravated sexual offences**. These are more serious versions of certain sexual offences, which have identical elements to the basic versions of the offences except they include an additional element that the prosecution must prove beyond reasonable doubt: that the offence was committed in a statutorily defined circumstance of aggravation.[1] There are three aggravated sexual offences in the *Code*: aggravated sexual penetration without consent;[2] aggravated indecent assault;[3] and aggravated sexual coercion.[4]

9.2. An aggravated sexual offence is a different offence than the basic offence. It is for the jury to determine if the accused should be convicted of the aggravated sexual offence. If it finds that the prosecution has proven all the elements of the aggravated sexual offence, it must specifically convict the accused of the aggravated sexual offence. The name of the aggravated sexual offence (for example, aggravated sexual penetration without consent) will be recorded on the offender's criminal record.

9.3. As aggravated sexual offences include an additional element requiring proof of at least one specified circumstance of aggravation, a higher maximum penalty is attached to the aggravated versions of the offences. For example, the maximum penalty for the basic version of sexual penetration without consent is 14 years' imprisonment, and for the aggravated version it is 20 years' imprisonment.

9.4. Secondly, the *Code* contains some sexual offences for which the maximum penalties increase if the complainant was under the offender's care, supervision or authority (**sexual offences committed under the accused's care).** The following sexual offences against incapable persons[5] and children 13 to under 16[6] increase if the sexual offences are committed under the accused's care:

- Sexual penetration; procuring, inciting or encouraging to engage in sexual behaviour: increase from 14 years' imprisonment to 20 years' imprisonment.[7]

1 The circumstances of aggravation are defined in sections 221 and 319 of the *Code*: see below.
2 *Criminal Code Act Compilation Act 1913* (WA) s 326.
3 Ibid s 324.
4 Ibid s 328.
5 Ibid s 330: see Chapter 8.
6 Ibid s 321: see Chapter 7.
7 Ibid ss 321(7), 330(7).

- Indecent dealing; procuring, inciting or encouraging to do an indecent act; indecent recording: increase from 7 years' imprisonment to 10 years' imprisonment.[8]

9.5. This increase in the maximum penalty reflects the increased seriousness of offences which involve a breach of the trust placed in the accused to care for the complainant. It is also presumably intended to act as an additional deterrent to offending in such circumstances.

9.6. The effects of these sexual offences committed under the accused's care are similar to aggravated sexual offences, insofar as they both increase the maximum penalty that may be imposed on a person found to have committed a particularly serious instance of a sexual offence. However, they differ in two key ways:

- Where it is alleged that the accused committed an aggravated sexual offence, the relevant aggravating factor is an element of the offence. If the accused enters a not guilty plea to the charge as a whole, it is for the jury to determine whether the prosecution has proved it to the standard of beyond reasonable doubt. By contrast, where the indictment alleges a sexual offence committed under the accused's care (that is, that the maximum penalty should be increased due to the aggravating circumstance of the complainant being under the accused's care, supervision or authority), the circumstance of aggravation is not an element of the offence.[9]
- Where the accused is convicted of an aggravated sexual offence, the name of the aggravated sexual offence will be recorded on the offender's criminal record. By contrast, where the accused is convicted of an offence under the accused's care, the name of the offence does not change.

9.7. Thirdly, judges may use their discretion to impose a harsher sanction on an offender who has committed a particularly serious instance of a crime. While the *Code* sets out the maximum penalty that may be imposed on a person found guilty of the relevant offence, or who pleads guilty to that offence, the maximum penalty does not need to be imposed in every case: it is reserved for the worst offences. Judges generally have some discretion about the penalty they may impose.[10]

9.8. Consequently, after a person is found guilty of an offence, the court will usually hold a sentencing hearing to gather information relevant to their sentencing determination. At this hearing, defence counsel will raise any **mitigating factors**. These are factors identified for the purpose of sentencing an offender which make an offence less serious and weigh in favour of the imposition of a more lenient sentence. Conversely, the prosecution will raise any **aggravating factors**.[11] These are factors identified for the purpose of sentencing an offender which make an offence more serious and weigh in favour of the imposition of a more serious sentence. Any aggravating factors must be proven by the prosecution beyond reasonable

8 Ibid ss 321(8), 330(8).

9 In Western Australia a circumstance of aggravation (not being an element of an offence) relied on by the prosecution must be expressly included in an indictment. If the accused pleads not guilty to the base offence, the jury is required to return verdicts in respect to the base offence and separate verdicts in respect to each circumstance of aggravation pleaded in the indictment. However, if the accused pleads guilty to the base offence, a judge sitting without a jury may determine whether the prosecution has proved any of the pleaded circumstances of aggravation: *Sentencing Act 1995* (WA) ss 7(3) and 146A; *Gillespie v Western Australia* [2013] WASCA 149 and the cases cited therein.

10 See *Sentencing Act 1995* (WA) s 9. This discretion may be confined by the specification of a mandatory minimum penalty.

11 Ibid ss 6-8.

doubt;[12] and any mitigating factors must be proven by the offender on the balance of probabilities.[13]

9.9. Similarly to sexual offences committed under the accused's care, mitigating and aggravating factors do not change the name of the criminal offence. Unlike sexual offences committed under the accused's care, however, mitigating and aggravating factors are not specified in the *Code* and they do not affect the maximum penalty available: they simply help the judge to determine what sanction should be imposed, within the range of penalties generally available for the relevant offence.

9.10. In this Chapter we focus on aggravated sexual offences. We first consider whether the circumstances of aggravation for aggravated sexual offences should be amended in any way. We then consider which sexual offences should have aggravated versions. We also consider whether there should be sexual offences committed in aggravated circumstances (such as the current sexual offences committed under the accused's care). In Chapter 12 we examine the appropriate maximum penalties for aggravated sexual offences.

Should the statutory circumstances of aggravation for aggravated sexual offences be amended?

9.11. There are two provisions in the *Code* which list circumstances of aggravation, either of which may be proved in order in order to prove an aggravated sexual offence. The first is section 221, which applies to all offences in Part V of the *Code* (including Chapter XXXI). It covers cases in which:

- The offender is in a family relationship with the victim of the offence.[14]
- A child was present when the offence was committed.[15]
- The offender's conduct constituted a breach of an order under the *Restraining Orders Act 1997* (WA).
- The victim is 60 or over.

9.12. Section 319 sets out additional circumstances of aggravation that only apply to the offences in Chapter XXXI. It provides that:

> ***circumstances of aggravation***, without limiting the definition of that expression in section 221, includes circumstances in which —
>
> (a) at or immediately before or immediately after the commission of the offence —
>
> (i) the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; or
>
> (ii) the offender is in company with another person or persons; or

[12] *Marker v The Queen* [2002] WASCA 282; *Langridge v The Queen* (1996) 17 WAR 346; *R v Olbrich* (1999) 199 CLR 270.

[13] *Marker v The Queen* [2002] WASCA 282.

[14] 'Family Relationship' has the extensive meaning given in the *Restraining Orders Act 1997* (WA) s 4. This circumstance of aggravation does not apply if the offender was a child at the time of the commission of the offence: *Criminal Code Act Compilation Act 1913* (WA) s 221(1A).

[15] We discuss the definition of 'child' in Chapter 7. This circumstance of aggravation does not apply if the offender was a child at the time of the commission of the offence: *Criminal Code Act Compilation Act 1913* (WA) s 221(1A).

(iii) the offender does bodily harm to any person; or

(iv) the offender does an act which is likely seriously and substantially to degrade or humiliate the victim; or

(v) the offender threatens to kill the victim; or

(b) the victim is of or over the age of 13 years and under the age of 16 years.

9.13. The section 319 circumstances of aggravation were introduced into the *Code* in 1985 and have not been amended since then.[16] The Explanatory Memorandum to the amending Bill states that the circumstances of aggravation are factual circumstances that increase the likelihood of the successful commission of the offence or increase the severity of the harm to the victim.[17]

9.14. In the Discussion Paper we noted that one possibility for reform would be to add new circumstances of aggravation to the list in section 319.[18] We identified some possibilities, based on the legislation of other jurisdictions.[19] We also noted that it would be possible to remove or amend the circumstances of aggravation relevant to proof of aggravated sexual offences currently included in the *Code*.[20]

9.15. We sought views on whether the circumstances of aggravation listed in section 319 of the *Code* should be amended in any way.[21]

Stakeholders' views

9.16. We received limited submissions on this issue. Communities and Legal Aid submitted that the existing circumstances of aggravation are appropriate. Communities also stated that it does not oppose adding new circumstances.

9.17. The ODPP submitted that the circumstance of aggravation that applies where the victim is 13 to under 16 'frequently has the potential to apply unfairly to juvenile accused' and suggested that section 319 be amended so that subsection 1(b) does not apply if the offender, at the time of the offence, was under 18 and not more than 3 years older than the victim. In support of this suggestion it said:

> Presumably, it is primarily directed at adult accused, in contemplation of the age disparity between adults and children under 16 years of age.
>
> In our view, there is good reason to disapply the aggravating circumstance where the parties are close in age.[22]

9.18. Dr Andrew Dyer submitted that the circumstances of aggravation should apply to scenarios where there are 'two wrongs'. He provided the following example:

> Where a person (a) sexually penetrates or touches (etc) another person without consent and (b) applies, or threatens to apply, force to that person or causes that person to fear that force will applied to her … there is a breach of sexual autonomy and there is also the wrong that is criminalised by an offence such as common

16 *Acts Amendment (Sexual Assaults) Act 1985* (WA) s 324H.
17 Explanatory Memorandum, Acts Amendment (Sexual Assaults) Bill 1985 (WA) 4–5.
18 Discussion Paper Volume 2, [14.8].
19 Ibid.
20 Ibid [14.9].
21 Ibid [14.8]-[14.9].
22 Email Submission E19 (ODPP).

> assault. On the other hand, where there is sexual penetration without consent, on its own, there is one wrong (a breach of sexual autonomy). The law should acknowledge that the offending in the first of these cases is generally even worse than the offending in the second.[23]

9.19. Dr Dyer queried whether all the existing circumstances of aggravation, in particular doing an act which is likely to seriously and substantially degrade or humiliate the victim, demonstrate the occurrence of a 'second wrong' (arguing by implication that all sexual offences are likely to seriously and substantially degrade and humiliate the victim).[24]

The Commission's views

Complainant 13 to under 16

9.20. One of the current circumstances of aggravation is that 'the victim is of or over the age of 13 years and under the age of 16 years'.[25] This circumstance applies where:

- The complainant was a child 13 to under 16 at the time of the relevant sexual activity;
- The prosecution elect to charge the accused with the relevant aggravated sexual offence (as opposed to a child sexual offence); and
- The prosecution allege that the complainant's age is an aggravating circumstance.

9.21. We consider that this circumstance of aggravation should remain only if the child sex offences which apply specifically to complainants who are 13 to under 16 do not adequately protect children in that age group. If they are adequate, it is inconsistent with the scheme of sexual offences to have an adult sexual offence with this circumstance of aggravation.

9.22. There are three situations where currently the prosecution may consider that it is preferable to charge an accused with an aggravated sexual offence (where the circumstance of aggravation alleged is that the complainant is 13 to under 16) rather than a child sexual offence. The situations are:

- When it is unclear whether the child complainant was under 16 at the time of the alleged sexual activity.
- When it is unclear whether the child complainant consented in fact to the relevant sexual activity with an accused who was close in age to them.
- Where the facts of the case are very serious.

9.23. In respect to the first situation, prior to commencement of the *Criminal Law Amendment (Uncertain Dates) Act 2020* in late 2020, adult sexual offences were not statutory alternative charges to child sexual offences, even where the jury was satisfied beyond reasonable that the relevant sexual activity was non-consensual. To ensure that the accused was convicted of an appropriate offence when it was unclear whether the complainant was under 16 at the time of the relevant sexual activity, the prosecution may have charged the accused with an aggravated sexual offence with the circumstance of aggravation alleged that the complainant was a child 13 to under 16. If the jury was satisfied beyond reasonable doubt that the relevant sexual activity occurred, it could return a verdict of guilty as charged or guilty of one of the

[23] Email Submission E18 (Dr Andrew Dyer).
[24] Ibid.
[25] *Criminal Code Act Compilation Act 1913* (WA) s 319.

statutory alternatives (being an adult sex offence without the circumstance of aggravation, or a child sex offence if it was proved that the complainant was a child 13 to under 16).

9.24. This use of an aggravated sexual offence (where the circumstance of aggravation alleged is that the complainant is 13 to under 16) may have become unnecessary when the *Criminal Law Amendment (Uncertain Dates) Act 2020* (WA) commenced. As a consequence of amendments made to the *Code* by that Act, section 10N of the *Code* now provides that if the complainant's age at the time of the alleged sexual activity is uncertain, and the alleged activity constituted a sexual offence if the complainant was of a particular age and a different sexual offence if the complainant was of a different age, the accused may be charged with, convicted and sentenced of either sexual offence depending on the maximum penalties for the offences. Similarly, section 10M of the *Code* provides that if the offence occurred on a date that cannot be identified with specificity, but during a period when the complainant had a birthday, and the alleged activity constituted a sexual offence if the complainant was of a particular age and a different sexual offence if the complainant was of a different age, the accused may be charged with, convicted and sentenced of either sexual offence depending on the maximum penalties for the offences.

9.25. We note, however, that there may be doubt as to whether sections 10M and 10N enable an accused charged with a child sexual offence to be convicted in the alternative of an adult sexual offence.[26] This is because adult sex offences require proof of the additional element of lack of consent. It is not clear that the requirement for sections 10M and 10N to operate, namely that the alleged sexual activity constituted a sexual offence if the complainant was under 16 and a different sexual offence if the complainant was 16 or over, is satisfied simply by proof of the sexual activity being the same for both offences. This interpretation appears to ignore a fundamental difference between adult and child sexual offences, being the requirement to prove lack of consent for an adult offence.

9.26. In relation to the second situation, during a consultation with lawyers who regularly practice in the Children's Court, we were told that where the complainant is 13 to under 16 and the accused is also a child, occasionally the prosecution elects to charge the accused with the relevant aggravated sexual offence (as opposed to a child sexual offence) and alleges that the complainant's age is an aggravating circumstance.[27] They thought this may be out of fairness where the circumstances suggest that the complainant consented in fact, so that evidence related to consent can be led.[28]

9.27. In relation to the third situation, currently the maximum penalty for some child sexual offences is less than the maximum penalty for the equivalent adult sexual offence. For example, the maximum penalty for sexual penetration of a child 13 to under 16 is 14 years' imprisonment and the maximum penalty for aggravated sexual penetration without consent is 20 years' imprisonment. Thus, in particularly serious cases the prosecution may choose to charge an accused with an aggravated sexual offence rather than the equivalent child sexual offence so, if convicted, the offender may be liable to the greater maximum penalty.

9.28. If the recommendations we have made in this Report are implemented and a similar age defence is enacted, the three situations where currently the prosecution may consider that it

[26] The second reading speech and explanantory memorandum say or imply that the amending Act was intended to apply where there is uncertainty as to whether the complainant was still a child at the time of the relevant sexual activity. The uncertainty relates to the meaning of the words of the relevant sections in the amending Act.

[27] Although, as a matter of law, a child under 16 does not consent.

[28] This approach is necessary because lack of consent is not an element of the sexual offences against children, and there is currently no similar age defence: see Chapter 7.

is preferable to charge an accused with an aggravated sexual offence, rather than a child sexual offence, will not arise. This is because:

- We recommend that the *Code* should provide that adult sexual offences be statutory alternative verdicts to child sexual offences.[29] This reform will enable the accused to be charged with a child sexual offence in relation to a child 13 to under 16. If it is not proved that the complainant was of that age, the accused will be able to be convicted in the alternative of an adult sex offence. It may be desirable in the process of reform to review sections 10M and 10N of the *Code* so as to ensure that they do what they were intended to do in this regard.
- The similar age defence will ensure that if the accused and the complainant are of similar ages, and the child complainant willingly participated in the sexual activity, the accused will not be convicted of a child sexual offence.
- We recommend increasing the penalties for child sexual offences, so that child sexual offences and aggravated sexual offences will have the same maximum penalties.[30] This will remove the need to charge an accused with an aggravated sexual offence to reflect the seriousness of their conduct.

9.29. Consequently, if the recommendations discussed above and a similar age defence are enacted, we recommend the repeal of the circumstance of aggravation that the complainant is 13 to under 16.

9.30. Given this recommendation, it is unnecessary for us to determine, as raised by the ODPP, whether the circumstance of aggravation should apply to an offender who is within three years of the complainant's age.

Complainant under the accused's care, supervision or authority

9.31. As noted above, the *Code* currently specifies that the maximum penalties for certain sexual offences against incapable persons and children increase if the complainant was under the offender's care, supervision or authority. In Chapter 12 we recommend increasing the base penalty for these offences and consequently repealing the increased maximum penalty provisions for sexual offences committed under the accused's care. This is not because we do not consider the abuse of power or the relationship of trust inherent in offending against people in care, supervision or authority to be egregious and worthy of condemnation. However, in light of our recommended increases to the maximum penalties available for sexual offences against children and vulnerable persons, we are of the view that this matter can be appropriately addressed by the judge as an aggravating factor in determining an appropriate sanction.

9.32. By contrast, we are of the view that the *Code* should specify that the general sexual offences against adults,[31] which do not have such high base penalties, are aggravated where the complainant was under the accused's care, supervision or authority. This would include cases where such offences are committed by the complainant's employer, teacher or lecturer, health care worker or custodial officer. Due to the power imbalance and the relationship of trust between the accused and complainant in such cases, we consider the offence to be more serious than one committed absent the relevant relationship, justifying the availability of a higher maximum penalty. We therefore recommend that an additional aggravating

[29] See 'Statutory alternatives' below.

[30] See Chapter 12.

[31] Under our recommended approach, these would be sexual penetration without consent, coerced sexual penetration without consent, sexual act without consent, and coerced sexual act without consent: see Chapter 6.

circumstance that focuses on sexual offending in the context of a relationship of care, supervision or authority be added to the *Code's* circumstances of aggravation for the purpose of aggravated sexual offences against adults.

9.33. We note that we are not recommending that the *Code* prohibit consensual sexual activity between adults who are in a relationship of care, trust or authority.[32] Rather, we are recommending that if non-consensual sexual activity between adults in these relationships occurs, the aggravated version of the relevant sexual offence and its higher maximum penalty should apply.

9.34. In Chapter 7 we considered the meaning of the term care, supervision or authority in the context of sexual offences against children. Our comments about the meaning of the expression apply in this context too. We recommended that this term be defined both to clarify its meaning and serve an educational function. For the same reasons, we recommend that the term be defined in this context.

9.35. We recommend taking a similar approach to defining care, supervision or authority, although the definition will need to be modified slightly to reflect the different context in which it is operating. The definition should be inclusive and should capture circumstances where the accused, at the time of the commission of the offence:

- Was a teacher at a school or other educational institution, or a person with responsibility for students at a school or other educational institution, and the complainant was a student at the school or educational institution.
- Had an established personal relationship with the complainant in relation to the provision of religious, sporting, musical or other instruction, in which relationship the complainant was under the authority of the accused person.
- Was the complainant's employer.
- Provided correctional services to the complainant in a correctional institution or the community.
- Provided professional counselling to the complainant.
- Was a health service provider and the complainant was the accused's patient.
- Was a carer for the complainant.
- Was employed in, or provided services in, an institution at which the complainant was detained.
- Was a police officer acting in the course of their duty in respect of the complainant.

9.36. This definition differs from the definition of care, supervision and authority that we recommended enacting in relation to sexual offences against children in two ways:

- It does not include cases in which the accused and the complainant were previously in a relationship of care, supervision or authority. It only applies if they were still in that relationship at the time of the offence. This is because we consider it less likely, in the case of adult complainants, that a power imbalance will continue to exist beyond the ending of the relationship of care, supervision or authority.

[32] Although in some circumstances there may be laws or rules made by professional or disciplinary bodies prohibiting such activity.

- Some categories have been added or modified to reflect that the circumstance is not limited to cases involving child complainants.[33]

Recommendations

91. The circumstances of aggravation in section 319(1) of the *Code* should be amended to:

- **Repeal the circumstance that the victim is of or over the age of 13 years and under the age of 16 years.**
- **Include the circumstance in which the complainant was under the accused's care, supervision or authority.**

92. For the purposes of section 319 of the *Code*, the term 'care, supervision or authority' should be defined. The definition should be inclusive and should capture circumstances where, at the time of the sexual activity, the accused:

- **Was a teacher at a school or other educational institution, or a person with responsibility for students at a school or other educational institution, and the complainant was a student at the school or educational institution.**
- **Had an established personal relationship with the complainant in relation to the provision of religious, sporting, musical or other instruction, in which relationship the complainant was under the care, supervision or authority of the accused person.**
- **Was the complainant's employer.**
- **Provided correctional services to the complainant in a correctional institution or the community.**
- **Provided professional counselling to the complainant.**
- **Was a health service provider and the complainant was the accused's patient.**
- **Was a carer for the complainant.**
- **Was employed in, or provided services in, an institution at which the complainant was detained.**
- **Was a police officer acting in the course of their duty in respect of the complainant.**

Offences committed in the course of home burglaries

9.37. The *Code* currently mandates that specific penalties must be imposed if certain sexual offences[34] are committed during the course of an aggravated home burglary. In Chapter 12 we recommend that these mandatory penalties be repealed; we recommend that an offence

[33] In most cases where this provision is relevant the complainant will be an adult. However, as noted above, there may be rare cases in which the prosecution elects to charge an accused who is alleged to have committed an offence against a child complainant with an adult offence. These aggravating circumstances should be equally applicable in such cases.

[34] The relevant offences are: sexual offences against a child under 13 (s 320); sexual offences against children of or over 13 and under 16 (s 321); aggravated indecent assault (s 324); sexual penetration without consent (s 325); aggravated sexual penetration without consent (s 326); sexual coercion (s 327); aggravated sexual coercion (s 328); and sexual offences against an incapable person (s 330).

being committed in the course of an aggravated home burglary should instead be added to the list of aggravating circumstances which may be proved in order to prove an aggravated offence. We explain this recommendation more fully in Chapter 12.

Other amendments to aggravating circumstances

9.38. We did not receive any submissions suggesting other amendments to the circumstances of aggravation relevant to proof of aggravated sexual offences.

9.39. We considered whether the fact that the complainant has a cognitive or physical disability ought to be added to the list of aggravating circumstance. However, we concluded that if the complainant is a vulnerable person, it is appropriate for the prosecution to charge the accused with an offence against a vulnerable person (requiring them to satisfy the jury that the complainant meets the definition of vulnerable person). We consider offences against vulnerable persons in Chapter 8.

Should there be new aggravated sexual offences?

9.40. In the Discussion Paper we sought views on whether the *Code* should include new aggravated sexual offences.[35] For example, it would be possible to create:

- Aggravated versions for offences which do not currently have them (such as the sexual offences against children).
- Additional levels of aggravation for the offences which already have aggravated versions. For example, it would be possible to have three levels of seriousness for those offences: the basic version, a mid-level aggravated version and a high-level aggravated version, similar to the scheme in place in the ACT.[36]

Stakeholders' views

9.41. We received limited submissions on this issue.

9.42. Communities submitted that there is no need for aggravated sexual offences against children for the following reason:

> There already exists aggravated offences for sexual offences against persons generally and, if circumstances of aggravation exist in a case of sexual offending against a child, then there is nothing stopping WAPOL from charging the offender with the more general aggravated sexual offence rather than the narrower child sex offence.[37]

9.43. Communities also submitted that introducing graded levels of sexual offences such as exist in the ACT would be a 'drastic change' that is unnecessary given that 'the existence of current aggravated sexual offences appears to already provide flexibility in terms of laying charges to deal with extrinsic violence'.[38]

9.44. Legal Aid said there is no need for new aggravated sexual offences.

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35 Discussion Paper Volume 2, [14.10].
36 See *Crimes Act 1900* (ACT) ss 51-54.
37 Email submission E24 (Communities).
38 Ibid.

The Commission's views

9.45. In Chapter 6 we make various recommendations for reforming the sexual offences against adults. These include recommending that there should be aggravated versions of the following reformed offences:

- Sexual penetration without consent.
- Coerced sexual penetration.
- Sexual act without consent.
- Coerced sexual act.

9.46. We do not recommend that there be an aggravated version of the new recommended offences of obtaining sexual penetration by fraud or obtaining a sexual act by fraud, as the circumstances of aggravation are not easily applicable to fraudulent or deceitful behaviour.

9.47. We also do not recommend that there be aggravated versions of the offences against children or vulnerable people. This is largely due to the fact that in Chapter 12 we recommend increasing the maximum penalty for these offences. In our view, these increased levels adequately allow for the imposition of a penalty that reflects the existence of the matters included in the list of aggravating circumstances.

9.48. For the reasons stated by Communities, we also do not recommend introducing graded levels of sexual offences such as exist in the ACT.

Statutory alternatives

9.49. Generally, a jury[39] can only consider whether an accused person is guilty of the offence with which they have been charged, and so can only convict or acquit the accused of that offence.[40]

9.50. There are two general exceptions to this rule:

- If the prosecution notice or the indictment states that the accused is charged with a second offence as an alternative to the first offence.[41]
- If the *Code* or other legislation specifies that a different offence is an alternative to the offence with which the accused is charged (**statutory alternatives**).[42]

9.51. In either of these two circumstances the jury may find the accused not guilty of the offence charged and guilty of the alternative offence.

9.52. Most statutory alternatives are listed immediately after the offence provision to which they apply. In addition, section 10D of the *Code* specifies statutory alternatives to all substantive offences in the *Code*. It provides:

> If a person is charged with committing an offence (the principal offence), the person, instead of being convicted as charged, may be convicted of —
>
> (a) attempting to commit; or
>
> (b) inciting another person to commit; or

39 The term jury includes a judge or magistrate sitting without a jury to try a charge.
40 *Criminal Code Act Compilation Act 1913* (WA) s 10A.
41 Ibid.
42 Ibid.

(c) becoming an accessory after the fact to,

the principal offence or any alternative offence of which a person might be convicted instead of the principal offence.

9.53. There are some additional exceptions to the rule that a jury can only consider whether an accused person is guilty of the offence with which they have been charged. These exceptions are phrased as applying to all offences, but they apply most frequently when the accused is charged with a sexual offence against a child:

- If the relevant act occurred in a period when the law making the act an offence was amended, and it is uncertain when in the relevant period the alleged act occurred, and if proved, the alleged act constituted an offence before the law was amended but a separate and different offence after the law was amended – the jury may convict the accused of either of the offences if their statutory penalties are the same, or the offence with the lower statutory penalty if the penalties are different.[43]
- If the alleged act occurred in a period during which the victim had a birthday, and it is uncertain when in the period the alleged act occurred, and if proved the alleged act constituted a sexual offence in respect of the victim before the relevant birthday but a separate and different sexual offence in respect of the victim on or after the relevant birthday – the jury may convict the accused of either of the offences if their statutory penalties are the same, or the offence with the lower statutory penalty if the penalties are different.[44]
- If the relevant act occurred at a time when the victim's age is uncertain, and if the alleged act constituted an offence if the victim was a particular age, but a separate and different offence if the victim was a different age – the jury may:
  - If the offences' statutory penalties are the same, convict the accused of either of the offences, regardless of when it finds the act occurred; or
  - If the offences' statutory penalties are different, convict the accused of the offence with the lower statutory penalty.[45]

9.54. In the Discussion Paper we set out the statutory alternatives for each of the offences we are considering in this project.[46] We sought views on whether there are any sexual offences for which it would be logical to have additional statutory alternatives, or whether any of the existing alternatives should be removed.

9.55. In the Discussion paper we suggested it might be useful to add the following statutory alternatives to the *Code*:[47]

- Sexual penetration without consent (section 325(1)) and/or aggravated sexual penetration without consent (section 326(1)) could be added as statutory alternatives to sexually penetrating a child under 16 (section 321(2)) and/or sexually penetrating a child of or over 16 (section 322(2)). This would capture the situation where the jury is not satisfied that the sexual penetration took place when the child was of the relevant age.
- Indecent assault (section 323) and/or aggravated indecent assault (section 324(1)) could be added as a statutory alternative to indecently dealing with a child under 16 (section

43 Ibid s 10L.
44 Ibid s 10M.
45 Ibid s 10N.
46 Discussion Paper Volume 2, Table 15.1.
47 Discussion Paper Volume 2, [15.8].

321(4)) and/or indecently dealing with a child of or over 16 (section 321(4)). This would capture the situation where the jury is not satisfied that the indecent dealing took place when the child was of the relevant age.

Stakeholders' views

9.56. We received limited submissions on this issue.

9.57. The ODPP submitted:

> The issues about uncertainty of age … have largely been addressed by the insertion of Chapter IIB (Charges where date of offence, or age of victim, is uncertain). However, it may be prudent to make the amendments suggested because since the High Court's decision in *Stephens v R* it is unclear whether the State is limited in when it may invoke the uncertain dates provisions. Since it is not uncommon for an uncertainty as to age to arise during a trial, if the State were barred from invoking ss 10M or 10N when that occurs, it would threaten the efficacy of those provisions.
>
> In addition … we suggest the following additions to the statutory alternatives:
>
> - Section 329(7) (sexual penetration of adult lineal relative) should be a statutory alternative to s 330(2) (sexual penetration of incapable person) and s 330(3) (procuring, inciting or encouraging an incapable person to engage in sexual behaviour). This would address factual circumstances involving, for example, an accused parent offending against an adult incapable person, where the jury does not accept the complainant is an incapable person. A charge of sexual penetration without consent or sexual coercion may be open, but there may be real problems with the consent / compulsion elements.
>
> - Nevertheless, this leaves a lacuna in respect of statutory alternatives where an accused person offends against an adult complainant who is their de facto child.[48]

9.58. Communities also supported the options identified in the Discussion Paper of adding statutory alternatives that can be relied upon when the jury determines that the action relevant to a sexual offence occurred, but the age of the child cannot be determined.

9.59. Some participants in the Legal Expert Group and Geraldton consultation said that common assault should be an automatic alternative to indecent assault. This would mean that if the jury determines that contact occurred but was not indecent, a conviction would still be available to recognise the occurrence of the unwanted touching.

The Commission's views

9.60. In Chapters 6 to 8 we make several recommendations for reforming the sexual offences to be included in the *Code*. Due to the wide-ranging nature of these recommendations, it is difficult to make specific and comprehensive recommendations concerning statutory alternatives. It will be necessary for the Government to give detailed consideration to how enacted offences fit together, to ensure that appropriate alternative offences are identified.

[48] Email Submission E19 (ODPP) (citations omitted).

9.61. Consequently, in this section we do not make detailed recommendations in relation to current *Code* provisions or offences in the reformed scheme of offences. We do, however, make the following general recommendations:

- The current approach to statutory alternatives is largely comprehensive and should be applied, with appropriate modifications, to the reformed offences.
- Adult sexual offences should be added as statutory alternatives to child sexual offences, to capture the situation where the jury is not satisfied that the sexual activity took place when the child was of the relevant age.[49] In this regard, we note that adult sexual offences have an additional element, lack of consent. Commonly, alternative offences are included offences that do not require proof of additional elements to the charged offence, but this is not always the case. For example, sexual penetration of a child under the accused's care supervision or authority is currently a statutory alternative to sexual penetration of a child 13 to under 16, despite the former offence having the additional element that the child was under the accused's care supervision or authority. If adult sexual offences are added as statutory alternatives to child sexual offences, an accused should only be liable to conviction of the alternative offence if the jury is satisfied that they are not guilty of the charged child sexual offence (because the prosecution has failed to prove that the complainant was under 16, or under 18 in the case of a charge against a young person under the accused's care, supervision or authority) and the prosecution has proved any additional element of the alternative charge. It is this process which may be unclear in respect of sections 10M and 10N of the *Code* and which should also be clarified in the process of reform. As mentioned by the ODPP, any issues arising from the reasoning in *Stephens v The Queen*[50] also should be resolved in this process of reform.
- Sexual offences against adult lineal relatives should be added as statutory alternatives to sexual offences against vulnerable persons, for the reasons outlined by the ODPP.
- Common assault should be added as a statutory alternative to the non-penetrative sexual offences, to capture the situation where the jury is not satisfied that the act was of a sexual nature.

Recommendation

93. The current approach to statutory alternatives should be applied to the reformed sexual offences with appropriate modifications, including:

- **Adult sexual offences should be statutory alternatives to child sexual offences.**
- **Sexual offences against adult lineal relatives should be statutory alternatives to sexual offences against vulnerable persons.**
- **Assault should be a statutory alternative to the non-penetrative sexual offences.**

[49] In the previous section of this Chapter we discuss the effect of the amendments made to the *Code* by the *Criminal Law Amendment (Uncertain Dates) Act 2020* (WA). This proposal should be considered in light of the that discussion.

[50] *Stephens v The Queen* [2022] HCA 31.

10. Jury directions

Chapter overview

This Chapter makes recommendations about jury directions. It also considers the issues of juror education and the use of expert witnesses in sexual offence trials.

Introduction

10.1. 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. Relevantly, the judge directs the jury about its role and the law it must apply in deciding its verdict. The judge is required to summarise the prosecution case and the case of an accused and may also make any observations about the evidence that they think necessary in the interests of justice.[51]
- The role of the jury is to decide whether the prosecution has proven the offence(s) charged beyond reasonable doubt. The jury is the sole judge of the facts, but it must apply the law as directed by the judge.[52] A jury is at liberty to disregard a judge's comments about the evidence.[53]

10.2. 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. The jury is required to follow and apply every direction on the law given by a trial judge.

51 *Criminal Procedure Act 2004* (WA) ss 106 and 112.
52 *Azzopardi v R* [2001] HCA 25; 205 CLR 50 [49]-[50].
53 Ibid [50].

10.3. The High Court has held that the judge's 'fundamental' role in directing the jury is 'to ensure a fair trial of the accused'.[54] 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.[55]

10.4. In determining the fairness of a trial, the interests of the accused, the complainant and society all need to be taken into account.[56] In addition, the concept of a fair trial is not static: it evolves over time.[57] 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.[58]

Current approach

10.5. 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.

10.6. To assist judges in formulating 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; while some do, others do not. The bench book is not publicly available.[59]

10.7. Where an accused has been charged with an offence which requires proof of a lack of consent, the judge must explain the meaning of consent to the jury. There is no set way in which they must do so, but currently they will commonly be guided by the wording of section 319(2) of the *Code* (see Chapter 4). The judge 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.

10.8. In the Discussion Paper we discussed various other directions which may be permitted or mandated (by statute or the common law) in sexual offence cases.[60] For example, certain directions are mandated or permitted where:

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54 *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620 [41].

55 Ibid (citations omitted).

56 Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, 2015) 5–6.

57 Ibid 5–6.

58 Ibid.

59 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.

60 Discussion Paper Volume 1, [6.15]-[6.22].

- There is evidence that suggests that the complainant did not immediately make a complaint about the alleged incident of sexual violence to the police or anyone else (**delayed complaint**) or did not tell anyone about that alleged incident (**absence of complaint**).[61]
- There is evidence that suggests that the delay in making a complaint has caused the accused to suffer a forensic disadvantage.[62]
- 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.[63]
- There is evidence of family violence.[64]

10.9. There are also some historic common law directions which are prohibited by statute. For example, the Evidence Act provides that:

- A 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.[65]
- A 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.[66]

10.10. When determining which directions to give in a case, judges will sometimes seek the views of counsel, particularly if the directions are complex or not the type of direction that are given in every case.

10.11. The District Court transcript analysis shows that the length of Western Australian judges' directions to juries at the end of sexual offence trials does not raise concerns. Out of 188 sexual offence trials in the District Court in 2019, the longest direction was 204 minutes, and the shortest direction was 23 minutes. The mean length was 92 minutes for trials involving adult complainants only and 100 minutes for trials involving child complainants only.[67] Consequently, in this Chapter we focus on issues about the content of judges' directions. We acknowledge that legislating additional jury directions may add to the length of judges' directions in sexual offence trials. The District Court transcript analysis shows that there is scope for some increase in the length of judges' directions to improve juror's understanding, without creating additional problems.

10.12. In the Discussion Paper we noted that other jurisdictions have legislated with respect to jury directions in various ways. We outlined the approaches taken in four jurisdictions: Victoria, NSW, Queensland and New Zealand.[68]

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61 *Evidence Act 1906* (WA) s 36BD; *Crofts v The Queen* [1996] HCA 22; (1996) 186 CLR 427. See Discussion Paper Volume 1, [6.15]-[6.17].

62 *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79; *Eravelly v Western Australia* [2018] WASCA 139; *DWM v Western Australia [No 2]* [2019] WASCA 143. See Discussion Paper Volume 1, [6.18].

63 *Azarian v Western Australia* [2007] WASCA 249. See Discussion Paper Volume 1, [6.19].

64 *Evidence Act 1906* (WA) s 39F. See Discussion Paper Volume 1, [6.20]-[6.22].

65 *Evidence Act 1906* (WA) s 50.

66 Ibid s 106D.

67 Statistical Analysis Report, 32.

68 Discussion Paper Volume 1, [6.23]-[6.47].

Should jury directions for sexual offences be legislated?

10.13. 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.[69]

10.14. 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 who do not consent to sexual activity may not be physically injured or subjected to violence.[70] This could help ensure that the jury does not infer, from the fact that the complainant was not injured, that they consented to the sexual activity.

10.15. In the Discussion Paper we noted that even if it is thought that such directions are desirable, it does not follow that they should in every case be legislated.[71]

10.16. Under the current law, Western Australian judges may 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). Whether 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 submissions from the parties and by the directions included in the District Court bench book.

10.17. The alternative approach would be to legislate more jury directions for sexual offence trials. The relevant legislation could do one or more of the following:

- Set out the required content of the direction.
- Require or permit a judge to give the direction in specified circumstances.
- Specify the time at which the direction should or may be given.

10.18. In the Discussion Paper we sought views on whether Western Australia should legislate for more jury directions for sexual offence trials.[72]

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69 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].

70 Criminal *Procedure Act 1986* (NSW) s 292C.

71 Discussion Paper Volume 1, [6.51].

72 Ibid [6.54]-[6.59].

Stakeholders' views

10.19. There was widespread support in submissions and consultations for legislating jury directions in sexual offence trials. Sixty-five per cent of responses to the online survey were in favour of legislating jury directions, and numerous other stakeholders who wrote submissions also expressed support for this approach.

10.20. A number of stakeholder submissions argued that misconceptions about sexual offending remain prevalent in Western Australia and that jury directions could help overcome them. For example, one online portal submission stated:

> I believe that the average jury member, other court members and likely most judges do not have a clear understanding of issues surrounding sexual violence. Sadly many people in the community hold misguided or outdated and harmful views. I think this would offer a little more clarity and assist with working towards less bias (conscious or unconscious bias).[73]

10.21. Another stakeholder submitted that 'jurors may be unaware of the nuances and realities of sexual violence, so addressing the jury with responses that may differ from "common sense" is important to reduce preconceived ideas or bias'.[74]

10.22. The CWSW submission echoed these views:

> CWSW advocates that jury directions be codified and support the development of judicial directions and the admission of expert evidence to address myths and misconceptions in sexual offence proceedings. As previously mentioned, research has demonstrated that myths and stereotypes about violence against women persist into the courtroom and influence juror decision-making. Jury directions may serve to educate the jury, assist jurors to understand and apply the legal definition of consent, to counter the myths and misconceptions that jurors may hold about sexual assault, and to reinforce an affirmative model of consent.[75]

10.23. Likewise the submission from Communities stated that 'legislated jury directions can be an instrument of social change through an educative function to address commonly held misconceptions and community attitudes that are highly problematic and adversarial toward victim-survivors'.[76]

10.24. Submissions and stakeholder views expressed during consultations also identified that legislating directions would likely improve consistency in the types of directions that should be given and their contents, both between judges and trials. In particular, it was argued, legislating jury directions would assist in eliminating the adverse consequences that can arise if individual judges do not use the most commonly used and accepted directions.

10.25. Some legal service providers noted that if the content of directions appeared in legislation it might help them explain the law to their clients – as they could identify with certainty the type of directions that would be given. Similarly, members of the Community Expert Group suggested that legislated directions would provide victim-survivors with greater certainty and clarity about what the judge would say to the jury.

10.26. The Royal Commission recommended that state and territory governments should settle standard directions about the effect of child sexual abuse and introduce legislation as soon as

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73 Portal Submission P31 (B).

74 Portal Submission P26 (Confidential).

75 Portal Submission P57 (CWSW) (citations omitted).

76 Email Submission E24 (Communities).

possible to require the directions to be given.[77] The Western Australian Government accepted this recommendation in principle.[78]

10.27. Dr Faye Nitschke and Professor Blake McKimmie submitted:

> Research suggests that having pre-written educational jury directions could be helpful to both judges and jurors. Jurors are likely to be able to understand and apply judicial directions which are conceptually simple and explain the reason why the judge is providing the direction. Research has consistently shown that the way in which a judicial direction is expressed has an impact on the extent to which jurors comprehend the directions, and whether they accurately apply directions. Educational directions could be pre-written in legislation, a bench book or other repository for judges to access.[79]

The Commission's view

10.28. The Commission agrees with the views outlined above which support legislating some jury directions for sexual offences. In particular, we consider that legislating jury directions will play an important role in addressing misconceptions surrounding sexual violence and consent. Additionally, we see value in legislating such directions rather than leaving them to the discretion of judges. Doing so will:

- Ensure that appropriate directions are given (and not overlooked).
- Reduce inconsistencies between trials and judges.
- Help legal service providers explain the law to their clients.
- Help educate the community about sexual violence.

Which jury directions should be legislated?

10.29. In the Discussion Paper we discussed various jury directions that have been legislated in other jurisdictions and which could be enacted in Western Australia.[80] We sought views on whether any of these directions (or others) should be legislated. We also sought views on the content of any proposed directions and the circumstances in which they should be given.

10.30. In this section we consider which directions should be legislated and the appropriate content of the recommended directions. In the following sections we consider when, during the trial, the recommended directions should be given, and the circumstances in which they should be given.

10.31. We note that the recommended legislated jury directions cover what we regard to be the most important aspects of directing a jury in sexual offence trials. There are many other directions that a trial judge is required to give or should choose to give, depending on the relevant law and particular facts of a case.

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77 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive summary and parts I and II, 2017) 92–93 and Rec 70.

78 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, 37.

79 Email Submission E7 (Dr Faye Nitschke and Prof Blake McKimmie).

80 Discussion Paper Volume 1, [6.64]-[6.128].

Should there be a legislated direction about consent?

10.32. In the Discussion Paper we observed that 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.[81] We noted that current practice in Western Australia (in trials where a lack of consent is an element of the offence) already includes judges directing the jury as to these issues.

10.33. In Chapter 4 of this Report we make various recommendations for reforming the *Code's* approach to consent. These include:

- Defining consent to mean freely and voluntarily agreeing to the relevant sexual activity.
- Reforming the negative indicators of consent.
- Reforming the list of circumstances in which a person does not consent.
- Specifying certain mistaken beliefs which do not negate consent.

10.34. These recommendations should be borne in mind when considering the jury directions that should be legislated.

Stakeholders' views

10.35. There was general support for a legislated direction on the meaning of consent from a range of stakeholders.

10.36. The ODPP and Legal Aid suggested that there should be a mandatory direction on consent which always includes the basic statutory definition. The ODPP further submitted that where relevant, it should be supplemented by directions on withdrawing consent, negative indicators and circumstances of non-consent.[82]

10.37. Communities suggested that consideration should be given to alignment with Victorian legislation, whereby the prosecution or defence may request that the judge inform the jury:

- That a person can consent to an activity only if the person is capable of consenting and free to choose whether or not to engage in or allow the activity.
- That where a person has given consent to an activity, the person may withdraw that consent before the activity takes place or at any time when the activity is taking place.
- Of relevant circumstances in which the law provides that a person does not consent to the activity.

The Commission's view

10.38. In cases where lack of consent is an element of the sexual offence being tried, judges necessarily direct juries as to the *Code* definition of consent. A failure to do so would almost guarantee a successful appeal against conviction. Consequently, we think that it is unnecessary to recommend that judges do so because of any defect in current trial practices. Further, it would be highly undesirable to legislate a requirement to give a direction in a manner that re-words or in any way departs from the statutory definition of consent. In such circumstances, legislating to require a direction on the meaning of consent would in effect simply confirm an existing practice.

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81 Ibid [6.66]-[6.68].

82 Email Submission E19 (ODPP).

10.39. However, we agree with the ODPP and other stakeholders that, to avoid doubt, judges should be required to direct juries, where relevant, about withdrawing consent. In Chapter 4 we recommend that as part of the definition of consent, the *Code* should provide that a person may, by words or conduct, withdraw consent to a sexual activity at any time; and that sexual activity that occurs after consent has been withdrawn occurs without consent. We recommend that the statutory direction on withdrawal of consent should use the same wording.

10.40. For the same reason, we also agree that the judge should be required to direct the jury about any relevant circumstances of non-consent that are listed in the *Code*, and to inform the jury that if it finds one of those circumstances to be proven beyond reasonable doubt, then it must find the complainant did not consent to the relevant sexual activity. They should also be required to direct the jury about any relevant mistaken beliefs which cannot negate consent.

10.41. In light of these recommendations, we consider that judges should also be required to direct juries on the meaning of consent by reference to the statutory definition of consent. This is to avoid any uncertainty regarding requirements that may arise from the absence of such a provision; it is not because the Commission has any doubt about the current trial practice.

Recommendations

94. There should be a legislated jury direction about consent which codifies the obligation of a judge to inform the jury of the *Code's* definition of consent.

95. There should be a legislated jury direction about the withdrawal of consent. The direction should inform the jury of the *Code's* approach to the withdrawal of consent.

96. There should be a legislated jury direction about the *Code's* listed circumstances in which there is no consent. The direction should:

- **Explain the relevant circumstance; and**
- **Inform the jury that if it finds the circumstance has been proven beyond reasonable doubt, it must find the complainant did not consent to the relevant sexual activity.**

97. There should be a legislated jury direction about the matters which the *Code* specifies do not negate consent. The direction should inform the jury that consent is not negated only because a person had a mistaken belief about the relevant matters.

Should there be a legislated direction about responses to sexual violence?

10.42. In the Discussion Paper we noted that one of the common misconceptions about sexual violence is that victim-survivors will resist and fight off the offender.[83] This belief does not align with research findings.[84]

10.43. It would be possible to legislate that, in relevant cases, judges must counter this misconception by giving a jury direction about the range of ways in which victim-survivors might respond to

[83] Discussion Paper Volume 1, [6.69]-[6.71].

[84] QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.85]. See also VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) 41.

sexual violence. There are provisions requiring this type of direction in the ACT,[85] NSW,[86] SA[87] and Victoria.[88]

Stakeholders' views

10.44. Around 80% of responses we received via the online survey supported a legislated direction regarding responses to sexual violence, as did a number of written submissions.

10.45. Some stakeholders suggested mandating a direction that aligns with that required in NSW. The NSW provision is to the effect that:

- There is no typical or normal response to non-consensual sexual activity.
- People may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything.
- The jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.[89]

10.46. Some stakeholders submitted that the befriend or fawn response is also a common response to sexual violence and that it should be reflected in the legislated jury direction along with the freeze or do-nothing response. A submission regarding the befriend or fawn response to sexual violence explained this issue as follows:

> A claimant's capacity to consent is limited by reasonably believing they need to participate to 'keep the peace' for fear of consequences or where they lacked internal resources/capacity to initiate a fight or flight response; this may be due to precipitating behaviour patterns or exertion of control, coercion or other means of intimidation preceding the incident of the sexual offence.[90]

The Commission's view

10.47. The Commission recommends the introduction of a legislated jury direction regarding victim-survivors' responses to sexual violence. A number of misconceptions about responses to sexual violence persist. Their correction will ensure fairer trials. The view that victim-survivors will resist and fight off an offender is common in the community but does not correspond with the experience of victim-survivors. Neither does the belief align with research findings.[91] A goal of reforms to the law of jury directions in sexual offence trials is to ensure that juries do not employ incorrect reasoning based on misconceptions about the nature of sexual violence and victim-survivors' responses to it. A direction properly identifying the range of ways that victim-survivors may respond to sexual violence will help address those misconceptions.

10.48. The Commission notes that neither the NSW nor Victorian provisions (which are very similar) refer specifically to the befriend or fawn response.

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85 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C(a)-(b).

86 *Criminal Procedure Act 1986* (NSW) s 292D.

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

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

89 *Criminal Procedure Act 1986* (NSW) s 292D.

90 Portal Submission P56 (Andrea Manno).

91 QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.85]. See also VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) 41.

10.49. It is important to distinguish between two situations. The first is the immediate response of a person to sexual violence and the second is the later response once the violence has ended. The freezing or do-nothing response is a well-known immediate response to sexual violence.

10.50. As a matter of common sense a person may, however, both behave in a co-operative or friendly manner at the time of an attack (for example, because they seek to appease the perpetrator to reduce the severity of the attack or because their will to fight has been neutralised as a result of an abusive relationship) or after an attack (for example, by not reporting the attack to the police for fear of retribution or in order to maintain a family unit). We understand the befriend or fawn response as being a reference to co-operative, appeasing or friendly behaviour in these contexts. We will refer to it as the fawn response.

10.51. The fawn response after an attack is considered later in this chapter under the heading 'directions about the relationship between the accused and complainant'.

10.52. The direction under consideration here is focused on the victim-survivor's response at the time of the attack. The NSW direction is inclusive; it does not exclude the fawn response as a 'typical or normal response to non-consensual sexual activity'. However, the examples of responses given in the second part of the NSW direction (the second dot point above) are only relevant to a case where the complainant has testified that they froze or said or did nothing during an attack.

10.53. Given that a judge's direction must be relevant to the issues in a trial, the Commission considers that a judge should be required to give examples of other responses that do not include physical or verbal rejection of the accused if they are relevant to the issues in the trial. It would make no sense to give the NSW examples if the complainant had testified that at the time of the attack they had made a fawn response.

10.54. Taking these matters into account, we recommend that the provision should require judges to give the following direction:

- There is no typical or normal response to non-consensual sexual activity.
- The jury must not draw conclusions from the evidence based on a view that there is a typical or normal response to non-consensual sexual activity.

10.55. The judge should give relevant examples of different possible responses to non-consensual sexual activity, including:

- Physically or verbally resisting the activity;
- Freezing or not saying or doing anything; or
- Saying or doing things that are co-operative or friendly.

Recommendation

98. There should be a legislated jury direction about responses to sexual violence. The direction should:

- **Inform the jury that there is no typical or normal response to non-consensual sexual activity.**
- **Provide relevant examples of typical or normal responses to non-consensual sexual activity, such as physically or verbally resisting the activity, freezing or not saying or doing anything, or saying or doing things that are co-operative or friendly.**
- **Direct the jury that they must not draw conclusions from the evidence based on a view that there is a typical or normal response to a non-consensual sexual activity.**

Should there be a legislated direction about the absence of injury, violence or threat?

10.56. In the Discussion Paper we noted other common misconceptions about sexual violence include that:

- Sexual offences usually involve the use of physical force; and
- Victim-survivors of sexual violence will show signs of physical injury.[92]

10.57. It would be possible to legislate that, in relevant cases, judges must counter these misconceptions by giving jury directions that:

- 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
- 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.

10.58. There are provisions of this kind in the NSW and Victorian Acts[93] and a similar provision was recommended by the Queensland Taskforce.[94]

Stakeholders' views

10.59. Over 86% of responses we received via the online survey supported this reform, as did a number of written submissions. For example, Communities advocated for a jury direction akin to the legislated direction in NSW, while the ODPP supported the similarly phrased direction in the NSW Bench book.

10.60. Some stakeholders did not, however, support the introduction of a proposed legislated jury direction dealing with this issue. Legal Aid, for example, opposed a legislated jury direction, stating 'this need not be legislated and is often the subject of comment and direction by trial judges'.[95]

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92 Discussion Paper Volume 1, [6.72]-[6.74].

93 *Criminal Procedure Act 1986* (NSW) s 292C; *Jury Directions Act 2015* (Vic) s 47D.

94 Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No. 2, July 2022) Rec 77.

95 Email Submission E24 (Communities).

The Commission's view

10.61. As already explained, the Commission sees benefit in legislating to require judges, in relevant cases, to give jury directions to correct common misconceptions about the nature of sexual violence. We did not receive submissions, other than that from Legal Aid, which said that such directions were routinely given by trial judges. Legislating these directions will ensure that they are given consistently and that misconceptions can be appropriately corrected.

10.62. As such, the Commission recommends a legislated direction in similar terms to section 292C of the *Criminal Procedure Act 1986* (NSW), which is to the effect that:

- 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
- 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.[96]

Recommendation

99. There should be a legislated jury direction about the absence of injury, violence or threat. The direction should inform the jury that:

- **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**
- **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.**

Should there be a legislated direction about the complainant's other sexual activity?

10.63. In the Discussion Paper we noted another misconception about sexual violence: that if a complainant had previously consented to sexual activity of the same kind or another kind, with the accused or another person, then they must have consented to the sexual activity that is the subject of the trial.[97]

10.64. It would be possible to legislate that, in relevant cases, judges must counter this misconception by directing the jury that people who do not consent to sexual activity with a particular person may have previously consented to sexual activity with that person or another person, or to sexual activity of the same kind or a different kind.[98]

Stakeholders' views

10.65. Seventy-five per cent of responses we received via the online survey supported this reform, as did a number of stakeholders who wrote submissions.

10.66. The submission from Communities stated:

> Research shows that a relationship between the perpetrator and victim-survivor, particularly if they are currently engaging in an intimate relationship or had previously

[96] *Criminal Procedure Act 1986* (NSW) s 292C.
[97] Discussion Paper Volume 1, [6.75]-[6.76].
[98] Ibid.

> engaged in consensual sexual activity, can be used as a reason to mistrust allegations of sexual violence.[99]

10.67. The submission from Legal Aid asserted that there is no need for a legislated direction on this topic.[100] While the precise reason for Legal Aid's view is not clear, the Commission notes the earlier submission from Legal Aid that there is no need to legislate for that which judges routinely do as a matter of practice.

The Commission's view

10.68. In Chapter 4 we recommend that, in the list of circumstances in which there is not consent, the *Code* should provide that a person does not consent to a sexual activity with another person only because they consented to a sexual activity of the same type, or a sexual activity of a different type, with that person or any other person at any time.

10.69. Having regard to the Commission's view expressed above concerning the utility of legislated directions in correcting misconceptions about sexual violence, the Commission recommends the enactment of a legislated direction in similar terms.

10.70. We do not recommend using the phrase 'experience shows that' (which appears numerous times in the comparable Victorian direction) as it raises the question of whose experience is being spoken about. We prefer a formulation which simply instructs the jury as to the facts.

Recommendation

100. There should be a legislated jury direction about a person's other sexual activity. The direction should inform the jury that a person does not consent to a sexual activity with another person only because they consented to a sexual activity of the same type, or a sexual activity of a different type, with that person or any other person at any time.

Should there be a legislated direction about personal appearance and irrelevant conduct?

10.71. Another misconception about sexual violence that we identified in the Discussion Paper is that consent to sexual activity may be assumed or inferred from a complainant's personal appearance (for example, the type of clothing the complainant wore) or conduct (for example, their consumption of drugs or alcohol or their attendance at a particular venue such as a nightclub).[101]

10.72. It would be possible to legislate that, in relevant cases, judges must counter this misconception by directing the jury that it should not be assumed that a person consented to sexual activity just because of their clothing, appearance, consumption of drugs or alcohol or presence at a particular location.

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[99] Email Submission E24 (Communities) (citation omitted).
[100] Portal Submission P23 (Legal Aid).
[101] Discussion Paper Volume 1, [6.77]-[6.82].

10.73. There are such provisions in Victoria[102] and NSW.[103] The Queensland Taskforce also recommended a provision of this kind.[104]

Stakeholders' views

10.74. A majority of online survey responses supported this reform, as did submissions from a range of stakeholders.

10.75. The ODPP noted:

> The 'negative indicator' of 'other sexual activity' could be dealt with as a jury direction, rather than in a general consent provision in the *Code*. Such a jury direction would be along the lines of s 47F of the *Jury Directions Act 2015* (Vic), which is simpler than the version in new s 34N(1)(a)(iv) of the SA Act.[105]

10.76. The submission from Legal Aid again did not support the introduction of a legislated direction on this topic.[106]

The Commission's views

10.77. We agree with stakeholders that there should be a legislated jury direction on this issue. We consider that such a direction could help redress the commonly held misconception that consent to sexual activity may be assumed or inferred from a complainant's personal appearance or conduct.

10.78. We note that such a direction will not prevent a jury from taking into account the complainant's clothing, appearance, consumption of drugs or alcohol, or presence at a particular location if those matters are relevant to proof of lack of consent or any other issue in the trial. The aim of the legislated jury direction is to ensure that the jury does not reason that the complainant must have consented to the sexual activity that is the subject of the trial simply due to the existence of one of those facts or a combination of them.

10.79. Section 47G of the *Jury Directions Act 2015* (Vic) (**Victorian Jury Directions Act**) states:

> It should not be assumed that a person consented to a sexual act just because the person:
>
> i. Wore particular clothing;
>
> ii. Had a particular appearance;
>
> iii. Drank alcohol or took any other drug;
>
> iv. Was present in a particular location; or
>
> v. Acted flirtatiously.[107]

10.80. The Commission recommends that a similar legislated jury direction be enacted in Western Australia. Rather than tell the jury that it must not draw an assumption based on these factors, however, it should tell the jury that it must not reason that a person consented on that basis

[102] *Jury Directions Act 2015* (Vic) s 47G.
[103] *Criminal Procedure Act 1986* (NSW) s 292E.
[104] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No. 2, July 2022) Rec 77.
[105] Email Submission E19 (ODPP).
[106] Portal Submission P23 (Legal Aid).
[107] *Jury Directions Act 2015* (Vic) s 47G.

alone. This would make clear that what is prohibited is not just an assumption but any invalid form of reasoning based on such assumptions.

10.81. In making this recommendation we are not suggesting that it is relevant for the jury to ask itself whether the complainant was consenting to the relevant sexual activity. The question for the jury is always whether the prosecution has proved, beyond reasonable doubt, that the complainant was not consenting to the relevant sexual activity. The purpose of the recommended direction is to direct the jury not to reason impermissibly.

Recommendation

101. There should be a legislated jury direction about personal appearance and irrelevant conduct. The direction should inform the jury that they must not reason that a person consented to a sexual activity only because the person:

- **Wore particular clothing;**
- **Had a particular appearance;**
- **Drank alcohol or took any other drug;**
- **Was present in a particular location; or**
- **Acted flirtatiously.**

Should there be a legislated direction about the relationship between perpetrators and victim-survivors?

10.82. In the Discussion Paper we noted that other common misconceptions about sexual violence include that:

- They are usually committed by strangers; and
- Victim-survivors will discontinue any relationship they have with the perpetrator.[108]

10.83. By contrast, research shows that most acts of sexual violence are committed by someone the victim-survivor knows, and victim-survivors often stay in a relationship with their abusers for various reasons, such as fear or financial isolation.[109]

10.84. It is possible to legislate that, in relevant cases, judges must counter misconceptions about the relationship between perpetrators and victim-survivors by directing the jury that:

- Sexual offences occur in many situations, including between people known to each other; and
- There may be good reasons why a person who is the subject of non-consensual sexual activity may continue a relationship with the perpetrator or continue to contact them.

10.85. There are legislated jury directions aimed at countering misconceptions regarding the relationship between perpetrators and victim-survivors in NSW and Victoria.[110]

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[108] Discussion Paper Volume 1, [6.83]-[6.86].

[109] 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).

[110] *Criminal Procedure Act 1986* (NSW) s 292A; *Jury Directions Act 2015* (Vic) s 47H.

10.86. The NSW provision reads:

> Consensual sexual activity can occur—
>
> (a) in many different circumstances, and
>
> (b) between different kinds of people including—
>
> (i) people who know one another, or
>
> (ii) people who are married to one another, or
>
> (iii) people who are in an established relationship with one another.[111]

10.87. The Victorian legislation has two relevant provisions, one which focuses on the general relationship between perpetrators and victim-survivors and one which focuses on post-offence relationships. The general relationship provision reads:

> Experience shows 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.[112]

10.88. The Victorian post-offence relationship jury direction reads:

> Experience shows that—
>
> (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
>
> (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—

[111] *Criminal Procedure Act 1986* (NSW) s 292A.

[112] *Jury Directions Act 2015* (Vic) s 47H.

(i) may continue a relationship with the person who subjected them to the act; or

(ii) may otherwise continue to communicate with that person.[113]

Stakeholders' views

10.89. There was general support for a direction on the relationship between perpetrators and victim-survivors in consultations and in written submissions.

10.90. Legal Aid submitted, without providing reasons, that there is no need for a legislated direction in this area.

10.91. Communities supported the Victorian approach on the relationship and post-offence relationship directions.[114] The ODPP recommended a combination of the NSW approach to the relationship direction and the Victorian approach to the post-offence relationship direction.[115]

The Commission's views

10.92. The transcript review project showed that of sexual offence charges tried before juries in the District Court in 2019 and involving adult complainants, only 19% involved a complainant and an accused who were strangers. In the same category of cases involving child complainants, only 3% involved a complainant and an accused who were strangers.

10.93. The Commission notes that in the context of family violence, the relationship between perpetrators and victim-survivors is addressed to a certain extent by the family violence jury directions in the Evidence Act. Where either family violence or self-defence in response to family violence is an issue in a criminal trial, the family violence jury directions require a judge to direct a jury 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.[116]

[113] Ibid s 54H.
[114] Email Submission E24 (Communities).
[115] Email Submission E19 (ODPP).
[116] *Evidence Act 1906* (WA) s 39F.

10.94. Having considered stakeholders' views, the family violence directions required by the Evidence Act, and similar laws in other jurisdictions, the Commission sees value in directions aimed at countering misconceptions about the relationship between perpetrators and victim-survivors.

10.95. We recommend that a provision should be enacted requiring judges to direct the jury, in relevant cases, along the following lines:

- There are many different circumstances in which people do and do not consent to a sexual activity.
- Sexual activity can occur without consent between all sorts of people, including—
    - People who know each other.
    - People who are married to each other.
    - People who are in a relationship with each other.
    - People who provide commercial sexual services and the people for whom they provide those services.
    - People of the same or different sexual orientations.
    - People of any gender identity.
- It is not uncommon for people who are subjected to sexual violence to continue a relationship with or to continue to communicate with the perpetrator.

10.96. The only aspect of the family violence jury directions likely to overlap with our recommended relationship direction is that 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. Where sexual violence occurs alongside or in the context of family violence, we consider that both directions could be given in appropriate cases.

10.97. We do not recommend using the phrase 'experience shows that' (which appears numerous times in the Victorian legislation and the Western Australian family violence provisions) as it raises the question of whose experience is being spoken about. We prefer a formulation which simply instructs the jury as to the facts.

Recommendation

102. There should be a legislated jury direction about the relationship between perpetrators and victim-survivors. The direction should inform the jury that:

- **There are many different circumstances in which people do and do not consent to a sexual activity.**
- **Sexual activity can occur without consent between all sorts of people, including—**
  - **People who know each other.**
  - **People who are married to each other.**
  - **People who are in a relationship with each other.**
  - **People who provide commercial sexual services and the people for whom they provide those services.**
  - **People of the same or different sexual orientations.**
  - **People of any gender identity.**
- **It is not uncommon for people who are subjected to sexual violence to continue a relationship with or to continue to communicate with the perpetrator.**

Should there be a legislated direction about the mistake of fact defence?

10.98. In the Discussion Paper we raised various options for reforming the mistake of fact defence[117] and suggested that if any of the potential reforms are implemented it would be possible to accompany them with a related jury direction.[118]

10.99. In Chapter 5 we make several recommendations for reforming the mistake of fact defence, including providing that:

- The jury should determine the reasonableness of a mistaken belief in consent according to the standards of a reasonable sober person, unless the accused's intoxication was involuntary.
- A mistaken belief in consent is not reasonable if the accused knew or believed in the existence of a circumstance included in the *Code's* list of circumstances in which there is no consent.
- Subject to specific exceptions, the accused's belief that the complainant consented to a sexual activity is not reasonable if the accused did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the complainant consented to that activity.

10.100. These recommendations should be borne in mind in considering the need for legislated jury directions about the mistake of fact defence.

[117] See Discussion Paper Chapter 5.

[118] Discussion Paper Volume 1, [6.87]-[6.93].

Stakeholders' views

10.101. There was general support for a direction on the operation of the mistake of fact defence amongst written submissions and in comments made in consultations with the Legal Expert Group.

10.102. Legal Aid submitted that there is no need for a legislated direction in this area.[119]

The Commission's view

10.103. Under the current law, if the judge decides there is sufficient evidence of a mistaken belief in consent for the jury to consider the defence, then the judge will direct the jury on the meaning of the mistake of fact defence in section 24 of the *Code* in the context of the facts of the case. However, directions that individual judges give explaining how to apply the defence may vary. Without legislated jury directions this may continue to be the case, even after recommended reforms are made to the defence.

10.104. We agree that if the mistake of fact defence is reformed then judges should (as they currently do) explain the defence to the jury. Rather than duplicating or re-wording any provisions inserted into the *Code* we recommend the enactment of a provision requiring judges to direct in accordance with the *Code*.

Recommendation

103. There should be a legislated jury direction about the mistake of fact defence in sexual offence trials. The direction should codify the obligation of a judge, when there is evidence which raises the mistake of fact defence, to direct the jury in accordance with the *Code's* mistake of fact provisions.

Should there be a legislated direction about inconsistent statements?

10.105. In the Discussion Paper we noted that defence counsel is permitted to cross-examine a witness as to whether they have previously given a prior inconsistent statement about a matter upon which they have testified.[120] This is a common practice in criminal trials generally, and sexual offence trials in particular, where the credibility of the complainant is an issue. One study suggested that in sexual offence trials in Victoria, Queensland and NSW, defence counsel questioned more than 90% of complainants about all forms of inconsistencies in the complainant's evidence.[121]

10.106. In Western Australia judges are currently required to direct the jury about how it can use evidence of a prior inconsistent statement.[122] 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:

- Anything said by a witness out of court is not evidence that what the witness said on the previous occasion (which is inconsistent with their testimony in court) occurred.

[119] Portal Submission P23 (Legal Aid).

[120] *Evidence Act 1906* (WA) s 21.

[121] Discussion Paper [6.114]; Royal Commission into Institutional Child Sexual Abuse, *An Evaluation of How Evidence is Elicited from Complainants of Child Sexual Abuse* (Report, 2016) 227.

[122] *Driscoll v The Queen* [1977] HCA 43; (1997) 137 CLR 517; *Job v Western Australia* [2006] WASCA 186.

- 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.[123]

10.107. The Royal Commission addressed this issue, noting that:

> The Complainants' Evidence Research cites empirical research that errors or inconsistencies in minor details do not reliably predict overall accuracy or deception. The transcript analysis identified that defence counsel routinely suggested that poor memory or inconsistency in relation to minor details indicated that the central allegation was wrong. 'Minor details' included the colour of clothing or the weather. … While there are likely to be inconsistencies in a complainant's account of abuse, the inconsistencies do not necessarily indicate that the account is inaccurate or unreliable.[124]

10.108. In the Discussion Paper we noted that it would be possible to enact a provision that, in relevant cases, requires judges to counter the misconception, identified by the Royal Commission, that poor memory or inconsistency in relation to minor details indicated that a witness' central allegation was wrong by giving a direction that it is common for there to be differences in accounts over time of a traumatic incident.[125] There are provisions of this kind in NSW[126] and Victoria.[127]

Stakeholders' views

10.109. We received mixed submissions on this issue.

10.110. Online survey responses were strongly in favour of a direction, as were some written submissions. Communities noted that research indicates the prevalence of the misconception that 'genuine victims' of sexual violence are able to, and are expected to, recount their experience completely, consistently and in detail; this is contrary to empirical evidence showing how traumatic experiences of sexual violence can negatively impact memory.[128]

10.111. In its written submission Legal Aid contended that the existing obligation for judges to give directions about prior inconsistent statements, in appropriate cases, is sufficient.[129]

10.112. Some members of the Legal Expert Group noted that the common law direction, at a base level, does not explain what the genuine reasons for any inconsistency might be (for example, trauma). We note that the common law does not prevent a trial judge from giving assistance to the jury as to why there may be inconsistencies (from both the prosecution and defence perspectives), and some trial judges do so.

The Commission's view

10.113. Notwithstanding the existing common law obligation, the Commission supports the enactment of a legislated jury direction on inconsistencies. We see benefit in legislating to require judges, in relevant cases, to give jury directions to correct common misconceptions

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123 *Job v Western Australia* [2006] WASCA 186 [143].

124 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 32.

125 Discussion Paper Volume 1, [6.114]-[6.119].

126 *Criminal Procedure Act 1986* (NSW) s 293A.

127 *Jury Directions Act 2015* (Vic) s 54D.

128 Email Submission E24 (Communities).

129 Portal Submission P23 (Legal Aid).

that may affect the jury's assessment of the evidence – particularly a misconception often capitalised upon in sexual offence trials because of its focus on the credibility of the complainant.

10.114. In the Commission's view, the direction should expand upon the common law direction, and inform the jury that:

- People may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time.
- Trauma may affect people differently, including affecting how they recall events.
- It is common for there to be differences in accounts of a sexual offence.
- Both truthful and untruthful accounts of an event may contain differences.
- A 'difference' in an account means:
    - A gap in the account.
    - An inconsistency in the account.
    - A difference between the account and another account.

10.115. It is beyond the Commission's Terms of Reference to make recommendations regarding the introduction of jury directions outside the context of sexual offences. However, the Commission notes that difficulties might arise in cases that try charges of both a sexual and non-sexual nature (for example, violence or burglary charges), as the judge would potentially be required to give different directions about how the jury could use inconsistencies in the evidence on different types of charges. Similar issues may arise in relation to inconsistencies in the evidence of witnesses other than the complainant. In the event that the Commission's recommendation is adopted, consideration would need to be given to those potential broader consequences.

Recommendation

104. There should be a legislated jury direction about inconsistent statements in sexual offence trials. The direction should:

- **Tell the jury that if it finds that a witness previously said something which was inconsistent with the evidence the witness gave in court, it can take the inconsistency into account when assessing the witness's credibility and reliability.**
- **Inform the jury that:**
  - **People may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time.**
  - **Trauma may affect people differently, including affecting how they recall events.**
  - **It is common for there to be differences in accounts of a sexual offence.**
  - **Both truthful and untruthful accounts of an event may contain differences.**
  - **A 'difference' in an account means:**
    - **A gap in the account.**
    - **An inconsistency in the account.**
    - **A difference between the account and another account.**

Should there be a legislated direction about assessing the complainant's evidence?

10.116. In the Discussion Paper we outlined research indicating that complainants who appear calm or controlled in court are perceived to be less credible than those who appear distressed. However, research has also found that emotional demeanour is not a reliable indicator of honesty. Complainants can respond to the process of giving evidence in different ways: they may appear emotional and distressed, anxious and irritable, or numb and controlled.[130]

10.117. In the Discussion Paper we noted that it would be possible to legislate a jury direction on this issue.[131] Legislation in NSW[132] and Victoria[133] requires judges to give a direction about complainants' demeanour, and the Queensland Taskforce recommended a similar provision be enacted in Queensland.[134]

10.118. The NSW provision reads:

> (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and

[130] Discussion Paper Volume 1, [6.120].
[131] Ibid [6.120]-[6.122].
[132] *Criminal Procedure Act 1986* (NSW) s 292D.
[133] *Jury Directions Act 2015* (Vic) s 54K.
[134] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No. 2, July 2022) 347.

(b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.[135]

10.119. The Victorian provision reads:

> Experience shows that—
>
> (a) because trauma affects people differently, some people may show obvious signs of emotion or distress when giving evidence about a sexual offence, while others may not; and
>
> (b) both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress.[136]

Stakeholders' views

10.120. There was general support for a direction on responses to giving evidence. Seventy per cent of responses we received via the online survey portal, as well as number of written submissions, supported this reform.

10.121. Legal Aid said that a direction is not needed.[137]

10.122. Communities noted that ANROWS research shows that:

> A key aspect of the 'genuine victim' myth is that victim-survivors must show emotions according to normative, socially constructed behaviours expected of 'genuine victims'. This research shows that 'failure to promptly report the assault to police or display emotional distress increased suspicions that the victim and survivor might be lying'.[138]

10.123. Professor McKimmie and Dr Nitschke noted that there is a clear stereotype about how a credible adult complainant of sexual assault should give evidence, with mock jurors and other decision-makers viewing emotional complainants as more credible.[139] However, they also noted that it is not clear whether educational directions about complainant emotion can help jurors to make accurate inferences about the emotions shown by sexual assault complainants.[140]

10.124. Communities recommended the NSW approach[141] and the ODPP recommended the Victorian approach.[142]

The Commission's view

10.125. The Commission recommends the introduction of a legislated jury direction about complainants' demeanour which draws on both the Victorian and NSW legislated jury directions. We favour the first part of the NSW direction for two reasons. First, we consider that, as a reflection of the presumption of innocence, any direction should refer to evidence of 'an alleged sexual offence' as in the NSW provision, rather than 'a sexual offence' as in

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135 *Criminal Procedure Act 1986* (NSW) s 292D.

136 *Jury Directions Act 2015* (Vic) s 54K.

137 Portal Submission P23 (Legal Aid).

138 Email Submission E24 (Communities) citing K Minter, E Carlisle, C Coumarelos, '"Chuck Her on a Lie Detector" – Investigating Australians' Mistrust in Women's Reports of Sexual Assault' (Research report April 2021) ANROWS 17.

139 Email Submission E7 (Dr Faye Nitschke and Prof Blake McKimmie).

140 Ibid.

141 Email Submission E24 (Communities).

142 Email Submission E19 (ODPP).

the Victorian provision. We consider the second part of the Victorian direction, without the reference to 'experience shows', to better communicate the proposition that emotion is not a good indicator of the truth of an account.

10.126. The direction will be most relevant to the assessment of a complainant's evidence. However, as the proposed direction refers to people who have experienced trauma, in order to avoid any implication arising from the direction that the complainant has suffered trauma (as opposed to allegedly having suffered trauma), we recommend that the legislated direction be phrased in general terms, as applying to any person who has suffered trauma.

10.127. We recommend enactment of a legislated direction to the effect that:

- Trauma affects people differently. This means that a person who has experienced a traumatic event may or may not show obvious signs of emotion or distress when giving evidence.
- Both truthful and untruthful accounts of an alleged sexual offence may be given with or without obvious signs of emotion or distress.

Recommendation

105. There should be a legislated jury direction about giving evidence. The direction should inform the jury that:

- **Trauma affects people differently. This means that a person who has experienced a traumatic event may or may not show obvious signs of emotion or distress when giving evidence.**
- **Both truthful and untruthful accounts of an alleged sexual offence may be given with or without obvious signs of emotion or distress.**

Should there be a legislated direction about delayed complaint and credibility?

10.128. In the Discussion Paper we noted the misconception that victim-survivors of sexual violence would report their experience immediately, and those who delay are likely to be lying.[143] 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'.[144] This misconception was also discussed in the Background Paper.[145]

10.129. Despite this fact, in *Kilby v The Queen* the High Court held that judges, 'depending of course on the particular circumstances of the case, ought as a general rule' direct juries that the absence of early complaint 'may show inconsistency on a complainant's part, and is clearly relevant to the issue of her credibility in that respect'.[146] Thus, juries are entitled to conclude that failure to complain or delay in complaining casts doubt upon the reliability of the evidence of lack of consent given by the complainant.

[143] Discussion Paper, Table 1.1.
[144] NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.21].
[145] Background Paper, section 2.6.
[146] *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460, 465, 472.

10.130. This problem was addressed to some extent by the enactment of section 36BD of 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
- Inform the jury that there may be good reasons why a victim-survivor of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence.[147]

10.131. However, this provision does not relieve a judge of the common law 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.[148] After the enactment of similar provisions to those in the Evidence Act in Victoria, the High Court reiterated the general legal requirement for a direction of the type identified in *Kilby* and only noted the following:

> Two qualifications to the duty to provide the warning suggested by *Kilby* may be accepted. The first is where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness. The second is that the warning should not be expressed in such terms as to undermine the purpose of the amending Act by suggesting a stereotyped view that complainants in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false. So long as the purpose of the legislation, to rid the law of such stereotypes, is kept in mind, and the terms in which the legislation is expressed are followed, judges striving to assist juries in their consideration of the facts are unlikely to fall into the kind of error that occurred in this case.[149]

10.132. 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'.[150]

10.133. The Western Australian government has 'accepted in principle' each of these recommendations.[151] It has not yet, however, introduced a Bill to give effect to this in-principle acceptance.

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147 *Evidence Act 1906* (WA) s 36BD.

148 *Crofts v The Queen* [1996] HCA 22; (1996) 186 CLR 427.

149 Ibid, 452.

150 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 89.

151 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.

10.134. The transcript review project showed that a delay direction[152] was given in 79% of sexual offence charges involving adult complainants tried before juries in the District Court in 2019. A delay direction was given in only 40% of charges involving child complainants in the same category. This difference may reflect that in 60% of the cases involving children there was no delay or a delay of less than six months, whereas in only 24% of the cases involving adults was there no delay or a delay of less than six months. There was a relationship between delay directions being given and guilty verdicts on charges for offences against children, but there was no such correlation in relation to adult complainants.

10.135. In the Discussion Paper we sought views on whether the current statutory directions on the use the jury may make of evidence that the complainant failed to complain or delayed in making a complaint are sufficient, or whether section 36BD of the Evidence Act should be amended.[153]

Stakeholders' views

10.136. The vast majority of online responses did not express a view for or against this proposed reform. The Commission assumes that this is in part on account of the highly technical nature of the question, which referred to a specific provision of the Evidence Act.

10.137. There was some support for reform in the submissions and consultations, with several written submissions advocating for the Victorian approach.

10.138. The Victorian Jury Directions Act allows the judge to advise the jury 'that experience shows' that:

- People may 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 complaining, about a sexual offence.[154]

10.139. The relevant NSW provision is similar to the current Western Australian provision. However, the *Criminal Procedure Act 1986* (NSW) also provides that a trial 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'.[155]

10.140. Legal Aid considered the current common law and statutory directions to be sufficient. Comments made during the Legal Expert Group consultation did not evidence a particular level of concern about the current directions on delay, with attendees generally considering the directions that are currently given on the topic to be balanced. However, there was some strong support amongst this group for ensuring that all Royal Commission recommendations are implemented – both due to the underlying policy and a desire for national consistency.

[152] Defined as being a direction under s 36BD of the *Evidence Act 1906* (WA).
[153] Discussion Paper Volume 1, [6.94]-[6.102].
[154] *Jury Directions Act 2015* (Vic) s 52.
[155] *Criminal Procedure Act 1986* (NSW) s 294(2)(C).

The Commission's view

10.141. The Commission agrees with the following points (which are drawn from written submissions we received) as to why the Royal Commission's recommendations on this issue should be implemented:

- To reflect the complexity of reasons for delay, and to overcome the application by jurors of 'common sense' principles in assessing the evidence in matters about which they have limited knowledge and/or where myths abound.[156]
- While there is now well documented research, including from the Royal Commission, which substantially deals with matters where delay was a common feature, such delay is still a basis for scepticism about both the truth and the motivation of victim-survivors in late reporting of potential offences.[157]
- Research from ANROWS shows that individual, societal or structural factors – such as immigration policies, gender norms, concerns about not being believed, victimisation and pressures on women to present an image of a happy family – are persistent barriers to disclosing and reporting sexual violence.[158]
- Delay in reporting offences is explicable because victim-survivors may not know that the conduct complained of may constitute an offence, as they may also be trapped by 'myths'.[159]
- Understanding the social and economic consequences of reporting sexual violence can inform critical understandings of how and when women choose to disclose and report, and of their interactions with the justice system throughout particular times in their lives.[160]

10.142. The Royal Commission's recommendation that there be no requirement for a direction or warning that delay affects the complainant's credibility, if implemented, would not affect an accused's ability to seek such a direction or the judge's discretion to give such a direction. It would simply remove the rule of practice that such a direction must be given unless there are good reasons not to do so. We believe that this is appropriate given what is now known about the frequency of, and reasons for, delay in making complaints in sexual violence cases.

10.143. The Royal Commission's recommendation that there be a statutory prohibition on a judge directing, warning or suggesting to a 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) implements rules of practice that are targeted to achieve fairness in every case. They ensure that such directions are not given merely because there is delay and are only given if requested by the accused and the trial judge determines the evidence warrants the requested direction.

10.144. The Royal Commission's recommendation that there be a statutory prohibition on a judge giving any direction, warning or comment about delay in making a complaint or the absence of a complaint – using expressions such as 'dangerous or unsafe to convict' or 'scrutinise

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156 Email Submission E11 (Confidential).

157 Ibid.

158 Email Submission E24 (Communities); S Wendt, D Chung, A Elder, A Hendrick, A Hartwig, *Seeking Help for Domestic and Family Violence: Exploring Regional, Rural, and Remote Women's Coping Experiences: Final Report* (ANROWS Horizons June 2017).

159 Email Submission E11 (Confidential).

160 Email Submission E24 (Communities); S Wendt, D Chung, A Elder, A Hendrick, A Hartwig, *Seeking Help for Domestic and Family Violence: Exploring Regional, Rural, and Remote Women's Coping Experiences: Final Report* (ANROWS Horizons June 2017).

with great care' – generally reflects the fact that at common law delay has only ever been relevant to a complainant's credibility. There are many matters that a jury will consider in assessing credibility. We are aware of no reason that justifies delay being singled out for the use of such strong language by a judge.

10.145. We recommend:

- Legislated jury directions to give effect to the Royal Commission's recommendations; and
- Legislated jury directions in similar terms to those in section 52(4)(a)-(d) of the Victorian Juries Act provisions that:
    - 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.
    - There may be good reasons why a person may not complain, or may delay complaining, about a sexual offence.

10.146. We do not recommend using the phrase 'experience shows that' as it raises the question of whose experience is being spoken about. We prefer a formulation which simply instructs the jury as to the facts.

10.147. In recommending these reforms the Commission does not intend that counsel be prohibited from commenting on the timing of a particular complaint of a sexual offence. For example, if the accused's case is that the complainant made a false complaint for ulterior purposes, it is fair that the accused be able to cross-examine the complainant about the timing of the complaint. The trial judge's directions to the jury should not undermine the defence. The prohibition should be on the judge and counsel saying that it is to be expected that all truthful complainants would promptly make a complaint, rather than forbidding counsel or the judge from referring to the specific circumstances in which the complainant in the particular case did or did not complain.

10.148. The Commission notes that such an intention is encapsulated in note 3 to section 51 of the Victorian Jury Directions Act, which states that:

> The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) may say or suggest that the particular complainant's delay in making a complaint or lack of a complaint does, or may, affect the complainant's credibility.

Recommendations

106. The Government should give effect to the Royal Commission's recommendations on delayed complaint and credibility in sexual offence trials, which state that:

- **There should be 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.**
- **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'.**

107. There should be a legislated jury direction in sexual offence trials about the reporting of complaints. The direction should provide that:

- **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.**
- **There may be good reasons why a person may not complain, or may delay complaining, about a sexual offence.**

Should there be a legislated direction about delayed complaint and forensic disadvantage?

10.149. In Western Australia, the common law requires that where there is evidence to suggest that the accused has suffered a forensic disadvantage as a result of a delay in making a complaint, 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 the jury 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**).[161]

[161] *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79; *Eravelly v Western Australia* [2018] WASCA 139; *DWM v 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. A Longman warning is sometimes referred to as a **Longman direction**.

10.150. This is a warning originating in a sexual offence trial in which there was a 20-year delay in the complaint being made. It was 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'.[162] However, due to the delay this was no longer possible, disadvantaging the accused.

10.151. In *YNT v Western Australia*[163] the Court of Appeal said:

> The 'Longman direction'…was expressed by the plurality in *Longman* as follows:
>
> > The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence **alone** unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.
>
> The warning contemplated by the High Court in *Longman* is a warning that it would be dangerous to convict on the complainant's evidence **alone** without the closest scrutiny of the complainant's evidence. However, as has been recognised by a number of decisions of this court, no particular form of words is required in every case, and the sufficiency of a Longman direction does not depend on the use of the word 'dangerous'. Rather, as this court recognised in *MAS*:
>
> > [t]he question is whether the direction given, read as a whole, conveyed, with appropriate emphasis, the forensic disadvantage suffered by the appellant, and the risk of a miscarriage of justice arising from that prejudice, particularly if the uncorroborated testimony of the complainant provided the only basis for conviction, notwithstanding that the trial judge failed to use the expression 'dangerous to convict'.[164]

10.152. In the above quote we have emphasised the word 'alone' to draw attention to the proposition that the Longman warning is only applicable where there is no evidence to support or corroborate the complainant's account of the sexual offence. However, it is difficult in some cases to determine what constitutes corroborating evidence, and even when this is clear it is not possible to know whether a jury will accept or reject the corroborating evidence. This is why a Longman warning is often given even in cases where it is unlikely that the jury will act on the evidence of a complainant alone.

10.153. The warning must be given 'as a direction which the jury is bound to follow – rather than a mere comment'.[165] Although there are no set words required, and there is no requirement to use the words 'dangerous to convict',[166] 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

[162] Ibid [30].
[163] [2021] WASCA 89.
[164] Ibid [121]-[122].
[165] *CAND v Western Australia* [2018] WASCA 101, [23].
[166] *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79, [16]; *MB v Western Australia* [2016] WASCA 160, [47]; *Kemp v Western Australia* [2006] WASCA 6, [9].

> an appreciation of the forensic disadvantages suffered by an accused where the trial occurs many years after the alleged offences.[167]

10.154. 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.[168] The disadvantages might include the loss of the chance to identify the occasion of the allegations with any specificity, the loss of the chance to identify or locate 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.

10.155. The Longman warning has attracted significant criticism over recent years, including that:[169]

- The combined effect of *Longman* and subsequent High Court cases[170] 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'.[171] 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',[172] 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.[173]
- A practice has developed of giving the Longman warning to 'appeal-proof' judges' directions, even if it is unnecessary in the particular case.[174]
- The warning is given even where there is corroboration of the complainant's evidence.[175]

10.156. The Longman warning has also been criticised by the Western Australian Court of Appeal. For example, in *MB v 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;[176] and in *Anderson v 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

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167 *MB v Western Australia* [2016] WASCA 160, [47].

168 Ibid [50]; *JJR v Western Australia* [2018] WASCA 51, [40].

169 ALRC and NSWLRC, *Family Violence – A National Response* (Final Report, October 2010) [28.37].

170 *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285; *Doggett v The Queen* [2001] HCA 46; (2001) 208 CLR 343; *Robinson v The Queen* [1999] HCA 42; (1999) 197 CLR 162; *Crampton v The Queen* [2000] HCA 60; (2000) 206 CLR 161.

171 *R v BWT* (2002) 54 NSWLR 241, [14]–[15].

172 Ibid [34].

173 Ibid [95]. See, eg, *R v Heuston* (2003) 140 A Crim R 422.

174 Attorney General's Department of NSW Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005) 89–90. See also NSWLRC, *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].

175 A Cossins, 'Time out for Longman: Myth, Science and the Common Law' (2010) 34 *Melbourne University Law Review* 3.

176 *MB v Western Australia* [2016] WASCA 160, [29].

> 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.[177]

10.157. 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 law in Western Australia.[178] 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'.[179]

10.158. The Western Australian government has 'accepted in principle' each of these recommendations,[180] but has not yet introduced a Bill to give effect to this in-principle acceptance. By contrast, various other jurisdictions have legislated to address this issue.[181]

10.159. The District Court transcript analysis showed that there is no significant correlation between Longman warnings and trial outcomes on charges for offences against adults tried before juries in the District Court in 2019. There were significantly more guilty verdicts paired with Longman warnings, and more not guilty verdicts paired with no Longman warnings, in the same category of cases involving child complainants.

10.160. In the Discussion Paper we sought views on whether there should continue to be a requirement for a Longman warning to be given in sexual offence trials and, if so, whether the terms in which the warning is given should be changed in any way.[182]

Stakeholders' views

10.161. There was roughly equal support for maintaining and abolishing the Longman warning via the online survey portal. There was the same number of 'don't know' responses.

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[177] *Anderson v Western Australia* (2014) 46 WAR 363 [41].

[178] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts VII to X and Appendices, 2017) 192.

[179] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 89.

[180] 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.

[181] See, eg, *Evidence Act 1995* (NSW) s 165B; *Jury Directions Act 2015* (Vic) ss 3, 38-40; *Evidence Act 1977* (Qld) s 132BA.

[182] Discussion Paper Volume 1, [6.103]-[6.113].

10.162. Written submissions and in-person consultations generally supported the abolition or reform of the direction. For example, the ODPP submitted:

> We support the abolition of the Longman warning for the reasons canvassed in the Discussion Paper Vol. 1 at [6.107]-[6.109], and consider it the most urgent reform that the government has agreed to, but not yet implemented. The former Director of Public Prosecutions, Amanda Forrester SC, advised the Attorney General some years ago that a provision similar to that used in South Australia could be used (with some suggested modifications) to abolish the warning and retain a direction on significant forensic disadvantage. The reform should be immediately prioritised.[183]

10.163. However, Legal Aid submitted that the direction should continue to be a requirement and should not be changed in any way. There was also some support for its retention in the Geraldton consultation.

10.164. Comments made during the consultations with the Legal Expert Group and with lawyers from ALS distinguished between the parts of the direction which focus on forensic disadvantage (which were seen as being valid) and those which may be seen as inherently criticising a complainant for not complaining immediately (which it was acknowledged are invalid given the availability of research suggesting that delay is common or in fact normal).

10.165. Another issue that arose in consultations with ALS lawyers is that a delay in complaint may cause particular challenges for some Aboriginal and Torres Strait Islander accused due to structural, socio-economic disadvantage. For example, the prosecution may allege that an offence occurred whilst the accused lived in a particular house or suburb or whilst the complainant attended a particular school on a particular date. However, if an Aboriginal or Torres Strait Islander person is not able to produce documents such as home ownership or rental records, email records, mobile phone statements, bank account records and photographs, due to the abovementioned disadvantage, it may be harder to refute aspects of the prosecution case or assist in establishing an alibi.

The Commission's view

10.166. We note that no jurisdiction has legislated to completely abolish all aspects of the Longman warning. Rather, some jurisdictions have recognised a distinction between a delay causing a forensic disadvantage, on the one hand, and the complainant's evidence being unreliable because of any delay, on the other. Judges are still permitted or required to direct the jury as to the use they may make of any forensic disadvantage which has occurred. For example, legislation in NSW[184] (which is substantially the same as legislation on this point in the NT[185] and Tasmania[186]) states:

> (1) This section applies in a criminal proceeding in which there is a jury.
>
> (2) If the court is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.
>
> (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

[183] Email Submission E19 (ODPP).
[184] *Evidence Act 1995* (NSW) s 165B.
[185] *Evidence (National Uniform Legislation) Act 2016* s 165B.
[186] *Evidence Act 2001* (Tas) s 165B.

(4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge 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.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.

(6) For the purposes of this section:

(a) delay includes delay between the alleged offence and its being reported; and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

(7) The factors that may be regarded as establishing a significant forensic disadvantage include, but are not limited to, the following:

(a) the fact that any potential witnesses have died or are not able to be located;

(b) the fact that any potential evidence has been lost or is otherwise unavailable.

10.167. Queensland legislation likewise requires the judge to direct the jury as to the nature of any forensic disadvantage which has occurred, and the need to take it into account when considering the evidence, but it specifically states that the judge must not warn or suggest that it would be dangerous or unsafe to convict the accused, or that the complainant's evidence should be scrutinised with great care.[187]

10.168. We recommend that the Government introduce legislation that mirrors what is in place in NSW, the NT and Tasmania. We consider that the form of the direction which is provided for in those jurisdictions provides an appropriate balance between recognising that delays in prosecution may cause hardship and unfairness to an accused person, and not criticising the complainant for behaving in a way which is now recognised by research as common or, in fact, normal.

10.169. Included in this recommendation is that judges should be prohibited from commenting that, because of the delay in complaint, the complainant's evidence should be scrutinised with great care, or that it would be dangerous to convict without careful scrutiny of the complainant's evidence, or that there is the possibility of a miscarriage of justice if the complainant's evidence is not scrutinised with care.

10.170. The view that the Longman warning involves a warning to the jury that failing to take the direction into account may result in a miscarriage of justice has conceivably arisen from the comment in the joint judgment in *Longman v The Queen* that 'to leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice'.[188] The connection between the Longman warning and the avoidance of a possible miscarriage of justice was repeated in *YNT v Western Australia*, where the Court said that the Longman warning under

[187] *Evidence Act 1977* (Qld) s 131C.

[188] *Longman v The Queen* [1989] HCA 60 [30] per Brennan, Dawson and Toohey JJ; (1989) 168 CLR 7.

appeal ‘conveyed both the forensic disadvantage suffered by the appellant and the risk of a miscarriage of justice arising from that disadvantage’.[189] In fact, the risk of a miscarriage of justice is not part of a Longman warning, as that warning was articulated by the High Court in *Longman* itself. We consider that because of the risk of trial judges misunderstanding that it is part of the warning, the legislature should prevent reference to it in this context.

[189] *YNT v Western Australia* [2021] WASCA 89 [126].

Recommendation

108. There should be a legislative provision addressing forensic disadvantage which mirrors section 165B of the *Evidence Act 1995* (NSW), which states:

(1) This section applies in a criminal proceeding in which there is a jury.

(2) If the court is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge 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.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.

(6) For the purposes of this section:

(a) delay includes delay between the alleged offence and its being reported; and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

(7) The factors that may be regarded as establishing a significant forensic disadvantage include, but are not limited to, the following:

(a) the fact that any potential witnesses have died or are not able to be located;

(b) the fact that any potential evidence has been lost or is otherwise unavailable.

Should there be a legislated direction about unreliable witnesses?

10.171. The common law required that judges 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.[190]
- That it is dangerous to convict on the uncorroborated evidence of a child. This was due to the view that children may be being under the influence of others, are apt to allow their 'imaginations to run away with them' and are apt to having imperfect powers of comprehension.[191]

10.172. The Royal Commission recommended that the law should be reformed in this regard. It 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; or
- That the uncorroborated evidence of a complainant or a child should be 'scrutinised with great care'.

10.173. The Royal Commission 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.[192]

10.174. The Western Australian government has 'accepted in principle' each of the Royal Commission's recommendations.[193] 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 in Western Australia to the extent that judges are not required to give a corroboration warning unless they are 'satisfied that it is justified in the circumstances'.[194] A corroboration warning is defined as 'a warning to the effect that it is unsafe to convict person who is being tried on the uncorroborated evidence of one person'.[195]

10.175. Judges 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 are classified by the law as unreliable witnesses'.[196]

10.176. However, Western Australian legislation is currently silent about whether judges may tell juries that the uncorroborated evidence of a complainant or a child should be 'scrutinised with great care'. 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.[197] Judges are also not currently prohibited from commenting on the reliability of a child's evidence based solely on the child's age.

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190 See, eg, *Riggall v Western Australia* [2008] WASCA 69, [26].

191 *B v The Queen* [1992] HCA 68; (1992) 175 CLR 599, 616.

192 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 90.

193 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.

194 *Evidence Act 1906* (WA) s 50.

195 Ibid s 50.

196 Ibid s 106D.

197 Ibid s 100A.

10.177. In some other Australian jurisdictions, judges are prohibited from warning or suggesting to the jury that complainants in sexual offence cases 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.[198] In Victoria, the judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) are also prohibited 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.
- 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.[199]

10.178. In the Discussion Paper we sought views on whether the law should prohibit judges from warning the jury that certain complainants are, as a class, less credible or require more careful scrutiny than other complainants.[200]

Stakeholders' views

10.179. There was general support for directions on unreliable witnesses. Communities noted that:

> ANROWS research regarding mock juror trials shows that doubt about and suspicion towards the allegation of sexual violence and the women making the claim, is the default starting position for police, lawyers, jurors and other court officers and the wider community. This research shows that court interrogations regarding sexual offences against women typically rely on misconceptions, myths, gendered stereotypes and victim-blaming as ways to undermine the perceived credibility of women's accounts of sexual assault.[201]

10.180. Some written submissions supported the Victorian approach. There was also some interest in this approach from members of the Legal Expert Group – although they noted that Victoria has legalised sex work, which may make a difference to how this is approached.

10.181. Legal Aid asserted that there is no need for such directions, as there is no evidence it is common practice for judges to direct that certain complainants are, as a class, less credible or require more careful scrutiny than other complainants.

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198 See, eg, *Criminal Procedure Act 1986* (NSW) s 294AA; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80; *Jury Directions Act 2015* (Vic) s 33.

199 *Jury Directions Act 2015* (Vic) s 51(c)-(f).

200 Discussion Paper Volume 1, [6.124]-[6.128].

201 Email Submission E24 (Communities).

The Commission's view

10.182. Although it does not seem that Western Australian judges routinely direct juries that certain complainants are, as a class, less credible or require more careful scrutiny than other complainants, we consider that such a direction would be both unwarranted and undesirable, such that legislating to ensure that no such direction is given is appropriate.

10.183. We recommend legislation mirroring the Victorian provisions on this issue. As noted above, these provisions prevent such comments from being made about complainants who delay in making a complaint, or who do not make a complaint; complainants who provide commercial sexual services; or complainants who have a particular sexual orientation or gender identity.

10.184. We consider that our terms of reference only permit us to recommend the introduction of such a provision in relation to sexual offence cases, but note that Government may wish to consider the broader application of such a provision.

Recommendation

109. There should be a legislative provision addressing unreliable witnesses in sexual offence trials which mirrors section 51(1) of the *Jury Directions Act 2015* (Vic), which provides that the trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury 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.**
- **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.**

Should there be legislated directions about other misconceptions?

10.185. In the Discussion Paper[202] we asked whether, rather than specifying different directions that may be given, legislation should require judges to give any direction they consider 'necessary or desirable to address any relevant misconception relating to sexual cases'.[203]

10.186. Judges in New Zealand are required to give such a direction about any misconceptions the judge considers relevant, including but not limited to misconceptions:

[202] Discussion Paper Volume 1, [6.123].
[203] *Evidence Act 2006* (NZ) s 126A.

- About the prevalence or features of false complaints in sexual cases.
- That a victim or an offender in a sexual case has, or does not have, particular stereotypical characteristics.
- 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.
- That sexual offending always involves force or the infliction of physical injuries.
- 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—
    - Dressing provocatively, acting flirtatiously, or drinking alcohol or taking drugs.
    - Being in a relationship with a defendant, including a sexual relationship.
    - Maintaining contact with a defendant, or showing a lack of visible distress, after the alleged offending.[204]

Stakeholders' views

10.187. Stakeholders generally supported the enactment of a direction on misconceptions, although it was not supported by Legal Aid. Eighty-five per cent of the respondents to the online survey portal supported the enactment of such a direction.

10.188. For example, knowmore submitted that such a provision should supplement (rather than replace) the specific directions discussed above, because it would:

- Support judges to address misconceptions about sexual violence that may be relevant in a particular trial but may not neatly align with the specific directions discussed above.
- Allow judges to respond flexibly to developments in our knowledge.[205]

10.189. Professor McKimmie and Dr Nitschke stated that it is not clear that generalised directions about misconceptions about sexual violence would help jurors. They said that there are several studies suggesting that educational directions which warn jurors against using misconceptions about sexual violence can assist mock jurors to decide cases of adult and child sexual assault; however, these studies provide education about specific misconceptions about the particular case.[206]

10.190. Communities supported the New Zealand approach and said that directions in relation to misconceptions regarding the sex work industry may also be warranted, for example, to address a misconception that people working in the sex industry cannot be harmed or assaulted while working given the nature of their work.[207]

The Commission's view

10.191. In this Chapter we have recommended the enactment of several legislated directions requiring judges, in appropriate cases, to address specific misconceptions about sexual violence. One of our guiding principles for this review is that sexual offence laws should be guided and informed by evidence, current research and data. We are also of the view that

[204] Ibid.
[205] Email Submission E8 (knowmore).
[206] Email Submission E7 (Dr Faye Nitschke and Prof Blake McKimmie).
[207] Email Submission E24 (Communities).

the law should be clear and judges and parties to sexual offences trials should know which specific jury directions about sexual violence will or may be given.

10.192. The specific directions we recommend are based on research we have accessed or been referred to about the existence of particular misconceptions. Those directions are clear and will enable judges and parties to sexual offences trials to know what specific jury directions about sexual violence will or may be given. At this time there is no justification for a provision giving judges statutory power to supplement legislated jury directions about misconceptions relating to sexual cases. A judges' common law power to make comments about the evidence is sufficient.

10.193. If in the future other misconceptions arise in the community, Parliament may consider amending the provisions to require judges to direct juries to correct those specific misconceptions.

In what circumstances should directions be given?

10.194. In relation to each of the jury directions that we have recommended legislating, it is necessary to determine:

- Whether the direction should be mandatory or discretionary; and
- If the direction is discretionary, in what circumstances it should or should not be given.

10.195. The Commission examined the way that comparable jurisdictions which have chosen to legislate jury directions have drafted their provisions about the circumstances in which directions must or may be given. Table 10.1 summarises the approaches of other jurisdictions.

Jurisdiction	Provision
ACT	'In a relevant case' certain directions (eg, about consent) are mandatory.[208]
NSW	The judge must give certain directions (eg, about consent) if: • there is a good reason to give the direction**;** or • if requested to do so by a party, unless there is a good reason not to give the direction.[209]
New Zealand	The judge must give any direction they consider 'necessary or desirable to address any relevant misconception relating to sexual cases'. The provision sets out a non-exhaustive list of topics about which there may be misconceptions.[210]
SA	The judge must give certain directions (eg, about consent) as may be applicable in the circumstances of the particular case.[211]
Victoria	Practitioners must request the directions they want the judge to give.[212] A judge must give a direction that has been requested unless there are good reasons for not doing so.[213] This requires consideration of the evidence in the trial and the manner in which the parties have conducted their cases, including whether the direction concerns a matter not raised or relied upon by the accused, or whether the direction would involve the jury considering issues in a manner that is different from the way in which the accused has presented their case.[214] A judge must not give a direction that has not been requested[215] unless the judge considers there are substantial and compelling reasons for doing so.[216]

Table 10.1: In what circumstances directions may or must be given

10.196. We also considered sections 39C−39D of the Evidence Act which specify when certain directions regarding family violence must be given. Section 39D reads:

> **39D. Request for direction on family violence — general provision**
>
> (1) In criminal proceedings in which family violence is an issue, prosecution or defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with all or specified parts of section 39F.
>
> (2) The trial judge must give the jury a requested direction on family violence, including all or specified parts of section 39F if so requested, unless there are good reasons for not doing so.

[208] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 80B – 80D.
[209] *Criminal Procedure Act 1986* (NSW) s 292(2).
[210] *Evidence Act 2006* (NZ) s 126A.
[211] *Evidence Act 1929* (SA) s 34N(2).
[212] *Jury Directions Act 2013* (Vic) s 12.
[213] Ibid s 14(1).
[214] Ibid s 14(2).
[215] Ibid s 15.
[216] Ibid s 16.

> (3) If a direction on family violence is not requested, the trial judge may give the direction if the trial judge considers that it is in the interests of justice to do so. …

Stakeholders' views

10.197. We received a variety of submissions on these issues. By way of example, Communities and knowmore both supported the legislated directions being mandatory.[217] The ODPP expressed support for directions being given wherever requested, but with the judge retaining a discretion not to give a direction where there are good reasons for that, stating:

> If prosecution or defence counsel request a direction, the trial judge should be required to give it, unless there are good reasons for not doing so. Our experience with the family violence directions is that invariably a requested direction is given. We have no concerns with a provision that in a rare case where there are good reasons not to give a requested direction, the judge can exercise their discretion. … It is expected the appropriate directions would be requested and decided between counsel and the trial judge, and the judge may make any direction on their own initiative.[218]

10.198. Members of the Legal Expert Group were generally supportive of directions being mandatory, although some members expressed concern that judges should not be legislatively required to give irrelevant directions, and generally agreed that judges should be able to tailor directions to the circumstances of the case.

10.199. Various members of the Legal Expert Group also contended that judges should not have to use particular words when giving directions. Concern was expressed that judges should not be obliged to express directions in a 'generic' way and that judges ought to retain ultimate discretion as to the wording of directions. There did not seem to be much support for limiting the giving of directions to cases in which they had been requested by counsel.

10.200. However, there was some support for the adoption of a model like that used in Victoria, which places a significant amount of responsibility on counsel to request the directions they want (but in which the judge still retains some discretion to ensure that necessary directions are given). For example, attendees at the consultation with ALS supported placing an obligation on counsel to identify the directions they want, stating that this is an important part of counsel's role.[219]

10.201. The submissions we received about the family violence provisions suggested that there is some consensus that the provisions generally work well. We did not receive any submissions or comments in consultations expressing concern about the balance that these provisions find between the responsibilities of the judge and counsel.

The Commission's view

10.202. The Commission supports a model which does not radically change the current balance of responsibility between the judge and counsel as to when directions ought to be given. That is, the Commission considers that the judge ought to take into account counsels' views as to appropriate directions. However, the judge should still retain overall responsibility to give the directions that are necessary to ensure a fair trial, including a discretion not to give a direction

[217] Email Submission E24 (Communities); Email Submission E8 (knowmore).
[218] Email Submission E19 (ODPP).
[219] Consultation with Aboriginal Legal Service of WA, 28 March 2023.

where there are good reasons for not doing so. It was not suggested in submissions or consultations that there are significant problems with the current operation of this method in Western Australia, and the Commission considers that it is an appropriate model to underpin a more legislated approach to jury directions.

10.203. Consequently, the Commission supports a model similar to that in place in NSW for sexual offence trials. Judges should be required to give legislated directions:

- If there is a good reason to do so; or
- If requested to do so by a party, unless there is a good reason not to give the direction.

10.204. Other statutory provisions which use the phrase 'good reason' have been interpreted as conferring a judicial discretion.[220] 'Good reason' has been interpreted as incorporating concepts of relevance (to the specific facts of the trial and the manner in which counsel have chosen to run their respective cases, including any defences), fairness and the interests of justice. The Commission considers that meaning to be appropriate in this context.

10.205. Generally, it is appropriate for judges to give directions to the jury using the language used in legislation. Further, judges must ensure that they do not give a direction to the jury contrary to a legislative prohibition on a direction of that type. However, we do not think that it is appropriate to require judges to use a prescribed form of words when directing a jury. The circumstances of the case may require variations in terminology and approach.

Recommendations

110. Judges should be required to give the legislated jury directions:

- **If there is a good reason to do so; or**
- **If requested by a party, unless there is a good reason not to give the direction.**

111. Judges should not be required to use a prescribed form of words when giving a legislated jury direction.

When during a sexual offence trial should directions be given?

10.206. As noted above, judges in Western Australia give the bulk of their directions immediately before the jury retires to consider its verdict. In the Discussion Paper we noted that one possibility for reform would be to require judges to give certain directions earlier in the trial.[221]

10.207. 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

[220] *R v Flood* [1999] NSWCCA 198 [17]-[18]; *Boyer (A pseudonym) v R* [2015] VSCA 242; *Brendan Davies v R* [2019] VSCA 66.

[221] Discussion Paper Volume 1, [6.129]-[6.140].

> evidence as it emerges, evaluating it and attempting to fit it into an evolving story which makes sense to them.[222]

10.208. Research also suggests that:

- Jurors' attitudes are strongly influenced by the opening addresses in the case.[223]
- 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.[224]
- Repetition of jury directions helps jury comprehension.[225]

10.209. 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.[226]

10.210. In the Discussion Paper we noted that legislation is not required to permit Western Australian judges to give relevant directions earlier in the trial.[227] 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. Legislation would, however, be required if judges were to be mandated to give directions on a particular topic at a specific time during the trial.

10.211. The Evidence Act requires the judge to give directions about family violence as soon as practicable after the request for such a direction is made, including in advance of any evidence being adduced in the trial.[228]

10.212. Victoria and NSW have legislation that permits directions about consent and misconceptions about sexual offences to be given at special times during the trial. In NSW directions about consent may be given at any time during the trial and on more than one occasion.[229] In Victoria directions regarding misconceptions about sexual offences can be given at different times, depending on the specific direction. For example:

- Directions about the absence of injury, violence or threats, responses to non-consensual sexual activity, and personal appearance and irrelevant conduct must be given at the

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[222] 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.

[223] Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [6.49]-[6.50].

[224] 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 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [8.81].

[225] Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, 2015) 9.

[226] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Executive Summary and Parts I to II, 2017) 93.

[227] Discussion Paper Volume 1, [6.133].

[228] *Evidence Act 1906* (WA) s 39E(4).

[229] *Criminal Procedure Act 1986* (NSW) s 292(4).

earliest time in the trial the judge considers appropriate, including before any evidence is adduced, and may also be given in the judge's summing up.[230]

- Directions about any lack of complaint or delayed complaint:
    - Must be given before any evidence about delay in or lack of complaint is adduced (if, based on submissions it appears likely there will be evidence that suggests the complainant delayed in complaining or did not complain).
    - Must be given as soon as practicable if at any other time it appears that there is evidence to suggest the complainant delayed in complaining or did not complain.[231]
- Directions about inconsistent statements:
    - Can be given on request from the prosecution or the trial judge's own initiative and can be repeated at any time during the trial.[232]

10.213. In the Discussion Paper we sought views on whether legislation addressing the timing of directions is desirable, or whether the current system (with the judge determining when to give a direction on a matter of evidence having regard to the circumstances of the case) is working satisfactorily.[233]

Stakeholders' views

10.214. Online survey responses varied on the question of whether judges should be required to give any directions at a specific time during the trial, with most responses being equivocal on the point. Other stakeholders also held a variety of views as to what the appropriate timing of directions should be, and to what degree that should be left to the discretion of the judge.

10.215. Written submissions from a range of stakeholders, as well as participants in the Legal Expert Group, supported a requirement for judges to give relevant directions as soon as possible during the course of a sexual offence trial.

10.216. For example, knowmore submitted that:

> Ensuring that educative jury directions are delivered before relevant evidence is given increases the likelihood of the directions effectively challenging the misconceptions about sexual abuse that can adversely affect jury decision-making. … If jury directions are not delivered until later, it is likely that any misconceptions jurors have will have already influenced their reaction and processing of the evidence, undermining the intent of the directions.[234]

10.217. Within those submissions, however, there was still variance as to whether the legislation should fix a time for the giving of the relevant direction, or whether it should remain a matter for the judge's sole discretion.

10.218. The ODPP submitted that:

- Directions are more effective when they are given contemporaneously with the evidence to which they relate.

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230 *Jury Directions Act 2015* (Vic) s 47C.
231 Ibid s 52.
232 Ibid s 54D.
233 Discussion Paper Volume 1, [6.129]-[6.140].
234 Email Submission E25 (knowmore).

- Some directions are better given before the evidence is adduced, but it will not always be known when some types of evidence are going to emerge.
- Some directions might be better suited to be given in the judge's final charge to the jury.
- Consequently, counsel (prosecution and defence) should have discretion as to when they request the direction be made.
- The direction should be required as soon as practicable after the request is made.[235]

10.219. Communities and knowmore supported the NSW approach of allowing a direction to be given at any time during the trial and to be repeated.[236]

10.220. WLSWA and CWSW recommended adopting the Victorian approach, which would empower a judge to give a mid-trial direction, temporally adjacent to the evidence in question, but would require it to be given as soon as is practicable.[237]

10.221. Other stakeholders were of the view that it was unnecessary to legislate this issue, and that attempts to do so would mean that the discretion of judges to decide when it is appropriate to give a direction would be unduly fettered. Legal Aid, for example, was not in favour of legislating the timing of directions.[238]

The Commission's view

10.222. As we have already noted, it is unnecessary to legislatively empower Western Australian judges to give directions at any point during the trial. They already have that power and exercise it regularly. The effect of legislating in relation to this issue would be to impose some limitation on the existing broad discretion of judges to determine the appropriate point at which to give a direction.

10.223. Given the adequacy of the existing law and practice, we do not recommend that a legislative requirement be placed on judges to give jury directions in sexual offence trials at any particular time.

10.224. The existing law allows judges to consider the appropriate timing of directions having regard to all the circumstances of the case, including any views expressed by counsel on the matter. Statutorily requiring directions to be given at a specific time would impair that discretion and potentially risk unintended negative consequences by compelling a judge to give a direction in advance of particular anticipated evidence. An advance direction could only be justified based on submissions from counsel as to what a witness is likely to testify, given the content of that witness' written statement. However, it is common for witnesses to diverge from the contents of their written statements when testifying. The Commission considers that this risk outweighs any potential benefit of requiring directions generally to be given at a particular time.

10.225. We note, however, that the Evidence Act requires directions about family violence to be given 'as soon as practicable' after they are requested, including in advance of any evidence being adduced. Although the Commission is not in favour of this approach in sexual offence trials, we acknowledge that there may be some benefit to taking a consistent approach to matters which involve family violence and those which involve sexual violence.

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[235] Email Submission E19 (ODPP).
[236] Portal Submission P49 (Communities); Email Submission E25 (knowmore).
[237] Portal Submission P36 (WLSWA); Portal Submission P57 (CWSW).
[238] Portal Submission P41 (Legal Aid).

Should the jury be educated about sexual violence in other ways?

Should jurors be provided with education specific to sexual offending?

10.226. A possible alternative, or adjunct, to dispelling misconceptions through jury directions is to seek to achieve the same end via the education of jurors.

10.227. For example, the Law Commission of New Zealand noted the possibility of seeking to educate jurors:

> After they have been empanelled through the provision of information packs covering 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.[239]

10.228. In the Discussion Paper we sought views on whether jurors should be provided with education specific to sexual offending. We also sought views on what the content of any proposed education should be, and how and when it should be delivered.[240]

Stakeholders' views

10.229. The prospect of juror education received mixed support. For example, Communities said:

> Communities supports juror education specific to sexual offending. Research from the Australian Institute of Criminology shows that 'juror judgements in rape trials are influenced more by the attitudes, beliefs and biases about sexual violence which jurors bring with them into the courtroom than by the objective facts presented, and that stereotypical beliefs about rape and victims of it still exist within the community'. This research shows that many jurors hold strong and stereotypical expectations about how a 'genuine victim' of sexual violence would behave before, during and after the offending, and that these assumptions affect the jurors' perception of the complainant and how a testimony is interpreted.[241]

10.230. However, Legal Aid stated 'the very practise suggested in the question may result in a loss of objectivity'.[242]

The Commission's view

10.231. We did not receive any detailed submissions detailing how or at what stage jurors should receive any education about sexual violence or about the content of such education. We are concerned that providing jurors with information about sexual violence, in advance of their hearing evidence, and in circumstances where counsel would be unable to comment on the information provided to them, is contrary to practice in an adversarial system.

10.232. We are also concerned that providing information prior to a case commencing would be likely to result in jurors hearing a significant amount of information which may be irrelevant to the case on which they are required to serve.

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[239] Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [6.72].

[240] Discussion Paper Volume 1, [6.141]-[6.144].

[241] Email Submission E24 (Communities) (citations omitted).

[242] Portal Submission P23 (Legal Aid).

10.233. Additionally, under our current system, juries are obliged to follow a judge's directions, but they are not obliged to make themselves available for education, or to apply or follow the content of any education sessions.

10.234. In light of these concerns, we do not make a recommendation for jury education about the nature of sexual violence or related matters.

Should expert witnesses be used to give evidence about the nature and effects of sexual violence?

10.235. In some jurisdictions, expert witnesses are permitted to give evidence on a range of issues related to sexual offending. These include countering misconceptions about sexual violence and consent.

10.236. In Western Australia, the common law permits persons with specialised knowledge in a recognised field of expertise to give opinions based on their expertise.[243] Sections 36BE 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.[244]
- 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.[245]

10.237. In the Uniform Evidence Act jurisdictions[246] 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'.[247]

10.238. In the Discussion Paper we sought 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.

10.239. During the Legal Expert Group consultation some attendees said they had seen experts called (by both the prosecution and defence) to give evidence on issues relating to family and domestic violence but noted that such expert evidence is rare and expensive.

10.240. 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.[248]

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[243] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [85].
[244] *Evidence Act 1906* (WA) s 36BE.
[245] Ibid s 39.
[246] The ACT, NSW, NT, Tasmania and Victoria.
[247] See, eg, *Evidence Act 2008* (Vic) s 79.
[248] *Criminal Procedure Act 2008* (Vic) s 388.

10.241. In its review of sexual offences, the VLRC stated that although such evidence is admissible, it is rarely given in practice.[249] 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'.[250]

10.242. 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'.[251]

10.243. 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.[252]

10.244. The Royal Commission recommended:

> In any state or territory where provisions such as those in sections 79(2) and 108C of the Uniform Evidence Act or their equivalent are not available, the relevant government should introduce legislation to allow for expert evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been victims of child sexual abuse offences.[253]

10.245. In the Discussion Paper we sought views on whether experts should be permitted to give evidence about the nature and effects of sexual violence in Western Australia. We also sought views on the purpose of such evidence, the topics it should be permitted to cover,

[249] VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [20.59].
[250] Ibid [20.60].
[251] Ibid [20.61].
[252] *DH v R* [2015] NZSC 35.
[253] Royal Commission, *Criminal Justice Report* (Executive Summary and Parts I and II, 2017) 92, Recommendation 69.

and whether the legislature should provide for the creation of a panel of approved experts who could give such evidence.[254]

Stakeholders' views

10.246. A majority of responses we received via the online survey supported this reform, as did written submissions from a number of stakeholders.

10.247. For example, knowmore stated:

> knowmore considers that expert evidence on issues relating to sexual offending should generally be admissible in Western Australia. We support the view of the Queensland Women's Safety and Justice Taskforce (Queensland Taskforce) that admitting expert evidence is likely to help address the lack of understanding about sexual offending in the criminal legal system and support jury decision making. We also support the Royal Commission's view that, where the prosecution considers that it might be useful to use expert evidence in a child sexual abuse trial, this should generally be an option (citations omitted).[255]

10.248. However, the ODPP and Legal Aid were not in favour of a provision specifically for expert evidence. The ODPP reasoned that:

- If expert evidence is relevant, it is already able to be led under the common law.
- There is a shortage of experts, and there is a commitment in terms of time and cost to prepare this evidence.
- There should not be an expectation that it will be led in order to demonstrate the validity of the content of the legislated directions.
- Its value can be assessed on a case-by-case basis according to whether there is an expert well-placed to do it, and whether the prosecution considers it necessary or particularly valuable.[256]

The Commission's view

10.249. The Commission believes that expert evidence provides another avenue, in conjunction with legislated directions, to counter common misconceptions about sexual violence. We note that section 39 of the Evidence Act (which permits expert evidence about the effects of family violence) is intended to work in tandem, in appropriate cases, with directions about family violence.

10.250. While a provision confirming the admissibility of expert evidence about sexual violence may not be technically required (as such evidence may already be admissible under the general expert evidence provisions at common law), creating such a provision would avoid the possibility of debate about its admissibility. Even if the provision is rarely relied upon, we consider that it does no harm to include it.

10.251. We recommend the enactment of a provision similar to section 39 of the Evidence Act which relates to sexual violence (rather than family violence). We suggest that the provision should provide that:

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[254] Discussion Paper Volume 1, [6.149]-[6.167].
[255] Email Submission E8 (knowmore).
[256] Email Submission E19 (ODPP).

- Evidence of an expert on the subject of sexual violence is admissible in relation to the trial of any offence in the relevant Chapter of the *Code*.
- Evidence given by the expert may include —
    - Evidence about the nature of sexual violence;
    - Evidence about the effects of sexual violence on any person; and
    - Evidence about the effects of sexual violence on a particular person who has been the subject of sexual violence.
- An expert on the subject of sexual violence includes a person who can demonstrate specialised knowledge, gained by training, study or experience, of any matter that may constitute evidence of sexual violence.

10.252. We suggest that the legislation makes clear that the giving of legislated directions about sexual violence is not intended to be confined to cases in which there is expert evidence about sexual violence. As is the case with the family violence directions, we intend that directions about sexual violence could be given either on their own or in conjunction with expert evidence on sexual violence.

10.253. We do not recommend the creation of a panel of expert witnesses, as it appears to us that there are limited suitably qualified experts available, and so the creation of such a panel is likely to be difficult in practice.

Recommendation

112. Legislation should provide that expert evidence on the subject of sexual violence is admissible in sexual offence trials. The relevant provision should be drafted in similar terms to section 39 of the *Evidence Act 1906* (WA), and should provide that:

- **Evidence given by the expert may include —**
    - **Evidence about the nature of sexual violence;**
    - **Evidence about the effects of sexual violence on any person; and**
    - **Evidence about the effects of sexual violence on a particular person who has been the subject of sexual violence.**
- **An expert on the subject of sexual violence includes a person who can demonstrate specialised knowledge, gained by training, study or experience, of any matter that may constitute evidence of sexual violence.**

Should the District Court Bench Book be made publicly available?

10.254. 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.

10.255. We understand that judges are not obliged to follow the directions in the bench book, and while some do, others do not.

10.256. The bench book is not publicly available in Western Australia. By contrast, the NSW, Queensland and Victorian bench books are publicly available.[257]

10.257. It was contended in consultations and submissions that the District Court bench book should be made publicly available as soon as possible.

10.258. For example, knowmore submitted:

> At a fundamental level the law should be available and accessible to all. Making the bench book publicly available would also assist counsel in framing submissions about relevant directions and their form, helping the court to ensure a fair trial and potentially reducing the number of appealable errors. It would also enhance transparency of the criminal trial process, which may in turn help to promote confidence among victims, survivors and their supporters and improve reporting and participation rates. Victims and survivors engaging with our service frequently seek information and advice about their options for reporting the criminal offences committed against them. It would be of assurance to at least some survivors, and their advisors and supporters, to be able to access the bench book and to note the provisions about specific jury directions on issues of frequent concern, such as how the passage of time between the commission of offences and their reporting by the complainant will be dealt with by the court.
>
> Publication of the bench book would also help to ensure continuing scrutiny of existing directions and their suitability, supporting the ongoing improvement of the criminal legal system.[258]

10.259. Comments made during the Legal Expert Group consultation included that a publicly available bench book would mean that submissions to judges by counsel about the content of appropriate directions would be informed by, and have as a starting point, a common document, being the bench book.

10.260. The Commission agrees that a publicly available bench book may bring about the benefits identified in the submissions referred to above. It is beyond the scope of the Terms of Reference to recommend the creation of a publicly available bench book that contains sample directions applicable to all criminal trials. However, the Commission sees the benefit in the existence of and public access to such a document, created and maintained by or with the approval of the District Court.

[257] 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.

[258] Email Submission E25 (knowmore).

11. Special verdicts

Chapter overview

This Chapter considers whether special verdicts should be used in sexual offence trials.

Introduction

11.1. In a jury trial the jury is usually required to deliver one verdict on a charge, either guilty or not guilty (a **general verdict**).

11.2. In certain circumstances, a judge may require the jury to deliver a verdict about a fact which is relevant to the charge (a **special verdict**).[1]

11.3. The Criminal Procedure Act permits a special verdict to be delivered in two circumstances:

- If the accused is found not criminally responsible for an act or omission on account of unsoundness of mind,[2] the trial judge must direct the jury to return a special verdict to that effect.[3] In such cases, if the judge is of the opinion that the proper 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.
- 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'.[4]

11.4. A jury also has the right to return a special verdict under the common law.[5] However, there is uncertainty as to when a jury can or should be required to deliver a special verdict that may reveal the jury's opinions on matters of fact.

11.5. 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 *Chiro v The Queen* 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]

11.6. The Criminal Procedure Act may not oust all common law rules about special verdicts,[8] 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. In practice, it is

1 *Criminal Procedure Act 2004* (WA) s 113.
2 *Criminal Code Act Compilation Act 1913* (WA) s 27.
3 *Criminal Procedure Act 2004* (WA) s 113(1).
4 Ibid s 113(2).
5 *R v Spanos* [2007] SASC 409, [2].
6 *Chiro v The Queen* [2017] HCA 37, 260 CLR 425, [33].
7 Ibid [28] (Keifel CJ, Keane and Nettle JJ), [96] (Edelman J).
8 This issue has not be been determined by the Court of Appeal or the High Court: *Caporn v Western Australia (No 2)* (2008) 36 WAR 294; *Gillespie v Western Australia* (2013) 45 WAR 207.

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.

Should judges be given broader powers to require special verdicts?

11.7. Our Terms of Reference ask us to consider whether special verdicts should be used in sexual offence trials.

11.8. In the Discussion Paper we outlined some ways in which special verdicts could, in theory,[9] already be used in sexual offence trials under the current law.[10] For example, 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.

11.9. In the Discussion Paper we also examined the various approaches other jurisdictions have taken to special verdicts,[11] and set out several options for reform, such as empowering judges in sexual offence trials to ask juries to:

- Return a special verdict in relation to any question that has arisen in a sexual offence trial.
- Return a special verdict on a specific fact relevant to a conviction.
- Return a special verdict of not guilty by reason of mistake of fact.
- Return a special verdict of not proven.[12]

11.10. In the sections below we briefly outline each of these options for reform, along with their purported advantages and disadvantages. We then examine stakeholders' views on whether judges should be empowered to require any of these special verdicts, and set out the Commission's recommended approach.

11.11. We note that in the Discussion Paper we also considered whether a provision should be introduced to clarify whether, in a trial of an offence of persistent sexual conduct with a child under 16,[13] a judge is permitted to ask a jury to return a special verdict directed to ascertaining which sexual activity alleged by the prosecution had been proven beyond a reasonable doubt.[14] However, in light of the Government's in-principle acceptance of the Royal Commission's recommendations in this area, our Terms of Reference were subsequently amended to exclude consideration of this offence from the scope of our review. Consequently, we do not make any recommendations in this regard.

Options for reform

Special verdicts on any question of fact

11.12. A provision could be introduced for sexual offence trials which enables a judge to ask a jury to 'find specially on any particular question', as is the case in Tasmania.[15]

11.13. Some advantages of this approach include:

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9 While this is theoretically possible, we are not aware of any cases in which a judge has used this procedure.
10 Discussion Paper Volume 1, [7.11]-[7.15].
11 Ibid [7.16]-[7.38].
12 Ibid [7.39]-[7.56].
13 *Criminal Code Act Compilation Act 1913* (WA) s 321A.
14 Discussion Paper Volume 1, [7.57]-[7.60].
15 *Criminal Code Act 1924* (Tas) s 383.

- If there were material differences between the complainant's evidence and the accused's case on a particular issue, the issue could be settled by the jury returning a special verdict in relation to that issue.
- It would relieve the judge of the obligation to make a finding about the disputed fact for sentencing purposes, and so it may simplify the sentencing proceedings.

11.14. The disadvantages of this approach, many of which were considered by the New South Wales Court of Criminal Appeal in *R v Isaacs*,[16] include that it may:

- Distract the jury from determining the general verdict.
- Complicate jury deliberations by confusing juries about issues upon which unanimity is or is not required.
- Complicate jury directions by confusing juries about which issues are required to be determined to arrive at 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.

Special verdicts on a specific fact relevant to conviction

11.15. A provision could be introduced for sexual offence trials which empowers 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. This is the case in Queensland and the NT.[17]

11.16. This would have similar application, advantages and disadvantages to special verdicts on any question of fact (as discussed above) but would only apply where the answer to the issue may determine whether the accused ought to be convicted. Thus, the special verdict would have to relate to a more important issue than one on which the accused and the complainant merely disagreed.

Special verdicts of not guilty by reason of mistake of fact

11.17. A provision could be introduced for sexual offence trials in which the mistake of fact defence had been raised. The provision would enable the judge to ask a jury returning a general verdict of not guilty to return a special verdict as to whether it found the accused not guilty by reason of the defence of mistake of fact.

11.18. An advantage of this approach would be that the parties and the complainant would learn whether the verdict was due to the prosecution failing 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. The jury returning a verdict of not guilty by reason of mistake of fact might give the complainant

[16] (1997) 41 NSWLR 374, 379-380.

[17] *Criminal Code Act 1899* (Qld) s 624; *Criminal Code Act 1983* (NT) s 369.

the comfort of knowing by inference that the jury believed their evidence on the issue of consent.

11.19. The disadvantages of this approach are similar to those discussed above in relation to introducing a power to take a special verdict on any question of fact. There is also the consideration that a jury's returning a verdict indicating that it did not find the accused not guilty because of the mistake of fact defence might add to the complainant's distress. In such a case, the complainant might conclude that the jury did not believe their evidence on the issue of consent.

Special verdicts of not proven

11.20. 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.[18]

11.21. While in Scotland judges have been discouraged from attempting to explain the difference between a not guilty and not proven verdict to juries,[19] 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 it was satisfied that the prosecution had proved each element of the offence on the balance of probabilities.

11.22. 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.

11.23. We note that although the not proven verdict is currently available in Scotland, it is set to be abolished by the Scottish Government.[20] The Scottish Government has provided the following reasons for abolishing the verdict:

> It is … often said that the existence of the not proven verdict encourages jurors to avoid the proper discharge of their functions (by allowing them to 'sit on the fence'), that it may cause additional trauma to complainers, that it is confusing and that the lack of legal definition for the verdict is undesirable in a criminal justice system where jurors should be able to make their decisions with certainty as to what those decisions mean …
>
> The Scottish Government has undertaken significant work to examine and assess the effect of Scotland's three verdict system. This has included commissioning the independent Scottish jury research, conducting a programme of engagement on its findings and seeking wider views through a public consultation.
>
> The Scottish Government considers the evidence overwhelming: that the existence of a verdict that people do not understand, that can stigmatise the acquitted and may cause additional trauma to victims, does not serve the interests of justice or the people of Scotland.[21]

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18 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/.

19 Ibid, citing *MacDonald v Her Majesty's Advocate* 1996 SLT 723.

20 *Victims, Witnesses and Justice Reform (Scotland) Bill 2023* (UK).

21 *Victims, Witnesses and Justice Reform (Scotland) Bill 2023* (UK) Policy Memorandum, 49.

11.24. No such verdict presently exists in any Australian jurisdiction, and introducing it in Western Australia would be a novel and radical alteration to the rules about general and special verdicts.

Stakeholders' views

11.25. Only 36% of respondents to the online survey chose to answer questions about special verdicts, and of these, 9% answered 'don't know' to each question. Approximately 50% of those who did respond favoured empowering judges to ask juries to return verdicts on any question of fact (including any question of fact relevant to conviction) or a verdict of not proven. A lower percentage of respondents favoured empowering judges to ask juries to return a special verdict of not guilty on the ground of the mistake of fact defence.

11.26. There was also some limited support in the submissions for introducing special verdicts. However, several stakeholders expressed broad concerns regarding the introduction of special verdicts of the types discussed in the Discussion Paper in Western Australia. For example, the ODPP stated:

> In the absence of receiving advice from representatives of victim-survivors advocating for the use of special verdicts, we are against introducing them.
>
> If it were envisaged that special verdicts would better enable a complainant to understand the reasons for a not guilty verdict, in many cases this would be ineffective. There are often reliability issues relevant to questions of fact that mean they are not binary propositions: for example, a jury may accept the complainant as a truthful witness, but the forensic disadvantage to an accused resulting from their delayed complaint introduces reasonable doubt.
>
> The State Prosecutors who participated in our internal consultation processes were unanimous in their concern that special verdicts could be detrimental to complainants. At present, complainants can at least be reassured that a not guilty verdict does not necessarily reflect the jury's disbelief of their evidence, but rather that the charge was not able to be proven beyond a reasonable doubt. If a special verdict involved, in effect, asking a jury whether or not they accepted that a complainant did not consent, the answer may well be received by the complainant as a disparaging judgment on their credibility.[22]

11.27. Members of the Legal Expert Group were also unanimously opposed to the introduction of special verdicts. They suggested that the introduction of special verdicts may overcomplicate jury deliberations. Given that jurors must come to a unanimous general verdict, asking them to come to special verdicts on findings of intermediate facts may create confusion in their decision-making and intrude on the sanctity of the jury room. Furthermore, members of the Legal Expert Group were of the view that introducing special verdicts is not necessary, given that judges are capable of making factual findings for the purpose of sentencing, unassisted by the jury, but consistent with the jury's general verdict.

11.28. Some submissions expressed concerns at the risks of enabling a jury to return a special verdict of not proven in a sexual offence trial. For example, while Communities noted that such a provision 'will align the judicial process with Communities' processes, in respect to burden of proof (ie: both the judiciary and Communities would operate with the balance of probabilities/likelihood, as opposed to the judiciary operating with beyond reasonable doubt)', it was of the view that such a provision 'poses inherent risks', including:

[22] Email Submission E19 (ODPP).

- A potential for a reduction in the level of independence the statutory child protection process has from the judiciary process. Currently it is reasonable for a child protection investigation outcome to differ from a judiciary outcome, because the two systems operate with different burdens of proof. Should a judicial outcome of a special verdict, based on the balance of probabilities be given, this will align to the burden of proof used in child protection assessments. This may present a risk that child protection assessments, decisions and outcomes may receive pressure to align with judiciary outcomes and/or be subject to review where outcomes can be overturned, on the premise the judiciary and child protection should be returning the same outcome.

- The risks noted in the Discussion Paper, including undermining of the criminal justice system, stigmatising a sex offender, and potentially encouraging the jury to compromise a verdict to a middle ground.[23]

11.29. Law Access further noted that:

> The introduction of a verdict of 'not-proven' (in addition to the usual choice between guilty and not-guilty) raises complex issues and it is not apparent from the Discussion Paper that these have been fully explored. In particular:
>
> - It will be necessary to consider the risk that this verdict could enable discrimination (i.e. be more likely to be used in circumstances where the elements of the offence haven't been proven but the jury remains suspicious of the offender) and to take steps to negate this risk.
>
> - Any amendments to sexual offences laws should be accompanied by associated amendments to law and in relation to criminal records, police clearances, WWCC, and lawful discrimination in employment, so that a verdict of 'not proven' doesn't carry disproportionate consequences when an offence has not been proven.[24]

The Commission's view

11.30. The Commission does not recommend that judges be given broader powers to require special verdicts. We agree with members of the Legal Expert Group that introducing special verdicts would create complications in jury deliberations that may interfere with a jury's primary responsibility to arrive at a unanimous general verdict.

11.31. We are also of the view that requiring a special verdict to be given when an accused has been acquitted of a sexual offence may be detrimental to complainants. As noted by the ODPP, rather than providing the complainant with potential comfort, such a verdict 'may well be received … as a disparaging judgment on their credibility'.[25]

11.32. This issue was considered by the Scottish Government in consultations regarding the not proven verdict, where a majority of respondents agreed that the not proven verdict could cause trauma to victims of crime and their families.[26] In particular, there were concerns that trauma could be caused because of 'a belief that the accused was guilty but there was a lack of evidence to prove this', and that the not proven verdict would offer no sense of closure to victims of crime.[27]

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[23] Email Submission E24 (Communities).
[24] Email Submission E14 (Law Access).
[25] Email Submission E19 (ODPP).
[26] Scottish Government, 'The Not Proven Verdict and Related Reforms: Analysis of Responses to Consultation' (July 2022) 32.
[27] Ibid 34.

11.33. Finally, our view is that the usefulness of such a reform is limited, given that judges can already require juries to give special verdicts in certain circumstances; that there are no perceived gaps that the broader application of special verdicts is intended to fill; and that we received no broad community support for the introduction of such verdicts.

12. Penalties

Chapter overview

This Chapter makes recommendations about the maximum penalties for sexual offences that should be included in the *Code*.

Introduction

12.1. Sentencing is an essential part of the criminal justice system. The sentence that an offender receives for a sexual offence is important to offenders, victims and the community.

12.2. The sentencing process is complex and requires judges to consider various factors, principles, procedures and practices. These are set out in several statutes (including the *Sentencing Act 1995* (WA) (the **Sentencing Act**) and the *Young Offenders Act 1994* (WA) (the **Young Offenders Act**)) as well as the common law.[1]

12.3. Our Terms of Reference do not permit us to review sentencing law generally. We are only permitted to consider:

- What the maximum penalty should be for the sexual offences under review;[2] and
- Any specific sentencing requirements for sexual offences in Chapter XXXI of the *Code*, such as mandatory minimum sentences or periods of imprisonment.

12.4. We cannot make recommendations about matters such as:

- The aggravating and mitigating factors that a judge should consider when determining what penalty should be imposed on a sexual offender within the range established by the *Code*.
- The principles that should be applied in determining an appropriate sentence.

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1 For a brief summary of the sentencing process, see Discussion Paper Volume 2, [16.6]-[16.15].

2 Those contained in Chapter XXXI of the *Criminal Code Act Compilation Act* (WA), as well as sections 186, 191 and 192 of the *Code*.

- Measures that occur after a court imposes a sentence such as sex offender registration,[3] supervision measures imposed as part of a sentence, supervision measures imposed as part of parole, or supervision or detention orders imposed after sentence.

12.5. The Terms of Reference do not permit us to review the maximum penalty for the offence of persistent sexual abuse of a child under 16. Currently, the maximum penalty for that offence is 20 years' imprisonment. The Royal Commission's model provision for a reformed offence of persistent sexual abuse of children (which it recommended replace the offence of persistent sexual abuse of a child under 16) includes a maximum penalty of 25 years' imprisonment. Although it is beyond the scope of our Terms of Reference to comment on whether 25 years is the appropriate penalty, it is important to note that the penalty for that offence is relevant to the appropriateness of the recommendations we make in this Chapter. This is because, in our view, offences of persistent sexual abuse of a child under 16 (or any replacement offence) are in the category of the most serious sexual offences and should have the highest maximum penalty of any sexual offences. The most serious categories of offence set the benchmark for maximum penalties. The Commission is of the view that all other sexual offences should have penalties that are the same as or lower than the maximum penalty for that offence.

12.6. As the Government has accepted in-principle the Royal Commission's recommendation to reform the offence of persistent sexual abuse of a child, our recommendations in this chapter are made on the assumption that an offence the same as or similar to the Royal Commission's model provision for a reformed offence of persistent sexual abuse of children, including a maximum penalty of 25 years' imprisonment, will be enacted. If that does not occur, our recommendations for maximum penalties for other sexual offences will need to be reconsidered in light of the maximum penalty for the reformed offence of persistent sexual abuse of children, whatever that may be.

Current penalty levels

Western Australia

12.7. In the Discussion Paper we explained the sentencing process[4] and the development of Western Australia's sexual offence sentencing laws.[5]

12.8. The maximum penalty available for each of the sexual offences under review is a term of imprisonment, ranging from 2 years' imprisonment, for procuring a person to be a prostitute and fraudulently procuring a person to have carnal knowledge, to 20 years' imprisonment for aggravated penetrative sexual offences. Appendix 6 in Discussion Paper 2 sets out the current maximum penalties for each of the offences we are considering.

12.9. The *Code* sets minimum levels of imprisonment that must be imposed on offenders who commit certain sexual offences during an aggravated home burglary. In all other cases, the full range of sentencing options is available. However, it is rare for a person convicted of a sexual offence involving sexual penetration or an offence committed against a child to receive any type of sentence besides a term of immediate imprisonment. This reflects the seriousness with which courts and the community regard sexual offending.[6]

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3 These are addressed in the *Community Protection (Offender Reporting) Act 2004* (WA).

4 See Discussion Paper Volume 2, [16.6]-[16.15].

5 Ibid [16.16]-[16.19].

6 See further discussion at Discussion Paper Volume 2, [6.22]-[16.23].

12.10. Although courts almost always impose terms of immediate imprisonment for sexual offending, the length of the term can vary considerably, even when comparing cases of the same type of offence. Western Australian courts have frequently said that there is no tariff (or guideline as to an appropriate type or length of sentence) for sexual offences because 'the circumstances of sexual offences and sexual offenders are widely variable. This means that the sentence imposed in one case can only provide limited guidance in deciding what sentence should be imposed for a similar offence in another case'.[7]

Comparison with other Australian jurisdictions

12.11. In the Discussion Paper we noted that it is not valid to directly compare maximum penalty levels across jurisdictions because sexual offence definitions and related sentencing rules (for example, the minimum periods of imprisonment to be served before an offender is eligible for parole) vary widely between jurisdictions.[8] To the extent that it is possible to compare, there is considerable variation between the maximum penalties in Australian jurisdictions and in comparable overseas jurisdictions.

12.12. Despite these difficulties, we were interested to know (to the extent that it is possible to draw any comparisons) whether comparable sentences, including non-parole periods, are imposed for the same or similar offences in different jurisdictions. We considered it to be relevant whether, despite the different maximum penalties available in different jurisdictions, Western Australian courts are currently imposing sentences which are higher or lower than their interstate counterparts.

12.13. Consequently, we decided to compare sentences imposed for sexual penetration without consent in Western Australia with those imposed for the most similar offence in Victoria, NSW and Queensland. Sexual penetration without consent is one of the most serious sexual offences with respect to adult victims and there is clear and settled Court of Appeal authority as to the types of sentences usually imposed for this offence in Western Australia. We considered that the maximum penalties in Victoria, NSW and Queensland demonstrate the considerable range of maximum penalties currently available in different Australian jurisdictions.[9] They are also jurisdictions in which sentencing statistics are published.

12.14. Our analysis is set out in Appendix 3. Table 12.1 summarises our findings. It shows the length of the penalty that is most likely to be imposed for sexual penetration without consent (or the most similar offence) and the period after which the offender is likely to be eligible for parole.

	WA	Vic	NSW	Qld
Length of term	4 years 8 months – 6 years	6 years	4.15 years	6.6 years
Parole eligibility after	2 years 8 months – 4 years	3.6 – 4.5 years	2.58 years	2.2 – 5.28 years

Table 12.1: Most likely penalty for sexual penetration without consent or similar offence

7 *MRW v Western Australia* [2022] WASCA 98, [54].

8 Discussion Paper Volume 2, [16.30]-[16.31].

9 In Victoria the most similar offence is rape for which the maximum penalty is 25 years' imprisonment. In NSW the most comparable offence is sexual intercourse without consent for which the maximum penalty is 14 years' imprisonment. In Queensland the most comparable offence is rape for which the maximum sentence is life imprisonment.

12.15. This analysis indicates that the length of the term of imprisonment typically imposed in Western Australia for this offence is shorter than that typically imposed in NSW, perhaps shorter than that typically imposed in Victoria and shorter than that typically imposed in Queensland.

12.16. Although our Terms of Reference do not require or enable us to review non-parole periods, it is relevant to our review of maximum penalties to understand the effect of non-parole periods in Western Australia and comparable jurisdictions. The typical period after which an offender first becomes eligible for parole consideration in Western Australia:

- Is shorter for shorter sentences but longer for longer sentences than the similar period in NSW.
- Is shorter for both shorter and longer sentences than the similar period in Victoria.
- Is longer for shorter sentences but shorter for longer sentences than the similar period in Queensland.

12.17. The data presented in this analysis should be read with caution. As noted above, the sentencing schemes in different jurisdictions vary widely and are not directly comparable. The data presented covers offences that have different elements and maximum penalties, and they were collected during different time periods. As described in Appendix 3, there are also different methods of gathering data in each jurisdiction.

Should the factors that affect the maximum penalties be changed?

12.18. Under the *Code*, the maximum penalties for some sexual offences vary depending on:

- The age of the complainant.[10]
- Whether the complainant was under the offender's care, supervision or authority.[11]
- The age of the offender.[12]

12.19. In the Discussion Paper we noted that it would be possible to reform the factors which increase or decrease the maximum penalty.[13] We sought views on whether the existing factors should be amended in any way, or whether any new factors should be added.

12.20. We did not receive any submissions recommending the addition of new factors. In the sections below we address the three factors listed above.

The complainant's age

12.21. Under the *Code*, there are generally[14] three levels of maximum penalty for a particular type of sexual offending (for example, sexual penetration) committed against a child:

10 See, eg, *Criminal Code Act Compilation Act 1913* (WA) ss 329(9)-(10), 331B, 331C(2).

11 See, eg, ibid ss 321(7)-(8), 330(7)-(8).

12 See, eg, ibid ss 321(7)-(8).

13 Discussion Paper Volume 2, [16.40]-[16.68].

14 This is not always the case. For example, the maximum penalty for sexual offences against lineal relatives or de facto children only varies depending on whether the child is under or over 16; and the maximum penalties for the sexual servitude offences do not alter according to the age of the child: see *Criminal Code Act Compilation Act 1913* (WA) ss 329(9)-(10), 331B, 331C(2).

- Offences against children under 13 attract the highest maximum penalty. For example, the maximum penalty for sexual penetration of a child under 13 is 20 years' imprisonment.[15]
- Offences against children 13 to under 16 attract a mid-level maximum penalty. For example, the maximum penalty for sexual penetration of a child 13 to under 16 is 14 years' imprisonment.[16]
- Offences against children 16 or over attract the lowest maximum penalty. For example, the maximum penalty for sexual penetration of a child 16 or over who is under the offender's care, supervision, authority is 10 years' imprisonment.[17]

12.22. Most comparable jurisdictions provide that a higher maximum penalty for a child sexual offence is available if the complainant is below a certain age. This age is 10 in the ACT, NSW, and the NT, 12 in Queensland, Victoria and New Zealand, 13 in Western Australia and 14 in South Australia.[18] In Tasmania and Canada, the maximum penalty does not vary based on the child's age.[19]

12.23. The availability of higher maximum penalties for sexual offences against young children reflects the view that sexual contact with younger children is a more serious offence than sexual offences against older children.[20]

12.24. It is likely that the primary principle justifying a higher maximum penalty for offences against very young children are first, the desire to protect them because of their vulnerability to adult pressure to engage in sexual activity when they do not understand its meaning or consequences. Second, sexual activity between children and adults is contrary to societal norms that that children should be protected from harm. Third, the younger the child, the more likely it is that the child will be physically injured.[21]

12.25. These factors may lead to the conclusion that severe maximum penalties are needed to mark society's abhorrence of sexual activity with young children, and that the younger the child the higher the maximum penalty ought to be. Children under 13 may be considered extremely vulnerable to adult pressure to engage in sexual activity.

12.26. However, the variation in the age below which a higher maximum penalty will be available in Australian jurisdictions suggests that there is no consensus as to the age at which a child's immaturity makes them most vulnerable, or if such an age exists at all. As we discuss in relation to the age of consent, there may be a degree of arbitrariness in selecting the ages for which the highest maximum penalty for sexual offences against children ought to be available.[22]

12.27. In the Discussion Paper we sought views on whether the age below which a higher maximum penalty for child sexual offences is available (13) should be raised, lowered, maintained or abolished.[23]

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15 Ibid s 320(2).

16 *Criminal Code Act Compilation Act 1913* (WA) s 321(2). This increases to 20 years' imprisonment if the child is under the care, supervision or authority of the offender.

17 Ibid s 322(2).

18 *Crimes Act 1900* (ACT) s 55; *Crimes Act 1900* (NSW) s 66A; *Criminal Code Act 1983* (NT) s 127; *Criminal Code Act 1899* (Qld) s 215; *Crimes Act 1958* (Vic) ss 49A, 49B; *Crimes Act 1961* (NZ) ss 132, 134; *Criminal Code Compilation Act* 1913 (WA) ss 320(2), 321(2); *Criminal Law Consolidation Act 1913* (SA) s 49.

19 *Criminal Code 1924* (Tas) s 124; *Criminal Code*, RSC, 1985, c. C-34 s 151.

20 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person* (Report, 1999) 125.

21 See, eg, *Marris v The Queen* [2003] WASCA 171 at [12]–[13]; *VIM v Western Australia* [2005] WASCA 233, [289]-[294].

22 See Chapter 7.

23 Discussion Paper Volume 2, [7.77]-[7.81].

Stakeholders' views

12.28. Views were split on this issue. While some stakeholders were of the view that 13 was the appropriate age below which a higher maximum penalty should be available, others supported raising this age. For example, Communities submitted that there should be the same maximum penalty available for offences against all children under 16. While acknowledging that it could not identify an evidence-based finding that definitively identifies an age other than 13 as appropriate in making a higher maximum penalty available, Communities considered that a single maximum penalty for offences against all children under 16 acknowledges the impact sexual offences have on children of any age.

The Commission's view

12.29. All sexual offending against children is abhorrent and all child sexual offences should have significant maximum penalties. However, in the Commission's view it is appropriate that offences against very young children should have a slightly higher maximum penalty. This identifies such offences as being committed against the most vulnerable members of the community.

12.30. To some extent, the setting of the relevant age categories for child sexual offences is arbitrary; there is no evidence-based reason for selecting a specific age at which a higher penalty should be imposed. This is reflected in the different approaches taken by the other Australian jurisdictions, which have set the relevant age for the most serious offences at various levels between 10 and 14.

12.31. In light of the lack of consensus surrounding this issue, and the absence of significant community support for reforming the law in this area, the Commission is of the view that the current age groupings should be retained. We consider it to be appropriate to impose the most severe sanctions for offences against children under 13, with a slightly lesser maximum penalty for offences against children 13 to under 16.

12.32. A child's age is only one factor relevant to determining an appropriate sentence for sexual offences against children. Other relevant factors include the nature of the relationship between the offender and child, including whether the offending constituted a breach of trust; the age gap between the offender and child; the nature of the sexual activity in question; and whether force was used or physical injury caused.

12.33. Offences committed against very young children will usually warrant a higher penalty. However, once all relevant factors are considered and given appropriate weight, offences committed against older children may be seen to be equally serious (for reasons unrelated to the child's age) and equally deserving of a higher penalty. For example, the use of a weapon or the infliction of physical injury may render an offence against an older child deserving of a penalty determined by reference to a higher maximum penalty.

12.34. For this reason, although we recommend that for each form of prohibited sexual conduct there be distinct offences for children under 13 and children 13 to under 16 (and higher penalties for the offences against the younger age group), we do not consider there to be justification for these two age groups having a large difference between maximum penalties.

12.35. We consider that there are philosophical and practical differences to consider with respect to the penalties for sexual offences against children 16 or over. Children of this age are deemed capable of consenting to sexual activity in most circumstances. However, where there is a relationship of care, supervision and authority the law recognises that the generally uneven balance of power within the relationship renders the child vulnerable to sexual exploitation. This is why there are sexual offences against children 16 or over where the child is under the

care, supervision or authority of the accused. While a sexual offence against a child in this category is still undoubtedly serious, it is distinguishable in moral severity from offending against a child under 16 who is, by virtue of their age, less likely to be able to guard themselves against sexual exploitation and so is deserving of greater legal protection. Consequently, we recommend retaining a slightly lower penalty for offences committed against children who are 16 or over.

Care, supervision or authority

12.36. The maximum penalties for sexual offences against incapable persons[24] and children 13 to under 16[25] increase if the complainant was under the offender's care, supervision or authority:[26]

- Sexual penetration and procuring, inciting or encouraging to engage in sexual behaviour: increase from 14 years' imprisonment to 20 years' imprisonment.[27]
- Indecent dealing and procuring, inciting or encouraging to do an indecent act; indecent recording: increase from 7 years' imprisonment to 10 years' imprisonment.[28]

12.37. This increase in the maximum penalty for offences committed under the accused's care reflects the increased seriousness of offences which involve a breach of the trust placed in the accused to look after the complainant. It is also presumably intended to act as an additional deterrent to offending in such circumstances.

12.38. In the Discussion Paper we sought views on whether there should there be any change to the circumstances in which a maximum penalty is increased due to the victim being under the accused's care, supervision or authority.[29] The only submission on this issue that we received was from Legal Aid; it said that no changes are necessary.

The Commission's view

12.39. The Commission acknowledges that the existence of a relationship of care, supervision or authority makes an offence more serious. However, as we note in the preceding section in relation to the age of the victim, there are many factors relevant to determining an appropriate sentence for a child sexual offence. They include the age of the child, the age gap between the offender and child, the nature of the sexual activity in question, whether force was used or physical injury was caused, as well as the relationship between the offender and child.

12.40. While offences committed against people who are in care, supervision or authority will usually warrant a higher penalty, once all relevant factors are considered and given appropriate weight, there may be offences committed in other circumstances which are equally deserving of a higher penalty. For example, the use of a weapon or the infliction of physical injury may render an offence equally deserving of a penalty determined by reference to a higher maximum penalty.

12.41. In the Commission's view, there is insufficient justification for singling out the relationship of care, supervision or authority as the one factor that increases the maximum penalty level available for offences against children 13 to under 16 or vulnerable persons. We are of the

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24 *Criminal Code Act Compilation Act 1913* (WA) s 330: see Chapter 8.

25 Ibid s 321: see Chapter 7.

26 The mechanism by which the *Code* increases the maximum penalties is by creating a base offence committed with circumstances of aggravation that the victim was under the offender's care, supervision or authority: see Chapter 9.

27 *Criminal Code Act Compilation Act 1913* (WA) ss 321(7), 330(7).

28 Ibid ss 321(8), 330(8).

29 Discussion Paper Volume 2, [16.43]-[16.52].

view that it would be preferable for the judge to have the flexibility to address the issue of care, supervision or authority as part of their general sentencing discretion.

12.42. Consequently, we recommend that:

- Care, supervision or authority be repealed as a matter which increases the maximum penalty available for all sexual offences against children or vulnerable people; and
- The base penalty for these offences be increased to a higher level to provide judicial officers with the flexibility to take the issue of care, supervision or authority into account in appropriate cases.

Recommendations

113. The *Code* should not specify that the maximum penalty for sexual offences against children 13 to under 16 or vulnerable people increases where the child or vulnerable person was under the offender's care, supervision or authority at the time of the offence. This should be a matter that is taken into account as part of the general sentencing determination.

114. The base maximum penalties for sexual offences committed against children 13 to under 16 and vulnerable people should be increased, to provide judicial officers with sufficient flexibility to take the issue of care, supervision or authority into account in appropriate cases.

Child offenders

12.43. Offenders who are younger than 18 at the time they commit any offence, including sexual offences, are sentenced differently to adults. They are sentenced in accordance with the principles of juvenile justice, which are set out in section 7 of the Young Offenders Act. These principles provide that a young person's rehabilitation is an important, if not dominant, consideration.[30] General and personal deterrence have a role to play, but generally a tempered role.[31] Additional types of penalties to those available for adult offenders are available for child offenders.[32] Sentences of imprisonment for young people are generally only imposed as a last resort.[33]

12.44. Under the *Code*, the maximum penalties for the following offences against children 13 to under 16[34] are reduced if the offender was under 18 at the time of the offence, and the victim was not under their care, supervision or authority:

- Sexual penetration; procuring, inciting or encouraging to engage in sexual behaviour: decrease from 14 years' imprisonment to 7 years' imprisonment.[35]
- Indecent dealing; procuring, inciting or encouraging to do an indecent act; indecent recording: decrease from 7 years' imprisonment to 4 years' imprisonment.[36]

30 *JA (A Child) v Western Australia* [2008] WASCA 70, [29].

31 Ibid [30].

32 For example, the *Young Offenders Act 1994* (WA) allows a judge sentencing a young person to refer the young person to a juvenile justice team (s 28), impose no punishment (s 66) or impose no punishment in return for the young person or a responsible adult making certain undertakings or promises to the Court (s 67).

33 *M (A Child) & Ors* [1999] WASCA 111, [15], [17].

34 *Criminal Code Act Compilation Act 1913* (WA) s 321: see Chapter 7.

35 Ibid s 321(7).

36 Ibid s 321(8).

12.45. In the Discussion Paper we noted that these reduced penalties appear to be a statutory recognition of the mitigatory effect of youth.[37] We also noted that the provision of a lower maximum penalty for child offenders in section 321 is a reflection of that section's legislative history.[38] In particular, we noted that when section 321 was introduced, comments made during parliamentary debates indicated that it was intended to cover a wide range of conduct. Therefore, a wide range of penalties was justified, particularly for offenders who were close in age to the victim and where the victim voluntarily engaged in the sexual activity (despite the law deeming them incapable of consenting to it).[39]

12.46. In the Discussion Paper we sought views on whether there should be any change to the circumstances in which a maximum penalty is reduced due to the offender being a child.[40]

Stakeholders' views

12.47. We received limited submissions on this issue. Communities stated that it 'encourages the inclusion of provisions that consider a child's age, their functional capacity and developmental stage, in the context of determining a penalty and making a reduced penalty available where the offender is a child'.[41] In response to the question on this issue, knowmore submitted that the Government should consider raising the age of criminal responsibility from 10 to 14. Legal Aid submitted that there is no need to change this aspect of the law.

The Commission's view

12.48. Our Terms of Reference prevent us from reviewing a similar age defence to offences in section 321 of the *Code* (sexual offences against a child 13 to under 16). Without commenting on whether a similar age defence should be enacted, in our view such a defence would achieve the same policy objectives as are currently achieved by the inclusion of a lower maximum penalty for child offenders. Consequently, if the Parliament enacts such a defence, we recommend that the existing lower maximum penalty provisions be repealed.

12.49. If the Parliament does not enact a similar age defence we consider it important to retain the lower maximum penalty provisions for child offenders.

Recommendation

115. If a similar age defence is enacted that apples to offences against children 13 to under 16, the provisions which provide a lower maximum penalty for children convicted of those offences should be repealed.

Should the maximum penalties for any sexual offences be changed?

12.50. In the Discussion Paper we discussed the importance of maximum penalties, and sought views on whether the maximum penalties for any of the sexual offences under review should be changed.[42]

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37 Discussion Paper Volume 2, [16.63].

38 Described by Wheeler JA at length in *Marris v The Queen* [2003] WASCA 171; *Deering v Western Australia* [2007] WASCA 212; *Riggall v Western Australia* [2008] WASCA 69.

39 Western Australia, *Parliamentary Debates*, Legislative Council, 6 May 1992, 1803; Western Australia, *Parliamentary Debates*, Legislative Council, 14 May 1992, 2361.

40 Discussion Paper Volume 2, [16.61]-[16.68].

41 Email Submission E24 (Communities).

42 Discussion Paper Volume 2, [16.25]-[16.39].

Stakeholders' views

12.51. No stakeholders suggested that maximum penalties should be lowered. The possibility of increasing maximum penalties received mixed support. Written submissions from several stakeholders supported increasing the maximum penalties, arguing:

- Changes should be made in Western Australia to reflect the higher maximum penalties set by other Australian jurisdictions.[43]
- Victim-survivors in Western Australia should not feel that their experiences are less serious than those of victim-survivors in other jurisdictions (which the submission implies is the case as a result of the lower maximums).[44]
- Victim-survivors consider the current maximum penalties to be inadequate, given the seriousness of sexual offences[45] and the long-term impact of sexual violence on victim-survivors and their family networks.[46]
- Inadequate penalties for sexual violence offences in Western Australia can deter victim-survivors from reporting violence.[47]

12.52. There was also some support for increasing maximum penalties in the consultation with the Community Expert Group; one comment was that Western Australia has a low maximum for our most serious offence (sexual penetration without consent) compared to some other jurisdictions. Another comment was that the maximum penalties are appropriate, but concern was expressed about how judges apply the maximums and other factors (with the attendee believing judges generally settle on a figure that is too low).

12.53. Within the Legal Expert Group some members also observed that Western Australia's maximum penalties are lower than those in other jurisdictions, which may send the message that sexual offending is not taken as seriously in Western Australia. However, they also commented that this is a general feeling – and there is no indication in specific cases that the penalties that are actually imposed are too low.

12.54. During the consultation with WA Police,[48] the general view expressed was that the sentences usually imposed for sexual offences are too low (especially in comparison to those imposed for other types of offences such as drug offences) and victims often approach police officers after sentencing hearings to ask 'what was the point?'

12.55. Other stakeholders argued that the current maximum penalties are appropriate. For example:

- Legal Aid considered that current penalties are adequate and Western Australia already has a large prison population. This view was supported by a member of the Legal Expert Group who considered that offenders in Western Australia already receive very long sentences, that there is a high rate of imprisonment and a serious problem with rates of imprisonment for Aboriginal and Torres Strait Islander Peoples.
- A participant in the ALS consultation submitted that there is no need for change as the current maximum penalties cater for offences which are very serious, and are deserving of lengthy terms of imprisonment.

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43 Email Submission E24 (Communities).

44 Portal Submission P36 (WLSWA).

45 Email Submission E15 (Confidential); Email Submission E16 (Zonta Club of Bunbury); Email Submission E17 (Professor Hélène Jaccomard).

46 Portal Submission P36 (WLSWA).

47 Ibid.

48 The consultees expressed their views as police officers. They did not speak on behalf of the WA Police.

- A participant in the Broome consultation suggested that deterrence by way of higher maximum penalties only works for law-abiding people – people who are commiting sex offences do not think about how much jail time they will get if they are caught.
- Another view expressed during the Legal Expert Group consultation was that a risk of increasing maximum penalties is that sentences at the lower end of the spectrum would be 'dragged up' to a level that is inappropriately high.

12.56. The ODPP did not argue for a general increase in maximum penalties, with the exception of an increase to the maximum available for the offence of persistent sexual conduct with a child under 16 pursuant to section 321A of the *Code*. It said that this offence is:

> An under- and poorly-utilised offence, when it was designed to capture the most serious form of sexual offending … A major contributing factor to its under-utilisation is the maximum penalty (20 years). One reason that alternative charges to s 321A are used is that the sentencing for s 321A is not commensurate with sentences for individual acts. Both s 321A and sexual penetration of a child under 13 years have a maximum penalty of 20 years. In many instances it is preferable to prove multiple instances of sexual penetration rather than persistent sexual conduct. In that regard, it is an offence 'of last resort'. … The maximum penalty for s 321A should be lifted to at least 25 years' imprisonment, with consideration given to whether life imprisonment is appropriate in respect of children under 13 years' of age. This would recognise that persistent sexual conduct with a child is the most serious sexual offence. There should not be a lower maximum penalty due to some subliminal dubiety about the lack of particulars, where the offence has been proven beyond reasonable doubt.[49]

The Commission's view

12.57. In the following sections we make various recommendations for reforming the maximum penalties for the sexual offences under review. We have summarised these recommendations in Appendix 2.

Penetrative sexual offences against adults

12.58. Chapter XXXI of the *Code* currently contains four penetrative sexual offences which do not require proof that the complainant was a vulnerable person, was related to the offender or was of a specified age. They are:

- Sexual penetration without consent.
- Aggravated sexual penetration without consent.
- Sexual coercion.
- Aggravated sexual coercion.[50]

12.59. The two base offences have maximum penalties of 14 years' imprisonment. The two aggravated offences have maximum penalties of 20 years' imprisonment.

12.60. In Chapter 6 we recommend that these four offences remain, but that there be some definitional changes. Additionally, we recommend a broader and modern offence of obtaining sexual penetration by fraud. In this section we discuss the appropriate penalties for these five offences.

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[49] Email Submission E19 (ODPP) (citations omitted).

[50] *Criminal Code Act Compilation Act 1913* (WA) ss 325-328.

12.61. Taking into account the limitations on comparing maximum penalties between jurisdictions, and in particular noting that not all jurisdictions have aggravated versions of offences (which Western Australia does), the Commission considers that Western Australia's maximum penalties for non-aggravated penetrative sexual offences against adults are comparable to those in the ACT and NSW. All of the other jurisdictions identified below specify a single maximum penalty for penetrative offences. Western Australia's maximum penalties for aggravated penetrative sexual offences against adults are comparable to those in the ACT, NSW (other than if the offender was in company and inflicts bodily harm or deprives the victim of their liberty), Tasmania and New Zealand. They are lower than those in Victoria, Queensland, SA, the NT and NSW (only if the offender was in company and inflicts bodily harm or deprives the victim of their liberty).

12.62. The current maximum penalties for the offence of sexual penetration without consent (or the most similar offence) in Australian States and Territories, New Zealand and the UK are:

- 12 years' imprisonment for the basic offence and 20 years' imprisonment for the aggravated offence in the ACT.[51]
- 14 years' imprisonment for the basic offence and 20 years' imprisonment for the aggravated offence in Western Australia.[52]
- 14 years' imprisonment for the basic offence, 20 years' imprisonment for the aggravated offence, and life imprisonment if the offender was in company and inflicts bodily harm or deprives the victim of their liberty in NSW.[53]
- 20 years' imprisonment in New Zealand[54] (no aggravated offence exists).
- 21 years' imprisonment in Tasmania[55] (no aggravated offence exists).
- 25 years' imprisonment with a standard sentence of 10 years' imprisonment in Victoria[56] (no aggravated offence exists).
- Life imprisonment in the UK, Queensland, SA and the NT[57] (no aggravated offences exist).

12.63. We have carefully considered the views of stakeholders arguing for and against an increase in maximum penalties for sexual offences. The Commission sees merit in the submissions that suggest that maximum penalties for similar offences should be set at similar levels across the different Australian jurisdictions. However, given the current range in maximum penalties, more than one State or Territory must change their maximum penalties in order to achieve national uniformity. Further, the different parole laws throughout Australia make it difficult to achieve national uniformity in the length of time that an offender must serve before becoming eligible for parole.

12.64. We note that the sentencing information we examine in Appendix 3 indicates that Western Australian sentences and non-parole periods for sexual penetration without consent are not significantly different from those in Victoria, NSW and Queensland despite the higher maximum penalties in those states. Also, limited information is gained by comparing

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51 *Crimes Act 1900* (ACT) ss 51-54.

52 *Criminal Code Act Compilation Act 1913* (WA) ss 325-326.

53 *Crimes Act 1900* (NSW) ss 61I, 61J, 61JA.

54 *Crimes Act 1961* (NZ) ss 128B, 129.

55 *Criminal Code Act 1924* (Tas) s 185.

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

57 *Sexual Offences Act 2003* (UK) ss 1, 2; *Criminal Code Act 1899* (Qld) ss 349-350; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1983* (NT) s 192.

sentences for single offences as many offenders are sentenced for more than one offence at one time, and the total length of the sentence will depend on whether sentences for individual offences are ordered to be served cumulatively or partly cumulatively on another sentence. However, the maximum penalty set by Parliament for an offence provides at least an indication to victim-survivors and others of the importance that Parliament and the community place on deterring offending of that type – regardless of actual sentencing patterns.

12.65. Taking all of the above into account, it is our view that there should be a modest increase to the maximum penalties available for the basic offences of sexual penetration without consent and coerced sexual penetration. We recommend that the maximum penalty be set at 15 years' imprisonment. We also consider this to be an appropriate penalty for the recommended offence of coerced sexual penetration, which is of an equally serious nature.

12.66. We have considered whether this change, and other similar changes, are too minor to be justified, and whether they unnecessarily interfere with current sentencing standards. This, and similar changes we recommend, are to be understood in the context of our recommendations for a significantly improved scheme of sexual offences. If this scheme is introduced, it provides an important opportunity to determine the appropriate penalty for each existing, new and amended sexual offence, taking into account where the offence under consideration fits in the scale of seriousness of all other sexual offences. Such an approach is preferable to assuming that the existing offences which will remain substantially part of the new scheme should not have their maximum penalties reassessed.

12.67. If the new scheme of sexual offences is introduced, there may be an adjustment period while courts reassess sentencing standards. Any such period is unsettling for those who are familiar with the existing sentencing standards. It is not, however, a justification for failing to ensure that both sexual offences and maximum penalties for them meet modern community expectations. This is especially so as even if all we did was recommend maximum penalties for new or amended existing offences, sentencing and appellate courts would still have to reassess sentencing standards for existing offences, in light of the existence of, and maximum penalties for, the new and amended offences.

12.68. We do not recommend increasing the maximum penalties for the aggravated penetrative offences. We consider a maximum penalty of 20 years' imprisonment to be a sufficiently severe sanction for conduct of this nature. This maximum penalty is comparable to the maximum penalties in NSW,[58] the ACT, Tasmania and New Zealand, and is not inconsistent with the range of maximum penalties for comparable offences in other Australian jurisdictions.

12.69. With respect to our recommended new offence of obtaining sexual penetration by fraud, we recommend a maximum penalty of 10 years' imprisonment. In making this recommendation we have taken into account the fact that this offence is designed to address fraudulent or deceptive conduct which does not negate consent (and so should not be penalised as harshly as the other penetrative offences), but which is sufficiently serious to deserve criminalisation (and so is potentially deserving of a significant sanction). We do not recommend enacting an aggravated version of obtaining a sexual act by fraud, so do not recommend a penalty for such an offence

[58] Unless the offender was in company and inflicts bodily harm or deprives the victim of their liberty in which case the maximum penalty increases to life imprisonment.

Recommendation

116. The maximum penalties for the penetrative sexual offences against adults should be as follows:

- **Sexual penetration without consent: 15 years' imprisonment.**
- **Aggravated sexual penetration without consent: 20 years' imprisonment.**
- **Coerced sexual penetration: 15 years' imprisonment.**
- **Aggravated coerced sexual penetration: 20 years' imprisonment.**
- **Obtaining sexual penetration by fraud: 10 years' imprisonment.**

Non-penetrative sexual offences against adults

12.70. The *Code* currently contains an offence of indecent assault and an offence of aggravated indecent assault.[59] Neither of these offences requires proof that that the complainant was a vulnerable person, was related to the offender or was of a specified age. The base offence has a maximum penalty of 5 years' imprisonment. The aggravated offence has a maximum penalty of 7 years' imprisonment.

12.71. There are also maximum 'summary conviction penalties' for the indecent assault offences. These are the maximum penalties that a magistrate may impose if an offender is sentenced in the Magistrates Court. They are presently 2 years' imprisonment for the basic offence and 3 years' imprisonment for the aggravated offence.

12.72. In Chapter 6 we recommend that these two offences be replaced by offences of sexual act without consent, aggravated sexual act without consent, coerced sexual act and aggravated coerced sexual act. We also recommend a new offence of obtaining a sexual act by fraud. In this section we discuss the appropriate penalties, including the summary conviction penalties, for these five new offences.

12.73. The current maximum penalties for the offence of indecent assault (or the most similar offence) in Australian jurisdictions are:

- 5 years' imprisonment for the basic offence and 7 years' imprisonment for the aggravated offence in Western Australia[60] and NSW.[61]
- 7 years' imprisonment for the basic offence and 9 years' imprisonment for the aggravated offence in the ACT.[62]
- 8 years' imprisonment for the basic offence and 10 years' imprisonment for the aggravated offence in SA.[63]
- 10 years' imprisonment in Victoria[64] (no aggravated offence exists).
- 14 years' imprisonment in the NT[65] (no aggravated offence exists).

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59 *Criminal Code Act Compilation Act 1913* (WA) ss 323, 324.
60 *Criminal Code Conmpilation Act 1913* (WA) s 323.
61 *Crimes Act 1900* (NSW) s 61KC (sexual touching without consent).
62 *Crimes Act 1900* (ACT) s 57 (act of indecency without consent).
63 *Criminal Law Consolidation Act 1913* (SA) s 56 (indecent assault).
64 *Crimes Act 1958* (Vic) 40(1) (sexual touching wihtout consent).
65 *Criminal Code 1983* (NT) s 192(4).

- 21 years' imprisonment in Tasmania[66] (no aggravated offence exists).

12.74. Noting the limitations on comparing maximum penalties between jurisdictions, the Commission considers Western Australia's maximum penalties for indecent assault to be comparatively low when viewed nationally and consideration of increased penalties is warranted. We recommend that the maximum penalty for the base offence be increased to 7 years' imprisonment, and the maximum penalty for the aggravated offence be increased to 10 years' imprisonment. These should also be the maximum penalty levels for the coerced versions of these offences, which are equally serious.

12.75. We recommend that the maximum penalties for the new offences if a magistrate sentences the offender should remain the same: 2 years' imprisonment for the base offence and 3 years' imprisonment for the aggravated offence. Indecent assault currently encompasses a very wide range of offending that spans, for example, a fleeting touch of a person's buttocks on the outside of their clothing to an extended rubbing of a person's genitals under their clothing (in a way that falls short of constituting penetration). If our recommendations as to the reform of the offence of indecent assault are adopted then the offence will also extend to non-consensual sexual acts which do not involve physical contact or a threat or attempt to apply force (for example, intentionally masturbating in front of the complainant without their consent). As the reformed offences will encompass a wide range of conduct, we believe it is appropriate that there be a relatively high maximum (applicable where the offence is dealt with on indictment). The increased maximum penalty should not affect the facility for the offence to be dealt with summarily (by a magistrate) with an accompanying relatively low maximum. If a magistrate decides that an offence is too serious to be dealt with under the lower penalty, they may commit the offender to be sentenced in the District Court.

12.76. With respect to our recommended new offence of obtaining a sexual act by fraud, we recommend a maximum penalty of 5 years' imprisonment if sentenced in the District Court, and 2 years' imprisonment if sentenced in the Magistrates Court. In making this recommendation we have taken into account the fact that this offence is designed to address fraudulent or deceptive conduct which does not negate consent, and so should not be penalised as harshly as the other non-penetrative offences. We do not recommend enacting an aggravated version of obtaining a sexual act by fraud, so do not recommend a penalty for such an offence.

[66] *Criminal Code 1924* (Tas) s 127 (indecent assault).

Recommendations

117. The maximum penalties for the non-penetrative sexual offences against adults should be as follows:

- **Sexual act without consent: 7 years' imprisonment.**
- **Aggravated sexual act without consent: 10 years' imprisonment.**
- **Coerced sexual act: 7 years' imprisonment.**
- **Aggravated coerced sexual act: 10 years' imprisonment.**
- **Obtaining a sexual act by fraud: 5 years' imprisonment.**

118. The maximum summary conviction penalties for the non-penetrative sexual offences against adults should be:

- **2 years' imprisonment for the base offences.**
- **3 years' imprisonment for the aggravated offences.**

Penetrative sexual offences against children

12.77. The *Code* currently contains six offences requiring both proof of penetration and proof that the complainant was of a specified age. They are:

- Sexual penetration of a child under 13.
- Sexual penetration of a child 13 to under 16.
- Sexual penetration of a child 16 or over who is under the offender's care, supervision or authority.
- Procuring, inciting or encouraging a child under 13 to engage in sexual behaviour.
- Procuring, inciting or encouraging a child 13 to under 16 to engage in sexual behaviour.
- Sexual penetration of a child 16 or over who is under the offender's care, supervision or authority to engage in sexual behaviour.[67]

12.78. The offences against children under 13 have maximum penalties of 20 years' imprisonment. The offences against children 13 to under 16 have maximum penalties of 14 years' imprisonment, although this increases to 20 years' imprisonment if the child is under the offender's care, supervision or authority. The offences against children 16 or over have maximum penalties of 10 years' imprisonment.

12.79. In Chapter 7 we recommend that these offences be replaced by the following offences:

- Sexual penetration involving a child victim under 13.
- Sexual penetration involving a child victim 13 to under 16.
- Sexual penetration involving a child victim 16 or over who is under the offender's care, supervision or authority.
- Coerced sexual penetration involving a child victim under 13.
- Coerced sexual penetration involving a child victim 13 to under 16.

[67] *Criminal Code Act Compilation Act 1913* (WA) ss 320, 321 and 322. The Terms of Reference prevent us from reviewing the maximum penalty for the offence of persistent sexual conduct with a child under 16 (s 321A).

- Coerced sexual penetration involving a child victim 16 or over who is under the offender's care, supervision or authority.

12.80. In this section we discuss the appropriate penalties for these six offences.

12.81. Noting the limitations on comparing maximum penalties between jurisdictions, we consider that maximum penalties for the current penetrative offences against children in Western Australia are in the mid-range of those in comparable jurisdictions. For example, the maximum penalties for sexual penetration of a child under 13 (or the most comparable offence) in Australian States and Territories, New Zealand and the UK are:

- 14 years' imprisonment if the child is under 12 in New Zealand.[68]
- 17 years' imprisonment if the child is under 10 in the ACT.[69]
- 20 years' imprisonment if the child is under 13 in Western Australia.[70]
- 21 years' imprisonment if the child is under 17 in Tasmania.[71]
- 25 years' imprisonment if the child is under 10 in Victoria and the NT.[72]
- Life imprisonment if the child is under 14 in SA, under 13 in the UK, under 12 in Queensland or under 10 in NSW.[73]

12.82. In light of this fact, and upon consideration of the views put forward in submissions and consultations, we recommend increasing the maximum penalty for sexual penetration of a child under 13. We consider a maximum penalty of 22 years' imprisonment to be appropriate. We consider that this increase recognises the seriousness of child sexual offences, in general, and sexual offences against the very young, in particular. We also consider this to be an appropriate penalty for the recommended offence of coerced sexual penetration of a child under 13, which is of an equally serious nature.

12.83. Regrettably, the number of child sexual offence charges laid by the WA Police each year remains shockingly high, despite a reduction in 2022.[74] The Statistical Analysis Report shows that 60% of the sex offence trials which took place in 2019 related to child sexual offence charges.[75] Appropriately high maximum penalties for child sexual offences is one way that the community marks its disapproval of this type of offending, attempts to deter it and ensures punishment of offenders.

12.84. As noted above, we are of the view that there should be a slightly lesser penalty for children 13 to under 16. In addition, we do not think that there should be a higher maximum penalty for offences committed against children who are under the offender's care, supervision or authority: the maximum penalty should be set at a sufficiently high level for this issue to be addressed as an ordinary sentencing consideration in appropriate cases. To facilitate these views, we recommend increasing the maximum penalty for the offence of sexual penetration of a child 13 to under 16 to 20 years' imprisonment. That should also be the maximum penalty

68 *Crimes Act 1961* (NZ) s 132.
69 *Crimes Act 1900* (ACT) s 55.
70 *Criminal Code Act Compilation Act 1913* (WA) s 320(2).
71 *Criminal Code Act 1924* (Tas) s 124 (indecent assault).
72 *Crimes Act 1958* (Vic) s 49A; *Criminal Code Act 1983* (NT) s 127.
73 *Sexual Offences Act 2003* (UK) ss 5, 6; *Criminal Code Act 1899* (Qld) s 215; *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code Act 1983* (NT) s 127.
74 Discussion Paper Volume 2, Appendix 2.
75 Statistical Analysis Report, 31.

for coerced sexual penetration of a child 13 to under 16, which can be an equally serious offence.

12.85. We consider that the penalty for offences committed against children who are 16 or over should be slightly less than the penalty for offences committed against children 13 to under 16. At present, the penalty for sexual penetration of a child 16 or over who is under the offender's care, supervision or authority is 10 years' imprisonment. Under our recommended approach, this would mean there would be a 10-year disparity between the offences, which we consider too great. Consequently, we recommend increasing the maximum penalty for this offence to 15 years' imprisonment. That should also be the maximum penalty for coerced sexual penetration of a child 16 or over, which can be an equally serious offence.

Recommendation

119. The maximum penalties for the penetrative sexual offences against children should be as follows:

- **Sexual penetration involving a child victim under 13: 22 years' imprisonment.**
- **Sexual penetration involving a child victim 13 to under 16: 20 years' imprisonment.**
- **Sexual penetration involving a child victim 16 or over who is under the offender's care, supervision or authority: 15 years' imprisonment.**
- **Coerced sexual penetration involving a child victim under 13: 22 years' imprisonment.**
- **Coerced sexual penetration involving a child victim 13 to under 16: 20 years' imprisonment.**
- **Coerced sexual penetration involving a child victim 16 or over who is under the offender's care, supervision or authority: 15 years' imprisonment.**

Non-penetrative sexual offences against children

12.86. Western Australia currently has six non-penetrative sexual offences against children.[76] They are:

- Indecently dealing with a child under 13.[77]
- Indecently dealing with a child 13 to under 16.[78]
- Indecently dealing with a child 16 or over who is under the offender's care, supervision or authority.[79]
- Procuring, inciting or encouraging a child under 13 to do an indecent act.[80]

[76] This does not include the offence of indecently recording a child, which is addressed separately below.
[77] *Criminal Code Act Compilation Act 1913* (WA) s 320(4).
[78] Ibid s 321(4).
[79] Ibid s 324(4).
[80] Ibid s 320(5).

- Procuring, inciting or encouraging a child 13 to under 16 to do an indecent act.[81]
- Procuring, inciting or encouraging a child 16 or over who is under the offender's care, supervision or authority to do an indecent act.[82]

12.87. The offences against children under 13 have maximum penalties of 10 years' imprisonment. The offences against children 13 to under 16 have maximum penalties of 7 years' imprisonment, although this increases to 10 years' imprisonment if the child is under the offender's care, supervision or authority. The offences against children 16 or over have maximum penalties of 5 years' imprisonment.

12.88. In Chapter 7 we recommend that these offences be replaced by the following offences:

- Sexual act involving a child victim under 13.
- Sexual act involving a child victim 13 to under 16.
- Sexual act involving a child victim 16 or over who is under the offender's care, supervision or authority.
- Coerced sexual act involving a child victim under 13.
- Coerced sexual act involving a child victim 13 to under 16.
- Coerced sexual act involving a child victim 16 or over who is under the offender's care, supervision or authority.

12.89. In this section we discuss the appropriate penalties for these six offences.

12.90. The current maximum penalties for the offence of indecent dealing with a child (or the most similar offences) in Australian jurisdictions are:

- 3 years' imprisonment for a first offence or 5 years' imprisonment for subsequent offences in SA.[83]
- 7 years' imprisonment if the child is under 10, 2 years' imprisonment if the child is 10 to 15 and the offence is non-aggravated, and 5 years' imprisonment if the child is 10 to 15 and the offence is aggravated in NSW.[84]
- 10 years' imprisonment if the child is under 16 in Victoria (with a standard sentence of 4 years' imprisonment), or 5 years' imprisonment if the child is 16 or over and under the offender's care, supervision or authority.[85]
- 12 years' imprisonment if the child is under 10, 10 years' imprisonment if the child is 10 to 15, and 7 years' imprisonment if the child is 16 or over and under the offender's special care in the ACT.[86]
- 14 years' imprisonment if the child is under 10, and 10 years' imprisonment if the child is 10 to 15 in the NT.[87]
- 14 years' imprisonment in Queensland.[88]

81 Ibid s 321(5).
82 Ibid s 324(5).
83 *Criminal Law Consolidation Act 1935* (SA) s 58.
84 *Crimes Act 1900* (NSW) ss 66DC-66DE.
85 *Crimes Act 1958* (Vic) ss 39, 49D, 49E.
86 *Crimes Act 1900* (ACT) ss 61-61A.
87 *Criminal Code 1983* (NT) ss 132(2) and (4).
88 *Criminal Code 1899* (Qld) s 217.

12.91. Noting the limitations on comparing maximum penalties between jurisdictions, the Commission considers that Western Australia's penalties for non-penetrative sexual offences against children are in the mid-range of those in Australian jurisdictions.

12.92. In light of this fact, and upon consideration of the views put forward in submissions and consultations, we recommend increasing the maximum penalty for sexual act with a child under 13. We consider a maximum penalty of 12 years' imprisonment to be appropriate. We also consider this to be an appropriate penalty for the recommended offence of coerced sexual penetration of a child under 13, which is of an equally serious nature.

12.93. As noted above, we are of the view that there should be a slightly lesser penalty for offences against children 13 to under 16. In addition, we do not think that there should be a higher maximum penalty for offences committed against children who are under the offender's care, supervision or authority: the maximum penalty should be set at a sufficiently high level for this issue to be addressed as an ordinary sentencing consideration in appropriate cases. To facilitate these views, we recommend increasing the maximum penalty for the offence of sexual act with a child 13 to under 16 to 10 years' imprisonment. That should also be the maximum penalty for coerced sexual act with a child 13 to under 16, which can be an equally serious offence.

12.94. We consider that the penalty for offences committed against children who are 16 or over should be slightly less than the penalty for offences committed against children 13 to under 16. At present, the penalty for sexual act with a child 16 or over who is under the offender's care, supervision or authority is 5 years' imprisonment. Under our recommended approach, this would mean there would be a five-year disparity between the offences, which we consider too great. Consequently, we recommend increasing the maximum penalty for this offence to 7 years' imprisonment. That should also be the maximum penalty for coerced sexual act involving a child 16 or over, which can be an equally serious offence.

Recommendation

120. The maximum penalties for the non-penetrative sexual offences against children should be as follows:

- **Sexual act involving a child victim under 13: 12 years' imprisonment.**
- **Sexual act involving a child victim 13 to under 16: 10 years' imprisonment.**
- **Sexual act involving a child victim 16 or over who is under the offender's care, supervision or authority: 7 years' imprisonment.**
- **Coerced sexual act involving a child victim under 13: 12 years' imprisonment.**
- **Coerced sexual act involving a child victim 13 to under 16: 10 years' imprisonment.**
- **Coerced sexual act involving a child victim 16 or over who is under the offender's care, supervision or authority: 7 years' imprisonment.**

Indecently recording a child

12.95. The *Code* contains three offences of indecently recording a child: one for each of the two younger age groups and one for children 16 or over who are under the offender's care, supervision or authority.[89]

12.96. The maximum penalty for indecently recording a child under 13 years is 10 years' imprisonment. The maximum penalty for indecently recording a child 13 to under 16 is 7 years' imprisonment, although this increases to 10 years' imprisonment if the child is under the offender's care, supervision or authority. The maximum penalty for indecently recording a child 16 or over who is under the offender's care, supervision or authority is 5 years' imprisonment.[90]

12.97. The offence of indecent recording is very broad in scope: it can range from behaviour such as taking a photograph for indecent purposes of an unclothed toddler at the beach, to taking a photograph for indecent purposes of an unclothed child doing an indecent act which the offender has procured them to perform for the purpose of recording and distributing the photograph. In the Commission's view, the most serious instances of this offence can be just as grave as the offence of sexual act with a child. Consequently, we recommend the same penalty scheme be applied: 12 years' imprisonment where the child is under 13, 10 years' imprisonment where the child is 13 to under 16, and 7 years' imprisonment where the child is 16 or over and under the offender's care, supervision or authority.

Recommendation

121. The maximum penalties for indecently recording a child should be as follows:

- **Indecently recording a child under 13: 12 years' imprisonment.**
- **Indecently recording a child 13 to under 16: 10 years' imprisonment.**
- **Indecently recording a child 16 or over who is under the offender's care, supervision or authority: 7 years' imprisonment.**

Persistent sexual abuse offences

12.98. The *Code* currently contains one persistent conduct offence: persistent sexual conduct with a child under 16.[91] The maximum penalty for this offence is 20 years' imprisonment. As discussed elsewhere in this Report, our Terms of Reference do not permit us to review this offence.

12.99. In Chapters 7 and 8 we also recommend enacting two other persistent conduct offences:

- Persistent sexual abuse of a child 16 or over who is under the care, supervision or authority of the offender.
- Persistent sexual abuse of a vulnerable person.

12.100. In this section we discuss the appropriate penalties for these two offences.

12.101. We consider that the maximum penalty for an offence of persistent sexual abuse should be higher than the maximum penalty for a single sexual offence of the same type committed against a relevant victim. This recognises that the criminality in an offence of persistent sexual

[89] *Criminal Code Act Compilation Act 1913* (WA) ss 320(6), 321(6) and 322(6).
[90] Ibid ss 320(8), 321(8) and 322(8).
[91] Ibid s 321A.

abuse is usually greater than it is in a single offence of the same type committed against the relevant victim.

12.102. In the case of persistent sexual abuse of a vulnerable person, we are of the opinion that the maximum penalty should be 25 years' imprisonment.

12.103. However, we recognise that the penalty should not be greater than the maximum penalty for persistent sexual conduct with a child under 16. As the maximum penalty for that offence is 20 years' imprisonment and outside the Terms of Reference, we have formed our recommendation in this regard on the basis that the Government will implement its in-principle acceptance of the Royal Commission's recommendation that the maximum penalty for the offence of persistent sexual conduct with a child under 16 should be 25 years' imprisonment.[92]

12.104. For the reasons expressed above, we consider that the offence of persistent sexual abuse of a child 16 or over who is under the care, supervision or authority of the offender should have a lesser maximum penalty than the comparable offence against younger children. It should, however, have a higher maximum penalty than the maximum penalty for a single sexual offence committed against a child of that age. We recommend setting the maximum penalty for this offence at 20 years' imprisonment.

Recommendation

122. The maximum penalties for the persistent sexual abuse offences should be as follows:

- **Persistent sexual abuse of a child under 16: 25 years' imprisonment.**
- **Persistent sexual abuse of a vulnerable person: 25 years' imprisonment.**
- **Persistent sexual abuse of a child 16 or over who is under the care, supervision or authority of the offender: 20 years' imprisonment.**

Sexual offences against lineal relatives or de facto children

12.105. The *Code* contains five sexual offences against child lineal relatives or a de facto child. They are:

- Sexual penetration of a child lineal relative or a de facto child.
- Procuring, inciting or encouraging a child lineal relative or a de facto child to engage in sexual behaviour.
- Indecently dealing with a child lineal relative or a de facto child.
- Procuring, inciting or encouraging a child lineal relative or a de facto child to do an indecent act.
- Indecently recording a child lineal relative or de facto child.[93]

12.106. The maximum penalties for these offences differ from those for other sexual offences against children, in that the *Code* does not provide different maximum penalties for children under

[92] See also the discussion in the Introduction to this Chapter about the effect of the maximum penalty for the offence of presistent sexual abuse of child on the sentencing scheme for sexual offences.

[93] *Criminal Code Act Compilation Act 1913* (WA) s 329.

13. There are only two penalty levels: one for offences against children who are under 16 and one for offences against children who are 16 or over.

12.107. For the two penetrative offences, the maximum penalty for children under 16 is 20 years' imprisonment, and for children 16 or over is 10 years' imprisonment. For the other three offences, the maximum penalty for children under 16 is 10 years' imprisonment, and for children 16 or over is 5 years' imprisonment.

12.108. There are also sexual offences that a person can commit against an adult lineal relative:

- It is an offence to sexually penetrate a person 18 or over knowing that person is a lineal relative.[94]
- It is an offence for a person 18 or over to consent to sexual penetration by a person who they know is their lineal relative.[95]

12.109. The maximum penalties for the two offences against adult lineal relatives are 3 years' imprisonment.[96]

12.110. In Chapters 6 and 7 we recommend that these offences be replaced by the following offences:

- Sexual penetration of a child relative.
- Coerced sexual penetration of a child relative.
- Sexual act with a child relative.
- Coerced sexual act with a child relative.
- Indecently recording a child relative.
- Sexual penetration by an adult involving an adult relative victim.
- Coerced sexual penetration by an adult involving an adult relative victim.
- Sexual act by an adult involving an adult relative victim.
- Coerced sexual act by an adult involving an adult relative victim.

12.111. This section discusses the maximum penalties for the above offences.

12.112. In the previous sections, we have recommended that the penalty for children who are 16 or over should be less than for children under that age. This is in recognition of the fact that while sexual offences against such children are still undoubtedly serious, they are distinguishable in moral severity from offending against younger children who, by virtue of their age, are less likely to be able to guard themselves against sexual exploitation and so are deserving of greater legal protection. We do not think that this reasoning applies in the context of sexual offences against child relatives. We consider all sexual offences against children that are committed in the context of a family relationship to be equally abhorrent and deserving of the same maximum penalty.

12.113. We recommend that the maximum penalties for offences against child relatives be set at the same level as the highest maximum penalties for other child sexual offences of the same nature. For example, the maximum penalty for sexual penetration of a child relative should be the same as the maximum penalty for sexual penetration of a child under 13 (22 years' imprisonment); and the maximum penalty for sexual act with a child lineal relative or de facto

94 Ibid s 329(7).
95 Ibid s 329(8).
96 Ibid s 329(7) and (8).

child should be the same as the maximum penalty for sexual act with a child under 13 (12 years' imprisonment).

12.114. We recommend that the maximum penalties for all of the offences committed by adults against adult lineal relatives be set at 3 years' imprisonment. We consider that this penalty reflects the place that these offences hold in the scale of seriousness of sexual offences and that the offences do not require proof of non-consent.

Recommendations

123. The maximum penalties for the offences against child relatives should be as follows:

- **Sexual penetration of a child relative: 22 years' imprisonment.**
- **Coerced sexual penetration of a child relative: 22 years' imprisonment.**
- **Sexual act with a child relative: 12 years' imprisonment.**
- **Coerced sexual act with a child relative: 12 years' imprisonment.**
- **Indecently recording a child relative: 12 years' imprisonment.**

124. The maximum penalties for each of the offences by adults against adult lineal relatives should be 3 years' imprisonment.

Sexual offences against vulnerable people

12.115. Western Australia currently has five sexual offences against incapable persons. They are:

- Sexual penetration of an incapable person.
- Procuring, inciting or encouraging an incapable person to engage in sexual behaviour.
- Indecently dealing with an incapable person.
- Procuring, inciting or encouraging an incapable person to do an indecent act.
- Indecently recording an incapable person.[97]

12.116. The maximum penalty for sexual penetration of an incapable person is 14 years' imprisonment for the basic offence and 20 years' imprisonment where the victim is under the care, supervision or authority of the offender.[98] Those same penalties apply to the offences of procuring, inciting or encouraging an incapable person to engage in sexual behaviour.[99] The maximum penalty for the other three offences is 7 years' imprisonment for the basic offence and 10 years' imprisonment where the victim is under the care, supervision or authority of the offender.[100]

12.117. In Chapter 8 we recommend that these offences be replaced by the following offences:

- Sexual penetration involving a vulnerable person.
- Coerced sexual penetration involving a vulnerable person.

97 Ibid s 330.
98 Ibid s 330(2) and (7).
99 Ibid s 330(3) and (7).
100 Ibid s 330(2) and (7).

- Sexual act involving a vulnerable person.
- Coerced sexual act involving a vulnerable person.
- Indecently recording a vulnerable person.

12.118. In Chapter 8 we also recommend that there be a new offence of grooming a vulnerable person to be involved in a sexual offence. In this section we discuss the appropriate penalties for these six offences.[101]

12.119. As noted above, we are of the view that there should not be a higher maximum penalty for offences which are committed against people who are under the offender's care, supervision or authority. This is just one aggravating factor which is relevant to the sentencing determination and should not be treated differently to other aggravating factors, such as the fact that the offender was in company or threatened the victim-survivor. However, it is important that the maximum penalty is set at a sufficiently high level for this issue to be addressed as a sentencing consideration in appropriate cases. Consequently, we recommend that the maximum penalties for these offences be set at the higher of the currently available levels: 20 years' imprisonment for the penetrative offences and 10 years' imprisonment for the non-penetrative offences and the indecent recording offence. This will provide judges with an appropriately wide discretion to consider all relevant sentencing factors in determining the penalty, including but not limited to whether the vulnerable person was under the offender's care, supervision or authority.

12.120. We note that these are the same maximum penalty levels that we have recommended for offences committed against children 13 to under 16. We consider this to be appropriate, as both categories of people are highly susceptible to sexual exploitation and are considered by the criminal law to be incapable of consenting to sexual activity.

12.121. We do not make any recommendation with respect to the maximum penalty for the recommended offence of grooming a vulnerable person to be involved in a sexual offence. As noted in Chapter 8, we are of the view that this offence should be framed in similar terms to the child grooming offence (if enacted), but should apply to cases where the person groomed was a vulnerable person rather than a child. We are similarly of the view that the penalty for this offence should be the same as the penalty for any child grooming offence that is enacted.

[101] In Chapter 8 we also recommend the enactment of an offence of persistent sexual abuse of a vulnerable person. We discuss the appropriate penalty for this offence above.

Recommendation

125. The maximum penalties for the offences against vulnerable people should be as follows:

- **Sexual penetration of a vulnerable person: 20 years' imprisonment.**
- **Coerced sexual penetration of a vulnerable person: 20 years' imprisonment.**
- **Sexual act with a vulnerable person: 10 years' imprisonment.**
- **Coerced sexual act with a vulnerable person: 10 years' imprisonment.**
- **Indecently recording a vulnerable person: 10 years' imprisonment.**

Sexual servitude and deceptive recruiting for commercial sexual service offences

12.122. Western Australia's sexual servitude and deceptive recruiting for a commercial sexual service offences are described in the Discussion Paper and Chapter 6. We do not recommend any changes to these offences.

12.123. The maximum penalties for the two sexual servitude offences are 14 years' imprisonment, or 20 years' imprisonment if the victim-survivor is a child or vulnerable person.[102] In the sexual servitude provisions, 'child' means a person under 18. The maximum penalty for deceptive recruiting for a commercial sexual service is 7 years' imprisonment, or 20 years' imprisonment if a child or vulnerable person is recruited.[103]

12.124. In the other Australian jurisdictions which have sexual servitude offences, the maximum penalty for the base offences is 15 years' imprisonment.[104] In the ACT and NSW there are aggravated versions of the offences available where the offence is committed against a child, carrying maximum penalties of 19 and 20 years' imprisonment, respectively.[105]

12.125. In the ACT the maximum penalty for the deceptive recruiting offence is 7 years' imprisonment for the base offence and 9 years' imprisonment for the aggravated offence.[106] In the Northern Territory the maximum penalty is 10 years' imprisonment.[107] The offence does not exist in the other State jurisdictions.

12.126. Consistent with the maximum penalties in other Australian jurisdictions which have these offences, we recommend increasing Western Australia's base penalty for the sexual servitude offences to 15 years' imprisonment, and the base penalty for the deceptive recruiting offence to 10 years' imprisonment. We recommend retaining the current aggravated circumstances and increasing the penalties to 22 years' imprisonment, in line with our recommended reform to the maximum penalties for sexual offences involving children under 13. Consistent with our recommendations in Chapter 8, however, the term 'incapable person' should be replaced with the term 'vulnerable person'.

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102 *Criminal Code Act Compilation Act 1913* (WA) ss 331B-C.

103 Ibid s 331D.

104 *Crimes Act 1900* (ACT) ss 79-80; *Crimes Act 1900* (NSW) ss 80D-80E; *Criminal Code 1983* (NT) ss 202B-202D; *Criminal Law Compilation Act 1935* (SA) s 66; *Crimes Act 1958* (Vic) ss 53B, 53C, 53F.

105 *Crimes Act 1900* (ACT) s 79; *Crimes Act 1900* (NSW) s 80D.

106 *Crimes Act 1900* (ACT) s 80.

107 *Criminal Code Act 1983* (NT) s 202D.

Recommendation

126. The base maximum penalties for the sexual servitude and deceptive recruiting for commercial sexual services offences should be as follows:

- **Sexual servitude: 15 years' imprisonment.**
- **Sexual servitude where the victim-survivor is a child or a vulnerable person: 22 years' imprisonment.**
- **Conducting a business involving sexual servitude: 15 years' imprisonment.**
- **Conducting a business involving sexual servitude where the victim-survivor is a child or a vulnerable person: 22 years' imprisonment.**
- **Deceptive recruiting for commercial sexual service: 10 years' imprisonment.**
- **Deceptive recruiting for commercial sexual service where the victim-survivor is a child or a vulnerable person: 22 years' imprisonment.**

Should the circumstances in which a penalty is mandated be changed?

12.127. A sentence for an offender is usually determined by a judge or magistrate after taking into account the maximum penalty for the relevant offence, the facts, and all aggravating and mitigating factors. From time to time, however, Parliament chooses to mandate specific penalties in legislation.

12.128. The *Code* currently mandates specific penalties that must be imposed if certain sexual offences[108] are committed during the course of an aggravated home burglary:

- If the offender is an adult, the court must impose a sentence that is at least 75% of the specified maximum penalty.[109]
- If the offender is a juvenile, the court must impose a term of imprisonment of at least three years, must not suspend the term of imprisonment and must record a conviction against the offender.[110]

12.129. The Second Reading Speech of the Bill which introduced these mandatory penalties explained the reason for their introduction as follows:

> Those who have been present at home when their home is invaded are at risk of assault and harm, even sexual assault, and of being maimed or killed. Fortunately, such instances are uncommon. Nevertheless, the community views with disquiet the frequency of home burglaries and is understandably alarmed when offences of violence occur in the course of those burglaries. Citizens are also concerned that

[108] The relevant offences are: sexual offences against a child under 13 (s 320); sexual offences against a child 13 to under 16 (s 321); aggravated indecent assault (s 324); sexual penetration without consent (s 325); aggravated sexual penetration without consent (s 326); sexual coercion (s 327); aggravated sexual coercion (s 328); and sexual offences against an incapable person (s 330).

[109] *Criminal Code Act Compilation Act 1913* (WA) ss 320(7); 321(14); 324(3); 325(2); 326(2); 327(2); 328(2); 330(10).

[110] Ibid ss 320(8); 321(15); 324(4); 325(3); 326(3); 327(3); 328(3); 330(11).

> those who perpetrate such outrages appear not to be punished with sufficient severity by the courts.[111]

12.130. At the same time as Parliament introduced these penalties, it also introduced mandatory sentencing requirements for other violent offences committed during home burglaries, including murder, manslaughter, attempted unlawful killing, and aggravated grievous bodily harm.[112]

12.131. In the Discussion Paper we noted that mandatory sentencing has been widely criticised by the judiciary and other bodies, as it:

- Arbitrarily and unfairly limits a judge's right to impose an appropriate sentence based on the unique circumstances of the case.
- Provides too little scope for judges to distinguish between the least and most serious examples of an offence. For example, for an offence of aggravated sexual penetration without consent committed in the course of an aggravated home burglary, the permissible difference between the sentences for a case in the least serious category and a case in the worst category is only five years' imprisonment.
- Disproportionately impacts particular groups in society, including Aboriginal and Torres Strait Islander Peoples, juveniles and people with a mental illness or cognitive impairment.
- Is an ineffective deterrent.

12.132. In the Discussion Paper we sought views on whether these mandatory sentencing provisions should be retained or reformed in any way. We also sought views on any other circumstances in which mandatory sentencing provisions should be used.[113]

Stakeholders' views

12.133. In the stakeholder submissions and consultations, there was widespread disapproval of mandatory sentencing and strong support for judicial discretion in sentencing.

12.134. For example, knowmore submitted that:

> In knowmore's view, the sentences imposed for sexual offences against children often do not adequately reflect the seriousness of the offence. knowmore supports measures to ensure that appropriate sentences are imposed, which in many cases, will mean increased sentences. At the same time, knowmore considers that sentencing measures must be consistent with human rights, evidence-based, cognisant of the complex considerations that may arise in particular cases, and preserve judicial discretion to ensure that appropriate sentences can be imposed that properly recognise the circumstances of each case. In light of these factors, knowmore does not consider mandatory sentencing to be an appropriate or effective approach.
>
> We note that complex sentencing considerations can arise in many cases, including where a survivor is convicted of an offence. … Survivors are presently overrepresented in prison and mandatory sentencing is likely to worsen this problem. knowmore supports many survivors in prison and holds significant concerns as to the

[111] Western Australia, *Parliamentary Debates*, Legislative Council, 24 March 2015, 1917-19 (The Hon. M Mischin, Attorney General).

[112] *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA).

[113] Discussion Paper Volume 2, [16.69]-[16.81].

> risk of further harm to survivors in the detention environment. The Royal Commission has addressed these issues at length in Volume 5 of its Final Report.
>
> Where a survivor is convicted of a criminal offence, their experience of child sexual abuse and need for appropriate support should be important considerations in sentencing. Mandatory sentencing significantly interferes with the ability of the sentencing judge to give appropriate weight to these factors, and other relevant factors that may arise in the particular case.[114]

12.135. In its submission, knowmore also noted that sentencing research conducted on behalf of the Royal Commission had found that:

> The criminological evidence is that mandatory sentences are not as effective as deterrents, do not reduce crime rates and generally operate in such a way that discriminates against certain minority groups. In terms of consistency, rather than leniency of sentences, mandatory sentencing has the effect of treating unlike cases as like, creating a form of unfairness analogous to the situation where there is too much discretion and where like cases are treated differently.[115]

12.136. In the consultations we conducted with the Legal Expert Group, in Broome and with the ALS, multiple lawyers commented on cases they were aware of in which mandatory minimums caused injustice by imposing a disproportionately high sentence. Lawyers also commented that mandatory minimums significantly reduce incentives that otherwise exist to plead guilty, causing matters to go to trial that otherwise may not have done so.

The Commission's view

12.137. As noted in the Discussion Paper, our Terms of Reference do not allow us to comment on mandatory sentencing generally. We can only address the sentencing requirements for the sexual offences under review. However, based on the submissions we received and consultations we conducted, we recognise that there is a significant level of opposition to mandatory minimum penalties within the community.

12.138. In the Discussion Paper we noted that if greater flexibility and discretion is thought to be desirable, a variety of ways of redressing this issue exist in the context of sexual offences, including by:

- Repealing the mandatory sentencing provisions and leaving it to the sentencing judge to determine the extent to which an offence was aggravated by the fact that it was committed during an aggravated home burglary.
- Replacing the mandatory sentencing provisions with new aggravated versions of the relevant sexual offences that apply to sexual offences committed during an aggravated home burglary.
- Reducing the length of the mandatory sentencing provisions to give sentencing courts greater scope for taking into account factors relevant to the offender.

[114] Email Submission E25 (knowmore).

[115] A Freiberg, H Donnelly and K Gelb, 'Sentencing for Child Sexual Abuse in Institutional Contexts' (July 2015) 189 www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Sentencing%20for%20Child%20Sexual%20Abuse%20in%20Institutional%20Context%20-%20Government%20responses.pdf, quoted in ibid.

- Limiting the application of mandatory penalties to certain classes of offender, or providing that there are circumstances in which the penalties do not apply (such as where the offender has a severe mental health problem or cognitive impairment).

12.139. None of the submissions or comments made during consultations suggested that any of the above options should be used, other than the repeal of mandatory sentencing provisions.

12.140. We note that no Australian State or Territory except the NT has mandatory minimum penalties for a single sexual offence.[116] The NT's mandatory sentencing provision for sexual offences obliges the sentencing judge to impose either a term of actual imprisonment or a term of imprisonment which is suspended partly but not wholly.[117]

12.141. The NT provision is distinguishable from Western Australia's mandatory penalties for sexual offences, which not only oblige the sentencing judge to impose a term of imprisonment, but to impose one which is at least 75% of the maximum penalty. The Western Australian provisions also do not allow the option of a partly suspended term of imprisonment.

12.142. By contrast, in NSW, committing a sexual offence in the course of a home burglary is considered to be an aggravating circumstance, which increases the maximum penalty which may be imposed.[118] We discuss aggravating circumstances in Chapter 9.

12.143. The Commission recognises that sexual offences committed during the course of home burglaries are a very serious example of sexual offending. However, we also consider that there are various other serious ways in which sexual offending can be committed. Several of these are reflected in the statutory aggravating circumstances listed in sections 221 and 319(1) of the *Code*, including:

- Committing a sexual offence while armed with a dangerous weapon.
- Committing a sexual offence while in company with another person.
- Doing bodily harm in the course of committing a sexual offence.
- Doing an act, in the course of committing a sexual offence, which is likely to seriously and substantially degrade or humiliate the victim.
- Threatening to kill the victim in the course of committing a sexual offence.
- Committing a sexual offence in the presence of a child.

12.144. Rather than there being mandatory minimum penalties for sexual offences committed during aggravated home burglaries, we recommend that committing a sexual offence during the course of an aggravated home burglary should be treated as a statutory aggravating circumstance. We consider that this provides appropriate recognition of the fact that this is a very serious example of a manner in which a sexual offence can be committed. However, we do not consider the fact that a sexual offence occurred during the commission of an aggravated home burglary necessarily elevates it in seriousness (compared to other ways in which sexual offences can be committed) such that the current mandatory minimum penalties are justified.

12.145. We note that this recommendation (to treat the fact that a sexual offence is committed during the course of an aggravated home burglary as a statutory circumstance of aggravation rather than a circumstance mandating a minimum penalty) should be considered in the context of

[116] Queensland has mandatory minimum penalties for repeat serious child sex offences: see *Penalties and Sentences Act 1992* (Qld) s 161E.

[117] *Sentencing Act 1995* (NT) s 78F.

[118] *Crimes Act 1900* (NSW) s 61J(2)(h).

the various other recommendations we make in this Chapter, which include increasing the maximum penalties for several offences and enacting rebuttable sentencing presumptions (see below). We consider that the combined effect of these recommendations will be to treat sexual offences committed during the course of aggravated home burglaries with appropriate severity.

Recommendation

127. The provisions mandating that specific penalties must be imposed if a sexual offence is committed during an aggravated home burglary should be repealed. The fact that a sexual offence is committed during an aggravated home burglary should instead be added to the list of statutory aggravating circumstances in section 319(1) of the *Code*.

Should rebuttable sentencing presumptions be introduced?

12.146. One potential problem with mandatory sentencing regimes is that there may be exceptional cases in which the mandatory sentence is not justified. To address this concern, it would be possible to instead enact rebuttable sentencing presumptions. These provide that a certain sentence should ordinarily be imposed on an offender, yet leave scope for judges to avoid imposing such a sentence in exceptional circumstances.

12.147. Such an approach has been taken in Victoria, where some serious sexual offences, such as rape and sexual penetration of a child under 12, are defined as Category 1 offences. A court must ordinarily impose a sentence of imprisonment on an adult who is convicted of a Category 1 offence.[119] There are, however, limited circumstances (which relate to offenders with impaired mental functioning) in which this need not occur.[120]

12.148. A Bill of this nature is also currently before the Tasmanian Parliament. The Bill proposes minimum penalties ranging from 2 to 4 years (in the context of the Tasmanian maximum penalty of 21 years) for certain child sex offences. However, it permits a judge not to impose the minimums for juvenile offenders, certain offenders with impaired mental functioning, or if the judge determines there are other exceptional circumstances.[121]

12.149. Similarly, in New Zealand an offender convicted of sexual violation must be sentenced to imprisonment, unless – having regard to the particular circumstances of the person convicted and the particular circumstances of the offence, including the nature of the conduct constituting it – the court thinks that the person should not be sentenced to imprisonment.[122]

12.150. We sought views on whether rebuttable sentencing presumptions should be used in relation to the *Code's* sexual offences.[123] We did not receive any comments suggesting that rebuttable sentencing presumptions should be used for sexual offences in Western Australia either in written submissions or during consultations.

[119] *Sentencing Act 1991* (Vic) s 5(2G).
[120] See ibid s 5(2GA).
[121] The *Sentencing Amendment (Mandatory Sentencing) Bill 2022* (Tas).
[122] *Crimes Act 1961* (NZ) s 128B. The offence of sexual violation is New Zealand's version of the penetrative sexual offence.
[123] Discussion Paper Volume 2, [16.82]-[16.85].

The Commission's view

12.151. Rebuttable sentencing presumptions are not commonly used in Western Australia sentencing laws, although they are used for sentencing offenders who repeatedly breach family violence restraining orders.[124] When sentencing a repeat offender under the *Restraining Orders Act 1997* (WA) a court must impose a penalty that is or includes imprisonment or detention, unless it would be clearly unjust to do so given the circumstances of the offence or the person, and the offender is unlikely to be a threat to the person protected by the restraining order or the community generally.[125]

12.152. Although rebuttable sentencing presumptions provide sentencing judges with greater flexibility than mandatory minimum provisions, they are still relatively rigid and thus subject to many of the same criticisms that apply to minimum mandatory penalties.

12.153. As we observed earlier in this Chapter, the law developed and applied by courts in Western Australia is that a term of immediate imprisonment will be imposed for sexual penetration without consent and sexual offending against children, unless there are 'exceptional circumstances'[126] or 'an unusual and exceptional combination of mitigating factors'.[127] These principles were repeated in the recent case of *Western Australia v Rayapen*, in which the Court of Appeal said:

> The sentencing judge in the present case was correct to conclude that he could only exercise mercy, by suspending [the appellant's] term of imprisonment, if there were exceptional circumstances based on a proper evidential foundation.[128]

12.154. However, we note that this principle is not stated in the *Code*. The *Code* simply provides that the maximum penalty for each of these offences is a term of imprisonment (the length of which varies depending on the offence in question). By operation of the various provisions of the Sentencing Act, all sentencing options falling beneath a term of imprisonment are then available to a sentencing judge. This may provide members of the public with an inaccurate view as to the type of sentence that a person who commits this type of offence is likely to receive.

12.155. The Commission believes that the law should be easily accessible to all members of the community, not just lawyers and judicial officers. We consider that inserting the applicable law into the *Code* would have an educative effect even as it denounces the conduct in question.

12.156. We therefore recommend that Parliament enact a provision giving effect to the common law principle that a term of immediate imprisonment will be imposed for the most serious sexual offences, unless there are exceptional circumstances. In our view this provision should apply to the following offences:

- All penetrative sexual offences, other than the offence of obtaining sexual penetration by fraud.
- All persistent sexual abuse offences.
- All sexual servitude offences.

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[124] *Restraining Orders Act 1997* (WA) s 61A.
[125] Ibid s 61A (4)-(6).
[126] *Western Australia v Syred* [2020] WASCA 185, [27].
[127] *Western Australia v Shephard* [2018] WASCA 140, [44].
[128] *Western Australia v Rayapen* [2023] WASCA, [206].

12.157. We note that we have excluded obtaining sexual penetration by fraud from the scope of this recommendation. This is not because we consider the offence not to be serious: such conduct can constitute a serious violation of a person's sexual autonomy. However, it is capable of being committed in such a wide range of circumstances that we consider a rebuttable presumption of immediate imprisonment to be inappropriate. Due to the similarly wide range of circumstances in which the offence of grooming a vulnerable person for sex can be committed, we also do not recommend that it have a rebuttable presumption of immediate imprisonment.

12.158. We do not recommend that the *Code* include a definition of 'exceptional circumstances'. This is a phrase which is used often in criminal law, and it is well understood by judicial officers, lawyers and the public.

12.159. In deciding whether or not to make this recommendation we have considered only whether the presumption should apply to the offences within the Terms of Reference. The recommendation does not expressly, or by implication, infer that a presumption of imprisonment exists, should exist or does not already exist with respect to other offences not included in the Terms of Reference. If this recommendation is implemented this could be made clear by the terms of the relevant amendment.

Recommendation

128. The *Code* should provide that a term of immediate imprisonment will be imposed for the following offences, unless there are exceptional circumstances:

- **All penetrative sexual offences, other than the offence of obtaining sexual penetration by fraud.**
- **All persistent sexual abuse offences.**
- **All sexual servitude offences.**

Should Western Australia reform sexual offence penalties in other ways?

12.160. In the Discussion Paper we sought views on whether any other changes should be made to the penalty provisions for sexual offences.

12.161. In the Legal Expert Group consultation there was support for providing a much greater discount on sentence to people who plead guilty. Currently section 9AA of the Sentencing Act caps the maximum discount that a judge can give a person in recognition of their plea of guilty to 25%. The views expressed were that accused people should be encouraged to plead guilty to prevent victim-survivors from having to give evidence at trial, and to provide victim-survivors with greater satisfaction than may be achieved by a verdict of guilty obtained after trial. It was maintained that these aims apply particularly to sexual offences in which there is a greater proportion of particularly vulnerable victim-survivors compared to other offences. It was said that the current law incentivises accused people to go to trial and that this could be ameliorated if the discount for pleas of guilty were increased.

12.162. The Commission notes the weight of these arguments but considers it beyond our Terms of Reference to recommend a change to section 9AA of the Sentencing Act, which applies to sentencing for all criminal offences, not just sexual offences.

12.163. In the consultation with WA Police there was some support expressed for the Victorian standard sentencing scheme.[129] We acknowledge these views but note that the Victorian scheme applies to a wide range of offences. We consider it would be inappropriate for us to recommend that standard sentences be introduced for sexual offences in Western Australia when they would represent a significant change to sentencing for all other kinds of offences.

[129] The consultees expressed their views as police officers. They did not speak on behalf of the WA Police

13. Structure of Chapter XXXI of the *Code*

Chapter overview

This Chapter considers the structure of Chapter XXXI of the *Code* and the position of offences in the *Code*.

Structure of Chapter XXXI

13.1. Most of the sexual offences we have reviewed in this project are contained in Chapter XXXI of the *Code*. That Chapter currently has the following structure:

- Interpretation provisions.
- Sexual offences against children (grouped together in sections dealing with discrete age groups).
- Sexual offences against adults divided by the nature and/or seriousness of the conduct.
- Sexual offences against lineal relatives and de facto children.
- Sexual offences against incapable persons.
- Sexual servitude offences.

13.2. In the Discussion Paper we sought views on two issues relating to this structure:[1]

- How the sexual offences against children should be grouped in the *Code* (for example, whether they should be grouped by the age of the child or by the nature of the offence).
- Whether sexual offences against adults or children should appear first in the *Code*.

Stakeholders' views

13.3. The issues relating to the structure of Chapter XXXI were not addressed in detail by any stakeholders.

13.4. Legal Aid did not support any structural changes to Chapter XXXI: it submitted that the sexual offences against children should remain grouped in the *Code* as they presently are.[2] Similarly, the ODPP submitted that there is no demonstrable need for major structural reform, including altering the age categories for sexual offences against children.[3] No reasoning was given for these positions.

The Commission's view

13.5. The Commission does not consider it appropriate to formally recommend any specific structural amendments to Chapter XXXI of the *Code*. In reaching this view, we acknowledge that a range of considerations relating to the *Code's* integrity must inform any decisions to

1 Discussion Paper Volume 2, [17.3]-[17.4].
2 Portal Submission P41 (Legal Aid).
3 Email Submission E19 (ODPP).

amend its structure. We are cognisant that there are sexual offences in the *Code* that are both beyond the scope of the Terms of Reference and might appropriately be included in any consideration of structural amendments to the *Code*. For example, sections 204A and 204B, which concern offensive material and indecent matter in relation to children under 16, are presently located in Chapter XXII of the *Code*.

13.6. We also note that we received limited submissions addressing the structure of the *Code*.

13.7. However, the Commission recognises that the amendments recommended in this Report will likely require some restructuring of the *Code* should they be implemented. In that context, we suggest a way of implementing the Commission's recommended amendments that might augment the *Code's* readability.

13.8. In terms of the first structural issue, it would be logical to group sexual offences against children according to the nature of the conduct, with the various ages dealt with as penalty matters within the provision. For example, the offences might be appropriately grouped as follows:

- Persistent sexual abuse.
- Sexual penetration involving a child victim.
- Sexual acts involving a child victim.

13.9. This approach would allow a person reading an index to the *Code* to see various forms of conduct which are prohibited against children, rather than a list of age groups, which is less descriptive of the prohibited conduct. It would also appropriately label convicted offenders by identifying the nature of the conduct they had committed, instead of simply the fact that they had offended against a child of a certain age.

13.10. In regard to the second structural issue, it might also be appropriate for sexual offences against adults to precede those against children in the *Code*. As we observed in the Discussion Paper, each of the relevant chapters of the ACT, NSW and Victorian legislation set out sexual offences against adults before setting out sexual offences against children.[4]

Position of offences in the *Code*

13.11. At present, most of the sexual offence provisions are contained in Chapter XXXI of the *Code*. That Chapter is contained in Part V of the *Code*, which includes homicide offences, assaults, threat offences, stalking and various other offences against the person.

13.12. In the Discussion Paper we noted that some other jurisdictions had instead grouped sexual offences in their own part of the relevant legislation, and we sought views on whether this should be done in Western Australia.[5]

13.13. In the Discussion Paper we also asked whether, if the offences set out in sections 186, 191 and 192 are to be retained, they should be moved to a different part of the *Code* or a different Act (such as the Prostitution Act).

[4] Discussion Paper Volume 2, [17.4].
[5] Ibid [17.5]-[17.8].

Stakeholders' views

13.14. Few stakeholders made submissions on the position of the offences in the *Code*. Legal Aid submitted that all offences should remain in Part V of the *Code*,[6] while Communities stated that it held no position in relation to the placement of sexual offences in the *Code*.[7]

13.15. In relation to sections 186, 191 and 192, there was some support for moving those offences to Chapter XXXI of the *Code* if they were retained. For example, knowmore submitted:[8]

> A number of sexual offences against children are currently grouped under Part IV of the Code, named 'Acts injurious to the public in general', and specifically under Chapter XXII of the Code, named 'Offences against morality'. These are not appropriate places in the Code for sexual offences against children. Traditionally, these classifications have been used to describe criminalised behaviours between consenting adults, based on traditional (and often, patriarchal and heteronormative) values. When applied to sexual offences against children, these classifications are euphemistic — they imply that the offences are committed only against abstract concepts (morality or the public in general), obscuring the gravity of offences committed against children. This does not reflect current community standards and is not appropriate in a modern criminal legal system.

13.16. In contrast, the ODPP submitted that if the offences in sections 186 and 191 of the *Code* are retained, those offences should be moved to the Prostitution Act.[9]

The Commission's view

13.17. For the same reasons we expressed in relation to the *Code's* structure, the Commission does not consider it appropriate to formally recommend prescriptive changes to the position of offences in the *Code*.[10]

13.18. However, in light of our other recommendations in this Report, we consider that all of the sexual offences in the *Code* might more logically be grouped under a new Part in the *Code*, titled Sexual Offences. In addition to the offences currently in Chapter XXXI, this Part could include the child exploitation offences currently in Chapter XXV and the intimate image offences in Chapter XXVA. If this is done, the Government may wish to consider grouping the indecent recording offences with the intimate image offences (rather than with the sexual offences against children, as is currently the case).

13.19. It would also be appropriate to enact any new sexual offences under this Part: for example, the offences of obtaining sexual penetration by fraud and obtaining a sexual act by fraud (which are presently dealt with in section 192 of the *Code*).[11]

13.20. The Commission observes that a new Sexual Offences Part would allow for the use of divisions, consistently with the rest of the *Code's* structure. For example, one possible approach might divide the Part according to:

- General provisions.

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6 Portal Submission P41 (Legal Aid).

7 Email Submission E24 (Communities).

8 Email Submission E25 (knowmore).

9 Email Submission E19 (ODPP).

10 See above [14.5].

11 The Commission's view that section 192 of the *Code* should be repealed and new offences addressing these matters be enacted is discussed in Chapter 6.

- Definitions of relevant terms (eg, sexual penetration).
- Meaning of consent.
- Defences specific to sexual offences, including mistaken belief in consent, mistaken belief in age and similar age.
- Sexual offences against adults.
- Sexual offences against children.
- Sexual offences against relatives.
- Sexual offences against vulnerable people.
- Sexual servitude and deceptive recruiting offences.
- Child exploitation material offences.
- Intimate image offences.

13.21. We have recommended repealing the offences in sections 186 and 191 of the *Code*,[12] and so have not included these offences in our proposed structure. If any aspects of these offences are to be retained, we are of the view that they would be better placed in the Prostitution Act, given they relate to the regulation of sex work. As such they should be considered and addressed in the context of other laws specifically aimed at the sex work industry. A detailed consideration of that issue is beyond the scope of the Terms of Reference.

[12] See Chapters 6 and 7.

14. Implementation and monitoring

Chapter overview

This Chapter considers the processes that should accompany any legal reforms. It makes recommendations about 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.

What education and training should be provided?

14.1. 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]

14.2. 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]

14.3. 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.

14.4. In the Discussion Paper we outlined various recommendations for education and training that have been made in other Australian jurisdictions and sought views on whether we should make any similar recommendations in the Western Australian context.[5]

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1 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.26]; see also [1.30]; [1.37]-[1.40]; Background Paper, Part 3.3.

2 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.27]-[10.28] (citations omitted).

3 Ibid [1.31]-[1.36]; Background Paper, Part 2.

4 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.30], citing J Temkin and B Krahé, S*exual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 1.

5 Discussion Paper Volume 1, [8.3]-[8.10].

Stakeholders' views

14.5. Submissions frequently emphasised the importance of education and training. Various stakeholders supported specific training for those working in the criminal justice system, as well as broader community education on consent and sexual violence.

14.6. WLSWA submitted that law reform must be accompanied, if not driven by, community education; and that a failure to establish a concurrent public awareness and education campaign further harms victim-survivors. WLSWA referred the Commission to research demonstrating a 'knowledge gap' between the legal content of progressive sexual violence laws and perceptions of those laws by community members and professionals in the sexual violence sector.[6]

14.7. Several submissions from individuals suggested that the Commission's recommendations should seek to strengthen the bi-directional relationship between community education and the law, in that people who receive sexual violence education are better placed to make decisions as jurors and to interact with victim-survivors of sexual violence. CWSW also recognised an aspect of this relationship in its submission, suggesting that if myths about sexual violence exist in the community, it is reasonable to assume their existence in a courtroom. Integrating principles from community education into the law and vice versa will, it was submitted, assist in creating a unified response to sexual violence across the law and society.[7]

14.8. Submissions also referred to several key community education programs in Western Australia, including a program provided by Legal Aid, advice provided by UWA and the DrYES program run by the Australian Medical Association. Those programs were described as generally adopting an affirmative consent model, which emphasises the need for all parties to request and provide consent to sexual activity, as well as a strong focus on situations which negate consent (such as extreme intoxication and lack of consciousness or cognitive ability).[8] It was suggested that juror education or any specific sexual offending training should integrate these principles, given their congruence and community acceptance.

14.9. A number of stakeholders supported education programs for participants in the criminal justice system, such as the programs recommended by the NSWLRC and VLRC. For example, AFLSWA and Communities said judges, criminal defence lawyers, prosecutors and police should receive education on the reforms' objectives and how the reforms change the law. Communities suggested the education program should include content on:[9]

- The nature and prevalence of sexual violence, including its gendered nature.
- The effects of trauma and how it affects victim-survivor responses (including the freeze response).
- The effects of intoxication on behaviour and memory.
- How to reduce the risk of further trauma for victim-survivors.

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6 Portal Submission P46 (WLSWA); Wendy Larcombe et al., '"I Think It's Rape and I Think He Would Be Found Not Guilty": Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social & Legal Studies* 611. See also Portal Submission P57 (CWSW).

7 Portal Submission P57 (CWSW).

8 Legal Aid also submitted that community education should focus on the importance of mutuality and circumstances in which someone is incapable of providing consent, including intoxication and impairment: Portal Submission P41 (Legal Aid).

9 See also Portal Submission P27 (AFLSWA) and Portal Submission P46 (WLSWA).

- Particular effects of sexual violence on certain groups of people, including Aboriginal and Torres Strait Islander Peoples, people from culturally and linguistically diverse backgrounds, people with physical and/or cognitive disability, young people and LGBTIQA+ people.
- Barriers to disclosure and reporting sexual violence.
- Identifying and challenging misconceptions, assumptions and myths about sexual violence.
- Best practice, trauma-informed ways to communicate with complainants.
- Ethical and trauma-informed communication with and questioning of victim-survivors of sexual violence, with consideration of diverse groups.
- Alternative arrangements for giving evidence, and special hearings for children and people with physical and/or cognitive disabilities.
- The therapeutic treatment order system.
- The intersection of sexual violence with intimate partner violence and family and domestic violence.

14.10. The CWSW and WLSWA both highlighted the importance of criminal justice system stakeholders (including police, prosecutors, court staff, judges and interpreters) receiving specialist training in order to provide trauma-informed and culturally sensitive responses. WLSWA further emphasised this need in the context of police responses to intimate partner sexual violence, recommending investment in police systems and processes to cultivate both cultural change and competency-based, trauma-informed responses to victim-survivors.

14.11. The ODPP also emphasised that if jury directions are to be legislated, prosecutors and defence counsel should be trained on how to proactively and discerningly request the directions so that their effectiveness is maximised.

14.12. Beyond the criminal justice system, submissions were supportive of broader community education programs, including consent education in schools (which is to be mandated in Western Australia in 2024). The Commissioner for Children and Young People highlighted the crucial need for children and young people to understand the issue of consent, and what does and does not constitute consent, through education commencing at an early age.[10]

14.13. Presently, the Departments of Communities and Education are partnered with Starick Services Inc. in delivering the Respectful Relationships program across public schools in Western Australia. In its submission, NASASV referred approvingly to steps taken by the Australian Curriculum Assessment and Reporting Authority and women's safety ministers to enshrine consent and respectful relationships education in the national curriculum. NASASV also identified the need for those developing state curricula to increase the focus on sexual violence prevention and on how to negotiate affirmative consent.

14.14. NASASV further suggested that the specialist sexual assault sector is best placed to deliver initiatives designed to prevent sexual violence, noting that Australian sexual assault services have been supporting schools to implement respectful relationships education for more than a decade. NASASV noted that these services have a key role to play in supporting teachers to deliver consent education and other critical content (such as the influence of pornography), as well as offering guidance in providing trauma-informed responses to disclosures.

[10] Email Submission 10 (Commissioner for Children and Young People).

14.15. Similarly, in terms of education and training providers, WLSWA suggested that programs should be evidence-based and developed by experts; and delivered by a wide range of community stakeholders, including teachers, parents, carers, hospital staff, social workers, police and the legal assistance sector.

14.16. The Commission also received submissions in support of engaging Aboriginal Community Controlled Organisations in the development and provision of training for Aboriginal and Torres Strait Islander Peoples involved in community education programs.[11]

The Commission's view

14.17. The Commission recognises the value of education and training in realising the positive and practical impacts of any legislative reforms. We view education initiatives as instrumental in addressing the persistence of common misconceptions about consent and sexual violence, including within the criminal justice system.

14.18. In addition to stakeholders' views, the Commission notes the sector-specific education programs recommended by the NSWLRC and VLRC,[12] as well as the Royal Commission's recommendation of regular training and education programs for the judiciary and legal profession in relation to understanding child sexual abuse and current social science research in relation to child sexual abuse.[13]

14.19. After reviewing the submissions, the Commission agrees that specialised training on sexual violence should be developed and delivered to those who work in the criminal justice system. We recommend that the Government develop and deliver a program to educate and train police, lawyers, judges and magistrates on:

- The objectives of the reforms; and
- How the reforms change the law.

14.20. The Commission also recommends that the Government develop and deliver a program to educate and train police, lawyers and judicial officers on:

- The nature and prevalence of sexual violence in the community, including the relationship between sexual violence and intimate partner violence;
- The effects of trauma on victim-survivors of sexual violence, including the freeze and the befriend or fawn responses;
- Ways of reducing the risks of further traumatising victim-survivors of sexual violence;
- Barriers to disclosing and reporting sexual violence;
- Identifying and countering misconceptions about sexual violence;
- How to respond to diverse experiences and contexts of sexual violence; and
- How to effectively communicate with and question victim-survivors of sexual violence, including children.

14.21. The Commission agrees that broader community education campaigns to improve awareness and understanding about sexual violence, including consent, are vital, particularly in the school

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11 Email Submission E24 (Communities); Portal Submission 27 (AFLSWA).

12 NSWLRC, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [10.32] Rec 10.2; VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) Rec 69.

13 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) Rec 67.

context. However, the Commission does not make any specific recommendations in this regard in anticipation of their inclusion in the forthcoming review by OCVOC or the State's Sexual Violence Prevention and Response Strategy being conducted by Communities. In the Commission's view, these reviews will be better placed to make recommendations in relation to community education than our reference, which is focused on substantive laws. The Commission acknowledges the importance of any education programs focusing on substantive legal matters complementing broader education campaigns and being informed by the experience of victim-survivors.

Recommendations

129. The Government should develop and deliver a program to educate and train police, lawyers and judicial officers on:

- **The objectives of any implemented reforms; and**
- **How the reforms change the law.**

130. The Government should develop and deliver a program to educate and train police, lawyers and judicial officers on:

- **The nature and prevalence of sexual violence in the community, including the relationship between sexual violence and intimate partner violence;**
- **The effects of trauma on victim-survivors of sexual violence, including the freeze and the befriend or fawn responses;**
- **Ways of reducing the risks of further traumatising victim-survivors of sexual violence;**
- **Barriers to disclosing and reporting sexual violence;**
- **Identifying and countering misconceptions about sexual violence;**
- **How to respond to diverse experiences and contexts of sexual violence; and**
- **How to effectively communicate with and question victim-survivors of sexual violence, including children.**

How should the implemented reforms be monitored?

14.22. In the Discussion Paper we noted that as sexual offence law reforms are particularly susceptible to implementation problems, it may be desirable to monitor the implementation of any reforms that are adopted. We outlined some measures other jurisdictions have taken to monitor their sexual offence law reforms and sought views on what recommendations, if any, we should make in this regard.[14]

Stakeholders' views

14.23. Submissions highlighted the importance of monitoring the implementation of any reforms to sexual offence laws in Western Australia. For example, a District Court Judge commented that reforms do not always achieve their intended results; it is important to regularly appraise

[14] Discussion Paper Volume 1, [8.11]-[8.20].

whether they are doing so, and if not, to consider how the intended changes might be achieved.[15]

14.24. While there was broad support for reviewing the reforms, stakeholders' views differed on the timing of any review. For example, Legal Aid submitted that 'any significant reforms should have a two-year review date'[16] while other submissions supported the approach adopted in New South Wales (a three-year review date).[17]

14.25. Communities recommended that a review should occur no later than 5 years after any amending provisions commence.

14.26. Communities submitted that, at a minimum, the reforms should be monitored to evaluate whether the amendments:[18]

- 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 to better respond to situations in which a complainant freezes and does not say or do anything to communicate consent;
- Improved the way the law treats sexual activity involving intoxicated complainants;
- Improved the way the law responds to non-consensual sexual activity occurring in the context of domestic and family violence; and
- Led to a greater emphasis on whether the accused person took steps to ascertain consent and, if so, whether those steps were adequate.

14.27. AFLSWA also submitted that any review should consider the impact of the reforms on criminal justice outcomes and whether the reforms have improved the way the law responds to sexual violence.

14.28. It was suggested that the relevant Minister should conduct the monitoring and evaluation process, but that the Minister consult widely and draw on the expertise of organisations such as ANROWS in doing so.[19] Any review ought to consider a wide range of perspectives from legal and non-legal sectors; consider complainants' experiences and the lived experiences of those who have not made complaints; and be informed by research about sexual offences, including in Western Australia.

14.29. Several stakeholders also said these reviews should be accompanied by transparency in reporting. Additionally, AFLSWA submitted that the Minister should regularly report on training that has occurred during the review period, including: the type of training provided, the number of participants and their roles, and whether the training has been effective in relation to its objectives.[20]

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15 Consultation with District Court Judge, 23 April 2023.
16 Portal Submission P23 (Legal Aid).
17 Portal Submission P26 (Confidential); Portal Submission P27 (AFLSWA).
18 Email Submission E24 (Communities).
19 Ibid.
20 Portal Submission P27 (AFLSWA).

The Commission's view

14.30. The Commission accepts the value of monitoring the reforms. The Commission is of the view that the Government should conduct a formal review within five years of implementing any reforms to determine the efficacy of those reforms. We consider that requiring a review within a shorter period would not enable a meaningful review of the efficacy of the laws to occur. Reforms to the law sometimes have short-lived effects, and it would not be helpful to review these reforms until their effects are fully known. The Commission notes, however, that the absence of a specific legal obligation to conduct a review is not an impediment to Government agencies regularly considering the effectiveness of policy positions and implementing change where it is needed.

14.31. We also accept the need for ongoing monitoring of the effectiveness of sexual offence laws and related procedural statutory provisions. To achieve this we recommend that a formal review take place no later than every seven years after the first and subsequent reviews. It is likely that in the space of seven years, there will have been developments in the law and changes in society which will require amendments to sexual offence laws and related procedural statutory provisions.

14.32. We also consider that in conducting this review, the Government should consider whether the reforms have:

- Achieved the aims of modernising, simplifying and clarifying sex offence laws; and
- Improved the criminal trial process for sexual offence trials.

14.33. This includes ensuring that:

- Juries in sex offence trials are properly instructed about the nature of sexual violence;
- Jury directions have not become unnecessarily complex;
- Any new offences are being properly utilised;
- The reforms have not unduly lengthened or complicated trials; and
- No unanticipated problems have arisen due to the reforms.

Recommendations

131. The Government should conduct a review within five years of implementing any reforms to determine the effectiveness of those reforms. In conducting this review, the Government should consider whether the reforms have:

- **Achieved the aims of modernising, simplifying and clarifying sex offence laws; and**
- **Improved the criminal trial process for sexual offences.**

132. The Government should conduct reviews every seven years after the first and subsequent reviews to determine whether Western Australia's sexual offence laws and related procedural statutory provisions should be:

- **Modernised, simplified and clarified; or**
- **Amended to improve the criminal trial process for sexual offences.**

What provision should be made for data collection?

14.34. 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.[21]

14.35. In the course of this reference we sought to obtain data on sexual offending in Western Australia, the prosecution of sexual offences in Western Australia and the sexual offence trial processes and outcomes in Western Australia. In doing so, we obtained significant assistance from the Western Australian Police Service, the Department of Justice, the ODPP and the District Court. However, it was the Commission's experience that there is not yet in Western Australia an established, integrated system for the collection and analysis of this data for the purposes referred to by the VLRC.

14.36. In the Discussion Paper we outlined the recommendations the VLRC had made to address this issue and sought views on whether we should make any recommendations about data collection.[22]

Stakeholders' views

14.37. The importance of appropriate data collection was widely acknowledged in submissions the Commission received. A number of stakeholders recognised that data could assist in evaluating the effectiveness of reforms and inform future decisions. Communities also highlighted data collection's potential to contribute to the research base on the policing and/or prosecution of family, domestic and sexual violence in Western Australia.[23]

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[21] VLRC, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [6.71].

[22] Discussion Paper Volume 1, [8.22]-[8.23].

[23] Email Submission E24 (Communities).

14.38. NASASV recommended 'allocation of resourcing to develop ongoing mechanisms to collect data about victim-survivors' experience about each stage of the justice system which can be used to guide future legal reform that may be required'.[24] As examples of these mechanisms, it referred to surveys of victim-survivors, some of which have been conducted by the Victims' Commissioner for England and Wales in 2020[25] and the New Zealand Ministry of Justice in 2018.[26]

14.39. WLSWA also reiterated its preliminary submission[27] that there should be a greater emphasis on data collection and analysis of such data to determine the proportion of reported sexual violence cases that result in conviction.[28] In its final submission, WLSWA emphasised that data must be disaggregated for sexual offences that are committed in the context of intimate partner relationships, domestic relationships, and by strangers, in order to inform specific policy responses.[29]

14.40. Importantly, WLSWA also submitted that data collection processes must be cognisant of the barriers against the reporting of sexual violence against First Nations women, which extend to the accurate collection of data. These include a lack of culturally appropriate services for victim-survivors, language barriers and lack of trust in police.[30]

14.41. Dr Nitschke and Professor McKimmie also highlighted the potential of data collection in the context of developing an evidence base for judicial directions. They submitted that to effectively monitor whether such directions are helping jurors to make fairer decisions in sexual offence trials, the following types of data need to be collected: basic trial facts, directions used in trial and trial outcomes. This would enable case file analysis to provide some insight into whether directions are changing case outcomes as expected. However, Dr Nitschke and Professor McKimmie also suggested that mock jury research would need to be commissioned to evaluate whether educational directions assist juries to make accurate decisions about complainant evidence in sexual offence trials, as data of this type cannot be collected from real jury trials.

14.42. Stakeholders also emphasised that any data collection in this area must be conducted with the utmost discretion and empathy towards all participants and that data must be stored and protected against data breaches.

The Commission's view

14.43. The Commission acknowledges the potential for data to facilitate evaluations of any legislative reform and to inform future institutional responses to sexual violence, as well as the development of sound policy advice to inform Government decision-making and allocation of resources.

14.44. The Commission is of the view that the Government should, at an early stage, develop and implement a plan for:

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24 Email submission E4 (NASASV).

25 Julian Molina and Sarah Poppleton, *Rape Survivors and the Criminal Justice System* (Report, 20 October 2020).

26 Tania Boyer et al, *Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences* (Research Report, Ministry of Justice (NZ), August 2018).

27 Preliminary Submission 11 (WLSWA).

28 Portal Submission P46 (WLSWA).

29 Ibid.

30 Ibid.

- Collecting data and conducting research targeted at measuring the effectiveness of the reforms; and
- Collecting data about participants' (particularly victim-survivors') experiences of each stage of the justice system which can be used to guide future legal reform that may be required.

14.45. The Commission recognises the importance of ensuring that there are appropriate safeguards for the protection of the privacy of sensitive personal information and that any collection and use of information needs to be done in a manner that does not compromise personal privacy. Accordingly, we also recommend that the Government should ensure that all data is de-identified, that it is sensitive to the privacy of participants and pays heed to the ethical requirements surrounding its collection.

14.46. The Government should also ensure the data collection process is sensitive to the independence of the judiciary and any other relevant independent agencies (eg, the ODPP).

14.47. Data should be permitted to be collected and used only for the specific purposes identified: it should not be collected 'just in case' it is required. The purposes for which information is able to be collected and used should be framed by reference to the manner in which the success of the laws is to be evaluated and monitored, to ensure that the provisions are appropriately directed to achieving their intent.

14.48. The Commission notes that it anticipates that these issues will likely be addressed at least to some degree by the Government in its privacy and responsible information sharing reforms.

Recommendations

133. The Government should, at an early stage, develop and implement a plan for:

- **Collecting data and conducting research targeted at measuring the effectiveness of any implemented reforms; and**
- **Collecting data about participants' (particularly victim-survivors') experiences of each stage of the justice system which can be used to guide future legal reform that may be required.**

134. The Government should ensure that:

- **Data is collected only for specifically identified purposes;**
- **The data collection process is sensitive to the independence of the judiciary and any other relevant independent agencies; and**
- **All collected data is de-identified, sensitive to the privacy of participants, and pays heed to the ethical requirements surrounding its collection.**

Appendix 1: List of Submissions

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. WLSWA.
12. Sexual Health Quarters.
13. The Law Society of Western Australia.
14. CWSW.
15. WA Police.
16. ODPP.
17. Department of Health.
18. Ethnic Communities Council of Western Australia.

Email submissions

1. Confidential.
2. Confidential.
3. Christie Mathews.
4. NASASV.
5. Dr Kelley Burton.
6. Full Stop Australia (submission re Discussion Paper Volume 1).
7. Dr Faye Nitschke and Professor Blake McKimmie.
8. knowmore (submission re Discussion Paper Volume 1).
9. Confidential.
10. Commissioner for Children and Young Persons.
11. Confidential.

12. Confidential.
13. Confidential.
14. Law Access.
15. Confidential.
16. Zonta Club of Bunbury.
17. Professor Hélène Jaccomard.
18. Dr Andrew Dyer.
19. ODPP.
20. Melissa Callanan.
21. Detective Sergeant Hugh Scott.
22. Australian Lawyers Alliance.
23. Dr Philip Glover.
24. Communities.
25. knowmore (submission re Discussion Paper Volume 2).
26. Confidential.
27. Full Stop Australia (submission re Discussion Paper Volume 2).

Online portal submissions

1. Patrick Hogan.
2. Anonymous.
3. Anonymous.
4. Confidential.
5. Anonymous.
6. SWEAR WA.
7. Sandra Boulter.
8. Confidential.
9. Anonymous.
10. Anonymous.
11. Anonymous.
12. Anonymous.
13. Anonymous.
14. Myles Niutta.
15. Anonymous.
16. Anonymous.
17. Anonymous.

18. Ketherine Spence.
19. Tyril Houghton.
20. Abigail Gregorio.
21. Anonymous.
22. Ariyana Gaudoin.
23. Legal Aid (submission re Discussion Paper Volume 1).
24. Ken Devereux.
25. Aleisha Cash.
26. Confidential.
27. AFLSWA.
28. RASARA.
29. Anonymous.
30. Alan Bunce.
31. B.
32. Elle Harvey.
33. Anonymous.
34. Anonymous.
35. Confidential
36. WLSWA (submission re Discussion Paper Volume 1).
37. Anonymous.
38. Shannon Morgan.
39. Heather Bytheway.
40. Isabelle Hamer.
41. Legal Aid (submission re Discussion Paper Volume 2).
42. Dr Philip Glover.
43. Confidential.
44. Anonymous.
45. Skye Quartermaine.
46. WLSWA (submission re Discussion Paper Volume 2).
47. Christina Baker.
48. Carol Peers.
49. Communities.
50. Kristy Johnson.
51. S Porter.
52. Jessica Bruce.

53. Anonymous.
54. Anonymous.
55. Anonymous.
56. Andrea Manno..
57. CWSW.
58. WAAC.

Appendix 2: Structure of revised offences and maximum penalties

This table lists the offences recommended in this Report. It also lists the offences recommended by the Royal Commission for which the Government has indicated its in-principle support. These offences have been italicised. It is a matter for the Government as to whether the italicised offences and our recommendations are enacted and when that might occur.

The table also includes information about the current maximum penalties for existing relevant sexual offences and our recommended maximum penalties for those offences, similar reformed offences and new offences. Where we have recommended reforms to an offence, the penalties listed in the current maximum penalty column relate to the closest equivalent offence under the *Code*. For example, the row which contains our recommended maximum penalty for the new offence of 'sexual act: adult' also contains the current maximum penalty for the offence of indecent assault, and the row which contains our recommended maximum penalty for the new offence of 'coerced sexual penetration: child under 13' also contains the current maximum penalty for the offence of procuring, inciting or encouraging a child under 13 to engage in sexual behaviour.

Offence description	Current maximum penalty (years of imprisonment) (base/aggravated offence)	Recommended maximum penalty (base/aggravated offence)[1]
Sexual offences against adults		
Sexual penetration: adult	14/20	15/20
Coerced sexual penetration: adult	14/20	15/20
Obtaining sexual penetration by fraud	2	10
Sexual act: adult	5/7 (judge) 2/3 (magistrate)	7/10 (judge) 2/3 (magistrate)
Coerced sexual act: adult	No equivalent offence	7/10 (judge) 2/3 (magistrate)
Obtaining a sexual act by fraud	No equivalent offence	5 (judge) 2 (magistrate)
Sexual offences against children		
Persistent sexual abuse: child under 16	20	*25*[2]
Sexual penetration: child under 13	20	22
Coerced sexual penetration: child under 13	20	22
Sexual penetration: child 13 to under 16	14/20	20

[1] Columns have been left blank where no recommendation has been made for the maximum penalty for the reasons stated in the text.

[2] As noted in Chapter 12, it is beyond our Terms of Reference to recommend a maximum penalty for this offence. This is the penalty that was recommended for this offence by the Royal Commission.

Offence description	Current maximum penalty (years of imprisonment) (base/aggravated offence)	Recommended maximum penalty (base/aggravated offence)[1]
Coerced sexual penetration: child 13 to under 16	14/20	20
Persistent sexual abuse: child 16 or over under care, supervision or authority	No equivalent offence	20
Sexual penetration: child 16 or over under care, supervision or authority	10	15
Coerced sexual penetration: child 16 or over under care, supervision or authority	10	15
Sexual act: child under 13	10	12
Coerced sexual act: child under 13	10	12
Sexual act: child 13 to under 16	7/10	10
Coerced sexual act: child 13 to under 16	7/10	10
Sexual act: child 16 or over under care, supervision or authority	5	7
Coerced sexual act: child 16 or over under care, supervision or authority	5	7
Indecent recording: child under 13	10	12
Indecent recording: child 13 to under 16	7/10	10
Indecent recording: child 16 or over under care, supervision or authority	5	7
Grooming a child for sex		
Failing to protect a child in an institution		
Concealing and failing to report child sexual abuse		
Sexual offences against relatives		
Sexual penetration: child relative	20 (child under 16) 10 (child 16 or over)	20
Coerced sexual penetration: child relative	20 (child under 16) 10 (child 16 or over)	20
Sexual act: child relative	10 (child under 16) 5 (child 16 or over)	12
Coerced sexual act: child relative	10 (child under 16) 5 (child 16 or over)	12
Indecent recording: child relative	10 (child under 16) 5 (child 16 or over)	12

Offence description	Current maximum penalty (years of imprisonment) (base/aggravated offence)	Recommended maximum penalty (base/aggravated offence)[1]
Sexual penetration: adult relative by adult	3	3
Coerced sexual penetration: adult relative by adult	No equivalent offence	3
Sexual act: adult relative by adult	No equivalent offence	3
Coerced sexual act: adult relative by adult	No equivalent offence	3
Sexual offences against vulnerable people		
Persistent sexual abuse: vulnerable person	No equivalent offence	25
Sexual penetration: vulnerable person	14/20	20
Coerced sexual penetration: vulnerable person	14/20	20
Sexual act: vulnerable person	7/10	10
Coerced sexual act: vulnerable person	7/10	10
Indecent recording: vulnerable person	7/10	10
Grooming a vulnerable person for sex	No equivalent offence	
Sexual servitude and deceptive recruiting offences		
Sexual servitude	14/20	15/22
Conducting a sexual servitude business	14/20	15/22
Deceptive recruiting for commercial sexual service	7/20	10/22

Appendix 3: Jurisdictional comparison of sentences imposed for sexual penetration without consent or closest equivalent

A3.1. This Appendix compares sentences imposed for sexual penetration without consent in Western Australia[1] with those imposed for the most similar offence in Victoria, NSW and Queensland.

A3.2. In Victoria the most similar offence is rape, for which the maximum penalty is 25 years' imprisonment.[2] In NSW the most comparable offence is sexual intercourse without consent, for which the maximum penalty is 14 years' imprisonment.[3] In Queensland the most comparable offence is rape, for which the maximum sentence is life imprisonment.[4]

Western Australia

A3.3. Unlike the other jurisdictions examined, Western Australia does not have an institution that collects and reports sentencing statistics. The only way to obtain such information was from Court of Appeal cases.

A3.4. There is no tariff for any type of sexual offending in Western Australia. However, the general sentencing standards for the offence of sexual penetration without consent are well established. In *Western Australia v Hussian*[5] the Court of Appeal said:

> Where an offender is convicted after trial of a single count of non-aggravated penile penetration of the vagina, a sentence of 5 to 6 years' imprisonment is not unusual. See *The State of Western Australia v Richards*. However, it must be emphasised that a sentence outside that range will not necessarily be manifestly excessive or manifestly inadequate. The circumstances of offending and offenders vary widely. Sentences significantly beyond the range identified in *Richards* may, having regard to the maximum penalty and the relevant facts and circumstances, be justified in particular cases.[6]

A3.5. In *Western Australia v Akizuki*,[7] Steytler P said that an 'average starting point' for an offence under section 325 is 'in the order' of around 4 years and 8 months' imprisonment, but that this starting point takes no account of any factors in mitigation.[8]

A3.6. In Western Australia, a person convicted of sexual penetration without consent who received a sentence of:

- 4 years 8 months' imprisonment will be eligible for parole after serving 2 years 8 months.
- 6 years' imprisonment will be eligible for parole after serving 4 years.[9]

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1 *Criminal Code Act Compilation Act 1913* (WA) s 325. The maximum penalty for this offence is 14 years' imprisonment.

2 *Crimes Act 1958* (Vic) s 38(1).

3 *Crimes Act 1900* (NSW) s 61I.

4 *Criminal Code 1899* (Qld) s 349.

5 [2020] WASCA 186.

6 Ibid [119]. See also *Western Australia v Richards* [2008] WASCA 134, [49]; *NPA v Western Australia* [2018] WASCA 131, [51]; *McNally v Western Australia* [2019] WASCA 93, [53].

7 [2008] WASCA 267 [68]-[69].

8 Ibid [68]-[69].

9 The *Sentencing Act 1995* (WA) s 95 states that a person who receives a sentence of four years or less will be eligible for release on parole after serving half their sentence. A person who receives a sentence of more than four years will be eligible for release on parole after they have served two years less than the term.

Victoria

A3.7. In Victoria, while the maximum penalty for rape is 25 years,[10] there is a 'standard sentence' of 10 years for offences committed on or after 1 February 2018.[11] The period specified as the standard sentence is 'the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.[12] When sentencing for a standard sentence offence a judge 'must only have regard to sentences previously imposed for the offence as a standard sentence offence in relation to the sentencing for which this section applied'.[13]

A3.8. The court must give reasons for imposing the sentence and any non-parole period that is shorter than that specified for standard sentences, and it must state how the sentence imposed relates to the standard sentence.[14]

A3.9. In Victoria, between 1 July 2016 and 30 June 2021 93.7% of offenders were sentenced to terms of immediate imprisonment.[15] Table A3.1 shows the lengths of the terms imposed.[16].

Term	Percentage of offenders
Less than 1 year	0.3
1 – 2 years	1.2
2 – 3 years	1.8
3 – 4 years	5.6
4 – 5 years	18.1
5 – 6 years	19.3
6 – 7 years	17.0
7 – 8 years	14.9
8 – 9 years	11.7
9 – 10 years	4.1
10 – 11 years	3.2
11 – 12 years	0.3
12 – 13 years	2.0
13 years +	0

Table A3.1: Victorian terms of imprisonment for rape: 01.07.16-30.06.21

10 *Crimes Act 1958* (Vic) s 38(1).
11 Ibid s 38(2).
12 *Sentencing Act 1991* (Vic) s 5A(1)(b).
13 Ibid s 5B(2)(b).
14 Ibid s 5B(5).
15 Sentencing Advisory Council, https://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_38_1.html.
16 Ibid.

A3.10. We note that these figures should be read with some caution, as the standard sentencing scheme ('the scheme') came into effect on 1 February 2018,[17] but it is not possible only to view data from that date onwards. This means that the table includes sentences imposed both before and after the introduction of the scheme. Given the nature of the scheme it may be expected that Victorian sentences for rape have increased since the scheme began.

A3.11. A Victorian offender who receives a term of imprisonment of less than 20 years must receive a non-parole period of at least 60% of the relevant term.[18]

New South Wales

A3.12. In NSW, the maximum sentence for sexual intercourse without consent is 14 years' imprisonment.[19] Between 24 September 2018 and 30 September 2022, 95.7% of offenders sentenced in NSW for sexual intercourse without consent (where that offence was considered the principal offence) received a term of imprisonment.[20] Table A3.2 shows the length of the terms imposed:

[17] Sentencing Advisory Council, 'Standard Sentences Confirmed as "Valid and Capable of Practical Operation" (29 November 2018) https://www.sentencingcouncil.vic.gov.au/news-media/news/standard-sentences-confirmed-valid-and-capable-practical-operation.

[18] *Sentencing Act 1991* (Vic) s 11A(4).

[19] *Crimes Act 1900* (NSW) s 61I.

[20] Information concerning sentencing in NSW was obtained from the Judicial Commission of New South Wales' *Judicial Information Research System*: see <https://www.judcom.nsw.gov.au/judicial-information-research-system-jirs/>.

Term	Number of offenders	Percentage of offenders
Up to 6 Months	0	0
7-12 Months	2	0.7
13-18 Months	4	1.5
19-24 Months	16	6.0
25-30 Months	26	9.7
31-36 Months	51	19.1
37-42 Months	22	8.2
43-48 Months	40	15.0
49-54 Months	30	11.2
5 Years	23	8.6
6 Years	27	10.1
7 Years	14	5.2
8 Years	8	3.0
9 Years	3	1.1
10 Years	0	0
11-12 Years	1	0.4
13 Years +	0	0
Total	267	99.8

Table A3.2: NSW terms of imprisonment for sexual intercourse without consent: 24.09.18-30.09.22

A3.13. The Judicial Commission website does not provide median or average sentence lengths. However, we calculated the average as 4.15 years.[21]

[21] We rounded up the figures in the term column to the nearest half year (for example, we treated 7-12 months as 12 months). We then multiplied that figure by the figure in the number column. We then divided this figure by the total number of offenders sentenced.

A3.14. Certain offences have standard non-parole periods specified in legislation. The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.[22] The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record its reasons for each factor that it took into account.[23]

A3.15. The standard non-parole period must be applied where the offence is 'in the middle range of seriousness taking into account only the objective factors affecting the relative seriousness of that offence'.[24]

A3.16. The standard non-parole period for adults convicted of sexual intercourse without consent is 7 years.[25] The standard non-parole period is not always imposed; a common reason for not imposing a standard non-parole period is that the offending does not fall within the middle range of seriousness for that offence.[26]

A3.17. From 24 September to 30 September 2022 data from the Judicial Information Research System (**JIRS**)[27] show that offenders who received a term of imprisonment for sexual intercourse without consent (where that offence was considered the principal offence) received non-parole periods of the following lengths:

22 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

23 Ibid s 54B(3).

24 Ibid s 54A.

25 *Crimes (Sentencing Procedure) Act 1999* ss 54A, 54D(3), read with Table to Division 1A of *Crimes (Sentencing Procedure) Act 1999* (NSW).

26 *R v Shortland* [2018] NSWCCA 34 [3] per Basten JA.

27 Judicial Commission of NSW, https://www.judcom.nsw.gov.au/judicial-information-research-system-jirs/.

Non-parole period	No.	%
Up to 6 Months	1	0.4
7-12 Months	19	7.6
13-18 Months	58	23.3
19-24 Months	36	14.5
25-30 Months	39	15.7
31-36 Months	39	15.7
37-42 Months	17	6.8
43-48 Months	17	6.8
49-54 Months	6	2.4
5 Years	8	3.2
6 Years	8	3.2
7 Years	0	0
8 Years	1	0.4
9 Years +	0	0
Life	0	0
	249	**100**

Table A3.3: NSW non-parole periods for sexual penetration without consent: 24.09.18-30.09.22

A3.18. The JIRS website does not contain tables showing the relationship between the full sentence and the non-parole period, only the above two tables which appear to show those figures independently of each other.

A3.19. The JIRS website does not show average or median non-parole periods. Using table A4.3 we calculated the average non-parole period as 2.58 years.[28]

[28] We rounded up the figures in the NPP column to the nearest half year (for example, we treated 7-12 months as 12 months). We then multiplied the figure in the rounded up NPP column by the figure in the number column. We then divided that figure by the total number of offenders with NPPs.

Queensland

A3.20. In Queensland, the maximum sentence for rape is life imprisonment.[29] For offenders sentenced for rape from July 2005 to June 2021:

- 98.7% of adult offenders received a custodial penalty.[30]
- The average prison sentence was 6.6 years' imprisonment.[31]
- The median sentence was 6.5 years' imprisonment.[32]
- The range was 3 months to life imprisonment.[33]

A3.21. If a Queensland court imposes a sentence of more than 10 years, the judge is obliged to make a **serious violent offenders** (SVO) order and the non-parole period is automatically set at 80% of the total sentence or 15 years, whichever is less.[34]

A3.22. Judges can also choose to make a SVO order for sentences in the following circumstances:

- For sentences of 5 to 10 years;[35] or
- For any serious or violent offence if the offence was dealt with on indictment and involved violence/attempted violence or resulted in serious harm being caused.[36]

A3.23. If the SVO scheme does not apply, then the sentencing judge may set a parole eligibility date which is usually after one-third of the sentence.[37]

Summary

A3.24. Table A4.3 summarises the data presented above. It shows the length of the penalty that is most likely to be imposed for sexual penetration without consent (or the most similar offence) and the period after which the offender is likely to be eligible for parole.

	WA	Vic	NSW	Qld
Length of term	4 years 8 months – 6 years	6 years	4.15 years	6.6 years
Parole eligibility after	2 years 8 months – 4 years	3.6 – 4.5 years	2.58 years	2.2 – 5.28 years

Table A3.4: Most likely penalty for sexual penetration without consent or similar offence

29 *Criminal Code 1899* (Qld) s 349.

30 Queensland Sentencing Advisory Council, https://www.sentencingcouncil.qld.gov.au/statistics/type-of-offence/rape.

31 Ibid.

32 Queensland Sentencing Advisory Council, https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0006/744441/sentencing-spotlight-on-rape-updated-Jan-23.pdf, p 10.

33 Ibid.

34 *Penalties and Sentences Act 1992* (Qld) ss 161A, 161C; *Corrective Services Act 2006* (Qld) s 182(2).

35 *Penalties and Sentences Act 1992* (Qld) ss 161B(3) and (4), 161C; *Corrective Services Act 2006* (Qld) s 182(2).

36 *Penalties and Sentences Act 1992* (Qld) ss 161B(3)-(4).

37 Sentencing Council of Queensland *Sentencing Manual* (March 2023) https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/572161/QLD-Sentencing-Guide.pdf.

A3.25. This analysis indicates that the length of the term of imprisonment typically imposed in Western Australia for this offence is greater than that typically imposed in NSW, perhaps less than that typically imposed in Victoria and less than that typically imposed in Queensland.

A3.26. The period after which an offender first becomes eligible for parole consideration in Western Australia:

- Is shorter for shorter sentences but longer for longer sentences than the similar period in NSW.
- Is shorter for both shorter and longer sentences than the similar period in Victoria.
- Is longer for shorter sentences but shorter for longer sentences than the similar period in Queensland.

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