

Sexual Assault Law Reform in NSW: Issues of Consent and Objective Fault

Ian Dobinson and Lesley Townsley*

The purpose of this paper is to assess the recent reforms to the Crimes Act 1900 (NSW) in relation to sexual assault. Two of the main reasons for reform were to increase the reporting of sexual assault and to increase conviction rates for sexual assault. It is not possible to assess the impact of the reforms on these two factors, as such the paper focuses on the legal changes and their predictive impact upon the proof of liability for sexual assault offences. Specifically, the paper assesses the statutory definition of consent, the expansion of the circumstances whereby consent would be negated or vitiated, and the adoption of an objective fault element. As part of this assessment, the paper also considers, where relevant, the current law on sexual assault in other Australian jurisdictions, as well the UK and Canada, from which NSW has 'borrowed'. We add to this context a consideration of the law in New Zealand.

INTRODUCTION

On 14 November 2007, the NSW Parliament passed the Crimes Amendment (Consent—Sexual Assault Offences) Act 2007.¹ These new laws are a result of an extensive review of sexual assault in NSW and the adequacy of existing law to deal with such offences.

This review began with the 2004 Report by the NSW Adult Sexual Assault Interagency Committee.² In Part 4.2 of this Report, three main areas of reform were identified. These included the adoption of a statutory definition of consent, an expansion of the circumstances whereby consent would be negated or vitiated and the adoption of an objective fault element.³ This was followed in April 2006 by the Attorney General's Department's Report of the Criminal Justice Sexual Offences Taskforce.⁴ As part of this Report, the current law in a number of Australian jurisdictions was considered as well as that in the United Kingdom and Canada.

In May 2007 the Criminal Law Review Division of the NSW Attorney General's Department released its Discussion Paper.⁵ As part of this paper, significant changes were proposed to the *Crimes Act 1900* (NSW) in the form of a Consultation Bill.⁶ Such changes involved the adoption, in similar or varied forms, of the legislative provisions in

* Ian Dobinson is a Senior Lecturer at the University of Technology, Sydney (UTS). Lesley Townsley is a Lecturer also at UTS.

¹ Assent occurred on 23 November 2007.

² New South Wales Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (November 2004).

³ New South Wales Adult Sexual Assault Interagency Committee, n 2 at 31-36.

⁴ Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward* (Sydney: Criminal Law Review Division, Attorney General's Department NSW, December 2005).

⁵ Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (Sydney: Attorney General's Department NSW, May 2007).

⁶ Crimes Amendment (Consent—Sexual Assault Offences) Consultation Bill 2007.

other Australian jurisdictions as well Canada and the United Kingdom. In this regard, the Consultation Bill proposed a legislative definition of consent, an expansion of the circumstances whereby consent which is apparently given is vitiated and an objective fault element.

A number of problems with how the justice system was dealing with sexual assault were identified in the above forums. As noted in the Introduction to the 2007 Discussion Paper, the Attorney General's Department's Report of the Criminal Justice Sexual Offences Taskforce:

made numerous recommendations aimed at improving the responsiveness of the criminal justice system to sexual assault complainants, whilst ensuring that an accused person receives a fair trial.⁷

For the purposes of this article, the problems identified include the extremely low level of the reporting of sexual assault, a high level of attrition of cases following an initial report and a low level of conviction following trial.⁸ The legislative changes proposed and now adopted are seen as a means of addressing and hopefully remedying these problems. These are significant claims and the actual capacity of the reforms to achieve such goals is an extremely important issue especially given the assurances regarding a fair trial.

This article does not undertake any analysis of the problems identified. Our objective is to assess the new reforms in light of the outcomes claimed they will achieve. Specifically, the paper assesses the statutory definition of consent, the expansion of the circumstances whereby consent would be negated or vitiated and the adoption of an objective fault element. As part of this assessment, we refer, where relevant, to the current law on sexual assault in other Australian jurisdictions, the UK and Canada, from which NSW has 'borrowed'. We add to this context, however, a consideration of the law in New Zealand. This jurisdiction appears to have been overlooked in the three reports mentioned above but as will be demonstrated later, the law in NZ is of some significance.⁹

The discussion that follows is divided into two main parts. The first part considers the statutory definition of consent and the provisions concerning the negation of consent. The second part assesses the provisions relating to fault, the adoption of an objective fault element and the apparent abolition of the defense of honest mistake as to honest, the so-called Morgan defense.

CONSENT

Under Section 61HA(2) Meaning of consent:

A person *consents* to sexual intercourse if the person freely and

⁷ Criminal Justice Sexual Offences Taskforce, n 4 at 4.

⁸ Criminal Justice Sexual Offences Taskforce, n 4 at 8-18.

⁹ New Zealand was referred to in Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004).

voluntarily agrees to the sexual intercourse.

This definition puts in legislative form, aspects of the judgment by Studdert J in *R v Mueller*.¹⁰ It is similar yet also different to the NSW Bench Book direction that “consent involves conscious and voluntary permission by the complainant to engage in sexual intercourse with the accused”. As noted in the Discussion Paper:

Studdert J was of the view that whilst there was no statutory requirement in NSW for a judge to give a direction that consent must be freely and voluntarily given, the direction given in *R v Mueller* (by the trial judge) was not erroneous when viewed in context.¹¹

Studdert J also referred to *R v Clark*¹² “where Simpson J expressed the view that for the purpose of NSW law, consent meant ‘consent freely and voluntarily given’.”¹³ In *Mueller*, however, Hunt AJA and Holme J had significant reservations as to the adoption of such a general definition.

As the Discussion Paper notes, Hunt AJA stated:

There will inevitably be difficulties for a jury in understanding how consent may at the same time be both (a) freely and voluntarily given and (b) given reluctantly or after persuasion. If both directions are given because of the necessity to do so in the particular case, the judge should also give assistance to the jury as to how each of those directions is relevant to the facts of the particular case, with an explanation, which removes the likelihood of confusion.¹⁴

On this basis it is arguable that a victim does not consent where consent is not voluntarily given but may consent reluctantly or after persuasion. Alternatively, a victim does not agree if they do so reluctantly or after persuasion. To what extent does the new definition under s61HA(2) make this clear?

In responding to the suggestion that the approach in *Mueller* might be too general, the Discussion Paper further refers to “a recent report commissioned by the NSW Attorney General’s Department and conducted by the Australian Institute of Criminology (AIC) on juror’s perceptions of sexual assault victims,” noting that this “suggests that consent is a difficult concept for juries to understand.”¹⁵ The Taskforce report also acknowledges the opposition to adopting a statutory definition from the Bar Association, Law Society, Legal Aid and members of the judiciary.¹⁶

It is also important to note that under s61R(2) of the Consultation Bill consent was initially defined so that:

¹⁰ *R v Mueller* (2005) 62 NSWLR 476; [2005] NSWCCA 47 (*Mueller*).

¹¹ Criminal Law Review Division, n 5 at 8.

¹² *R v Clark* (Unreported, NSWCCA, 18 April 1998).

¹³ Criminal Law Review Division, n 5 at 8.

¹⁴ Criminal Law Review Division, n 5 at 8.

¹⁵ Criminal Law Review Division, n 5 at 10.

¹⁶ Criminal Law Review Division, n 5 at 34.

A person does not consent to sexual intercourse if the person:

- (a) does not have the capacity to agree to the sexual intercourse, or
- (b) has that capacity but does not have the freedom to choose whether to have sexual intercourse, or
- (c) has that capacity and freedom but does not agree to the sexual intercourse.

For all intents and purposes, this is the UK definition stated in the negative. The extent to which this definition is different to that adopted, and would have been of any practical significance had it been adopted, is now irrelevant. The Second Reading Speech by the Attorney General, the Hon. John Hatzistergos, and subsequent debate, sheds no light on the reasoning behind this change. As noted in the Discussion Paper:

The Exposure Draft Bill, attached to this paper at Appendix 3, contains the following definition of consent that reflects the UK definition, however, it defines *lack of consent* rather than consent, in accordance with the elements of the relevant sexual offences.¹⁷

Having noted these reservations, s61HA(2) is comparatively similar to all other Australia jurisdictions. Generally, but with some variation, consent is defined across Australia as “free and voluntary agreement”. To a lesser extent, although still similar, the current definitions in Canada, UK and New Zealand also imply free and voluntary agreement, the UK and New Zealand including a consideration of the capacity of the victim to consent.¹⁸ As such, the justification for NSW adopting a statutory definition could be somewhat cynically seen as no more than bringing NSW in line with approaches elsewhere. The extent to which such a definition is an improvement on the previously existing position is unclear.¹⁹

Negated/Vitiated Consent

Under the old provisions a number of circumstances were identified where consent would be vitiated if those circumstances existed.²⁰ An important area canvassed by the Taskforce was whether the list of such circumstances should be expanded so as to include the legislative position in other Australian jurisdictions, the UK and Canada.²¹

The Taskforce recommendations and the provisions of the Consultation Bill provided for such expansion including a provision that the list of circumstances be non-exhaustive. This is now encompassed under s61HA(4)-(8). There are some significant differences, however, between the provisions in the Consultation Bill (see s61R(4)-(9)) and s61HA

¹⁷ Criminal Law Review Division, n 5 at 12.

¹⁸ QLD is the only Australian jurisdiction that currently refers to capacity see *Criminal Code* (Qld), s 348(1).

¹⁹ The previously existing position being the NSW Bench Book direction that “consent involves conscious and voluntary permission by the complainant to engage in sexual intercourse with the accused”.

²⁰ *Crimes Act 1900* (NSW), s 61R(2).

²¹ *Criminal Code* (Cth), s 319(2)(a); *Crimes Act 1900* (ACT), s 67; *Crimes Act 1958* (Vic), s 36(a)-(g); *Criminal Code* (WA), s 319(2)(a); *Criminal Code 1899* (Qld), s 348(2)(a)-(f); *Criminal Code Act 1924* (Tas), s 2A(2)(a)-(i); *Criminal Code* (NT), s 192(2)(a)-(g); *Criminal Code* (Can) s 273.1(2)(a)-(e), s 273.1(3); *Sexual Offences Act 2003* (UK), s 75(2), s 76(2); *Crimes Act 1961* (NZ), s 128A.

and these are discussed below. It is also important to note that the Consultation Bill talked about vitiation whereas s61HA now uses the term negation of consent.

There appears to be two categories of negated consent. These are i) where consent is automatically negated and ii) where consent may be negated.

i) Where consent is automatically negated

Section 61HA (4) states that consent will be negated:

- (a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep.

Dealing first with ss4(b), these provisions do not appear to describe circumstances where consent is given but then negated. Rather they are circumstances where there is no consent in the first instance and could be encompassed by the definition under s61HA(2). Sub-section 4(b), however, mirrors the UK provisions whereby the unconscious victim does not consent by definition but that this is further reinforced by s75(2)(d) *Sexual Offences Act 2003* (UK). That section states that the complainant is taken not to have consented where the complainant was asleep or otherwise unconscious at the time. Section 273.1(3) of the Canadian Criminal Code also provides that no consent is obtained if the complainant is incapable of consenting to the activity. As noted in the Taskforce Report:

It may therefore be appropriate to explicitly state that consent is vitiated if the complainant is unconscious or asleep.²²

Sub-section 4(a), on the other hand, does not reflect the position elsewhere. It is included, in our opinion, to counter the generality of s61HA(2) and to specifically include within the circumstances of negated consent a reference to the capacity of the victim to consent, inclusive of age and cognitive incapacity. It is unclear, however, whether ss4(a) reflects a general consideration of capacity outside that of age or cognitive incapacity. If so, what might this more general notion include? In our opinion, ss4(a) and (b) have been included to reflect legislative provisions elsewhere. From a practical perspective this may mean that the general definition will, in certain circumstances, be interpreted together with S61HA(4)(a) and (b). This, however, does not answer the reservations previously identified.

The second category of negated consent is set out in 61HA(4)(c) and (d) whereby consent is negated:

²² Criminal Justice Sexual Offences Taskforce, n 4 at 37.

- (c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- (d) if the person consents to the sexual intercourse because the person is unlawfully detained.

These provisions copy those in the Consultation Bill. Sub-section 4(c) also mirrors the existing Crimes Act s61R(2)(c). The addition of the unlawful detention provisions in 4(d) reflects the position in the Northern Territory, ACT, Victoria and the UK.

Section 61HA(5) mirrors the provisions in the Consultation Bill as to consent given under mistaken belief. This, in turn, is a mere re-working of the existing *Crimes Act*, s61R(2)(a), (a1) and (b).

Further to the provisions on mistaken belief:

For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.²³

How this affects a defence argument that they mistakenly believed the victim was consenting is considered in the next section of the article.

Obviously, negated consent in any of the forms above must be proven by the prosecution but what the provisions now make clear is that a victim's consent given under any of the above circumstances will be automatically negated. Once this is established, an accused's only recourse will be to argue that they mistakenly believed that the victim was consenting.

The *Crimes Act* also includes a now separate provision regarding the lack of physical resistance as not necessarily amounting to consent.²⁴ As such, a victim will not be taken to have consented by reason only of a lack of physical resistance. Passive submission is accordingly not consent but this along with a lack of consent (as defined) will have to be proven by the prosecution. This is the same as the previous s61R(2)(d).

This is uncontroversial but not so the new provisions regarding "non-violent threats" and "sexual intercourse while intoxicated".²⁵

ii) Where consent may be negated

In the Taskforce Report, an issue arose in terms of how best to deal with situations where consent to sexual intercourse was obtained by way non-violent threats. This issue, it was said, was highlighted by the case of *Aiken*.²⁶ In *Aiken*, the accused had sexual

²³ *Crimes Act 1900* (NSW), s 61HA(5).

²⁴ *Crimes Act 1900* (NSW), s 61HA(7)

²⁵ *Crimes Act 1900* (NSW), s 61HA(6)

²⁶ *R v Aiken* [2005] NSWCCA 328 (*Aiken*).

intercourse with the victim following a threat to disclose the victim's shoplifting. On appeal against the accused's conviction for sexual assault under s61I, it was concluded that the facts could not support such a conviction as the offence could only have amounted to conduct under s65A. Section 65A states:

- (1) In this section:
non-violent threat means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.
- (2) Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably expected to resist the threat, be liable to imprisonment for 6 years.
- (3) A person does not commit an offence under this section unless the person knows that the person concerned submits to the sexual intercourse as a result of the non-violent threat.

The recommendation of the Taskforce, which has now been adopted, was that s65A be repealed and that non-violent threats be encompassed within the expanded list of circumstances involving vitiated/negated consent.²⁷ Section 61HA(6)(b) and (c) state that consent *may* be negated:

- (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
- (c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

While sub-section 6(b) is the same as the Consultation Bill, 6(c) is a new addition. In the Taskforce Report, there was considerable concern about including such circumstances as ones which would automatically negate consent.²⁸ It is noted that non-violent threats are a vitiating circumstance in the ACT and that abuse of position of authority or trust is a type of vitiating circumstance in Queensland, ACT and Canada.²⁹ The compromise position now taken in the *Crimes Act* is that both types are included but only as circumstances which may negate consent.

In terms of "intimidatory or coercive conduct, or other threat, that does not involve a threat of force", it is presumed that the circumstances arising in *Aiken* would satisfy such negation of consent. In this regard, there may be general agreement that an accused who has sexual intercourse with a person in circumstances similar to those in *Aiken* should be liable for sexual assault. As noted in the Taskforce Report, s65A was enacted in 1987.³⁰ Since then there have been only two convictions and the Report further highlights problems with proving the offence as specified. To what extent, however, is there a case for retaining s65A in a revised form? The Taskforce Report refers to an article by

²⁷ Criminal Justice Sexual Offences Taskforce, n 4 at 42.

²⁸ Criminal Justice Sexual Offences Taskforce, n 4 at 39.

²⁹ *Criminal Code 1899* (Qld), s 348(2)(a)-(f); *Crimes Act 1900* (ACT), s 67; *Criminal Code* (Can) s 273.1(2)(a)-(e).

³⁰ Criminal Justice Sexual Offences Taskforce, n 4 at 38.

Temkin, which, while somewhat dated (1982), suggests that non-violent threats or abuse of a position of authority or trust should give rise to liability for an offence which is less serious (than rape).³¹

The inclusion of these as negating circumstances, albeit those which only *may* negate consent, could prove problematic. History reminds us that juries may be reluctant to convict for serious crimes such as sexual assault where they perceive that an offender is perhaps less blameworthy due to the circumstances.³²

An issue of similar difficulty considered by the Taskforce was how to deal with the intoxicated victim. As with non-violent threats, the *Crimes Act* states that a victim's intoxication may negate consent. Specifically, s61HA(6)(a) states that a person's consent may be negated:

- (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug.

It is initially important to note the distinction here between a victim who is intoxicated but still conscious and someone who is asleep or unconscious due to intoxication. Being asleep or unconscious would appear to be covered by a combination of 61HA(2) and (4)(b). As indicated in the Taskforce Report, s61HA(6)(a) is intended to cover the victim who is conscious but unable due to their intoxication to comprehend what is happening.³³ Where such a degree of intoxication exists, consent may be negated. The Taskforce stated:

Expert evidence may be called on this issue to give the jury a further understanding of the complainant's inability to comprehend. However, a person may be 'affected' by alcohol or drugs, but still be aware and capable of voluntarily consenting.³⁴

A case referred to by the Taskforce was *Chant and Madden*.³⁵ Without entering into any detailed analysis of the case, it is important to acknowledge the NSWCCA's agreement with the trial judge's directions as to the relevance of the victim's intoxication.

His Honour said, in this regard:

"...the fact that a person is affected by alcohol or drugs is a factor to be taken into consideration in this case on the question of consent or lack of it in this way. You have the evidence of Dr Gaffney that both alcohol and Indian Hemp, pot, marijuana, call it what you will, are drugs that affect the central nervous system and that they both have an initial affect of inducing euphoria and a feeling of well being that could result in a lowering of inhibitions.

³¹ Criminal Justice Sexual Offences Taskforce, n 4 at 38.

³² This was a factor relevant to changes to the law in 1981 and the abolition of the offence of rape with a maximum penalty of life.

³³ Criminal Justice Sexual Offences Taskforce, n 4 at 37.

³⁴ Criminal Justice Sexual Offences Taskforce, n 4 at 37.

³⁵ *R v Chant; R v Madden* 12 June 1998 NSWCCA (BC9802382) (*Chant and Madden*).

This lowering of inhibitions you may think may lead to a person doing things that he or she might not otherwise have done or engaged in conduct that might otherwise be foreign to them. Their perceptions and the perceptions of people with them might be entirely different as to what was taking place.

Further imbibing in the drugs and/or alcohol and the mixing of them ultimately may lead to a position that because of the state of intoxication, the person is unable to voluntarily and consciously consent. They are so drunk that they cannot understand what is going on. Nevertheless that does not mean that a person in a state of euphoria or well being or intoxication induced by drugs or alcohol cannot consent to an act or acts of intercourse. They obviously can.

Whether they do so is a question of fact and the fact that a person is intoxicated does not necessarily mean that they cannot. It may depend on the question as to whether they were so intoxicated that they could not consciously and voluntarily give such a consent. That is a matter for you on the evidence and of course, a person asleep cannot give such a consent."³⁶

And then further down:

His Honour then appropriately reminded the jury that the accused did not have any duty to ensure that the complainant remained sober or did not smoke cannabis, before continuing:

"However, it is equally clear that if the Accused is aware that the complainant is in no condition to rationally give consent, because of her condition as to intoxication"³⁷

The inclusion of s61HA(6)(a), however, has been controversial. In the second reading debate, the danger of including such provisions was highlighted by the hypothetical scenario of the drunk young female victim and drunk young male defendant.³⁸ In response, the Attorney General did not see the new law as in any way changing the previous situation concerning intoxicated victims, whereby a determination of whether a victim was so intoxicated as to not being capable of consenting was a question of fact to be determined by the jury (see *Chant and Madden* above). This is the same position in England, but the recent decision in *Bree*³⁹ highlights the possible problems.

The basis of the successful appeal in *Bree* was that the trial judge failed to properly direct the jury on the victim's intoxication. At trial, the judge directed the jury that:

³⁶ *R v Chant; R v Madden* 12 June 1998 NSWCCA (BC9802382), at 18-19.

³⁷ *R v Chant; R v Madden* 12 June 1998 NSWCCA (BC9802382), at 19.

³⁸ See Mr Greg Smith, NSW Legislative Assembly, Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007 *Agreement in Principle*, 14 November 2007 at 4176-4177.

³⁹ *R v Bree* [2007] 3 WLR 600 (*Bree*).

a person consented if she agreed by choice and had the freedom and capacity to make that choice, but he made no reference to the effect of self-induced intoxication on that person's capacity to consent.”⁴⁰

In acquitting the defendant, the Court of Appeal held that the judge should have given assistance to the jury as to the meaning of “capacity” and the how and to what extent the jury should have taken into consideration the effect of the victim’s voluntary intoxication on her consent.

If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact-specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.⁴¹

While this direction is arguably sound, and very similar to the words of the trial judge in *Chant and Madden*, the problem demonstrated by *Bree* is the possible extension of the criminal law to catch people who might not otherwise be regarded as criminals. While *Bree* was ultimately acquitted, he was not only charged with rape but convicted at trial.⁴²

Could a case such as *Bree* arise in NSW? The victim in *Bree* was not asleep or unconscious so were a similar case to occur in NSW, it would now fall under s61HA(6)(a). What the prosecution would need to prove, so as to negate the victim’s apparent consent, was that she was so intoxicated as to be incapable of freely and voluntarily agreeing to the sexual intercourse. A jury’s determination of this will ultimately depend on how they are directed. What *Bree* demonstrates are the possible dangers if the direction is not clear and/or adequate. It is possible that the jury in *Bree* determined that the victim did not consent simply because of her degree of intoxication and her subsequent statements that she did not consent, even though this was never communicated to the defendant.⁴³

The above analysis highlights a number of potential problems with the new provisions. It is not certain whether such problems will eventuate but they are real. What is clear is that every case which involves an issue as to the victim’s consent as an element of the conduct / *actus reus* will inevitably revert to argument concerning proof of the accused’s

⁴⁰ *R v Bree* [2007] 3 WLR 600.

⁴¹ *R v Bree* [2007] 3 WLR 600 at 608-609.

⁴² Space does not allow for an analysis of the facts of *Bree*. The reader is referred to the facts to draw their own conclusions.

⁴³ On the issue of intoxication, it is also important to note the now specific reference to the accused’s intoxication under s 61HA(3) whereby consideration by a jury as to whether the defendant knew that a victim was not consenting must include all the circumstances of the case “not including any self-induced intoxication of the person” *Crimes Act 1900* (NSW), s 61HA(3)(e).

fault / *mens rea* once non-consent is established. How this will be affected by the new provisions under s61HA is discussed next.

MENS REA AND HONEST / REASONABLE BELIEF IN CONSENT

Section 61I of the *Crimes Act 1900* (NSW) states that a person commits sexual assault where they know the other person is not consenting. Prior to the reforms section 61R stated further, that for the purpose of s61I (and ss61J and 61JA) a person who was reckless as to the consent of the other person was taken to know that the person did not consent. Such recklessness has been defined at common law to involve two states of mind.⁴⁴ Firstly, an accused is reckless where they realize the possibility that the other person was not consenting, this being known as reckless advertence. Secondly, where an accused fails to consider whether the other person was consenting or not in circumstances where they should have adverted to this possibility, then they are recklessly inadvertent.

In *R v Kitchener*,⁴⁵ the NSW Court of Criminal Appeal considered the meaning of recklessness in the then existing 61D 1A(2) of the *Crimes Act 1900* (NSW).⁴⁶ Carruthers J, who gave the judgement for the Court, began by dealing with the case of *DPP v Morgan*.⁴⁷

[w]here Lord Cross of Chelsea stated: ‘Rape, to my mind, imports at least indifference as to the woman's consent.’ Lord Edmund-Davies stated (at 225) ‘the man would have the necessary *mens rea* if he set about having intercourse *either* against the woman's will *or* recklessly, without caring whether or not she was a consenting party.’ Lord Hailsham of St Marylebone stated (at 215) ‘the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no’; and (at 209) ‘if the intention ... is to have intercourse *nolens volens*, that is recklessly and not caring whether the victim be a consenting party or not’ then the requisite criminal intention is found...⁴⁸

Since *Kitchener*, the NSWCCA has confirmed this concept of reckless inadvertence in *Tolmie v R*,⁴⁹ *R v Mueller*⁵⁰ and *R v Banditt*,⁵¹ the decision in *Banditt* also being upheld by the High Court on appeal.⁵²

⁴⁴ *R v Murray* (1987) 11 NSWLR 12; *R v Kitchener* (1993) 29 NSWLR 696.

⁴⁵ *R v Kitchener* (1993) 29 NSWLR 696 (*Kitchener*).

⁴⁶ Previously s 61R(1).

⁴⁷ *Director of Public Prosecutions v Morgan* [1976] AC 182 (*Morgan*).

⁴⁸ *R v Kitchener* (1993) 29 NSWLR 696 at 702.

⁴⁹ *R v Tolmie* (1995) 37 NSWLR 660; 84 A Crim R 293.

⁵⁰ *R v Mueller* [2005] NSWCCA 47.

⁵¹ *R v Banditt* (2004) 151 A Crim R 215; [2004] NSWCCA 208 (*Banditt*).

⁵² *Banditt v R* (2005) 224 CLR 262; 223 ALR 633; 80 ALJR 421.

This adoption of *Morgan*, however, resulted in an accused being able to argue that they had an honest but mistaken belief in consent. This, in line with *Morgan* was a wholly subjective consideration and that belief did not have to be reasonable.

As noted in the Discussion Paper:

In *R v Banditt* [2004] NSWCCA 208 the NSW Court of Criminal Appeal reinforced that if it were reasonably possible the accused believed the complainant was consenting, the accused would be entitled to an acquittal, whether or not there were any reasonable grounds for such a belief. The trial judge would, of course, be entitled to tell the jury that in determining whether the appellant believed, or might reasonably possibly have believed the complainant was consenting, the jury could examine whether there were any grounds for such a belief.⁵³

In the UK and elsewhere this became known as the “Morgan defence”.⁵⁴

In the Consultation Bill, the concept of recklessness was included in s61I(b)(ii) and there was an additional fault element in s61I(b)(iii):

A person:

- (a) who has SI with another person without consent of the other person, and
- (b) who:
 - (i) knows the other person does not consent to the SI (intention) or,
 - (ii) is reckless as to whether the other person consents to the SI, or
 - (iii) has no reasonable grounds for believing that the other person consents to the SI, is guilty of an offence.⁵⁵

Further under the proposed s61R(3):

In determining whether a person has reasonable grounds to believe that another person consents to having SI with the person, regard is to be had to all the circumstances of the case:

- (a) including any steps taken by the person to ascertain whether the other person consents to the SI, and
- (b) not including the personal opinions, values and general social and educational development of the person.⁵⁶

These sections were further amended so that the final version of the Bill omitted s61R, and issues of consent and knowledge about consent, are now contained in the one provision being s 61HA. Section 61HA(3) states:

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

- (a) the other person knows that the other person does not consent to sexual intercourse, or

⁵³ Criminal Law Review Division, n 5 at 20.

⁵⁴ *DPP v Morgan* [1976] AC 182.

⁵⁵ Crimes Amendment (Consent – Sexual Assault Offences) Consultation Bill 2007, s 61I.

⁵⁶ Crimes Amendment (Consent – Sexual Assault Offences) Consultation Bill 2007, s 61R(3).

- (b) the person is reckless as to whether the other person consents to the sexual intercourse, or
- (c) the other person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) not including any self-induced intoxication of the person.

Both sets of provisions are a significant departure from the common law and prior legislative regime. Section 61HA(3) displaces the *Morgan* defence, and whilst intention and recklessness have been retained; there is now an objective fault component in the *mens rea* for sexual assault. While there was some debate over whether recklessness should be retained or defined in the *Crimes Act*, the Taskforce recommended that it should be retained but not legislatively defined.⁵⁷

In the Discussion Paper it was further noted that the concept of recklessness in other jurisdictions “has either been removed or ameliorated by placing the onus on the accused to take reasonable steps to determine whether in fact consent has been given.”⁵⁸ However, no other Australian jurisdiction, Canada, the United Kingdom or New Zealand have included both recklessness and an objective test in the one provision defining sexual assault or rape. Either they have excluded recklessness and included a requirement for reasonableness, or have included recklessness and have a separate section dealing with the objective requirement.

Is Recklessness Obsolete?

As noted, a definition of recklessness has not been included in the new provisions. Section 61HA(3) is also a mixture of concepts from different jurisdictions. The issue that arises is how this will (if at all) affect the definition and/or application of recklessness under the new provisions. In this regard, does s61HA(3)(c) encompass reckless indifference or is it setting a criminal negligence standard for sexual assault? This will have obvious implications for a convicted person where their culpability is being assessed for sentencing, but it also has implications as to which test or objective standard applies to the section.

Both points were considered during debates in the Legislative Council and Legislative Assembly. There was concern that the introduction of an objective fault component was introducing a new crime of negligent sexual assault and that an accused would be judged against the standard of a reasonable person.⁵⁹ Further to this, concern was raised over the

⁵⁷ Criminal Law Review Division, n 5 at 25.

⁵⁸ Criminal Law Review Division, n 5 at 25.

⁵⁹ See Hon. John Ajaka, NSW Legislative Council, Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007 *Second Reading*, 13 November 2007 at 3881; Mr Greg Smith, NSW Legislative Assembly,

construction of s61HA because a negligence standard was being combined with the subjective standards of intention and recklessness.⁶⁰ This is said to be problematic as it would cause confusion amongst juries and make it difficult for judges to give clear instructions because an objective standard is not consistent with the criminal principle of *mens rea*.⁶¹

Proponents of the objective test, however, assert that it will still be necessary to prove what the accused knew, and rather than removing *mens rea* the new provisions merely change the test to be applied, so that the accused's belief has to be reasonable according to objective standards.⁶² This implies that the more likely interpretation of s61HA(3)(c) is that it inadvertently captures reckless indifference but alters the test that establishes this state of mind. The consequence of this interpretation is that the legal standard of reckless indifference is now redundant.

If s61HA(3)(c) encompasses fact situations where reckless indifference would arise, that is where the accused failed to advert to the possibility of non-consent, then it is illogical that the accused could have also taken reasonable steps to ascertain consent. For example, under the *Morgan* defence the accused would have contended that they did not turn their mind to the possibility of non-consent because they honestly believed that B was consenting. This belief did not have to be reasonable, but now it does. Under the new law the prosecution would contend that the accused could not have honestly held that belief because there were no reasonable grounds, including steps taken to ascertain consent, on which the accused could have formed that belief; therefore the belief was unreasonable.

This would mean, that the prosecution does not initially have to prove that the accused was inadvertent, what is now required is only for the prosecution to prove that the accused had no reasonable grounds for believing that B consented. To this effect the policy of the law is clear; it is no longer acceptable for a person not to have turned their mind to the issue of consent. There must be objectively reasonable grounds on which the person's belief in consent is formed; ergo they must take positive steps to ascertain consent. This leaves us with the situation where a provision states two subjective states of mind and one objective. Two questions arise, firstly why have subjective tests at all and secondly does s61HA(3)(c) create a negligence standard?

The former question highlights the discrepancy between distinguishing subjective states of mind and objective fault when the same maximum penalty, and therefore culpability, attaches to each. For example, both intention and recklessness require proof beyond

Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007 *Agreement in Principle*, 14 November 2007 at 4175.

⁶⁰ Mr Greg Smith, NSW Legislative Assembly, Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007 *Agreement in Principle*, 14 November 2007 at 4175-4176.

⁶¹ See Hon. John Ajaka, NSW Legislative Council, Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007 *Second Reading*, 13 November 2007 at 3882; Mr Greg Smith, NSW Legislative Assembly, Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007 *Agreement in Principle*, 14 November 2007 at 4176.

⁶² See John Hatzistergos, NSW Legislative Council, Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007 *Second Reading*, 13 November 2007 at 3907.

reasonable doubt that the accused knew or knew there was a possibility B was not consenting. In the absence of a confession, the evidence presented and the resulting inferences drawn from it are much more difficult for the prosecution to establish in relation to a state of mind, as opposed to a jury objectively assessing the circumstances to determine whether the accused took reasonable care (assuming a negligence standard applies). In the absence of a confession wouldn't the prosecution go for the easiest element to prove? Does this not render subjective fault obsolete?

We suspect that many people would have no objection to making the prosecution's job easier when it came to convicting a person who had acted intentionally or recklessly. But what is alarming here, is that a person who believes there was consent but who took just less than the reasonable care of a circumspect reasonable person, will be just as culpable as the person who intended to have non-consensual intercourse. The government has offered no clear explanation as to why the provision was constructed in these terms. The obvious solution, as Stephen Odgers has suggested, is to create two separate offences which reflect the varying levels of culpability.⁶³ The latter question, of whether s61HA(3)(c) creates a negligence standard, however, requires closer examination.

Reasonable Grounds

Section 61HA(3)(c) contains the objective standard of "no reasonable grounds for believing" as an element of the *mens rea* of sexual assault. There are two similar provisions in this respect, the closest being that of New Zealand as "no reasonable grounds" must be established and the next is the UK where "no reasonable belief" must be established having regard to all the circumstances including steps taken to ascertain consent, as elements of the offence.

The Taskforce considered arguments both for and against introducing an objective fault element and in doing so considered the law in other Australian jurisdictions and those of Canada and the UK. The Taskforce acknowledged one of the most persuasive arguments against introducing an objective fault standard was how it should be formulated.⁶⁴ That is, should the accused's conduct be examined by reference to a hypothetical reasonable person or by reference to what would be reasonable for a person with the accused's attributes?⁶⁵ It is somewhat curious that the interpretation of the objective test in New Zealand was not examined for its effects on these questions. The statutory language in the New Zealand provision is closely aligned to s61HA(3) in relation to "reasonable grounds", and the courts in New Zealand have favoured the application of the reasonable person test, thus creating a negligence standard.

The New Zealand provision on 'Sexual Violation' states:

Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis, -

⁶³ Criminal Justice Sexual Offences Taskforce, n 4 at 50.

⁶⁴ Criminal Justice Sexual Offences Taskforce, n 4 at 46.

⁶⁵ Criminal Justice Sexual Offences Taskforce, n 4 at 46.

- (a) without person B's consent to the connection; and
- (b) without believing on reasonable grounds that person B consents to the connection.⁶⁶

Again, the purpose of this amendment was to displace the effect of *Morgan* under which an honest but unreasonable belief in consent was a defence to rape.⁶⁷ Further to that, the determination of whether a person has a reasonable belief (note however the section states reasonable grounds) is determined by either a subjective or objective assessment based on the facts. The objective assessment involves an assessment of the accused's behaviour against that of a "reasonable person".

In *R v Mustafa Can*⁶⁸ the New Zealand Court of Appeal (NZCA) examined the trial judge's direction to the jury on reasonable belief stating the two ways in which the Crown could prove it. Firstly, that the accused did not in fact believe B was consenting, or secondly that "no reasonable person, in the accused's shoes, could have thought she was consenting."⁶⁹ This direction originated in the case of *R v Gutuama*⁷⁰ and the NZCA confirmed that this was a "model direction" and was "entirely orthodox."⁷¹

On appeal counsel for the accused submitted that the *Gutuama* direction was wrong because the legislative test under s128 required an analysis of what the accused actually thought and whether the grounds giving rise to the belief were reasonable.⁷² He further submitted that the current interpretation of the test being based on the reasonable person "shifts the focus from the reasonableness of the grounds to the reasonableness of the belief itself."⁷³ The NZCA recognised that the alternate formulation of the test may be more favourable for an accused to rely on personal characteristics, but they ultimately rejected the submission for "pragmatic reasons".⁷⁴

While the NZCA was concerned that it would be easy for a judge summing up to reverse the onus of proof and ignore the standard of proof, it held that the *Gutuama* direction provided a "simple form of words which addressed the requirement for the Crown to disprove an erroneous honest but reasonable belief in consent".⁷⁵ The court also stated that an approach focusing on the actual thought processes of the accused would be likely less favourable for the accused "because the jury will struggle to form a view as to the reasonableness of an erroneous belief in consent where the defendant has not expressly asserted having such a belief and advanced reasons for it."⁷⁶ And finally, the Court stated that "in the vast majority of cases" there would be "no practical difference" between the

⁶⁶ *Crimes Act 1961* (NZ), s 128(2).

⁶⁷ *R v Mustafa Can* [2007] NZCA 291 at [35].

⁶⁸ *R v Mustafa Can* [2007] NZCA 291.

⁶⁹ *R v Mustafa Can* [2007] NZCA 291 at [36].

⁷⁰ *R v Gutuama* CA275/01 13 December 2001 (*Gutuama*).

⁷¹ *R v Mustafa Can* [2007] NZCA 291 at [36].

⁷² *R v Mustafa Can* [2007] NZCA 291 at [37]. Mr Carruthers contended that the direction was an "impermissible truncating" of the actual legislative test.

⁷³ *R v Mustafa Can* [2007] NZCA 291 at [43].

⁷⁴ *R v Mustafa Can* [2007] NZCA 291 at [36]-[47].

⁷⁵ *R v Mustafa Can* [2007] NZCA 291 at [48].

⁷⁶ *R v Mustafa Can* [2007] NZCA 291 at [48].

Gutuama reasonable person direction “and one which adheres more closely to the relevant statutory language.”⁷⁷

With respect, we think there is a very significant practical difference between applying a reasonable person test as opposed to one which focuses on the subjective state of mind of the accused. The reasonable person test does not focus on what the accused actually thought and the capacity of the accused is accordingly not relevant in their assessment of the circumstances leading to the belief. It thereby, quite clearly, creates a negligence standard in the *mens rea* of sexual assault. As mentioned earlier, proponents of the objective test assert that it does not remove *mens rea* but only changes the test to be applied. Such proponents have arrived at this conclusion, however, because of their focus on the language of reasonable belief and not reasonable grounds. This may seem a mere matter of semantics but as the New Zealand example illustrates, the choice of language and the shifting focus between ‘grounds’ and ‘belief’ has important implications.

In light of this we contend that the statutory language should be given its effect, and that the reasonable grounds standard should focus on the subjective belief of the accused, and whether the grounds giving rise to that belief were reasonable in the circumstances. This contention is further supported by the additional requirement in s61HA(3)(d) which requires that in determining whether the accused had reasonable grounds that all the circumstances be considered including steps taken to ascertain consent.

All the Circumstances Including Steps Taken To Ascertain Consent

Some guidance as to how these new provisions might be interpreted can be gained by reference to the UK reforms. Section 1(1) of the *Sexual Offences Act 2003* (UK) states that rape is committed if A intentionally penetrates another person where the other person does not consent, and A does not reasonably believe that the other person consents. This is a significant shift from previous law because both knowledge and recklessness as to consent have been removed. Further, whether a belief is reasonable is determined having regard to all the circumstances, including steps taken by A to ascertain whether the other person consents.⁷⁸ For our purposes we are not concerned with ‘reasonable belief’ as this is not the test under s61HA(3). Rather, it is the scope of what constitutes ‘all the circumstances’ that is of interest particularly in relation to the purported policy of the law.

Initially, the UK proposed reasonable belief test was to turn on whether the accused had acted as a reasonable person would, but concerns were raised about an accused being

⁷⁷ *R v Mustafa Can* [2007] NZCA 291 at [49]. The court supported this statement with 3 reasons (a) in most cases the primary contests will be over whether B consented with secondary reliance being placed on s128(2)(b) and 3(b); (b) even if those sections are relied on it will be a comparatively rare case where A has a particular characteristic which could be relevant to the reasonableness of the belief; and (c) the current direction focuses on what a reasonable person in A’s position would have believed and this leaves some scope to argue the relevance of personal characteristics.

⁷⁸ *Sexual Offences Act 2003* (UK), s 1(2).

judged by standards they could not attain (e.g. a person with a learning disability).⁷⁹ The Bill was then amended to discard the “reasonable person” for the general test of “reasonable in the circumstances” which focuses on the accused’s belief and allows characteristics of the accused to be taken into account.⁸⁰ Recently, however, concern has been expressed over what “all the circumstances” will encompass. Temkin and Ashworth contend that:

a broad reference to “all the circumstances” is an invitation to the jury to scrutinize the complainant’s behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent. In this respect the Act contains no real challenge to society’s norms and stereotypes about either the relationship between men and women or other sexual situations, and leaves open the possibility that those stereotypes will determine assessments of reasonableness.⁸¹

In taking a literal view of the words in “all the circumstances” Temkin and Ashworth are concerned that, even if the circumstances are confined to the time consent is being ascertained, an accused’s “culturally engendered belief(s)” may be considered reasonable.⁸² Thus Temkin and Ashworth contend that the UK reforms may not achieve their objectives and they may not impose a greater duty on the accused as the law previously.

Interestingly, under the proposed section 61R(3)(b) of the Consultation Bill the issue of culturally engendered beliefs was addressed by excluding “personal opinions, values and general social and educational development” from the consideration of the accused’s formation of a reasonable belief in “all the circumstances”. In the Act that subsection has been omitted and replaced by the s61HA(3)(e), which excludes self-induced intoxication from being considered as part of the circumstances leading to the accused’s belief.⁸³ Further, it is a curious omission because the provision in the Consultation Bill would have fulfilled the purported policy of the law in regards to challenging society’s norms and stereotypes about sexual relations, thus avoiding the problems that Temkin and Ashworth envisage.

CONCLUSION

The purpose of this article was to assess the very recent amendments to the sexual assault provisions in the *Crimes Act 1900*.⁸⁴ While there are as yet no NSW cases to consider, some guidance can be obtained from the operations of similar legislative provisions in other Australian and overseas jurisdictions. As to the broader objectives of the amendments, such as increased reporting and increased rates of conviction, there is little

⁷⁹ Temkin J, Ashworth A, “The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent” (2004) Crim LR, 328 at 340.

⁸⁰ Temkin and Ashworth, n 79 at 341.

⁸¹ Temkin and Ashworth, n 79 at 342.

⁸² Temkin and Ashworth, n 79 at 342.

⁸³ This is unnecessary because self-induced intoxication cannot be taken into account in determining *mens rea* for sexual assault pursuant to s 428D *Crimes Act 1900* (NSW).

⁸⁴ *Crimes Amendment (Consent – Sexual Assault) Act 2007* (NSW).

that can be said at this stage. Having said this, the current situation in the UK does not bode well for improvement in these rates. This can be compared, however, with Canada where the picture appears somewhat more positive.⁸⁵

It is evident that the amendments are significant both from a conduct/*actus reus* and fault/*mens rea* perspective. In terms of the conduct element for the offence of sexual assault in New South Wales, there is now a statutory definition combined with a non-exhaustive list of circumstances whereby consent given by a victim will or may be negated depending on those circumstances. The statutory definition requires that a person must *freely and voluntarily agree* to sexual intercourse.⁸⁶ This is very general and concerns about such generality were raised in both the Taskforce Report and Discussion Paper. Whether such generality will lead to future problems remains to be seen. In terms of positive outcomes elsewhere, the Discussion Paper noted:

It was also submitted that the adoption of a definition of consent in other jurisdictions, such as Canada, has had a positive impact, in that acquiescence is far less likely to be transformed into consent.⁸⁷

The new definition under s61HA(2) is, however, different to the Canadian where consent is defined as “*the voluntary agreement of the complainant to engage in the sexual activity in question.*”⁸⁸ Whether s61HA(2) is too general and a more detailed definition is necessary is a difficult question to answer, although the suggestions of those initially opposed to the definition are noted. In addition, the generality of the definition may not be of great practical significance in that s61HA (2) will likely be often considered together with the circumstances where consent will or may be negated.⁸⁹ The English case of *Bree*, however, does highlight possible dangers of jury directions based on a general definition.

As noted, the most controversial amendments, both from a political and legal perspective are those contained in s61HA(6). This section provides for circumstances where consent may be negated and includes a victim being intoxicated, non-violent threats and abuse of a position of authority or trust. The non-violent threat circumstance replaces the now repealed lesser offence under s65A,⁹⁰ while intoxication and abuse of position are new additions in line with statutory provisions elsewhere.

⁸⁵ See Criminal Law Review Division , n 5 at 31:

“Women’s Legal Services and Associate Professor Stubbs favoured the Canadian approach, called a quasi-objective approach, on the basis that it is a balanced approach and empirical evidence suggests that it has been effective.”

There is no reference however, for such empirical evidence and to date, the authors have not been able to access it.

⁸⁶ *Crimes Act 1900* (NSW), s 61HA(2).

⁸⁷ Criminal Law Review Division , n 5 at 10.

⁸⁸ Criminal Code (Can), s 273.1(1).

⁸⁹ *Crimes Act 1900* (NSW), s 61HA(4), (5) and (6).

⁹⁰ Previously a maximum of 5 years.

Of these, the voluntary intoxication of the victim has caused the most criticism, framed around the scenario of the intoxicated young female having sexual intercourse with the intoxicated young male. Once again, *Bree* provides a somewhat stark example of how this could go wrong and the resulting, devastating consequences for an individual who is charged with rape, convicted at trial but then acquitted on appeal.

All cases which involve the determination of lack of consent as a real issue will inevitably also involve a defence contention of honest but mistaken belief once the prosecution establishes non-consent. As such, the amendments in relation to *mens rea* are significant and troubling in respect to the addition of an objective fault element in the one provision. The effect of abolishing *Morgan* has made the *mens rea* element of reckless indifference or “couldn’t care less” redundant, and significantly confined the availability of the honest and mistaken belief in consent defence. In this respect the purported policy of the law to place a positive onus on people to ascertain consent is clear.

However, introducing an objective element into this area of law may give rise to issues in respect of culpability that may require further consideration as to whether objective fault is more suited to a separate offence. The issue arises because a person who holds an honest belief in consent, but who has not taken reasonable steps to ascertain consent, is liable to the same punishment as a person who has committed sexual assault intentionally or recklessly. The degree of an offender’s culpability could be taken into account at the sentencing stage but this would require a judge to undertake the task of ascertaining the basis on which the jury convicted the offender; something which is not always evident.

In his submission to the Sexual Assault Taskforce, Stephen Odgers SC contended that a person in that situation has less moral culpability and therefore should be subject to a lesser penalty, suggesting that a new offence be created to reflect this.⁹¹ This proposal was never rejected outright and both the Taskforce Report and the subsequent Discussion Paper postponed consideration until an unknown future date. This is in fact an issue which requires serious and immediate consideration. Although the government has undertaken to review the effectiveness of the reforms in four years time, we contend that this will be too late for people who have been penalized for negligent sexual assault. The government should amend s61HA and create a new offence with a lesser penalty which more fairly reflects the culpability of the alleged offender.

This is particularly important because the government has given no indication of how the review of the reforms will be undertaken and what evidence they will rely on to ascertain the effectiveness or otherwise of the new laws. For example, Temkin and Ashworth’s concern that the changes to the law will do little to alter culturally engendered beliefs, appear to be valid in light of recent reports that the UK government is considering a proposal for juries in rape trials to be issued “myth-busting” packs, or for trial judges to give the information in a direction.⁹² Despite the substantive changes to the law in the UK, in order to boost conviction rates and counter myths, it appears that there is a

⁹¹ Criminal Justice Sexual Offences Taskforce, n 4 at 50.

⁹² Gibb F, “Juries to be warned of rape victim ‘myth’” *The Times Online*, 26 November 2007, <http://business.timesonline.co.uk/tol/business/law/article2943263> (27/11/07).

perception that these problems are still ongoing. The perception in the UK that the policy of the law is not being fulfilled and that conviction rates are still too low, has also been criticized as being another myth propagated by politicians who misinterpret conviction rate statistics.⁹³ The result of this being that the important issue of low reporting rates is obscured.⁹⁴

Given these issues, it is vital that the government consider amending s61HA to create a separate offence for negligent sexual assault and formulate clear and appropriate guidelines for reviewing the effectiveness of these reforms. This should include an assurance, that if the substantive changes to law are not operating to meet the purported objectives, that the government will act on that review and develop alternative strategies.

⁹³ Cavendish C, "Justice? No, a violation of common sense" *The Times Online*, 29 November 2007, http://www.timesonline.co.uk/tol/comment/columnists/camilla_cavendish/article/29633 (4/12/07).

⁹⁴ Cavendish C, n 93.