National Reports

Australia

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A. Introduction

'I believe that the main object of our legal system is to preserve individual liberty', said *Lord Salmon* in the well-known English case of *Director of Public Prosecutions v Majewski*.[1] 'One important aspect of individual liberty', his Lordship continued, 'is protection against physical violence.'[2] There is an obvious tension between these two statements. No doubt, as *Lord Salmon* indicated, the state must take reasonable measures to protect the community from violent acts.[3] If it were to do otherwise, it would fail properly to respect the autonomy of those who might be victimised by such conduct. But those responsible for the content of the criminal law must not '*exclusive[ly]* focus on victims' perspectives'.[4] For, when they do so, they usually produce 'harsh and intrusive policies'[5] that show insufficient concern for the autonomy and rights of the accused. In other words, as *Hörnle* has observed, '[c]riminal prohibitions should be based on a fair balancing of what can be expected of citizens on *both* sides, that is, potential offenders and potential victims'.[6]

Does Australian sexual offence law achieve a fair balance between the interests of the complainant and those of the accused? Until recently, the answer to this question was largely 'yes' – and this continues to be the case in some Australian jurisdictions. This balance is under threat, however. It is under threat from elements in Australian society who have been led by their understandable concern about the low conviction rates for sexual offending in this country to advocate legal reforms that, according

1 *DPP v Majewksi* [1977] AC 443, 484.
2 Ibid.
3 See e.g., *Mastromatteo v Italy* [2002] VIII Eur Court HR 151, 165–6 [67]-[68].
4 Tatjana Hörnle, '#MeToo – Implications for Criminal Law?' 6(2) *Bergen Journal of Criminal Law and Criminal Justice* 115, 124 (2018) (emphasis added).
5 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 7th ed. 2013, 26.
6 Hörnle (note 4), 124 (emphasis in original).

to them, will 'shift … the focus'[7] of non-consensual sexual offence trials and 'ensure more effective prosecutions'.[8] It is very doubtful whether these reforms will have the intended effect. There is little evidence that such law reform initiatives will either produce 'cultural change'[9] or increase by very much the conviction rate for non-consensual sexual offending. But, even if there were such evidence, certain of these reforms would be undesirable. The Victorian Law Reform Commission is probably correct to observe that the New South Wales ('NSW') government's recent decision largely to remove a mens rea requirement for very serious sexual offences 'has elicited a 'generally … positive'[10] response from the media and the public. But it is certainly wrong to state that this response indicates that 'a stronger model of affirmative consent' should now be enshrined in Victorian law.[11] The media and public support all kinds of punitive irrationality.[12] Such support provides no basis for treating those accused of rape and like offences unfairly.

In part 2 of this chapter, I set out the Australian legal position concerning sexual offending. My main focus is on non-consensual sexual offences, though I also note sexual offences against (i) minors[13] and (ii) those with mental[14]/cognitive[15] impairments. And I note the uneven treatment across Australia of cases where a person participates in sexual activity because s/he has made a mistake about some matter.[16] In some jurisdictions, the accused who has fraudulently induced such a mistake is always (at least, on the face of it),[17] or usually,[18] guilty of a non-consensual offence. In

7 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences,* Report No 148 (2020) 88 [6.49].
8 New South Wales, *Parliamentary Debates,* Legislative Assembly, 20 October 2021, 7507 (Mark Speakman, Attorney General).
9 Stephen J Odgers, 'Reform of "Consent" Law', 45 *Criminal Law Journal* 77 (2021).
10 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report (September 2021) 303 [14.62].
11 Ibid. 304 [14.70].
12 See, e.g., John Pratt, *Penal Populism*, 2007, especially chapters 1–3.
13 See, e.g., *Crimes Act 1900* (NSW) Division 10, Subdivisions 5–9.
14 See, e.g., *Criminal Code Act 1913* (WA) s 330(1) and the offences created by s 330(2)-(8).
15 See, e.g., *Crimes Act 1900* (NSW) s 66F(2)-(3).
16 On this point see Jianlin Chen, 'Fraudulent Sex Criminalisation in Australia: Disparity, Disarray and the Underrated Procurement Offence', 43 *UNSW Law Journal* 581 (2020).
17 See, e.g., *Crimes Act 1900* (ACT) s 67(1)(i) – though cf *R v Tamawiwy (No 2)* (2015) 11 ACTLR 82, 92 [55], 93 [59] (Refshauge ACJ).
18 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3).

others, only some such accused persons will be guilty of a non-consensual sexual offence:[19] the remainder, it seems, are guilty of the offence of procuring sexual activity by fraud.[20] In the Northern Territory, there is no procurement offence – and only a limited number of frauds will lead to non-consensual sexual offence liability.[21]

In part 3, I note some broad recent trends in the Australian law concerning non-consensual sexual offending and I argue that not all of them are worthy of emulation. The first such trend is to treat consent, not as what it is – a state of mind,[22] but as what it is not – 'a communicated state of mind'.[23] The second is to provide explicitly in the relevant legislation that sexual activity that continues after consent has been withdrawn is non-consensual[24] (a proposition to which no one could sensibly object) – but that such withdrawal only becomes effective once communicated by 'words or conduct'[25] (which seems wrong). The third is to treat all 'consents' that are obtained by threats,[26] and at least most 'consents' that are induced by fraud,[27] as in fact not being consents at all. The fourth is to prevent those accused of non-consensual sexual offending from relying on the 'defence' of honest and reasonable mistake of fact unless they have taken 'reasonable steps',[28] or have said or done something,[29] to ascertain whether the other person was consenting to the sexual activity at issue.

In part 4, I conclude by arguing that, while Australian sexual offence law rightly seeks to 'privilege … individual autonomy',[30] it does not in fact do so in certain respects. Increasingly, the law's failure to give proper

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19 See, e.g., *Criminal Code Act 1899* (Qld) s 348(2)(e) -(f).
20 See, e.g., *Criminal Code Act 1899* (Qld) s 218(1).
21 *Criminal Code Act 1983* (NT) s 192(2)(e)-(g).
22 On this point, see, e.g., Larry Alexander, Heidi Hurd and Peter Westen, 'Consent Does Not Require Communication: A Reply to Dougherty', 35(6) *Law and Philosophy* 655 (2016).
23 New South Wales Law Reform Commission (note 8), 84 [6.28]. See also, eg, *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2)(l).
24 See, e.g., *Criminal Code Act 1899* (Qld) s 348(4).
25 See, e.g., *Criminal Code Act 1899* (Qld) s 348(4).
26 See, e.g., *Criminal Code Act 1913* (WA) s 319(2).
27 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3). Cf Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (2020) 117 [6.31] and *Criminal Code Act 1899* (Qld) s 348(2)(e)-(f).
28 *Criminal Code Act 1924* (Tas) sch 1 s 14A(1)(c).
29 *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1900* (ACT) s 67(5).
30 Tom O'Malley and Elisa Hoven, 'Consent in the Law Relating to Sexual Offences' in Kai Ambos et al (eds), *Core Concepts in Criminal Law and Criminal Justice, Volume I*, 135, 141 (2020).

recognition to this value stems from a concern to protect the interests of complainants – though, as shown by its approach to the question of withdrawal of consent, this is not always so.

B. Australian sexual offence law

In Australia, the criminal law is generally a matter, not for the Federal government, but for the governments of the (six) States and (two) Territories. When it comes to the law regarding sexual offending, the position taken by the various State and Territory governments is broadly similar.[31]

In most Australian jurisdictions, a person will commit an offence (variously described as rape,[32] sexual assault[33] and sexual penetration/intercourse without consent[34]) if s/he sexually penetrates another person[35] without both that person's consent[36] and a reasonable belief that s/he is consenting.[37] The two exceptions are South Australia ('SA') and the Northern Territory ('NT'), where a slightly more exacting mens rea standard applies.[38] In those jurisdictions, the person who has sexual intercourse with a non-consenting person will be acquitted if s/he may have believed,

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31 For a review of Australian rape laws, see Andrew Hemming, 'In Search of a Model Provision for Rape in Australia', 38(1) *University of Tasmania Law Review* 72 (2019).

32 *Crimes Act 1958* (Vic) s 38(1); *Criminal Code Act 1899* (Qld) s 349; *Criminal Code Act 1924* (Tas) s 185(1).

33 *Crimes Act 1900* (NSW) s 61I.

34 *Criminal Code Act 1913* (WA) s 325(1); *Crimes Act 1900* (ACT) s 54; *Criminal Code Act 1983* (NT) s 192(3).

35 Such penetration need not be by a penis – it may be by any part of the body of the other person or by an object – and it need not be female genitalia that is penetrated: anal penetration, cunnilingus and fellatio all potentially give rise to liability for rape/sexual assault/sexual penetration without consent: *Criminal Code Act 1913* (WA) s 319(1) (definition of 'to sexually penetrate'); *Crimes Act 1900* (NSW) s 61HA; *Criminal Code Act 1924* (Tas) sch 1 s 2B(1); *Crimes Act 1958* (Vic) s 35A(1); *Criminal Code Act 1899* (Qld) s 349(2) – and see also s 6.

36 *Crimes Act 1900* (NSW) s 61I; *Crimes Act 1958* (Vic) s 38(1)(b); *Criminal Code Act 1899* (Qld) s 349(2); *Criminal Code Act 1924* (Tas) sch 1 s 185(1); *Criminal Code Act 1913* (WA) s 325(1).

37 *Crimes Act 1900* (NSW) s 61HK(1)(c); *Crimes Act 1900* (ACT) s 67(4); *Crimes Act 1958* (Vic) s 38(1)(c); *Criminal Code Act 1899* (Qld) ss 24(1) and 348A; *Criminal Code Act 1913* (WA) s 24; *Criminal Code Act 1924* (Tas) sch 1 ss 14 and 14A – and see also *Arnol v The Queen* [1981] Tas R 157.

38 Though it is unclear how much longer the relevant governments will permit this situation to continue.

however unreasonably, that the other person was consenting.[39] But s/he will be convicted of rape[40]/sexual intercourse without consent[41] if the Crown can prove that s/he actually knew that the complainant was not,[42] or might not,[43] have been consenting, or altogether failed to consider the matter of consent.[44]

What about the accused who engages in *non-penetrative* sexual activity on, or with or towards, a non-consenting person?

In all Australian States and Territories, a person is guilty of an offence (variously described as 'sexual touching',[45] 'sexual assault',[46] 'indecent assault',[47] 'gross indecency without consent'[48] and 'act of indecency without consent'[49]), if s/he performs an act of intentional non-consensual sexual

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39 See *Criminal Law Consolidation Act 1935* (SA) ss 48 and 47; *Criminal Code Act 1983* (NT) s 192(3) and (4A).

40 *Criminal Law Consolidation Act 1935* (SA) s 48(1).

41 *Criminal Code Act 1983* (NT) s 192(3).

42 *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Criminal Code Act 1983* (NT) s 192(3)(b).

43 *Criminal Law Consolidation Act 1935* (SA) ss 48(1) and 47(a)-(b); *Crimes Act 1983* (NT) ss 192(4)(b) and 43AK. See also *Gillard v The Queen* (2014) 88 ALJR 606, 612–3 [26] ('*Gillard*'). Note that it is slightly imprecise to say, as I have in the text, that, in the Northern Territory, it is enough for the Crown to prove that the accused realised that the complainant might not be consenting. More precisely, the Crown must prove that the accused realised that there was a substantial risk that the complainant was not consenting and that, having regard to the circumstances known to the accused, it was unjustifiable for him or her to take the risk. That said, it would be a rare case where the accused realised that there was a possibility that the complainant was not consenting and yet lacked the mens rea for the crime of sexual intercourse without consent. On this point, see *Banditt v R* (2004) 151 A Crim R 215, 232 [92].

44 *Criminal Law Consolidation Act 1935* (SA) ss 48(1) and 47(c); *Crimes Act 1983* (NT) s 192(3)(b) and (4A). It is true that the High Court of Australia in *Gillard* (2014) 88 ALJR 606, 613 [26], expressed no final view about whether such inadvertence amounted to 'reckless[ness]' for the purposes of *Crimes Act 1900* (ACT) s 54(1). However, if the Courts are ever called upon to determine this question, they would surely find that an intellectually able accused who did not even bother to consider the question of consent was 'reckless'. On this point, see, e.g., *Tolmie v R* (1995) 37 NSWLR 660.

45 *Crimes Act 1900* (NSW) s 61KC.

46 *Criminal Code Act 1899* (Qld) s 352; *Crimes Act 1958* (Vic) s 40.

47 *Criminal Code Act 1913* (WA) s 323; *Criminal Code Act 1924* (Tas) s 127; *Criminal Law Consolidation Act 1935* (SA) s 56.

48 *Criminal Code Act 1983* (NT) s 192.

49 *Crimes Act 1900* (ACT) s 60.

touching[50] and, at the time of the relevant conduct, has the requisite mens rea.[51] As with the penetrative sexual offences just discussed, the culpability requirement for such offending differs as between the relevant jurisdictions. In many jurisdictions, the person who engages in such conduct will be convicted upon proof that s/he lacked a reasonable belief that the complainant was consenting.[52] In some jurisdictions, however, it is necessary for the Crown to prove that the accused knew the complainant was not consenting or was reckless as to whether s/he was consenting.[53]

In *Fairclough v Whipp*,[54] it was held that the respondent had wrongly been convicted of an English indecent assault offence, in circumstances where he had exposed his penis to a girl and told her to 'touch it', which she did. That is because there had been no assault.[55] If, in Australia today, a person were to perform similar conduct – that is, if s/he were to incite a non-consenting[56] person to touch him or her in such a way – s/he would be guilty of an offence,[57] so long as (in some jurisdictions, anyway)

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50 A classic example of 'sexual touching' is the touching of another person's breasts or genital region: see, e.g., *Harkin v R* (1989) 38 A Crim R 296, 301.

51 *Crimes Act 1900* (NSW) s 61KC; *Criminal Code Act 1899* (Qld) s 352(1)(a); *Crimes Act 1958* (Vic) s 40(1); *Criminal Code Act 1924* (Tas) s 127(1); *Criminal Code Act 1913* (WA) s 323; *Crimes Act 1900* (ACT) s 60; *Criminal Code Act 1983* (NT) s 192(4); *Criminal Law Consolidation Act 1935* (SA) s 56(1).

52 *Crimes Act 1900* (NSW) s 61HK(1)(c); *Crimes Act 1900* (ACT) s 67(4); *Criminal Code Act 1899* (Qld) ss 24(1) and 348A; *Crimes Act 1958* (Vic) s 40(1)(d); *Criminal Code Act 1913* (WA) s 24; *Criminal Code Act 1924* (Tas) sch 1 ss 14 and 14A.

53 *Criminal Code Act 1983* (NT) s 192(4)(b); *South Australian Criminal Trials Bench Book* (2nd ed, September 2020) 373. 'Recklessness' seems to mean the same thing for the purposes of these offences as it does for penetrative sexual offences: see notes 43–44 and the text accompanying those footnotes. See also *Criminal Code Act 1983* (NT) ss 192(4)(b) and 43AK; *Gillard* (2014) 88 ALJR 606, 612–3 [26]; *South Australian Criminal Trials Bench Book* (2nd ed, September 2020) 373, citing *Fitzgerald v Kennard* (1995) 38 NSWLR 184.

54 (1951) 35 Cr App R 138.

55 Ibid. 140.

56 Because the complainant in *Fairclough* was aged nine, consent was not in issue in those proceedings.

57 *Crimes Act 1900* (NSW) s 61KC; *Criminal Code Act 1899* (Qld) s 352(1)(b)(i); *Crimes Act 1958* (Vic) s 41(1); *Criminal Law Consolidation Act 1935* (SA) ss 48A(1); *Criminal Code Act 1983* (NT) s 133 (and note that s 133(1) creates the offence of indecent dealing with *a child*); *Crimes Act 1900* (ACT) s 60(1); *Criminal Code Act 1924* (Tas) s 137 (and note that s 125B creates the offence of doing an indecent act with a child); *Criminal Code Act 1913* (WA) ss 203(1) and 204 (and note that s 321(4) and (5) make it clear that the person who incites *a child* to touch him or her sexually has offended seriously – see also s 319(1) (definitions of 'deals with' and 'indecent act') and (3)).

s/he lacked a reasonable belief in consent[58] and (in SA) s/he was at least 'reckless' as to the complainant's consent.[59]

The final non-consensual sexual offence scenario that we must consider is the case where there has been no touching at all, but the accused has performed a sexual act in the presence of a non-consenting person (such as, for example, an act of masturbation[60]). Where the accused has the applicable mental element, such conduct is criminal in all Australian jursidictions,[61] although there is no uniformity across Australia about what precisely must be proved in such a case. The contrasting approaches in NSW and Victoria give us a glimpse of the complexities here. In the former jurisdiction, the Crown must prove that the accused carried out a 'sexual act'[62] with or towards a non-consenting complainant and lacked a reasonable belief that that person was consenting.[63] In the latter, consent is not an issue. The Crown must instead prove that: the accused engaged in sexual activity;[64] the complainant saw this activity; the accused knew that it was at least probable that the complainant would see the activity or part of it; and the accused intended, or knew, or knew it was probable, that the complainant would thus experience fear or distress.[65]

Before we consider some recent trends in Australian non-consensual sexual offence law reform initiatives, it is necessary to deal with two other matters.

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58 *Crimes Act 1900* (NSW) s 61HK(1)(c); *Crimes Act 1900* (ACT) s 67(4); *Crimes Act 1958* (Vic) s 41(1)(d); *Criminal Code Act 1899* (Qld) ss 24(1) and 348A.

59 *Criminal Law Consolidation Act 1935* (SA) s 48A(1). Note, however, that non-consent is not an element of the offences created by *Criminal Code Act 1983* (NT) ss 132 and 133; *Criminal Code Act 1924* (Tas) s 137 or *Criminal Code Act 1913* (WA) ss 203(1), 204, 321(4)-(5). Concerning non-consent and the *Criminal Code Act 1924* (Tas) s 125B offence, see s 125B(3).

60 For a recent example of such offending, see *Veljanoski v R* [2021] NSWCCA 255, [8].

61 *Crimes Act 1900* (NSW) s 61KE(a); *Crimes Act 1958* (Vic) s 48(1); *Criminal Code Act 1899* (Qld) s 352(1)(b)(ii); *Crimes Act 1900* (ACT s 60(1); *Criminal Code Act 1924* (Tas) s 137; *Criminal Code Act 1983* (NT) s 133 (note, however, that the Crown must prove that the accused's conduct took place in public); *Criminal Code Act 1913* (WA) ss 203(1) and 204; *Summary Offences Act 1953* (SA) s 23.

62 As to which, see *Crimes Act 1900* (NSW) s 61KE.

63 *Crimes Act 1900* (NSW) s 61KE and 61HE(3)(c).

64 As to which, see *Crimes Act 1958* (Vic) s 35D.

65 *Crimes Act 1958* (Vic) s 48(1).

The first is that, in all Australian jurisdictions, there are crimes of engaging in sexual activity with a person who is under the age of consent,[66] or who has a 'cognitive impairment'[67] (to use the language that is favoured in NSW[68]). It would be wearisome to discuss all of these offences. It suffices to say that, throughout Australia, a person behaves prima facie[69] criminally if s/he: engages in penetrative sexual activity with a child;[70] intentionally touches a child sexually;[71] incites a child to touch the accused sexually;[72] or performs a sexual act in the presence of a child.[73] Moreover, it can be

66 See, e.g., *Crimes Act 1900* (NSW) Division 10 Subdivisions 5–9; *Crimes Act 1958* (Vic) ss 49A-49F, 49H, 49J-49K, 49N-49S; *Criminal Code Act 1899* (Qld) ss 210, 213, 215, 217, 218A-219; *Criminal Code Act 1983* (NT) ss 127, 131–131A; *Criminal Code Act 1913* (WA) ss 320–322; *Criminal Code Act 1924* (Tas) ss 124–125D; *Criminal Law Consolidation Act 1935* (SA) ss 49–50; *Crimes Act 1900* (ACT) ss 55, 61. As these offences show, the age of consent to both heterosexual and homosexual sexual activity is 16 in all Australian jurisdictions apart from Tasmania and SA, where it is 17.

67 See, e.g., *Crimes Act 1900* (NSW) s 66F; *Criminal Code Act 1899* (Qld) s 216; *Crimes Act 1958* (Vic) s 52B-52E; *Criminal Code Act 1924* (Tas) s 126; *Criminal Law Consolidation Act 1935* (SA) s 51; *Criminal Code Act 1913* (WA) s 330; *Criminal Code Act 1983* (NT) s 130; *Crimes Act 1900* (ACT) s 36A (note the definition of 'abusive conduct' in s 36A(5)).

68 The term 'cognitive impairment' is defined in *Crimes Act 1900* (NSW) s 61HD.

69 I say this because the accused might be able to raise a defence successfully or otherwise excuse his or her conduct. For example, the accused who might honestly and reasonably, but mistakenly, have believed that the complainant was 16 years or over will not be convicted of the NSW offence of having sexual intercourse with a person who is aged 14 or 15, even though s/he has performed the prohibited conduct; *CTM v The Queen* (2008) 236 CLR 440.

70 *Crimes Act 1900* (NSW) ss 66A and 66C; *Criminal Code Act 1983* (NT) s 127; *Crimes Act 1958* (Vic) ss 49A-49B; *Crimes Act 1900* (ACT) s 55; *Criminal Law Consolidation Act 1935* (SA) s 49(1) and (3); *Criminal Code Act 1913* (WA) s 320(2); *Criminal Code Act 1924* (Tas) s 124(1); *Criminal Code Act 1899* (Qld) s 215.

71 *Crimes Act 1900* (NSW) ss 66DA(a) and 66DB(a); *Criminal Code Act 1983* (NT) s 127(1); *Crimes Act 1958* (Vic) s 49D; *Criminal Law Consolidation Act 1935* (SA) ss 56(2) and 58(1)(a); *Criminal Code Act 1913* (WA) s 321(4) – and see s 319(1) (definition of 'deals with'); *Criminal Code Act 1899* (Qld) s 210(1)(a); *Crimes Act 1900* (ACT) s 60(1)-(2); *Criminal Code Act 1924* (Tas) s 127(1)-(3).

72 *Crimes Act 1900* (NSW) ss 66DA(b)-(c); *Criminal Law Consolidation Act 1935* (SA) s 58(1)(b); *Criminal Code Act 1913* (WA) s 321(4) – and see s 319(3)(a)-(b); *Criminal Code Act 1924* (Tas) s 125B(1); *Crimes Act 1958* (Vic) s 41(1); *Criminal Code Act 1899* (Qld) s 210(1); *Crimes Act 1900* (ACT) s 61(1)-(2); *Criminal Code Act 1983* (NT) s 132(2) and (4).

73 *Crimes Act 1900* (NSW) s 66DC(a) and 66DD(a); *Criminal Law Consolidation Act 1935* (SA) s 58(1)(a); *Criminal Code Act 1913* (WA) s 321(4) – and see s 319(3)(c); *Crimes Act 1900* (ACT) s 61(1)-(2); *Criminal Code Act 1983* (NT) s 132(2)

noted that s 130(2) of the *Criminal Code Act 1983* (NT) creates an offence of a kind that features in many Australian criminal law statutes.[74] That sub-section states that it is a crime for a person who provides 'disability support services' to a 'mentally ill or handicapped person' to have sexual intercourse with, or commit an act of gross indecency upon, that person. That said, s 132(3) goes on to provide that the person accused of such offending will be excused if s/he can prove either that s/he was the 'spouse or de facto partner' of the complainant or 'did not know that the person was a mentally ill or handicapped person.'

The second matter that must be dealt with is Australian law's approach to situations where a person fraudulently induces another person to engage in sexual activity. As noted in part 1, there is no consistency across the various jurisdictions about this issue.

In the NT, an accused who induces another person to engage in sexual intercourse or sexual touching, by making a false representation as to 'the nature or purpose of the act',[75] or who knowingly capitalises on a mistake that the complainant has made about the accused's identity,[76] will be guilty of a non-consensual sexual offence.[77] But in at least most[78] other cases where an accused has fraudulently induced a complainant to participate in such sexual activity, there would seem to be no criminal liability at all.

On the other hand, in Western Australia ('WA'), the Australian Capital Territory ('ACT') and Tasmania, it would seem that in at least most cases where an accused has fraudulently procured sexual activity for him or herself, s/he will be guilty of non-consensual sexual offending. In all of these jurisdictions, the relevant statute provides that there is no consent where a complainant's participation in sexual intercourse or certain other sexual activity has been 'obtained by … *any* fraudulent means' (to use the WA language).[79] Under reforms that came into force in NSW on June 1, 2022, the position is much the same. NSW law now states that there is no

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and (4); *Criminal Code Act 1924* (Tas) s 125B(1); *Criminal Code Act 1899* (Qld) s 210(1)-(4A); *Crimes Act 1958* (Vic) s 49F(1).

74 See, e.g., *Crimes Act 1900* (NSW) s 66F(2); *Criminal Law Consolidation Act 1935* (SA) s 51(1)-(2).

75 *Criminal Code Act 1983* (NT) s 192(1)(g); see also s 192(e)-(f).

76 *Criminal Code Act 1983* (NT) s 192(2)(e).

77 *Criminal Code Act 1983* (NT) s 192(3)-(4).

78 I say this because the list of vitiating circumstances in s 192(2) is stated to be non-exhaustive.

79 *Criminal Code Act 1913* (WA) s 319(2)(a) (emphasis added). See also *Criminal Code Act 1924* (Tas) s 2A(2)(f); *Crimes Act 1900* (ACT) s 67(1)(i).

consent to sexual activity if 'the person participates in the sexual activity because of a fraudulent inducement'[80] – though the relevant legislation also provides that a 'fraudulent inducement … does not include a misrepresentation about a person's income, wealth or feelings'.[81]

The remaining jurisdictions – that is, Queensland, Victoria and SA – take yet another approach to this issue. As in the NT, in these jurisdictions, an accused who has fraudulently induced another to participate in sexual activity will be guilty of non-consensual sexual offending only in limited circumstances.[82] If the accused has induced the complainant to believe, wrongly, that the act is not a sexual act,[83] or that the accused is the complainant's regular sexual partner,[84] or that 'the act is for medical or hygienic purposes',[85] the accused will be guilty of the relevant non-consensual offence. However, if the accused has used some other fraud to induce the complainant to participate, s/he will – in most cases, at least – be guilty of the offence of procuring sexual activity by fraud.[86]

C. Recent Trends in Australian Non-consensual Sexual Offence Law

I am now in a position to note some broad recent trends in the Australian law concerning non-consensual sexual offending.

The first of these trends relates to what precisely consent is. In all Australian jurisdictions the relevant legislation provides for a positive definition of consent.[87] 'A person consents', we are told, 'if [s/he] … freely

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80 *Crimes Act 1900* (NSW) s 61HJ(1)(k).

81 *Crimes Act 1900* (NSW) s 61HJ(3).

82 *Crimes Act 1958* (Vic) s 36(2)(h)-(j); *Criminal Code Act 1899* (Qld) s 348(2)(e)-(f); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(g)-(h).

83 For an example, see the case of *R v Williams* [1923] 1 KB 340, where a choirmaster induced a girl to participate in penetrative acts on the basis that this would improve her singing voice. On one view, because of Victorian naivety about sexual matters the girl did not know what sexual intercourse was and therefore had been caused mistakenly to believe that s/he was not engaging in a sexual act.

84 Note, e.g., *R v Pryor* (2001) 124 A Crim R 22, where the complainant had sexual intercourse with a burglar because of her mistaken belief that he was her boyfriend.

85 To use the Victorian language: *Crimes Act 1958* (Vic) s 36(2)(j).

86 *Crimes Act 1958* (Vic) s 45(1); *Criminal Code Act 1899* (Qld) s 218(1); *Criminal Law Consolidation Act 1935* (SA) s 60.

87 *Crimes Act 1900* (NSW) s 61HI(1); *Crimes Act 1900* (ACT) s 50B(a); *Crimes Act 1958* (Vic) s 36(1); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act 1913*

and voluntarily agrees to the sexual activity.'[88] In other words, if a person autonomously participates in sexual activity, s/he is consenting to it; but if his or her participation is not 'free', his or her sexual autonomy is being infringed and the accused has performed the actus reus of a non-consensual sexual offence.

In my view, this positive definition creates no difficulties. What creates difficulties, at least potentially, is the increasing tendency of Australian legislatures to supplement this definition with a provision that states that a person does not autonomously participate in sexual activity if s/he 'does not say or do anything to communicate consent'.[89] The double negative here might leave readers in a state of confusion. What exactly does this provision mean? It means that, if A squeezes her husband on the bottom without warning, he is not consenting to the touching - even if he is in fact willing to be touched in this way. Why not? The answer is that he has neither said nor done anything to communicate to his wife his willingness to be touched sexually. Yet it seems clear that A has not infringed this man's sexual autonomy.[90]

Why does the law in an increasing number of Australian jurisdictions provide, wrongly, that a person consents only once s/he has said or done something to communicate his or her willingness? The answer lies in pragmatism. According to the NSW Law Reform Commission ('NSWLRC'), the provision just noted will cause juries at non-consensual sexual offence trials to focus less on what the complainant did, if anything, to resist the

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(WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(1); *Criminal Code Act 1983* (NT) s 192(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2).

88 To use the SA language: *Criminal Law Consolidation Act 1935* (SA) s 46(2).

89 *Criminal Code Act 1924* (Tas) s 2A(2)(a). See also *Crimes Act 1900* (NSW) s 61HJ(1)(a); *Crimes Act 1900* (ACT) s 50B(b); *Crimes Act 1958* (Vic) s 36(2)(l). The position in Queensland is similar but subtly different. That State's Court of Appeal has held that, because consent must be 'given' (see *Criminal Code Act 1899* (Qld) s 348(1)), it only becomes effective once the complainant has represented to the accused in some way that s/he is willing. That said, in some circumstances, silence is capable of amounting to such a representation. See *R v Makary* [2019] 2 Qd R 528, 543 [49]-[50].

90 As I have argued elsewhere. See, e.g., Andrew Dyer, 'A Reasonable Balance Disrupted (in New South Wales): The New South Wales and Queensland Law Reform Commissions' Reports about Consent and Culpability in Sex Cases Involving Adults – and the Governments' Responses' 51(1) *Australian Bar Review* 28, 42 (2022); Andrew Dyer and Thomas Crofts, 'Reforming Non-consensual Sexual Offences in Hong Kong: How Do the Law Reform Commission of Hong Kong's Proposals Compare with Recent Recommendations in Other Jurisdictions?' (2022) 51(3) *Common Law World Review* 145, 155-156.

accused, and more on what s/he said or did, if anything, to communicate her or his willingness.[91] But will it? The NSWLRC provides no evidence to support its assertion that it will. And it is necessary also to note this. The non-resisting complainant will nevertheless almost always have done *something* around the time of the sexual activity. Where s/he has, it seems inevitable that, despite a provision of the kind being discussed, juries will continue to focus on her or his lack of resistance. If a complainant, for example, places her hands on a wall at the accused's request,[92] juries will (rightly) take into account her or his lack of resistance at the relevant time when assessing whether such an act was, or was not, done to communicate to the accused that s/he was a willing participant.

In short, the onus should be on those who claim that the law should say that consent is something that it is not, to establish that this will bring about practical benefits. They have not discharged this onus.[93]

This brings me to the second recent trend in non-consensual sexual offence law reform in Australia. If, in truth, consent is a state of mind, and exists without communication, then surely the same must be true of withdrawal of consent? Take, for example, the person who, while engaging in sexual intercourse, 'freezes' and decides that this is not something that s/he is any longer willing to do. Such a person is clearly not autonomously participating in any further sexual activity that takes place. Yet the law in Queensland takes a different view – and the same is true in NSW and the ACT.[94] 'If an act is done or continues after consent is withdrawn *by words or conduct*', the relevant Queensland provision states, 'then the act continues without consent.'[95]

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91 New South Wales Law Reform Commission (note 7), 88 [6.49].

92 To use the facts of *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017).

93 Cf, however, the arguments presented by James Duffy, 'Sexual Offending and the Meaning of Consent in the Queensland Criminal Code', 45 *Criminal Law Journal* 93, 109 (2021). Duffy is one of those rare people – an Australian advocate of 'affirmative consent' (see at 93, fn 5) who is willing to engage with the arguments of those who take a different stance.

94 *Crimes Act 1900* (NSW) s 61HI(2); *Crimes Act 1900* (ACT) s 67(1)(a).

95 *Criminal Code Act 1899* (Qld) s 348(4) (emphasis added). Note the slightly different wording of *Crimes Act 1900* (ACT) s 67(1)(a). It seems clear that, in all jurisdictions, a person can withdraw her or his consent to sexual activity, though this is not always expressly stated in the relevant statute – and, where it *is*, the statute does not make it clear whether such withdrawal only becomes effective once it is communicated: see, e.g., *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Crimes Act 1958* (Vic) s 36(2)(m).

Why have the Queensland, ACT and NSW Parliaments accepted that withdrawal of consent only becomes effective once the complainant actually communicates this withdrawal? The answer seems to be fuzzy thinking. According to the NSWLRC, '[f]airness dictates that, if consent has been freely and voluntarily given, its withdrawal should be communicated before a person acting on the consent … could be convicted of a criminal offence.'[96] But, if the law were to provide that withdrawal of consent is a state of mind, the accused who reasonably believed that the complainant was continuing to consent would *not* be convicted. S/he would lack the requisite mens rea. It is true that the accused who lacked such a reasonable belief *would* be liable. But that is as it should be. It is not in the least bit unfair to convict of a non-consensual sexual offence a person who continues with sexual activity despite having such a culpable state of mind.

The third noteworthy recent development in Australian non-consensual sexual offence law concerns the negation of consent.

In all Australian jurisdictions, the law provides that a person is not consenting to sexual activity where s/he participates in it because of force[97] or a threat of force.[98] In many Australian jurisdictions, the law states that there is no consent where a person participates in sexual activity because s/he: is unlawfully detained;[99] is overborne by a person in a position of authority over him or her;[100] is unconscious or asleep;[101] is so affected by

96 New South Wales Law Reform Commission (note 7), 64 [5.45].

97 *Crimes Act 1900* (NSW) s 61HJ(1)(e); *Crimes Act 1958* (Vic) s 36(2)(a); *Criminal Code Act 1899* (Qld) s 348(2)(a); *Criminal Code Act 1913* (WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(c); *Criminal Code Act 1983* (NT) s 192(2)(a); *Crimes Act 1900* (ACT) s 67(1)(b) and (f); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i).

98 *Crimes Act 1900* (NSW) s 61HJ(1)(e); *Crimes Act 1958* (Vic) s 36(2)(a); *Criminal Code Act 1899* (Qld) s 348(2)(b)-(c); *Criminal Code Act 1913* (WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(b)-(c); *Criminal Code Act 1983* (NT) s 192(2)(a); *Crimes Act 1900* (ACT) s 67(1)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i).

99 *Crimes Act 1900* (NSW) s 61HJ(1)g); *Crimes Act 1900* (ACT) s 67(1)(o); *Crimes Act 1958* (Vic) s 36(2)(c); *Criminal Code Act 1924* (Tas) s 2A(2)(d); *Criminal Code Act 1983* (NT) s 192(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b).

100 *Crimes Act 1900* (NSW) s 61HJ(1)(h); *Criminal Code Act 1899* (Qld) s 348(2)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(e). See also *Crimes Act 1900* (ACT) s 67(1)(k).

101 *Crimes Act 1900* (NSW) s 61HJ(1)(d); *Crimes Act 1900* (ACT) s 67(1)(m)-(n); *Crimes Act 1958* (Vic)

alcohol or drugs as to be incapable of consenting[102] or, for some other reason, lacks the capacity to consent/[103]'understand … the sexual nature of the act'/[104] 'understand the nature of the act.'[105] There seems little to disagree with here.[106] But other aspects of the law concerning negation of consent are more contentious – and this brings me to the recent trend in Australian law that I wish to highlight. That trend is this: Australian law seems increasingly to be accepting the notion that a person is not consenting: (i) *whenever* s/he has participated in sexual activity because of a non-violent threat;[107] and (ii) *in most circumstances (at least)*, where the accused has used fraud to induce such participation.[108] How sound is such an approach?

My own view is that the first of these developments is sound. It is true that the person who participates in sexual activity because of a threat, say,

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s 36(2)(d); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Criminal Code Act 1983* (NT) s 192(2)(c). See also *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c).

102 *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1958* (Vic) s 36(2)(e); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Criminal Code Act 1983* (NT) s 192(2)(d). See also *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d).

103 *Crimes Act 1900* (NSW) s 61HJ(1)(b); *Crimes Act 1900* (ACT) s 67(1)(l); *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(e).

104 *Crimes Act 1958* (Vic) s 36(2)(g); *Criminal Code Act 1983* (NT) s 192(2)(d).

105 *Criminal Code Act 1924* (Tas) s 2A(2)(i); See also *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h).

106 But cf Odgers (note 9), 77–8. Julia Quilter, 'Getting Consent 'Right': Sexual Assault Law Reform in New South Wales', *Australian Feminist Law Journal* 1 (2021) has recently argued that the law should do more than it does to state when consent is *present*, as opposed to when it is absent (at 20), and seems to believe that a person consents only when s/he enthusiastically participates in sexual activity. The person who participates reluctantly, as a result of persuasion, is not consenting, Quilter seems to think (at 21). Such views are misconceived. To use an example that I have used elsewhere, if a woman persuades a man to engage in sex that a doctor has prescribed as fertility treatment, the man is clearly consenting despite his reluctance: Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr', 7(1) *Griffith Journal of Law and Human Dignity* 1, 5 (2019).

107 *Crimes Act 1900* (NSW) s 61HJ(1)(f); *Crimes Act 1900* (ACT) s 67(1)(d)-(f); *Criminal Code Act 1899* (Qld) s 348(2)(b); *Criminal Code Act 1913* (WA) s 319(2)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(c). See also *Criminal Code Act 1983* (NT) s 192(2)(a); *Crimes Act 1958* (Vic) s 36(2)(b).

108 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3); *Crimes Act 1900* (ACT) s 67(1)(i).

to 'tell her fiancé that she had been a prostitute',[109] or to report her for shoplifting,[110] makes a freer choice than does the person who participates with a gun at her or his head.[111] Nevertheless, there seems much to be said for the view that, because she 'mentally object[s]'[112] to the sexual activity, she is not participating autonomously in it.

What about the second of these developments? If a person procures 'consent' by telling the complainant, falsely, that he has had a vasectomy,[113] or poses no real risk of transmitting HIV,[114] or will not ejaculate inside him or her,[115] or will pay him or her,[116] should s/he be guilty of rape? Consistently with what I have argued elsewhere,[117] I believe that the answer to this question is 'yes.' The person who 'consents' because of any of these mistaken beliefs – or any other mistaken belief, for that matter – is participating in the sexual activity no more autonomously than the person who participates due to a mistaken belief as to the accused's identity or the nature or purpose of the activity.[118] But that is not to say that that liability should arise – for non-consensual sexual offending, or for anything else – in *all* cases where an accused has fraudulently induced another person to participate in sexual activity.

The first type of case in which liability should not arise is where the accused's fraud concerns a trivial matter. In other words, the NSW Parliament is right to hold that, where the accused procures 'consent' by lying about his or her 'income, wealth or feelings',[119] a conviction should not be possible. However non-consensual such conduct in fact is, such prosecutions would bring the criminal law into disrepute. That said, there are reasons to doubt whether the NSW approach goes far enough. On the face

109 *R v Olugboja* [1982] 1 QB 320, 328.
110 *R v Aiken* (2005) 63 NSWLR 719, 727 [33].
111 Jennifer Temkin, 'Towards a Modern Law of Rape', 45(4) *Modern Law Review* 399, 406–7 (1982).
112 Larry Alexander, 'The Ontology of Consent', 55(1) *Analytic Philosophy* 102, 111 (2014); see also 112–3.
113 *R v Lawrance* [2020] 1 WLR 5025.
114 See, e.g., *R v Zaburoni* [2014] QCA 77, [7].
115 *R(F) v DPP* [2014] QB 581.
116 See, e.g., *R v Linekar* [1995] QB 250.
117 See especially Andrew Dyer, 'Mistakes that Negate Apparent Consent', 43(3) *Criminal Law Journal* 159, 165–8 (2019).
118 For similar views, see, e.g., Tom Dougherty, 'Sex, Lies and Consent', 123(4) *Ethics* 717, 728 (2013); Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy', 122(6) *Yale Law Journal* 1372, 1376–8 (2013); Jonathan Herring, 'Mistaken Sex', *Criminal Law Review* 511, 517 (2005).
119 See, e.g., *Crimes Act 1900* (NSW) s 61HJ(3).

of things,[120] in NSW, a person will now commit sexual assault if s/he, say, induces: (i) his or her spouse to 'consent' to sexual intercourse by falsely telling him or her that s/he is not having an affair; or (ii) his or her lover to 'consent' by falsely telling him or her that s/he does not have a spouse. That does not seem desirable.

The second type of case in which there should be no liability is where the accused's lie concerns a matter about which s/he has a reasonable expectation of privacy, or where a successful prosecution would see the law conniving at discriminatory attitudes.[121] In other words, if an accused induces a complainant to participate in sexual activity by lying about, say, his or her race, or sexual or gender history,[122] there seem good reasons for the law not to treat his or her conduct as criminal. To the extent that the law in most Australian jurisdictions allows such persons to be convicted of serious offending,[123] it seems clear that that law is misconceived.

The fourth recent trend in Australian non-consensual sexual offence law is the most pernicious – at least from the point of view of criminal law principle. We have seen that, in the majority of Australian jurisdictions, an accused will be guilty of non-consensual sexual offending if the Crown can prove that s/he engaged in non-consensual sexual activity with the complainant *and lacked a reasonable belief that the complainant was consenting*. In recent years, in response to claims or suggestions that an accused should be convicted of serious sexual offending simply upon proof that s/he in fact engaged in non-consensual sexual activity with the complainant,[124] certain Australian legislatures have adopted measures that severely limit

120 Cf New South Wales, *Parliamentary Debates,* Legislative Assembly, 20 October 2021, 7510 (Mark Speakman, Attorney General). The Attorney General describes the statutory list of 'trivial lies' as 'non-exhaustive', but there is nothing in the statutory language itself that makes this clear.

121 See, e.g., Nora Scheidegger, 'Balancing Sexual Autonomy, Responsibility and the Right to Privacy: Principles for Criminalizing Sex by Deception', 22 *German Law Journal* 769, 780–782 (2021).

122 On this point, see, e.g., Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent', 3 *Criminal Law Review* 207 (2014).

123 See *Crimes Act 1900* (NSW) s 61HJ(1)(k) and (3); *Criminal Code Act 1913* (WA) s 319(2)(a); *Crimes Act 1900* (ACT) s 67(1)(i); *Criminal Code Act 1924* (Tas) s 2A(2)(f); *Criminal Code Act 1899* (Qld) s 218(1); *Crimes Act 1958* (Vic) s 45(1); *Criminal Law Consolidation Act 1935* (SA) s 60.

124 See, e.g., Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform', 39 *University of Queensland Law Journal* 1, 4–5, 25–27 (2020); Wendy Larcombe et al, "I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Percep-

the availability of honest and reasonable mistake of fact in sexual offence cases. I discuss this issue more fully in my other chapter in this volume. It is enough to note two things at this stage.

First, in Tasmania, a person accused of, relevantly, rape or indecent assault, may only hope to raise honest and reasonable mistake of fact successfully if s/he took '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.'[125] It is unclear what a 'step' is for the purposes of this provision;[126] but if a person only takes a 'step' by saying or doing something,[127] there is an obvious problem. The person who says or does something to ascertain whether another person is consenting, is seldom mistaken about whether consent has been granted. If it is only persons of this kind who can rely successfully on honest and reasonable *mistake* of fact, then it seems to follow that that 'defence' has practically been abolished. And yet there are certainly people who, because they reasonably believe that a non-consenting person is consenting, have not acted at all culpably, and therefore should be excused on the basis of their reasonable belief. I provide examples of such persons in my other chapter.

The second thing that must be noted is that NSW law now provides that, certain persons with mental health or cognitive impairments aside, an accused's belief in consent will be incapable of being reasonable unless, 'within a reasonable time before, or at the time of the sexual activity', s/he said or did something to 'find out whether the other person' was consenting[128] – and the Victorian government has recently followed suit.[129] Now that the two largest Australian jurisdictions have failed to resist the punitive allure of 'affirmative consent', it is hard to believe that the other

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tions of (un)Reasonable Belief in Consent in Rape Law', 25(5) *Social and Legal Studies* 611, 623–624 (2016).

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

126 On this point, see the Canadian case of *Barton v The Queen* [2019] 2 SCR 579, 634–9 [101]-[113], where the Supreme Court of that country did its best to elucidate the precise meaning of a provision that is similar to s 14A(1)(c).

127 Cf *Lazarus v The Queen* (2017) 270 A Crim R 378, 406–7 [146]-[147].

128 See *Crimes Act 1900* (NSW) s 61HK(2).

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

Australian States and Territories will exhibit greater restraint.[130] The floodgates seem to have opened.[131]

It is not as though such laws are likely to lead to widespread injustice: because the lively issue at most Australian sexual offence trials is consent,[132] not the accused's knowledge of the complainant's non-consent, juries will probably not be required very often to consider whether the accused might have taken the prescribed steps. But these laws might well cause *some* injustice; and this is essentially because they uphold a fiction. Above, we encountered the woman who, without warning, squeezes her husband on the bottom.[133] In NSW, such conduct now amounts to a serious crime. We have seen that, according to NSW law, the man is not consenting. Partly because she has neither done nor said anything to work out whether he is consenting, the woman is deemed to have the requisite mens rea. Of course, this particular case would be very unlikely to lead to a prosecution. Nevertheless, when it deems to be culpable those who are not, the law plays a dangerous and unprincipled game. Again, I elaborate on this point in my other chapter.

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130 Indeed, the ACT government has already adopted the NSW approach – or, to be more precise, an even stricter one. According to *Crimes Act 1900* (ACT) s 67(5), a person accused of sexual intercourse without consent or a like offence cannot rely on honest and reasonable mistake of fact if s/he 'did not say or do anything to ascertain whether the other person consented.' Unlike in NSW, this requirement applies to *all* those accused of the relevant offences: no exception is made for those with a cognitive or mental health impairment.

131 In early 2022, the WA government requested the Law Reform Commission of that State to review the law relating to sexual consent: John Quigley and Simone McGurk, 'Two Major Reviews to Examine Western Australia's Sexual Offence Laws' 8 February 2022 < https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/02/Two-major-reviews-to-examine-WAs-sexual-offence-laws.aspx > (accessed August 25, 2022). Nobody expects that the WA Law Reform Commission will recommend against the adoption of an affirmative consent model – but it should. It also seems practically certain that the Queensland government will adopt such a model in that State, despite its refusal to do so in 2020. See Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System,* Report Two, Volume 1 (2022) 216, cf 222–4.

132 See, e.g., *Director of Public Prosecutions for the Northern Territory of Australia v WJI* (2004) 219 CLR 43, 77 [107] (Kirby J).

133 See text accompanying notes 89–90.

D. Conclusion

'[T]he aim of the law on rape', announces *Cossins*, 'is to preserve 'human dignity''.[134] According to that commentator, however, Australian law has traditionally not achieved this aim. This is because it has required the Crown to prove, not merely that there was non-consensual sexual activity, but also that the accused had a culpable state of mind.[135]

What *Cossins*'s analysis overlooks is that it is not only sexual offence complainants who have human dignity: those accused of such offending have it, too.[136] Accordingly, while the law must do what it can do to protect the sexual autonomy of complainants, it must ensure that this interest is appropriately balanced against the autonomy and other interests of the accused. It should not allow for the conviction of morally innocent persons. Because the fictions that Australian law is increasingly endorsing allow for such convictions, they are unjustified. And so too is Australian law's increasing tendency to treat withdrawal of consent as being effective only once it is communicated. In this latter respect, Australian law *does* fail sufficiently to protect complainants' sexual autonomy.

134 Annie Cossins, 'Why Her Behaviour is Still on Trial', 42(2) *UNSW Law Journal* 462, 477 (2019), quoting *R v Kitchener* (1993) 29 NSWLR 696, 697 (Kirby P).

135 Ibid.

136 See Simon Bronitt and Patricia Easteal, *Rape Law in Context: Contesting the Scales of Injustice*, 2018, 170.