

# CONSTRUCTING CONSENT IN THE AUSTRALIAN CAPITAL TERRITORY

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This article considers the way in which consent has been constructed and evolved in the criminal law in the context of sexual assault. The article compares and contrasts the test for consent across the Australian jurisdictions, with particular interest on consent in the ACT – the only jurisdiction in Australia with a negative consent model. The article examines the intersection of common law and legislation in that jurisdiction, and considers how consent came to be framed this way in that jurisdiction. It suggests that the ACT will likely adopt a two-part reform based on the law of New South Wales.

## I INTRODUCTION

The essential element of sexual offences in Australian law is the absence of consent. The absence of consent transforms what is normally a physical expression of affection and intimacy into crime and violence. For this reason, Australian law places considerable attention on the meaning and evidence of consent in sexual offences – especially in cases of sexual assault. One of the current problems in Australian criminal law is the way in which consent is established as a matter of law. This is particularly the case in the Australian Capital Territory ('ACT'), where consent is expressed in negative terms. In this jurisdiction, consent is determined by what it is not, rather than what it is. It is argued in this article that this definition requires statutory alteration to bring the meaning of the term into line with the rest of the country. As discussed below, Australian law concerned with consent has evolved a two-pronged test involving a positive and negative component. The positive component involves establishing the fact of consent, while the negative component involves a legal erasure of the fact of consent if certain conditions are met. To this is a third aspect, which is the question of the perception of consent on the part of the accused. This aspect has evolved as a defence of mistake of fact. These elements are overlapping and connected, however, for the purposes of this article the focus is on the first elements concerned with establishing consent.

## II THE CONTOURS OF CONSENT

Consent in the context of sexual assault has generated a vast amount of literature.<sup>1</sup> Much of that literature has been reform-oriented. Indeed, consent in sexual assault

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<sup>1</sup> As an introductory sample, see Theodore Bennett, 'Consent Interruptus: Rape Law and Cases of Initial Consent.' (2017) 19(2) *Flinders Law Journal* 184; Annie Cossins, 'Why Her Behaviour Is Still On Trial: The Absence Of Context In The Modernisation Of The Substantive Law On Consent' (2019) 42(2) *University of New South Wales Law Journal* 499; Ian Leader-Elliott and Ngaire Naffine, 'Wittgenstein, Rape Law And The Language Games Of Consent' (2000) 26(1) *Monash University Law Review* 73; Wendy Larcombe, "'Worsnop v The Queen': Subjective Belief In Consent Prevails (Again) In Victoria's Rape Law' (2011) 35(2) *Melbourne University Law Review* 697; Jonathan Crowe, 'Consent, Power And Mistake Of Fact In Queensland Rape Law' (2011) 23(1) *Bond Law Review* 40; Jonathan Crowe and Lara Sveinsson, 'Intimidation, Consent And The Role Of Holistic Judgments In Australian Rape Law' (2017) 42(1) *University of Western Australia Law Review* 154; Beatrice Diehl, 'Affirmative Consent In Sexual Assault: Prosecutors' Duty' (2015) 28(3) *Georgetown Journal of Legal Ethics* 503; Janet Napolitano, "'Only Yes Means Yes": An Essay On University Policies Regarding Sexual Violence And Sexual Assault' (2015) 33(2) *Yale Law & Policy Review* 387; Michael Scott, 'Jake And Josie Get Drunk And Hook Up: An Exploration Of Mutual Intoxication And Sexual Assault' (2017) 54(4) *Alberta Law Review* 1061; Noah Hilgert, 'The Burden Of Consent: Due Process And The Emerging

cases is one of those matters that tends to generate a great deal of publicity and associated demands for law reform. At the time of writing there are, in fact, two Law Reform Inquiries concerned with proposed changes to sexual assault consent rules.<sup>2</sup> It is not the purpose of this article to undertake a systematic literature review of the available scholarship. Such an undertaking is beyond our scope. The purpose of this article is to outline something of the nature of consent as concept, and then focus sharply on the state of current doctrine. We therefore begin with setting out the contours of consent.

Consent has three distinct dimensions: philosophical, semantic and legal. The three are linked. Philosophically, the western legal tradition assigns a significant importance to consent because of its association with the liberty of the individual, and the exercise of reason. Consent is a key aspect of the will and has come to be regarded as an integral part of assessing the moral right or wrong of behaviour. Consent, unlike intent, is concerned with the acceptance, merger or acquiescence of the will of another. Consent is the rational merger of self and other. In this respect it is regarded as an aspect of moral or ethical philosophy, and as such a central component in criminal liability for conduct involving questions of consent.<sup>3</sup> In this context the ability to consent, to surrender or agree, is a core aspect of autonomy and the capacity to exercise personal agency. Consent has transformative effect. As observed by Hurd, the grant of consent can transform the moral “right” of actions in two ways. First, it can make a wrong action “right” through the grant of permission to perform what would otherwise be a “wrong”. Second, it conveys a right to perform an action that is wrongful of itself.<sup>4</sup> Intentional or knowing actions perpetrated against a person in the knowledge that person is not consenting is a foundational principle of criminal responsibility.<sup>5</sup> Here the philosophers remind us that consent always involves an exercise of the will; it is a function of reason, and as this is part of shared human experience, there is broad acceptance that rationally extending permission, agreement, acceptance or mutual purpose is the foundation of moral transformation.

This merger of the minds is reflected in the language constructs around consent. In English, the word “consent” has its origins in Old French (*consentir*), sourced in Latin (*consentire*). It is a concept also linked to “consensus”, being distinguished between personal and collective sharing of views. To consent means to “express willingness, give

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Adoption Of The Affirmative Consent Standard In Sexual Assault Laws' (2016) 58(3) *Arizona Law Review* 899; David Ross, 'Consent in Criminal Law' (2009) 32(1) *Australian Bar Review* 76; Wendy Larcombe et al, 'Reforming The Legal Definition Of Rape In Victoria - What Do Stakeholders Think?' (2015) 15(2) *QUT Law Review* 30; Andrew Dyer, 'The Mens Rea For Sexual Assault, Sexual Touching And Sexual Act Offences In New South Wales: Leave It Alone (Although You Might Consider Imposing An Evidential Burden On The Accused)' (2019) 48 *Australian Bar Review* 63.

<sup>2</sup> New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (2019); Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (2020).

<sup>3</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013); Joel Feinberg and Russ Shafer-Landau, *Reason and Responsibility: Readings in Some Basic Problems of Philosophy* (Cengage Learning, 16th ed, 2016); Celia Wells and Oliver Quick, *Reconstructing Criminal Law* (Cambridge University Press, 4th ed, 2010); Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2nd ed, 2001); Patricia Kazan, 'Sexual Assault and the Problem of Consent' in Stanley French, Wanda Teays and Laura Purdy (eds), *Violence Against Women: Philosophical Perspectives* (Cornell University Press, 1998) 27-42; David Archard, 'Informed Consent: Autonomy and Self-Ownership' (2008) 25(1) *Journal of Applied Philosophy* 19; Larry Alexander, 'The Ontology of Consent' (2014) 55(1) *Analytic Philosophy* 102; Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2009).

<sup>4</sup> Heidi M. Hurd, 'The Moral Magic of Consent' (1996) 2(2) *Legal Theory* 121.

<sup>5</sup> HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 2nd ed, 2008).

permission, agree". It is a voluntary agreement. A distinction is made, however, between mere consent and informed consent. The latter is linked to "permission granted in the knowledge of the possible consequences ... with full knowledge of the possible risks and benefits".<sup>6</sup> This distinction is important, and often overlooked. There is a distinction between consent given in the absence of sufficient information, and the presence of sufficient or complete information. A decision made on the basis of a complete picture enables the exercise of a greater level of reason than insufficient or absent information; and is starkly contrasted with consent made on the basis of misrepresentation, false or deceitful information. There are, in effect, distinctions between kinds of consent. In the context of sexual intercourse the idea of "informed consent" would be absurd in the sense of requiring explicit information sharing of details equivalent to a formal contract, but it appears that something more than "mere consent", in the sense of simple acquiescence to a sexual advance is what is expected. In other words, there is a requirement for sufficient information of matters of concern or importance to be known and communicated.

These distinctions intersect with theoretical and substantive law in numerous ways. Feinberg, in his analysis of *harm* (as a setback of interests) as a core principle of criminal law theory, argued that the presence of consent removes the perception of harm or setback of interest in those who extend the consent. Accordingly, the moral or affective basis for harm is transformed by the presence of actual consent. The difficulty in law, recognised by Feinberg, is that the fact of consent does not necessarily mean a "harm" has not been suffered. Here Feinberg drew a distinction between "harms" and "wrongs". In this context a "harm" is linked to a tangible interest, while a "wrong" is the (moral) right attached to it. Normally these concepts are merged, but in the case of consent, the "wrong" is neutralized, even though the harm continues or becomes manifest.<sup>7</sup> Feinberg suggests this principle has ancient life in the English legal tradition, tracing the origins into Roman law, and ultimately into Aristotle's *Nicomachean Ethics*. Here Aristotle outlined a principle of reason, and ethical governance, that the foundation of injury to another is any situation where a person acts with the intention of causing injury to another, "contrary to the wish of the person acted on."<sup>8</sup> This principle has become manifest in the Latin maxim *Volenti non fit injuria* ("To one who has consented, no wrong can be done").

The problem alluded to by Feinberg and others is the distinction between a physical and an incorporeal interest. Feinberg's theory, although rightfully well regarded, does not adequately distinguish between the interests at the core of this theory. And this is core business of the criminal law. A distinction between physical and non-physical interests is a useful starting point, as we able to start tracking the importance of consent in the context of physical acts. Here the starting point in the criminal law relating to consent is the principle on inviolability. This principle is that our bodies may not be interfered with by others in the absence of consent. The principle was articulated by Blackstone in these terms:

[T]he law cannot draw the line between [T] different degrees of violence and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.<sup>9</sup>

<sup>6</sup> *Oxford English Dictionary*.

<sup>7</sup> Joel Feinberg, *Harm To Others* (Oxford University Press, 1984) 35-36: "One class of harms (in the sense of set-back to interests) must certainly be excluded from those that are properly called wrongs, namely those in which the complainant has consented. These include harms voluntarily inflicted by the actor upon himself, or the risk of which the actor freely assumed, and harms inflicted upon him by the actions of others to which he has freely consented."

<sup>8</sup> *Ibid*, 115.

<sup>9</sup> William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979) vol III, 120.

This principle of inviolability is the “beginning of wisdom” in understanding the contours of consent in the context of criminal law. But it overlaps with other aspects of liberty, including the idea of autonomy and liberty. The ability to give consent is an exercise in decision making, and where it relates to the control a person is able to exercise over their own life, it is a cherished expression of freedom and self-determination. However, in the context of the criminal law – our present subject – we are primarily concerned with the exercise of decisions that convey agreement that the inviolability of our physical selves may be interfered with, if not shared.

There are, of course, many instances where the fact of consent does not erase the harm done. Accordingly, the law constructs many and numerous exceptions to the meaning of consent. Indeed, there are so many layers of consent that it is perhaps best to speak of “meanings” of consent. In particular, the distinction between “mere consent” and “informed consent” is of critical importance in the law, and, as we will see, particularly in the criminal law. In the context of sex offences, this distinction is critical. The reform argument considered in the concluding remarks contends that the proper foundation of consent in relation to conduct that infringes the inviolability of self can only be linked to informed consent. That is, a person gives valid consent only where there is voluntary agreement grounded in actual knowledge of the scope of the anticipated sexual activity. But as we will observe, the contours of consent in Australian law are remarkably complicated.

### III CONSENT IN AUSTRALIA

#### A *Consent and Common Law Rape*

The core principle of consent (generally), was set out in *Marion’s Case* in 1992.<sup>10</sup> Here a majority of the High Court,<sup>11</sup> after referring to the inviolability principle outlined by Blackstone above, stated:

Consent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, contact. Consensual contact does not, ordinarily, amount to assault. However, there are exceptions to the requirement for, and the neutralising effect of, consent and therefore qualifications to the very broadly stated principle of bodily inviolability. In some instances consent is insufficient to make application of force to another person lawful and sometimes consent is not needed to make force lawful .... The rationale for this exception appears to rest in the idea that some harms involve public, not just personal, interests.<sup>12</sup>

In this instance we observe many of the legal contours: the transformation of the event from unlawful to lawful; and a range of public policy limitations on the extent of consent, based on collective as opposed to individual interests. Moreover, in the context of the criminal law, consent is located at multiple sites and differing contexts, and accordingly, consent can take on a distinct meaning in a particular legal context. As stated above, the present article relates to the meaning of consent in the context of rape and sexual assault.

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<sup>10</sup> *Department of Health & Community Services v JWB & SMB* (“Marion’s Case”) (1992) 175 CLR 218.

<sup>11</sup> Mason CJ, Dawson, Toohey and Gaudron JJ.

<sup>12</sup> *Department of Health & Community Services v JWB & SMB* (“Marion’s Case”) (1992) 175 CLR 218, 233 (Footnotes omitted).

Rape was an offence at common law, manifested in England as early as the *Laws of Aethelbeht*,<sup>13</sup> and later documented in Mathew Hale's *Pleas of the Crown*.<sup>14</sup> As is well known, at common law the offence of rape involved "carnal knowledge of a woman without her consent".<sup>15</sup> Or, as stated by Blackstone, "carnal knowledge of a woman forcibly and against her will."<sup>16</sup> The change in language is not accidental. It reflects an evolution in the law, which in its early stage had emphasised the use of force, while the latter emphasised the role of consent – recognising that rape did not require the use of force.<sup>17</sup> At common law the question of what constituted consent was largely a question of fact at trial, with consent having its "ordinary meaning". The common law position was perhaps best expressed by Lord Justice Dunn in *R v Olugboja*:<sup>18</sup>

....'consent'...covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent: ... In the majority of cases, where the allegation is that the intercourse was had by force or the fear of force, such a direction coupled with specific references to and comments on the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or the fear of it, as in the examples given by counsel for the appellant, to which we have referred earlier in this judgment, we think that an appropriate direction to a jury will have to be fuller. They should be directed to concentrate on the state of mind of the complainant immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. ... the dividing line ... between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.<sup>19</sup>

This approach to consent has the considerable advantage of being flexible enough to consider the full factual matrix,<sup>20</sup> and, as Dunn LJ observed, it enables the tribunal of fact to bring "good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case." The problem, however, is that "consent" does not have a settled or consistent meaning in the wider community. Indeed, in the context of consent to sexual intercourse, empirical studies have shown widespread myths about how people communicate with one another in expressing desire for sexual

<sup>13</sup> Lisi Oliver, *The Beginnings of English Law* (University of Toronto Press, 2002) 79. "77. If a person takes a maiden by force: to the owner [of her protection] 50 shillings, and afterwards let him buy from the owner his consent [to marry her]."

<sup>14</sup> Matthew Hale, *Historia Placitorum Coronae: The History Of The Pleas Of The Crown* (R.H. Small, 1 ed, 1847) vol 1, 627.

<sup>15</sup> *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 261.

<sup>16</sup> Blackstone, above n 9, vol IV, 210.

<sup>17</sup> Great Britain. Advisory Group on the Law of Rape, Report of the Advisory Group on the Law of Rape. (HMSO, Cmnd 6352 ed, 1975) 3.

<sup>18</sup> [1981] 3 All ER 443.

<sup>19</sup> [1981] 3 All ER 443, 448-449.

<sup>20</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co., 4th ed, 2017) 666-669.

acts, what role intoxication plays in decision making, tolerance for physical resistance, and sexual assault in relationships.<sup>21</sup> These issues complicate the determination of consent in sexual assault trials, which makes the work of the courts that much harder, particularly in relation to giving jury instructions during cases that involve contested consent, or situations where both parties were intoxicated. It is no wonder rape has been the subject of significant law reform over the last 40 years.

## B Statutory Reform of Consent

In Australia the offence of rape has been placed on a statutory footing.<sup>22</sup> In all jurisdictions the common law has been abolished and replaced by a statutory framework. In most cases the term “rape” has been replaced. In all cases the absence of consent is a physical element of the offence, and accordingly is an essential consideration at trial. It is very often the case that the question of consent is the main point of contention. Consequently, the more recent cases that consider consent do so on the basis of the relevant legislation. What has emerged out of these cases is an emphasis on consent being *freely and voluntarily given*. The scope of this requirement was articulated by King CJ in a referred case in the South Australian Court of Criminal Appeal in 1993:

The law on the topic of consent is not in doubt. *Consent must be a free and voluntary consent*. It is not necessary for the complainant to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.<sup>23</sup> [Emphasis added]

This position forms the foundation of the way consent is expressed in statute across the Australian jurisdictions. This concept forms the nucleus, however, of an increasingly complex set of limits and exceptions. In addition, one of the further complexities in relation to consent is the knowledge the accused has in relation to the absence of consent.

While the presence or absence of consent is a *physical element* of the offence, the knowledge of the accused forms part of the fault element (*mens rea*) of the offence. But as we will see, the law has also extended the inquiry into the context in which the consent was given. In this respect attempts to define consent have had to address the expression of consent by the complainant, as well as the understanding of that consent by the accused *AND* the circumstances in which that expression has been articulated.

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<sup>21</sup> Ibid. Here the learned authors were referring to a 2013 study on National Community Attitudes towards Violence Against Women. Compare this with the most recent 2017 study, which has found substantial (positive) changes in attitudes. Although there are positive changes, one concerning finding was that *19% of those surveyed did not recognise that it was a criminal offence for a man to have sex with his wife without her consent*. See [https://ncas.anrows.org.au/wp-content/uploads/2019/04/300419\\_NCAS\\_Summary\\_Report.pdf](https://ncas.anrows.org.au/wp-content/uploads/2019/04/300419_NCAS_Summary_Report.pdf). Attitudes with respect to consent are more alarming with respect to migrants. Here it was found that 25% of those surveyed believed that if a woman was sexually assaulted while intoxicated, she was “at least partly responsible”. <https://ncas.anrows.org.au/findings/n-mesc-findings/>.

<sup>22</sup> For a comparison with the UK, see David Ormerod, *Smith & Hogan: Criminal Law* (Oxford University Press, 12th ed, 2008).

<sup>23</sup> *Question of Law Reserved on Acquittal Pursuant to Section 350(1a) Criminal Law Consolidation Act (No 1 of 1993)* (1993) 59 SASR 214, 220.

## 1 New South Wales

In NSW the common law offence of rape was abolished in 2003.<sup>24</sup> It has been replaced by a series of “sexual assault” offences, including sexual assault,<sup>25</sup> aggravated sexual assault,<sup>26</sup> aggravated sexual assault in company,<sup>27</sup> sexual intercourse with a child under 10,<sup>28</sup> sexual intercourse with a child aged between 10 and 16,<sup>29</sup> and sexual intercourse with a child aged between 16 and 18 in special care.<sup>30</sup> A fundamental distinction relating to consent exists between these offences. As a matter of law, a child *cannot* lawfully consent to sexual intercourse.<sup>31</sup> Accordingly, consent is not an element of an offence involving a child complainant.

In this jurisdiction consent has been heavily modified by statute. Consent is set out in section 61HE, and requires close reading. For the purposes of the *Crimes Act*, the definition of consent applies to a limited range of offences, being sexual assault, sexual touching and sexual acts in both their ordinary and aggravated forms.<sup>32</sup> Consent is specifically defined: *A person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity.*<sup>33</sup> Here “sexual activity” is defined to include sexual intercourse, sexual touching, or sexual acts.<sup>34</sup> All of these are further defined.<sup>35</sup> The accused is deemed to have knowledge of the absence of consent where they have actual knowledge,<sup>36</sup> was reckless as to consent,<sup>37</sup> or where there were no reasonable grounds to believe the person was not consenting.<sup>38</sup> The fact of consent can also be negated as a matter of law, where:

- The complainant lacks capacity to consent;<sup>39</sup>
- There is no opportunity to consent;<sup>40</sup>
- The person surrenders because they are coerced, intimidated,<sup>41</sup> or unlawfully detained;<sup>42</sup>
- Mistaken beliefs about the identity<sup>43</sup> or marriage to the accused;<sup>44</sup> or that the intercourse was for a medical purpose;<sup>45</sup> or was otherwise obtained through fraudulent means.<sup>46</sup>

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<sup>24</sup> *Crimes Amendment (Sexual Offences) Act 2003* (NSW), s63. This section was renumbered as s80 in 2018. See *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), Sched 1 [9].

<sup>25</sup> *Crimes Act 1900* (NSW), s61I: “Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.”

<sup>26</sup> *Crimes Act 1900* (NSW) s61J.

<sup>27</sup> *Crimes Act 1900* (NSW) s61JA.

<sup>28</sup> *Crimes Act 1900* (NSW) s66A.

<sup>29</sup> *Crimes Act 1900* (NSW) s66C.

<sup>30</sup> *Crimes Act 1900* (NSW) s73.

<sup>31</sup> *Crimes Act 1900* (NSW) s80AE.

<sup>32</sup> *Crimes Act 1900* (NSW) s61HE(1).

<sup>33</sup> *Crimes Act 1900* (NSW) s61HE(2).

<sup>34</sup> *Crimes Act 1900* (NSW) s61HE(11).

<sup>35</sup> *Crimes Act 1900* (NSW) s61HA, HB and HC respectively.

<sup>36</sup> *Crimes Act 1900* (NSW) s61HE(3)(a).

<sup>37</sup> *Crimes Act 1900* (NSW) s61HE(3)(b).

<sup>38</sup> *Crimes Act 1900* (NSW) s61HE(3)(c).

<sup>39</sup> *Crimes Act 1900* (NSW) s61HE(5)(a).

<sup>40</sup> *Crimes Act 1900* (NSW) s61HE(5)(b).

<sup>41</sup> *Crimes Act 1900* (NSW) s61HE(5)(c).

<sup>42</sup> *Crimes Act 1900* (NSW), s61HE(5)(d).

<sup>43</sup> *Crimes Act 1900* (NSW) s61HE(6)(a).

<sup>44</sup> *Crimes Act 1900* (NSW) s61HE(6)(b).

<sup>45</sup> *Crimes Act 1900* (NSW) s61HE(6)(c).

<sup>46</sup> *Crimes Act 1900* (NSW) s61HE(6)(d).

A further qualification exists, that permits a finding that person has not given consent in circumstances where the complainant was “substantially intoxicated”,<sup>47</sup> was intimidated or coerced (in a manner falling short of threats);<sup>48</sup> or the accused had taken advantage of a position of authority or trust.<sup>49</sup>

## 2. Northern Territory

The Northern Territory prohibits acts of sexual intercourse and gross indecency without consent;<sup>50</sup> including offences against children under 16;<sup>51</sup> those under 18 if in special care;<sup>52</sup> and sexual intercourse with disabled or mentally ill people in care.<sup>53</sup> As in the other jurisdictions, a child or person in special care cannot consent to sexual intercourse.<sup>54</sup> For offences involving adults, “consent” is defined as “*free and voluntary agreement*”.<sup>55</sup> And, consistent with other jurisdictions, the fact of consent can be negated where it has been procured through threat, force or fear;<sup>56</sup> where the complainant has been unlawfully detained;<sup>57</sup> where the person was asleep, unconscious or intoxicated;<sup>58</sup> incapable of understanding the sexual nature of the act;<sup>59</sup> mistake as to the identity of the accused,<sup>60</sup> or the nature of the activity;<sup>61</sup> and consent obtained through fraud.<sup>62</sup>

## 3. Queensland

In Queensland the crime of rape was codified in the *Criminal Code Act 1899* (Qld). In its current manifestation, rape is an offence pursuant to s349.<sup>63</sup> Here the absence of consent is an essential element. Consent is a defined term, meaning: *freely and voluntarily given by a person with the cognitive capacity to give the consent*.<sup>64</sup> There are no qualifications as expressed in NSW, with the question of consent being a question of fact. There are, however, nominated grounds which it may be found the consent was not freely given, which includes use of force, threat, fear, abuse of authority, fraud and mistaken belief. These conditions are not exhaustive, and it is otherwise open ended.<sup>65</sup> In this context, like NSW, a child may not give consent. An important distinction, however, is that for the purposes of rape, the age limit is 12.<sup>66</sup>

<sup>47</sup> *Crimes Act 1900* (NSW) s61HE(8)(a).

<sup>48</sup> *Crimes Act 1900* (NSW) s61HE(8)(b).

<sup>49</sup> *Crimes Act 1900* (NSW) s61HE(8)(c).

<sup>50</sup> *Criminal Code Act 1983* (NT) s192.

<sup>51</sup> *Criminal Code Act 1983* (NT) s127.

<sup>52</sup> *Criminal Code Act 1983* (NT) s128.

<sup>53</sup> *Criminal Code Act 1983* (NT) s130.

<sup>54</sup> *Criminal Code Act 1983* (NT) s139A.

<sup>55</sup> *Criminal Code Act 1983* (NT) s192(1).

<sup>56</sup> *Criminal Code Act 1983* (NT) s192(2)(a).

<sup>57</sup> *Criminal Code Act 1983* (NT) s192(2)(b).

<sup>58</sup> *Criminal Code Act 1983* (NT) s192(2)(c).

<sup>59</sup> *Criminal Code Act 1983* (NT) s192(2)(d).

<sup>60</sup> *Criminal Code Act 1983* (NT) s192(2)(e).

<sup>61</sup> *Criminal Code Act 1983* (NT) s192(2)(f).

<sup>62</sup> *Criminal Code Act 1983* (NT) s192(2)(g).

<sup>63</sup> *Criminal Code Act 1899* (Qld) s349: “(1)Any person who rapes another person is guilty of a crime. Maximum penalty—life imprisonment. (2) A person rapes another person if— (a)the person has carnal knowledge with or of the other person without the other person’s consent; or (b)the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or (c)the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.”

<sup>64</sup> *Criminal Code Act 1899* (Qld) s348(1).

<sup>65</sup> *Criminal Code Act 1899* (Qld) s348(2).

<sup>66</sup> *Criminal Code Act 1899* (Qld) s349(3). This section was inserted in 2003, pursuant to the *Evidence (Protection of Children) Act 2003* (Qld) s11.



#### 4. South Australia

Rape is an offence in South Australia.<sup>67</sup> Like other Australian jurisdictions, the offence is one in which the absence of consent is an essential element. In this jurisdiction consent is simply defined, but the statutory definition includes a number of qualifiers. Here *a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity*.<sup>68</sup> It is open to the tribunal of fact to conclude a person did not consent where the person succumbs to threats;<sup>69</sup> was unlawfully detained;<sup>70</sup> asleep or unconscious;<sup>71</sup> intoxicated to the extent they could not freely and voluntarily consent;<sup>72</sup> suffered from a cognitive impairment;<sup>73</sup> was unable to understand the nature of the activity;<sup>74</sup> or where the person was mistaken either about the identity of the accused,<sup>75</sup> or the nature of the activity.<sup>76</sup>

#### 5. Tasmania

In Tasmania, the *Criminal Code Act 1924* prohibits rape,<sup>77</sup> as well as similar crimes involving a “young person”.<sup>78</sup> In this jurisdiction a “young person” is under 17 years of age. Consent with respect to offences involving a young person is a defence only where the accused is up to 3 or 5 years older than the complainant.<sup>79</sup> As in other jurisdictions around Australia, *consent means free agreement*.<sup>80</sup> The fact of consent can be negated in circumstances where there is no communication of the fact of consent;<sup>81</sup> the complainant agrees as a result of threat, force or fear;<sup>82</sup> was unlawfully detained;<sup>83</sup> the accused was in a position of trust or authority;<sup>84</sup> consent was obtained by fraud;<sup>85</sup> the complainant was mistaken as to the identity or nature of the activity;<sup>86</sup> was asleep, unconscious or intoxicated;<sup>87</sup> or was unable to understand the nature of the activity.<sup>88</sup>

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<sup>67</sup> *Criminal Law Consolidation Act 1935* (SA) s48: “(1) A person (the *offender*) is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who— (a) does not consent to engaging in the sexual intercourse; or (b) has withdrawn consent to the sexual intercourse, and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be). Maximum penalty: Imprisonment for life. (2) A person (the *offender*) is guilty of the offence of rape if he or she compels a person to engage, or to continue to engage, in—(a) sexual intercourse with a person other than the offender; or (b) an act of sexual self-penetration; or (c) an act of bestiality, when the person so compelled does not consent to engaging in the sexual intercourse or act, or has withdrawn consent to the sexual intercourse or act, and the offender knows, or is recklessly indifferent to, the fact that the person does not so consent or has so withdrawn consent (as the case may be). Maximum penalty: Imprisonment for life.”

<sup>68</sup> *Criminal Law Consolidation Act 1935* (SA) s46(2).

<sup>69</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(a).

<sup>70</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(b).

<sup>71</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(c).

<sup>72</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(d).

<sup>73</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(e).

<sup>74</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(f).

<sup>75</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(g).

<sup>76</sup> *Criminal Law Consolidation Act 1935* (SA) s46(3)(h).

<sup>77</sup> *Criminal Code Act 1924* (Tas) s185: “(1) Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.”

<sup>78</sup> *Criminal Code Act 1924* (Tas) s124.

<sup>79</sup> *Criminal Code Act 1924* (Tas) s124(3).

<sup>80</sup> *Criminal Code Act 1924* (Tas), s2A.

<sup>81</sup> *Criminal Code Act 1924* (Tas) s2A(2)(a).

<sup>82</sup> *Criminal Code Act 1924* (Tas) s2A(2)(b)(c).

<sup>83</sup> *Criminal Code Act 1924* (Tas) s2A(2)(d).

<sup>84</sup> *Criminal Code Act 1924* (Tas) s2A(2)(e).

<sup>85</sup> *Criminal Code Act 1924* (Tas) s2A(2)(f).

<sup>86</sup> *Criminal Code Act 1924* (Tas) s2A(2)(g).

<sup>87</sup> *Criminal Code Act 1924* (Tas) s2A(2)(h).

<sup>88</sup> *Criminal Code Act 1924* (Tas) s2A(2)(i).

## 6. Victoria

In Victoria, the common law of rape is also on a statutory footing. Here, as in other jurisdictions, the absence of consent is a specific element of the offence.<sup>89</sup> Consent is a defined term in this jurisdiction, which requires, simply, “free agreement”.<sup>90</sup> As is the case elsewhere, consent may be negated where there is actual or threatened force;<sup>91</sup> fear of harm;<sup>92</sup> the complainant was unlawfully detained;<sup>93</sup> asleep or unconscious;<sup>94</sup> substantially intoxicated<sup>95</sup> (including being unable to withdraw consent because of intoxication);<sup>96</sup> the person could not understand the nature of the act,<sup>97</sup> or its sexual nature;<sup>98</sup> the complainant with mistaken about the identity of the accused;<sup>99</sup> or that the act was not for a legitimate medical or hygienic purpose;<sup>100</sup> mistaken about the use of animals;<sup>101</sup> the complainant fails to do anything to indicate consent;<sup>102</sup> or initially consents, but later retracts consent.<sup>103</sup>

## 7. Western Australia

Like Queensland, West Australia codified rape in its *Criminal Code*. However, the offence was modified as is now expressed as “sexual penetration without consent”.<sup>104</sup> It has ordinary and aggravated forms,<sup>105</sup> with specific offences concerning the sexual penetration of children.<sup>106</sup> In this jurisdiction, consent means freely and voluntarily given.<sup>107</sup> Without limiting the circumstances through which the fact of lack of consent is negated, in this state the absence of consent includes “consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means”. A child under the age of 13 cannot consent as a matter of law.<sup>108</sup>

## 8. Discussion

This general survey of the meaning of consent throughout Australia confirms a settled position in law, and that is that consent, for the purposes of sexual activity, is grounded in terms that are basically contractual. That is, the parties engage in a shared agreement to engage in sexual activity. Ideally, that arrangement would be one of mutual enjoyment and an expression of intimacy, if not affection. The law cannot, of course, ensure these qualitative aspects of intimacy; but it can ensure that the decision to

<sup>89</sup> *Crimes Act 1958* (Vic) s38: “(1) A person (A) commits an offence if— (a) A intentionally sexually penetrates another person (B); and (b) B does not consent to the penetration; and (c) A does not reasonably believe that B consents to the penetration. (2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).”

<sup>90</sup> *Crimes Act 1958* (Vic) s36(1).

<sup>91</sup> *Crimes Act 1958* (Vic) s36(2)(a).

<sup>92</sup> *Crimes Act 1958* (Vic) s36(2)(b).

<sup>93</sup> *Crimes Act 1958* (Vic) s36(2)(c).

<sup>94</sup> *Crimes Act 1958* (Vic) s36(2)(d).

<sup>95</sup> *Crimes Act 1958* (Vic) s36(2)(e).

<sup>96</sup> *Crimes Act 1958* (Vic) s36(2)(f).

<sup>97</sup> *Crimes Act 1958* (Vic) s36(2)(g).

<sup>98</sup> *Crimes Act 1958* (Vic) s36(2)(h).

<sup>99</sup> *Crimes Act 1958* (Vic) s36(2)(i).

<sup>100</sup> *Crimes Act 1958* (Vic) s36(2)(j).

<sup>101</sup> *Crimes Act 1958* (Vic) s36(2)(k).

<sup>102</sup> *Crimes Act 1958* (Vic) s36(2)(l).

<sup>103</sup> *Crimes Act 1958* (Vic) s36(2)(m).

<sup>104</sup> *Criminal Code 1913* (WA) s325(1): “A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.”

<sup>105</sup> *Criminal Code 1913* (WA) s326(1): “A person who sexually penetrates another person without the consent of that person in circumstances of aggravation is guilty of a crime and liable to imprisonment for 20 years.”

<sup>106</sup> *Criminal Code 1913* (WA) ss322, 321, 320.

<sup>107</sup> *Criminal Code 1913* (WA) s319(2)(a).

<sup>108</sup> *Criminal Code 1913* (WA) s319(2)(c).

engage in those activities is a rational one, based on free choice. In each of the jurisdictions examined, consent is understood as an agreement to engage in sexual activity, given voluntarily. That necessarily implies some understanding of the scope of what activities are going to be engaged in. This is consistent with what is known as the “communicative” model of consent, which focuses the practical attempts in law to ensure mutual understanding, autonomy and personal responsibility.<sup>109</sup>

Yet as we have seen, in each jurisdiction there is clear recognition that consent can be obtained through a variety of means that are not regarded as legitimate forms of agreement. Indeed, there is no agreement because one of the parties has not expressed true consent or was not in possession of sufficient facts to enable an informed decision. Even in cases where a sexual advance was communicated and understood, the reality of communication is such that what is communicated and understood is not necessarily clear at a practical level. Accordingly, each jurisdiction contains provisions that will negate the fact of consent or enable the tribunal of fact to conclude there was no consent if the issue is ambiguous.

#### IV. CONSENT IN THE ACT

The one jurisdiction in Australia where the question of consent is far from clear is the ACT. Here the criminal law, generally, is currently in a less than settled state, resting in an unfinished transition from a common law to a code jurisdiction. It is the only jurisdiction in Australia where a *Crimes Act* and a *Criminal Code* are operating concurrently as the basis of local law.<sup>110</sup> This results in a substantial degree of complexity, and uncertainty. The difficulty arises because the *Code* is only “partially operational”, which means that the general principles of criminal responsibility found in Chapter 2 of the *Code* do not apply to every offence. In many cases the common law and its associated linkages with legislation continues to operate.

In the context of sex offences, Part 3 of the *Crimes Act 1900* (ACT) prohibits sexual assault. Unlike NSW, sexual assault offences in the ACT are in three degrees, based on injury suffered by the complainant.<sup>111</sup> Here the accused may be charged with sexual assault in the first degree if they inflict grievous bodily harm on the complainant;<sup>112</sup> in the second degree if they inflict actual bodily harm;<sup>113</sup> in the third degree if the attack involves an assault or threat of injury;<sup>114</sup> or an ordinary charge of sexual intercourse without consent.<sup>115</sup> It is important to note that of these offences, only the latter charge requires the absence of consent as an element of the offence.

For the purposes of sexual intercourse without consent, section 67 of the *Crimes Act 1900* (ACT) defines consent in the following terms:

- (1) ...without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person ... is negated if that consent is caused—

<sup>109</sup> James Monaghan and Gail Mason, 'Communicative consent in New South Wales: Considering *Lazarus v R*' (2018) 43(2) *Alternative Law Journal* 96.

<sup>110</sup> The Commonwealth Criminal Code also applies concurrently throughout Australia, but as that Code does not purport to criminalise sexual assaults this issue does not arise.

<sup>111</sup> NSW introduced four categories of sexual assault in a set of reforms in 1981. (*Crimes (Sexual Assault) Amendment Act 1981* (NSW)). These provisions served as a model and were operative when the ACT introduced the three categories in 1985. See *Crimes (Amendment) Ordinance (No. 5) 1985*. The NSW categories were subsequently repealed and changed in 1989 (*Crimes Amendment Act 1989* (NSW)).

<sup>112</sup> *Crimes Act 1900* (NSW) s51.

<sup>113</sup> *Crimes Act 1900* (NSW) s52.

<sup>114</sup> *Crimes Act 1900* (NSW) s53.

<sup>115</sup> *Crimes Act 1900* (NSW) s54.

- (a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
  - (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or
  - (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
  - (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
  - (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
  - (f) by a mistaken belief as to the identity of that other person; or
  - (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
  - (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
  - (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
  - (j) by the unlawful detention of the person.
- (2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

At first glance this definition appears entirely consistent with the law as it stands across Australia. It sets out the circumstances through which consent can be negated and does so on the basis of indicia common to all Australian jurisdictions. But what is missing is any reference to the meaning of consent. It is a *negative* definition, telling us what consent is *not*, rather than what it *is*. Otherwise there is no express statement as to the meaning of consent. This position seems to be at odds with the law around the country, and it begs the question why this is the case.

In the absence of any statutory embodiment, the default position is the common law. As it stands, there are actually only a handful of authorities in the ACT that indicate the correct position.

### A *Grey v The Queen* [2019]<sup>116</sup>

*Grey* was a decision of Chief Justice Murrell. This case involved the prosecution of a brothel owner on 27 charges linked to the “training” of sex workers in the ACT. Here the accused advertised for sex workers to work in his brothel, but required each of the women involved to engage in sex with him as a “training” process. This case was concerned with the appropriate directions to be given to the jury with respect to the meaning of the accused having “authority” over the women sufficient to vitiate consent under s67(1)(h) of the meaning of consent outlined above. Murrell CJ set out the required directions.<sup>117</sup> Here her Honour made passing reference to the limits of s67,<sup>118</sup> but otherwise did not address the question of consent other than the scope of its limits required under s67(1)(h). It was clear, however, that the Crown was relying on consent as meaning “free and voluntary”.<sup>119</sup>

<sup>116</sup> [2019] ACTSC 315.

<sup>117</sup> [2019] ACTSC 315 [22].

<sup>118</sup> [2019] ACTSC 315 [10]-[13].

<sup>119</sup> [2019] ACTSC 315 [4].

## B *Agresti v The Queen* [2017]

*Agresti* is a decision of the Court of Appeal.<sup>120</sup> This was an appeal against conviction for one count of sexual intercourse without consent, pursuant to s54 of the *Crimes Act 1900* (ACT). The accused had engaged in sexual intercourse with the complainant after a night out drinking. There was strong evidence indicating the complainant was substantially intoxicated, and also evidence that the question of consent was never clearly articulated by either party during the event. One of the issues at trial was evidence that suggested the complainant was so intoxicated that she “lapsed in and out of consciousness”.<sup>121</sup> The basis of the appeal was a direction given to the jury with respect to the meaning of consent. Here the learned trial judge (Murrell CJ), gave the following direction:

Before you can consent to an act of intercourse or anything for that matter, you must have the opportunity to do so. What that means is if a person is asleep or unconscious at the time that an act of intercourse occurs, they cannot have consented because they did not have – unless of course they agree before they fell asleep or something like that but let’s not worry about those complications; that the person cannot have consented if they were unconscious at the time because they were incapable of consenting. They had no opportunity to consent freely and voluntarily.<sup>122</sup>

In this case the direction was held to be inadequate, as the direction did not properly address the possibility of the shifting consciousness.<sup>123</sup> The appeal was allowed, and a new trial ordered. However, their Honours did not doubt the gist of consent as “freely and voluntarily given”. However, no authorities were cited in either case to confirm the relevant legal foundations for the principle.

## C *R v Tamawiwiy (No 2)*<sup>124</sup>

*Tamawiwiy* is part of a rather extraordinary group of cases, illustrating the lengths that people go to for sex. Here, Mr Tamawiwiy established a fake Facebook identity, representing himself as a woman who was part of a bisexual community in Canberra. When contacted by interested parties (young men), discussions would take place online in which it was suggested the woman was prepared to engage in a threesome with the young man, on condition that he have sex with Tamawiwiy (using another false name). The complainant in this case agreed, and consensual homosexual intercourse took place. In addition, the intercourse was filmed. When the complainant then sought to make contact with the two women, they were nowhere to be found – since they did not exist. In effect, consent was obtained through fraud. Tamawiwiy was later charged with two counts of sexual intercourse without consent, and one count of an act of indecency, pursuant to s54 and s60 of the *Crimes Act 1900* (ACT) respectively. Further charges were laid, bringing the indictment to a total of 14 counts. After pleading guilty to five counts, the remaining charges were put to trial.<sup>125</sup>

This case was an interlocutory proceeding, in the sense that accused challenged the Crown’s reliance on s67(1)(g) of the *Crimes Act 1900* (ACT) and was seeking a direct acquittal. Relevantly, that section negative consent where there had been fraudulent misrepresentation by the accused. In this case, that was alleged to be the existence of two woman who did not, in fact, exist at all. A no case submission was made with

<sup>120</sup> [2017] ACTCA 20, Refshauge, Burns and Rangiah JJ.

<sup>121</sup> [2017] ACTCA 20 [114].

<sup>122</sup> [2017] ACTCA 20 [110].

<sup>123</sup> [2017] ACTCA 20 [113]. Interestingly, their Honours were drawing specifically from two West Australian cases, *Ibbs v The Queen* [1988] WAR 91 and *Saibu v The Queen* (1992) 10 WAR 279, both of which necessarily draw on the provisions of the West Australian Criminal Code.

<sup>124</sup> [2015] ACTSC 302.

<sup>125</sup> [2015] ACTSC 302 [1]-[11].

respect to three of the charges, on the basis that there was no misrepresentation of identity, rather the issue was at best a promise to engage in sexual activity. Refshauge J dismissed the application, on the basis the evidence was capable of supporting a conclusion that the complainant had been induced to engage in sexual intercourse with the accused on that basis.<sup>126</sup>

In reaching this conclusion, Refshauge J made an important contribution to our understanding of the law relating to consent by undertaking a historical analysis of s67. His Honour traced the section from its initial introduction as s92P in 1985,<sup>127</sup> later renumbered as s67 in 2001.<sup>128</sup> The section was introduced for the purpose of extending the grounds for “vitiating” consent on the basis of fraud or mistake, previously found in common law.<sup>129</sup> Refshauge J observed that section 92P “was not preceded by any apparent policy consideration in the Territory,”<sup>130</sup> but did note that the Explanatory Memorandum made passing reference to a Tasmanian Law Reform Commission (“TLRC”) Report.<sup>131</sup> That report recommended implementing a provision in Tasmania based on a draft proposal for the Model Code of the Northern Territory.<sup>132</sup> Here the TLRC endorsed the view that when the law requires evidence of consent from the complainant, it has the effect of shifting attention to the conduct of the complainant before, during and after the event, rather than directing attention to the conduct of the accused. This position was specifically endorsed by the Women’s Electoral Lobby in Tasmania. Refshauge J concluded:

It appears that the relevant provision was not inserted in the Northern Territory legislation but a form of the Law Reform Commission’s recommendation was introduced in Tasmania in s 2A of the Criminal Code Act 1924 (Tas). This Territory and Tasmania appear to be the only jurisdictions which have accepted the wide form of the provision, despite most other jurisdictions reforming the provisions relating to consent in respect of non-consensual sexual intercourse.<sup>133</sup>

The “form” introduced in Tasmania was initially introduced in 1987,<sup>134</sup> although it has since undergone numerous amendments (that have largely expanded the definition). Notably, the newly inserted s2A contained *both* a positive and negative meaning of consent. Here consent was considered present when it was freely given.<sup>135</sup> That aside, the reference to the purpose behind a negative meaning of consent cannot be overlooked. Quoting the TLRC, Refshauge J noted that the effect of a negative meaning shifted the emphasis at trial *away* from the complainant, and onto the conduct of the accused. There is an important public policy aspect to the way in which consent is constructed in legislation.<sup>136</sup>

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<sup>126</sup> [2015] ACTSC 302 [67].

<sup>127</sup> *Crimes (Amendment) Ordinance (No 5) 1985* (ACT).

<sup>128</sup> *Crimes Legislation Amendment Act 2001* (ACT).

<sup>129</sup> *R v Clarence* (1888) 22 QBD 23; *Papadimitropoulos v The Queen* (1957) 98 CLR 249; *Michael v Western Australia* [2008] WASCA 66; (2008) 183 A Crim R 348.

<sup>130</sup> [2015] ACTSC 302 [25].

<sup>131</sup> Tasmanian Law Reform Commission, *Report and Recommendations on Rape and Sexual Offences*, Report No 31, (1982).

<sup>132</sup> A digital copy of this report is available at: <https://www.ncjrs.gov/pdffiles1/Digitization/90161NCJRS.pdf>.

<sup>133</sup> [2015] ACTSC 302 [28].

<sup>134</sup> *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas).

<sup>135</sup> *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas), s4: ‘2A-(1) In the code, unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.’

<sup>136</sup> The Tasmanian Law Reform Commission Report specifically observed initiatives of the Michigan Criminal Sexual Conduct Reforms, which had effectively removed consent from the elements of sex offences entirely. See Law Reform Commission, *Report and Recommendations on Rape and Sexual Offences*, (Government Printer, Tasmania, 1982) Report No 31, 15. The

Although the case hinged on the provisions that vitiated consent, it is clear that Refshauge J clearly endorsed the common law meaning of consent as being “freely and voluntarily given”. His Honour referred to both Code definitions<sup>137</sup> and common law in the decision, notably the reasoning of King CJ in *Question of Law Reserved*.<sup>138</sup> It should be noted that Mr Tamawiwiy was subsequently convicted of 24 counts of various acts of sexual intercourse, acts of indecency, and using a carriage service to menace, harass or cause offence.<sup>139</sup>

### **D      *R v Ardler* [2003]**

*R v Ardler*<sup>140</sup> was a decision of the ACT Supreme Court before Justice Crispin. The case involved non-consensual sexual intercourse. The complainant had an intellectual disability. The couple had been friends for many years. On the night in question the accused had missed his bus, and was allowed to sleep at the complainant’s home. In the early hours of the morning the accused climbed into bed with the complainant, who later awoke to find the accused groping her breasts, which was soon followed by penile-vaginal intercourse. Complex issues arose in the case in relation to the knowledge of lack of consent on the part of the accused, further complicated by a long history of mental illness. Ultimately the accused was found not guilty by reason of mental illness.

What is instructive in this case are the sentencing remarks of Crispin J on the question of liability:

The offence with which the accused stands charged has three elements. First, the accused must have engaged in sexual intercourse with the complainant; second, he must have done so without her consent; and, third at the time he did so he must have either known that she did not consent or have been reckless as to whether she was consenting ....<sup>141</sup>

In the context of the second element of the offence the concept of consent means a free and voluntary consent.<sup>142</sup>

This is as clear a statement as you can get. However, Justice Crispin deployed no authority to confirm the source of the principle. Indeed, he may not have needed to do so since, as stated by King CJ in *Question of Law Reserved*, the principle seems to be well settled – or at least regarded as an establish principle.

### **V.      THE PROBLEM OF THE BINARY CONSENT MODEL**

The discussion above indicates that the ACT is the only jurisdiction in Australia that defines consent in negative terms. That is, the common law provides a basic principle that consent means “free and voluntary”, with a related statutory rule that will negate the fact of consent when one or more the statutory elements exist. This model is, in fact, a two-part model of consent that is broadly consistent with the other jurisdictions. The point of departure is the absence of a statutory definition of consent. This is apparently found in the common law.

The first issue here is the assumption there is a problem. Does it really matter that the ACT has a negative consent model? Indeed, the Law Reform literature, and particularly

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issue was also discussed in Simon Bronitt, 'Rape and Lack of Consent' (1992) 16(4) *Criminal Law Journal* 289. (Also referred to by Refshauge J in *Tamawiwiy*)

<sup>137</sup> [2015] ACTSC 302 [36] and [43].

<sup>138</sup> [2015] ACTSC 302 [44].

<sup>139</sup> *The Queen v Tamawiwiy (No 4)* [2015] ACTSC 371.

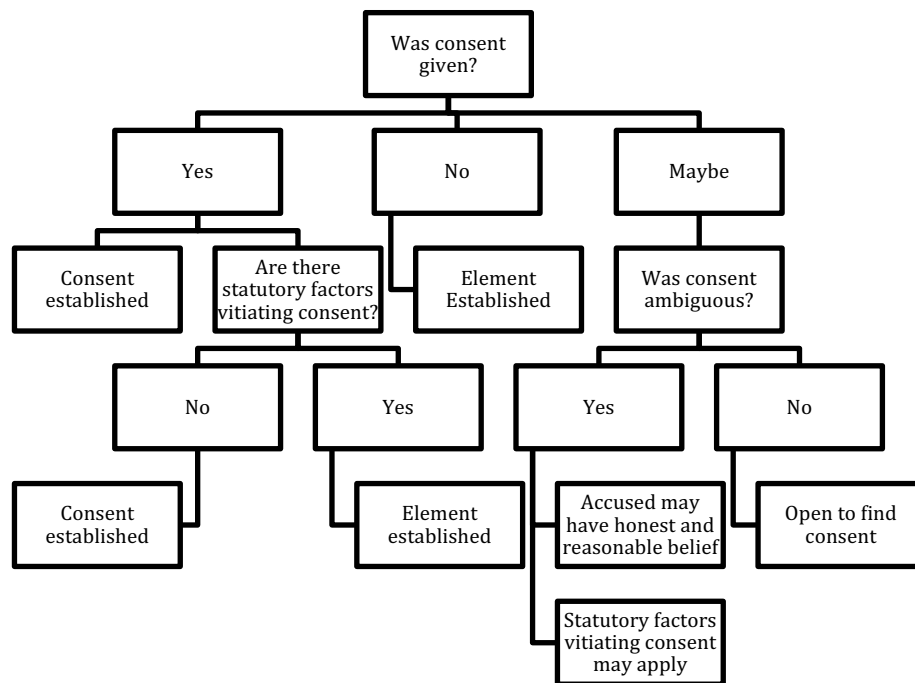
<sup>140</sup> [2003] ACTSC 24.

<sup>141</sup> [2003] ACTSC 24 [30].

<sup>142</sup> [2003] ACTSC 24 [32].

the feminist scholarship, strongly advocates a negative model on the basis that the attention of the trial is shifted at a tactical and structural level away from the question of whether the complainant gave consent, and onto the conduct of the accused’s conduct that deprived the consent of its voluntary foundations.<sup>143</sup>

The problem with the negative model is that it appears that consent in sexual assault cases has moved on from a binary model of “consent”. As is evident in all Australian jurisdictions, the question is now a hybrid model that requires, in effect, a three-stage evaluation. The first step requires attending to the question of consent at all; and if consent was given, or ambiguous, a second step has evolved that requires attention to either the honest and reasonable mistake of the accused in the validity of the belief, or conduct on the part of the accused that vitiated consent even when it was given. There is now recognition that *context* plays a role in the assessment of consent, an important development as empirical studies are now showing that context will shape the behaviour of sex offenders. Indeed, serial offenders will often engineer specific circumstances that make offending easier and legally ambiguous.<sup>144</sup> To a large extent that is a natural consequence of the way in which the binary model has evolved. There is recognition that consent can, in practice, result in something more than “Yes/No” answer. In some situations the response and/or interpretation is vague: and in some cases the defendant’s only line of defence is painting the situation in vague terms in order to enliven the defence of mistake of fact. In effect, the circumstances in which the consent was given will qualify the consent if given or doubtful. This is represented in the following diagram:



Whether a negative consent model like the ACT actually has the effect of shifting attention away from the complainant is open to debate. There is always some necessity in soliciting evidence from the accused to establish the threshold question of consent. This is a legal fact. It is the same in all jurisdictions. However, once the threshold question of consent has been established, the law, and associated trial, quickly shifts into an analysis of the circumstances of the consent. This is undoubtedly a positive development.

<sup>143</sup> Wells and Quick, above n 3.

<sup>144</sup> Ashley Hewitt and Eric Beaugard, 'Sexual Crime And Place: The Impact Of The Environmental Context On Sexual Assault Outcomes' (2014) 42(5) *Journal of Criminal Justice* 375.



The apparent issue here is concerned with the source of law. The ACT is certainly lacking a statutory declaration as to the meaning of consent. However, given the common law meaning of that concept this is not necessarily an issue, apart from national consistency. Given that it appears a settled principle in law and practice in the ACT, at the very least a statutory reform to that effect would import consistency.

## VI. REFORMING CONSENT IN THE ACT

Substantive and procedural reforms relating to rape and sexual offences have been a feature of Australian law for the last 25 years or more.<sup>145</sup> Importantly, in 2010 the Australian Law Reform Commission recommended that consent be placed on a statutory footing in all jurisdictions. In its report on *Family Violence – A National Legal Response*,<sup>146</sup> the ALRC made four specific recommendations in relation to consent. First, that a statutory definition of consent be based on “free and voluntary agreement”.<sup>147</sup> Second, that consent be vitiated on the basis of a “non-exhaustive list of circumstances” that include lack of capacity, acquiescence through fear, threats, unlawful detention, abuse of authority or trust, mistaken identity or understanding of the nature of the act(s), and intimidation or coercion.<sup>148</sup> Third, a statutory defence be available based on honest and reasonable belief in consent. And finally, that judges be required to give directions on the meaning of consent to juries.<sup>149</sup> Additional recommendations suggested enacting provisions concerned with the objectives of legislation and judicial statements about the nature of sex offending in sentencing decisions.<sup>150</sup> Broadly speaking, all Australian jurisdictions *except* the ACT have enacted statutory rules based on these recommendations.

At the time of writing, a Private Member’s Bill is before the Legislative Assembly in the ACT.<sup>151</sup> Introduced on 11 April 2018, the Crimes (Consent) Amendment Bill<sup>152</sup> provides, inter alia, to amend s67 of the *Crimes Act 1900* (ACT) by inserting the following:

- (1) For a sexual offence consent provision, *consent* of a person to an act mentioned in a sexual offence consent provision by another person means—
  - (a) the person gives free and voluntary agreement; and
  - (b) the other person—
    - (i) knows the agreement was freely and voluntarily given; or
    - (ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.
- (1A) Without limiting the grounds on which it may be established that consent is negated, the consent of a person to an act mentioned in a sexual offence consent provision is negated if that consent is caused—

<sup>145</sup> Tasmanian Law Reform Commission, *Report and Recommendations on Rape and Sexual Offences*, (1982) Report No 31; Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Final Report* (2004); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (2019); Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (2020).

<sup>146</sup> Australian Law Reform Commission, *Family Violence : A National Legal Response: Final Report* (2010).

<sup>147</sup> *Ibid* 37. Recommendation 25-4.

<sup>148</sup> *Ibid*. Recommendation 25-5.

<sup>149</sup> *Ibid*. Recommendation 25-6.

<sup>150</sup> *Ibid* 38. Recommendations 25-8, 25-9.

<sup>151</sup> The Bill was introduced by the Hon Caroline Le Couteur, MLA (Greens) on 11 April 2018. The Bill was presented as an exposure draft, specifically intended to implement the 2010 recommendations of the ALRC.

<sup>152</sup> [https://www.legislation.act.gov.au/b/db\\_57900/](https://www.legislation.act.gov.au/b/db_57900/).

This amendment imports the two-step tests that are consistent with other jurisdictions around Australia. It is important to note that the definition relates to “a sexual offence consent provision”, which includes sexual intercourse without consent, as well as the non-consensual distribution of intimate images.<sup>153</sup> The Bill was then referred to the Standing Committee on Justice and Community Safety, as part of its function as scrutineer of legislation required by the *Human Rights Act 2004* (ACT).<sup>154</sup> As criminal law routinely has the capacity to interfere with human rights, the Bill was necessarily considered. The Committee explained the effect of the amendment in these terms:

The Bill will amend the current approach in the ACT by defining consent of a person for those various sexual offences (as well as the proposed new defence in section 66A applying to young persons of a similar age). A person will consent when they give free and voluntary agreement; and the other person knows the agreement was freely and voluntarily given, or is satisfied on reasonable grounds that the agreement was freely and voluntarily given. The effect of this provision will be that the prosecution can establish the mental element of lack of consent through showing that there were no reasonable grounds open to the defendant to believe that the agreement was freely and voluntarily given. It is intended that the Bill will remove the ability of the defendant to show that they had an honest belief that the other person had consented where that belief was not reasonable in the circumstances. As the Bill increases the evidential burden on the defendant to establish the reasonableness of their belief that the other person was consenting, the Bill will extend the circumstances in which an innocent person may be found guilty because they are unable to meet their evidential burden. The Bill therefore engages the right to the presumption of innocence protected by section 22 of the HRA.<sup>155</sup>

The concern with this was articulated by the Human Rights Commission (ACT) (‘HRC’), which made formal submissions on the exposure draft of the Bill. According to the HRC, the question of consent, at least as it related to the definition of consent in its application to intimate image abuse, may have the effect of:

Placing a legal burden on the defendant in these circumstances gives rise to a serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden (emphasis added) placed upon them to show they did not.<sup>156</sup>

This conclusion arises out of the language used in the amendment. Both limbs require the accused to establish that they had *actual knowledge* of consent, or to establish the existence of *reasonable grounds for the belief*. In both cases the focus at trial would be, in effect, at least an evidential, if not a legal burden on the part of the accused. Accordingly, the HRC advised against approving the Bill in its current form, advising:

As the explanatory statement suggests, the extent of any limitation of this right is ‘difficult to ascertain at this stage’. The Committee is concerned that the new definition of consent may result in substantial changes to how knowledge or recklessness of the lack of consent is established. In particular, by including the need for an defendant to be satisfied on reasonable grounds within the definition of consent, and applying that definition to a number of offences, it is difficult to determine the extent of the evidential or legal burdens that may be

<sup>153</sup> This is also a proposed amendment set out in s67(4) of the Bill: “(4) In this section: sexual offence consent provision means any of the following: (a) section 54; (b) section 55 (3) (b); (c) section 60; (d) section 61 (3) (b); (e) section 66A (2) (c).”

<sup>154</sup> Section 38(1) of that Act provides: ‘The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly’.

<sup>155</sup> ACT Legislative Assembly, Standing Committee on Justice and Community Safety (ACT), *Scrutiny Report 17* (2018) 2.

<sup>156</sup> *Ibid.*

faced by the defendant, such as whether they will need have evidence going both to their state of mind and the reasonableness of that state of mind. Therefore, the Committee is not satisfied, on the information available to it, that the amendments to the definition of consent will have only a reasonable limitation on the right to the presumption of innocence. The Committee therefore recommends that an inquiry is needed to establish the possible operation and impact of the amendments to the definition of consent included in the Bill.<sup>157</sup>

The Bill, having been identified as a potential problem, was then opened to the public for submissions on the way forward.<sup>158</sup> This inquiry closed in September 2018, having received 28 submissions. The subsequent report was published in October 2018.<sup>159</sup> Simply stated,<sup>160</sup> the report affirmed the view of the Committee that the ACT *not* proceed with the Bill as tabled.<sup>161</sup> Further, it recommended that any legislative changes be delayed until after the publication of the findings of the NSWLRC on the issue of consent.<sup>162</sup> The Report did, however explicitly state that:

[A] definition of consent based on a concept of free and voluntary agreement, and affirmative and communicative consent be considered for enactment into ACT law.<sup>163</sup>

In short, the ACT is in the process of bringing the statutory definition of consent into line with the 2010 ALRC recommendations, consistent with other jurisdictions in Australia. It is just a matter of time. What is worth noting about the focus of the Committee was *not* the question of whether or not the meaning of consent was at issue, but rather the perception or knowledge of genuine consent in the mind of the accused. In other words, the issue goes towards the knowledge of the accused rather than any concern in relation to the meaning or qualification of consent.

## VII. CONCLUSION

The ACT has been slow to effect legislative changes. This appears to be the result of three connected factors. The first of these is the feminist jurisprudence behind negative models of consent. As outlined above, that jurisprudence is concerned with a focus on the conduct of the accused and the circumstances of the conduct, rather than the communication of consent on the part of the complainant. There is much to respect in that policy, grounded as it is in the overriding concern to protect the complainant as much as possible during the trial process. The problem here is twofold. Firstly, that the question of consent is necessarily a part of any sexual offence allegation, and continued to operate in the ACT at common law and in practice in spite of the statutory framework. Questions routinely were asked about the communication of consent during sexual assault trials despite the focus implied by s67 of the *Crimes Act*. Secondly, the emergence of a national approach to consent left s67 behind, notably after the ALRC published its report and associated recommendations in 2010. As a result, the negative model of consent has come to be seen as an anomaly rather than sound policy.

The second aspect of the conservative position in the ACT is undoubtedly the effect of the *Human Rights Act 2004* (ACT), and the strong influence of the Human Rights

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<sup>157</sup> Ibid 3.

<sup>158</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety/inquiry-into-the-crimes-consent-amendment-bill-2018>.

<sup>159</sup> ACT Legislative Assembly, Standing Committee On Justice And Community Safety (ACT), *Report On Inquiry Into The Crimes (Consent) Amendment Bill 2018* (2018).

<sup>160</sup> The Report contained 10 recommendations.

<sup>161</sup> Standing Committee on Justice and Community Safety, above n 158. Recommendation 1

<sup>162</sup> Ibid. Recommendation 2.

<sup>163</sup> Ibid.

Commission in legislative activity in this jurisdiction. This is not to suggest that the HRC stands in opposition of consent reforms. That is not the case. Rather, the necessary concern of the HRC is to provide high-level input into legislative design that has the potential to impact on domestic and internationally recognised human rights. As the criminal law is fundamentally linked to those questions, matters that have the potential to erode, compromise or threaten human rights are of necessary concern. As discussed above, the concern with recent amendments has been the question of whether the legislation effectively imposed an evidential, of not legal burden on the accused to establish the existence and content of consent communication. As a result, statutory reforms in this area will always be delayed because of the “precautionary logic” that operates in organisations that are effectively concerned with risk assessment.<sup>164</sup> Because reforms in this area present a *legal risk* to the question of rights, the recommended approach is necessarily a cautious one.

Associated with this is the problem associated with making reforms in an area of complex law. The ACT, being, ostensibly, a Code jurisdiction that continues to operate a common law foundation, and reform in areas that have such complex substantive and procedural law inevitably requires a painstaking analysis of the implications of any proposed reform. Submissions before the Standing Committee discussed above show a serious concern with how the operation of consent reforms would play out in a courtroom, especially in front of a jury.

All things considered, it is no surprise as to why legislators in the ACT have preferred an approach that is awaiting the outcome of the NSW Law Reform Commission’s own inquiry into the laws of consent. This inquiry commenced in May 2018, in the wake of the *Lazarus* trials in that state.<sup>165</sup> This report has still yet to be published. It is worth noting, however, that the Draft Proposals published for public comments specified that there were no plans to change the meaning of consent as currently provided as “free and voluntary”. Rather, the intention was to extend the circumstances where consent may be vitiated.<sup>166</sup> This being the case, it seems very likely that consent in the ACT will shortly involve a similar hybrid as other Australian jurisdictions, involving an explicit meaning of consent on a statutory basis, with a series of statutory circumstances where consent may be vitiated. The story will not, however, end there. It seems likely this area of law will continue to evolve, most likely in the direction of merging communication and context.

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<sup>164</sup> Richard Ericson and Kevin Haggerty, *Policing the Risk Society* (University of Toronto Press, 1997); Richard Ericson, *Crime in an Insecure World* (Polity Press, 2007).

<sup>165</sup> *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* [2017] NSWCCA 279. For discussion see Andrew Dyer, 'Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need for s. 61HE of the Crimes Act to Be Changed (Except in One Minor Respect)' (2019) 43(2) *Criminal Law Journal* 100.

<sup>166</sup> New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2018).