

Submission to NSW Law Reform Commission

Consent in relation to sexual offences:

Consultation Paper 21

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1. Background

1. Rape & Domestic Violence Services Australia (R&DVSA) welcome the opportunity to contribute to the review of consent in relation to sexual offences.
2. R&DVSA is a non-government organisation that provides a range of specialist trauma counselling services to people who have been impacted by sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have been impacted by sexual violence and their professional or non-professional supporters; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers and staff who are seeking to escape domestic or family violence.
3. In making this submission, we acknowledge the role played by R&DVSA in developing the current law dealing with consent in NSW through our participation as a member of the Criminal Justice Sexual Offence Taskforce (“the Taskforce”). The Taskforce was established in December 2004 to “advise the Attorney General on ways to improve the responsiveness of the criminal justice system to victims of sexual assault.”¹ One of the key outcomes of the review was the introduction of s 61HA into the Crimes Act 1900 (NSW) (the Crimes Act).
4. At the time of reform in 2007, R&DVSA expressed support for the key features of s 61HA. These included a statutory definition of consent based on “free and voluntary” agreement; a list of circumstances that vitiate consent; and a partially objective mental element. In 2013, R&DVSA again expressed support for s 61HA in our submission to the Department of Attorney General and Justice’s Review of Consent Provisions for Sexual Offences.
5. However, over the past five years, it has become increasingly clear that s 61HA has failed to achieve its policy objective to implement a communicative, or affirmative, model of consent. As such, R&DVSA now believe that further reforms are necessary to crystallise the ideal of affirmative consent from policy into practice.
6. On 29 June 2018, R&DVSA made a preliminary submission to this inquiry. In our preliminary submission, we argued that to be effective, any statutory reform in relation to consent must be accompanied by more fundamental structural reform to the criminal justice system and society. In particular, we advocated for the establishment of specialist sexual violence courts that would bring together specialist legal actors and a coordinated system of support in order to facilitate a trauma-informed response to sexual violence. We also advocated for broad community education, training for first responders, and increased funding for sexual assault services.
7. R&DVSA strongly maintains that there is an urgent need for systemic reform that goes beyond the statutory law of consent. However, we recognise that the NSW Law Reform Commission is limited by the terms of reference of the current inquiry. As such, in this submission, we focus specifically on the possibilities for legislative reform.
8. We continue to rely on our preliminary submission for a broader analysis of the legal and non-legal context within which the law of consent operates.

¹ NSW Attorney General’s Department, *Responding to sexual assault: The way forward* (December 2005), iii.

2. Language and terminology

9. In this submission, R&DVSA use the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is designed to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.
10. R&DVSA use the term *people who have experienced sexual violence* rather than the terms survivors or victims. This language acknowledges that, although experiences of violence are often very significant in a person's life, they nevertheless do not define that person. Moreover, the process of recovery from trauma is complex, multifaceted and non-linear and will often involve experiences of survival in combination with experiences of victimisation.
11. R&DVSA use gendered language when discussing sexual, family and domestic violence. This reflects the fact that sexual, family and domestic violence are predominantly perpetrated by men against women. However, we acknowledge that gendered language can exclude the experiences of some people impacted by sexual, domestic and family violence. In particular, we acknowledge that:
 - a. Women can also be perpetrators of sexual, domestic and family violence.
 - b. Sexual violence occurs within LGBTIQ+ relationships at a similar rate to sexual violence within heterosexual relationships.²
 - c. Sexual violence is perpetrated against transgender and gender-diverse people at a higher rate than against cis gender people.³

² B. Fileborn 'Accounting for space, place and identity: GLBTIQ young adults' experiences and understandings of unwanted sexual attention in clubs and pubs' (2013) 22(1) *Critical Criminology* 81.

³ K. O'Halloran, 'Family Violence in an LGBTIQ context' (2015) 2 *Royal Commission In Brief*, <https://www.dvrcv.org.au/sites/default/files/Family-violence-in-an-LGBTIQ-context-Kate-OHalloran.pdf>; Australian Human Rights Commission, *Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017), <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>.

3. Introduction

12. The NSW criminal justice system is failing people impacted by sexual violence. Despite decades of legislative reform, sexual offences remain under-reported, under-prosecuted and under-convicted.⁴ For complainants, the criminal justice process continues to result in re-traumatisation more commonly than it results in either justice or healing.⁵
13. R&DVSA commend the NSW Government on its commitment to improve the criminal justice experience for people who have been impacted by sexual violence.
14. However, we caution that legislative change alone is unlikely to result in any significant improvement for complainants, unless accompanied by broader cultural change.
15. This risk is evidenced by previous reform experience. For example, an evaluation of the 2004 Tasmanian reforms found that despite a legislative intention to implement an affirmative model of consent, this policy has largely failed to come about in practice. According to Cockburn:

[This] lack of success is not grounded in any inherent shortcomings of the legislative changes themselves, rather, it is chiefly due to an apparent reluctance of lawyers and judges to engage with the new concept of consent that the reforms have embodied.⁶
16. The NSW experience following reforms in 2007 was similar. Although the 2007 reforms were strongly underpinned by communicative ideals, recent case law including *Lazarus*⁷ has shown that communicative ideals remain “under-realised in legal discourses in NSW.”⁸
17. On the basis of these experiences, R&DVSA believe that inserting an affirmative model of consent into legislation may have little impact where it is not supported by cultural change. Thus, R&DVSA urge that the NSW Government supplement any legislative amendments with broader structural reforms designed to shift the cultural paradigm towards affirmative consent. For example, in our preliminary submission we recommended:
 - a. The establishment of specialist sexual violence courts that would bring together specialist legal actors and a coordinated system of support in order to facilitate a trauma-informed response to sexual violence;
 - b. The adoption of specialist judge-only trials in sexual offence matters;
 - c. Broad community education about respectful relationships, ethical sexual practice, and the affirmative model of consent; and
 - d. Improved funding for sexual, family and domestic violence services.⁹
18. However, we recognise the NSW Law Reform Commission is limited by the terms of reference of this inquiry to consider only issues specifically related to the law of consent.¹⁰

⁴ W. Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27.

⁵ Ibid.

⁶ H. M. Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, June 2012) 188.

⁷ *R v Lazarus* [2017] NSWCCA 279.

⁸ J. Monaghan and G. Mason, ‘Communicative Consent in New South Wales: Considering *Lazarus v R*’ (2018) 43(2) *Alternative Law Journal* 96, 96.

⁹ Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*.

19. As such, in this submission, R&DVSA focus on possibilities for legislative reform. While recognising the limitations of this approach, we consider that legislative reform may contribute to broader cultural change by:
 - a. Signalling to legal actors, including police, prosecutors, judicial officers and jurors, that parliament intends them to shift their understandings of consent;
 - b. Creating an opportunity for the media and community to engage in public discourse and education around issues of consent; and
 - c. Prompting the NSW Government to consider broader structural changes that may support the implementation of any legislative reforms.

Overview of this submission

20. This submission is structured according to the questions raised in Consultation Paper 21.
21. In Section 5, we make recommendations in relation to the meaning of consent. We argue that consent remains the appropriate basis for criminal liability in relation to sexual offences. However, we suggest that the positive definition of consent should be reformulated to clearly articulate an affirmative model whereby consent is defined as an act of communication, rather than a state of mind.
22. In Section **Error! Reference source not found.**, we make recommendations in relation to the existing circumstances of negation. We argue that legislation should provide a single, non-exhaustive list of “circumstances in which a person does not consent.” We suggest how the current list of circumstances that may negate consent could be reformulated to fit this model. We also consider how the list might be expanded to better capture specific types of sexual violence, including sexual violence within the context of domestic or family violence and fraudulent misrepresentation in relation to the payment of sex workers.
23. In Section 7, we make recommendations in relation to the mental element in sexual offences. We argue that legislation should provide one simplified mental element formulated as a “no reasonable belief” test, and that this test should be incorporated directly into each sexual offence provision. This key purpose of this reformulation is to simply the task of the fact finder. We also recommend that additional guidance be given to fact finders about how to interpret the “no reasonable belief” test. For example, we suggest clarifying the requirement to consider “any steps taken” by the accused be clarified to provide that steps must be verbal or physical and cannot involve merely an internal thought process.
24. Finally, in Section 8, we make recommendations in relation to various issues of application. We recommend that the legislation should be redrafted using simple, plain English and a logical structure. We also recommend that the definition of sexual intercourse be amended to ensure that it is inclusive of the experiences of transgender, gender diverse and intersex people. Finally, we recommend that the Commission conduct further research into the potential for expanded jury directions or the use of expert evidence to improve juror decision-making.

¹⁰ NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 5.

25. To illustrate how our recommendations might be incorporated into legislation, we have included the following draft provisions in Appendix A:
- a. A redrafted version of s 61HE; and
 - b. A redrafted version of s 61I, included as an example to illustrate how the updated mental element could be incorporated into each sexual offence provision.

4. Full list of recommendations

Recommendation 1: Maintain a model of sexual offences based on an absence of consent.

Recommendation 2: Amend the positive definition of consent to provide a clear endorsement of the affirmative model of consent.

Recommendation 3: Include in the amended definition that consent involves a positive act of communication. For example, the definition could provide: “A person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and communicates this agreement through words or actions.”

Recommendation 4: Replace the current lists of negating circumstances in 61HE(5), (6) and (8) with a single, non-exhaustive list of “circumstances in which a person does not consent.”

Recommendation 5: Redraft the current list of circumstances in s 61HE(8) to provide absolute thresholds for non-consent, rather than mere discretionary considerations.

Recommendation 6: Redraft s 61HE(8)(a) to provide that a person does not consent where “the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity.”

Recommendation 7: Redraft s 61HE(8)(b) to provide that a person does not consent where “the person submits because of fear of harm of any type to that person, another person, an animal, or damage to property.”

Recommendation 8: Insert an additional provision to clarify that fear of harm need not be immediately present before or during the sexual activity.

Recommendation 9: Include additional jury directions to clarify that fear of harm may arise in circumstances of family and domestic violence.

Recommendation 10: Redraft s 61HE(8)(c) to provide that a person does not consent where “the person was in the care, or under the supervision or authority, of the other person and as a result, was incapable of consenting to the sexual activity.”

Recommendation 11: Amend s 61HE(5)(c) to provide explicitly that a person does not consent where they submit to the sexual activity because of acts of force.

Recommendation 12: Maintain the current position whereby the grounds for fraudulent misrepresentation about identity are limited to circumstances where an offender impersonates another person.

Recommendation 13: Remove s 61HE(6)(b) which provides that consent is negated where a person consents under a mistaken belief of marriage.

Recommendation 14: Maintain the current position whereby a person’s failure to disclose their HIV/AIDS positive status is dealt with separately from the law of sexual offences.

Recommendation 15: Maintain the current position whereby a person’s representation of their gender or sex identity does not amount to grounds for fraudulent misrepresentation.

Recommendation 16: Maintain the current position whereby the non-consensual removal of a condom can be dealt with as fraudulent misrepresentation about “the nature of the activity.”

Recommendation 17: Insert an additional circumstance to provide that a person does not consent where they submit to the sexual activity under “a mistaken belief that the sexual activity is for the purposes of monetary exchange.”

Recommendation 18: Insert an additional circumstance to provide that a person does not consent where “the person consents, but later through words or actions withdraws consent to the sexual activity taking place or continuing.”

Recommendation 19: Insert an additional circumstance to provide that a person does not consent where “the person does not say or do anything to communicate consent to the act.”

Recommendation 20: Maintain a mental element for sexual offences which encompasses actual knowledge, advertent recklessness, inadvertent recklessness and an objective standard.

Recommendation 21: Reject the proposal by the NSW Bar Association to create a lesser offence of negligent sexual assault.

Recommendation 22: Replace the current three-tier mental element with a simplified “no reasonable belief” test.

Recommendation 23: Amend each sexual offence provision to include the “no reasonable belief” test.

Recommendation 24: Amend s 61HE(4)(a) to provide that when making findings about the mental element, the fact finder must consider whether the defendant took “reasonable steps, through words or actions, to find out whether the other person consents to the sexual activity.”

Recommendation 25: Insert an additional provision to provide that when making findings about the mental element, the fact finder must consider the effect that any behaviour of the accused before the alleged offence may have had on the behaviour of the complainant at the relevant time.

Recommendation 26: Maintain the current provision in s 61HE(4)(b) which provides that when making findings about the mental element, the fact finder must not consider any self-induced intoxication of the accused.

Recommendation 27: Insert an additional provision to provide that when making findings about the mental element, the fact finder must not consider any opinions, values or attitudes held by the accused that do not meet community standards.

Recommendation 28: Maintain the current position whereby s 61HE applies to a wide range of sexual offences.

Recommendation 29: Redraft s 61HA using simple, plain English and a logical structure.

Recommendation 30: Amend the definition of ‘sexual intercourse’ to be inclusive of the experiences of transgender, gender diverse and intersex people.

Recommendation 31: Ensure that jury directions provide a clear endorsement of the affirmative model of consent, including that consent requires a positive act of communication.

Recommendation 32: Commission further research to discover the impact that jury directions, including legislated directions, may have in combating jurors’ reliance on rape myths.

Recommendation 33: Ensure judicial officers receive extensive and ongoing training in relation to the complex dynamics and impacts of sexual violence, so they are equipped to provide appropriate jury directions to combat rape myths.

Recommendation 34: Commission further research to discover the impact that any amendments to expert evidence may have in combating jurors’ reliance on rape myths.

5. The meaning of consent

Question 3.1: Alternatives to a consent-based approach

- (1) Should the law in NSW retain a definition of sexual assault based on an absence of consent? If so, why? If not, why not?
- (2) If the law was to define sexual assault differently, how should this be done?

Support for consent-based model

26. R&DVSA believe that absence of consent remains the most appropriate basis for criminal liability in relation to sexual offences.
27. The centrality of consent reflects the fundamental principle of sexual autonomy: the right of a person to have control over their own body, but also to grant permission to another to engage in sexual activity. As Munro argues, “some concept of consent is needed to allow people to act, and be respected, as moral agents who police the boundaries of their own personal intimacy by inviting as well as denying sexual access.”¹¹
28. Within a consent framework, sexual violence can be understood as an offence against a person’s agency rather than merely against their body.¹² This understanding makes sense of the complex harms of sexual violence, which extend far beyond physical injury.

Opposition to injury-based model

29. R&DVSA does not support a model of sexual assault based on “proof of injury” as proposed by Rush and Young.¹³
30. We accept that in some cases, the existence of injury may be easier for the prosecution to prove than absence of consent. However, we perceive several problems with this model.
31. First and most importantly, a definition of sexual violence based on injury does not accurately capture the wrong involved in sexual violence: that is, the violation of a person’s agency. To illustrate this point, it is helpful to consider that people may experience injury as a result of consensual sex that is not, and should not be, a criminal matter. A person who engages in consensual sadomasochistic sex with a trusting partner may experience physical injury. Likewise, a person who engages in consensual sex with someone who they later regret may experience psychological injury. However, it seems clear that neither of these interactions should attract the attention of the criminal law. Rather, sexual activity only becomes wrongful where perpetrated without the consent of the other person.
32. Second, research shows that proof of injury is not a reliable indicator of sexual violence. Many people who experience sexual violence do not experience any physical injury as a

¹¹ V. E. Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 940.

¹² B. Fileborn, ‘Sexual Assault Laws in Australia’ (2011) *ACSSA Resource Sheet No 1*, <https://aifs.gov.au/publications/sexual-assault-laws-australia>.

¹³ P Rush and A Young, *Preliminary Submission PCO59*.

result of the offence.¹⁴ Conversely, evidence shows that physical injuries do not reliably evidence non-consent, as injuries may be present following either consensual or non-consensual intercourse.¹⁵ Furthermore, we note that proving psychological injury is beset with difficulties. For example, where a complainant has previously experienced mental health issues, it may be difficult for the prosecution to establish causation between the incident of sexual violence and any subsequent psychological injuries.

33. Third, a model based on “proof of injury” may result in increased scrutiny of the complainant’s behaviour after the assault. Given that physical injury is relatively uncommon, it is likely that the prosecution will need to rely on proof of psychological injury in many cases. This will create an additional incentive for parties to subpoena the complainant’s confidential counselling notes. However, disclosing the contents of confidential counselling notes may have negative impacts for the complainant, as well as for people impacted by sexual violence more broadly. For example:
 - a. The complainant may feel further violated and experience heightened impacts of trauma;
 - b. There may be damage to the therapeutic relationship of trust between practitioner and client and hence to the complainant’s prospects of recovery;
 - c. The complainant may experience heightened risks to their safety, as a result of the perpetrator gaining access to sensitive information;
 - d. Other people who have experienced sexual violence may be discouraged from accessing counselling services or speaking candidly with their counsellor; and
 - e. Other people who have experienced sexual violence may be discouraged from pursuing legal options due to fear that their counselling records might be compelled.¹⁶
34. In 1997, the NSW Government recognised that there is a broad public interest in maintaining the confidentiality of therapeutic relationship when it introduced Sexual Assault Communications Privilege.¹⁷
35. R&DVSA submit that introducing an injury-based model of sexual violence may compromise the policy objectives behind this initiative.

Opposition to a circumstance-based model

36. R&DVSA does not support the Michigan model of sexual offences, under which the prosecution is not required to prove absence of consent where circumstances of force or coercion are proven.
37. As acknowledged in the Consultation Paper, experience shows this model is not effective at displacing the focus on consent.¹⁸ In 1981, NSW adopted a version of the Michigan

¹⁴ Studies have found variable rates of injury during sexual offences: see Australian Institute of Family Studies, *Challenging Misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (Melbourne: Australian Institute of Family Studies, 2017) 6.

¹⁵ A. Quadara, B. Fileborn, and D. Parkinson, *The role of forensic medical evidence in the prosecution of adult sexual assault* (Melbourne: Australian Institute of Family Studies, 2013).

¹⁶ Legal Aid NSW and Women’s Legal Service NSW, ‘Subpoena Survival Guide’ (2016), 21.

¹⁷ *Ibid* 24.

model when it reconceptualised sexual assault as a graded series of violent assaults.¹⁹ However, research undertaken by BOSCAR found that the reform failed in its objective and that the issue of consent remained “at the heart of the trial.”²⁰ In 1989, NSW retreated from this model and enacted reforms to reinstate consent as the “crucial determinant of legitimacy.”²¹

38. R&DVSA also believe this model is problematic at a theoretical level as it obscures the core wrong involved in sexual violence: that is, the violation of autonomy. As Munro argues, “some concept of consent is needed to allow people to act, and be respected, as moral agents who police the boundaries of their own personal intimacy by inviting as well as denying sexual access.”²² While circumstances of coercion or force are no doubt relevant considerations, “in reality [they] no more than indicators of lack of consent.”²³

Recommendation 1: Maintain a model of sexual offences based on an absence of consent.

Question 3.2: The meaning of consent

- (3) Is the NSW definition of consent clear and adequate?
- (4) What are the benefits, if any, of the NSW definition?
- (5) What problems, if any, arise from the NSW definition?
- (6) What are the potential benefits of adopting an affirmative consent standard?
- (7) What are the potential problems with adopting an affirmative consent standard?
- (8) If NSW was to adopt an affirmative consent standard, how should it be framed?
- (9) Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?
- (10) Do you have any other ideas about how the definition of consent should be framed?

39. R&DVSA believe that NSW law should be amended to provide a clear and unambiguous endorsement of the affirmative model of consent.
40. R&DVSA refer the Commission to our preliminary submission which outlined several problems with the current legislation, with reference to *Lazarus*²⁴ and *XHR*.²⁵
41. In this submission, we focus on the possibilities for legislative reform.
42. According to Consultation Paper 21, there are two key elements to an affirmative model of consent:
- a. A person consents only where consent is communicated through words or actions.

¹⁸ NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 35.

¹⁹ *Crimes (Sexual Assault) Amendment Act 1981* (NSW).

²⁰ R. Bonney, ‘Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation: Interim Report 2 – Sexual Assault, Court Outcome: Acquittals, Convictions and Sentence’ (1985) *NSW Bureau of Crime Statistics and Research*, 8.

²¹ H. M. Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, June 2012) 78.

²² V. E. Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 940.

²³ Victorian Law Reform Commission, *Rape: Reform of Law and Procedure: Interim Report*, Report No 42 (1991) 6.

²⁴ *R v Lazarus* [2017] NSWCCA 279.

²⁵ *R v XHR* [2012] NSWCCA 247.

- b. A person has a responsibility to find out whether the other person consents before engaging in sexual activity.
43. We consider each of these elements below.

An affirmative communication of consent

- 44. At its core, an affirmative model of consent requires that consent be characterised in the affirmative rather than the negative – as requiring a positive communication of agreement rather than the mere absence of communicated disagreement.²⁶ The key purpose of this model is to displace the notion that a woman’s consent can be assumed.²⁷
- 45. R&DVSA believe that a person may properly communicate consent in innumerable ways: through words, actions or a combination of both.
- 46. R&DVSA does not believe that the law should require verbal consent in every instance. Certainly, from an ethical standpoint, we consider that it is always preferable for a person to obtain verbal consent. This is because body language can be difficult to read and may be more likely to result in miscommunications. However, R&DVSA acknowledge that ethical sexual activity can and often does occur in the absence of any explicit words of consent. As such, to require verbal consent in every instance may represent an excessive expansion of the criminal law.
- 47. In contrast, R&DVSA believe that it is both realistic and appropriate to expect that in every instance of consensual sexual activity, a person will indicate their agreement through either words or actions, or a combination of both.
- 48. We reject the proposition by critics that an affirmative model would “unduly broaden the criminal law, deeming a lot of sexual activity sexual assault.”²⁸ Rather, we believe that by formulating a standard of affirmative consent that incorporates both verbal and physical forms of communication, the law would appropriately reflect the diverse range of ways that people can and do communicate consent during consensual sexual activity.
- 49. To illustrate this point, it is helpful to consider the wide variety of ways that people may communicate consent through either words or actions. Certainly, we acknowledge that an affirmative standard will be “open to different interpretation and modes of communication” and that there is “no normative or standardised way in which notions such as ‘consent’ are communicated or understood.”²⁹ However, we contend that adopting a broad and flexible affirmative standard will in fact narrow the scope of the criminal law, rather than broaden it.
- 50. The table below demonstrates what affirmative consent might look like in practice.³⁰ The examples provided are not intended to be exhaustive, or to provide any definitive legal

²⁶ E. Craig, ‘Ten Years After Ewanchuk The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent’ (2009) 13 *Canadian Criminal Law Review* 248, 250.

²⁷ W. Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27, 32.

²⁸ NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 42.

²⁹ Australian Lawyers Alliance, *Preliminary Submission PCO74*, 5.

³⁰ This table is based on resources produced by Epigeum as part of their ‘Consent Matters: Boundaries, Respect, and Positive Intervention’ training module.

standard. Rather, they are intended to demonstrate that the affirmative model of consent would largely reflect current ethical sexual practice, rather than create any new or especially onerous standard.

Verbal indications of consent	Physical indications of consent
<p>Verbal consent may be communicated where a person says words such as:</p> <ul style="list-style-type: none"> • “Yes” • “That feels good” • “Keep going” • “Don’t stop” • “I want you to...” • “I love it when you...” etc. 	<p>Physical consent may be communicated where a person engages in positive and voluntary body language, for example:</p> <ul style="list-style-type: none"> • Appearing relaxed, happy and/or enthusiastic • Being engaged and responsive • Reciprocating sexual advances, eg. kissing or touching the other person etc.

An affirmative responsibility

51. The second element of an affirmative model is that a person has a responsibility to find out whether the other person is consenting prior to, and throughout, any sexual activity.
52. This is the corollary of the model’s requirement for positive communication. It acknowledges that in many situations, a person’s communication in relation to consent might be ambiguous. However, where ambiguity arises, there is a social burden on the person initiating sexual activity to take steps to ensure there has, in fact, been a positive communication of consent – in other words, to resolve any ambiguity in communication. This will necessarily involve further communication, and thereby any steps taken must involve either words or actions.
53. The responsibility to find out whether the other person is consenting is an ongoing responsibility which continues throughout the sexual activity. This reflects the fact that affirmative consent must be specific and ongoing and can be withdrawn at any time.
54. Essentially, the affirmative model holds that a person has a responsibility to ‘check in’ with the other person at any point that communication of consent becomes unclear. For example, where the other person initially communicates a clear and unequivocal ‘yes’ but subsequently indicates through body language that they have become uncomfortable, a person must take steps to find out whether the other person is continuing to consent to that sexual activity or has withdrawn their consent.
55. As with communicating consent, there are a wide variety of ways that a person may take steps to find out whether the other person is consenting.
56. To illustrate how this requirement may look in practice, we outline some examples in the table below.³¹ As above, the examples provided are not intended to be exhaustive, or to provide any definitive legal standard. Rather, they are intended to demonstrate that the affirmative model of consent would largely reflect current ethical sexual practice, rather than create any new or especially onerous standard.

³¹ This table is based on resources produced by Epigeum as part of their ‘Consent Matters: Boundaries, Respect, and Positive Intervention’ training module.

Verbal steps to confirm consent	Physical steps to confirm consent
<p>A person may take verbal steps to find out whether the other person is consenting by asking questions such as:</p> <ul style="list-style-type: none"> • “Would you like me to stop?” • “Do you want to keep going?” • “Is this ok?” • “Does this feel good?” • “What would you like to do now?” etc. 	<p>A person may take physical steps to find out whether the other person is consenting by:</p> <ul style="list-style-type: none"> • Stopping any sexual activity and waiting to see whether the other person says or does anything to communicate their desire to continue.

The cultural significance of an affirmative model

57. The affirmative model of consent represents an important shift in the cultural narrative of sexual relations. Historically, the normative script of heterosexual courtship has been founded on a dynamic of male pursuit and female acquiescence. As Cockburn describes:

This version of normative sexuality is predicated on an aggressive male role in sexual relations and a passive or acquiescent female role. In this account of gender relations the only appropriate female behaviour is to maintain an appearance of sexual unavailability unless and until persuaded to grant consent.³²

58. The affirmative model of consent offers an updated narrative founded on principles of mutuality and reciprocity. Crucially, the model offers relief for all parties from the constraints of traditional gender roles.

59. For women, the affirmative model aims to normalise positive affirmations of consent and thereby overcome the notion that women are “more valuable” where they express initial reluctance to engage in sexual activities.³³ As a result, women’s indications of non-consent become imbued with greater meaning. In this way, the model affirms women’s role as “moral agents who police the boundaries of their own personal intimacy by inviting as well as denying sexual access.”³⁴

60. For men, the affirmative model clarifies the socially acceptable boundaries of pursuit.³⁵ Traditionally, persistence has been romanticised as part of the normative narrative of heterosexual courtship.³⁶ For example, romantic films regularly portray male characters engaging in “the chase” ie. ignoring the woman’s initial rebuffs and engaging in “persistent pursuit” until eventually, the woman is portrayed as relenting to his efforts, apparently flattered by his persistence.³⁷ The affirmative model of consent clarifies to men that

³² H. M. Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, June 2012) 78.

³³ E. Friedrichs, ‘Why It’s Dangerous to Tell Men to Be Persistent to Get Women to Sleep with Them’, *Everyday Feminism*, 19 October 2016, <https://everydayfeminism.com/2016/10/men-persistent-with-women/>.

³⁴ V. E. Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 940.

³⁵ J. R. Lippman (2015) ‘I Did It Because I Never Stopped Loving You: The Effects of Media Portrayals of Persistent Pursuit on Beliefs About Stalking’ (2018) 45(3) *Communications Research* 394; Kasey Edwards, ‘Persistence, the chase, is portrayed as what men are supposed to do’, *Sydney Morning Herald online*, 3 December 2018, <https://www.smh.com.au/lifestyle/life-and-relationships/persistence-the-chase-is-portrayed-as-what-men-are-supposed-to-do-20181126-p50ign.html>.

³⁶ Ibid.

³⁷ Ibid.

where a woman rebuffs his sexual advances, this should not be interpreted as a coded invitation for pursuit. In simple terms, the model clarifies that only “yes” means “yes”.

The impact of legislative reform

61. In our preliminary submission, R&DVSA argued that legislative change alone is unlikely to result in any significant improvement for complainants, unless accompanied by broader cultural change to the legal system and society more broadly.³⁸
62. However, this does not mean that legislative reform is futile. Rather, R&DVSA considers that enshrining an affirmative model of consent into legislation may still have positive impacts by encouraging cultural change across both legal and non-legal spheres. In particular, amending the definition of consent may:
 - a. Signal to legal actors, including police, prosecutors, judicial officers, that parliament intends them to adopt an affirmative understanding of consent;
 - b. Offer an opportunity for the media and community to engage in public discourse around affirmative consent, and thereby educate people about their responsibilities when engaging in ethical sexual practice; and
 - c. Prompt the NSW Government to consider broader structural changes to support the implementation of an affirmative model.
63. We note that legislative change may have a greater impact in the current cultural climate, given that the *#metoo* movement has drawn significant public attention to issues of consent. In this context, any legislative changes adopted by the NSW Government are likely to receive significant media attention and prompt widespread public discussion. Thus, legislative change at this time may have greater potential for cultural impact than previous reform efforts, such as those in Tasmania in 2004 or NSW in 2007.

Responding to key criticisms of the affirmative model

64. One of the key criticisms of the affirmative model is that it would “unduly broaden the criminal law, deeming a lot of sexual activity sexual assault.”³⁹ R&DVSA reject this criticism for the following reasons:
 - a. Sexual assault is dramatically under-reported, under-prosecuted and under-convicted.⁴⁰ It is highly unlikely that any reform would cause the pendulum to swing in the opposite direction, such that consensual sexual activity would be at risk of becoming criminalised. Moreover, given that false reports of sexual assault are extremely uncommon,⁴¹ incidents of consensual sexual activity are highly unlikely to ever come to the attention of police.

³⁸ Rape and Domestic Violence Services Australia, *Preliminary Submission PC088*.

³⁹ NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 42.

⁴⁰ W. Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27.

⁴¹ Australian Institute of Family Studies, *Challenging Misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (Melbourne: Australian Institute of Family Studies, 2017) 9.

- b. The affirmative model recognises the broad range of ways that people may communicate consent through words, actions or a combination of both. R&DVSA consider it unrealistic that “a lot of sexual activity”⁴² involves absolutely no positive act of consent.
- 65. Another key criticism of the affirmative model is that it may be “overly onerous for the accused.” R&DVSA also reject this criticism.
- 66. The effect of the affirmative model is merely to distribute more fairly the social burden to protect against non-consensual sexual activity.⁴³ Traditionally, this responsibility has rested asymmetrically with the woman, who has been expected to respond to any unwanted sexual advances with forceful resistance. The purpose of the affirmative model is to share the responsibility for sexual communication between both parties. It achieves this by imposing a responsibility onto the person initiating the sexual activity to take steps to find out whether the other person is consenting.
- 67. R&DVSA reject the view that this social burden is “overly onerous for the accused” for two reasons:
 - a. First, the obligation can be easily fulfilled. As discussed above, there are a wide variety of ways that a person may take steps to find out whether the other person consents. For example, a person may fulfil this responsibility by asking a simple question (eg. “would you like to keep going?”) or even through inaction (eg. by stopping the sexual activity and waiting to see whether the other person indicates their desire to continue).
 - b. Second, the extent of this obligation is entirely proportionate considering the risk of serious harm if the obligation were not imposed. It cannot be “overly onerous” to expect an accused to ask a simple question in order to avoid the immense trauma which commonly results from sexual violence.
- 68. It is critical to note that adopting an affirmative model does not require any shift to the legal burden of proof. Rather, it is entirely possible to adopt an affirmative model of consent and maintain the current position whereby the the burden of proof remains on the prosecution to establish all elements of the offence beyond reasonable doubt, including the mental element of the offence.
- 69. The effect of the affirmative model is merely to shift the focus of inquiry. Traditionally, in order to make out a sexual offence, the prosecution case has focused around proving that the complainant fulfilled her social responsibility to actively resist the defendant’s advances. Under the affirmative model, the prosecution case may instead focus on proving that the defendant failed to fulfil his social responsibility to find out whether the complainant was consenting.
- 70. Thus, R&DVSA submit that the question of whether to shift the legal burden of proof should be approached as an independent inquiry to the question of whether to legislate an affirmative model of consent. We discuss this further in Section 7.

⁴² NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 42.

⁴³ V. Munro, ‘Shifting sands? Consent, context and vulnerability in contemporary sexual offences policy in England and Wales’ (2017) 26(4) *Social and Legal Studies* 1, 3.

Recommendation 2: Amend the positive definition of consent to provide a clear endorsement of the affirmative model of consent.

The current NSW definition

71. The current NSW definition of consent already reflects principles of affirmative consent to some extent. In particular, the emphasis on free and voluntary agreement reflects ideals of autonomy and mutuality.⁴⁴ It also signals that consent should be understood “as a positive state of mind, and something to be sought and communicated, rather than assumed.”⁴⁵
72. In addition, principles of affirmative consent are reflected in other provisions including:
 - a. S 61HE(4)(a) which requires the fact finder to have regards to all the circumstances of the case “including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity”; and
 - b. S 61HE(9) which provides that “[a] person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity.”
73. However, as argued in our preliminary submission, R&DVSA believe that the affirmative model of consent has not been translated effectively from policy into practice.
74. For example, Mason and Monaghan argue that case law including *Lazarus*⁴⁶ demonstrates that “communicative ideals” remain “under-realised in legal discourses in NSW.”⁴⁷ Instead, defence lawyers continue to rely on views that “an absence of indicators of non-consent leaves a presumption of a women’s consent unrebutted”⁴⁸ and that “a defendant could have *no reason* to enquire as to consent.”⁴⁹ As stated by Mason and Monaghan, these perspectives are “a far cry from communicative thinking.”⁵⁰
75. R&DVSA consider that under current NSW law, it remains ambiguous whether or not consent must be communicated. Legislative commentary in regards to s 61HA (now s 61HE) reveals the convoluted and unclear status of the law. This commentary reads:⁵¹

In the absence of threats etc, *physical inaction may convey consent*.⁵² Although it has been judicially remarked that whether consent requires not only a state of mind, but also the communication of it, “could be the subject of debate”⁵³, the definition of consent including the term “agrees”, suggests the requirement of some

⁴⁴ J. Monaghan and G. Mason, ‘Communicative Consent in New South Wales: Considering *Lazarus v R*’ (2018) 43(2) *Alternative Law Journal* 96, 97.

⁴⁵ *Ibid*.

⁴⁶ *R v Lazarus* [2017] NSWCCA 279.

⁴⁷ J. Monaghan and G. Mason, ‘Communicative Consent in New South Wales: Considering *Lazarus v R*’ (2018) 43(2) *Alternative Law Journal* 96, 96.

⁴⁸ *Ibid* 99.

⁴⁹ *Ibid* 100.

⁵⁰ *Ibid*.

⁵¹ M. Blackmore, G. Hosking, and R.S. Watson, ‘Section 61HA Commentary: Crimes Act 1900 (Annotated)’, *Westlaw Criminal Law (NSW)*, accessed November 2018. We note that this resource has since been replaced with a new section in relation to the current provision in s 61HE.

⁵² *R v Maes* [1975] VR 541 at 548 (Vic Sup Ct, FC); *R v Laz* [1998] 1 VR 453(Vic CA).

⁵³ *R v Maes* [1975] VR 541 at 548 (Vic Sup Ct, FC).

communication. The term "consent" itself includes the aspect of communication as part of its definition.⁵⁴ Conversely, a complainant who fails by word or action to manifest dissent is not in law thereby *necessarily* taken to have consented to sexual intercourse.⁵⁵ [emphases added]

76. Given this lack of clarity, R&DVSA consider there is a need to clarify through legislative amendment that consent must always involve a positive act of communication.

Redefining consent as an act of communication

77. R&DVSA believe the NSW definition should be amended to provide a stronger endorsement of the affirmative model of consent. This could be achieved by redefining consent as involving an act of communication, rather than merely a state of mind.
78. The Victorian Department of Justice and Regulation provide a helpful explanation of this distinction:

Under the communicative [or affirmative] model, consent is understood as not merely an internal state of mind or attitude (like willingness or acceptance) but also as permission that is given by one person to another. Therefore, it is something that needs to be communicated (by words or other conduct) by the person giving the consent to the person receiving it. By definition, on this model, an uncommunicated internal attitude is insufficient consent for the purposes of the law on rape and sexual assault.

The relationship between the state of mind of consent and the communicative giving of consent can be very close. For example, it will often be the case that a person gives their consent to a sexual act to another person by communicating or indicating to that person that they have the relevant attitude or state of mind. In other words, in the right context, indicating one's attitude can itself be the giving of consent. But, on the communicative model, that indication is still a distinct and essential step for the giving of consent to the other person.

Under the communicative model, consensual sex should, at a minimum, only take place where there has been communication and agreement between the parties.⁵⁶

79. The Washington and Vermont models referenced in the Consultation Paper provide useful illustrations of how this understanding of consent might be enshrined into legislation:
 - a. In Washington, the legislative definition provides: "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."⁵⁷

⁵⁴ The Macquarie Dictionary (3rd ed) defines consent as a noun as "assent; acquiescence; permission; compliance".

⁵⁵ *R v Shaw* [1996] 1 Qd R 641; (1995) 78 A Crim R 150 at 646 (Qd R), 155 (A Crim R) per Davies and McPherson JJA; *R v Chant* (unreported, NSW (CCA), 12 June 1998) at 8 per Wood CJ at CL.

⁵⁶ Victoria Department of Justice and Regulation, *Victoria's New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015), 12.

⁵⁷ *Revised Code of Washington* § 9A.44.010(7) definition of "consent" ..

- b. In Vermont, the legislative definition provides: ““Consent” means words or actions by a person indicating a voluntary agreement to engage in a sexual act.”⁵⁸
- 80. In line with these models, R&DVSA recommend that NSW adopt a two-pronged approach to implementing an affirmative model of consent. We recommend:
 - a. Amending the positive definition of consent as follows: “A person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and communicates this agreement through words or actions.”
 - b. Inserting an additional circumstance which clarifies that the complainant does not consent where the complainant “does not say or do anything to communicate consent.” This recommendation is discussed further in Section **Error! Reference source not found.**
- 81. We recognise this two-pronged approach goes a step further than the models of affirmative consent previously adopted in Victoria and Tasmania. In these jurisdictions, affirmative consent has been legislated by inserting an additional circumstance that consent does not arise where the complainant does not say or do anything to communicate consent. However, these jurisdictions do not include any explicit reference to the need for communication in their positive definitions of consent.
- 82. R&DVSA believe that a two-pronged approach may be more effective than the approach adopted in Tasmania and Victoria. We believe that amending the positive definition of consent to reflect an affirmative model would:
 - a. Provide clear, unambiguous and upfront notice to members of the public about the positive standard of behaviour which is required at law.
 - b. Make clear that an act of communication is an essential element of consent, rather than merely an evidentiary issue which goes towards proving the complainant’s state of mind.
 - c. Be useful as an educative tool for shifting public understandings of consent.
 - d. Emphasise to fact finders the central importance of affirmative principles.
- 83. The purpose of amending the positive definition of consent is not to achieve any different outcome than was intended in Tasmania and Victoria. Rather, amending the positive definition of consent is intended to clarify and reinforce those same objectives.

Recommendation 3: Include in the amended definition that consent involves a positive act of communication. For example, the definition could provide: “A person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and communicates this agreement through words or actions.”

Other aspects of consent

- 84. R&DVSA agree that the law should address the issues of withdrawal of consent and the interaction between consent and the use of contraception.

⁵⁸ *Vermont Statutes* Title 13, ch 72 § 3251(3) definition of “consent”.

85. However, we believe these issues are more appropriately dealt with through the list of circumstances where a person does not consent in s 61HE. As such, these issues are considered in Section 6.

6. Circumstances where a person does not consent

Question 4.1: Negation of consent

- (11) Should NSW law continue to list circumstances that negate consent or may negate consent? If not, in what other ways should the law be framed?
- (12) Should the lists of circumstances that negate consent, or may negate consent, be changed? If so, how?

Maintaining a list of circumstances in which a person does not consent

86. R&DVSA believe the legislation should continue to include a list circumstances in which a person does not consent. This list serves to provide guidance to fact finders about how to interpret the positive definition of consent.
87. We note the NSW Bar Association has signalled they do not support the retention of a statutory list of factual circumstances.⁵⁹ However, R&DVSA submit this position is entirely inconsistent with their assertion that the position definition of consent lacks clarity.
88. In their 2010 report on family violence, the Australian Law Reform Commission and NSW Law Reform Commission recommended a definition of consent based on “free and voluntary agreement.” Noting the potential for ambiguity in interpretation, they stated:
- To the extent that introducing the concept of ‘agreement’ to the definition of consent may give rise to interpretation issues and problems in practice, the Commissions consider that supplementing any legislative provision that defines consent with a provision that includes a list of circumstances where free agreement may not have been given will assist, in practice, to clarify the meaning and expression of ‘agreement.’⁶⁰
89. Thus, R&DVSA support the retention of a list of circumstances to clarify the meaning of the positive definition of consent and ensure that fact finders interpret the legislation in accordance with parliament’s intention.

Reframing the list

90. R&DVSA submit that the statutory list of circumstances should be reframed in line with the Victorian model, which provides a single, non-exhaustive list of “circumstances in which a person does not consent.”
91. Currently, NSW law contains three separate lists of circumstances. Sections 61HE(5) and (6) list circumstances that automatically negate consent, whereas s 61HE(8) lists circumstances that may negate consent. R&DVSA recommend that these lists be combined into one, non-exhaustive list of “circumstances in which a person does not consent.” This will require two key amendments to the current legislation:
- a. The language of ‘negation’ should be removed to clarify that the purpose of the list is to assist the fact finder to understand the positive definition of consent, rather than to rebut it.

⁵⁹ NSW Bar Association, *Preliminary Submission PCO47*, 2.

⁶⁰ Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010), 68.

- b. The list of circumstances which may negate consent set out in s 61HE(8) should be reformulated to articulate absolute thresholds rather than mere considerations.

92. We consider each amendment below.

Replacing the language of negation

- 93. R&DVSA are concerned that the language of ‘negation’ implies a starting assumption of consent and is therefore inconsistent with an affirmative model of consent.
- 94. Under the current legislation, the statute appears to assume consent as a starting point, which is then deemed absent in certain circumstances for the purposes of the law. This artificiality of this approach is evident in the self-contradictory phrasing of the legislation. For example:
 - a. Section 61HE(6) provides that: “A person who consents to a sexual activity ... does not consent to the sexual activity”.
 - b. Section 61HE(8) provides that: “A person does not consent to a sexual activity ... if the person consents to the sexual activity because ...”
- 95. This language suggests that consent is deemed absent as a matter of legal technicality. Further, it does not encourage the fact finder to apply the positive definition of consent, given that it would not make sense to apply the definition of ‘free and voluntary agreement’ to both invocations of the word in ss 61HE(6) and (8).⁶¹
- 96. In contrast, the Victorian legislation includes a list of circumstances framed as follows: “Circumstances in which a person does not consent to an act include, but are not limited to, the following—”⁶²
- 97. This framing emphasises that the purpose of the list is to give meaning and expression to the positive definition of consent. As the Victorian Department of Justice and Regulation described when introducing the 2014 reforms:

The Act does not ‘deem’ these to be circumstances in which consent is absent, if ‘deeming’ is taken to be the creation of a ‘legal fiction’, a matter of making something a legal fact that is not an actual fact. Instead, this provision fleshes out the definition of ‘consent’ as ‘free agreement’ by identifying some of the circumstances where there is in fact no free agreement.⁶³

Recommendation 4: Replace the current lists of negating circumstances in 61HE(5), (6) and (8) with a single, non-exhaustive list of “circumstances in which a person does not consent.”

Reformulating the list of circumstances in s 61HE(8)

- 98. R&DVSA consider that the circumstances which may negate consent set out in s 61HE(8) should be reformulated to articulate absolute thresholds rather than mere considerations. This will clarify the task of the fact finder by confirming the relevance of these factors to the question of consent.

⁶¹ Victoria Department of Justice and Regulation, *Victoria’s New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015).

⁶² *Crimes Act 1958* (Vic), s 36(2).

⁶³ Victoria Department of Justice and Regulation, *Victoria’s New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015).

99. This recommendation responds to concerns expressed by the NSW Bar Association and Quilter that the list of circumstances which may negate consent is essentially futile. As Quilter writes, “at best the factors are symbolic; at worst, they may impact negatively on the complainant and the Crown case.”⁶⁴ This is because, even where the prosecution is able to prove one of the circumstances in s 61HE(8) beyond reasonable doubt, it remains entirely at the discretion of the fact finder to determine whether or not this factor has any relevance to the issue of consent. Thus, in effect, the circumstances have “little role to play over and above the key definition of consent as free and voluntary agreement.”⁶⁵
100. In the sections below, we consider how each circumstance could be reformulated to articulate a clear and absolute threshold for non-consent.

Recommendation 5: Redraft the current list of circumstances in s 61HE(8) to provide absolute thresholds for non-consent, rather than mere discretionary considerations.

Intoxication

101. Currently, S 61HE(8)(a) provides that non-consent may be established “if the person consents to the sexual activity while substantially intoxicated by alcohol or any drug.”
102. R&DVSA suggest that NSW replace this provision with the Victorian formulation which provides an absolute formulation: that a person does not consent where “the person is so affected by alcohol or another drug as to be incapable of consenting to the act.”⁶⁶

Recommendation 6: Redraft s 61HE(8)(a) to provide that a person does not consent where “the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity.”

Intimidatory or coercive conduct

103. Currently, s 61HE(8)(b) provides that non-consent may be established “if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force.”
104. R&DVSA suggest that NSW law instead provide that a person does not consent where “the person submits because of fear of harm of any type to that person, another person, an animal, or damage to property.”
105. The purpose of this shift in language is to better capture sexual violence that occurs within the context of domestic or family violence.
106. As we explained in our preliminary submission, R&DVSA is highly concerned that the current law of consent does not adequately capture sexual violence that occurs within the context of domestic or family violence. One of the key difficulties in proving this type of sexual violence is that often, within the context of family and domestic violence, coercion is experienced as the cumulative effect of a pattern of ongoing coercive and controlling behaviours carried out over several months or years. Thus, it may be difficult for the

⁶⁴ J Quilter, *Preliminary Submission PCO92*, 6.

⁶⁵ *Ibid.*

⁶⁶ *Crimes Act 1958 (Vic)*, s 36(2)(e).

prosecution to establish that the complainant consented because of any specific incident of “intimidatory or coercive conduct.”

107. In their 2010 report on family violence, the Australian Law Reform Commission and the NSW Law Reform Commission recognised this problem and recommended that legislation provide that a person does not consent if they “[submit] because of fear of harm of any type against the complainant or another person.”⁶⁷
108. A similar formulation has been adopted in Victoria which provides that a person does not consent where “the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal.”⁶⁸
109. The advantage of this formulation is that it does not require the prosecution to prove causation between the complainant’s purported consent and any specific act of “intimidatory or coercive” carried out by the perpetrator. Instead, the prosecution need only prove that the complainant’s consent was caused by fear, which may have been the cumulative result of a pattern of ongoing coercive and controlling behaviour over several months or years. In other words, this formulation recognises that in the context of domestic or family violence, a threat of harm need not be immediately present in order to affect a person’s capacity to consent.
110. R&DVSA recommend that NSW adopt this provision, but also include an additional type of harm which is “damage to property”. Damage to property is a common tactic of domestic and family violence which is used by perpetrators as a tool of power and control.⁶⁹ Thus, it is important that the legislation captures circumstances where a person submits to the sexual activity because of fear of this type of harm.
111. To ensure this provision applies appropriately to circumstances of domestic and family violence, R&DVSA recommend inserting an additional provision to clarify that fear of harm need not be immediately present before or during the sexual activity.
112. Further, we recommend inserting additional jury directions that clarify the application of this provision to circumstances of family and domestic violence. For example, jury directions might provide:
 - a. A person may submit because of fear of harm in circumstances of domestic and family violence. This includes where there has been an ongoing pattern of coercive and controlling behaviour, whether or not there was an immediate threat of harm immediately before or during the sexual activity.
 - b. A definition of domestic and family violence. Given that NSW legislation does not include any positive definition of domestic violence, we recommend adopting the Victorian definition of ‘family violence’ located in s 5 of the *Family Violence Protection Act 2008* (Vic).⁷⁰
 - c. A definition of emotional and psychological abuse, and a non-exhaustive list of examples. We recommend adopting the definition and list of examples included in

⁶⁷ Ibid, Recommendation 25-5(c).

⁶⁸ *Crimes Act 1958* (Vic), s 36(2)(b).

⁶⁹ Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010), 224.

⁷⁰ See Appendix B.

s 7 of the *Family Violence Protection Act 2008* (Vic).⁷¹ The Victorian list of examples is effective at highlighting the diverse forms of family violence that may be experienced by particular communities, including Aboriginal and Torres Strait Islander people, LGBTIQ+ people, and people with disability. The list includes:

- i. repeated derogatory taunts, including racial taunts;
 - ii. threatening to disclose a person's sexual orientation to the person's friends or family against the person's wishes;
 - iii. threatening to withhold a person's medication;
 - iv. preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity;
 - v. threatening to commit suicide or self-harm with the intention of tormenting or intimidating a family member, or threatening the death or injury of another person.
- d. A definition of economic abuse, and a non-exhaustive list of examples. We recommend adopting the definition and list of examples included in s 6 of the *Family Violence Protection Act 2008* (Vic).⁷² The Victorian list of examples is effective at illustrating the diverse range of behaviours that may amount to financial abuse.

113. We have included a copy of the relevant Victorian provisions in Appendix B.

114. The purpose of these jury directions is to highlight that in some circumstances, a person will be incapable of consenting where they are fearful as a result of a pattern of non-physical forms of domestic or family violence. For example, a person may be incapable of consenting where the perpetrator has previously threatened to disclose their sexual orientation against their wishes, has previously withheld their medication, or has previously denied them financial support.

115. R&DVSA also endorse the recommendation by Women's Legal Services NSW for a roundtable to discuss how the law might better capture sexual violence that occurs within the context of domestic or family violence.

Recommendation 7: Redraft s 61HE(8)(b) to provide that a person does not consent where “the person submits because of fear of harm of any type to that person, another person, an animal, or damage to property.”

Recommendation 8: Insert an additional provision to clarify that fear of harm need not be immediately present before or during the sexual activity.

Recommendation 9: Include additional jury directions to clarify that fear of harm may arise in circumstances of family and domestic violence.

⁷¹ See Appendix B.

⁷² See Appendix B.

Abuse of a position of trust

116. Currently, s 61HE(8)(c) provides that non-consent may be established “if the person consents to the sexual activity because of the abuse of a position of authority or trust.”
117. R&DVSA suggest that NSW law instead provide that a person does not consent where “the person was in the care, or under the supervision or authority, of the other person and as a result, was incapable of consenting to the act.”
118. This language is adopted from s 61H which defines the circumstances in which a person is “under the authority of another person” as where “the person is in the care, or under the supervision or authority, of the other person.”⁷³
119. We prefer this language to the current language included in s 61HE(8)(c) because it emphasises that within certain relationships, a person is incapable of consenting regardless of whether the person in a position of trust intended to ‘abuse’ their power or not. For example, where a treating psychiatrist engages in sexual activity with a vulnerable client, the client may be incapable of consent by the very nature of that relationship. It is irrelevant whether or not the psychiatrist otherwise ‘abused’ their position of trust, for example by exploiting the client’s sensitive information in order to manipulate them into a relationship. Rather, where the prosecution establishes a relationship of care, this may in and of itself be sufficient to establish non-consent.

Recommendation 10: Redraft s 61HE(8)(c) to provide that a person does not consent where “the person was in the care, or under the supervision or authority, of the other person and as a result, was incapable of consenting to the sexual activity.”

Acts of force

120. R&DVSA support the proposed amendment of s 61HE(5)(c) to provide explicitly that a person does not consent where they submit because of acts of force.⁷⁴ This aligns with the current position in every other Australian State and Territory.

Recommendation 11: Amend s 61HE(5)(c) to provide explicitly that a person does not consent where they submit to the sexual activity because of acts of force.

Fraudulent misrepresentation about personal characteristics

121. The Consultation Paper notes that NSW law provides a more limited set of grounds for mistaken belief than other states and territories.⁷⁵
122. Under NSW law, consent is negated where a person provides consent under a mistaken belief about “the identity of the other person.”⁷⁶ However, generally, consent will not be negated by fraudulent misrepresentations about personal characteristics, for example in relation to the person’s occupation, wealth, religion or romantic intentions.
123. R&DVSA support the current position in NSW law.

⁷³ *Crimes Act 1900* (NSW) s 61H(2).

⁷⁴ NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 59.

⁷⁵ *Ibid.*

⁷⁶ *Crimes Act 1900* (NSW) s 61HE(6)(a).

124. It is entirely appropriate to criminalise the act of impersonating another individual in order to engage in sexual activity. This behaviour is clearly identifiable and represents an obvious contravention of community standards.
125. However, R&DVSA believe that it would be both impracticable and undesirable to criminalise the act of fraudulently misrepresenting your own personal characteristics. This is because there is no principled basis on which the law could distinguish between personal characteristics which are material to consent, and personal characteristics which are not.
126. The factors which might influence a person's decision to consent to sexual activity are complex, multifarious and nuanced – and therefore inappropriate for judicial adjudication.
127. For example, while a person's occupation might be a material consideration when deciding whether to engage in sexual intercourse for one individual, it might be entirely irrelevant to another. Thus, it would be inappropriate if the law were to provide that consent were always negated where a person fraudulently misrepresents their occupation. However, conversely, it would also be unjust if the law were to provide that consent were only negated in circumstances where that particular complainant deemed occupation to be a material factor.
128. R&DVSA accept that from a moral or philosophical standpoint, consent requires an appreciation of all facts material to a decision. Thus, as Aubourg argues, a moral standard of consent may be breached where an offender intentionally deceives a complainant about any fact, however trivial, so long as that fact was material to the complainant's decision to consent.⁷⁷
129. However, the purpose of the law is not to distinguish between moral and immoral sexual activity.⁷⁸ We note that there is much sexual activity which might be considered immoral, which is not, and should not, be considered criminal behaviour. An obvious example is adultery. Instead, the purpose of the law must be to distinguish behaviour that falls so far below community standards that it is deserving of criminal sanction. Although lying about your personal characteristics is certainly unethical, R&DVSA does not believe it meets the threshold for criminal sanction.
130. This perspective is supported by studies which demonstrate the commonality of lying between sexual partners. One study found that forty-six percent of men and thirty-six percent of women report that they have told at least one lie to initiate a date.⁷⁹ Another study on online dating found that approximately nine out of ten individuals lie about their personal features when creating online profiles.⁸⁰ Given the commonality of these behaviours, it can be assumed that some level of lying may be considered socially

⁷⁷ Jarrah Aubourg, 'When "Yes" Doesn't Mean "Yes": The Problem of Sexual Consent Obtained by Fraud', 2013, Honours thesis submitted in partial fulfillment of the requirements for the award of the degree Bachelor of Arts (Honours) from University of Wollongong.

⁷⁸ Ibid 5.

⁷⁹ W. Rowatt, M. Cunningham, and P. Druen, 'Lying to Get a Date: The Effect of Facial Physical Attractiveness on the Willingness to Deceive Prospective Dating Partners' (1999) 16(2) *Journal of Social and Personal Relationships* 209.

⁸⁰ J. Hancock, C. Toma and N. Ellison, 'The Truth about Lying in Online Dating Profiles' (2007) *CHI 2007 Proceedings* 449.

acceptable. We do not consider that it would be possible for the legal system to distinguish in any principled way between acceptable and unacceptable lies.

131. Thus, R&DVSA recommend that fraudulent misrepresentation about identity should be limited to circumstances where an offender impersonates another person.
132. In line with the above discussion, R&DVSA suggest that NSW law should remove the ground in s 61HE(6)(b) which provides that a person does not consent “under a mistaken belief that the other person is married to the person.”
133. Although the fact of marriage may certainly be a material consideration for many individuals, R&DVSA does not see any principled reason why this characteristic should be privileged over other characteristics that may be material to other individuals – such as that a person is a particular religion or has been monogamous with the complainant.

Recommendation 12: Maintain the current position whereby the grounds for fraudulent misrepresentation about identity are limited to circumstances where an offender impersonates another person.

Recommendation 13: Remove s 61HE(6)(b) which provides that consent is negated where a person consents under a mistaken belief of marriage.

Fraudulent misrepresentation about HIV/AIDS positive status

134. R&DVSA support the current position in NSW law whereby a person’s failure to disclose their HIV/AIDS positive status is dealt with separately from the law of sexual offences – as either assault causing grievous bodily harm⁸¹ or failure to take reasonable precautions against spreading the disease or condition.⁸²
135. As discussed in the Consultation Paper, this approach is critical to ensure that people are not discouraged from undertaking appropriate health checks in relation to HIV/AIDS and other sexually transmittable conditions.⁸³

Recommendation 14: Maintain the current position whereby a person’s failure to disclose their HIV/AIDS positive status is dealt with separately from the law of sexual offences.

Fraudulent misrepresentation about sex or gender

136. R&DVSA has grave concerns about recent caselaw from the UK which found that consent can be negated by the fraudulent misrepresentation of a person’s gender identity.⁸⁴
137. R&DVSA understand both sex and gender as socially constructed concepts. As such, we believe that it is each person’s right to determine how they wish to represent their sex and gender identity when moving through the world, including to people with whom they engage in sexual activities.

⁸¹ *Crimes Act 1900* (NSW) s 4 definition of “grievous bodily harm”, inserted by *Crimes Amendment Act 2007* (NSW) sch 1 [1].

⁸² See *Public Health Act 2010* (NSW) s 79.

⁸³ NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 61.

⁸⁴ See, eg, *R v McNally* [2013] EWCA Crim 1051; *R v Barker* [2012] EWCA Crim 1593; *R v Newland* (Unreported, Chester Crown Court, Dutton J, 12 November 2015).

138. We believe that it would be both impracticable and undesirable for a court to determine the truth of someone's sex or gender representation. Moreover, a law to this effect would likely have prejudicial impacts on transgender, gender diverse and intersex people.

139. Thus, R&DVSA reiterate our earlier position that fraudulent misrepresentation about identity should be limited to circumstances where an offender impersonates another person.

Recommendation 15: Maintain the current position whereby a person's representation of their gender or sex identity does not amount to grounds for fraudulent misrepresentation.

Non-consensual removal of a condom

140. In the consultation paper, the Commission considers whether the non-consensual removal of a condom (an act colloquially known as "stealthing") should be listed as an additional negating factor.

141. R&DVSA believe that the practice of "stealthing" is sufficiently captured by the provision in NSW law which provides that a person does not consent where they are under a mistaken belief about "the nature of the activity."⁸⁵ This emphasises that the core wrong involved in "stealthing" is the fraudulent misrepresentation, rather than the removal of the condom itself.

142. R&DVSA recommend a cautious approach to inserting any additional circumstance to target fraudulent misrepresentations about the use of contraception. This is because such a provision might unintentionally capture behaviour that, while unethical, is not deserving of criminal sanction – for example, improper use of the contraceptive pill.

Recommendation 16: Maintain the current position whereby the non-consensual removal of a condom can be dealt with as fraudulent misrepresentation about "the nature of the activity."

Fraudulent misrepresentation that the sexual activity is for the purposes of monetary exchange

143. R&DVSA believe that NSW law should provide explicitly that a person does not consent where they submit under a mistaken belief that the sexual activity is for the purposes of monetary exchange. This is intended to capture circumstances where a client fraudulently misrepresents to a sex worker their agreement to pay, but subsequently refuses payment.

144. This position is informed by the perspective of sex worker organisations, including Sex Workers Outreach Project (SWOP)⁸⁶ and Vixen Collective.⁸⁷

145. We note that it is unclear how this situation would currently be handled under NSW law. In some jurisdictions, courts have found that where a person promises to pay for sexual services and subsequently refuses payment, such acts constitute fraud rather than sexual assault.⁸⁸ According to SWOP, fraud is not a sufficiently serious offence to capture the

⁸⁵ *Crimes Act 1900* (NSW) s 61HE(6)(d).

⁸⁶ Sex Workers Outreach Project, *Preliminary Submission PCO103*, 10.

⁸⁷ Michael McGowan and Christopher Knaus, "It absolutely should be seen as rape": When sex workers are conned', *The Guardian*, 13 October 2018, <https://www.theguardian.com/australia-news/2018/oct/13/it-absolutely-should-be-seen-as-when-sex-workers-are-conned>.

⁸⁸ *Ibid.*

nature of the wrong.⁸⁹ For example, in a Queensland case, a man charged with two counts of fraud in these circumstances was ordered to pay \$350 restitution to each woman and fined \$750 for each offence.⁹⁰ This penalty does not reflect the seriousness of the offence.

146. In contrast, in the ACT case of *Livas*, the court found a defendant guilty of sexual assault after he fraudulently misrepresented to a sex worker that he had paid for sexual intercourse, by handing her an empty envelope that he promised contained \$850.⁹¹

147. In order to clarify the position in NSW law, R&DVSA recommend inserting an additional circumstance of fraudulent misrepresentation where a person submits under “a mistaken belief that the sexual activity is for the purposes of monetary exchange.”

148. We note that legal certainty is especially important for sex workers, given this community already face significant barriers in reporting sexual offences to police.⁹²

Recommendation 17: Insert an additional circumstance to provide that a person does not consent where they submit to the sexual activity under “a mistaken belief that the sexual activity is for the purposes of monetary exchange.”

Inequality

149. In her preliminary submission, Cossins suggests inserting a circumstance to provide that a person may not consent where the person “was in a position of inequality with respect to another person, as a result of economic, social, cultural and/or religious reasons, or as a result of being groomed for sex.”⁹³

150. R&DVSA agree that from a moral or philosophical standpoint, true consent requires complete equality in power relations between each party. However, we do not consider it realistic to translate this position into law. This is because, arguably, the majority of sexual relations involve some difference in power between the parties.

151. We believe that inequality is appropriately dealt with through the provisions recommended above, namely that a person does not consent where:

- a. the person submits because of fear of harm of any type to that person, another person, an animal, or damage to property; or
- b. the person was in the care, or under the supervision or authority, of the other person and as a result, was incapable of consenting to the act.

Withdrawal of consent

152. R&DVSA support the inclusion of an additional circumstance which provides that a person does not consent “where a person consents, but later through words or actions withdraws consent to the sexual activity taking place or continuing.”

⁸⁹ Sex Workers Outreach Project, *Preliminary Submission PCO103*, 10.

⁹⁰ Michael McGowan and Christopher Knaus, “‘It absolutely should be seen as rape’: When sex workers are conned”, *The Guardian*, 13 October 2018, <https://www.theguardian.com/australia-news/2018/oct/13/it-absolutely-should-be-seen-as-when-sex-workers-are-conned>.

⁹¹ *Akis Emmanouel Livas v The Queen* [2015] ACTCA 54.

⁹² Antonia Quadara, ‘Sex Workers and Sexual Assault in Australia’ (2008) 8 *Australian Centre for the Study of Sexual Assault*, <https://aifs.gov.au/publications/sex-workers-and-sexual-assault-australia>.

⁹³ A Cossins, *Preliminary Submission PCO33*, 45.

153. The purpose of including “through words or actions” is to clarify that in some circumstances, a complainant may withdraw consent through body language alone and this may be effective even where they had previously given verbal consent.

Recommendation 18: Insert an additional circumstance to provide that a person does not consent where “the person consents, but later through words or actions withdraws consent to the sexual activity taking place or continuing.”

Where a person does not say or do anything to indicate consent

154. As outlined in Section 5, R&DVSA recommend a two-pronged approach to implementing an affirmative model of consent that includes:

- a. Amending the positive definition of consent as follows: “A person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and communicates this agreement through words or actions”; and
- b. Inserting an additional circumstance which clarifies that the complainant does not consent where “a person does not say or do anything to communicate consent.”

155. The insertion of an additional circumstance aligns with the approach adopted in Tasmania and Victoria. It aims to reinforce the affirmative model of consent as requiring a positive communication of agreement rather than the mere absence of communicated disagreement.

156. In our two-pronged approach, the circumstance serves to assist the fact finder to interpret the positive definition of consent as an act of communication, rather than a state of mind.

Recommendation 19: Insert an additional circumstance to provide that a person does not consent where “the person does not say or do anything to communicate consent to the act.”

7. Knowledge about consent

157. In this section, R&DVSA make recommendations in relation to the mental element. We argue that legislation should provide one simplified mental element formulated as a reasonable belief test. This test would incorporate actual knowledge, recklessness, and an objective standard into one provision and thereby simplify the fact finder's task.

158. R&DVSA does not respond to the questions from Consultation Paper 21 in chronological order. Rather, we have separated the questions into four themes. These are:

- a. Determining the appropriate standard of liability;
- b. Determining the burden of proof;
- c. Formulating the legislative test; and
- d. Guiding the fact finder to apply the legislative test.

Determining the appropriate standard of liability

Question 5.1: Actual knowledge and recklessness

- (1) Should "actual knowledge" remain part of the mental element for sexual assault offences? If so, why? If not, why not?
- (2) Should "recklessness" remain part of the mental element for sexual assault offences? If so, why? If not, why not?
- (3) Should "reckless" be defined in the legislation? If so, how should it be defined?
- (4) Should the term "reckless" be replaced by "indifferent"? If so, why? If not, why not?

Question 5.6: "Negligent" sexual assault

- (1) Should NSW adopt a "negligent" sexual assault offence? If so, why? If not, why not?

Question 5.7: "No reasonable grounds" and other forms of knowledge

- (2) Should a test of "no reasonable grounds" (or similar) remain part of the mental element for sexual assault offences?
- (3) If not, are other forms of knowledge sufficient?

159. R&DVSA generally support the current scope of the mental element included in s 61HE.⁹⁴

This test includes four levels of knowledge:

- a. Actual knowledge;
- b. Advertent recklessness;
- c. Inadvertent recklessness; and
- d. An objective standard.

160. R&DVSA support the continued inclusion of each of these four levels of knowledge.

161. The inclusion of actual knowledge and advertent recklessness is largely uncontroversial. However, the inclusion of inadvertent recklessness and an objective standard has attracted criticism from some parties, most notably the NSW Bar Association.

⁹⁴ In the sections below, we make recommendations that the legislation should be reformulated to provide one simplified mental element based on a reasonable belief test. However, the purpose of these amendments is to increase clarity rather than make any substantive change to the standard of liability.

162. In the sections below, we outline the reasons why we consider that inadvertent recklessness and an objective standard should be retained in the mental element for sexual offences. We then outline our strong opposition to the Bar Association's proposal for a lesser offence of negligent sexual assault.

Inadvertent recklessness

163. Inadvertent recklessness refers to the situation where "the accused simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the sexual intercourse, even though the risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned their mind to it."⁹⁵

164. The NSW Bar Association has argued that inadvertent recklessness should not attract the same liability as actual knowledge. It writes:

Merely taking a risk that consent is absent, particularly if the risk is perceived to be small and there are reasons available to explain why the risk was not eliminated, does not necessarily import a comparable level of culpability to knowledge of absence of consent.⁹⁶

165. R&DVSA strongly disagree with this position.

166. R&DVSA believe that a person who engages in a sexual activity without consent and fails to turn their mind, even for a moment, to whether or not the complainant was consenting should be guilty of the same offence as someone who has actual knowledge of non-consent.

167. The position held by the Bar Association is based on the subjectivist principle of criminal law which holds that punishment should be reserved for individuals with a 'guilty mind'. As Professor Ashworth explains:

The essence of the principle of mens rea is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences. This approach is grounded in the principle of autonomy: individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices.⁹⁷

168. However, as Ashworth explains, there is an important qualification to this principle:

There are certain situations in which the risk of doing a serious wrong is so obvious that it is right for the law to impose a duty to take care to ascertain the facts before proceeding.⁹⁸

⁹⁵ Judicial Commission, *NSW Criminal Trial Courts Bench Book*, https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual_intercourse_without_consent.html

⁹⁶ NSW Bar Association, *Preliminary Submission PCO47*, 3.

⁹⁷ A. Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 155.

⁹⁸ A. Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th edition, 2009) quoted in W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, 'Reforming the Legal Definition of Rape in Victoria - What Do Stakeholders Think?' (2015) 15(2) *Queensland University of Technology Law Review* 30, 35.

169. An obvious example where the law departs from the subjectivist principle is in relation to the offences of dangerous driving. These offences are strict liability, which means that a person can be found guilty even where they did not have a guilty mind. The policy rationale for imposing liability in relation to this type of offence is clear. The risk of causing serious harm while driving dangerously is so obvious that any offender who fails to consider this risk should be liable on the basis that they have “abandoned responsibility for his or her own conduct.”⁹⁹
170. The same logic can be applied to sexual offences. Where a person engages in sexual activity without even considering whether or not the other person is consenting, their total and absolute abandonment of responsibility falls so far short of community standards that it is deserving of criminal liability. In other words, the risk of serious harm when having sexual intercourse without considering consent is “so obvious that it is right for the law to impose a duty to take care to ascertain the facts before proceeding.”¹⁰⁰
171. In *R v Kitchener*,¹⁰¹ Justice Kirby outlined numerous “sound reasons of policy” why inadvertent recklessness to the possibility of non-consent must be criminalised. He said:

To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrong-doing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today. Every individual has a right to the human dignity of his or her own person. Having sexual intercourse with another, without the consent of that other, amounts to an affront to that other's human dignity and an invasion of the privacy of that person's body and personality. It would be unacceptable to construe a provision such as s 61D(2) so as to put outside the ambit of what is reckless a complete failure to advert to whether or not the subject of the proposed sexual intercourse consented to it or declined consent. Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women. Our law is not unprincipled or inadequate in this regard.

... [Recklessness] can be shown not only where the accused adverts to the possibility of consent but ignores it, but also where the accused is so bent on gratification and indifferent to the rights of the victim as to ignore completely the requirement of consent.

No reasonable grounds

172. Under current NSW law, a person can be guilty of sexual assault where they held an honest belief in consent but there were no reasonable grounds for that belief. This is a partially objective test, which requires the fact finder to consider the subjective belief of

⁹⁹ Judicial Commission, *NSW Criminal Trial Courts Bench Book*,

https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/dangerous_driving.html

¹⁰⁰ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th edition, 2009) quoted in W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, ‘Reforming the Legal Definition of Rape in Victoria - What Do Stakeholders Think?’ (2015) 15(2) *Queensland University of Technology Law Review* 30, 35.

¹⁰¹ (1993) 29 NSWLR 696 per Kirby J at 668.

the accused, and then weigh this subjective belief against some objective standard of reasonable grounds.

173. The NSW Bar Association has critiqued the inclusion of any objective test in the mental element for sexual assault. It writes:

[a] person should not be liable to conviction for sexual assault in circumstances where he or she honestly believes that there is consent.¹⁰²

174. R&DVSA strongly disagree with this position.

175. We believe that a person who engages in a sexual act without consent and holds an honest but unreasonable belief in consent should be guilty of the same offence as someone who has actual knowledge of non-consent.

176. An objective test serves as recognition that “a person who initiates sexual penetration without reasonable grounds for believing in the other person’s consent is not ‘morally innocent’ and should not escape liability for rape given the ease with which consent can be ascertained and the harm to the victim from proceeding without consent.”¹⁰³

177. Further, an objective test reflects important principles of public policy, signalling that every person engaging in sexual activity must take reasonable care to:

- a. Ascertain whether the other person consents before embarking on what could be potentially dangerous behaviour;¹⁰⁴ and
- b. Educate themselves about community standards, in order to avoid being held criminally responsible as a result of distorted, outdated or prejudicial views.

178. In essence, the objective test is vital to prevent defendants from relying on abhorrent views that fall below the accepted standards of the community.

179. R&DVSA caution that to remove an objective standard from NSW law would be entirely out of step with international trends of law reform. Over the last four decades, an objective mental element has been adopted across numerous common law jurisdictions including New Zealand (1985), England and Wales (2003), Scotland (2009) and Victoria (2014).¹⁰⁵ There is also an objective approach in the Australian code states of Queensland, Tasmania and Western Australia, which require that any mistaken belief in consent be both honest and reasonable.¹⁰⁶

180. Although once controversial, the issue of whether NSW should adopt an objective standard of consent was settled decisively in 2007. At this time, the NSW Attorney General described the previous subjective test as “outdated” and “archaic”.¹⁰⁷

¹⁰² NSW Bar Association, *Preliminary Submission PCO47*, 5.

¹⁰³ W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, ‘Reforming the Legal Definition of Rape in Victoria - What Do Stakeholders Think?’ (2015) 15(2) *Queensland University of Technology Law Review* 30, 35.

¹⁰⁴ NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (Hon John Hatzistergos, Attorney General).

¹⁰⁵ W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, ‘I Think it’s Rape and I Think He Would be Found Not Guilty’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law’, 25(5) *Social and Legal Studies* 611, 613.

¹⁰⁶ *Ibid.*

¹⁰⁷ NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW)).

181. R&DVSA submit that to revert to a subjective test 12 years later would represent a bizarre and disturbing step in the wrong direction.

Recommendation 20: Maintain a mental element for sexual offences which encompasses actual knowledge, advertent recklessness, inadvertent recklessness and an objective standard.

Responding to the proposal for a lesser offence of negligent sexual assault

182. The NSW Bar Association has proposed the creation of a new offence with a lower maximum penalty to cover situations of “negligent” sexual assault. This would include situations involving a mistaken but unreasonable belief in consent, and potentially situations involving a failure to take reasonable steps to ascertain consent.¹⁰⁸

183. R&DVSA has grave concerns about this proposal for the following reasons:

- a. A person’s culpability cannot be distinguished on the basis of their level of knowledge. For the reasons outlined above, R&DVSA believe that a person who acts with inadvertent recklessness or “no reasonable grounds” may be equally culpable to someone who has actual knowledge of non-consent. As the NSW Government stated in 2007, “all sexual assault is serious and should have the same penalties.”¹⁰⁹
- b. The creation of a lesser offence would send the wrong message. The NSW Government has indicated that the purpose of this inquiry is to determine how to better “protect vulnerable people from sexual assault and put offenders on notice.”¹¹⁰ To create a lesser offence punishable by only five years imprisonment would be contrary to this intention, and to the expectations of the community.
- c. The creation of a lesser offence might create additional barriers to the prosecution of non-negligent sexual assault. Were a lesser offence available, police and prosecutors might be incentivised to pursue charges for the lesser offence even where the elements of the more serious offence could be satisfied, on the basis that the lesser offence would be easier to prove. Prosecutors may also be incentivised to enter into plea bargains, whereby the accused negotiates a lower charge in return for a guilty plea. Given that sexual assault is already under-prosecuted, R&DVSA does not support any reform that would create additional barriers to prosecution.
- d. The lesser offence might enliven the jurisdiction of the local court. This raises questions about whether local court magistrates are sufficiently equipped to handle serious and complex sexual assault matters.

Recommendation 21: Reject the proposal by the NSW Bar Association to create a lesser offence of negligent sexual assault.

¹⁰⁸ NSW Bar Association, *Preliminary Submission PCO47*, 5.

¹⁰⁹ NSW, *Parliamentary Debates*, Legislative Council, 13 November 2007, 3885.

¹¹⁰ NSW Justice Department, ‘Sexual Consent Laws to be Reviewed’, *Media Release*, 8 May 2018.

Determining the burden of proof

Question 5.5: Evidence of the accused's belief

- (1) Should the law require the accused to provide evidence of the “reasonableness” of their belief? If so, why? If not, why not?
- (2) If so, what form should this requirement take?

184. R&DVSA do not advocate for any shift to the legal burden of proof in sexual offence matters. Rather, our proposal merely aims to shift the focus of inquiry in the prosecution case from whether the complainant resisted adequately, to whether the accused took adequate steps to ascertain consent.
185. We acknowledge that some preliminary submissions have argued that an evidential burden should be placed on the accused in relation to the mental element of the offence.¹¹¹ The apparent objective of these proposals is to reduce barriers to conviction for sexual offences. R&DVSA support this objective.
186. In our preliminary submission, we noted that sexual offences have unique characteristics which make prosecution an especially onerous task. For example, sexual violence commonly occurs in private, without any witness, and without force or physical injury. The consequent dearth of evidence makes it difficult to prove sexual offences to the criminal standard of beyond reasonable doubt.¹¹²
187. We also recognise that the mental element of sexual offences may be especially difficult to prove. Under the current law, it is not enough to show that there is “considerable evidence that the mistake was an unreasonable one.”¹¹³ Rather, the prosecution must eliminate, beyond reasonable doubt, any reasonable ground that might exist for the accused’s mistaken belief in consent.¹¹⁴ This is a high bar and notoriously difficult to establish in a typical ‘word against word’ case. The prosecution may have particular trouble where the defendant elects not to give evidence, such that any asserted grounds for reasonable belief cannot be tested.
188. However, R&DVSA also recognise that there are important reasons why the burden of proof has traditionally been placed on the prosecution. As explained by the NSW Legislation Review Committee:

requiring the prosecutor to prove all elements of an offence, including the intention of the person to do the act, is an essential safeguard for the rights of an accused person, particularly the fundamental right to be presumed innocent.¹¹⁵

¹¹¹ A Cossins, *Preliminary Submission PCO33*, 43–44; E Methven and I Dobinson, *Preliminary Submission PCO77*, 18, 21.

¹¹² New Zealand Law Commission, ‘The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes’, NZLC R136 (December 2015) 23.

¹¹³ L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3.

¹¹⁴ NSW Law Reform Commission, ‘Consultation Paper 21’ (2018) *Review of Consent in relation to Sexual Offences*, 71-72.

¹¹⁵ *Strict and Absolute Liability: Discussion Paper*, Legislation Review Committee, Parliament NSW Legislative Assembly (Sydney, 2006) 1.

189. Moreover, we acknowledge that any shift to the legal burden in relation to sexual offences may have unintended impacts, for example:
- a. Shifting the legal burden in relation to sexual offences may create a problematic precedent which could justify shifting the burden in relation to other types of criminal offences;
 - b. Requiring the accused to meet an evidentiary threshold may create an appearance of injustice to the accused, which could compromise the credibility of sexual offence trials;
 - c. Requiring the accused to meet an evidentiary threshold may have a disproportionate impact on certain groups of defendants, including those who cannot afford private legal representation and those whose evidence may be afforded less credibility due to discriminatory assumptions on the basis of their race, class etc.
190. These competing considerations are complex and no doubt worthy of further consideration.
191. However, R&DVSA urge that the Commission approach the question of whether to shift the burden of proof as an independent inquiry to the question of whether to legislate an affirmative model of consent.
192. We make this comment in light of several preliminary submissions which conflate the affirmative model with a model of strict or absolute liability.¹¹⁶ Where this conflation occurs, there is a risk that NSW might proverbially throw the baby out with the bathwater.
193. In fact, the affirmative model of consent does not require any shift to the legal burden of proof. Rather, an affirmative model may still require the prosecution to prove all elements of the offence beyond reasonable doubt, including the mental element.
194. The effect of legislating affirmative consent is merely to shift the focus of inquiry. Traditionally, the prosecution case has focused on proving that the complainant fulfilled her social responsibility to actively resist the defendant’s advances. However, under an affirmative model, the prosecution case may instead focus on proving that the defendant failed to fulfil his social responsibility to find out whether the complainant was consenting.
195. Further, R&DVSA propose that barriers to prosecution for sexual offences could alternatively be addressed through structural reforms to the criminal justice system, including the establishment of specialist sexual violence courts. The aim of specialist courts would be to bring together specialist personnel to facilitate a trauma approach that centres the needs of those who experience sexual violence, while upholding the accused’s right to a fair trial. This was the focus of our preliminary submission to this inquiry.¹¹⁷

Formulating the legislative test

Question 5.2: The “no reasonable grounds” test

(1) What are the benefits of the “no reasonable grounds” test?

¹¹⁶ A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 5; A Dyer, *Preliminary Submission PCO50* [20]–[23].

¹¹⁷ Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*.

(2) What are the disadvantages of the “no reasonable grounds” test?

Question 5.3: A “reasonable belief” test

(1) Should NSW adopt a “reasonable belief” test? If so, why? If not, why not?

(2) If so, what form should this take?

Question 5.13: A single mental element

(1) Should all three forms of knowledge be retained? If so, why? If not, why not?

(2) If not, what should be the mental element for sexual assault offences?

A single mental element

196. R&DVSA consider that NSW law should adopt a single mental element based on a “no reasonable belief” test.

197. A “no reasonable belief” test would incorporate all four current levels of knowledge into one provision. This is because actual knowledge and recklessness are essentially more specific forms of having “no reasonable belief.” We note that:

- a. Where an accused has actual knowledge that the complainant does not consent, he cannot reasonably believe that the other person consents.
- b. Similarly, where an accused either fails to consider whether or not the complainant consents (inadvertent recklessness) or otherwise realises the possibility that the complainant is not consenting but goes ahead regardless (advertent recklessness) he cannot reasonably believe that the other person consents.

198. Thus, as recognised by the Victorian Department, it is “technically unnecessary” to include separate provisions for actual knowledge or recklessness in the mental element for sexual offences.¹¹⁸

199. R&DVSA consider that reducing the current three-tier mental element down into one single test is desirable as it will simplify the task of the fact finder and thereby allow them to focus on the factual issues at hand.

No reasonable grounds vs no reasonable belief

200. R&DVSA recommend that the single mental element should be expressed as a “no reasonable belief” test rather than a “no reasonable grounds” test.

201. We agree with concerns raised in several preliminary submissions that the current “no reasonable grounds” test requires the fact finder to engage in a confusing and “convoluted analysis.”¹¹⁹

202. As Mason and Monaghan describe, the current test requires the fact finder to engage in numerous complex and artificial inquiries. The fact finder must:

- a. Distinguish between the accused’s belief and the grounds for that belief;

¹¹⁸ Victoria Department of Justice and Regulation, *Victoria’s New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015), 6.

¹¹⁹ G Mason and J Monaghan, *Preliminary Submission PCO40* [22].

- b. Consider whether there was a reasonable possibility of the existence of any reasonable ground for a belief in consent, even where the weight of evidence suggests there were also reasonable grounds for a belief in non-consent;
 - c. Avoid applying a ‘reasonable person’ standard.¹²⁰
203. To minimise these complexities, R&DVSA recommend that NSW should adopt a “no reasonable belief” test. This test involves a more simple and comprehensible inquiry for the fact finder: that is whether or not the defendant’s belief was a reasonable one.
204. The key purpose of this amendment is to simplify the task of the fact finder and thereby allow them to concentrate on the core issues of fact, such as whether the accused took steps to ascertain consent. By extension, the test would also simplify the task for judicial officers instructing jurors about how to apply the test, and thereby reduce possibilities for appeal on the basis of misdirection.
205. We note that preliminary submissions have proposed various formulations of a “no reasonable belief” test. These include:
- a. The accused “did not reasonably believe” the complainant consented;¹²¹
 - b. “The person’s belief in consent was not reasonable in all the circumstances”;¹²²
 - c. “The accused had an unreasonable belief that the victim was consenting”;¹²³ and
 - d. Any belief in consent asserted by an accused must be “based on reasonable grounds” or “be reasonable.”¹²⁴
206. R&DVSA does not oppose any of the above models. However, we suggest that it may be preferable to adopt the Victorian formulation that the accused “did not reasonably believe” the complainant consented because:
- a. It may be desirable to achieve consistency across the NSW and Victorian jurisdictions;
 - b. In 2014, the Victorian Department of Justice engaged in an extensive consultation process in relation to the mental element for consent in that jurisdiction. During this process, stakeholders suggested a preference for the language of “reasonable belief” over “reasonable grounds”.¹²⁵
207. We acknowledge and agree with Dyer’s perspective that a “no reasonable belief” test is unlikely to set any higher standard for sexual responsibility, given that jurors are likely to interpret each test according to similar logic.¹²⁶ This perspective is supported by Larcombe et al, who write:

¹²⁰ Ibid.

¹²¹ This is the formulation currently operating in Victoria, England and Wales, and Northern Ireland.

¹²² L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 3; J Quilter, *Preliminary Submission PCO92*, 10.

¹²³ E Methven and I Dobinson, *Preliminary Submission PCO77*, 17.

¹²⁴ E Methven and I Dobinson, *Preliminary Submission PCO77*, 17.

¹²⁵ Victoria Department of Justice and Regulation, *Victoria’s New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015), 7.

¹²⁶ A Dyer, *Preliminary Submission PCO50* [36]–[41].

Commentators in England have been concerned that the statutory wording adopted in that jurisdiction – ‘A does not reasonably believe that B consents’ – has weakened the objective ‘reasonable grounds’ standard by allowing that some of A’s characteristics (such as age and mental capacity) may be relevant to the reasonableness of their claimed belief. *In practice, however, variations in the wording of the reasonable belief standard do not appear to make a significant difference.* For example, New Zealand legislation uses the reasonable grounds formulation (Crimes Act 1961 (NZ) s 128(2)) and the Court of Appeal has approved a jury instruction on this provision as meaning that ‘no reasonable person, in the accused’s shoes, could have thought she was consenting’ (*R v. Mustafa Can* [2007] NZCA 291 at [36]). Notwithstanding this strongly objective ‘reasonable person’ standard, conviction rates in New Zealand are comparable to those in other common law jurisdictions and juries have acquitted defendants in circumstances that have caused public outrage.¹²⁷ [emphasis added]

208. Nonetheless, we recommend that a “no reasonable belief” test should be adopted on the basis that this language represents the most clear and simple formulation for the fact finder to apply.

209. Instead of including the test in the s 61HE, we recommend that the test be inserted directly into each sexual offence provision to which s 61HE applies. This will involve replacing the language of ‘knows’ currently included in each sexual offence with the new test of ‘does not reasonably believe’.

210. For example, section 61I currently outlines the offence of sexual assault as follows:

Any person who has sexual intercourse with another person without the consent of the other person and who *knows* that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

211. Under R&DVSA’s recommendation, s 61I would be amended as follows:

Any person who has sexual intercourse with another person without the consent of the other person and who *does not reasonably believe* that the other person consents to the sexual intercourse is liable to imprisonment for 14 years.

212. An equivalent amendment would be made to the offences under sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.

213. R&DVSA consider that inserting the knowledge test separately into each offence may have the following advantages:

- a. It avoids the need for fact finders to engage with an artificial definition of ‘knows’, which departs significantly from the ordinary or natural meaning the word.
- b. It emphasises to the fact finder the centrality of reasonable belief as the key mental element of each sexual offence, rather than some ancillary consideration.

¹²⁷ W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, ‘I Think it’s Rape and I Think He Would be Found Not Guilty’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law’, 25(5) *Social and Legal Studies* 611, 614-615.

214. This approach aligns with the Victorian model, whereby each sexual offence provision includes the following mental element: “A does not reasonably believe that B consents.”¹²⁸

215. In line with the Victorian model, additional provisions designed to guide the fact finder about how to interpret the “no reasonable belief” test would still be included in the centralised s 61HE consent provision. We discuss these provisions in the section below.

Recommendation 22: Replace the current three-tier mental element with a simplified “no reasonable belief” test.

Recommendation 23: Amend each sexual offence provision to include the “no reasonable belief” test.

Guiding the fact finder to apply the legislative test

Question 5.4: Legislative guidance on “reasonable grounds”

- (1) Should there be legislative guidance on what constitutes “reasonable grounds” or “reasonable belief”? If so, why? If not, why not?
- (2) If so, what should this include?

Question 5.8: Defining “steps”

- (1) Should the legislation define “steps taken to ascertain consent”? If so, why? If not, why not?
- (2) If so, how should “steps” be defined?

Question 5.9: Steps to ascertain consent

- (1) Should the law require people to take steps to work out if their sexual partner consents? If so, why? If not, why not?
- (2) If so, what steps should the law require people to take?

Question 5.10: Considering other matters

- (1) Should the law require a fact finder to consider other matters when making findings about the accused’s knowledge? If so, why? If not, why not?
- (2) If so, what should these other matters be?

Question 5.11: Excluding the accused’s self-induced intoxication

- (1) Should a fact finder be required to exclude the accused’s self-induced intoxication from consideration when making findings about knowledge? If so, why? If not, why not?
- (2) Should the legislation provide detail on when the accused’s intoxication can be regarded as self-induced? If so, what details should be included?

Question 5.12: Excluding other matters

- (1) Should the legislation direct a fact finder to exclude other matters from consideration when making findings about the accused’s knowledge? If so, what matters should be excluded?
- (2) Is there another way to exclude certain considerations when making findings about the accused’s knowledge? If so, what form could this take?

¹²⁸ See, for example, *Crimes Act 1958* (Vic), s 40(d).

The requirement for the fact finder to consider any steps to ascertain consent

216. Currently, section 61HA(3)(d) states that when determining the issue of knowledge, the fact finder must have regard to “any steps taken by the person to ascertain whether the other person consents to the sexual intercourse.”
217. R&DVSA support the intention of this provision, which is to highlight to the fact finder that the actions or omissions of the accused – and not just the behaviour of the complainant – may be relevant to whether or not a mistaken belief in consent is reasonable.¹²⁹
218. However, as raised in our preliminary submission, R&DVSA has significant concerns about the way this provision has been interpreted. In particular, we are concerned that Justice Bellew’s interpretation of the word ‘steps’ in *Lazarus* implies that a step need be nothing more than a subjective state of mind.¹³⁰
219. R&DVSA consider that this interpretation directly contradicts with parliament’s intention to encourage “dialogue ... between individuals prior to sexual intercourse to reach a necessary mutuality of understanding in relation to consent.”¹³¹ As the Department has stated: ‘a step ... necessarily involves communication with the other person.’¹³² Steps that involve only an internal thought process, rather than any communication with the complainant, do not achieve the desired effect.
220. As such, we recommend the following amendments:
- a. The legislation should clarify that steps must involve words or actions, as per Dyer’s suggestion,¹³³
 - b. The legislation should replace ‘any steps’ with ‘reasonable steps’ in order to signal to the fact finder that in the vast majority of cases, it will be reasonable for the defendant to take at least some step to find out whether the other person consents
 - c. The word “ascertain” should be replaced with the more plain English phrase “find out” as per the Victorian legislation.¹³⁴

Recommendation 24: Amend s 61HE(4)(a) to provide that when making findings about the mental element, the fact finder must consider whether the defendant took “reasonable steps, through words or actions, to find out whether the other person consents to the sexual activity.”

Considering other matters

221. R&DVSA support the proposal by McNamara et al that the fact finder should be required to consider “the effect that any behaviour of the accused before the alleged offence may have had on the behaviour of the victim at the relevant time.”¹³⁵

¹²⁹ A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See also G Mason and J Monaghan, *Preliminary Submission PCO40* [17].

¹³⁰ *R v Lazarus* [2017] NSWCCA 279 at [147] (Bellev J).

¹³¹ NSW Department of Attorney General and Justice, *Review of the Consent Provisions* (October 2013), 4.

¹³² *Ibid* 22.

¹³³ A Dyer, *Preliminary Submission PCO50* [5], [26].

¹³⁴ *Crimes Act 1958* (Vic) s 36A(2).

¹³⁵ L McNamara, J Stubbs, B Fileborn, H Gibbon, M Schwartz and A Steel, *Preliminary Submission PCO85*, 4.

222. This may be an effective way of directing the fact finder to consider how the behaviour of the accused in the lead up to the offence may have limited the complainant's capacity to express resistance to their sexual advances.

223. For example, where the accused is a manager at the complainant's workplace, his previous behaviour towards the complainant as her manager may have influenced her ability to resist his sexual advances. However, given his own knowledge of this past behaviour, it would not be reasonable for him to assume consent on the basis of her non-resistance.

224. This provision may also assist fact finders to recognise sexual violence within the context of domestic and family violence. In circumstances where the defendant has engaged in an ongoing pattern of coercive and controlling behaviour, the complainant may be less likely to exhibit active resistance. However, given his past behaviour, it would not be reasonable for a perpetrator of family violence to assume consent on the basis of her non-resistance.

Recommendation 25: Insert an additional provision to provide that when making findings about the mental element, the fact finder must consider the effect that any behaviour of the accused before the alleged offence may have had on the behaviour of the complainant at the relevant time.

Excluding the accused's self-induced intoxication

225. R&DVSA consider that it is entirely appropriate that when making findings about the mental element, the fact finder should exclude consideration of any self-induced intoxication by the accused.

226. We acknowledge that this provision duplicates the general rule in s 428D(a) of the *Crimes Act* which provides that self-induced intoxication is not to be considered when making findings about mens rea for criminal offences in NSW. However, we consider that repetition is necessary to correct the prevalent rape myth that intoxicated men are not able to control their sexual desires, and hence should not be held responsible for any sexual behaviour they engage in while intoxicated.

227. We strongly reject the perspective of the Bar Association that an accused should not be liable where they held an honest belief in consent "even if one reason for that mistaken belief is self-induced intoxication."¹³⁶ This view reflects a dangerous perspective that is entirely out of line with widely accepted policy principles around self-induced intoxication.¹³⁷ It is essential to public safety and order that people who voluntarily consume alcohol or other intoxicating substances accept responsibility for their behaviour while intoxicated.

Recommendation 26: Maintain the current provision in s 61HE(4)(b) which provides that when making findings about the mental element, the fact finder must not consider any self-induced intoxication of the accused.

¹³⁶ NSW Bar Association, *Preliminary Submission PCO47*, 6.

¹³⁷ Victoria, Department of Justice and Regulation, *Criminal Law Review, Victoria's New Sexual Offence Laws: An Introduction* (2015) 17.

Excluding other matters

228. R&DVSA consider that it may be useful to insert an additional provision excluding consideration of “any personal opinions, values or attitudes held by the accused that do not meet community standards.”
229. The purpose of this provision is to give meaning and expression to the “reasonable belief” standard. It does this by clarifying to the fact finder that an accused should not be able to rely on some outdated or prejudicial view in order to justify a mistaken belief in consent.
230. This recommendation is similar to the proposal included by the NSW Attorney General’s Department in its 2007 draft bill – to exclude consideration of “the personal opinions, values and general social and educational development of the person.”¹³⁸ However, we have amended the proposal to:
- a. Remove the phrase “social and educational development.” The objective of this provision should be to exclude unacceptable views that justify or excuse sexual violence. Given that such views exist across every class and sector of society, R&DVSA does not see any reason to exclude consideration of a person’s “educational development.” To do so may imply a problematic assumption that people with lower social and educational development are more likely to engage in sexual violence. R&DVSA is not aware of any evidence to this effect.
 - b. Clarify that jurors are to apply community standards. R&DVSA consider that it may be contradictory and confusing to require that jurors consider the accused’s subjective belief in consent, but at the same time, exclude consideration of the accused’s personal opinions. In order to consider whether an accused’s subjective belief was reasonable, a juror will no doubt need to consider the personal opinions on which that belief was based. Thus, R&DVSA suggest that it may be clearer to exclude only those personal opinions which fall short of community standards.
231. We recognise that some preliminary submissions recommend a more targeted approach that aims to exclude consideration of common rape myths. For example, Cossins recommends that the law should exclude consideration of the complainant’s style of dress, consumption of alcohol or drugs, silence or lack of physical resistance.¹³⁹ We recognise this approach may have some advantages, but are concerned that:
- a. It would be impossible to include any comprehensive list of rape myths. Therefore, including any specific list of rape myths may have the unintended impact of signalling to the fact finder that they are in fact permitted to consider those rape myths which are not explicitly excluded by the legislation.
 - b. There is a risk that repeating specific rape myths to the jury may “have the potential for reaffirming the very myths that [the provision] seek[s] to critique.”¹⁴⁰ This risk is explored further in relation to jury directions in Section 8.

¹³⁸ “A Bill for Crimes Amendment (Consent – Sexual Assault Offences Bill) 2007” sch 1 cl 4 in NSW, Attorney General’s Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) appendix 3.

¹³⁹ A Cossins, *Preliminary Submission PCO33*, 41, 44.

¹⁴⁰ K. Duncanson and E. Henderson, ‘Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials’ (2014) 22 *Feminist Legal Studies* 155, 171.

Recommendation 27: Insert an additional provision to provide that when making findings about the mental element, the fact finder must not consider any opinions, values or attitudes held by the accused that do not meet community standards.

8. Issues related to s 61HE¹⁴¹

232. In our preliminary submission, R&DVSA made numerous recommendations about issues related to the application of s 61HE, including issues related to jury decision-making.¹⁴²

233. We identified four key issues related to the use of juries in sexual offence matters:

- a. The decision-making problem: Juries lack the necessary expertise to make accurate and informed decisions about the credibility of sexual violence allegations, particularly due to the prevalence of rape myths.
- b. The harm problem: The presence of a jury may have a harmful impact on the complainant and increase the risks of re-traumatisation.
- c. The transparency problem: The lack of transparency around juror decision-making means that misapplications of the law may go unchallenged.
- d. The problem of vicarious trauma: Jurors who sit in sexual violence matters are at significant risk of vicarious trauma.

234. On the basis of these factors, we recommended that sexual offence trials should be heard as specialist judge-only trials. Crucially, we recommended that specialist judges should receive extensive and ongoing training on the complex dynamics and impacts of sexual violence.

235. In the alternative, we recommended reform to the jury system in order to overcome the influence of rape myths and victim blaming attitudes on juror decision-making.

236. R&DVSA continue to rely on our preliminary submission for a detailed analysis of the problems related to jury decision-making in sexual offence trials.

237. However, we note these issues are beyond the terms of reference of the current inquiry. Thus, our comments below respond directly to the questions in Consultation Paper 21.

Question 6.1: Upcoming amendments

- (1) What are the benefits of the new s 61HE applying to other sexual offences?
- (2) What are the problems with the new s 61HE applying to other sexual offences?
- (3) Do you support applying the legislative definition of consent and the knowledge element to the new offences? If so, why? If not, why not?

238. R&DVSA strongly support recent amendments which applied the legislative definition of consent and the mental element to a wide range of sexual offences. This achieves greater consistency in the law. It also simplifies the fact finder's task where an accused is charged with multiple sexual offences.

239. In particular, we support the extended application of an objective mental element to other sexual offences, not just the offence of sexual assault. For the same reasons that apply to sexual assault, we believe that an objective element is desirable in order to ensure the criminal law responds to sexual offenders who hold distorted, outdated, misogynist or otherwise prejudiced views.

¹⁴¹ Although the Consultation Paper referred to s 61HA, this section has since been replaced by s 61HE. In our submission, we consider the amended section s 61HE.

¹⁴² Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*.

Recommendation 28: Maintain the current position whereby s 61HE applies to a wide range of sexual offences.

Question 6.2: Language and structure

- (1) Should changes be made to the language and/or structure of s 61HA (and the new s 61HE)? If so, what changes should be made?
- (2) Should the definition of “sexual intercourse” be amended? If so, how should sexual intercourse be defined?

Amend the language and structure to increase clarity

240. R&DVSA believe the language and structure of s 61HA should be simplified as far as possible. We suggest the following amendments:

- a. In line with the Victorian approach, the legislation should refer to the offender and the complainant by allocating them each an initial. For example, “A does not reasonably believe that B consents to the touching.”¹⁴³ This approach is far easier to follow than the current approach in NSW legislation, which refers to the offender and the complainant intermittently as “a person” and “the other person”. For example, s 61HE(3) refers to the offender as “a person” and the complainant as “the other person,” while s 61HE(6) uses the opposite formulation, referring to the offender as “the other person” and the complainant as “a person”.
- b. The subsections should be structured in a logical order, by first setting out the actus reus elements and then setting out the mens rea elements. This could be achieved by placing the list of circumstances where consent does not arise before the section dealing with knowledge about consent.
- c. The legislation should be drafted using plain English. For example, “ascertain” should be replaced with “find out” as per the Victorian legislation.
- d. The legislation should avoid self-contradictory language. For example, s 61HE(6) currently provides that “A person who consents to a sexual activity ... does not consent to the sexual activity.” Similarly, s 61HE(8) provides that “A person does not consent to a sexual activity ... if the person consents to the sexual activity because of...” Instead, as proposed in Recommendation 4, the legislation should frame the list as “circumstances in which a person does not consent.”
- e. The legislation should avoid unnecessary repetition. As highlighted by Mason and Monaghan, s 61HE(3) currently provides, “A person ... knows that the alleged victim does not consent to the sexual activity if: (a) the person knows that the alleged victim does not consent to the sexual activity...” This repetition could be resolved if the mental element were replaced by the single “no reasonable belief” test proposed in Recommendation 22.

Amend the language to increase inclusivity of transgender, gender diverse and intersex people

241. R&DVSA support proposals to amend the definition of ‘sexual intercourse’ to ensure that the provision is inclusive of transgender, gender diverse and intersex people.

¹⁴³ Crimes Act 1958, s 41(1)(d).

242. We note that transgender, gender-diverse and intersex people experience specific challenges which heighten the likelihood and impacts of sexual violence.¹⁴⁴ Thus, it is imperative that legislation is inclusive in order to increase access to justice for these communities.

243. The Australian Queer Students Network suggest that greater inclusivity could be achieved by amending the definition of penetrative sexual intercourse in s 61HA(a) as follows:

sexual connection occasioned by the penetration to any extent of the genitalia or anus of a person (including genitalia or anus which has been surgically constructed)...

244. In addition, R&DVSA suggest that the definition of oral sexual intercourse in s 61HA(b) be amended to increase inclusivity as follows:

sexual connection occasioned by the introduction of any part of a person's genitalia or anus into the mouth of another person (including genitalia or anus which has been surgically constructed)...

Recommendation 29: Redraft s 61HA using simple, plain English and a logical structure.

Recommendation 30: Amend the definition of 'sexual intercourse' to be inclusive of the experiences of transgender, gender diverse and intersex people.

Question 6.3: Jury directions on consent

(1) Are the current jury directions on consent in the NSW *Criminal Trial Courts Bench Book* clear and adequate? If not, how could they be improved?

245. R&DVSA consider that the current jury directions in NSW are inconsistent with the affirmative model of consent.

246. The model directions provide that judges should tell the jury that offering resistance "is not necessary" due to the provision in s 61HE(7). However, the directions also provide that the judge should direct the jury that "absence of consent does not have to be in words; it also may be communicated in other ways such as the offering of resistance although..."¹⁴⁶

247. As Flynn and Henry argue, these directions are inconsistent and "arguably reinforce the myth that real victims typically 'resist' rape."¹⁴⁷ Moreover, the latter direction "firmly places the jurors' focus back on the complainant, and what they did to actively

¹⁴⁴ K. O'Halloran, 'Family Violence in an LGBTIQ context' (2015) 2 *Royal Commission In Brief*, <https://www.dvrcv.org.au/sites/default/files/Family-violence-in-an-LGBTIQ-context-Kate-OHalloran.pdf>; Australian Human Rights Commission, *Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017), <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>.

¹⁴⁵ Australian Queer Students Network, *Preliminary Submission PC056*, 3.

¹⁴⁶ Judicial Commission, 'Suggested direction — sexual intercourse without consent (s 61I) where the offence was allegedly committed on and after 1 January 2008', *NSW Bench Book*, https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual_intercourse_without_consent.html.

¹⁴⁷ A. Flynn and N. Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167, 173.

demonstrate non-consent, as opposed to the accused’s state of mind and what steps they took to reasonably ascertain consent.”¹⁴⁸

248. R&DVSA recommend that jury directions be clarified to endorse an affirmative model of consent, whereby it is clear that consent requires a positive act of communication.

Recommendation 31: Ensure that jury directions provide a clear endorsement of the affirmative model of consent, including that consent requires a positive act of communication.

Question 6.4: Jury directions on other related matters

(1) Should jury directions about consent deal with other related matters in addition to those that they currently deal with? If so, what matters should they deal with?

249. R&DVSA believe that jury directions may be one way of minimising juror’s reliance on rape myths. However, further research is necessary to determine the impacts of particular directions.

The impact of rape myths on juror decision-making

250. In our preliminary submission, we argued that jurors are not well positioned to make accurate and informed evaluations about the credibility of sexual violence complaints as a result of several factors, including the prevalence of rape myths.¹⁴⁹

251. Rape myths are defined by Gerger et al as “descriptive or prescriptive beliefs about sexual aggression (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexually aggressive behaviour that men commit against women.”¹⁵⁰

252. Research shows that jurors commonly rely on ignorant or biased assumptions when determining guilt in sexual violence matters.¹⁵¹ For example, a 2007 study conducted by the Australian Institute of Criminology revealed that:

pre-existing juror attitudes about sexual assault not only influence their judgements about the credibility of the complainant and guilt of the accused, but also influence judgements *more than the facts of the case presented* and the manner in which the testimony is given.¹⁵² [emphasis added]

¹⁴⁸ Ibid.

¹⁴⁹ Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*.

¹⁵⁰ H. Gerger, H. Kley, G. Bohner, F. Siebler, ‘The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English’ (2007) 33(5) *Aggressive Behavior* 422, 423.

¹⁵¹ See, for example, W. Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27, 32; L. Ellison and V. Munro, ‘Of “Normal Sex” and “real rape”’: Exploring the use of socio-sexual scripts in (mock) jury deliberation’ (2009) 18 *Social Legal Studies* 291; N. Taylor, ‘Juror attitudes and biases in sexual assault cases’, *Trends and Issues in Crime and Criminal Justice No 344* (Canberra: Australian Institute of Criminology, 2007); J. Temkin and B. Krahé, *Sexual assault and the justice gap: A question of attitude* (Oxford and Portland, Oregon: Hart Publishing, 2008); N. Taylor and J. Joudo, ‘The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: An experimental study’, *Research and Public Policy Series No 68* (Canberra: Australian Institute of Criminology, 2005).

¹⁵² N. Taylor, ‘Juror attitudes and biases in sexual assault cases’, *Trends and Issues in Crime and Criminal Justice No 344* (Canberra: Australian Institute of Criminology, 2007), 2.

253. Research by Ellison and Munro also demonstrates the dominant influence of rape myths on juror deliberations. For example, Ellison and Munro found that:
- a. In assessing the credibility of an “acquaintance rape”, jurors commonly relied on a perception that acquaintance rapes arise because of “miscommunication” and that responsibility for avoiding such miscommunication lies asymmetrically with the woman.¹⁵³ This belief directly contravenes the affirmative model of consent.
 - b. The average juror had a poor understanding of “common reactions to rape” – in other words, the impacts of trauma. For example, Ellison and Munro found that jurors often drew negative inferences from a complainant’s failure to appear obviously distressed while testifying, to report the offence immediately or to fight back physically during the course of the assault – despite the fact that these are common responses among genuine victims of sexual violence.¹⁵⁴ These misconceptions were encouraged by defence lawyers who had a tendency to portray the ordinary responses of sexual offence complainants as unusual or abnormal in order to discredit complainant testimony.¹⁵⁵
254. R&DVSA believe that the impact of rape myths on juror decision-making is unlikely to be resolved by any legislative amendment. This is evidenced by Cockburn’s analysis of the 2004 Tasmanian reforms. She found that despite the Tasmanian legislation reflecting a high standard of communicative consent, jury decision-making continued to reflect a standard that was “not very demanding” and suggested ongoing reliance on rape myths.¹⁵⁶ For example, juries were apparently satisfied that consent had been communicated in cases where the complainant merely moved over in bed, accepted a lift home with the defendant, or failed to resist the defendant’s overtures with sufficient force.¹⁵⁷
255. Thus, R&DVSA support the Commission inquiring into alternative measures designed to improve juror decision-making.
256. However, we note that evidence on the effectiveness of jury directions in combating the impact of rape myths on jury decision-making is “equivocal”.¹⁵⁸

The effectiveness of jury directions in combating rape myths

257. Some research has found that jury directions may be ineffective at countering rape myths.
258. For example, Flynn and Henry (2012) found that legislated directions in Victoria “appear to be achieving very little in the way of overcoming existing societal rape myths and the seemingly insurmountable obstacles that rape victims face in the criminal justice system.”¹⁵⁹ They noted that jury directions may have the following disadvantages:

¹⁵³ L. Ellison and V. E. Munro, ‘A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Jury Study’ (2010) 13(4) *New Criminal Law Review* 781, 792.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ H. M. Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, June 2012), 207.

¹⁵⁷ *Ibid.*

¹⁵⁸ A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*.

¹⁵⁹ A. Flynn and N. Henry, ‘Disputing Consent: The Role of Jury Directions in Victoria’ (2012) 24(2) *Current Issues in Criminal Justice* 167, 169.

- a. The complexity of the directions means that jurors may be “more likely” to “forget or misinterpret some directions or warnings.”¹⁶⁰
- b. The “perplexing nature” of the directions may result in an increase in acquittal rates, as occurred in Victoria after legislated jury directions were amended in 2006.¹⁶¹

259. In another analysis of Victorian jury directions, Duncanson and Henderson argue that jury directions are ineffective at countermanding the dominant narratives of sexual violence based on rape myths. They write:

Jury direction ... hidden in the depths of a lengthy judicial monologue, at the end of a days or weeks-long trials, are inadequate to the task of enabling the jury to imagine the evidence through an alternative narrative framework.¹⁶²

260. According to Temkin (2010), jury directions may even “have the potential for reaffirming the very myths that [the directions] seek to critique.” She argues:

... when individual jurors fail to understand what is being pronounced to them, or struggle to align this information with the concepts or narratives they are using in that moment within the trial, there is a risk that jurors will assimilate or distort the judge’s instructions so that the new information conforms with juror’s “existing attitudes”. In other instances, jurors may not cognitively digest a sentence that challenges the narrative they are using. Instead, a sentence used to describe the myth being critiqued may be accepted uncritically as a confirmation of its truth.¹⁶³

261. Other research has made more positive findings in relation to the potential impact of jury directions. For example, in a 2009 mock jury study, Ellison and Munro found that both expert evidence and judicial direction had the capacity to reduce juror misconceptions about what constitutes a “credible” complainant response to sexual violence – in relation to the complainant’s courtroom demeanour as well as any delay in reporting.¹⁶⁴

262. However, jurors were “generally unreceptive” to either expert testimony or judicial instruction that victims may freeze during incidents of sexual violence, and that there are many supporting explanations for a lack of physical resistance or injury. Jurors who received education on these topics continued to express rape myths during jury deliberations at a similar rate to those jurors who did not receive additional directions.¹⁶⁵

263. Ellison and Munro noted various possible implications of their findings:

It is possible that expectations of force, injury and resistance are just so deeply engrained within the popular imagination that attempts to disavow jurors of them through education within the rape trial are likely to meet with limited success. At

¹⁶⁰ *KRM v The Queen* per McHugh J at 234.

¹⁶¹ A. Flynn and N. Henry, ‘Disputing Consent: The Role of Jury Directions in Victoria’ (2012) 24(2) *Current Issues in Criminal Justice* 167, 174

¹⁶² K. Duncanson and E. Henderson, ‘Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials’ (2014) 22 *Feminist Legal Studies* 155, 172

¹⁶³ *Ibid* 171.

¹⁶⁴ L. Ellison and V. Munro, ‘Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009) 49(3) *The British Journal of Criminology* 363.

¹⁶⁵ *Ibid* 374.

the same time, it is possible that there were inadequacies in the scope or wording of our guidance, which, if rectified, would have ensured a more marked impact.¹⁶⁶

264. For example, Ellison and Munro hypothesised that a jury direction might have “a more positive impact in regard to the injury/resistance variable” if:

- a. The direction explicitly acknowledged that the “‘freezing’ is not a psychological reaction confined to stranger rape” – in order to address the common misconception that freezing was an unrealistic response to sexual assault by a known person;¹⁶⁷ or
- b. The direction was “combined with more expansive expert medical testimony” – in order to address the common misconception that “genital trauma is an inevitable outcome of rape.”¹⁶⁸

265. Despite these mixed evaluations, R&DVSA remain optimistic that jury directions could have a positive impact on correcting rape myths if crafted correctly.

266. However, we caution that any proposed jury directions should be thoroughly tested through consultation with sexual violence organisations as well as mock jury studies in order to assess their potential for combating juror reliance on rape myths.

267. Thus, we recommend that the Commission should commission research into the impact that jury directions may have on correcting rape myths about:

- a. The meaning of consent, including that consent to previous or different sexual activity does not amount to consent to the relevant sexual activity and that a person is entitled to withdraw consent at any time while an act is taking place;
- b. The nature of sexual violence, including the commonality of sexual violence by known perpetrators, without force, and without physical injury;
- c. The impacts of trauma during an incident of sexual violence, including the commonality of the freeze response during sexual violence by unknown and known perpetrators;
- d. The impacts of trauma after an incident of sexual violence, including the commonality of delayed reports;
- e. The impacts of trauma on memory;
- f. The impacts of trauma on demeanour during a criminal trial; and
- g. The uncommon prevalence of false complaints of sexual violence.

Recommendation 32: Commission further research to discover the impact that jury directions, including legislated directions, may have in combating jurors’ reliance on rape myths.

Question 6.5: Legislated jury directions

(1) Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed?

¹⁶⁶ Ibid 376.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

- (2) What are the benefits of legislated jury directions on consent and/or other related matters?
(3) What are the disadvantages of legislated jury directions on consent and/or other related matters?

268. R&DVSA consider that legislated jury directions may improve the criminal justice system response to sexual violence by ensuring that judges give consistent directions that align with community standards. However, we believe that greater judicial education and specialisation in relation to sexual violence may achieve similar benefits with fewer disadvantages.

269. Legislated jury directions may have the following benefits:

- a. Greater consistency in judicial officers' handling of sexual violence trials, regardless of their personal views or level of knowledge in relation to sexual violence;
- b. Reduced incentive for defence lawyers to craft arguments which assume jurors' reliance on rape myths, due to their knowledge that these perspectives will be corrected by the judicial officer;
- c. Increased confidence for complainants and the general public that jury decision-making will be informed by accurate understandings of sexual violence.

270. However, Flynn and Henry (2012) note several disadvantages in relation to Victoria's model of legislated jury directions. For example, legislated jury directions may:

- a. Increase possibilities for appeal where judicial officers stray from the legislated directions, which may create "a financial and resource burden on the court[s]" and "immense emotional strain for the parties involved."¹⁶⁹
- b. Result in judicial directions becoming so lengthy, and so complex, that they have a minimal impact on jury decision making or may even reinforce juror reliance on rape-myths.¹⁷⁰

271. R&DVSA query whether increased education, training, and specialisation for judicial officers may have a more positive impact in combating rape myths. Where judicial officers have a thorough and nuanced understanding of the dynamics and impacts of sexual violence, they will be best equipped to identify those directions that will be most pertinent and impactful to guide the jury in each case. For example, the judicial officer may identify specific rape myths suggested by the defence lawyer, and craft directions to combat these myths specifically.

Recommendation 33: Ensure judicial officers receive extensive and ongoing training in relation to the complex dynamics and impacts of sexual violence, so they are equipped to provide appropriate jury directions to combat rape myths.

¹⁶⁹ A. Flynn and N. Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167, 175.

¹⁷⁰ *Ibid.*

Question 6.6: Amendments to expert evidence law

- (1) Is the law on expert evidence sufficiently clear about the use of expert evidence about the behavioural responses of people who experience sexual assault? If so, why? If not, why not?
- (2) Should the law expressly provide for the introduction of expert evidence on the behavioural responses of people who experience sexual assault? If so, why? If not, why not?

272. As discussed in the section on jury directions above, R&DVSA is optimistic that the increased use of expert evidence in sexual offence matters may be one way of minimising juror's reliance on rape myths.

273. Thus, R&DVSA endorse those recommendations for reform to the laws of evidence made by Annie Cossins in her 2013 article, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England'.¹⁷¹

274. However, we consider that further research is necessary to determine the efficacy of expert evidence in combating juror's reliance on rape myths.

Recommendation 34: Commission further research to discover the impact that any amendments to expert evidence may have in combating jurors' reliance on rape myths.

¹⁷¹ Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *The International Journal of Evidence & Proof* 74.

Appendix A

Redrafted consent provision:

61HE CONSENT IN RELATION TO SEXUAL OFFENCES

(1) Offences to which section applies

This section applies for the purposes of the offences, or attempts to commit the offences, under sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.

(2) Meaning of consent

A person (X) consents to sexual activity if X freely and voluntarily agrees to the sexual activity and communicates this agreement through words or actions.

(3) Circumstances in which a person does not consent

Circumstances in which a person (X) does not consent to a sexual activity include, but are not limited to, the following—

- a. X does not say or do anything to communicate consent to the act;
- b. X does not have the capacity to consent to the sexual activity, including because of age or cognitive incapacity;
- c. X does not have the opportunity to consent to the sexual activity because X is unconscious or asleep;
- d. X submits to the sexual activity because of force or the fear of force, whether to that person or someone else;
- e. X submits to the sexual activity because X is unlawfully detained;
- f. X is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity;
- g. X submits because of fear of harm of any type to that person, another person, an animal, or damage to property;
- h. X was in the care, or under the supervision or authority, of the other person (Y) and as a result, was incapable of consenting to the sexual activity;
- i. X submits to the sexual activity under a mistaken belief as to the identity of Y;
- j. X submits to the sexual activity under a mistaken belief that the sexual activity is for health or hygienic purposes;
- k. X submits to the sexual activity under a mistaken belief that the sexual activity is for the purposes of monetary exchange;
- l. X submits to the sexual activity under any other mistaken belief about the nature of the activity induced by fraudulent means;
- m. X consents, but later through words or actions withdraws consent to the sexual activity taking place or continuing.

(4) Fear of harm

Fear of harm need not be immediately present before or during the sexual activity in order for subsection (3)(g) to apply.

(5) Reasonable belief in consent

In determining whether a person (Y) reasonably believed that another person (X) was consenting to a sexual activity, the fact finder should:

- a. Consider all the circumstances of the case, including but not limited to:
 - i. Whether or not Y took reasonable steps, through words or actions, to find out whether X was consenting to the sexual activity;
 - ii. The effect that any behaviour of Y before the alleged offence may have had on the behaviour of X at the relevant time;
- b. Not consider:
 - i. Any self-induced intoxication of Y;
 - ii. Any personal opinions, values or attitudes held by Y that do not meet community standards.

(6) The meaning of sexual activity

In this section, "sexual activity" means sexual intercourse, sexual touching or a sexual act.

Redrafted offence provision incorporating recommended mental element:

61I SEXUAL ASSAULT

A person (Y) who has sexual intercourse with another person (X) without the consent of X and who does not reasonably believe that X consents to the sexual intercourse is liable to imprisonment for 14 years.

Appendix B

Extract from the *Family Violence Protection Act 2008 (Vic)*:

5 Meaning of family violence

(1) For the purposes of this Act, **family violence** is—

- a. behaviour by a person towards a family member of that person if that behaviour—
 - i. is physically or sexually abusive; or
 - ii. is emotionally or psychologically abusive; or
 - iii. is economically abusive; or
 - iv. is threatening; or
 - v. is coercive; or
 - vi. in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
 - vii. behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Examples

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a)—

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member's property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

(2) Without limiting subsection (1), **family violence** includes the following behaviour—

- a. assaulting or causing personal injury to a family member or threatening to do so;
- b. sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
- c. intentionally damaging a family member's property, or threatening to do so;
- d. unlawfully depriving a family member of the family member's liberty, or threatening to do so;

- e. causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.

(3) To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

6 Meaning of *economic abuse*

For the purposes of this Act, ***economic abuse*** is behaviour by a person (the ***first person***) that is coercive, deceptive or unreasonably controls another person (the ***second person***), without the second person's consent—

- a. in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
- b. by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

Examples—

- coercing a person to relinquish control over assets and income;
- removing or keeping a family member's property without permission, or threatening to do so;
- disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;
- without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;
- preventing a person from seeking or keeping employment;
- coercing a person to claim social security payments;
- coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;
- coercing a person to sign a contract for the purchase of goods or services;
- coercing a person to sign a contract for the provision of finance, a loan or credit;
- coercing a person to sign a contract of guarantee;
- coercing a person to sign any legal document for the establishment or operation of a business.

7 Meaning of *emotional or psychological abuse*

For the purposes of this Act, ***emotional or psychological abuse*** means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.

Examples—

- repeated derogatory taunts, including racial taunts;

- threatening to disclose a person's sexual orientation to the person's friends or family against the person's wishes;
- threatening to withhold a person's medication;
- preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity;
- threatening to commit suicide or self-harm with the intention of tormenting or intimidating a family member, or threatening the death or injury of another person.