

To the Commission,

Thank you for the opportunity to respond to the draft proposals for consent law released by the Commission. The Commission's proposals come at the end of a long process of consultation with community and stakeholders. While these efforts should be applauded, we retain serious concerns about the capacity of the drafted proposals to respond to the issues raised by earlier submissions. In particular, it is unclear how these draft proposals will respond to the legal failures highlighted by the *R v Lazarus*.

Below we respond to each broad section of the draft proposals.

## GUIDING PRINCIPLES

### Proposal 4.1 Interpretive principles

#### ***Draft s61HF Principles to be used in interpreting and applying Subdivision***

*Regard must be had to the following principles when interpreting or applying this Subdivision—*

- (a) every person has a fundamental right to choose whether or not to participate in a sexual activity,*
- (b) a person's consent to a sexual activity should not be presumed,*
- (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.*

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The inclusion of a set of interpretive principles can ensure that the implementation of the law is representative of the spirit in which the reforms were made. Interpretive or guiding principles also have an important role to play in ensuring the proper and adequate function of the law in practice. Thus, their aim is also symbolic and educative.

The first of the proposed interpretive principles is drawn from Section 37A of the *Crimes Act 1958* (Vic) which lays out the objectives of the relevant law. The remaining two are newly formed. These last two in particular capture some of the fundamental assumptions of an affirmative consent standard. We support the Commission's inclusion of these principles that directly reflect a standard of affirmative consent. These will be important in ensuring that the laws are interpreted through a lens of positive consent. This is a progressive (and necessary) move towards affirmative consent.

However, these principles do not go far enough, and while the proposals draw on the Victorian legislation, there is no reference to the relevant *guiding principles* entrenched in Victorian law. This is despite reference to the *objectives* of Victorian rape law. The guiding principles are laid out in Section 37B of the *Crimes Act 1958* (Vic) which states:

It is the intention of Parliament that in interpreting and applying [the law], courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and

- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment or mental illness; and
- (d) sexual offences are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred (s37B *Crimes Act 1958* (Vic)).

These guiding principles from the Victorian law reflect the recommendations of *Family Violence: A National Legal Response*, a joint report from the Australian Law Reform Commission and the NSW Law Reform Commission released in 2010. The document detailing the draft proposals refers to this report, stating that the proposals build on its findings and recommendations. Yet, the draft proposals do not meet (nor approach) the expectations set out in that report, which sets a minimum requirement for guiding or interpretive principles for sexual offences. Thus, it cannot be said that these proposals build on the recommendations of the *Family Violence: A National Legal Response* report.

It is worth noting that the Victorian law at present also does not meet these minimum requirements, since references to family violence and people from Indigenous and culturally and linguistically diverse communities have not been legislated. The Commission should include specific reference to the family violence context within their final proposals.

## CONSENT

### Proposal 5.1 The meaning of consent

#### ***Draft s61HI(1)***

*(1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.*

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We support this definition of consent. The inclusion of the phrase ‘at the time of the sexual activity’ is important because it ensures that the notion of ‘prior consent’ cannot exist at law. The concept of implied consent has been explored in the Victorian context. As Burgin and Flynn (2019) have argued, this is ‘a misapplication of affirmative consent’ in which consent must be actively given and ongoing.

Burgin and Flynn (2019) found in their analysis of Victorian rape trial transcripts, that women’s behaviour in the hours and even days before the sexual act were relied on by the defence in constructing a narrative of consent. This included mundane, ordinary behaviour such as walking near the accused or sitting close by (Burgin and Flynn, 2019). Specifying that consent must be given at the time of the sexual activity will go some way to curbing trial argument that relies on women’s unrelated behaviour to construct narratives of consent (see also Vandervort, 2013).

### Proposal 5.2 Withdrawal of consent

#### ***Draft s61HI(2)***

*(2) 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.*

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Affirmative or positive consent is based on the premise that all persons involved in a sexual interaction actively give consent. Thus, a person does not need to revoke consent, since consent is *given, ongoing* and *performative* under this standard. Accordingly, once someone stops *giving* consent, then consent no longer exists. It follows that even during a sexual interaction in which consent is initially given, a person needs to continue to give consent to their sexual partner; they do *not* need to withdraw consent.

This provision undermines the legislative commitment to affirmative consent. Further, it is unclear how this facet of the law will play out in cases where, for example, a person falls asleep or becomes unconscious during a sexual act. Additionally, concerns would arise if the initiator of sex becomes aggressive or otherwise violent during a sexual act that was initially consented to. The expectation that women actively resist against an attack is outdated, and out of step with community standards and the current legal framework (Burgin, 2019; Crowe and Lee, 2020, *forthcoming*).

Our concern is piqued through the explanatory discussion of this provision that states, ‘this section would also recognise that the withdrawal of consent must be communicated’ (NSWRLC, 2019; 9). This statement undermines the legislative commitment to affirmative or positive consent and does not reflect situations where a person might ‘freeze’ in the context of sexual violence. Under an affirmative standard the onus is on the initiator of sex to actively seek ongoing consent. There should be no requirement on a person to demonstrate non-consent at any time.

The inclusion of this provision legitimises the argument that women who give consent then become responsible for any act occurring after that point. It may also legitimise the idea that consent to one activity means consent to all other activity. For these reasons, we recommend removing this element from the draft proposals.

### **Proposal 5.3: Absence of resistance**

#### ***Draft s61HI(3)***

*(3) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.*

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We support the inclusion of this provision asserting that there is no expectation that a person actively resists to indicate non-consent. However, given the substance of proposal 5.2, this will be undermined in situations where people consent initially consent to a sexual act, and then either no longer wish to continue the act or another act occurs which they have not given consent to.

We recommend retaining proposal 5.3 and removing proposal 5.2. Proposal 5.3 though, does not limit the trier of fact from considering non-resistance as indicative of consent. In this way it is likely that, as found in Victorian cases, trials will continue to centre on perpetrator force and victim resistance (Burgin, 2019; Crowe and Lee, 2020, *forthcoming*)

### **THE FAULT ELEMENT**

The suggestions do not substantially change the provisions about knowledge of consent, despite this being the impetus for the reforms. In this way, we do not see that the reforms

introduce any provisions that would have addressed the problems identified in the failed legal process of the *Lazarus* case.

### **Proposal 7.1: Knowledge about consent**

#### ***Draft s61HK***

- (1) *A person is taken to know that another person does not consent to a sexual activity if—*
  - (a) *the person actually knows the other person does not consent to the sexual activity,*
  - or*
  - (b) *the person is reckless as to whether the other person consents to the sexual activity, or*
  - (c) *any belief that the person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.*
- (2) *For the purposes of making any finding under this section, the trier of fact—*
  - (a) *must have regard to all the circumstances of the case, including whether the accused person said or did anything to ascertain if the other person consented to the sexual activity, and if so, what the person said or did, and*
  - (b) *must not have regard to any self-induced intoxication of the accused person.*

As stated in the paper detailing the draft proposals, regardless of the form of knowledge of consent (be it actual knowledge, recklessness or reasonableness), the trier of fact must have regard to the circumstances of the case. The provision that the circumstances include ‘whether the accused person said or did anything to ascertain if the other person consented’ is of particular importance here. This idea is broadly referred to the ‘taking steps’ aspect of affirmative consent.

The Commission have addressed the problems raised in earlier consultations regarding the vague nature of the term ‘taking steps’, by specifying that a step is a physical act or actual words; it is not an internal state, but a positive action. This is progressive and we support this statement. However, we retain concerns about the way that the draft proposals introduce the concept of ‘taking steps.’

Specifically, these suggested proposals do not introduce a positive obligation on a person to take steps to ascertain consent. There is no requirement that reasonable belief is based on any active physical or verbal steps taken by the accused person to ensure that the victim was consenting (see Burgin, 2019; Burgin and Flynn, 2019; Crowe and Lee, 2020, *forthcoming*). Instead the way that the provisions have been drafted provides a protection only to accused persons. In cases where a perpetrator failed to take steps to ascertain consent, this cannot be used to argue his belief is unreasonable, since there is no legal requirement to take steps. Furthermore, any steps that were taken can be used as evidence of reasonable belief, regardless of whether the steps were in themselves reasonable. As Burgin and Flynn (2019) have said, ‘The mere fact that the perpetrator took steps (regardless of how (un)reasonable or (dis)honest) could be enough to demonstrate an attempt to ascertain consent, thus meeting the low threshold of reasonableness’.

Our greatest concern is that there is no mandated requirement that people take active steps to ascertain consent. Without this, the draft proposals cannot be said to be introducing an affirmative or positive standard of consent into law.

Sincerely,

Dr Rachael Burgin and Professor Jonathan Crowe

### *References*

Burgin, R. (2019), 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform', *British Journal of Criminology* 59: 296-314.

Burgin, R. and Flynn, A. (2019), 'Women's Behaviour as Implied Consent: Male 'Reasonableness' in Victorian Rape Law', *Criminology and Criminal Justice*, published in advance online. DOI: <https://doi.org/10.1177/1748895819880953>.

Crowe J & Lee B (2020) The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and a Proposal for Reform. *University of Queensland Law Journal* 39, advanced copy.

Australian Law Reform Commission and NSW Law Reform Commission. (2010), *Family Violence: A National Legal Response*, ALRC Report 114, NSWLRC Report 128 (2010)

Vandervort, L. (2013), 'Sexual Consent as Voluntary Agreement: Tales of "Seduction" or Questions of Law?', *New Criminal Law Review: An International and Interdisciplinary Journal*, 16(1): 143-201.

### *Legislation & Cases*

*Crimes Act 1958* (Vic)

*R v Lazarus* [2017] NSWCCA 279