Reform to the Law of Consent: A Tale of Two States

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There has recently been detailed consideration of the reform of rape laws in two Australian jurisdictions. The results of these deliberations have been mixed. New South Wales has adopted an affirmative consent model, in line with two other Australian jurisdictions, while Queensland has declined to do so, but nudged the law slightly further in this direction. This article discusses the evolution of rape law, highlights recurrent difficulties with the law in this area, and discusses the recent reforms. It suggests further improvements to the law in Queensland, given evidence of the misuse of the mistake of fact defence. The subject matter of this article is considered relevant to how criminal trials for alleged sexual offences are conducted, including the instructions given to juries. Respectfully, it might potentially cause some reflection from members of the judiciary in relation to such matters, difficult as they are.

INTRODUCTION

The law relating to sexual offences has undergone a dramatic transformation in modern times. Traditionally, sexual offences were defined in terms of the use of force by an accused person.[1] It was necessary for the prosecutor to demonstrate that the complainant physically resisted in order to demonstrate the required lack of consent,[2] completely ignoring the real possibility, by now well-documented in the literature,[3] that some complainants regarding sexual assault may "freeze" during the attack, such that lack of physical resistance should not at all be used as a proxy for consent. Incredibly, the primary harm of a sexual assault was viewed not in terms of the actual complainant herself (typically it was a female), but her father, husband, brother or family, as damage to a property interest.[4] Reflecting bizarre and, to today's eyes, unfathomable views about women, a man could not be convicted of raping his wife.[5] This reflected an obviously untenable and completely unacceptable view of a wife as being somehow the property of

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[1] Sir William Blackstone 4, *Commentaries on the Laws of England 1765-1769* (Clarendon Press, 1769) 210. Some appear to defend this position today: Donald Dripps, "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent" (1992) 92 *Columbia Law Review* 1780, 1792: "only the requirement of force prevents the sweeping criminalization of sex."

[2] Anastacia Powell et al, "Meanings of 'Sex' and "Consent'" (2013) 22(2) *Griffith Law Review* 456, 460–461; Ian Leader-Elliott and Ngaire Naffine, "Wittgenstein, Rape Law and the Language Games of Consent" (2000) 26 *Monash University Law Review* 48, 60–63; *R v Hinton* [1961] Qd R 17, 25. For a recent example, *R v FAV* [2019] QCA 299, [124]: "the complainant's account of the removal of her clothing and the sexual intercourse that followed did not lay claim to any physical or verbal resistance having occurred" (Henry J, who in dissent found that a s 24 defence should have been left to the jury. The relevant events occurred after the complainant said "no" to the accused after he grabbed her shorts and pulled her towards him. The accused had denied that any sexual activity occurred between the parties).

[3] Rachel Burgin and Jonathan Crowe, "The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?" (2020) 32(3) *Current Issues in Criminal Justice* 346, 353.

[4] Christine Forster, "Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards" (2009) 33 *Melbourne University Law Review* 833, 836; Dripps, n 1, 1782; Nicola Lacey, "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law" (1998) 11 *Canadian Journal of Law and Jurisprudence* 47, 53.

[5] *PGA v The Queen* (2012) 245 CLR 355, 375–376 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2012] HCA 21, citing Matthew Hale, *The History of the Pleas of the Crown* (1736) c58, 629; *R v Kowalski* (1987) 86 Cr App R 339, 341.

her husband,[6] reflecting the position of wife as being servile and submissive, the husband superior and dominant. Questionable views continue to be expressed around consent within long-term relationships.[7] Views of sexuality more generally were outdated. There were particular views about female sexuality, and strict bounds around appropriate female behaviour. There was a view of men as sexual aggressors who had to "win over and persuade" reluctant or coy women. This view fits with terminology of a woman "consenting" to sexual activity, as opposed to making a positive choice about their activity, with control over their own bodies.[8] Thankfully, with the evolution of much more enlightened views about women in our society, much of this has disappeared, though outdated views and attitudes linger.[9] Of all of the areas of law, it is perhaps criminal law that demonstrates most blatantly both past primitive views of women, and how societal attitudes have changed.

Despite these improvements, many continue to view the law relating to sexual offences as problematic. They might point to the fact that sexual offence remains prevalent, and significantly under-reported, in our society.[10] They might add that the conviction rate for those accused of sexual offences is typically significantly lower than with respect to other offences.[11] Alleged sexual assault is under-charged, and the rate at which charges are withdrawn is higher than for other offences.[12] Serious misconceptions about sexual offences abound,[13] including that there should be physical evidence of a rape having been committed, and that a complainant would have physically resisted a rape,[14] ignoring significant evidence

[6] An example of the anachronistic thinking appears in Note "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard" (1952) 62 *Yale Law Journal* 55, 72: "the consent of a woman to sexual intercourse awards a man a privilege of bodily access, a personal 'prize' whose value is enhanced by sole ownership."

[7] Victor Tadros, "Rape without Consent" (2006) 26(3) *Oxford Journal of Legal Studies* 515, 529: "Consider A and B, who are in a long term relationship of mutual respect. B has her drink spiked by X. She is very drunk. A and B go home together and have intercourse. In that case, we may be reluctant to say that A has raped B. Although B's ability to decide has been undermined, the context of the relationship suggests that sexual autonomy remains intact." Respectfully, this passage and in particular the reference to the "context of the relationship" may be taken to suggest that someone in a relationship automatically consents to sexual intercourse. Tadros also refers to "an ongoing mutually supportive relationship between the defendant and the complainant in which there is an expectation of intercourse in such circumstances" (he cites this as an exception to a generally rule that where an accused suspected the complainant was involuntarily intoxicated and stupefied by that intoxication, an accused who proceeded to have sex with the complainant would ordinarily be considered to have committed a rape) (534). Later he suggests a defence to a rape charge on the basis that the parties were "in an ongoing sexual relationship of mutual trust and recognition … such that intercourse in such circumstances was legitimately expected". Of course, it is not true that a person cannot be convicted of raping their long-term partner, wife, or husband: *R v R* [1992] 1 AC 599; *PGA v The Queen* (2012) 245 CLR 355; [2012] HCA 21. And a corollary of this is that no one can or should have an "expectation of intercourse", regardless of how long the parties have been in a relationship. Views similar to that of Tadros are also expressed by Dripps, n 1, 1801: "in a case like that of the intoxicated spouses, it is not clear that the 'victim's' rights and interests are violated. True, she has not expressed approval; but then, she has, while sober and over a long course of dealing, approved of a complex relationship in which sex plays a prominent role. The husband has not sought to evade the terms of the relationship." Respectfully, I fundamentally disagree. The fact that anyone has agreed to sexual intercourse in the past does not entitle anyone, including the person's spouse, to assume that she/he agrees to intercourse on any particular occasion. If marriage is to be expressed to include "terms of the relationship", emphatically those terms do not include the right of one partner to have sex with the other at will.

[8] Leader-Elliott and Naffine, n 2, 60–63.

[9] Lani Anne Remick, "Read Her Lips: An Argument for a Verbal Consent Standard in Rape" (1993) 141 *University of Pennsylvania Law Review* 1103, 1104: "our male-dominated society accepts a certain amount of coercion, aggression or violence against women as a normal, even desirable, part of sexual encounters."

[10] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (September 2020) 15–16.

[11] New South Wales Law Reform Commission, n 10, 20–22.

[12] New South Wales Law Reform Commission, n 10, 16–20; see also Ian Dobinson and Lesley Townsley, "Sexual Assault Law Reform in New South Wales: Issues of Consent and Objective Fault" (2008) 32 *Criminal Law Journal* 152, 153.

[13] Jacqueline Horan and Jane Goodman-Delahunty, "Expert Evidence to Counteract Jury Misconceptions About Consent in Sexual Assault Cases: Failures and Lessons Learned" (2020) 43 *University of New South Wales Law Journal* 707, 709. The authors state that "research has shown that jurors expect that a sexual assault complainant will demonstrate overt signs of non-consent in verbal and non-verbal ways, such as saying 'no' and resisting use of force by the defendant … a United Kingdom community poll in 2005 found a third of people believed that a flirtatious woman is partially responsible for being raped" (716).

[14] New South Wales Law Reform Commission, n 10, 23–24; Horan and Goodman-Delahunty, n 13, 717–720.

that complainants may often "freeze" during an attack and may not offer resistance, despite their lack of actual consent.[15] Sometimes, what the complainant was wearing appears to have some relevance,[16] though of course it should not. Some defence counsel may seek to engage these misconceptions in order to defend their client.[17] In a recent decision of the Queensland Court of Appeal, grounds for an appeal on the basis that s 24 should have been left to the jury included that the complainant had agreed to particular sexual acts with the accused on a previous occasion, and she had sent him photographs of herself engaged in the past in activity similar to that that formed the basis of the criminal charge.[18] In another recent decision, defence counsel suggested that the complainant "by presence, acquiesced in further sexualised activity", asking her "why didn't you say 'get your hands off me. You leave'".[19]

Further, as will be seen, arguably there remain deficiencies and loopholes in relation to how the law of sexual assault is expressed, and how it is interpreted by some courts. These deficiencies and loopholes may be contributing to the problems just identified. We must also acknowledge that, on occasion, a person accused of sexual assault may genuinely not believe they committed the offence, and some may view their belief as "reasonable". It must also be acknowledged that, on a very small number of occasions, claims of sexual assault are fabricated, or at the very least the complainant is not telling the full story, whether wittingly or unwittingly. Consumption of excessive alcohol or other drugs by either or both/all of the parties can cloud the factual context. Many of the potential problems with the existing law of sexual assault relate to the question of "consent", a term that is admittedly contentious for what it may imply or suggest about sexual relations,[20] and which some argue should be discarded,[21] but which typically continues to feature in the law of the various Australian jurisdictions in this context. Some have cogently argued that, by using this concept, fact finders are invited to focus, and focus excessively, on the actions and behaviour of the complainant, and focus less, and insufficiently, on the actions and behaviour of the accused,[22] a feature which has continued despite previous reforms which sought to focus fact

[15] Jennifer Heidt, Brian Marx and John Forsyth, "Tonic Immobility and Childhood Sexual Abuse: A Preliminary Report Evaluating the Sequela of Rape-induced Paralysis" (2005) 43 *Behaviour Research and Therapy* 1157.

[16] *Getachew v The Queen* [2011] VSCA 164, [5]: "the complainant was wearing a short skirt, a top and a coat" (Buchanan JA). It is not clear what, if any, emphasis was placed on this fact in determining the question of consent, which is at issue in the trial. The obvious point is that, if it were not relevant, it should not have been noted in the judgment.

[17] For example, Powell et al cite cross-examination in *R v G*, where defence counsel apparently asked the complainant whether "freezing in those circumstances was an irrational thing to do", contrary to significant evidence that many survivors of sexual assault do so respond, and in any event apparently requiring complainants to meet some undefined standard of "rationality" which appears in no criminal statute, and asking her to confirm that she did not have any injuries, as if this were evidence that she had not been assaulted, when it is well known that it is not. The authors do not provide a citation for *R v G*: Powell et al, n 2, 468.

[18] *R v Kellett* [2020] QCA 199, [157]. In dissent, Jackson J concluded that the s 24 defence should have been left to the jury.

[19] *R v Mansoori* [2019] QCA 250, [38].

[20] This term may suggest that a woman (which is the typical, though clearly not always, gender of a complainant in a sexual assault case) might reluctantly agree to things "being done to them", with the male (the typical, though clearly not always, gender of an accused in such cases) cast as dominant and a woman as compliant. It can suggest something other than the view which most would have today of men and women, as equals. In such an informed view of sexual relations, they would be viewed as something like parties who have freely and voluntarily agreed to particular things, as full equals, rather than as one person "wanting to do something" to another. This article will, for the sake of simplicity, refer to a complainant in a sexual assault case as female, and an accused as a male. This is because this is the typical pattern in the majority of the cases considered. It is acknowledged that this is not the only context in which allegations of sexual assault can be made. And of course, the principles are the same, regardless of the gender of the parties involved. It is just that, traditionally, the laws regarding sexual assault were framed on the basis of a male accused and a female complainant. It is important to acknowledge this, because it helps to explain previous iterations of the law, and how law reform in this area has tracked more enlightened views (over time) about women in our society. Victor Tadros, "No Consent: A Historical Critique of the Actus Reus of Rape" (1993) 3 *Edinburgh Law Review* 317, 326–327: "the concept of consent implies that the role of the woman during intercourse is primarily passive"; Ngaire Naffine, "Possession: Erotic Love in the Law of Rape" (1994) 57 *Modern Law Review* 10, 26.

[21] Tadros, n 7, 518; Wendy Brown, *States of Injury* (Princeton University Press, 1995) 163.

[22] Tadros, n 20, 326; Tadros, n 7, 516; Simon Bronitt, "Rape and Lack of Consent" (1992) 16 *Criminal Law Journal* 289, 289–290.

finders on the question of what steps, if any, the accused took to ascertain consent.[23] This may reflect broader cultural norms[24] and stereotypes about gender roles.[25]

Traditionally, there is a significant difference in how consent is dealt with in the context of sexual offences in what is commonly called the Code jurisdictions (Queensland, Western Australia and Tasmania), and other (non-Code) jurisdictions. In the non-Code jurisdictions, such as New South Wales (NSW), Victoria and South Australia, mens rea is an element of criminal offences, including sexual offences. This meant that the prosecutor would need to demonstrate that the accused intended to have sexual relations with the complainant in the knowledge that they did not consent, or was reckless as to that fact.[26] At one point, the common law provided that where an accused was honestly, even if unreasonably, mistaken about the consent of the complainant, they could not be convicted of sexual assault.[27] This position was subsequently altered by legislation in the common law jurisdictions.[28] The steps, if any, taken by the accused to determine whether or not the complainant consented to sexual activity will be relevant.[29]

In the Code jurisdictions, Queensland, Tasmania and Western Australia, mens rea was not generally required in order to commit an offence. Thus, there was no particular mental requirement that the prosecutor needed to establish in order to convict an accused of sexual assault: sexual activity that was not consensual was sufficient.[30] Specifically, it was not necessary for the prosecution to prove that the accused was aware the complainant was not consenting.

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[23] Gail Mason and James Monaghan, "Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases" (2019) 31(1) *Current Issues in Criminal Justice* 24, 32: "at no point in her judgment did Tupman DCJ directly address the question of whether (the accused) took any steps to ascertain the complainant's consent. In effect, it is the complainant's conduct that appeared to provide the 'reasonable grounds' for (the accused's) belief in consent" (quoting the trial judge to the effect that "the complainant did nothing physical to prevent the sexual intercourse from continuing": [37]); (*Crimes Act 1900* (NSW) s 61HE(4)); another example appears in *R v XHR* [2012] NSWCCA 247, [32]: "it is abundantly clear from the complainant's evidence that at no stage did she say or indicate … in any way that she did not consent to the various things he did to her, and in particular the touching or massaging of her (genitalia)" (Beazley JA).

[24] Mason and Monaghan, n 23, 35: "the expectation that women need to say 'no' (as opposed to the expectation that men need to ask) remains deeply ingrained in Australian culture." Vanessa Munro speaks of the "profound suspicion of female sexuality": Vanessa Munro, "Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy" (2008) 41 *Akron Law Review* 923, 936; Annie Cossins, "Why Her Behaviour Is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent" (2019) 42(2) *University of New South Wales Law Journal* 462, 471; Leader-Elliott and Naffine, n 2. It has been observed that a gender gap exists in sexual communication, with men interpreting particular situations differently than women: Robin Wiener, "Shifting the Communication Burden: A Meaningful Consent Standard in Rape" (1983) 6 *Harvard Women's Law Journal* 143, 147–148.

[25] Vanessa Munro, "Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales" (2017) 26(4) *Social and Legal Studies* 1, 9. Powell et al argue that in some social constructions of sexual activity "women are understood to commonly offer 'token resistance' to sex that they secretly desire, in order to protect their sexual reputation. It is also expected that men might need to seduce or persuade women into sex, so may misinterpret women's resistance to sex as part of the seduction script": Powell et al, n 2, 459.

[26] *Crimes Act 1900* (NSW) s 61HE(3)(recklessness is not defined); *Criminal Law Consolidation Act 1935* (SA) s 48(1). Section 47 defines recklessness is this context to mean a situation where (1) the accused is aware the complainant may not be consenting or has withdrawn consent but "proceeds" regardless; (2) the accused is aware the complainant may not be consenting or has withdrawn consent but fails to take reasonable steps to determine the matter before proceeding; or (3) does not give thought to whether the complainant consents, or has withdrawn consent, before proceeding; *Crimes Act 1900* (ACT) s 54(1) and (3); *Criminal Code 1983* (NT) s 192(3)(b) and 192(4A).

[27] *DPP v Morgan* [1976] AC 182, 203 (Lord Cross), 210 (Lord Hailsham), 239 (Lord Fraser).

[28] *Crimes Act 1958* (Vic) s 38(1) places the issue within the definition of the offence rather than as a defence, including as an element of the offence that the accused "does not reasonably believe" that the complainant is consenting. This is similar to the *Sexual Offences Act 2003* (UK) s 1(1)(c).

[29] *Crimes Act 1900* (NSW) s 61HE(4); *Crimes Act 1958* (Vic) s 36A(2); *Criminal Law Consolidation Act 1935* (SA) s 47; *Criminal Code Act 1924* (Tas) s 14A(1)(c). The concept of "steps" has been given a somewhat unexpected interpretation by some courts. For example, in *R v Lazarus* the New South Wales Court of Appeal interpreted steps very broadly, not being confined to positive acts, but including a person's consideration or reasoning regarding particular events: *R v Lazarus* (2017) 270 A Crim R 378, [146]–[147]; [2017] NSWCCA 279.

[30] *Criminal Code Act 1899* (Qld) s 349; *Criminal Code Compilation Act 1913* (WA) s 325; *Criminal Code Act 1924* (Tas) s 185.

The way that Code states typically resolved issues of consent was through the mistake of fact defence.[31] There is a close analogy between a mistake of fact and the absence of mens rea in the criminal context.[32] For example, s 24 of the *Criminal Code Act 1899* (Qld) provided 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 the person believed to exist". An evidentiary onus of proof applies to this defence. Once the accused has raised some evidence of the existence of this defence, the onus of proof passes to the prosecution to negative its existence, beyond reasonable doubt.[33] There is weighty intellectual support for recognition of mistake as vitiating what would otherwise amount to criminal behaviour.[34]

Care must be taken regarding the use of "reasonable" in this context. It does not mean a simple objective negligence-based enquiry of what a reasonable hypothetical person would have believed.[35] It is an inquiry about the belief of the actual accused in the circumstances as they perceived them to be.[36] There is concern that, by use of the concept of "reasonable" in relation to this defence, that some or all of the misconceptions and myths about sexual assault claims noted earlier will be (silently) imported into jurors' deliberations.[37] Crowe and Lee note:

> The mistake of fact excuse, however, effectively provides a back-door way for factors such as the complainant's lack of overt resistance, level of intoxication, dress, prior behaviour and relationship to the defendant to be presented as supporting acquittal.[38]

It can again place the spotlight on the behaviour of the complainant, not the defendant.[39] It is also considered to be relatively easy for the accused to demonstrate some facts suggesting their belief as to consent was reasonable, at least meeting an evidentiary standard of proof.[40] It has been suggested that use of the reasonable belief standard is inappropriate because of the ease by which the accused might have avoided possible misunderstanding about consent by verbalising an inquiry of the complainant as to voluntariness/consent.[41]

Other scholars have criticised it on the basis of comparison of the magnitude of harm – the harm caused by non-consensual intercourse, albeit where the accused believed on reasonable grounds that the complainant was consenting, is great. In contrast, the harm caused by requiring any person intent on sexual intercourse with another to take steps to ensure that the intercourse is voluntary and consensual is

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[31] *Criminal Code Act 1899* (Qld) s 24; *Criminal Code Compilation Act 1913* (WA) s 24; *Criminal Code Act 1914* (Tas) s 14.

[32] "The absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent": *Thomas v The King* (1937) 59 CLR 279, 304–305; *Bank of New South Wales v Piper* [1897] AC 383, 389–390 (Sir Richard Couch, for the Privy Council).

[33] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 534 (Gibbs CJ), 546 (with whom Mason J agreed), 574 (Brennan J), 593 (Dawson J).

[34] *Thomas v The King* (1937) 59 CLR 279, 300 (Dixon J).

[35] This distinction is discussed in James Monaghan and Gail Mason, "Reasonable Reform: Understanding the Knowledge of Consent Provision in Section 61HA(3)(c) of the Crimes Act 1900 (NSW)" (2016) 40 *Criminal Law Journal* 246, 259–261. Some have advocated a negligence standard for rape offences: Lacey, n 4, 66.

[36] *R v Mrzljak* [2005] 1 Qd R 308, 321 (Williams JA), 327 (Holmes J); *Narkle v Western Australia* [2011] WASCA 160, [2].

[37] Thomas Crofts, "Rape, the Mental Element and Consistency in the Codes" (2007) 7(1) *Queensland University of Technology Law and Justice Journal* 1, 15. It has been suggested that reasonable mistaken belief in consent has been found in Queensland in circumstances that "beggars … belief": Wendy Larcombe et al, "Reforming the Legal Definition of Rape in Victoria – What Do Stakeholders Think?" (2015) 15(2) *QUT Law Review* 30, 35; Natalie Taylor, *Trends and Issues in Crime and Criminal Justice No. 344: Juror Attitudes and Biases in Sexual Assault Cases* (Australian Institute of Criminology, 2007) 3; Anna Carline and Clare Gunby, "'How an Ordinary Jury Makes Sense of It Is a Mystery': Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003" (2011) 32 *Liverpool Law Review* 237, 247.

[38] Jonathan Crowe and Bri Lee, "The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform" (2020) 39 *University of Queensland Law Journal* 1, 7.

[39] Larcombe et al, n 37, 47.

[40] Larcombe et al, n 37, 47; see also Carline and Gunby, n 37, 248.

[41] Anne Remick, n 9, 1132.

minimal.[42] It could also be viewed through the lens of dignity interests – sexual assault, even where the accused honestly and reasonably believed the complainant was consenting, deeply offends the dignity interest of the complainant.[43] There is minimal, if any, interference with the dignity interest of a person if the law requires them to take steps to ascertain that proposed intercourse is voluntary.

Common to both sets of jurisdictions was a presumption that sexual activity was consensual. This was reflected in the law itself, requiring the prosecutor to demonstrate the lack of consent, beyond a reasonable doubt. It was also reflected in factual presumptions – the law effectively presumed, in the absence of evidence to the contrary, for example physical resistance or verbal expression of non-consent, that the complainant consented to the activity.

Many deficiencies of the traditional approach to sexual offences have been noted. In particular, these have included that a focus on the concept of "consent" tends to result in too sharp a focus on the complainant, what they wore, what they did, whether they were intoxicated, their past sexual history etc, and a corresponding under-focus on what the accused did or did not do. It is trite to observe that previous features of sexual offence law, requiring juries to be warned of the dangers of accepting the uncorroborated testimony of the complainant, and taking into account whether or not the complainant made a complaint about the alleged incident at the first available opportunity, were not sufficiently sensitive to the situation of complainants of sexual assault. This was exacerbated by cross-examination practices of some defence counsel. Statutory reform has improved some of these features of the law and practice regarding sexual assault.

One aspect that causes sharp division among jurisdictions is the extent to which they accept an "affirmative consent" model. It has long been suggested that criminal law move in this direction.[44] The affirmative consent model effectively reverses the traditional practice of presuming consent. It presumes non-consent.[45] It requires the accused person to demonstrate that there was consent, rather than the complainant (more particularly, the prosecutor) to demonstrate a lack of consent.[46] Consent must be expressed in some way; it cannot be implied.[47] Some have even required that a person accused of rape prove beyond reasonable doubt that the complainant consented,[48] well beyond a traditional evidentiary, or even legal, onus of proof. The affirmative consent model presumes that women are capable of making rational, voluntary decisions as to whether to participate in sexual activity, in contrast to some of the more extreme versions of feminism which essentially view all sexual activity as rape, because women are so oppressed by existing patriarchy as to be unable to truly make a free and voluntary decision about participation.[49]

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[42] Toni Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 *University of Toronto Law Journal* 75, 77.

[43] Nicola Lacey suggests reframing of sexual assault laws around the similar concept of bodily integrity: Lacey, n 4, 66.

[44] Simon Bronitt, "The Direction of Rape Law in Australia: Toward a Positive Consent Standard" (1994) 18 *Criminal Law Journal* 249, 253; Anne Remick, n 9, 1105; Nicholas Little, "From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law" (2005) 58(4) *Vanderbilt Law Review* 1321, 1347.

[45] Deborah Tuerkheimer, "Affirmative Consent" (2016) 13 *Ohio State Journal of Criminal Law* 441, 448; Tom Dougherty, "Affirmative Consent and Due Diligence" (2018) 46(1) *Philosophy and Public Affairs* 90, 95–96.

[46] Rachel Burgin, "Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform" (2019) 59 *British Journal of Criminology* 296, 302: "In contrast to the 'no means no' approach to sexual consent, an affirmative standard redefines consent in positive terms; consent is something one actively gives to another. Affirmative consent requires that a person demonstrates willingness to engage in a sexual act either verbally or through their actions. The onus is on the initiator of sex to take steps to ensure that the other … is consenting."

[47] Burgin and Crowe, n 3, 348.

[48] Anne Remick, n 9, 1129. Respectfully, I cannot agree that a person accused of any crime be required to prove anything at the level of beyond reasonable doubt. The beyond reasonable doubt standard is obviously typically required of the person accusing another of wrongdoing. It is deliberately set at a very high level, due to the fear that an innocent person could be convicted of a crime. It reflects a considered position of the criminal law that, where is reasonable doubt as to the guilt of an accused, the default must be to "do nothing": James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2016). It is inconceivable in such a context that an accused would be required to meet such a standard.

[49] Catharine Mackinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989) 169.

Victoria and Tasmania have moved closest to an affirmative consent model. For example, s 36(2) of the *Crimes Act 1958* (Vic) states various circumstances in which a person *does not* consent to sexual activity. One of the stated grounds is that the complainant does not do or say anything to indicate consent.[50] In Tasmania, a defence of honest and reasonable mistake is available, but not where the accused failed to take reasonable steps to ascertain consent.[51] This mirrors developments overseas.[52] New South Wales has now moved in this direction, but the Queensland Parliament has declined to do so. This article will discuss recent law reforms in this area, before arguing that Australian sexual offence provisions do need to align with an affirmative consent model. It will also suggest improvements to the way in which the law might reflect an affirmative consent model.

The subject matter is considered particularly relevant to members of the judiciary who might be running a criminal trial involving allegations of sexual assault, potentially impacting on the instructions they might give to jurors during such trials, considering changes to legislation in this field, and discussing important academic literature reflecting on past case law involving allegations of sexual assault. The subject matter has caused the author to reflect on his own assumptions and thoughts in relation to these types of matters. It is thought that some working in the legal system might benefit from considered reflection on the difficult issues raised in this article.

Recent Reforms

A. Queensland

Rape and sexual assault offences are contained, respectively, in ss 349 and 352 of the *Criminal Code Act 1899* (Qld). They both focus on the question of lack of consent of the complainant. Section 245 defines consent.[53] The defence of mistake of fact in s 24 can apply in this context, where the accused argues they believed the complainant was consenting. The Queensland Law Reform Commission completed its *Review of Consent Laws and the Excuse of Mistake of Fact* in 2020. It recommended several changes to the law of sexual offences in Queensland, but stopped well short of adopting an affirmative consent model.

The Commission drafted a *Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020* (Qld). It contained the following specific reforms:

- amendment to s 348 *Criminal Code Act 1899* (Qld) to provide that a person should not be taken to consent to a particular act only because, at the relevant time, they did not say or do anything to indicate lack of consent;[54]

[50] *Crimes Act 1958* (Vic) s 36(2)(l); *Criminal Code Act 1924* (Tas) s 2A(2)(a). This overcomes past interpretations where the failure of the complainant to resist has been taken as evidence of consent: see for example *Getachew v The Queen* [2011] VSCA 164, where Buchanan JA noted, in setting aside a rape conviction, that "there was no demur on the part of the complainant" during the sexual activity ([25]). This was in the context where shortly prior to the events, the complainant had told the accused not to touch her.

[51] *Criminal Code Act 1924* (Tas) s 14A(1)(c).

[52] The best example is in the Canadian Criminal Code: *Criminal Code*, RSC 1985, c C-46, s 273(2)(c), explaining that a defence of consent is not available to a sexual assault charge where the complainant's consent was not affirmatively expressed by words or actively expressed by conduct; see *R v Ewanchuk* [1999] 1 SCR 330.

[53] This was defined to mean consent freely and voluntarily given by a person with cognitive capacity. Consent is not freely and voluntarily given if obtained by force, threat or intimidation, fear of bodily harm, exercise of authority, false and fraudulent representations about the nature and purpose of the act, or mistaken belief induced by the accused that they were the complainant's partner.

[54] Arguably, this reform was necessary in light of the decision of Sofronoff P in *R v Makary* [2019] 2 Qd R 528; [2018] QCA 258 where it was suggested that silence might amount to evidence of consent: "the giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation may 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" ([49]–[50])(with whom Bond J agreed); compare *R v Shaw* [1996] 1 Qd R 641, 646: "a complainant who at or before the time of sexual penetration fails by word or action to manifest (their) dissent is not in law thereby taken to have consented to it" (Davies and McPherson JJA).

- expressing a continuous consent model, under which a person's consent to sexual activity can be withdrawn at any time by words or conduct;
- in applying the s 24 mistake of fact defence, the court should take into account anything the accused did or said to determine whether or not the complainant consented to the activity; and
- in applying the s 24 mistake of fact defence, the fact of the voluntary intoxication of the accused should not be taken into account.[55]

The first two of these amendments are now reflected, respectively, in s 348(3) and (4) of the *Criminal Code Act 1899* (Qld), and the second two are reflected, respectively, in s 348A(2) and (3) of the Code.

It is clear that these reforms fall well short of the affirmative consent model that scholars had urged the Queensland Parliament to adopt.[56] They do move the law closer to that model, in effectively precluding reliance on silence as evidence of consent, and by requiring a focus on that the accused did, if anything, to determine consent. The Commission rejected an affirmative consent model:

> The Commission does not consider it desirable, either as a matter of principle or from a practical standpoint, to amend s 348 of the *Criminal Code* to change to the meaning of "consent" to require a clear and unequivocal "yes". This formulation of an affirmative consent model departs from the traditional model of consent in the criminal law and is not part of the criminal law in any jurisdiction. A requirement of unequivocal and express language or actions before there is consent in law presents difficulty. Such a model would reduce the means by which consent is given for the purposes of the law. It takes no account of variations in the dynamics of relationships. A reform of this nature would be unlikely to produce any positive outcome.[57]

Specifically, the Queensland Law Reform Commission did not support a move to the position in Victoria and Tasmania that failure of the complainant to do or say anything to indicate the presence of consent meant that there was no consent.[58] Instead, the Commission favoured a less robust amendment, to the effect that the fact the complainant did not do or say anything to indicate consent was a relevant factor to be taken into consideration, and consent should not be found merely for that reason.

The Queensland *Criminal Code* continues to provide for a mistake of fact defence, and the Law Reform Commission recommended its retention on the basis that criminal sanction should be reserved for situations where there was moral culpability, and the existence of an honest and reasonable, though mistaken, belief as to consent, means that the relevant culpability would not exist on given facts.

The Commission declined to amend Queensland law to require that an accused had taken steps to ascertain whether or not the complainant was consenting.[59] Instead, it recommended an express amendment to s 24 to make it clear that it would be relevant in determining the applicability of that defence to consider the extent to which, if any, the accused took such steps. This was on the ground that the proposed reform would operate more flexibly than a fixed rule focussed on what steps were taken.[60] It also declined to recommend the inclusion of objectives and principles to guide in the interpretation of the relevant provisions,[61] as has occurred in jurisdictions such as Victoria,[62] and is proposed in the NSW reforms. It also declined to recommend amendment of the definition of consent to require agreement, or free

[55] Arguably, this reform was necessary in light of the decision in *R v Duckworth* [2017] 1 Qd R 297; [2016] QCA 30, where the Court of Appeal determined that the voluntary intoxication of the accused might be relevant to whether they had an honest belief regarding consent: [106] (Burns J), with whom McMurdo P agreed ([1]).

[56] Crowe and Lee, n 38, 28.

[57] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (June 2020) 87.

[58] Queensland Law Reform Commission, n 57, 94.

[59] This had been recommended by Crowe and Lee, n 38, 28.

[60] Queensland Law Reform Commission, n 57, 188.

[61] Queensland Law Reform Commission, n 57, 227–228.

[62] *Crimes Act 1958* (Vic) s 37A (referring to the fundamental principle of sexual autonomy as a legislative objective) and s 37B (guiding principles for the interpretation of the relevant sexual assault provisions, including that there is a high degree of sexual violence within society, that it is significantly under-reported, that many of the complainants are vulnerable persons within the community, that sexual violence commonly occurs between individuals known to each other, and that there is often no physical evidence of a rape having occurred).

and voluntary agreement, as has been legislated elsewhere.[63] The Commission considered this would introduce uncertainty into Queensland law.[64]

There continues to be concern as to how the mistake of fact defence applies in sexual assault cases. Specifically, some of the factors that the court takes into account in determining the reasonableness of the accused's mistaken belief can be troubling, suggestive of a throwback to previous eras of sexual assault law. An example appears in the following passage:

> The absence of objection, verbal or physical; the proximate potential assistance of a male friend who was not called on; and the lack of actual or threatened violence against the complainant which might have explained subjection on her part make it possible that the appellant did believe there was consent.[65]

Another example appears in the judgment of McMurdo P (dissenting) in *R v Elomari* where her Honour stated that:

> There was other evidence capable of supporting an honest and reasonable belief as to consent. The complainant had accepted the appellant's invitation to come alone to his house after midnight. Inside the laundry of the house they kissed consensually. When he kissed her on the neck and grabbed her buttock, she giggled. She smoked three large cones of marijuana with him and was, on her evidence, "very stoned". Some of the marks later found on her body could have been made consensually … a jury could have considered that she may not have communicated her lack of consent effectively to the appellant because she was heavily affected by marijuana. They may have considered that he misinterpreted any signs of displeasure and discomfort as being caused by the pain from her recent tattoo rather than a demonstration of her lack of consent.[66]

With respect, it is not clear to me how the fact that a complainant agrees to go to the home of the accused late at night, kisses him, giggles or does not giggle during some flirtatious activity is relevant to whether the complainant consented to sexual intercourse, or whether the accused had an honest and reasonable belief as to consent. With respect, the fact that the complainant was affected by marijuana might also be said to suggest she was not in a position to consent to any sexual activity.

There are numerous examples where the failure of the complainant, by words or action, to make clear her lack of consent at the time of the events are considered to be relevant to consideration of whether the complainant did in fact consent, or whether a defence of mistake of fact as to consent should be left to the jury.[67]

Thus, Crowe and Lee have observed that reforms in this area risk being undermined if misconceptions and myths are introduced to the deliberation process via the mistake of fact defence.[68] Specifically, passive acquiescence in the activity by the complainant is sometimes being utilised to support a mistake of fact defence. It is not yet clear, of course, if the recent reforms will lead to substantial change to this practice.

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[63] For example, *Crimes Act 1900* (NSW) s 61HE(2).

[64] Queensland Law Reform Commission, n 57, 66; for criticism see James Duffy, "Sexual Offending and the Meaning of Consent in the Queensland Criminal Code" (2021) 45 *Criminal Law Journal* 93, 108.

[65] *R v Rope* [2010] QCA 194, [57] (Chesterman J, with whom de Jersey CJ and Fraser J agreed); see similarly *R v Dunrobin* [2008] QCA 116 and *Phillips v The Queen* [2009] QCA 57 (*Phillips*). In *Phillips*, the trial judge directed the jury as to a mistake of fact defence only in respect of counts involving facts where the complainant did not physically resist. This can suggest that the complainant's failure to physically resist may be used as evidence of consent, or at the least, reasonable mistake as to consent. It is hoped the recent amendments will mean that this is not suggested in future. Interestingly, *Criminal Code Act 1983* (NT) s 192A provides that the jury should be directed that the complainant should not be regarded as having consented to any sexual act merely because they did not protest or physically resist. For criticism of this line of cases see Crowe and Lee, n 38, 5–13.

[66] *R v Elomari* [2012] QCA 27, [5].

[67] *R v Shaw* [1996] 1 Qd R 641, 646: "a complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it. Failing to do so may, however, depending on the circumstances, have the consequence that at the trial a jury may decide not to accept her evidence that she did not consent, or it may furnish some reasonable ground for a reasonable belief on the part of the accused that the complainant was in fact consenting to sexual intercourse and so provide a basis (for a s 24 defence)" (Davies and McPherson JJA); applied in *R v Parsons* [2001] 1 Qd R 655, 657 (de Jersey CJ Davies JA and Helman J); [2000] QCA 136.

[68] Crowe and Lee, n 38, 12; see also Jonathan Crowe, "Consent, Power and Mistake of Fact in Queensland Rape Law" (2011) 23(1) *Bond Law Review* 21.

These comments are on one view an example of a concern expressed more generally by Annie Cossins that, where the concept of "reasonableness" is utilised to assess the views of an accused person about consent, the law becomes vulnerable, because in effect it:

> assumes that the fact-finder will not make unreasonable inferences about the complainant's behaviour in deciding whether reasonable grounds existed for the defendant's belief. From one fact-finder to the next, it is impossible to know the community standards each of them will consider to be reasonable.[69]

B. New South Wales

After reforms in 2007, the *Crimes Act 1900* (NSW) defined a sexual assault defence in terms of the accused having sexual activity with another person knowing that the other person does not consent. The concept of knowing that the other person does not consent could be met by evidence that (1) the accused knew the complainant did not consent; (2) was reckless as to whether or not the complainant consented; or (3) the accused had no reasonable grounds for believing that the complainant consented.[70] The provision also made clear that the decision-maker would have to have regard to all relevant facts, including the extent to which the accused took steps, if any, to ascertain that the complainant consented.[71] However, their self-induced intoxication was irrelevant.[72] It further made clear that the fact the complainant did not offer physical resistance to the sexual activity did not, by that fact alone, mean they consented to what occurred.[73] Clearly, these reforms did not reflect an affirmative consent standard, but did consider the extent to which the accused took steps to ascertain the existence of consent. It also contained a list of circumstances where "it may be established" that the complainant does not consent, including when they were affected by alcohol or other drug, was subject to intimidatory or coercive conduct, or through abuse of a position.[74]

Despite these changes, dissatisfaction with the application of the law in this context continued. Particular controversy attended the case of the prosecution of Lazarus. The complainant alleged that Lazarus sexually assaulted her in the laneway near a nightclub. The evidence suggested both the accused and the complainant had been drinking heavily in the lead up to the relevant events. The accused and the complainant interacted, the former telling the latter he was the part-owner of the nightclub. He indicated he would take her to a VIP room. Instead, he took her through a back door to the laneway. They kissed. The complainant indicated she wished to return to her friend in the nightclub. Then the accused sought to remove the complainant's pants. She pulled them back up. The accused then pulled the complainant's pants back down and proceeded to have anal sex with her. During the activity, the complainant did not indicate she did not consent to what occurred. The accused claimed the complainant was making movements consistent with seeking to facilitate the sexual activity. At no stage did the accused use force or threats against the complainant. After the event, the accused asked the complainant for her details, so he could add them to his phone. The two parted company. Soon after, the complainant told a friend she had been raped. The accused was charged with rape. His defence was that he had reasonable grounds for believing that the activity was consensual. The first trial of the accused resulted in a conviction, but this was overturned on appeal on the basis the trial judge misdirected the jury on the "reasonable grounds" defence.[75] Some comments on appeal suggest that courts might take a very broad view of what reasonable grounds might be, as a basis for an accused's defence,[76] making it extremely difficult to obtain a conviction.

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[69] Cossins, n 24, 477.

[70] *Crimes Act 1900* (NSW) s 61HE(3); see for discussion Monaghan and Mason, n 35.

[71] *Crimes Act 1900* (NSW) s 61HE(4)(a).

[72] *Crimes Act 1900* (NSW) s 61HE(4)(b).

[73] *Crimes Act 1900* (NSW) s 61HE(9).

[74] *Crimes Act 1900* (NSW) s 61HE(8).

[75] *Lazarus v The Queen* [2016] NSWCCA 52.

[76] *Lazarus v The Queen* [2016] NSWCCA 52, [156]: "in many … contested cases, perhaps all, there might be a reasonable possibility of the existence of reasonable grounds for believing (mistakenly) that the complainant consented and other reasonable grounds suggesting otherwise" (Fullerton J).

A second trial was held before a judge sitting alone. This judge found that the complainant did not consent to what occurred, but the accused had formed a belief on reasonable grounds that the complainant was consenting. This judge took into account that the complainant did not verbally object to what occurred, and did not take action to physically extricate herself from the situation, together with the lack of force on the part of the accused. This decision was successfully appealed on the basis that the judge had not considered what steps, if any, the accused had taken to ascertain whether the complainant consented,[77] as the relevant provision required.[78] Again, some comments on appeal were controversial as to the interpretation of "steps" here, the view being expressed that the concept was not confined to physical acts, but could include thought processes and consideration of what was perceived.[79] Again, this interpretation was favourable to an accused, making it more difficult to obtain a conviction, and has been cogently criticised.[80] However, it found that it would be oppressive to order the accused to stand trial again. The judgments have been the subject of strident criticism.[81]

Controversy over these trials led to calls for law reform. As a result, the New South Wales Law Reform Commission was engaged to investigate the matter. It recommended introduction of an objective provision in the relevant part of the legislation, reflecting every person's right to engage or not engage in sexual activity, that consent ought not be presumed, and that consent is ongoing and mutual, involving free and voluntary agreement. It recommended that the law adopt an affirmative consent model, by specifying that the fact that the complainant does not say or do anything to indicate consent means they do not consent. Further, the Commission recommended a rewording of (3) above, deleting reference to the accused having no reasonable grounds for believing the complainant consented, and replacing it with a belief that the accused has regarding consent is not reasonable in the circumstances. This is intended to be easier to establish, though the focus continues to be on the reasonableness of the belief that the particular accused holds, rather than what a reasonable person would have believed.[82] The Commission also recommended introduction of a provision to the effect that a belief that the other is consenting is deemed not reasonable if the accused did not do or say anything to determine whether the other person consented. This is again intended to facilitate successful prosecution, replacing a phrase that considered the extent to which the accused took steps, if any, to ascertain consent, with a deeming provision unfavourable to the accused, if they failed to do or say anything to determine consent.

The Commission also recommended that provision be made for specific jury directions in cases involving alleged sexual assault, which the judge could provide where there was good reason to do so and/or when either party requested it. These directions would aim to address common misconceptions around sexual assault cases, including the circumstances in which sexual assault might occur, how a sexual assault complainant "should" act, the demeanour of the complainant in the witness box, and the behaviour and appearance of the complainant. These would be consolidated with existing evidentiary provisions

[77] *R v Lazarus* (2017) 270 A Crim R 378; [2017] NSWCCA 279.

[78] *Crimes Act 1900* (NSW) s 61HE(4)(a).

[79] *R v Lazarus* (2017) 270 A Crim R 378; [2017] NSWCCA 279, [147]: "a 'step' … must involve the taking of some positive act. However, for that purpose, a positive act does not necessarily have to be a physical one. A positive act, and thus a 'step' for the purposes of the section, extends to include a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives" (Bellew J, with whom Hoeben CJ ([1]) and Davies J ([4]) agreed). This led the New South Wales Law Reform Commission to recommend removal of the concept of "steps" from the provision: New South Wales Law Reform Commission, n 10, 146, and the interpretation was criticised in the literature: Andrew Dyer, "Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need for s 61HE of the Crimes Act to Be Changed (Except in One Minor Respect)" (2019) 43 *Criminal Law Journal* 78, 81. It does not appear in the 2021 bill.

[80] Mason and Monaghan, n 23, 33: "in this interpretation, a step need be nothing more than a subjective state of mind. This appears to make it unnecessary for (an accused) to make a verbal or physical (such as a gesture) mode of inquiry to determine consent. Does this mean … that a man who has just met a young intoxicated woman … and taken her to a dark alleyway on her own may simply 'reason' in his own mind that she freely agrees to sex, based on his reading of what she says or does not say and what she does or does not do? … a mental step is all that is required to provide him with 'reasonable grounds' for belief in consent. This is a far cry from the statutory purpose of the 2007 reforms to make liability for sexual assault less dependent on distorted views about sex and more reflective of community expectations."

[81] Cossins, n 24, 479–492.

[82] In this way, it avoids arguments that merely negligent behaviour should not be a basis of criminal liability: Dyer, n 79, 80.

regarding discrepancies in the complainant's account of events, and the fact the complainant did not make an early complaint about the assault.[83]

The NSW Parliament recently passed the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW). It largely reflected the Law Reform Commission's suggestions, but in one important respect it went further. Specifically, s 61HF introduces an objective statement that:

(1) every person has a right to choose whether or not to participate in sexual activity;
(2) consent to sexual activity is not to be presumed;[84] and
(3) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the participating parties.

Section 61HJ clearly states circumstances in which a person does not consent to sexual activity. Subsection (1)(a) includes that the complainant does not do or say anything to communicate consent.[85] This amendment responds to the "freeze" situation, where the complainant does nothing in response to the sexual activity, but they in fact do not consent to it. The new provision effectively presumes non-consent when the complainant does not do or say anything to communicate consent; in the past, the law presumed consent from such circumstances. In this way, the law is (belatedly) becoming more attuned to realities of sexual assault, where many complainants do freeze, but are not by doing nothing actually consenting, and the law should not presume from the freeze response that they are. Section 61HJ also lists other circumstances in which a complainant does not consent to sexual activity, including when they are sufficiently affected by alcohol or drugs so as not to be capable of consenting, is unconscious or asleep, participates as a result of fear or threats, coercion, blackmail or intimidation, or as a result of a relationship of trust and/or dependency. These examples find some parallels in previous s 61HE(5) and (8) but are worded more strongly than the latter provision – emphatically stating that there is no consent in such situations, not that they may evidence lack of consent.

Section 61HK replaces the previous s 61HE(3) in stating that an accused is taken to know that another person does not consent to sexual activity if (1) they actually know this; (2) they are reckless as to this fact; or (3) any belief they have that the complainant is consenting is not reasonable in the circumstances.[86]

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[83] *Criminal Procedure Act 1986* (NSW) ss 293A, 294. These recommendations are contained in Appendix D to the Commission's Report, and are explained in Ch 8.

[84] Compare Andrew Dyer, "The Mens Rea for Sexual Assault, Sexual Touching and Sexual Act Offences in New South Wales" (2019) 48 *Australian Bar Review* 63, 94: "an accused who fails to gain a clear indication from the complainant that s/he is consenting should not necessarily be convicted of a serious offence."

[85] This mirrors reforms in Victoria (*Crimes Act 1958* (Vic) s 36(2)(l)) and Tasmania (*Criminal Code Act 1924* (Tas) s 2A(2)(a)). Some are sceptical this will make much difference in sexual assault cases: Dyer, n 79, 79. There is force in Dyer's observation that the wording of the proposed new provision creates new difficulties, because it requires fact finders to draw conclusions about why a complainant did a particular thing, specifically whether something they did was "to communicate consent" – focusing on the purpose of particular acts of the complainant. He interprets the word "to" here to mean "with the purpose of". He means the purpose of the person. He indicates it is often not clear why a person has done a particular thing, and it may be difficult to prove one way or the other (88). On the other hand, it is not inevitable that a court would interpret the phrase "the person does not say or do anything *to* communicate consent" to require that the person have a purpose of communicating by doing the act. It could conceivably be sufficient that the act does, or does according to the interpretation of a reasonable person, have the effect of communicating consent, regardless of any purpose in the mind of the person doing it. This proposal has been criticised on the basis that it "conflates the evidence from which a person's consent can be inferred (namely what was said or done by the person) with consent itself. There may be free agreement to sexual activity regardless of whether a person communicates that state of mind": Stephen Odgers, "Reform of Consent Law" (2021) 45 *Criminal Law Journal* 77, 79. Respectfully, Odgers has a point regarding the desirability of different grades of sexual offence depending on the level of culpability of the person convicted of such an offence. He reasonably views an unreasonable, mistaken view of consent case quite differently from one where there is clear evidence the accused knew that the complainant did not consent. The new law does not make this differentiation; the New South Wales Law Reform Commission rejected the suggestion to introduce a lower grade sexual assault offence: New South Wales Law Reform Commission, n 10, 131.

[86] It is not entirely clear whether this rephrasing is intended to mean that, in relation to (3), that the question is whether a reasonable person would not have had the particular belief, or whether a reasonable person in the position of the accused would not have had it. My best reading of the recommendations of the New South Wales Law Reform Commission, n 10, which drafted a proposed law upon which the current bill is based, suggests that the latter is intended: 130. This is also supported by case law: *Marwey v The Queen* (1977) 138 CLR 630, 641 (Stephen J); *Taiapa v The Queen* (2009) 240 CLR 95, 105 (French CJ Heydon Crennan Kiefel and Bell JJ); [2009] HCA 53 (suggesting an equivalence between whether a person has a reasonable belief and whether they have

Section 61HK(2) states that in determining whether a belief is reasonable, it is not considered such if the accused person did not, during or within a reasonable time prior to the sexual activity, say or do anything to determine whether the complainant consented to the sexual activity.[87] This is effectively acceptance of an affirmative consent model.[88]

Section 61HI discusses consent generally. It reflects aspects of previous s 61HE(3) by reiterating that the mere fact the complainant does not offer physical resistance to what occurred does not necessarily mean they consented, but adds verbal resistance.[89] In addition, new s 61HI expresses that a complainant may, by words or conduct, withdraw consent to sexual activity at any time, that sexual activity that occurs after consent is withdrawn is non-consensual, and the fact that a person has consented to some sexual activity does not necessarily mean they have consented to other sexual activity. Further, the fact that a person has consented to sexual activity with a person on a previous occasion does not mean they consented to sexual activity on the relevant occasion.[90]

The Act also adopts the Law Reform Commission's proposals around amendment to the *Criminal Procedure Act 1986* (NSW). Specifically, a judge in a sexual assault case may make particular directions about consent if they believe there is good reason to do so, and/or where one of the parties requests it. The suggested directions seek to counter common misconceptions that some jurors might have. Specifically, the directions would explain that sexual assault can occur in many different contexts, including people known to one another (including within a marriage or long-term relationship), that there is no typical or expected response to sexual assault and that some complainants may freeze, and jurors should not apply preconceived ideas of how complainants "should" respond, that the lack of physical injury, violence or threats is not evidence of consent, that trauma affects people differently and jurors should again not expect complainants to behave in a particular way in the witness box, and that it cannot be presumed that the complainant consented to sexual activity by the way they dressed, consumed alcohol or other drugs, or was at a particular location.[91]

In essence, I support the NSW reforms. I agree that the affirmative consent model better balances the interests involved. Consent should not be presumed. Sexual activity must be consensual, and voluntary. No one should presume that another is willing to have sex with them. The law should not generally defend a person who has made such a presumption. It should be incumbent upon any person intent on sexual activity to ensure that the party with whom they intend to have sexual relations agrees to what is proposed. While the law in this area has substantially evolved, there remain traces of outdated views and assumptions about sexual relationships among fact finders, which no longer accurately reflect community values and sentiment. The era of victim blaming is over. The proposed new laws are

reasonable grounds for the belief). Some have argued that this kind of defence would only be available where there was a lack of dissent or resistance on the part of the complainant, and that the accused did not seek to frighten or deceive the complainant: RA Duff, "Recklessness and Rape" (1981) 3(2) *Liverpool Law Review* 49, 62; Dyer, n 79, 99.

[87] In this respect, the legislation goes further than the Law Reform Commission's proposal, which merely required that regard must be had to whether the accused did or said anything to determine whether the complainant was consenting. This new provision, which replaces previous s 61HA(3)(d), does not use the word "steps", subject to a somewhat strained interpretation (with respect) in the New South Wales Court of Appeal decision in Lazarus: *R v Lazarus* (2017) 270 A Crim R 378, [146]–[147](Bellew J, with whom Hoeben CJ and Davies J agreed); [2017] NSWCCA 279. See for cogent criticism Dyer, n 79, 97–99; Mason and Monaghan, n 23, 33–34.

[88] Andrew Dyer, "Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism?" (2021) 45 *Criminal Law Journal* 185 is critical of this development, particularly new s 61HK(2) which effectively means that unless an accused has said or done something to determine whether or not the complainant consented, they will not be able to rely on a defence of reasonable belief as to consent. He claims that "if we convict all those who engage in non-consensual sexual relations, we expose to great stigma some people who have not acted culpably" (189), and "there are sometimes good reasons why people do not 'do or say anything' to ascertain whether then (sic) other person is consenting to a particular sexual act" (191).

[89] *Crimes Act 1900* (NSW) s 61HI (4).

[90] *Crimes Act 1900* (NSW) s 61HI(2), (3), (5) and (6).

[91] *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) Sch 2. The Schedule contains a consolidation, containing these new provisions in s 292 to complement existing provisions s 293A (relating to inconsistencies in a complainant's evidence in sexual assault cases) and s 294 (relating to whether or not the complainant made an early complaint about the alleged assault).

considered to be more sensitive to the actual experience of sexual assault complainants, not applying preconceived notions of how rape complainants "should" act, but embracing the reality that there is no one correct or typical way that complainants respond, and that the response of many is to "freeze" during the attack. It was a gross distortion to view such behaviour, as it was in the past, as evidence of consent. The onus remains on the prosecution to prove all elements of the offence, beyond reasonable doubt, as it should. This remains a very high bar, particularly in the context of alleged sexual assault, where a range of factors, including the lack of witnesses to events, intoxication, lack of communication and misunderstanding can make a successful prosecution fraught.

REFLECTIONS

A. The Criminal Law Should Only Punish the Morally Culpable

Criminal law should in general only punish behaviour that is morally culpable.[92] I leave aside for the purposes of current discussion regulatory offences, which might be based on strict liability, but which do not attract the possibility of jail terms. Great stigma is associated with a criminal conviction, and this is appropriate and deserved only in cases of clear culpability on the part of the defendant. This was recently recognised by the Queensland Law Reform Commission, in the course of recommending its reforms, more modest in nature than those in other jurisdictions, and its non-adoption of the affirmative consent standard.

I respectfully take a different position than that of the Law Reform Commission. While I accept that reasonable minds might differ on this point, it is considered today that where a person has sexual intercourse with another without having done anything to determine whether or not the other person consents, this is morally culpable behaviour, at least where the complainant has not done or said anything to indicate that they are a willing participant in the activity.[93] The Supreme Court of Canada has accepted this view.[94]

I must respectfully disagree with Ferzan's views as to which defendants are morally culpable:

> Codes that adopt affirmative expression models may be admirably attempting to protect women. However, we do not currently (consider) consent under the presumption that "only yes means yes". Accordingly, a man might believe, or even reasonably believe, that a woman is assenting despite her expression of non-consent. So too, a woman might misinterpret her partner's inexpressiveness and believe that her partner assents. If these potential defendants are punished in order to cause social change or to protect women by creating prophylactic rules, then we are punishing individuals who are nonculpable as to what we really care about (non-consensual sex) in order to accomplish our goal (better and more accurate communication about consent). We are punishing the morally innocent … the criminal law must take seriously that to brand someone a criminal is to stigmatize him and to subject him to hard treatment, often incarceration. This sort of condemnation is appropriate only where there is a guilty mind.[95]

First, a man who believes that a woman is assenting, despite her expression of non-consent, where the belief is completely unreasonable, is not morally innocent. The *Morgan* precedent has been greatly derided, and overturned in relevant common law jurisdictions. Second, a man who believes that a woman is assenting, despite her expression of non-consent, *where the belief is reasonable,* is in more of a grey area. However, the law should more closely specify when it might be reasonable for an accused to hold that belief, which will be elaborated upon below. The law in this area cannot be purely subjective, because it is impossible for us to get into the mind of the accused and to determine what they actually

[92] *Wilson v The Queen* (1992) 174 CLR 313, 327 (Mason CJ Toohey Gaudron and McHugh J); *Miller v The Queen* (2016) 259 CLR 380, 419 (Gageler J); [2016] HCA 30.

[93] Pickard, n 42, 77.

[94] *R v Ewanchuk* [1999] 1 SCR 330, 354: "in order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question" (Major J, for Lamer CJ, Cory Iacobucci Bastarache and Binnie JJ).

[95] Kimberly Kessler Ferzan, "Consent, Culpability and the Law of Rape" (2016) 13 *Ohio State Journal of Criminal Law* 397, 421–422.

believed at the time of the events. There may well be different grades of culpability in relation to sexual offences, which a simple offence of rape does not capture,[96] but due to space restrictions I will not further consider this point.

B. The Law Should Not Require an Accused to Prove Reasonable Belief as to Consent on the Balance of Probabilities

As it stands, the accused bears an evidentiary onus in relation to honest and reasonable mistake. They must raise some evidence supportive of the defence. Once they have done so, the onus shifts to the prosecution to prove that the defence does not apply, beyond reasonable doubt. It has been suggested that the accused should bear a legal onus to prove consent,[97] or at least a reasonable belief as to consent.[98]

The law should not impose a legal onus on the accused in relation to honest and reasonable mistake. Imposing a legal onus of proof on a defendant is problematic in principle, as was distinctively noted by the Supreme Court of Canada in *R v Oakes*,[99] in reliance on the distinguished work of Sir Rupert Cross. This is because it raises the unacceptable spectre of an accused being convicted despite the existence of reasonable doubt as to their guilt. This could occur if, for example, the accused could raise some evidence to support the defence (perhaps raising a reasonable doubt as to their guilt), but could not prove it on the balance of probabilities. If the accused were held to a legal onus in such cases, they would be convicted of the offence, despite the existence of reasonable doubt as to their guilt.[100] This is unacceptable.

C. The Complainant Need Not Have Verbally Agreed to Sexual Activity in Order That Consent Is Established

Some have argued that the accused would have had to obtain the prior verbal agreement of the complainant to sexual activity, and particular sexual activities, before the activity could be deemed to be consensual.[101] Remick argues it is not difficult or onerous to expect a person to obtain the verbal consent of another to proposed activity. If a person fails to do so, they are culpable in the event that the complainant does not, in fact, consent to what occurs.

I respectfully disagree with this suggestion. It should not be necessary for an accused to obtain the verbal consent of the other prior to engagement in sexual activity. The reality is that much, if not most, sexual activity takes place without such verbal agreement, and it would require a radical change in societal norms and behaviours to accommodate this requirement.[102] It is not realistic to expect this of individuals. It is preferred that there must be evidence that the complainant consented to the activity, either by words *or actions*.

The objection that Remick and others express to a test that considers the words and actions of the complainant, if any, to signify their agreement to the activity is that it leaves it open for fact finders to take into account a whole range of factors, many of which are irrelevant, in determining whether the complainant's actions reflected consent, or at the least, reasonable grounds for the complainant to believe that such consent existed. Remick fears that some jurors will consider factors such as promiscuity, flirting, clothing, the complainant's looks, and race as evidence of consent, or reasonable grounds for

[96] Kessler Ferzan, n 95, 433–434. For a developed argument to this effect see Helen Power, "Towards a Redefinition of the Mens Rea of Rape" (2003) 23(3) *Oxford Journal of Legal Studies* 379.

[97] Anne Remick, n 9, 1129 (Remick argues the accused should have to prove consent beyond reasonable doubt. This is typically a description of a standard to be met by a prosecutor, not a defendant in relation to a defence).

[98] Several submissions to the Queensland Law Reform Commission, n 57, suggested that the accused should bear a legal onus: 176.

[99] *R v Oakes* [1986] 1 SCR 103 (Dickson CJ Chouinard Lamer Wilson and Le Dain JJ; Estey and McIntyre JJ concurring in the result).

[100] *R v Oakes* [1986] 1 SCR 103, 133.

[101] Anne Remick, n 9, 1121–1130.

[102] HM Malm, "The Ontological Status of Consent and its Implications for the Law on Rape" (1996) 2 *Legal Theory* 147, 162–163.

belief as to consent.[103] These factors are on any measure irrelevant; her point is that jurors may take many factors into account in determining the issue of consent, or reasonable belief as to it. It is this possible Pandora's box of (legally) irrelevant matters that should not be opened. For Remick, the way to not open it is to confine the inquiry to what the complainant said, if anything, as to consent. These concerns that Remick and others have expressed are valid. We cannot know for sure, given the strict secrecy of jury deliberations, but given that jurors reflect a broad cross-section of society, it is considered quite possible that irrelevant factors, prejudices, myths, sexist and out of date attitudes may infect juror deliberations. However, this problem should be met by careful instructions to jurors in such cases, rather than an artificial limiting of the evidence relevant to consent.

D. The Fact the Parties Are in a Pre-existing Relationship Tells Us Nothing about Consent to Particular Acts on a Particular Occasion

Thankfully, the law in this area has evolved substantially from prior positions denying that a man could be convicted of raping his wife. This past position reflected a completely outmoded view of the status of women in the law, and relations between men and women. We understand now that women and men are equals. Women, like men, are autonomous beings who have control over their own bodies. They are not subservient to men. The fact that parties are in a pre-existing relationship, including being married, does not imply anything about anyone's consent to or attitude towards particular sexual activity on a particular occasion. Specifically, the law now recognises the right of anyone to decline to participate in sexual activity at any time. This is fundamental. It respects an individual's autonomy.

It is considered necessary to make these points due to some aspects of the literature that seem to suggest differently. For example, Victor Tadros cites an example:

> (t)here are cases where a person has become stupefied through involuntary intoxication, but where intercourse with her does not amount to her sexual autonomy being undermined. Consider A and B, who are in a long term relationship of mutual respect. B has her drink spiked by X. She is very drunk. A and B go home together and have intercourse. In that case, we may be reluctant to say that A has raped B. Although B's ability to decide has been undermined, the context of the relationship suggests that sexual autonomy remains intact.[104]

Later in the article, Tadros states:

> (I)f the defendant suspected that the complainant had become intoxicated without her consent, she was stupefied by that intoxication, and he had intercourse with her, barring exceptional circumstances (such as a verbal invitation, prior to her intoxication, to have intercourse with her whilst intoxicated, or if there is an ongoing mutually supportive relationship between the defendant and the complainant in which there is an expectation of intercourse in such circumstances) he ought fall within the offence of rape.[105]

Later, Tadros then frames two defences to a rape charge. The second of these is that the defendant "was in an ongoing sexual relationship of mutual trust and recognition with the complainant such that intercourse in such circumstances was legitimately expected".[106]

In response, I would respectfully suggest that no one can or should "legitimately expect" sexual intercourse with anyone, including their intimate partner. Agreement to particular activity is individual. Both parties must consent to a particular activity at a particular time. Nothing can be presumed from the fact the parties are in a relationship. We all know by now that a man can be charged with, and convicted of, raping his wife. That is how it should be.

A person who is drunk may not be in a position to agree to sexual activity. That is so, regardless of whether they are in a relationship with the person who had sex with them. The wrong associated with having sex with someone who cannot voluntarily agree because they are grossly intoxicated is not removed by the fact that it was their partner with whom they had the intercourse.

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[103] Remick, n 9, 1124.

[104] Tadros, n 7, 529.

[105] Tadros, n 7, 533–534.

[106] Tadros, n 7, 541.

Donald Dripps expresses similar views to those articulated by Tadros. After claiming that "unwanted sex is not as bad as violence", Dripps continues:

> In a case … of the intoxicated spouses, it is not clear that the victim's rights and interests are violated. True, she has not expressed approval; but then, she has, while sober and over a long course of dealing, approved of a complex relationship in which sex plays a prominent role. The husband has not sought to evade the terms of the relationship … the approach taken in the statute here proposed would permit a defendant accused of sexual expropriation from a person incapable of expressing refusal to raise an affirmative defense of implied authorization if a long-standing sexual relationship connects the defendant with the victim.[107]

Acknowledging that this text appeared in 1992 when attitudes towards these matters may have been different, it is highly problematic. I am not sure what Professor Dripps means when he refers to "the terms of the relationship". It would be ridiculous, for example, to suggest that it is a term of any intimate relationship that one party can have sex with the other any time they want. No one forfeits the right of bodily integrity and autonomy when they enter into a relationship. The voluntary nature of sexual relations must be satisfied on each and every occasion of intimacy between parties. It is not implicit from the fact they are in a relationship.

Given Professor Dripps' reference to the "terms" of the relationship, he may be viewing a relationship in contractual terms. It may be accepted for the purposes of discussion that marriage is sometimes viewed as a contract. But any analogy with contract does not serve Professor Dripps' argument well. Anyone with a knowledge of contract law is familiar with the classic position that, in contractual terms, silence cannot be taken to be acceptance of an offer.[108] If an indication of interest in sexual activity with one's partner is taken to be an "offer" for the purposes of the argument, and acknowledging its limitations and possible objections, the silence of the one "offered" it cannot be taken to be acceptance.

No one has "implied authorization" to have sex with another, regardless of how long they may have been together. It is offensive and wrong to suggest otherwise.[109]

As baseless as the above claims are, the broader point is that they doubtless reflect the views of some members of society about sexual activity. Thus, fact finders must be given explicit direction to ensure that, if they hold these attitudes, they are not utilising them to resolve rape cases.

E. Jurors Should Be Given Careful, Detailed Instructions as to How to Determine Consent

Empirical evidence suggests that jurors may find it difficult to understand the concept of consent in sexual assault cases.[110] This might mean that they fall back on personal assumptions and beliefs about sexual activity that may not be accurate.[111] The existence of the mistake of fact defence can facilitate use of this material in determining guilt.[112]

Given this, it is suggested that Queensland juries should be given specific instructions, as the recent NSW reforms contemplate. The instructions would be to the following effect:

- The fact that the complainant and the accused are, or were, in an intimate relationship, is irrelevant to the question of whether the complainant consented to particular activity on a particular day – this builds on, but goes further than, the Queensland Law Reform Commission's recommendations based on a "continuous consent" model. It seeks to avoid any presumption as to consent from past activity, or a current relationship. There is evidence that some continue to make such presumptions, thus the instruction is considered warranted. The NSW reforms move in this direction.

[107] Dripps, n 1, 1801.

[108] *Felthouse v Bindley* (1862) 11 CB (NS) 869; 142 ER 1037.

[109] See further Robin West, "Legitimating the Illegitimate: A Comment on Beyond Rape" (1993) 93 *Columbia Law Review* 1442.

[110] Carline and Gunby, n 37.

[111] Carline and Gunby, n 37, 241.

[112] and Lee, n 38, 7.

- The fact that the complainant did not offer physical or verbal resistance to the activity is not evidence of consensual sexual activity and not grounds for reasonable belief as to consent – this embraces the literature which indicates that rape complainants may respond in various ways, including to "freeze" when the activity is taking place,[113] and is reflected in Northern Territory law,[114] and the NSW reforms. There is evidence above that Queensland courts have taken into account the lack of resistance on the part of the complainant as evidence of consent, or at least grounds for reasonable belief as to consent.[115]
- The (mere) fact that the complainant had sexual intercourse with the accused, in the absence of an accused making threats of violence, is not evidence of consent or grounds for reasonable belief as to consent.[116]
- Fact finders must be carefully instructed about the evidence they take into account in determining whether there was consent, or grounds for reasonable belief as to consent. Specifically, the fact the complainant participated in some affectionate physical activity with the accused does not mean they consented to any sexual activity. The fact that the complainant visited the accused's premises at any particular hour of the day does not meant they consented to sexual activity.[117]
- Other behaviour of the complainant, including what some might regard as flirtatiousness, how they were dressed, how they were dancing etc is not evidence of consent to sexual activity, or grounds for reasonable belief as to consent.
- The fact that the complainant voluntarily consumed drugs or alcohol is not evidence of consent to sexual activity, or grounds for reasonable belief as to consent.[118] In fact, consumption of such substances may mean that the complainant is not able to consent to activity that occurred.[119] The fact of the voluntary intoxication of the accused is irrelevant to s 24, and this is reflected in the recent amendments.
- The fact the complainant consented to some sexual activity with the accused does not mean that they consented to all types of sexual activity.[120] This also reflects the NSW reforms.
- The fact finder should be slow to make any assumptions about how a complainant of sexual assault should act after the alleged events, or in the courtroom. They should be instructed that the literature suggests a very broad range of possible human responses to such events and that, just because the complainant did not act as an individual fact finder expected that they should act if the allegation were true, this does not mean that the complainant is lying or not providing an accurate recollection of events.
- I would have adopted the affirmative consent model, as occurred recently in New South Wales, and which is already a feature of the law in Victoria and Tasmania, by effectively requiring that the accused do something to determine whether the complainant consented to the activity. As explained, the Queensland reforms did not take this step, requiring merely that this question be taken into account in determining whether the accused might have had a reasonable belief about consent.

Conclusion

It is very difficult to legislate with respect to sexual offences. The stakes are very high. Punishment for sexual assault is typically severe. Severe opprobrium attends such a conviction. Evidence can be difficult to obtain, and often the consumption of drugs clouds the facts and relevant issues. Misunderstanding is

[113] A recent factual example of this is *R v Sunderland* (2020) 5 QR 261; [2020] QCA 156.

[114] *Criminal Code Act 1983* (NT) s 192A.

[115] *R v Rope* [2010] QCA 194, [57].

[116] Compare *R v Rope* [2010] QCA 194, [57].

[117] Compare *R v Elomari* [2012] QCA 27, [5].

[118] Compare *R v Elomari* [2012] QCA 27, [5].

[119] Crowe and Lee, n 38, 28.

[120] This sentiment is reflected in the recent decision in *R v Kellett* [2020] QCA 199.

possible. Of course, we do not wish to punish the innocent. We also want to fully reflect the autonomy of individuals, and respect their interests in bodily integrity. It is very hard to get the balance "right".

This article has outlined the development of the law in this area, highlighting existing anomalies. It has discussed recent reforms in Queensland and New South Wales, respectively. It has articulated important principles that ought to guide the law in this area. The law should only punish the morally culpable, but there is an argument that an accused who has failed to take steps to ascertain whether another consents to sexual activity has so acted. However, the accused should not be required to meet a legal onus as to a possible defence of mistake of fact. Verbal consent is not necessary in order to determine that sexual activity was consensual. The law must be very wary about making assumptions about consent based on the fact of an existing relationship between the parties. The article has determined there is clear evidence that, through the concept of "reasonableness" in relation to the mistake of fact defence, decision-makers are importing inappropriate values and attitudes about sexual activity into the process. It has concluded with recommendations as to how Queensland law could be further improved, and in particular greater direction to juries as to the interpretation of the mistake of fact defence, to properly balance the competing interests involved in this difficult area, and to avoid the silent use of inappropriate value judgments by fact finders.

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