

Submission about the New South Wales Law Reform Commission's Draft Proposals Concerning Consent in Relation to Sexual Offences

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Introduction

1. I have read and thought about the New South Wales Law Reform Commission's (the Commission's) draft proposals for reform of the law in this State concerning consent and knowledge of non-consent in relation to sexual offences.¹ While I agree with and support much of what the Commission has proposed, there are several proposals with which I respectfully disagree.
2. Concerning the question of the complainant's consent, I strongly agree with the Commission's proposal that there be a 'non-exhaustive list of specific circumstances in which a person "does not" consent to a sexual activity.'² I also strongly agree that there should no longer be a list of circumstances in which it 'may' be established that a person has failed to consent.³ But I continue to oppose inserting into the *Crimes Act 1900* (NSW) a provision such as proposed s 61HJ(1)(a).⁴ And, with respect, I do not accept the Commission's view that a person either consents⁵ or withdraws consent⁶ to sexual activity only when s/he communicates to her/his sexual partner that she is (no longer) willing.
3. I am also hostile to proposed s 61HJ(1)(g);⁷ and I have some doubts about the language of proposed s 61HJ(1)(e)(ii)⁸ – though not its general thrust. If implemented, the former provision would expose to sexual assault liability the person who induced another person to engage in sexual intercourse with him/her by lying about, for

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¹ New South Wales Law Reform Commission, 'Consent in relation to sexual offences: Draft Proposals' (October 2019).

² Ibid 12 [6.4].

³ Ibid 12 [6.5].

⁴ Ibid 13 [6.7].

⁵ Ibid 13 [6.9].

⁶ Ibid 9 [5.4].

⁷ Ibid 18-19 [6.48].

⁸ Ibid 15.

example, his/her wealth, marital status, ethnicity or biological sex at birth. In my view, that is undesirable. Under the latter provision, a person would not have consented to sexual activity if s/he participated in it ‘because of coercion, blackmail or intimidation occurring at any time.’⁹ While I accept that a person who ‘consents’ because of a threat – whether violent or non-violent – has not *really* consented,¹⁰ I consider that the words ‘non-violent threat(s), or intimidation, occurring at any time’ might usefully be substituted for the ‘coercion, blackmail’ language in the proposed sub-paragraph. This is a minor point, but it is hard to see why ‘blackmail’ is not an instance of ‘coercion.’ If so, it seems unnecessary to refer specifically to this particular kind of coercive behaviour. Further, given that ‘coercion’ is ‘the action or practice of persuading someone to do something by using force or threats’,¹¹ it would perhaps be preferable to use the language of ‘non-violent threat(s)’ here. In my respectful view, such language, though it seems to bear a similar meaning to that which the Commission has favoured (‘coercion’), is clearer and more readily understood than that language. Additionally, insofar as ‘coercion’ refers to the use of force, and to threats of force, there is overlap between draft s 61HJ(1)(e)(i) on one hand and draft s 61HJ(1)(e)(ii) on the other.

4. Concerning the question of the accused’s knowledge of a complainant’s non-consent, I support the retention of the three mental states for which s 61HE(3) of the *Crimes Act* currently provides.¹² I also support proposed s 61HK(2), which would require triers of fact to have regard to anything that the accused said or did to ascertain whether the complainant was consenting, when they determined whether s/he had the requisite mens rea.¹³ Further, I strongly agree with the Commission’s rejection of the notion that there should be a conviction in all cases where the accused has failed to *ensure* that the complainant was consenting.¹⁴
5. While I continue to believe¹⁵ that arguments against the ‘no reasonable grounds’ language in s 61HE(3)(c) arose from some commentators’ confusion about what the

⁹ Ibid.

¹⁰ This is for the reasons given in Andrew Dyer, ‘Yes! To Communication about Consent; No! to Affirmative Consent: A Reply to Anna Kerr’ (2019) 7(1) *Griffith Journal of Law and Human Dignity* 17, 40-2.

¹¹ Oxford English Dictionary online <<https://www.lexico.com/en/definition/coercion>>.

¹² See New South Wales Law Reform Commission, above n 1, 20.

¹³ Ibid 22.

¹⁴ Ibid 23 [7.24].

¹⁵ 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(2) *Criminal Law Journal* 78, 90-7.

NSW Appeal (NSWCCA) actually decided in *Lazarus v R*,¹⁶ and while I am far from convinced it is necessary to alter that language, I do not object to proposed s 61HK(1).¹⁷ Because the Commission's proposed language would not change the law – 'significantly'¹⁸ or otherwise – it would cause no adverse consequences. Most importantly, it seems clear that the Commission's proposed language would not facilitate a 'reasonable person' inquiry.¹⁹

6. Concerning jury directions, I agree with all of the Commission's recommendations in chapter 8 of its Draft Proposals, though I have one query about proposed s 292(2)(b) (i) of the *Criminal Procedure Act 1986* (NSW).²⁰ I also agree with the changes to the definitions of the terms 'sexual intercourse', 'sexual touching' and 'sexual act' that the Commission proposes in chapter 9 of its Draft Proposals. Furthermore, I have no objection to the structural and linguistic changes that the Commission proposes in chapter 3, or to the interpretive principles that it proposes in chapter 4.
7. Finally, I urge the Commission to reconsider one matter. At present in NSW, an accused is entitled to a direction about the mental element for the offences to which s 61HE applies even if s/he has neither pointed to nor produced any evidence that s/he did believe on reasonable grounds that the complainant was consenting. The Commission is apparently content for this state of affairs to continue. As recent events in Queensland demonstrate, this would be an error. Whatever flaws there are in the arguments that Jonathan Crowe and Bri Lee have made about the operation of the 'mistake of fact' excuse in rape and sexual assault trials in Queensland²¹ – and, in my respectful view, there are many²² – they seemingly *have* shown that judges have too readily left that excuse with juries in such matters. Accordingly, Sopronoff P was, with respect, correct recently to insist that juries be directed about mistake only where there is indeed evidence that the accused believed on reasonable grounds in the existence of consent.²³ The position should be the same in NSW. Juries should only be

¹⁶ [2016] NSWCCA 52, [156].

¹⁷ See New South Wales Law Reform Commission, above n 1, 20.

¹⁸ Ibid 21 [7.11].

¹⁹ See *ibid*.

²⁰ See *ibid* 27.

²¹ Jonathan Crowe and Bri Lee, 'Consent Law in Queensland', *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/about>>.

²² Andrew Dyer, 'Submission to the Queensland Law Reform Commission's Consent and Mistake of Fact Review' (21 October 2019).

²³ *R v Makary* [2018] QCA 258, [56].

able to be directed about honest and reasonable mistake if that matter is actually in issue.²⁴

Consent

8. I respectfully support proposed:

- s 61H(1), which provides that a person consents to sexual activity if, at the time of the sexual activity, s/he freely and voluntarily agrees to the sexual activity;²⁵
- s 61HI(3), which provides that a lack of physical or verbal resistance to sexual activity is, by itself, not to be taken as consent to that sexual activity;²⁶
- s 61HI(4), which provides that consent to one sexual activity is not, by itself, to be taken to be consent to another sexual activity;²⁷
- s 61HI(5), which provides that consent to sexual activity with a person on one occasion is not, by itself, consent to sexual activity with that person on another occasion, or another person on that or another occasion;²⁸ and
- s 61HI(6), which provides that consent to sexual activity being performed in a particular manner is not, by itself, to be taken as consent to the sexual activity being performed in a different manner.²⁹

9. As stated in the Introduction to this Submission, I also respectfully agree with the Commission's proposal that the law should provide for a non-exhaustive list of circumstances where a complainant does consent to sexual activity. More specifically, I support proposed:

- s 61HJ(1)(b), which states that a person does not consent to sexual activity if s/he does not have the capacity to do so;³⁰

²⁴ As I have argued in Andrew Dyer, 'The Mens Rea for Sexual Assault, Sexual Touching and Sexual Act Offences in New South Wales: Leave it Alone (But You Might Consider Placing an Evidential Burden on the Accused)' (2019) *Australian Bar Review*.

²⁵ New South Wales Law Reform Commission, above n 1, 9.

²⁶ Ibid 10.

²⁷ Ibid.

²⁸ Ibid 11.

²⁹ Ibid.

³⁰ Ibid 13.

- s 61HJ(1)(c), which states that a person does not consent to sexual activity if s/he is so affected by alcohol or another drug as to be incapable of consenting to sexual activity;³¹
- s 61HJ(1)(d), which states that a person does not consent to sexual activity if s/he is asleep or unconscious;³²
- s 61HJ(1)(e)(i),³³ which provides that a person does not consent to sexual activity if s/he participates in it ‘because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs’ (though, to make the meaning of this provision clearer, I think that there should be a comma after the first ‘force’³⁴);
- s 61HJ(1)(e) (iii), which provides that a person does not consent to sexual activity if s/he participates in it because s/he or another person is unlawfully detained;³⁵
- s 61HJ(1)(e)(iv), which provides that a person does not consent to sexual activity because s/he is overborne by the abuse of a position of authority or trust;³⁶ and
- s 61HJ(1)(f), which provides that a person does not consent to sexual activity because s/he is mistaken about the identity of the other person, the nature of the sexual activity or the purpose of the sexual activity.³⁷

10. However, there are two main reasons why I respectfully do not agree that proposed s 61HJ(1)(a)³⁸ should be inserted into the *Crimes Act*. The first is that, beyond antagonising readers of the *Daily Telegraph*, it would achieve no real practical benefits. The second is that it reflects an erroneous view of what consent is. In other

³¹ Ibid 14.

³² Ibid.

³³ Ibid 15.

³⁴ Assuming that what the Commission is saying here is that ‘a person is not consenting if s/he participates in sexual activity because of (a) force or (b) fear of force or harm’ – and not ‘a person is not consenting if s/he participates in sexual activity because of (a) force or (b) fear of force or (c) harm.’

³⁵ New South Wales Law Reform Commission, above n 1, 16.

³⁶ Ibid.

³⁷ Ibid 17.

³⁸ See ibid 13.

words, contrary to what the Commission has argued,³⁹ consent *is* just an internal state of mind. It can exist without being communicated. So can *withdrawal* of consent. Accordingly, I also oppose draft s 61HI(2) insofar as it states that, unless a person has withdrawn consent ‘by words or conduct’, there has in fact been no withdrawal.⁴⁰

11. Proposed s 61HJ(1)(a) is based on s 2A(2)(a) of the *Criminal Code Act 1924* (Tas) and s 36(2)(l) of the *Crimes Act 1958* (Vic). It would provide that:

A person does not consent to a sexual activity if –

- (a) the person does not say or do anything to communicate consent.

The *Sydney Morning Herald* has described this as a ‘centrepiece reform’ that is part of a ‘plan designed to ensure a person who “freezes” in fear is not mistaken for a willing participant.’⁴¹ The *Daily Telegraph* thinks that this and other reforms that the Commission has proposed might require ‘[h]usbands ... to get an explicit “yes” from their wives before having sex to ensure it is legal.’⁴² In truth, this provision does not achieve what it might appear to achieve.

12. Proposed s 61HJ(1)(a) would not require husbands – or anyone else – to have in fact received a clear communication of consent before they could hope to be acquitted of sexual assault. That is because that draft provision merely states that a complainant is not consenting in particular circumstances. Leaving aside the onus of proof, if the accused nevertheless believed that the complainant *had* communicated her/his consent, and if his/her belief was reasonable, the accused would avoid conviction.
13. What s 61HJ(1)(a) *would* do is require juries to answer a complex, double-negative, question before they came to resolve the ultimate question, namely, ‘was the complainant consenting?’ They would rely on exactly the same evidence when answering both of the questions. In other words, when ascertaining whether the complainant’s performed the conduct and/or uttered the words that s/he did at the time of the relevant conduct *to* – that is, for the purpose of – communicating her/his consent, jurors would have regard to such matters as (a) any distress on her/his part after the incident and (b) any complaint(s) that s/he made. It was for that reason that,

³⁹ Ibid 13 [6.9].

⁴⁰ Ibid 9.

⁴¹ Michaela Whitbourn, ‘Plan Unveiled to ‘Strengthen’ Sexual Consent Laws in NSW’, *Sydney Morning Herald*, 21 October 2019 < <https://www.smh.com.au/national/nsw/plan-unveiled-to-strengthen-sexual-consent-laws-in-nsw-20191020-p532d4.html> >. Elsewhere in this article, however, the author notes that some commentators have argued that this reform would not achieve very much in practice.

⁴² Janet Fife-Yeomans, ‘Sex Consent Law Proposals Could Apply to Husbands and Wives’, *Daily Telegraph*, 22 October 2019. See also Louise Roberts, ‘Consent Law Will Confuse an Already Complex Issue’, *Daily Telegraph*, 23 October 2019.

in both of my previous submissions to this Review,⁴³ I expressed the view that a provision along these lines would add nothing. Indeed, by placing greater emphasis on the complainant's conduct, and by essentially requiring juries to answer the same question twice, such a provision might have deleterious effects.

14. A few things must now be added to these views. The Commission has now made it clear that it supports such a provision because of its view about what consent is. That is, for the Commission:⁴⁴

Consent is not just an internal state of mind, but a communicated state of mind. Consent must be given by one person to another.

Accordingly, might it not be argued that, contrary to what I have just stated, s 61HJ(1) *would* add something? In other words, if such a provision were in force, it would not only be relevant to the question of whether the complainant consented. It would also limit the statutory honest and reasonable mistake of fact excuse⁴⁵ in this way: only if an accused might have had an honest and reasonable but mistaken belief in *communicated* consent would he or she be acquitted on this basis.

15. In practice, however, s 61HJ(1)(a) would not limit honest and reasonable mistake to any significant extent. This is because, when an accused seeks to rely on that excuse in a sexual assault (etc) case, s/he usually argues not only that s/he believed that the complainant 'in her [or his] own mind'⁴⁶ was a willing participant, but also that s/he thought that the complainant had communicated this state of mind to him/her. *Lazarus* exemplifies the point. In that case, the accused claimed that he thought that, when the complainant got down on all fours and arched her back, this was 'a sign that she was consenting.'⁴⁷ He also said that he thought that the way in which the complainant moved during the penile-anal intercourse was an indication from her that she was continuing to consent.⁴⁸ Likewise, in a number of Queensland cases that I have studied recently, the accused persons claimed that they believed, however mistakenly, that the complainant had communicated her/his consent to him or her. In *R v Mrzljak*, for example, the accused claimed that he thought that the complainant was

⁴³ See also Andrew Dyer, 'Sexual Assault Law Reform in New South Wales', above n 15, 86-8.

⁴⁴ New South Wales Law Reform Commission, above n 1, 13 [6.9].

⁴⁵ *Crimes Act 1900* (NSW) s 61HE(3)(c).

⁴⁶ *R v Lazarus* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

‘responsive to his physical advances.’⁴⁹ In *R v Dunrobin*, the accused’s version of events seems to have been that he proceeded only once he felt that the complainant had given him a ‘yes’ response.⁵⁰ And in *R v Lennox*, the accused alleged that he believed that the complainant, by her conduct, had communicated her willingness to him.⁵¹

16. But even if s 61HJ(1)(a) would limit honest and reasonable mistake to *some* extent in practice, there would be two major costs. First, there would be potential for injustice. This is because, where an accused *does* merely think that the complainant has an internal willingness to participate in the sexual activity, he or she might not be culpable. Secondly, the limitations on honest and reasonable mistake would come at the expense of enshrining in law an inaccurate and flawed account of what consent is. Both points can be seen if we adapt an example provided by Kimberley Kessler Ferzan.

17. Consider the man who wakes up to find the woman with whom he had sexual intercourse the night before about to perform oral sex on him.⁵² If the man does ‘nothing to indicate his acceptance of this act’,⁵³ and if the woman proceeds to perform fellatio on him, has she acted in a blameworthy manner? It is submitted that, so long as she has a reasonable belief that the man is internally willing to engage in this sexual activity, the answer to this question is ‘no.’ In such a case, she lacks any intention to infringe the man’s sexual autonomy, and has good grounds for her belief that she is not doing so.⁵⁴

18. Consider now that the man, as the woman thought, in fact is a willing participant (or, to use Ferzan’s language, thinks that ‘this is the best alarm clock ever’⁵⁵). Under the NSWLRC’s view of what consent amounts to, the woman has nevertheless committed sexual assault. Because the man has failed to communicate his willingness, he is not consenting. Because the woman knows that the man has failed to communicate his willingness, she knows that he is not consenting. Surely, this is so perverse an

⁴⁹ [2005] 1 Qd R 308, 312 [5].

⁵⁰ [2008] QCA 116, [23].

⁵¹ [2018] QCA 311, [40]-[43].

⁵² Kimberley Kessler Ferzan, ‘Consent, Culpability and the Law of Rape’ (2016) 13 *Ohio State Journal of Criminal Law* 397, 405.

⁵³ *Ibid.*

⁵⁴ See *Crimes Act 1900* (NSW) s 61HE(3)(c).

⁵⁵ Ferzan, above n 52, 405.

outcome as to call into question the analysis that mandates it? Certainly, three distinguished American scholars think so.⁵⁶

19. The Commission's proposed s 61HI(2) is flawed for like reasons. That draft provision states that:⁵⁷

A person may, by words or conduct, withdraw consent to a sexual activity at any time before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.

With respect, it is inaccurate to state that a person is engaging autonomously in sexual activity until s/he actually communicates her/his unwillingness to participate in that activity. Rather, as soon as s/he internally decides that s/he is not consenting, s/he *is* not consenting. The opposite view forces us to regard as a voluntary participant the complainant who, after initially consenting, 'freezes' during intercourse and who, because of this, is unable to communicate her/his newfound unwillingness. Yet in such a case, the complainant's sexual autonomy has clearly been violated.

20. This point can be taken further. Imagine a case where the complainant *does* 'freeze.' S/he no longer wishes to participate in sexual activity with the accused, but does nothing and says nothing to communicate to the accused her/his unwilling state of mind. Imagine further that the accused realises that – perhaps because the complainant has frozen – s/he is no longer, or at least might⁵⁸ no longer be, willing to participate in the sexual activity, but continues with that sexual activity even so – maybe for quite a long time. This accused is clearly culpable. He or she has proceeded with sexual activity despite his or her awareness that the complainant is, or might be, unwilling. This complainant has clearly been wronged. For a time at least, s/he has engaged unwillingly in sexual intercourse. Yet under the Commission's conception of consent, such an accused would have to be acquitted. The complainant's failure to communicate her/his unwillingness would mean that s/he would be treated as having consented. The accused would be held to have had a reasonable belief in consent. After all, such an accused does reasonably believe that the complainant has not communicated his/her withdrawal of consent to the accused.

21. In short, conceptual accuracy in the criminal law is crucial – not just for its own sake, but also because of the capacity of fictions to create injustice.⁵⁹ If the law were to treat

⁵⁶ Larry Alexander, Heidi Hurd and Peter Western, 'Consent Does not Require Communication: A Reply to Dougherty' (2016) *Law and Philosophy* (2016) 35 *Law and Philosophy* 655, 659.

⁵⁷ New South Wales Law Reform Commission, above n 1, 9.

⁵⁸ See *Hemsley v R* (1988) 36 A Crim R 334, 336-8; *R v Mitton* (2002) 132 A Crim R 123, 129 [28].

⁵⁹ See generally Andrew Dyer, 'The *Osland* 'Wrong Turn' and the Problems that Fictions Produce' (2018) 42(2) *UNSW Law Journal* 500.

consent as being something that it is not, maybe there would be symbolic benefits. Perhaps, too, such an approach would facilitate results that the Commission and others would consider desirable in some – though not very many – cases. But any such outcomes would come at the expense of the truth. And, as the examples in the paragraphs immediately above show, the Commission’s approach would also create the potential for injustice.⁶⁰

22. As foreshadowed above, I also respectfully disagree with draft s 61HJ(1)(g), which provides that:⁶¹

A person does not consent to a sexual activity if –

(g) the person is fraudulently induced to participate in the sexual activity.

I do so for a number of reasons. First, there is, with respect, conceptual inaccuracy here too: it is the complainant’s ‘mistake or misapprehension’, not the accused’s fraud, that vitiates the complainant’s consent in the cases that this provision is designed to cover.⁶² Secondly, this conceptual inaccuracy achieves no obvious practical benefits – other perhaps than appeasing those who think that a conviction is unwarranted where a person fails to disclose his or her HIV positive status to a prospective sexual partner, and then proceeds to have unprotected intercourse with him/her.⁶³ Thirdly, this provision is too broad. While I accept the Commission’s view that ‘a person who is fraudulently induced to participate in sexual activity does not ... consent to that activity’,⁶⁴ the criminal law must ensure that it enjoys the respect of those to whom it applies. A provision that criminalises as sexual assault the activity of a person who procures sexual intercourse by boasting about his/her wealth, or by lying about his/her marital status or about whether s/he is having an affair, risks not

⁶⁰ It might be argued that the scenario in [17]-[18] would be most unlikely to lead to a prosecution. This is true. However, it is possible to imagine successful prosecutions where the accused lacks blameworthiness even though the complainant has failed to communicate her/his willingness to him or her. Take, for example, the accused who, after engaging in consensual intercourse in one sexual position with the complainant, engages in further intercourse in another sexual position with the complainant immediately afterwards. Imagine now that the complainant is internally unwilling to have intercourse in the new position, but does nothing to communicate this unwillingness to the accused. If the accused believes reasonably *for him or her, taking into account any disabilities that s/he might have* that the complainant was internally willing, but realises that s/he has not communicated her/his willingness, it is submitted that s/he has not acted culpably. Yet, under the Commission’s view of what consent is, this accused would have committed sexual assault.

⁶¹ New South Wales Law Reform Commission, above n 1, 18.

⁶² *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 260. See also *Burns v The Queen* (2012) 246 CLR 334, 364 [86]-[87].

⁶³ However, as argued below, it is possible that such a person has in fact acted ‘fraudulently’ within the meaning of proposed ss 61HI: cf. New South Wales Law Reform Commission, above n 1, 19 [6.50]. Even if s/he has not, proposed ss 61HI(1) and 61HJ(2) mean that s/he might still be convicted of sexual assault.

⁶⁴ New South Wales Law Reform Commission, above n 1, 19 [6.48]; see also 19 [6.50].

enjoying such respect. Further, it is wrong to treat as a sex offender someone who induces another person to consent to sexual activity by lying about, for example, his/her race or religion, biological sex at birth, sexual history – or HIV positive status, in a case where there is not a real risk of his/her transmitting the disease to the complainant. In such cases, the accused’s interest in privacy, and/or public policy considerations, surely prevail over the complainant’s interest in sexual autonomy.

23. As to the first point: where an accused fraudulently induces another person to participate in sexual activity with him/her, the accused’s fraud establishes that he or she knows that the other person is not consenting.⁶⁵ In other words, because the accused in such a case knows that the complainant is ‘consenting’ *due to the mistaken belief* that the accused has induced her/him to hold, the accused has the requisite mens rea for the relevant sexual offence.⁶⁶ However, as this analysis suggests, it is the complainant’s but for mistake that negates her/his apparent consent. Accordingly, the focus of the Commission’s draft s 61HJ(1)(f)⁶⁷ is, with respect, clearly right.
24. As to the second point: why, in draft s 61HJ(1)(g), has the Commission deviated from the, correct, approach in s 61HJ(1)(f)? In other words, why does the Commission ‘deal with the issue of fraud separately’⁶⁸ from the issue of mistake (or at all)? It is impossible to be sure about this, because the Commission simply asserts that ‘mistaken beliefs about marriage’ – as in *Papadimitropoulos v The Queen*⁶⁹ – are better dealt with as a form of “fraud.”⁷⁰ But perhaps the Commission’s departure from principle has been caused by a concern not to criminalise the person who fails to disclose to his/her sexual partner that s/he is HIV positive? If this is right – and it might not be – it is difficult to see why such a person should avoid sexual assault liability, provided of course that his or her conduct carries a real risk of transmitting this disease.⁷¹
25. That said, it is not entirely clear that, if s 61HJ(1)(g) were in force, such a person *would* escape liability. The Commission *seems* to assume that the word ‘fraudulently’

⁶⁵ *Papadimitropoulos* (1957) 98 CLR 249, 260.

⁶⁶ See New South Wales Law Reform Commission, above n 1, 18 [6.40].

⁶⁷ *Ibid* 17.

⁶⁸ *Ibid* 17 [6.38].

⁶⁹ (1957) 98 CLR 249.

⁷⁰ *Ibid*. Cf. *Crimes Act 1900* (NSW) s 61HE(6)(b), where it is provided that a person who ‘consents’ to sexual activity because of ‘a *mistaken belief* that the other person is married to the person’, does not in fact consent.

⁷¹ See the argument in Andrew Dyer, ‘Mistakes that Negate Apparent Consent’ (2019) 43(3) *Criminal Law Journal* 159, 175-6.

in that draft provision means that the provision would cover only those circumstances where ‘participation is dishonestly procured by a false representation or ... a false pretence, known by the maker to be false when it was made.’⁷² While such an interpretation might be the right one, that is not necessarily so. For, it is often the case that the word ‘fraudulently’ in a criminal prohibition means ‘dishonestly.’⁷³ In turn, the person who withholds from another person information that s/he realises is, or might be, material to that other person’s decision to engage in sexual activity with him or her, has seemingly acted ‘dishonestly.’ In other words, such conduct does seem to be contrary to the standards of honesty of ordinary, decent people.⁷⁴

26. As to the third point: the Commission mentions that the law in certain other jurisdictions takes a similarly broad approach to fraud as does proposed s 61HJ(1) (g).⁷⁵ What the Commission does not mention is that, in one of those jurisdictions, Western Australia, the Court of Appeal has expressed grave reservations about such an approach. In *Michael v Western Australia*,⁷⁶ that Court considered s 319(2)(a) of the *Criminal Code Act 1913* (WA), which provides, relevantly:

a consent is not freely and voluntarily given if it is obtained by ... deceit or any fraudulent means.

According to Steytler P:⁷⁷

[I]t seems to me that the most appropriate solution is that the legislation should be amended. Plainly, the use of the words “deceit or any fraudulent means” renders the section susceptible to an interpretation that is dramatic in its reach ... There is obviously a need for some limit to be placed upon the meaning of those words. That is best done by the legislature.

Steytler P had in mind some examples provided by Neil Morgan,⁷⁸ which his Honour summarised as follows:⁷⁹

⁷² New South Wales Law Reform Commission, above n 1, 19 [6.50].

⁷³ *Macleod v The Queen* (2003) 214 CLR 230, 241 [34] (Gleeson CJ, Gummow and Hayne JJ), 255-6 [96]-[100] (McHugh J); *R v Glenister* [1980] 2 NSWLR 597, 605, 607 (Moffitt P, Glass JA and Nagle CJ at CL).

⁷⁴ *Macleod* (2003) 214 CLR 230, 242 [37] (Gleeson CJ, Gummow and Hayne JJ), 256 [100] (McHugh J); *Peters v The Queen* (1998) 192 CLR 493, 504 [18] (Toohey and Gaudron JJ).

⁷⁵ New South Wales Law Reform Commission, above n 1, 19 [6.49].

⁷⁶ (2008) 183 A Crim R 348.

⁷⁷ *Ibid* 371 [89].

⁷⁸ Neil Morgan, ‘Oppression, Fraud and Consent in Sexual Offences’ (1996) 26 *University of Western Australia Law Review* 223.

⁷⁹ *Michael* (2008) 183 A Crim R 348, 364 [62].

a man who falsely professes his undying love for a woman who agrees to have sexual intercourse only because she believes his protestations; ... a woman who tells a man that she is unmarried when she in fact is married; and ... a woman who agrees to sexual intercourse on the basis of a man's false promise that he intends to marry her.

No doubt, it is unlikely that the Crown would seek to prosecute such persons. Indeed, there is no evidence that there have been such prosecutions in Western Australia.

Nevertheless, it is submitted that criminal prohibitions should be drafted as precisely as possible, to ensure that there is not even the prospect of such prosecutions. It should not be left to the Crown to remove legislative harshness/overbreadth.⁸⁰

27. Furthermore, in some of the other types of cases mentioned above, it is conceivable that the Crown *would* prosecute. The English cases involving transgender defendants,⁸¹ for example, seem to indicate that it is possible that a person would be prosecuted for sexual assault, or a like offence, on the basis of a lie about his/her biological sex at birth. Indeed, it is not just in England where controversial 'rape-by-deception' prosecutions have succeeded. An example of a successful prosecution of this nature is the well-known Israeli case where a man appears falsely to have represented to the complainant that he was Jewish.⁸² It is true that the risk of such prosecutions should not be overstated. Nevertheless, again, it is questionable whether it should be left to the Crown to ensure that the law does not operate harshly.

28. It must be conceded that this is a difficult area to legislate in. Moreover, the Commission's approach *might* not create any problems in practice – at least for the time being. Nevertheless, I continue to support a provision similar to the one that I have recently advocated.⁸³ One advantage of such a provision is that it leaves it to the judges, *not the Crown*, to determine whether liability should attach in cases not specifically referred to in it. Judges would also be provided with guidance about how to decide the novel cases that arise. They would explicitly be directed that, when determining whether liability should attach in such cases, they must balance the complainant's interest in sexual autonomy against the defendant's privacy and other interests, as well as public policy concerns.

29. Before leaving s 61HJ(1)(g), it is necessary to refer to something that Steytler P said in one of the quotations set out above. As we have seen, after arguing that there was a need for some limitations to be placed on s 319(2)(a) of the *Criminal Code Act 1913*

⁸⁰ As pointed out, for example, in *R v Nur* [2015] 1 SCR 773, 819-20 [95] (McLachlin CJ).

⁸¹ See, for example, *R v McNally* [2014] QB 593.

⁸² 'Palestinian Jailed for Rape After Claiming to be Jewish' *The Telegraph*, 20 July 2010 <<https://www.telegraph.co.uk/news/worldnews/middleeast/israel/7901025/Palestinian-jailed-for-rape-after-claiming-to-be-Jewish.html>>.

⁸³ Dyer, 'Mistakes that Negate Apparent Consent', above n 71, 173.

(WA), his Honour observed that this is ‘best done by the legislature.’⁸⁴ In EM Heenan AJA’s judgment in the same case, his Honour took a different approach. According to him:⁸⁵

There are compelling practical considerations to confine the scope of fraud or deceit under s 319(2) to avoid inclusion within the offence fraudulent deceptions which do not go to the nature or quality of the act or its purpose or the identity of the person proposing the sexual activity.

In other words, for EM Heenan AJA, *the judiciary* was entitled to remove s 319(2)(a)’s harshness.

30. If the NSW judiciary were to take a similar approach, there is a danger that some cases that should be treated as sexual assault would not be treated in this way. The Commission has expressed the view that there should be a conviction where the accused has ‘dishonestly represent[ed] that [he or she] ... will pay the complainant for the sexual activity, not intending to do so.’⁸⁶ I respectfully agree. However, in *Michael*, Heenan AJA adopted a different stance. For him, where there is ‘plainly an active participation in sexual intercourse by a prostitute’, s/he is consenting, even if s/he has participated because of ‘some form of misrepresentation that she would be paid.’⁸⁷ It is true that, if proposed s 61HJ(1)(f) were in force, NSW courts would be unable to read proposed s 61HJ(1)(g) down in precisely the way in which EM Heenan AJA did s 319(2)(a).⁸⁸ Nevertheless, it would be open to them to exclude from the ‘rape by deception’ doctrine cases, like the one involving the unpaid sex worker, that should be covered by it. There would be less chance of this happening if the law were instead to provide for (a) a list of mistakes that negate a complainant’s apparent consent and (b) guidance about how the judges should decide those cases that were not explicitly mentioned.

31. The final point that I wish to raise concerning a complainant’s consent concerns draft s 61HJ(1)(e)(ii),⁸⁹ which provides:

A person does not consent to a sexual activity if –
(e) the person participates in the sexual activity

⁸⁴ See text accompanying n 77.

⁸⁵ *Michael* (2008) 183 A Crim R 348, 429 [361].

⁸⁶ New South Wales Law Reform Commission, above n 1, 19 [6.51].

⁸⁷ *Michael* (2008) 183 A Crim R 348, 432 [374].

⁸⁸ Because draft s 61HJ(1)(f) concerns mistakes as to identity, the nature of the activity and the purpose of the activity, it would not be possible to read draft s 61HJ(1)(g) as applying only in such cases.

⁸⁹ New South Wales Law Reform Commission, above n 1, 15.

...

(ii) because of coercion, blackmail or intimidation occurring at any time.

As noted above, the ordinary meaning of the word ‘coercion’ is ‘[t]he action or practice of persuading someone to do something by using force or threats.’⁹⁰ Given that that is so, is it necessary to refer explicitly to ‘blackmail’ in this provision? After all, blackmail seems to be a classic instance of persuading someone to do something by threatening her or him. Further, because, in my view, ‘non-violent threat(s)’ is plainer English than ‘coercion’, I believe that the former language should be substituted for the latter in the draft provision. Finally, ‘non-violent threat(s)’ is also a narrower term than ‘coercion.’ This is an advantage, because, while ‘coercion’ covers some conduct that is already caught by s 61HJ(1)(e)(i) – namely, the use of force or threats of force to persuade a person to participate in sexual activity – ‘non-violent threats’ avoids such overlap. With that said, however, as noted above, I do respectfully agree with the Commission’s view – reflected in this draft provision – that the person who participates in sexual activity because of a non-violent threat is not freely and voluntarily agreeing to that sexual activity.

Knowledge of non-consent

32. I respectfully do not object to:

- draft s 61HK(1);⁹¹

and I respectfully support:

- draft s 61HK(2), which would require triers of fact, when assessing whether the accused had the mens rea for one of the offences to which s 61HE applies, to have regard to ‘all the circumstances of the case, including whether the accused person said or did anything to ascertain if [‘whether’ should be substituted here⁹²] the other person consented to the sexual activity, and if so, what the person said or did’ (but not any self-induced intoxication on the accused’s part).⁹³

33. I also respectfully agree with the Commission’s views that:

⁹⁰ Oxford English Dictionary online <<https://www.lexico.com/en/definition/coercion>>.

⁹¹ New South Wales Law Reform Commission, above n 1, 20.

⁹² See Jeremy Butterfield, *Fowler’s Dictionary of Modern English Usage* (OUP, 2015 4th ed) 394: ‘*If* and *whether* are both used to introduce noun clauses as in *Tell me if/whether you can come*, but *whether* is regarded as more formal and is preferable in avoiding possible ambiguity; in the sentence just given, a possible interpretation, though not the natural one, when *if* is used is ‘If you can come, tell me (some other thing).’

⁹³ New South Wales Law Reform Commission, above n 1, 22.

- the law should not *require* an accused to have said or done anything to ascertain whether the complainant was consenting, if he or she is to be acquitted⁹⁴ (any other arrangement would come close to making sexual assault and like offences crimes of absolute liability,⁹⁵ and would have the potential to facilitate convictions of the morally innocent⁹⁶); and
- it is unnecessary to state in a distinct provision that the accused who ‘knows’ of a circumstance that renders non-consensual the complainant’s participation in sexual activity, has the mens rea for the offences to which s 61HE currently applies.⁹⁷

34. There are, however, some comments that I wish to make about the proposed ‘not reasonable in all the circumstances’ language in draft s 61HK(1)(c).

35. While the proposed language is in itself unobjectionable, I am far from convinced that it is necessary to replace the ‘no reasonable grounds’ language that currently appears in s 61HE(3)(c) of the *Crimes Act*. This is essentially for five reasons. First, there is in fact no difference between a test that asks whether an accused’s belief was reasonable and one that asks whether he or she held that belief on reasonable grounds. Secondly, certain commentators’ views that the ‘no reasonable grounds’ test provided for by s 61HE(3)(c) is narrower than a ‘reasonable belief’ test, was based on a misreading of Fullerton J’s judgment in *Lazarus*. Thirdly, juries are not exposed to the reasoning of Fullerton J that caused such confusion. Fourthly, even if the directions that juries are given might lead them to misapprehend the true nature of the s 61HE(3)(c) test, the language that the Commission favours would facilitate the same jury directions. Fifthly, and most fundamentally, any such misapprehension – that is, any erroneous idea on the part of juries that it is enough if the accused has a single reasonable ground for believing in the existence of consent – in fact would create no risk of unmeritorious acquittals.

36. In *Taiapa v The Queen*,⁹⁸ the High Court stated that ‘to ask whether a person has a reasonable belief is not different in substance from asking whether a person has reasonable grounds for belief.’ Accordingly, in the honest and reasonable mistake case

⁹⁴ Ibid 23 [7.24].

⁹⁵ See Dyer, ‘Yes! To Communication about Consent’, above n 10, 27-8.

⁹⁶ If the law were to provide that acquittal was possible only if the accused *ensured* that the complainant was consenting, all cases of non-consensual sexual activity – that is, all cases where the accused performed the actus reus of one of the s 61HE offences – would be criminalised. That is because the person who ensures that he or she has another person’s consent engages in consensual sexual activity with her/him.

⁹⁷ New South Wales Law Reform Commission, above n 1, 24 [7.28].

⁹⁸ (2009) 240 CLR 95, 105 [29].

law, judges of the highest distinction have treated the accused who believes X on reasonable grounds as having reasonably believed X. For example, in *Heaslop v Burton*,⁹⁹ the Queensland Criminal Code's draftsman, Sir Samuel Griffith, indicated that the honest and reasonable mistake of fact excuse for which s 24 of that Code provides, requires the accused to believe 'on reasonable grounds' in an innocent state of affairs. Likewise, in *Proudman v Dayman*, Sir Owen Dixon announced that, at common law:¹⁰⁰

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

It is therefore unsurprising that, more recently, in *CTM v The Queen*,¹⁰¹ the High Court saw no distinction between (a) the person whose belief is reasonable and (b) the person who has reasonable grounds for his or her belief. According to Gleeson CJ, Gummow, Crennan and Kiefel JJ:¹⁰²

An honest and reasonable belief that the other party to sexual activity is above the age of sixteen years is an answer to a charge of a contravention of s 66C(3). The evidential burden of establishing such a belief is in the first place upon an accused. If that evidential burden is satisfied, then ultimately it is for the prosecution to prove beyond reasonable doubt that the accused did not honestly believe, *on reasonable grounds*, that the other party was above the age of sixteen years believe.

Similarly, Hayne J said that:¹⁰³

It may be accepted that the common law of Australia and the common law of England diverged about whether a mistake of fact must be based *on reasonable grounds* if it is to be relevant to questions of criminal responsibility when the House of Lords decided *R v Morgan* ... But ... neither party in the present matter suggested that, if mistake is relevant to criminal responsibility, this Court should now reconsider the long-established Australian common law that the mistake must be founded *on reasonable grounds*.

And for Heydon J:¹⁰⁴

What is often called the "defence" in *Proudman v Dayman* may be put thus. Legislation will be construed so as not to render criminally liable an accused person provided that, first, the

⁹⁹ [1902] St R Qd 259, 266.

¹⁰⁰ (1941) 67 CLR 236, 241. [Emphasis added]

¹⁰¹ (2008) 236 CLR 440.

¹⁰² Ibid 456 [35]. [Emphasis added]

¹⁰³ Ibid 491-2 [176]-[177]. See also [142] 481, 482 [143], 483 [147], 485 [155], 486 [157], 487 [159] (Hayne J). [Emphasis added]

¹⁰⁴ Ibid 497 [199]. [Emphasis added]

accused person satisfies an evidential burden of establishing an honest belief *on reasonable grounds* in the existence of a state of factual affairs which, had it existed, would have made the acts alleged by the prosecution non-criminal, and, secondly, the prosecution fails to discharge a legal burden of establishing beyond reasonable doubt that the accused did not have that honest belief *on reasonable grounds*.

37. As Australian courts have repeatedly emphasised, however, there *is* a substantial difference between: (a) a provision that asks whether *a person's belief* is reasonable/held on reasonable grounds; and (b) one that asks whether a reasonable person would have held the belief that the accused said s/he did.¹⁰⁵ Because the words 'the person' appear in s 61HE(3)(c) of the *Crimes Act 1900* (NSW), it is clear that the question for which it provides is a 'reasonable *for the accused*' question, not a reasonable person one.¹⁰⁶ By requiring triers of fact to take into account 'all the circumstances of the case' when assessing whether the accused had the s 61HE(3)(c) mental state, s 61HE(4) also makes this plain.

38. It is true that, with respect, some academic commentators appear to have been confused by some of the reasoning deployed by Fullerton J in *Lazarus v The Queen*,¹⁰⁷ when her Honour was seeking to explain the familiar distinction just noted. Specifically, after making it clear that the trial judge had erred by implying that 'the jury should ask what a reasonable person might have concluded about consent, rather than what the accused himself might have believed in all the circumstances in which he found himself and then test that belief by asking whether there might have been reasonable grounds for it',¹⁰⁸ her Honour went on to say:¹⁰⁹

In many such contested (sic) cases, perhaps all, there might be a reasonable possibility of the existence of reasonable grounds for believing (mistakenly) that the complainant consented and other reasonable grounds suggesting otherwise. A reasonable person might conclude one way or the other but the statutory test is whether the Crown has proved the *accused* "has no reasonable grounds for believing" that there was consent.

These commentators seem to have thought that Fullerton J was impugning the trial judge's direction because that direction did not make it clear that it was enough if Mr

¹⁰⁵ See, for example, *Lazarus* [2016] NSWCCA 52, [156]; *Wilson* [2009] 1 Qd R 476; *Mrzljak* [2005] 1 Qd R 308; *Aubertin v Western Australia* (2006) 33 WAR 87.

¹⁰⁶ *Lazarus* [2016] NSWCCA 52, [156].

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

Lazarus had had one reasonable ground for his belief in consent.¹¹⁰ She was not. Rather, her Honour was merely saying that the trial judge’s direction erroneously indicated that the applicable test was a reasonable person test, rather than a ‘reasonable for the accused’ test. Thus her Honour’s italicisation of the word ‘accused’ in the quotation directly above. And thus her Honour’s failure to italicise the word ‘no’ when referring to the ‘no reasonable grounds’ language in what is now s 61HE(3)(c).

39. Because criticisms of the ‘no reasonable grounds’ language sprung from, with respect, a misreading of Fullerton J’s judgment in *Lazarus*, and because trial judges do not read to juries the passage from that judgment that caused such confusion, it is speculative to suggest, as the Commission does, that juries might be led by the ‘reasonable grounds’/‘no reasonable grounds’ language in the directions that they are given about the s 61HE(3)(c) mental state, ‘to focus narrowly on whether there was *any* possible reasonable ground for a belief in consent.’¹¹¹ Juries are currently directed that, if the Crown is to establish that the accused had the mental state to which s 61HE(3)(c) refers, it:¹¹²

must eliminate any reasonable possibility that [the accused] did honestly believe on reasonable grounds that [the complainant] was consenting.

There is no evidence that a jury so instructed would, in any case, reason in a different way from how it would if it were instead told that the Crown:

must eliminate any reasonable possibility that the accused’s belief was actually held by him or her and was reasonable in the circumstances.

40. In any case, if the statutory language that the Commission prefers were substituted for the current language, it would not be obligatory for judges to direct juries in the terms just noted. Because a reasonable belief *is* the same thing as a belief held on reasonable grounds, it would be permissible for a judge to instruct a jury that the accused must be acquitted unless it was satisfied that the Crown had excluded the reasonable possibility that the accused believed on reasonable grounds in the existence of consent. It is noteworthy in this regard that, in other jurisdictions,

¹¹⁰ For McNamara et al: ‘The decision in *Lazarus v R* [2016] NSWCCA 52 confirms that the objective test contained within the s 61HA(3)(c) formulation is significantly narrower than had previously been appreciated. If the Crown is unable to negative beyond reasonable doubt an assertion by the accused that there was a single ‘reasonable ground’ to support his mistaken belief in consent (even in the face of considerable evidence that the mistake was an unreasonable one) an acquittal will result’: Luke McNamara et al, ‘Preliminary Submission to the NSWLRC’s Review of Consent and Knowledge of Consent in Relation to Sexual Offences’ (29 June 2018) <<https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO85.pdf>>.

¹¹¹ New South Wales Law Reform Commission, above n 1, 21 [7.12].

¹¹² Criminal Trials Court Benchbook, ‘Suggested direction – Sexual Intercourse without Consent (s 61I) where the Offence was Committed on and (sic: or) after 1 January 2008’ <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual_intercourse_without_consent.html>.

‘reasonable grounds’ directions are frequently given despite there being ‘reasonable belief’ language in the relevant statutory provisions. For example, in the Queensland case of *R v Lu*,¹¹³ the trial judge informed the jury that:

[O]ur law provides that a person who does 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 to any greater extent than if the real state of things had been such as the person believed to exist.

...

The mistaken belief in consent must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant. To be reasonable the belief must be one held by the defendant in his particular circumstances *on reasonable grounds*.

Likewise, in *R v O’Loughlin*, the trial judge had said:¹¹⁴

In this case, the question is did the defendant in the circumstances honestly and reasonably believe the complainant was consenting?

The defence of mistake of fact requires consideration of whether the defendant’s belief honestly was honestly or actually held and was held *on reasonable grounds*, it can therefore take into account a person’s personal circumstances, their (sic) education, their (sic) language, their (sic) intellectual capacity or impairment, but intoxication of the accused is irrelevant when you are assessing the reasonableness of a belief.

And in *R v Wilson*,¹¹⁵ McMurdo P made it clear that, under s 24 of the *Criminal Code Act 1913* (Qld):

the correct question [is] ... whether the prosecution [has] proved beyond reasonable doubt that there were *no reasonable grounds* for [the accused’s] honest but mistaken belief ...

41. It will have been noticed that there is a subtle change of language in this last statement. ‘No reasonable grounds’ language is used instead of ‘reasonable grounds’ language. Accordingly, when directing juries in NSW about the s 61HE(3)(c) mental state, judges typically say:¹¹⁶

Therefore, the Crown must prove beyond reasonable doubt one of two facts before you can find the accused guilty, either:

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

¹¹³ [2018] QCA 193, [33]. [Emphasis added]

¹¹⁴ [2011] QCA 123, [27]. [Emphasis added]

¹¹⁵ [2009] 1 Qd R 476, 482 [19] [Emphasis added]; see also 490 [51] (Douglas J). McMurdo P proceeded to say that: ‘[i]s clear from its terms that s 24 requires a consideration of whether there were *reasonable grounds* for the accused person’s belief as to a state of things, not, in the primary judge’s words, whether a theoretical, ordinary, reasonable person would or should have made the mistake. The belief must be both subjectively honest and objectively reasonable but it is the accused person’s belief which is of central relevance.’ [Emphasis added]

¹¹⁶ Criminal Trials Court Benchbook, above n 112.

Does this mean that juries might acquit accused persons in NSW because they think it reasonably possible that the accused had a single reasonable ground for believing that the complainant was consenting? Of course, if so, the same thing would clearly be capable of happening even if the words ‘reasonable in the circumstances’ were substituted for the current statutory language. As we have just seen, the Queensland Court of Appeal has found that ‘reasonable belief’ language facilitates a ‘no reasonable grounds’ direction. But in fact the answer to this question is ‘no.’ Juries probably interpret the directions that they are given as requiring them to decide whether the accused’s belief was reasonable. And even if they were to interpret them instead as requiring them to identify individual reasonable grounds, this would have no capacity to affect the conclusion that they reached.

42. Immediately after he or she gives the ‘no reasonable grounds’ direction judge just set out, the trial judge will give the jury the reasonable *grounds* direction noted above.¹¹⁷ In other words, he or she will tell the jury that its job is to work out whether the Crown has eliminated any reasonable possibility that the accused believed on reasonable grounds in the existence of consent.¹¹⁸ Once directed in such terms, it is hard to believe that juries would consider any question other than whether the accused’s belief was reasonable. If they did, they would be exhibiting greater perceptiveness than the many High Court Justices who have failed to recognise a difference between a belief that is reasonable, on one hand, and a belief on reasonable grounds on the other.¹¹⁹
43. But even if the judge were not to give the latter direction, there is room for doubt about whether the jury would focus on individual grounds for belief. Certainly, appellate courts have often held, or implied, that ‘no reasonable grounds’ directions are sufficient in cases where the question is whether the accused reasonably believed/had reasonable grounds to believe some matter. In *R v Hawes*,¹²⁰ for example, Hunt CJ at CL (with whom Simpson and Bruce JJ agreed) noted that the trial judge had

¹¹⁷ See text accompanying n 112.

¹¹⁸ For example, in *O’Sullivan v The Queen* (2012) 233 A Crim R 449, 474 [125], the trial judge gave the following direction: ‘On the other hand, you may decide that he might have believed, although wrongly, that [JS] was consenting to intercourse with him. Whether that belief amounts to a guilty state of mind depends upon whether the accused honestly held it and, if so, whether he had *reasonable grounds* for that belief. Therefore if you are not satisfied that the accused knew the complainant wasn’t consenting, the Crown must prove one of two facts before you can find the accused guilty: either (a) that the accused did not honestly believe that the complainant was consenting or (b) that, if he did have an honest belief in consent, that he had *no reasonable grounds* for that belief. It is for the Crown to prove that the accused had a guilty mind, and so if there is the reasonable possibility that the accused did honestly believe *on reasonable grounds* that [JS] was consenting, then you would have to find that this third element of the offence is not made out, and return a verdict of “not guilty” of this charge.’ [Emphasis added]

¹¹⁹ See text accompanying nn 98-104. See also *Jiminez v The Queen* (1992) 173 CLR 573, 582.

¹²⁰ (1994) 35 NSWLR 294, 306.

directed the jury that self-defence could succeed only if the accused might have believed on reasonable grounds that it was necessary in self-defence to do what he had done. His Honour then made it clear that he saw no difference between such a standard and a test that asks whether ‘the belief of the accused ... [was] reasonable.’¹²¹ And, crucially, he also made it clear that it would be quite permissible for trial judges, in such circumstances, to ask jurors to consider whether the Crown had proved that ‘there were no reasonable grounds for any belief by the accused that it was necessary in self-defence to do what he did.’¹²² Likewise, in *Babic v R*,¹²³ the Victorian Court of Appeal considered s 9AD of the *Crimes Act 1958* (Vic), which provided, relevantly, that a person would be guilty of defensive homicide if s/he ‘did not have reasonable grounds’ for his or her belief that his or her conduct was necessary to defend him or herself from the infliction of death or serious injury. The Court thought that, in cases in which s 9AD was enlivened, juries should be asked to consider whether the Crown had proved that ‘the accused had no reasonable grounds for believing that his or her conduct was necessary to defend him or herself.’¹²⁴ Plainly, it did not occur to it that this ‘no reasonable grounds’ direction was apt to lead juries to deal in too refined a way with the question of reasonableness.

44. Even if a jury were somehow to become fixated on individual grounds for belief, however, this in fact could not lead to an unjust acquittal. It is true that those who have promoted arguments that the current test is ‘potentially too narrow’¹²⁵ have not been very specific about which exact individual grounds a jury might focus on. This creates difficulties for those seeking to assess the validity of their argument. But when one *is* specific about the grounds that juries might attach importance to, it becomes clear that that argument is a specious one.
45. As Duff has noted, an accused can *only* honestly and reasonably but mistakenly believe that a complainant is consenting to sexual activity if the complainant is silent because s/he is scared and the accused has not deliberately produced such fright.¹²⁶ What are the accused’s individual ‘reasonable grounds’ in such a case? The answer seems to be that there are two such grounds: (a) the complainant’s failure to resist; and (b) the accused’s lack of aggression. But, importantly, (a) and (b) will be *reasonable* grounds only for as long as both of these circumstances exist.

¹²¹ Ibid.

¹²² Ibid.

¹²³ (2010) 28 VR 297.

¹²⁴ Ibid 318 [95] (Neave and Harper JJA); see also 304 [34] (Ashley JA).

¹²⁵ New South Wales Law Reform Commission, above n 1, 21 [7.9].

¹²⁶ RA Duff, ‘Recklessness and Rape’ (1981) 3(2) *Liverpool Law Review* 49, 62.

Accordingly, it is in fact impossible for a person to have a single reasonable ground for believing that the complainant is consenting, while at the same time holding an unreasonable belief that this is so.

46. To illustrate the point, consider first the accused who *is* aggressive; that is, the accused who deliberately intimidates or threatens or assaults the complainant. If the complainant does nothing to resist such an accused, does the accused have a single reasonable ground for believing that the complainant is consenting? The answer is that no jury could, or would, find it reasonably possible that s/he does. As soon as the accused displays aggression, the complainant's failure to resist ceases to be a *reasonable* ground for the accused's belief.¹²⁷ Indeed, proposed s 61HJ(1)(e) is fully consistent with such a view. That provision makes it clear that the complainant who participates in sexual activity because of force, or intimidation, or a threat, is not consenting.¹²⁸ Because an accused who deliberately uses force against, or intimidates, or threatens, a complainant, knows that s/he is not consenting, he or she is guilty of the relevant sexual offence. There could be no question of him or her successfully raising honest and reasonable mistake of fact on the basis of the complainant's silence.
47. Now consider the complainant who responds to the accused's *non*-aggressive advance by saying 'stop' or 'no' or resisting the accused in some other way. If non-consensual sexual activity then occurs, does such an accused have a single reasonable ground for believing that the complainant is consenting? Again, the answer is obviously 'no.' The accused's lack of aggression is no longer a reasonable ground to support any belief of his or hers that the complainant was consenting. Indeed, by proceeding with the relevant sexual activity despite the complainant's protests, the accused *has* behaved aggressively. It is fanciful to suggest that a jury would acquit such an accused on the basis of a lack of aggression before he or she forced him or herself on the complainant. Rather, again, it would convict the accused on the basis that he or she knew that the 'consent' that the complainant had given resulted from the accused's use of force, and was therefore no consent at all.
48. But what about the jury that treats as a 'reasonable ground' something that is in fact an 'unreasonable ground'? In other words, might it be possible for such a jury to acquit an accused simply on the basis of, for example, how the complainant was

¹²⁷ See *McKinnon v Department of Treasury* (2006) 228 CLR 423, 430 [12], where Gleeson CJ and Kirby J made essentially the same point (though, in making it, they relied upon a non-sexual example). Their Honours said: 'Suppose the question is whether there are reasonable grounds for suspecting that A killed B. Suppose that A is a person of violent propensity, who had a motive to kill B, and had decreed an intention to do so. ... In the absence of any other facts, they may lead to a conclusion that there are reasonable grounds for suspecting that A killed B. Suppose, however, that A has an undisputed alibi. The first three facts then cease to constitute reasonable grounds for the suspicion.'

¹²⁸ New South Wales Law Reform Commission, above n 1, 15.

dressed, or how much alcohol s/he had drunk, or her previous participation in consensual sexual activity with the accused? The answer is ‘no.’ Take the case where the jury finds that the *single* ground on which the accused’s belief was based was that the complainant was dressed in a revealing way at the time of the relevant events. Logically, such a jury must have found that the complainant resisted the accused and that the accused behaved aggressively. For, unless this were so, the accused would have more than just the *single* ground for believing in the existence of consent. Again, it is not realistic to imagine that a jury that has made such findings would acquit the accused. Rather, the complainant’s resistance and the accused’s aggression would lead such a jury to convict. Even a jury that would ordinarily think of such a ground as being reasonable, could not maintain such a stance in the face of its acceptance that the accused aggressively overwhelmed the complainant’s resistance.¹²⁹

49. I must deal with a final scenario. So far, it has been shown that it is impossible for a jury to acquit an accused on the basis that he or she had a single reasonable ground for believing in the existence of consent. But what about the accused mentioned in paragraph 45, who has *two*? Would he or she automatically be acquitted? And, if so, would the position be different under a ‘reasonable in the circumstances’ test? It will be noted that, on Tupman DCJ’s findings of fact at the second *Lazarus* trial, Luke Lazarus was such an accused. In other words, her Honour could not be satisfied that the complainant had said ‘stop’ or ‘no.’¹³⁰ And nor could she be satisfied that Mr Lazarus had behaved aggressively before the relevant encounter.¹³¹
50. The answer to the first question just posed is that, if a jury in such a case were to understand the ‘no reasonable grounds’ question as asking it whether the accused had at least one reasonable ground for believing in consent, it would *not* automatically acquit such an accused. That is because the trial judge would have informed the jury that, when assessing whether the accused had ‘no reasonable grounds’ for believing in consent, it would have to take into account any ‘steps’ the accused took¹³²/anything that the accused said or did,¹³³ to ascertain whether the complainant was consenting. The clear implication of this is that, when juries to assess whether grounds *are* reasonable, they must consider what the accused did and said around the time of the relevant events.

¹²⁹ Once again, such a jury would have been instructed to find the accused guilty if it accepted that the complainant only agreed to the sexual activity because of ‘threats of force or terror’ and the accused knew this: see *Crimes Act 1900* (NSW) s 61HE(5)(c).

¹³⁰ *Lazarus* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ).

¹³¹ *Ibid.*

¹³² *Crimes Act 1900* (NSW) s 61HE(4)(d).

¹³³ New South Wales Law Reform Commission, above n 1, 22.

51. The answer to the second question just posed is that the jury would engage in exactly the same process if the test were a ‘reasonable in the circumstances’ one. That is, the question would continue to be: in the circumstances of the case, did the accused’s failure to inquire whether the complainant was consenting mean that (a) the complainant’s failure to resist and (b) the accused’s lack of aggression, provided no reasonable basis for any belief of his/hers that the complainant was consenting? It follows that, in my view, the substitution of ‘reasonable in the circumstances’ language for ‘no reasonable grounds’ language would in truth not alter the result of any trial. The focus would remain on whether, on the facts, circumstances (a) and (b) just mentioned, made it reasonable for the accused to believe what s/he claimed to have believed.
52. Two other arguments must be noted. First, the Commission refers to views, expressed in some submissions, that the test for which s 61HE(3)(c) currently provides ‘is confusing and difficult for fact finders to understand.’¹³⁴ If that is so, the test for which proposed s 61HK(1)(c) provides is susceptible of exactly the same criticisms. As is the case currently, under s 61HK(1)(c), the jury would have to answer the following questions: (i) did the accused have an honest belief that the complainant was consenting? and (ii) was his or her belief reasonable/held on reasonable grounds? As is the case currently,¹³⁵ when answering the second of these questions, the jury would have to take into account all of the circumstances of the case, including anything that the accused said or did to ascertain whether the complainant was consenting,¹³⁶ but excluding the accused’s self-induced intoxication. Indeed, because of the Commission’s ideas about what consent involves, directions about honest and reasonable mistake might be *more* complex in one respect than they are at the moment. When answering question (i), juries would have to consider not merely whether the accused believed that the complainant was subjectively willing to engage in sexual activity with him or her. They would also have to consider whether the accused believed that the complainant actually communicated to the accused her/his subjective willingness.¹³⁷
53. Secondly, the Commission observes that, in some submissions, the view was expressed that the ‘no reasonable grounds’ test ‘allows misconceptions about consent to influence the way fact finders decide if there are reasonable grounds for a belief in

¹³⁴ New South Wales Law Reform Commission, above n 1, 21 [7.9].

¹³⁵ *Crimes Act 1900* (NSW) s 61HE(4).

¹³⁶ The jury is currently required to take into account any ‘steps’ the accused took to ascertain whether the complainant was consenting (*Crimes Act 1900* (NSW) s 61HE(4)(a)). That inquiry seems no more or less complex than the inquiry mandated by proposed s 61HK(2).

¹³⁷ Note in this regard the reasoning of Sopronoff P in *R v Makary* [2018] QCA 258, [60].

consent.¹³⁸ The point here appears to be that the s 61HE(3)(c) ground of exculpation is capable of succeeding in cases where the complainant has failed to say or do anything to resist the accused. If this is right, this is really an objection not to the language that currently features in s 61HE(3)(c), but to the availability of honest and reasonable mistake in sexual assault cases. For, in truth, whatever the precise statutory language that provides for this excuse, it is capable of succeeding only in cases where the complainant has been silent. As soon as the complainant says ‘no’ or ‘stop’, or resists the accused in some other way, there is no room for the accused reasonably to believe that s/he is consenting.¹³⁹

54. With all of that said, I do concede that the wording that the Commission proposes would cause no difficulties in practice. I also concede that, if the language that currently appears in s 61HE(3)(c) had never made its way into the *Crimes Act*, there could be no objection to a provision in the terms of proposed s 61HK(1)(c) (though, because the words ‘the circumstances’ also appear in proposed s 61HK(2)(a), there is perhaps some unnecessary repetition in proposed s 61HK). Because the Commission’s language would not change the law, and because I support the status quo in this area, I do not object to the Commission’s proposed language – though I do maintain that this change is unnecessary.

Chapters 3, 4, 8 and 9 of the Draft Proposals

55. I respectfully agree with all that the Commission says in Chapter 3 of the Draft Proposals.¹⁴⁰

56. I also respectfully support everything in Chapters 4¹⁴¹ and 9¹⁴² of those Proposals.

57. Finally, I respectfully agree with all of the draft jury directions in Chapter 8 of the Draft Proposals¹⁴³ – though I do have one query about proposed s 292(2)(i) of the *Criminal Procedure Act 1986* (NSW). That provision would require trial judges to give one or more of the directions in draft s 292(6)-(11) of the Act¹⁴⁴, even in the

¹³⁸ New South Wales Law Reform Commission, above n 1, 21 [7.9].

¹³⁹ In the Queensland case of *Phillips v R* [2009] 2 Qd R 363, [29], for example, the accused was charged with four counts of rape. The trial judge directed the jury about honest and reasonable mistake of fact only concerning those counts that related to conduct that the complainant had not resisted.

¹⁴⁰ New South Wales Law Reform Commission, above n 1, 6.

¹⁴¹ *Ibid* 7.

¹⁴² *Ibid* 30-2.

¹⁴³ *Ibid* 25-9.

¹⁴⁴ See *ibid* 28.

absence of a request for this, ‘if there [was] ... a good reason to give the direction.’¹⁴⁵ My query concerns whether this would place too great a burden on trial judges? That said, the answer to this question might well be ‘no.’ Even if a judge were not to comply with his or her s 292(2)(i) obligation, this would usually not give rise to a successful Crown appeal against any acquittal in that case.¹⁴⁶ There is also much to be said for requiring all participants in a trial to ensure that as much is done as possible to counter the possibility of prejudicial thinking on the part of juries.

An evidential burden before there is a direction as to mens rea

58. I adhere to the views that I have expressed elsewhere¹⁴⁷ about the desirability of there being an evidential burden for the accused to discharge before he or she is entitled to a direction about mens rea in a sexual assault, sexual touching or sexual act case. For the reasons given there, and by Lord Diplock in *Sweet v Parsley*,¹⁴⁸ this would constitute no affront whatsoever to *Woolmington*.¹⁴⁹ It would also bring the law in NSW into conformity with that in other Australian jurisdictions where a person accused of rape/sexual assault has a statutory honest and reasonable mistake of fact excuse available to him or her.¹⁵⁰ If a rape or sexual assault accused in, for example, Queensland¹⁵¹ or Western Australia¹⁵² must produce or point to evidence of honest and reasonable mistake before he or she is entitled to a direction about this issue, why should the same not be true in this State? It is not as though the current approach is justified by any relevant difference between the ground of exculpation provided for by

¹⁴⁵ Ibid 27.

¹⁴⁶ The double jeopardy exceptions are currently very limited: see *Crimes (Appeal and Review) Act* 2001 (NSW) ss 99-107.

¹⁴⁷ Andrew Dyer, ‘The Mens Rea for Sexual Assault’, above n 24.

¹⁴⁸ [1970] AC 132, 164.

¹⁴⁹ [1935] AC 462. Claims that it would be impossible to reconcile with case law in many jurisdictions that establishes that evidential burdens amount to no breach of a person’s constitutional right to be presumed innocent. See, for example, *R v Oakes* [1986] 1 SCR 103; *R v Lambert* [2002] 2 AC 545, 563 [17] (Lord Slynn of Hadley), 586-90 (Lord Hope of Craighead), 607-10 [150]-[157] (Lord Clyde).

¹⁵⁰ Except in a very unusual case, a person accused of sexual assault in NSW will be acquitted on the basis that he or she lacked mens rea only if it is reasonably possible that he or she had reasonable grounds for his or her mistaken belief that the complainant was consenting. But, for the reasons that I have given elsewhere (Dyer, ‘The Mens Rea for Sexual Assault’, above n 24), before a jury considers a claim that the accused lacked mens rea because he or she (i) realised that there was a negligible, not a real, risk that the complainant was consenting (see *Banditt v R* (2004) 151 A Crim R 215, 232 [92]) or (ii) did not think about the question of consent at all, in circumstances where the risk of non-consent would *not* have been obvious to a person of his or her mental capacity if he or she had turned his or her mind to the relevant question (see *Tolmie v R* (1995) 37 NSWLR 660, 672), the accused should first have to establish that this is a real issue.

¹⁵¹ See, for example, *Brimblecombe v Duncan* [1958] Qd R 8, 12 (Philp J), 16 (Matthews J), 23 (Stanley J); *Hopper v The Queen* [1993] QCA 561.

¹⁵² See, for example, *Butler* [2013] WASCA 242, [22] (McLure P), [120] (Buss JA), [153] (Hall J).

s 61HE(3)(c) of the *Crimes Act* and those for which ss 24 of the WA and Queensland Codes respectively provide.

59. I will not refer in any more detail to the arguments that I have already made. I will merely add one thing to them. As the Commission will be aware, there has been controversy recently in Queensland concerning the operation of s 24 of that State's Criminal Code. The Commission will also be aware that that controversy has resulted in the Queensland government's requiring the Queensland Law Reform Commission (QLRC) to consider whether there is a need for reform of 'the excuse of mistake of fact in section 24 as it applies'¹⁵³ to the rape and sexual assault offences in Chapter 32 of the Code.

60. One legitimate point raised by those¹⁵⁴ who favour reform of s 24 is that, in certain Queensland cases, trial judges have left honest and reasonable mistake of fact with juries out of an 'abundance of caution'¹⁵⁵ and not because there is, in truth, evidence that raises this issue. Another legitimate point raised by these commentators is that the Queensland Court of Appeal appears, in certain cases, too readily to have accepted arguments that trial judges erred by failing to leave the s 24 excuse with juries.¹⁵⁶ Indeed, it might have been because of his recognition of the force of these arguments that, in *R v Makary*,¹⁵⁷ Sopronoff P cautioned trial and appellate judges about the need to take an appropriately stringent approach to the evidential burden in rape and sexual assault cases where the defence has alleged that there is evidence of honest and reasonable mistake of fact. Specifically, after noting Sir Samuel Griffith's observation in *Webster & Co v The Australasian United*¹⁵⁸ that the s 24 rule is one of 'common sense as much as ... of law', his Honour said that:¹⁵⁹

If that is to remain true, it is essential that evidence that is said to raise a requirement for a jury to consider s 24 *does indeed raise that issue*, both as to the defendant's honest belief and as to the facts that reasonably may give rise to that belief.

61. Now, in my view, it has not been *proved* that any laxity on the part of Queensland judges when dealing with the s 24 excuse has actually caused any unjust acquittals. In many of the Queensland cases where the jury appears to have been given an

¹⁵³ Yvette D'Ath, 'Terms of Reference: Queensland's Laws Relating to Consent and the Excuse of Mistake of Fact' (2 September 2019) <https://www qlrc qld gov au/ data/assets/pdf_file/0009/624465/consent-and-mistake-of-fact-tor-2-sep-2019-.pdf>.

¹⁵⁴ See, for example, Crowe and Lee, above n 21.

¹⁵⁵ To use Philippides JA's words in *Duckworth v R* [2017] 1 Qd R 297, 302 [22].

¹⁵⁶ For substantiation of these arguments, see Dyer, above n 22.

¹⁵⁷ [2018] QCA 258.

¹⁵⁸ [1902] St R Qd 207, 217.

¹⁵⁹ [2018] QCA 258, [56]. [Emphasis added]

unnecessary direction about mistake of fact, the jury convicted the accused anyway.¹⁶⁰ Indeed, in this connection, it is as well to recall Bell J's recent remarks that, when a judge directs a jury about a matter that has been 'barely raised by the evidence ... jurors' eyes are apt to glaze over.'¹⁶¹ Nevertheless, as Sopronoff P's comments suggest, it remain possible that, once instructed about a particular issue, jurors will acquit on that basis.¹⁶² In those circumstances, it is submitted that his Honour was clearly right to instruct Queensland judges to take a sufficiently rigorous approach to the evidential burden for honest and reasonable mistake of fact. In the absence of any such burden in NSW, judges in this State may leave the s 61HE(3)(c) issue with juries, no matter how exiguous an evidential basis there is for such an issue. I maintain that Parliament should reverse this position.

Conclusion

62. In my respectful view, the Commission's proposals are overall – and as one would expect – sound, well-considered and sensible. Even in those cases where I disagree with the stance that the Commission has taken, I do accept that its approach is a defensible one.
63. Specifically, while disagreeing with the Commission's approach to the question of what consent involves, I do concede that there is a respectable academic argument to the contrary.¹⁶³ And while I am opposed to the Commission's fraud provision, primarily because of its capacity to operate unjustly, the risk that that will happen – at least at the moment – should not be exaggerated. Certainly, the Commission is, in my view, clearly right to recommend more expansive provision in the *Crimes Act* for liability in cases where the complainant has 'consented' to sexual activity because of a mistaken belief on her or his part. Moreover, whatever doubts I have about the phrasing of the coercion provision (proposed s 61HJ(1)(e)(ii)), the Commission is, in my view, right, in that provision, to recognise that the complainant who 'consents' due to a non-violent threat has not consented at all.
64. When it comes to knowledge of non-consent, while the Commission's proposal to change that language seems to me, with respect, to amount to tinkering, the 'reasonable in the circumstances' language will cause no practical difficulties. I do, however, maintain that, as just discussed, the accused should have to discharge an

¹⁶⁰ An example is provided by *R v Makary* [2018] QCA 257.

¹⁶¹ Virginia Bell, 'Jury Directions: The Struggle for Simplicity and Clarity' (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 16.

¹⁶² See also Jeremy Gans, 'When Should the Jury be Directed on the Mental Element for Rape?' (1996) 20(5) *Criminal Law Journal* 247, 259-261.

¹⁶³ Tom Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43(3) *Philosophy and Public Affairs* 244.

evidential burden before the jury is required to consider whether he or she lacked the mens rea for one of the offences to which s 61HE currently applies. If, as I think, recent Queensland developments have shown that judges are inclined too readily to leave honest and reasonable mistake of fact with juries in sexual offence cases, it would be wise for the NSW Parliament to do what it can to restrain such tendencies.