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Justice Response to Sexual Violence: Issues paper 49

We write this submission in our capacity as academics **and scholars** at the Faculty of Law, University of Technology Sydney. We welcome the opportunity to submit to the inquiry of how the justice system responds to sexual violence. In this submission we focus on the outcomes of the sexual assault offences set out in s 61HA(3) of the *Crimes Act 1900* (NSW), to explore judicial response to sexual violence as example of the criminal justice system.

Yours sincerely

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We acknowledge the traditional Owners of Country and the Holders of Knowledge for this place, the Gadigal people of the Eora Nation, upon whose lands and waters we work, and extend our respect to their Elders past, present and emerging.

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Introduction

Successive New South Wales governments have developed an increasingly strong response to sexual violence over recent decades commenced some 40 years ago with the *Crimes (Sexual Assault) Amendment Act 1981* (NSW). Creating the offence of sexual intercourse without consent was legislated in the *Crimes Act 1900* (NSW) in 1991. In 2002 the maximum penalties were increased and in 2003 the age of consent standardised.

In 2006, the Criminal Justice Sexual Offences Taskforce, comprising wide community representation, issued a Report recommending statutory reforms to the *Crimes Act* 1900 that included:

1. Creation of a statutory definition of "consent" as being a free and voluntary agreement to sexual intercourse.
2. Provision and expansion of the circumstances when consent to sexual intercourse is vitiated.
3. Expand the element of knowledge of consent.

In response to public concern further changes ensued with The *Crimes Legislation Amendment Act* 2014 that amended s 61HA to cover the offence of 'mistaken belief' that consent was given.[1] In 2018 new amendments clarified the laws position on child sexual abuse with a new s 61HA that defined sexual intercourse, expanding the definition of consent to 'sexual activity' through a raft of sections in the *Crimes Act 1900.*

In order to assess the multiple legislative changes made to 'enhance the delivery of justice to victims of sexual violence' the NSW Bureau of Crime Statistics and Research (BOCSAR) undertook an analysis of transcripts of sexual offence trials finalised by the NSW District Court

[1] Sexual Assault Trials Handbook, *Judicial Commission of New South Wales*, (Update) April 2024.

during 2014 to 2020 BOCSAR reported[2] that while legislative reforms were 'operating as intended,' while in-court practices continued to contribute to negative experiences and outcomes for victims/complainants. It identified questioning by all parties around complainant conduct including the use of rape 'myths', particularly during questioning and cross-examination, continued to operate. Contrary to the recent reforms, less attention was attributed to the accused's knowledge that consent was given or refused by the complainant.

The BOCSAR study was completed prior to the most recent legislative reforms of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* which commenced June 1st 2022, hence this submission reviews the most recent legislative amendments to explore the impact of changes to consent laws in the NSW criminal justice process.

In order to address the issue of the justice system's response to sexual violence, we divide our submission into the following parts. First, we provide a background to the debate of 'consent' including amendments to sexual offences in the *Crimes Act 1900* (NSW) which commenced on 1 June 2022. Second, we review statutory developments in NSW, followed by a review of outcomes of the current criminal justice system in regard to the incidence of reporting, findings from recent sentencing cases, and the implications of the reforms for First Nations women in NSW. Third, we consider whether other jurisdictions in Australia might provide preferrable approaches. Finally, we suggest recommendations for the committees' consideration. Our submission offers insights into current statues across jurisdictions with a focus on statutory 'consent'. We draw attention to the committee that the majority of victims, including First Nations women, will not be affected by legislative changes unless more suitable pathways for disclosure are implemented.

[2] Julia Quilter and Luke McNamara, 'Experience of complainants of Adult Sexual Offences in the district Court of NSW: A Trial Transcript Analysis,' (2023) Crime and Justice Bulletin No 259, *Sydney NSW Bureau of Crime Statistics and Research.*

Academic considerations to consent in changes to section 61HA *Crimes Act 1900* (NSW)

Affirmative consent is a term used to refer to a model of consent where people engaging in sexual activity are required to take active steps to establish that consent has been given. Various commentators have described it as a model which transitions from traditional 'no means no' understandings to 'only yes means yes'.[3]

Affirmative consent models mark a departure from traditional common law concepts of consent, which were male-imagined conceptions of consent. While several commentators have described affirmative consent as an unorthodox model and rightly so, it is no longer a radical proposition.[4] Affirmative consent models have been widely adopted by a number of different jurisdictions, including most Australian jurisdictions (Queensland, NSW, Tasmania, Victoria, ACT), several states of the United States (Wisconsin, Vermont, New Jersey) and Canada. In Australia, Western Australia and South Australia are likely soon to follow suit in introducing new affirmative consent laws.

The main justification for this departure from traditional understandings of consent is that the successful prosecution of sexual offences is often frustrated by the embracing of prejudicial stereotypes by jurors, judges and counsel.

Universally across multiple jurisdictions, a key change made to sexual assault laws is the inclusion of communicative and affirmative consent language. New provisions make it clear that consent must be communicated by words or actions, and instigators must take steps to affirm whether the other person is consenting. These have been legislated as a direct response to common situations where the Crown case is frustrated by citing evidence that the complainant did nothing to indicate non-consent (i.e. silence or lack of resistance).

[3] Jonathan Witmer-Rich, 'Unpacking Affirmative Consent: Not As Great as You Hope, Not As Bad as You Fear' (2016) 49(1) *Texas Tech Law Review* 57.
[4] Anna High, 'Comparing Affirmative Consent Models: Confusion, Substance and Symbolism' (2024) 45(4) *Sydney Law Review* 52.

In addition, new provisions also make it clear it is not possible for defendants to assert their belief that the other person was consenting is reasonable unless they can produce evidence that they took steps - either by words and/or actions - to ascertain that consent. The provisions also make it clear that consent to sexual intercourse involves mutual and ongoing communication.

Statutory developments in New South Wales

The NSW Attorney General in the second reading of the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021*, the Honourable Mr Mark Speakman, laid out the purpose of the legislative changes was to "make consent law easier to follow and ensure more effective prosecutions." He added that the reforms would be accompanied by "extensive community education" and were aimed at "not just… holding perpetrators to account but changing social behaviour." The reforms were explicitly noted by lawmakers with the key purpose to clarify, simplify, and modernise consent legislation in NSW.

The Crimes Legislation Amendment (Sexual Consent Reforms) Act brought two particularly important changes to the criminal law. First, the law explicitly states that consent must always be communicated affirmatively. Passivity or a lack of resistance does not legitimate one to form a belief of consent, in situations where 'the person does not say or do anything to communicate consent'.

Second, the type of argument made in *Lazarus* cases is now precluded.[5] It is not possible for an accused to argue that turning their mind to the issue of consent amounts to taking steps to ascertain consent. Section 61HK(2) *Crimes Act* precludes a 'belief in consent' is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.

[5] *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (unrep, 4/5/17, NSWDC); *R v Lazarus* [2017] NSWCCA 279.

Whilst the passing of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* in 2022 made it clear that NSW was to adopt an affirmative consent model in its sexual assault offences, scholars have argued NSW has had a 'partial' approach to affirmative consent prior to its 2022 amendments.[6]

Prior to 2022, the *Crimes Act 1900 (NSW)* included a non-exhaustive list of factors which would render consent not freely and voluntarily given. The accused's failure to take steps to ascertain consent was a factor which would influence whether a mistaken belief in consent would be reasonable or not. While the existence of a 'failure to take steps' consideration suggests a 'partial' approach to affirmative consent predates 2022, High argues that the framing of the consideration makes it still possible for consent to be inferred, at least in some circumstances, from passivity and context.[7] High argues that the 'failure to take steps' provision was weakened, in terms of its ability to promote communication, by the finding in *Lazarus* that a defendant can be considered as having 'taken steps' to ascertain consent merely by observing the complainant's conduct and forming a belief that she is consenting.[8] In essence, it is a reinforcement of the notion that a lack of resistance legitimately gives rise to a belief of consent.

Interpreting outcomes since 2022

Reporting the experience of sexual violence

Despite the various reforms of sexual violence legislation across Australia, an unfortunate fact remains in the persistence of a lack of reporting. A survey by the Australian Bureau of Statistics, (ABS), 2013, reported that less than 17% of women who experience sexual violence that constitutes a criminal offence, do not contact police.[9] Over the period of 2020-21 ABS found that only 8.3% of women who had experienced sexual violence by a male reported their most recent experience of sexual assault to police.

[6] Anna High, 'Comparing Affirmative Consent Models: Confusion, Substance and Symbolism' (2024) 45(4) *Sydney Law Review* 52.
[7] Ibid.
[8] Ibid.
[9] Personal Safety Survey 2012, *Australian Bureau of Statics* 2013.

Non-reporting in the Indigenous community has reached critical levels. In New South Wales Aboriginal women are over six times more likely to be a victim of intimate partner sexual violence compared to non-Aboriginal women.[10] In 2017 researchers found 90% of Aboriginal women decided not to report intimate partner sexual victimization.[11] While reasons relating to cultural influences, systemic racism,[12] deprivation and disadvantage are well documented, 'reporting pathways' for this sector of the NSW community are inadequate or have not been addressed. Clearly the judicial system is failing this minority group

Failure of victims to report is acknowledged in the Issues Paper at [23], which details a raft of reasons for non-reporting of incidents of sexual violence. Two broad reasons can account for this. The first pertains to personal reasons held by victims, the second is a lack of trust in police as gate keeps of the justice process.

It is the opinion of this submission that an alternative pathway be provided to by-pass the role of the police as first contact. Establishing safehouses for Indigenous and non-Indigenous women, especially mothers, where they can find refuge and be provided with professional, culturally sensitive information, advice and support in reporting the offence to police if they choose to do so.

Examination of the Trends Following Reform in NSW

To understand the impact of the legislative reforms on justice responses to sexual violence we undertook a brief review of appeal cases. An argument can be made that the courts have applied the general intention of the reforms even though sexual assaults have increased 30% in the five years to September 2023 (BOCSAR).

[10] Maria Guggisberg, Aboriginal Women's Experience with Intimate Partner Sexual Violence and The Dangerous Lives They Live as a Result of Victimization, (2019) 28(2) *Journal of Aggression, Maltreatment and Trauma,*186, 188.

[11] K. Prentice, B. Blair, and C. O'Malley (2017) Sexual and family violence: Overcoming barriers to service access for Aboriginal and Torres Strait Islander clients. *Australian Social Work,* 70. 241

[12] Emma Buston-Naminsky, Domestic Violence Policing of First Nations Women in Australia: 'Settler Frameworks, Consequential Harms and the Promise of Meaningful Self-Determination, (2022) 62, *The British Journal of Criminology*, 1323.

The impacts can be seen in judicial consideration of the complainant. In the case of *R v Packer* [2023] NSWCCA 87, the NSW Court of Criminal Appeal upheld the Crown appeal that the trial judge had given an inadequate sentence as it did not take into account the significant emotional harm suffered by the victim as an aggravating factor pursuant to s 21A(2)(g) *Crimes Act*. The Appeal Court increased the sentence by four years, with Davies J commenting that the "extent of the physical and emotional abuse" of the victim meant that the accused's "overall criminality is at a high level." This highlighting of the impact on the victim by the Court of Appeal, and subsequent resentencing, is a welcome consideration which accords with the intention of the NSW Parliament insofar as encouraging the justice system in support of victims, reflecting the community's desire for more effective legislation.

In the recent case of *Kramer v R* [2023] NSWCCA 152, the Crown appealed the inadequacy of the sentence. Davies J held that the sentence as "manifestly inadequate," in part due to the lack of remorse by the offender including failing to enter a guilty plea, at [213].

The court dismissed the appeal in *Melville v R* [2023] NSWCCA 284 with Leeming JA rejected the offender's claim that his evidence supported an inference of significant personal distress and professional disadvantage. His Honour at [42] the "harrowing accounts of the pain and trauma of the abuse" perpetrated by the offender and the "life-long damage that the abuse has occasioned."

In *Pender v Rex* [2023] NSWCCA 291, the Court of Criminal Appeal engaged the *Bugmy* principles[13] in determining the trial judge's sentence of 6 years imprisonment was not excessive. His honour at [43] declared that the retribution for such a crime must lead to the victim's dignity being "vindicated." Along similar lines, the Court of Criminal Appeal also dismissed an offender's appeal in *Stein v R* [2023] NSWCCA 324, which was made on the basis that the trial judge at given undue weight to the harm suffered by the victim. The Court of Appeal held that at trial, Her Honour's discussion of the "devastating" impact on the victim to the jury was right and proper and did not generate any grounds for appeal. On appeal, Wilson J noted that:

[13] *Bugmy v The Queen* [2013] HCA 37-249 CLR 571; *Bugmy Bar Book* https://bugmybarbook.org.au

> Devastating harm to the victim of sexual offending is exactly what might be expected to be occasioned by the commission of an offence of sexual assault. That is one reason the legislature has seen fit to penalise such offending with a maximum term of 14 years imprisonment and a SNPP of 7 years. Sexual crimes are of their very nature serious and do great harm. There could be no error in her Honour acknowledging that harm [93].

These decisions indicate a positive position held by the courts on the impact of sexual violence on complainants/victims. They highlight increasing consideration of community expectation that sentencing processes recognise the unique trauma and harm suffered by the victims of sexual violence.

Australian jurisdictional alternatives

The Tasmanian Response

Tasmania was the first state to implement an affirmative consent model in 2004. The changes made to the Tasmanian Criminal Code were at the time considered to be 'amongst the most progressive in the common law world.' In the amending Bill's second reading speech, the intention to insert 'notions of mutuality and reciprocity into the concept of consent' was explicitly noted by lawmakers, as reflected in the key amendments which would later be implemented.

Some of the main amendments include:

1. The insertion of a statutory definition of consent in s 2A of the Tasmanian Criminal Code. Consent was now defined as 'free agreement', with the list of circumstances where there is no consent also further expanded. This includes when the complainant:

   (a) does not say or do anything to communicate consent; or
   (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or

(c) agrees or submits because of a threat of any kind against him or her or against another person; or

(d) agrees or submits because he or she or another person is unlawfully detained; or

(e) agrees or submits because he or she is overborne by the nature or position of another person; or

(f) agrees or submits because of the fraud of the accused; or

(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or

(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or

(i) is unable to understand the nature of the act.

2. The insertion of additional constraints on the availability of the defence of mistaken belief in consent in s 14A. The expanded list of constraints on the availability of the defence included when the accused:

3.

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

We believe the Tasmanian approach, in particular Tasmania's decision to require the accused to identify actions they took to ensure they had consent, is desirable and was rightfully used as a model for other Australian states and territories to implement their own models of affirmative consent. It requires the instigator to be more proactive in ascertaining consent, and this is crucial considering the well-known difficulties which have existed in attributing criminal fault to sexual assault offenders.

The Victorian Response

Similar to NSW, Victoria has passed amendments in 2022 which became law in July 2023 and have been described as an adoption of affirmative consent. The Victorian approach is similar to NSW's in how the Victorian 'reasonable belief' provision also now specifies that a person's belief in another's consent is not reasonable if the accused did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.

Prior to these changes, Victoria has also been described as having a 'partial' approach to affirmative consent, with the definition of consent in 2016 amended to provide that a person does not consent where 'the person does not say or do anything to indicate consent'. Similar to NSW's 'partial' approach to affirmative consent, the Victorian definition of consent would suggest that consent formed in response to a complainant's silence/passivity would be illegitimate.

High argues that, like NSW, the Victorian statutory principle is not reflected in the common law - with cases suggesting that a belief in consent can still be reasonably formed even in cases where the belief in consent is grounded on a lack of resistance or silence. Further, the lack of an obligation to take active steps to ascertain consent in order for a belief to be deemed reasonable also contributes to the issue.

The Queensland Response

As of May 2024, Queensland is the latest jurisdiction in Australia to pass affirmative laws through the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (Qld). In the Queensland Criminal Code, the definition of consent is defined in s 348 as "consent freely and voluntarily given by a person with the cognitive capacity to give the consent." This is accompanied by a non-exhaustive list of factors which outlined the situations where consent had not been given.

Whilst scholars have described the Queensland definition as 'comprehensive' and 'progressive', most of the criticisms of Queensland's sexual assault laws have stemmed around the 'mistake of

fact' defence found in s 24(1) of the Queensland Criminal Code. S 24(1) of the Queensland Criminal Code reads "a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist." When applied in sexual assault cases, the provision has been argued to allow defendants to benefit from old attitudes and rape myths, and has been criticised as vague, overly broad and 'biased in favour of the defendant.'

Duffy argues that this undermines 'free and voluntary' elements of the definition of consent. Whilst prima facie, consent cannot be established by pointing to the complainant's behaviour, level of intoxication, or lack of physical resistance, Duffy argues all these factors have been used to benefit defendants who say theirs is a 'mistake of fact' situation.

The new affirmative consent laws in Queensland now clarify in s 348(3) that 'a person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.' The mistake of fact excuse for sexual assault is also limited, with s 348A(2) reading 'regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.'

The changes made to the Queensland Criminal Code suggest Queensland has made changes to its sexual assault laws which are in line with the other jurisdictions in Australia which have adopted affirmative consent models. However, our reading of the Queensland legislation is that the Queensland model remains conservative when compared to Tasmania, Victoria and NSW - particularly in s 348A(2) use of the phrase 'regard may be had'. In our opinion, this does not sufficiently stress the importance of having the accused take steps to ascertain consent before initiating sexual intercourse.

Conclusions and recommendations

We support the suggestions in the Issues Paper that the needs of victims/complainants should include:

- 'the ability to report their experience in a safe space and obtain reliable information about available supports and options;
- 'having an informed choice as to whether or not to participate in the criminal justice system, including reporting to the police, giving evidence if charges are laid, having contact with the prosecution, and going to court; and
- 'the ability to make an informed decision regarding the options available instead of, or in addition to, the option of participating in the criminal justice system.'

We concur with the purpose of the ALRC to harmonise laws of sexual violence, however, we draw to the attention of the committee that any changes, however significant, will effect only a minority of Australian women, the majority of victims remain excluded due to non-reporting of sexual violence offences.

Recommendations:

1. It is the opinion of this submission that alternative pathways for reporting sexual violence be urgently addressed by establishing safehouses, where women, especially mothers, can find refuge, gain information, advice and support about reporting to the police, if they choose to do so.

2. We recommend as a priority establishing well-resourced, culturally sensitive safehouses for First Nations woman in regional and remote locations providing effective justice responses to this group who are disproportionately represented in sexual violence statistics.

3. We believe the Tasmanian approach, in particular Tasmania's decision to require the accused to identify actions they took to ensure they had consent, is desirable and should be used as a model for other Australian states and territories to implement their own models of affirmative consent.
