

Volume 1: Objectives, Consent and Mistake of Fact.

Full Stop Australia's Submission to the Law Reform Commission of Western Australia

17 March 2023

Introduction

Full Stop Australia (FSA) is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic and family violence since 1971. We offer expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic or family violence, and specialist help for their supporters and those experiencing vicarious trauma. We also provide best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector. Finally, FSA advocates with governments, the media and the community to prevent and put a full stop to sexual, domestic and family violence.

FSA, as a national service, aims through its advocacy work to support our colleagues in each State and Territory who are working tirelessly on the ground to improve the lives of victim-survivors of sexual, domestic and family violence. We aim to use our experience of law reform in different jurisdictions to advocate for consistent approaches to family, domestic and sexual violence nationally.

We thank the LRCWA for the opportunity to make a submission. This submission was prepared by Taran Buckby, Legal Policy Officer at Full Stop Australia with the assistance of Jacqueline Stark, Research Assistants.

We would be very happy to provide any further feedback on any aspect of this submission. You can contact us at any time if you have any further questions at info@fullstop.org.au

Terminology

Throughout this submission, Full Stop Australia uses 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 used to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.

Consent

Defining Consent

- Do any aspects of the current definition of consent give rise to particular concern or create problems in practice?

Sexual assault offences present a complex problem for the justice system, with low conviction and high attrition rates,¹ despite one in six women in Australia experiencing sexual assault at least once since they were 15 years old.² Across Australia the 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.³ In WA, the sustained operation of traditional consent models continue to be influenced by victim-blaming attitudes and misconceptions regarding the very nature of sexual violence and its effect of those impacted.⁴

In addition to promoting the rights of victims within the justice system, the law plays a fundamental role in defining the boundaries of socially and culturally acceptable conduct, and consent provisions have an impact on the way communities view and understand consent during sexual intercourse.⁵ WA's consent reform should be based on the understanding of the communicative model, including that consent should be an ongoing and mutual decision-making process that everyone has the right to choose to participate in, and it should never be presumed. These principles need to be developed more explicitly in consent laws, in a manner that sets consistent standards that can guide community understandings and improve outcomes for victims navigating the justice system.

- Should the Code define consent? If so, how should it be defined?

The definition of consent is a fundamental element of sexual assault law.⁶ It provides guidance to communities as to appropriate standards of behaviour when engaging in sexual activities. The Code's definition of consent should be based on a communicative model that promotes free, voluntary and informed consent between partners that is mutual and ongoing. In addition, a definition of consent would benefit from the inclusion of a provision that refers to consent as something that is communicated by saying or doing something, as has been implemented in the

¹ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [1.36], [2.7]-[2.43].

² Anthony North, 'Legislating Consent in Sexual Relations: How Significant is the Move to Affirmative Consent?' (2022) 0(0) *Alternative Law Journal* 1, 1.

³ Wendy Larcombe, 'Falling Rape Convictions Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 12 *Feminist Legal Studies* 27.

⁴ Wendy Larcombe et al, 'I Think It's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 614.

⁵ Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21, 40.

⁶ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [3.1], [3.19].

ACT.⁷ Including a definition of consent based on an affirmative consent model is a symbolically important policy measure to encourage ongoing communication between sexual partners, rather than continuing stereotypical assumptions about the presence of consent.

Communicating Consent

- Should the Code require participants to say or do something to indicate their consent to a sexual activity? If so, how should this requirement be framed?

Full Stop Australia supports the adoption of an affirmative consent standard that requires participants involved in sexual activity to say or do something to indicate their consent to a sexual activity.

The communicative model of consent, which views consent as a 'continuous process of mutual decision-making',⁸ has been influential in reform to sexual assault laws across Australia, such as in the ACT, NSW and Victoria.⁹ This model responds to misconceptions held by jurors and the broader community relating to women's sexual behaviour and sexual relations, including views that women may say 'no' when they really mean 'yes', that women who are raped are 'asking for it', and that rape can be the result of men not being able to control their need for sex so their responsibility is removed.¹⁰ In addition to improving the criminal justice system, including it in law aids in the general community's understanding of consent.¹¹ It encourages a person initiating a sexual act to ensure that consent is present before proceeding, making it an important policy measure to promote ongoing and mutual communication between parties, rather than relying on stereotypical presumptions about the presence of consent unless it is expressly negated.¹² It also is designed to combat public perceptions that the legal system is biased against victims, promoting increased complaints to the police and increased convictions as a result.¹³

WA can look to laws such as those adopted in the ACT and NSW to guide the implementation of

⁷ See, eg, *Crimes Act 1900* (ACT) s 50B which provides that consent, to a sexual act, means informed agreement to the sexual act that is ... (b) communicated by saying or doing something.

⁸ Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8(2) *Law and Philosophy* 217, 236-7.

⁹ Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases' (2019) 31 *Current Issues in Criminal Justice* 24, 26.

¹⁰ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [1.23] citing New South Wales, *Parliamentary Debates*, Legislative Council, Legislative Council, 7 November 2007, 3584-5 (John Hatzistergos); Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The Lazarus Cases' (2019) 31 *Current Issues in Criminal Justice* 24, 25.

¹¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7508 (Mark Speakman).

¹² Wendy Larcombe et al, 'I Think It's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 612.

¹³ Wendy Larcombe et al, 'I Think It's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 614.

an affirmative consent standard. The requirement that a person say or do something to indicate their consent to a sexual activity could be included in either the definition of consent,¹⁴ or in a provision defining circumstances where a person is not said to be consenting.¹⁵ This should be done in such a way that provides explicit legislative acknowledgement that a person is not consenting unless they say or do something to communicate consent.¹⁶ Consent should be able to be communicated through both words and reciprocating body language, and as long as there is consent that is continued to be reciprocated by all parties involved, there should be no requirement for a person to ask for verbal consent.¹⁷

The adoption of such a standard, designed to increase successful prosecutions for sexual assault,¹⁸ is reflective of national momentum in support of the adoption of affirmative consent provisions, and broad social, legal and political support for communicative consent models.¹⁹ Laws that do not expressly include affirmative consent standards fail to meet the key objectives of sexual assault laws, including reducing the number of offences occurring, improving reporting rates, increasing successful prosecutions of sexual assault through clear standards that jurors can apply, and developing public confidence in the legal process.²⁰ This is evident in the low conviction and high attrition rates for sexual assault offences.

Clarifying the Meaning of Consent

- Should the Code clarify the meaning of consent in any way? For example, should it make it clear that a person does not consent only because they:
 - a. Failed to verbally resist;
 - b. Consented to a different act with the same person;
 - c. Had previously consented to a sexual activity with that person or someone else;
 - d. Had previously consented to a sexual activity of that kind or any other kind; and/or
 - e. Had entered into an agreement for commercial sexual services?

If so, what matters should be addressed and how should they be addressed? For example, should they be addressed as part of the definition of consent and/or in jury directions?

¹⁴ See, eg, *Crimes Act 1900* (ACT) s 50B which provides that consent, to a sexual act, means informed agreement to the sexual act that is ... (b) communicated by saying or doing something.

¹⁵ See, eg, *Crimes Act 1900* (NSW) s 61HJ(1)(a) which provides that a person does not consent to a sexual activity if the person does not say or do anything to communicate consent.

¹⁶ James Duffy and Kelley Burton, 'A Review of the New Legislative Definition of Consent in Queensland: An Opportunity for Western Australia' (2022) 41(2) *The University of Queensland Law Journal* 189, 201.

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2021, 6633 (Natalie Ward).

¹⁸ See, eg, Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022 (ACT) 5.

¹⁹ Elaine Craig, 'Ten Years After Ewanchuk the Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence' (2009) 13(3) *Canadian Criminal Law Review* 247.; Asher Flynn and Nicola Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2021) *Current Issues in Criminal Justice* 167; Anthony North, 'Legislating Consent in Sexual Relations: How Significant is the Move to Affirmative Consent?' (2022) 0(0) *Alternative Law Journal* 1, 2.

²⁰ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [3.38].

Full Stop Australia supports the inclusion of provisions clarifying the meaning of consent, such as the examples provided in the Discussion Paper. These should be expressly included either in the definition of consent or in a list defining circumstances where a person is not to be taken to give consent.²¹

In undertaking a reform of its consent laws, WA has the opportunity to recognise and respond to common myths and misconceptions that continue to be held within the community. These include beliefs that consent to one activity is consent to any and all other sexual activities, or that a person is consenting unless they say no and actively physically resist. As the law plays an important part in not only protecting complainants navigating the justice system but also in defining community standards, it is beneficial to clearly provide guidance as to the presence or absence of consent in a standalone provision, rather than merely combining them with those relating to jury directions.

Importantly, in addition to its provision relating to the absence of physical resistance not indicating consent, the Code should make it clear that a failure to verbally resist does not reflect the granting of consent. Freeze and surrender responses are the two most reports responses by victims of sexual assault.²² In these circumstances, a victim may become unable to communicate their lack of consent during a sexual offence due to their fear.²³ Where an accused has not taken steps to ascertain whether a person is consenting at the commencement of a sexual activity, a failure to physically or verbally resist should not be taken as implying consent.

Including express provisions of this nature is especially important in promoting the rights of vulnerable groups, such as Indigenous peoples, persons with a disability and the LGBTI+ community. These groups are often more susceptible to sexual assault, so articulating clear boundaries of consent will assist in protecting them.²⁴

- Should the Code continue to list circumstances in which consent is not freely and voluntarily given, such as when it is obtained by force, threat or fraud? Why/why not?

In conformity with other Australian jurisdictions, the Code should continue to include a non-exhaustive list of circumstances where consent is not freely and voluntarily given, such as when it is coerced, or obtained by force, threat or fraud. This will help protect victims navigating the criminal justice system, by preventing ambiguities that may be relied on by defence counsel to suggest that consent was present or could be implied, even when it was not freely or voluntarily given. Additionally, as the law has a fundamental role in delimiting the boundaries of acceptable conduct within the community, consent provisions have an impact on the way people understand

²¹ See, eg, *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) ss 61HF and 61HI(4).

²² Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022 (ACT) 11.

²³ See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7507 (Mark Speakman).

²⁴ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022 (ACT) 5.

consent during sexual activity.²⁵ Accordingly, circumstances where consent is not present should be direct and unambiguous.

- The Code currently provides that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. Should this list of circumstances be amended in any way?

Full Stop Australia supports the express inclusion of the use, disruption or removal of a condom or other device used to prevent pregnancy or sexually transmitted infections as a form of fraud or deceit that negates consent.

The non-consensual tampering with or removal of a condom during sexual intercourse is an increasing practice that leads to a number of adverse consequences for victims, including the risk of STI transmission and unwanted pregnancy.²⁶ However, in jurisdictions such as WA where this practice is not expressly criminalised, ambiguity in the law may lead to negative outcomes for victims navigating the justice system. While there is some consensus amongst academics that stealthing arguably vitiates consent,²⁷ whether this practice constitutes sexual assault depends on the court's interpretation of current consent provisions which leads to inconsistencies in decision-making.²⁸ For example, in Queensland which has comparable consent provisions to those in WA, the District Court at Southport rejected an argument by the defence that the practice of stealthing could not reasonably support a prosecution for rape,²⁹ however the Queensland ODPP has also refused to proceed with an indictment for rape in a similar matter involving stealthing due to the difficulties in establishing the defendant's intention.³⁰

As the law plays an important role in shaping communities' understandings of acceptable behaviours with respect to sexual intercourse,³¹ Currently, only approximately 15% of Australians are familiar with the notion of stealthing, and 56% being unclear as to the legal status of this practice.³² Accordingly, Western Australia would benefit from the express inclusion of this practice

²⁵ Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21, 40.

²⁶ Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System* (Report Two Volume One, 2022) 218; Sienna Parrott and Brianna Chesser, *Stealthing: Legislating for Change* (Report, October 2022) 2.

²⁷ Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System* (Report Two Volume One, 2022) 218.

²⁸ Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System* (Report Two Volume One, 2022) 218.

²⁹ See Anne Hayden, 'Restorative Justice and Gender Differences in Intimate Partner Violence' in Theo Gavrielides (ed), *Routledge International Handbook of Restorative Justice* (Routledge, 2018) 193, 207-208.

³⁰ Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System* (Report Two Volume One, 2022) 218; 137.

³¹ Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21, 40.

³² Sienna Parrott and Brianna Chesser, *Stealthing: Legislating for Change* (Report, October 2022) 1.

as a standalone factor negating consent, as has been introduced in the ACT, Tasmania and Victoria, in order to set clear standards in relation to tampering with a condom during sexual intercourse.

Timing of Consent

- Should the Code specify when consent should be given? If so, should it specify that consent must be given at the time of the offence, or should it be permissible to give consent in advance?

WA's consent laws should reflect the principle that consent is an ongoing process of mutual decision-making. There should be an obligation on all parties involved in a sexual activity to ensure that every person involved consents at the time of the act.³³ In order to ensure that the law is clear and unambiguous, and prevent a defendant relying on misconceptions such as that consent can be implied from a person inviting another back to their room, the Code should specify that consent must be granted at the time of the act.

Withdrawal of Consent

- Should the Code explicitly address the withdrawal of consent? If so, how should this be done? For example, should the provision require the withdrawal of consent to be communicated by words or conduct?

The Code should explicitly address the withdrawal of consent, providing that this must be communicated by words or conduct. Consent laws must appropriately balance protections for victims and complainants with the rights of an accused person. Expressly providing that a withdrawal of consent after it was initially granted must be communicated precludes an internal withdrawal of consent in the complainant's own mind. There should be sufficient evidence that an accused knew that the complainant had withdrawn consent and therefore was no longer consenting.³⁴

Mistake of Fact

Excluding Operation of the Mistake of Fact Defence

- Should the law provide that the mistake of fact defence does not apply to sexual offences?

The Code should expressly exclude the application of the mistake of fact defence in cases of sexual offences. An accused's ability to rely on a mistake of fact defence where they have not taken steps to ascertain consent enables them to continue to rely on problematic narratives of implied consent based on myths and misconceptions. These stereotypical assumptions about women's sexual behaviour and sexual relations are part of the cause of low conviction rates for

³³ James Monaghan and Gail Mason, 'Communicative Consent in New South Wales: Considering *Lazarus v R* (2018) 43(2) *Alternative Law Journal* 96, 97.

³⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7508 (Mark Speakman).

sexual offences.³⁵ Mistake of fact defences have been relied on by defendant's to avoid conviction for sexual assault, despite evidence that the defendants in these cases forced themselves on the victims and the victims had resisted.³⁶ Preventing an accused from relying on this defence will help promote protections for victims navigating the criminal justice system.

Addressing the Measures the Accused Took to Ascertain the Complainant's Consent

- Should the Code provide that a belief in consent is not honest and/or reasonable if the accused did not take measures to ascertain the complainant's consent? If so, how should this requirement be framed?

A core aspect of the law of consent is the fault element relating to the necessary knowledge and intention of the accused person during the sexual act. Full Stop Australia supports the adoption of an affirmative consent model that requires that a person engaging in sexual activity says or does something to find out if the other person consents to that activity.

A reasonable belief standard that does not require an accused person to take positive steps to ascertain consent will not lead to widespread changes to the legal system, as it relies on patriarchal benchmarks to define appropriate behaviours.³⁷ Even after the adoption of reasonable belief standards, victims are still being questioned on what they did to demonstrate non-consent.³⁸

Without express legislation requiring an accused's knowledge to be based on positive steps they took to ascertain whether a person is consenting to sexual intercourse, an accused is likely to be able to continue to rely on problematic narratives of implied consent founded on misconceptions about women's behaviours.³⁹ The cumulative effect of reasonable belief provisions without complete affirmative consent requirements is that an individual does not necessarily have to take steps to ascertain consent, which undermines the goal of implementing a communicative model and the principles underpinning free and voluntary consent, as it does not place the appropriate responsibility on perpetrators to ensure that consent is mutual and ongoing.⁴⁰

For example, the NSW case of *R v Lazarus*, decided prior to the implementation of affirmative consent laws in the state, highlighted the significant issues with the application of the reasonable

³⁵ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [2.40].

³⁶ *R v Kovacs* [2007] QCA 143; *R v Dunrobin* [2008] QCA 116; *Phillips v R* [2009] QCA 57.

³⁷ Rachel Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334, 336.

³⁸ Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission, 2021); Anthony North, 'Legislating Consent in Sexual Relations: How Significant is the Move to Affirmative Consent?' (2022) 0(0) *Alternative Law Journal* 1, 3-4.

³⁹ Rachel Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334, 336.

⁴⁰ Rachel Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334, 337.

belief knowledge standard, as a significant amount of focus was placed on the behaviour of the victim and her freeze response not being enough to negate consent, as opposed to placing emphasis on the steps taken by the accused to ascertain consent in that situation.⁴¹ This is reflective of broader trends, where the scrutiny in sexual assault trials is placed on the complainant's actions, with little to no attention being placed on the obligations of an accused person to take positive steps to determine whether the other party is consenting, helping to entrench myths relating to sex and a women's role in it.⁴² Although these provisions are designed to direct attention to an accused's behaviours, the reasonableness standard continues to be informed by men's understandings of women as passive sexual actors who have no innate sexuality of their own, but are constantly oversexualised.⁴³ This has been consistently relied on in sexual assault trials, where men are successful in demonstrating their reasonable belief based on the victim's flirting, the fact that they accompanied the defendant to their bedroom or evidence of attraction between the parties, leading to the continued victimisation of women, where their ordinary behaviour is deemed to be implying consent to sex.⁴⁴ Absent any strict legislative guidance or education for jury members or the broader community the determination of whether the accused in fact held a reasonable belief is likely to be influenced by victim-blaming attitudes or misguided understandings about seduction or miscommunication that remain as dominant narratives even today.⁴⁵

The affirmative consent model has been adopted as a way to combat these misconceptions about consent and alter the direction of trials to be focused on a central question of whether the accused said or did anything to ascertain consent, as opposed to putting the victim's actions on trial.⁴⁶ For example, ss 67(4) and (5) in the *Crimes Act 1900* (NSW) operate as a hybrid objective/subjective test relating to an accused's knowledge of non-consent. The 'reasonable belief' requirement was introduced in s 67(4), in addition to the fault elements of knowledge and recklessness in the previous legislation, in order to require a trier of fact to consider whether an accused, based on reasonable community standards, believed that consent had been received, given all the circumstances of the case.⁴⁷ This operates with s 67(5), which provides that, for a person's belief to be deemed reasonable, they must have taken steps to ascertain consent, which places

⁴¹ Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases' (2019) 31 *Current Issues in Criminal Justice* 24, 32-4.

⁴² Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases' (2019) 31 *Current Issues in Criminal Justice* 24, 26.

⁴³ Rachel Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334, 335.

⁴⁴ Rachel Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334, 338; Wendy Larcombe et al, 'I Think It's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 614.

⁴⁵ Rachel Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334.

⁴⁶ Anthony North, 'Legislating Consent in Sexual Relations: How Significant is the Move to Affirmative Consent?' (2022) 0(0) *Alternative Law Journal* 1, 5.

⁴⁷ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022 (ACT) 15-17.

responsibility on the person seeking consent to obtain it, rather than on the victim to negate consent.⁴⁸ This has sought to shift the focus from the victim and the attribution of blame to their clothing or actions, to what actions the accused took to ensure that they had ongoing consent.⁴⁹

It is important that WA works to simplify and modernise the law with respect to knowledge in order to improve outcomes for victims navigating the criminal justice system.⁵⁰ Any definition adopted must be clear so that counsel and jurors do not continue to refer to pre-reform conceptions of consent to inform their approaches, which are often based on a range of non-legal and problematic misconceptions about a victim's role and how it is defined in other jurisdictions, as opposed to being properly guided by judicial directions and definitions.⁵¹ Reform should be done in a way that redirects cross-examination in sexual assault trials to focusing on whether the accused said or did anything to ascertain whether the other person was consenting, so that where a complainant gives evidence that they did not say or do anything to indicate consent, it is the accused who must produce evidence that they did, as opposed to scrutinising the victim's behaviour.⁵²

⁴⁸ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022 (ACT) 15-17.

⁴⁹ Rachel Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334, 335.

⁵⁰ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [1.34].

⁵¹ Wendy Larcombe et al, 'I Think It's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 615.

⁵² Anthony North, 'Legislating Consent in Sexual Relations: How Significant is the Move to Affirmative Consent?' (2022) 0(0) *Alternative Law Journal* 1, 5.