

15 March 2023

Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

Dear Committee Secretary,

**UNSW LAW SOCIETY SUBMISSION REGARDING CURRENT AND PROPOSED
SEXUAL CONSENT LAWS IN AUSTRALIA**

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The enclosed submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours faithfully,

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Acknowledgements

We acknowledge the support of the following individuals who made this submission possible.

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I INTRODUCTION

The definition of sexual intercourse is defined by statute in all jurisdictions other than the ACT, as is the definition of consent.¹ Definitions of consent vary by state, but all jurisdictions broadly define it as a ‘free and voluntary agreement’ (Northern Territory, New South Wales, Queensland, South Australia, Western Australia),² or ‘free agreement’ (Tasmania, Victoria).³ The only exception is the Australian Capital Territory, which does not define consent but circumstances where consent can be deemed negated.⁴ That consent is to be freely and voluntarily given means that where consent is obtained by force, intimidation, false representations, or exercise of authority, consent is vitiated. This applies consistently across all Australian jurisdictions.

The models of sexual consent laws in Australian jurisdictions are guided by the ‘communicative’ and ‘affirmative’ models.⁵ These models require consent to be positively provided in all sexual encounters and sought of one’s partner. Instead of placing the onus on the victim to have said no and indicated their dissent, this places the burden on the other person to actively seek their positive consent in words or actions.

II FINDINGS OF LAW REFORM COMMISSIONS

Since 2020, the NSW, Queensland, Victorian, and WA Law Reform Commissions have all made findings on the effectiveness of current sexual consent laws, and have outlined recommendations

¹ Terry Goldsworthy, ‘Yes means yes: moving to a different model of consent for sexual interactions’, *The Conversation* (online, 30 January 2018)

<<https://theconversation.com/yes-means-yes-moving-to-a-different-model-of-consent-for-sexual-interactions-90630>>.

² *Criminal Code Act* (NT) s 67; *Crimes Act 1900* (NSW) s 61HA; *Criminal Code 1899* (Qld) s 348
Criminal Law Consolidation Act 1935 (SA) s 46; *Criminal Code 1913* (WA) s 319(2).

³ *Criminal Code Act 1924* (Tas) Sch 1; *Crimes Act 1858* (Vic) s 36.

⁴ *Crimes Act 1900* (ACT) s 67.

⁵ Rachael Burgin, ‘NSW adopts affirmative consent in sexual assault laws. What does this mean?’, *The Conversation* (online, 25 May 2021), <<https://theconversation.com/we-need-better-jury-directions-to-ensure-justice-is-done-104417>>.

for proposed sexual consent law reform. The acceptance of many of these recommendations into legislation, notably in the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) (‘*NSW Consent Laws*’)⁶ and the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) (‘*Victorian Consent Laws*’)⁷ has resulted in a substantial overhaul of sexual consent laws in some Australian jurisdictions. Inconsistencies remain across state and territory sexual consent laws despite a consensus preference for some variation of a communicative and affirmative model of consent which is advocated for in all of the NSW, Queensland, Victorian, and WA Law Reform Commission reviews.

A *The Consensus Preference for a Communicative and Affirmative Model for Sexual Consent Laws*

The NSW Law Reform Commission’s (NSWLRC) 2020 Report on *Consent in Relation to Sexual Offences*⁸ outlined the need for the then sexual consent laws, governed by the *Crimes Act 1900* (NSW)⁹, to operate on clear communicative principles which do not favour accused persons in instances of non-communication. This was deemed necessary to avoid cases where an absence of negative communication (i.e. no statement of “stop” or “no”) could give rise to ‘reasonable grounds for believing that the alleged victim consents to the sexual activity.’¹⁰ The NSWLRC Report thus submitted that sexual consent laws should ‘expressly recognise the principles that underpin the communicative model’ by making it clear in legislation that consent is *not* provided unless there is affirmative communication through words or actions.¹¹

⁶ *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

⁷ *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

⁸ New South Wales Law Reform Commission, *Consent in relation to sexual offences* (Report No. 148, September 2020) (‘NSWLRC Report’).

⁹ *Crimes Act 1900 (No 40) s 61HE*, as repealed by *Crimes Legislation Amendment (Sexual Consent Reform) Act 2021 (No 43)* (NSW) sch 1 item 9.

¹⁰ *Ibid* sub-ss (3)(c).

¹¹ New South Wales Law Reform Commission, ‘NSWLRC Report’ (n 8), 47 [4.10].

The Victorian Law Reform Commission's (VLRC) 2021 Report on *Improving the Justice System Response to Sexual Offences*¹² went further than the NSWLRC Report, by recommending that an affirmative model of consent is adopted in legislation which requires a person to 'take steps' to find out if consent is given.¹³

This is designed to prevent reliance on implied consent and victim resistance arguments by the accused, which continue to be raised in cases despite affirmative consent legislation. Burgin's analysis of Victorian rape transcripts indicates this is seen frequently, allowing the reasonableness of a belief in consent to be built exclusively on the accused's subjective perception of the victim's conduct.¹⁴

B *The 'Take Steps' Requirement*

Tasmanian affirmative consent laws, which have operated without issue for almost two decades, have positive steps requirements built into the legislation, requiring a person to 'take reasonable steps' to ascertain whether the complainant was consenting to the sexual act.¹⁵ The adoption of such an affirmative model would eliminate any subjectivity or judicial discretion when determining whether a person had 'reasonable grounds' for believing that consent had been communicated.

¹² Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (September 2021) ('VLRC Report').

¹³ *Ibid*, 305 [50].

¹⁴ Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *The British Journal of Criminology* 296; Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology & Criminal Justice* 334.

¹⁵ *Criminal Code Act 1924* (Tas) s 14A(1)(c).

Amendments to Victorian Consent Laws have been assented to and are due to commence in July 2023.¹⁶ The amendment will adopt the affirmative consent model into legislation, and will bring Victorian Consent Laws into line with existing law in Tasmania and New South Wales.

However, in NSW, while the NSWLRC Report found that 76% of survey respondents support an affirmative model, the Report did not explicitly recommend the adoption of an affirmative model in legislation due to concerns that such a standard would be ‘too prescriptive, unrealistic, impractical, or invasive.’¹⁷

In response to the NSWLRC Report, the NSW Consent Laws were amended in 2021 in acceptance of the recommended improvements to the communicative model. Although not recommended in the NSWLRC Report, the NSW Parliament adopted elements of the affirmative model by legislating that consent is *not* given in cases of non-communication, regardless of ‘reasonable belief.’¹⁸ This represents a significant tightening of NSW Consent Laws which now require affirmative communication.

C *Remaining Inconsistencies in Sexual Consent Laws*

Despite significant law reform in NSW and Victoria, some inconsistencies remain in other jurisdictions. The Queensland Law Reform Commission’s (QLRC) 2020 Report on *Review of Consent Laws and the Excuse of Mistake of Fact*¹⁹ discusses the need for sexual consent law reform in Queensland. Similarly to the NSWLRC Report, the QLRC Report recommends amending the Queensland Criminal Code to expressly provide that consent is *not* given in cases of

¹⁶ *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

¹⁷ New South Wales Law Reform Commission, ‘NSWLRC Report’ (n 8), 222 [E.23]—[E.24].

¹⁸ *Crimes Act 1900 (No 40)* (NSW) s 61HJ(1)(a).

¹⁹ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No. 78, June 2020) (‘QLRC Report’).

non-communication.²⁰ However, the QLRC Report recommends against the adoption of an affirmative model of consent which would require a clear ‘yes’ or an ‘agreement’ of consent.²¹

D *Reliance on Mistake of Fact Defence*

Additionally, the Queensland Criminal Code allows for a ‘mistake of fact’ defence, which allows an accused person to defend themselves on the basis that they were under a reasonable, but mistaken belief that consent was given.²² The QLRC Report did not recommend the removal of the ‘mistake of fact’ excuse from application to matters regarding sexual consent, and instead recommended that juries should be directed to consider ‘what steps the accused took to ensure the complainant consented.’²³

The mistake of fact defence is a defence relied upon by the accused to argue they honestly and reasonably believed the other person consented to sex even where they did not. While available in Queensland to rape defendants where the complainant does not resist the accused,²⁴ it is not available in any other jurisdictions in Australia.

Studies have shown that this defence is often used in cases where the victim experienced a freeze response to the rape or tried to placate the attacker,²⁵ as seen in the Lazarus case,²⁶ allowing them to argue the complainant’s lack of dissent was evidence of a reasonable belief in their consent.²⁷

Without restrictions, this defence can allow attackers to base the reasonableness of a belief in

²⁰ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No. 78, June 2020) (‘QLRC Report’) 138 [5-1].

²¹ *Ibid* 87 [5.53]—[5.55], *Ibid* 91 [5.72—5.77].

²² *Criminal Code Act 1899* (Qld) s 24.

²³ Queensland Law Reform Commission, ‘QLRC Report’ (n 19), 16 [2.29].

²⁴ *Criminal Code Act 1899* (Qld) s 24.

²⁵ Grace Galliano et al., ‘Victim reactions during rape/sexual assault: A preliminary study of the immobility response and its correlates’ (1993) 8(1) *Journal of Interpersonal Violence* 8(1) 109.

²⁶ *R v Lazarus* [2017] NSWCCA 279.

²⁷ Jonathan Crowe, ‘Queensland rape law ‘loophole’ could remain after review ignores concerns about rape myths and consent’, *The Conversation* (online, 4 August 2020).

consent exclusively on their own perception of the complainant's conduct, perpetuating regressive rape myths that suggest the complainant was "asking for sex".²⁸ Crowe and Lee recommend that the mistake of fact defence should therefore be limited so it cannot be used when the defendant is reckless or did nothing to find out whether the other person was consenting.²⁹

E *Summary of Recommendations of Reports*

The recommendations of the NSWLRC, VLRC, and QLRC all intend to best achieve just and equitable outcomes in cases where the provision of sexual consent is in question. The differences in law which now exist between NSW and Victoria's affirmative approach, and Queensland's communicative approach which allows for the 'mistake of fact' excuse, may have little to no implication on the outcome of cases, as both approaches intend to apply the law justly and on a case-by-case basis. However, the difference in legislative strictness between the affirmative approach of NSW and Victoria, and the communicative approach with significant latitude for judicial and juror discretion in Queensland, has the potential to facilitate incongruous outcomes in similar cases between jurisdictions.

III NATIONAL HARMONISATION THROUGH UNIFORM UNDERSTANDING

In Australia, national harmonisation should occur as there are still inconsistencies in understanding what constitutes sexual consent in Australia between different states. Firstly, the age of consent in most states is 16, except for South Australia and Tasmania, which is 17. Also, NSW, Tasmania and Victoria are adopting the affirmative consent model, whereby a person must indicate that they agree to proceed at the time of the act. However, Queensland's Criminal Code did not reform to

²⁸ *R v Elomari* [2012] QCA 27.

²⁹ Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 39(1) 1.

affirmative consent and only made minor changes.³⁰ Also, as stated by Labor Senator Nita Green, there are nine other sexual consent laws in nine various jurisdictions. Therefore, national harmonisation would eliminate the disparities in the nation whereby the protection for victims is dependent on which jurisdiction they are located in.³¹

While there may be challenges in coming to a consensus on what sexual consent is, the recent reforms in most jurisdictions demonstrate the importance of this topical issue, indicating a step towards harmonisation. For example, Victoria has adopted consent through ‘free agreement’³² and NSW has similarly used terms including ‘freely and voluntarily agrees’.³³ Therefore, a standardised affirmative model approach for sexual consent laws in each state will be the next step towards creating more courteous relationships, greater clarity, justice for survivors, and in-depth consent education for society and its future generations.

To facilitate the national harmonisation of sexual consent laws, it is imperative that all Australian jurisdictions recognise the harmful consequences of having incongruent models of sexual consent from state to state. These consequences include legislative loopholes, inconsistent application of the law, and unjust outcomes for victims based on technical differences in interpretation. To improve the likelihood of all jurisdictions adopting homogenous sexual consent laws, the Commonwealth government is encouraged to lead further inquiries on this matter through the Australian Law Reform Commission and Parliamentary Committees. A Commonwealth approach, as opposed to a state-by-state approach, to such inquiries would reduce inconsistencies between jurisdictions and would facilitate a pathway to national harmonisation.

³⁰ Ibid.

³¹ Jonathan Crowe and Guzyal Hill, ‘It’s time we aligned sexual consent laws across Australia - but this faces formidable challenges’, *The Conversation* (online, 15 December 2022).

³² *Crimes Act 1958* (Vic) s 36(1).

³³ *Crimes Act 1900 (No 40)* (NSW) s 61HI(1).

IV THE IMPORTANCE OF THE SURVIVOR EXPERIENCE OF THE JUSTICE SYSTEM

With the survivor experience still being dependent on where victims live, there is a need to address their experience of the justice system. As managed by the Australian Institute of Family Studies, cultural change must be adopted in the justice system to ensure successful reforms.³⁴ Even if national harmonisation of the jurisdictions were to be achieved, it would be ineffective without proper implementation into society and education systems. A 2010 study by Clark found that victims have differing perceptions of what it looks like to achieve justice, including community safety and retribution.³⁵ However, a substantial number of the 22 victims interviewed held a similar belief that justice would not be adequate on an individual degree. Through greater clarity of sexual consent laws, it would ensure greater accountability for the perpetrators on a personal level.³⁶ Furthermore, it would allow a greater integration of resources on consent laws and education on the wrongdoing of sexual assault. This would also eradicate the injustice of victims being treated differently among different jurisdictions.

Recently, as evident in the QLRC's fourth and fifth editions, the jurisdiction chose to keep the mistake of fact excuse. Consequently, QLRC's report disregards the concerns of the survivor's experience of the justice system whereby a mistake of fact can be used as a loophole, serving an injustice to victims.³⁷ For example, the "freezing response" was not addressed, whereby victims were considered to have a lack of fight or resistance against the perpetrators.³⁸ Also, in *R v Lazarus*,

³⁴ Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions' (Research Report No 27/2014, Australian Institute of Family Studies, April 2014).

³⁵ Haley Clark, "What is the Justice System Willing to Offer?" Understanding Victim/Survivors' Criminal Justice Needs' (Research Paper No 85/2010, Australian Institute of Family Studies, January 2010).

³⁶ Ibid.

³⁷ Jonathan Crowe, 'Queensland rape law 'loophole' could remain after review ignores concerns about rape myths and consent', *The Conversation* (online, 4 August 2020).

³⁸ Ibid.

the mistake of fact defence was used as a justification for acquittal, as he reasonably believed that the teenager, Saxon Mullins, consented.³⁹ This loophole takes minimal consideration of the impact of the perpetrators' actions, having physical and emotional consequences onto victims like Saxon who still stays awake at night due to this inconsistency.⁴⁰ Therefore, the mistake of fact excuse plays an immense role in creating injustice for survivors seeking retribution and safety in our justice system, allowing perpetrators to avoid accountability. Hence, uniform consent laws would limit the capacity of using the mistake of fact defences through appropriate tests such as a reasonableness test across Australia to ensure greater justice towards the survivor experience.

V EFFICACY OF CURRENT CONSENT LAWS ON JURY DIRECTIONS

In a court of criminal law, jury directions refer to the instructions given by a presiding judge to the jury, specifically on subjects such as the relevant law(s), trial process, and evidence.⁴¹ Jury directions in matters of sexual consent and assault include, for example, a recognition of circumstances where non-consensual sexual activity may occur, and the differing effects of trauma and response on different complainants, among others.⁴² The efficacy of such assists in promoting a fair trial, as misconceptions regarding the law and thus miscarriages of justice are less likely to occur if the jury have proper understanding of directions.⁴³

As mentioned earlier in Part II (B), 2021 saw, following the New South Wales Law Reform Commission (NSWLRC)'s 2020 report on *Consent in Relation to Sexual Offences*,⁴⁴ the

³⁹ *R v Lazarus* [2017] NSWCCA 279.

⁴⁰ Georgie Dent, 'The Shocking Laws That Allow Men To Get Away With Rape', *Marie Claire* (online, 11 September 2019).

⁴¹ John Gibbons, 'We need better jury directions to ensure justice is done', *The Conversation* (online, 31 October 2018), <<https://theconversation.com/we-need-better-jury-directions-to-ensure-justice-is-done-104417>>.

⁴² *Criminal Procedure Act 1986* (NSW) s292.

⁴³ *Ibid*; Law Council of Australia, *Law Council Policy Statement on Jury Directions*, [3].

⁴⁴ New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020).

introduction of new sexual consent laws whereby consent had to be of an affirmative or communicative model, and instances of non-communication or ‘reasonable’ assumption were not acceptable.⁴⁵

According to Carter and McNamara, the defence may commonly challenge the Crown’s proof of non-consent, in particular by ‘citing evidence that the complainant did nothing to manifest non-consent’.⁴⁶ However, the reformed affirmative model of consent clarifies in specific the onus of proof required during a criminal trial of sexual assault matter – in that the onus is placed on the accused to prove positive consent given by the victim, rather than on the victim to prove their dissent. The ‘requirement’ for reaching a conclusion regarding the absence of consent is thus redefined to outlaw bypasses of the system, and such clarity allows for the increased efficacy of jury directions to be given to ensure a fair and legally accurate conclusion of trial may be reached.

VI IMPACT OF CONSENT LAWS ON EDUCATION

In 2021, the Victorian government made consent education mandatory in public schools throughout the state, following requests and petitions made by students on the grounds that ‘an expansion and greater depth’ were required, particularly regarding the teaching and understanding of consent.⁴⁷

New South Wales and Australia as a whole had also seen calls for ‘earlier and more holistic consent education’ within the state and nation, garnering more than thirty-thousand signatures each.⁴⁸

⁴⁵ *Crimes Act 1900 (No. 40)* (NSW), s 61HJ(1)(a).

⁴⁶ Allison Carter and Luke McNamara ‘Explainer: the reform of sexual consent laws in New South Wales’, *UNSW Sydney* (online, 1 June 2022) <<https://www.unsw.edu.au/news/2022/06/explainer--the-reform-of-sexual-consent-laws-in-nsw>>.

⁴⁷ ABC News, ‘Consent education to become mandatory in Victorian Schools’, *ABC News* (online 21 March 2021) <<https://www.abc.net.au/news/2021-03-21/consent-education-to-become-mandatory-in-victorian-state-schools/100019522>>.

⁴⁸ *Ibid.*

While legislative reform is a proper step forward, to bring that legislation into full effect and to achieve its aims of clarifying consent provisions,⁴⁹ education must accompany.

Education programs based on reformed consent laws should be introduced across Australian jurisdictions, particularly following petitions and requests for such from students nationally. Specifically, reformed education programs on consent may seek to include greater detail and insight into circumstances that do constitute affirmative consent, and circumstances that do not.

The introduction of reformed consent laws, such as that by New South Wales,⁵⁰ introduce a greater depth and meaning to the laws surrounding sexual consent, which thereby allow for a better understanding of what consent in itself means and what should then be relayed in education. Taking the reformed New South Wales laws for example, the issue of consent during sexual encounters has been redefined so that the circumstances outlining consent or non-consent are specified – there has been consent where there has been an affirmative and positive ‘go-ahead’, whereas there has been no consent even if the complainant had not explicitly dissented.⁵¹ The efficacy of this change stems from its provision for a clear direction of where consent education should go in terms of content and depth. As far as content and depth go, this allows for a more holistic educational campaign on sexual consent, per the aforementioned movements for change.⁵²

VII RECOMMENDATIONS

1. This submission recommends that the sexual consent laws of all jurisdictions undergo a process of ‘national harmonisation’, through which every Australian jurisdiction adopts some form of the affirmative consent model with explicit ‘take steps’ requirements, modelled on the current legislation of New South Wales and Tasmania. This aims to

⁴⁹ *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

⁵⁰ *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

⁵¹ *Crimes Act 1900 (No. 40)* (NSW).

⁵² ABC News, ‘Consent education to become mandatory in Victorian Schools’, *ABC News* (online 21 March 2021) <<https://www.abc.net.au/news/2021-03-21/consent-education-to-become-mandatory-in-victorian-state-schools/100019522>>.

minimise injustices and confusion that may arise due to inconsistent legislation across different jurisdictions.

2. This submission recommends that Commonwealth bodies, such as the Australian Law Reform Commission, lead further inquiries on sexual consent laws to facilitate a national approach, as opposed to a state-by-state approach, which is best able to achieve national harmonisation.
3. This submission recommends restricting the availability of the ‘mistake of fact’ defence so that it is not available where the defendant was reckless as to their partner’s consent. This aims to prevent perpetrators escaping accountability, recognising justice to the survivor's experiences.
4. This submission recommends that education programs be administered nationally in conjunction with reformed sexual consent laws and definitions, in order to ensure a clear and thorough understanding of sexual consent laws.