Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism?

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ABSTRACT

This comment discusses the NSW government's decision to "go further" with its reforms to s 61HE of the *Crimes Act 1900* (NSW) than the NSW Law Reform Commission recommended. It argues that that government's proposal to prevent non-consensual sexual offence defendants from relying on honest and reasonable mistake of fact unless they have "said or done something" to ascertain whether the complainant was consenting, is both populist and objectionable. If enacted, the government's proposal will come very close to transforming serious offences into crimes of absolute liability. It will certainly facilitate the conviction of morally innocent actors. Accordingly, those academic and practising lawyers who regard such reforms as "progressive" and/or "sound in principle" are wrong. This is yet another instance of a state government using rhetoric about the interests of crime victims and community protection to justify a serious departure from fundamental criminal law principles.

1. Introduction

A couple of years ago, in another journal, I stated that, because "affirmative consent" provisions "lead to unfairness and are untenable", I would be surprised if the New South Wales Law Reform Commission ("NSWLRC") were to recommend the insertion of such a provision into the *Crimes Act 1900* (NSW) ("*Crimes Act*").[1] The NSWLRC did not surprise me. In its Final Report about s 61HE of the *Crimes Act*, which concerns consent and knowledge of a complainant's non-consent for the purposes of various non-consensual sexual offences,[2] the Commission concluded that s 61HE should not require an accused to have taken "steps" to ascertain whether the complainant was consenting, before he or she could hope to prevent the Crown from proving that he or she had the requisite mens rea.[3] "[W]e are concerned", the NSWLRC said, "about the potential effect of such a requirement on the rights of accused persons."[4]

The Commission did not conclude that an accused's failure to take verbal or physical steps to determine whether his or her sexual partner was consenting to the relevant activity should be a neutral consideration at a sexual assault, sexual touching or sexual act trial. Juries, it thought, should be required to *take into account* "whether the accused person said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person

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[1] Andrew Dyer, "Yes! To Communication about Consent; No! to Affirmative Consent: A Reply to Anna Kerr" (2019) 7(1) *Griffith Journal of Law & Human Dignity* 17, 30.

[2] Namely, the sexual assault offences creates by *Crimes Act 1900* (NSW) ss 61I, 61J and s 61JA, the sexual touching offences created by ss 61KC and 61KD of the same Act, and the sexual act offenses created by ss 61KE and 61KF. See *Crimes Act 1900* (NSW) s 61HE(1).

[3] NSW Law Reform Commission, *Consent in Relation to Sexual Offences,* Report No 148 (2020), 139 [7.120].

[4] Ibid.

consented to the sexual activity, and if so, what the accused person said or did."[5] A provision of this character, it found, would "appropriately direct attention to the accused person's behaviour while also respecting fundamental criminal law principles."[6]

In the article just mentioned, I also expressed the view that, even if the NSWLRC were to recommend the adoption of an "affirmative consent" provision, I would be "very surprised" if the NSW government were to accept such a recommendation.[7] Accordingly, when, on 25 May 2021, the NSW Attorney General, Mr Mark Speakman, announced that the NSW government's reforms to s 61HE would "go further" than those that the NSWLRC had proposed, I *was* very surprised.[8] As well as "supporting, or supporting in principle" each of the NSWLRC's forty-four reform recommendations, Mr Speakman announced, the government will have the law state that "an accused person's belief in consent will not be reasonable in the circumstances unless … [he or she] did or said something to ascertain consent."[9] This "affirmative model of consent", he concluded, "will address issues that have arisen in sexual offence trials about whether an accused's belief that consent existed was actually reasonable."[10] As argued below, it will also make it practically impossible for a person accused of a non-consensual sexual offence to rely successfully on honest and reasonable mistake of fact.[11]

Perhaps less surprising than Mr Speakman's announcement was the reaction to it. In a press release issued on the same day, the NSW Bar Association claimed that the Attorney General's proposals "are likely to result in significant injustice."[12] Shortly afterwards, in an opinion piece in the *Sun-Herald*, Stephen Odgers SC contended that a person who has a mistaken belief in consent that it is reasonable for him or her to hold, should not be convicted of a "very serious

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[5] Ibid 141.

[6] Ibid 139 [7.121].

[7] Dyer, "Yes! To Communication about Consent", n 1, 30-1.

[8] Mark Speakman, "Consent Law Reform" (Media Release, 25 May 2021) < https://www.dcj.nsw.gov.au/news-and-media/media-releases/consent-law-reform>.

[9] Ibid.

[10] Ibid.

[11] Currently, very exceptional cases aside (as to which, see, respectively, *R v Mitton* (2002) 132 A Crim R 123, 129 [28] and *R v Banditt* (2004) 151 A Crim R 215, 232 [92]) if an accused is to be acquitted of one of the offences to which this comment relates on the basis that he or she lacked mens rea, it will be because he or she might have believed on reasonable grounds that the non-consenting complainant was consenting: see *Crimes Act 1900* (NSW) s 61HE(3)(c).

[12] NSW Bar Association, "Consent Proposals Could Result in Significant Injustice" (Media Release, 25 May 2021) <https://nswbar.asn.au/the-bar-association/publications/in-brief/view/08b347d11316f1372f3414b4c466afe4>.

crime" simply because of his or her failure to "say or do anything to ascertain consent".[13] But some academics – many of whom are not known to be hostile to stronger human rights protections than we have in NSW at the moment[14] – were more positive about Mr Speakman's announcement.[15] And twenty-three high-profile barristers soon took the opportunity to repudiate the Bar Association's remarks. The proposed reforms were "sound in principle", they said.[16] Under those reforms, Justin Gleeson SC added, "the accused will have the simple burden of asking before acting."[17] What could be wrong with that?

In this comment, I shall argue that these academics and barristers are wrong to support a populist and draconian reform, campaigned for by an illiberal and unprincipled newspaper,[18] and announced by a government that has once again[19] used rhetoric about the interests of crime victims to justify a departure from basic principles of fairness for accused persons.

2. Communication about Consent

Nobody with any decency could dispute the proposition that people who are engaging in sexual activity with one another should communicate with each other both before and during that activity.[20] Nor can it seriously be doubted that, if at any stage during sexual activity, ambiguity arises in the mind of one of the participants concerning whether the other participant is consenting, the first participant should ensure that he or she *is*.[21] And that is why I have argued

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[13] Stephen Odgers SC, "Peril in Sexual Consent 'Reform'", *The Sun-Herald,* 30 May 2021, 25. See also Stephen J Odgers, "Reform of "Consent" Law" (2021) 45 *Criminal Law Journal* 77, where Odgers, as he does in his *Sun-Herald* piece, criticises other reforms to which the NSW government has now lent its support/support in principle. I have made some similar criticisms of the NSWLRC's proposals in Andrew Dyer, "A Reasonable Balance: The New South Wales and Queensland Law Reform Commissions' Reports about Consent and Culpability in Sex Cases Involving Adults" (2021, forthcoming) *Australian Bar Review*.

[14] See, eg, Jonathan Crowe, "What's So Bad about Judicial Review?" (2008-9) 24(40) *Policy* 30.

[15] See, eg, Eden Gillespie, "'Cautiously Optimistic': Experts Respond to NSW Consent Law Reform", *SBS online*, < https://www.sbs.com.au/news/the-feed/cautiously-optimistic-experts-respond-to-nsw-consent-law-reform>.

[16] Michaela Whitbourn, "Top Silks Break Ranks to Back NSW Plan to Overhaul Sexual Consent Laws", *Sydney Morning Herald*, 2 June 2021 < https://www.smh.com.au/national/nsw/top-silks-break-ranks-to-back-nsw-plan-to-overhaul-sexual-consent-laws-20210601-p57x4u.html>.

[17] Justin Gleeson SC, "Sexual Consent Reforms Will Bring Laws into Line with Community Standards", *Sydney Morning Herald*, 3 June 2021 < https://www.smh.com.au/national/nsw/sexual-consent-reforms-will-bring-laws-into-line-with-community-standards-20210602-p57xgn.html>.

[18] See, eg, Ava Benny-Morrison, "IT'S YES FOR SEX: NSW to Adopt Affirmative Consent Model", *Daily Telegraph*, 25 May 2021, 1; Ava Benny-Morrison, "Sex Consent to be Law: Historic Overhaul of Legal System Wins Support from Assault Survivors", *Daily Telegraph*, 25 May 2021, 7.

[19] See, eg, *Crimes Act 1900* (NSW) ss 19B and 25B(1).

[20] See, eg, Gail Mason and James Monaghan, "Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases" (2019) 31(1) *Current Issues in Criminal Justice* 24, 26-7.

[21] See, eg, Rachael Burgin, "Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform" (2019) 59 *British Journal of Criminology* 296, 302.

many times elsewhere[22] that it would be unproblematic for the law to provide – as we have seen the NSWLRC thinks it should – that judges at sexual offence trials must instruct juries to *take into account* the accused's failure to take physical or verbal steps to ascertain whether the complainant was consenting, when those juries deal with the mens rea question. At any trial where the accused argues that he or she believed on reasonable grounds that the complainant was consenting, the jury will necessarily focus on the complainant's conduct. That is because a person can only realistically be found possibly to have had a reasonable but mistaken belief in consent, if the jury thinks that the complainant might not have resisted the accused.[23] It seems only fair that the jury should also focus to an extent on what *the accused* said and/or did, if anything, when it resolves the reasonable belief enquiry.

It is obviously wrong to argue, as some have, that the provision to which the NSWLRC lent its support "provides a protection only to accused persons."[24] Indeed, if the NSW had inserted such a provision into the *Crimes Act*, this might well have made a difference[25] in cases that are factually similar to that which led the NSW government to require the NSWLRC to review s 61HE (*The Queen v Lazarus*[26]).

In those proceedings, at the accused's second trial, the trier of fact was Judge Tupman. When assessing whether Mr Lazarus might have believed on reasonable grounds that the non-consenting complainant was consenting, her Honour took into account the complainant's failure to resist him.[27] This was not because Judge Tupman was endorsing the "rape myth"[28] that those who fail to resist are always consenting.[29] As just suggested, her Honour found that, despite her lack of resistance, the complainant was *not* consenting.[30] Rather, Judge Tupman was taking

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[22] See, eg, 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* 78, 97-9.

[23] See RA Duff, "Recklessness and Rape" (1981) 2) *Liverpool Law Review* 49, 62.

[24] Rachael Burgin and Jonathan Crowe, "The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?" (2020) 32(3) *Current Issues in Criminal Justice* 346, 355; See also Rachael Burgin and Asher Flynn, 'Women's Behaviour as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2019) *Criminology and Criminal Justice* 1, 4.

[25] Cf Burgin and Crowe, "The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences", n 24, 355.

[26] *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017).

[27] Ibid.

[28] Referred to at NSW Law Reform Commission, n 3, 170.

[29] Contra Jacqueline Horan and Jane Goodman-Delahunty, "Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned" (2020) 43(2) *UNSW Law Journal* 707, 708.

[30] *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017).

into account a factor that rationally bore on whether the accused might have had an exculpatory mental state. The problem was that the judge forgot about her obligation, when assessing whether the accused had the requisite mens rea, to consider any "steps" he took, if any, to ascertain whether the complainant was consenting.[31] Of course, when finding that this amounted to a legal error on Judge Tupman's part,[32] the NSW Court of Criminal Appeal did not say that, if her Honour had considered Mr Lazarus's failure to take any "steps", she should certainly have convicted him. But neither did it say that she should *not* have. As the Attorney General observed when announcing the NSWLRC's review, the matter of Mr Lazarus's guilt was left unresolved.[33] Perhaps if Judge Tupman had considered Mr Lazarus's passive and insouciant approach to the question of consent, the result would have been the same as the one actually reached at the trial that was had. But perhaps it would have been different. Moreover, it seems probable that if the accused had been tried by a judge and a properly instructed jury – as would normally be the case at such a trial – the jury would have convicted him. Similarly perhaps to how the jury reasoned at Mr Lazarus's first trial,[34] such a jury would be liable to take a negative view of an accused who proceeded with penile-anal intercourse with a woman he knew to be a virgin and whom he had met only minutes before – and without taking the simple step of working out whether this was something that she was willing to do.

Now, of course, some might object that a provision of the kind supported by the NSWLRC does not make convictions *inevitable* in cases such as *Lazarus*. And they might observe that the provision that the NSW government supports *would* certainly achieve such results. Why, then, should we refrain from imposing a legal requirement on those accused of non-consensual sexual offending to "do or say something" to ascertain whether the complainant is consenting before they can be found to have lacked the requisite mens rea?

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[31] See *Crimes Act 1900* (NSW) s 61HE(4)(a), though the relevant provision at the time was numbered *Crimes Act* s 61HA(3)(d).

[32] *R v Lazarus* (2017) 270 A Crim R 378, 407 [148].

[33] Mark Speakman and Pru Goward, "Sexual Consent Laws to be Reviewed" (Media Release, 8 May 2018) < https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/sexual-assault-consent-laws-to-be-reviewed.pdf >.

[34] At that first trial, the accused was convicted as charged. However, his conviction was set aside on appeal because of a fairly technical error that the trial judge had made when charging the jury. The judge was required to make it clear to the jury that the accused could be convicted only upon proof that any belief that he had in consent was unreasonable *for him*. It was an error for her Honour instead to suggest that the jury could convict if satisfied to the criminal standard that a reasonable person in the accused's position would have realised that the complainant was not consenting: *Lazarus v R* [2016] NSWCCA 52, [156].

3. Affirmative consent

One answer that I have given to the question just posed is that, depending on the precise wording of an affirmative consent provision, such provisions can effectively create an absolute liability standard for non-consensual sexual offences.[35] The NSWLRC referred without disapproval to this argument,[36] and several academic commentators have expressly approved it.[37] And the point can be explained briefly. Some think that the law should state that a person may be acquitted of non-consensual sexual offending on the basis of a lack of mens rea, only if he or she has *ensured* that the complainant was consenting.[38] But if that were so, in fact no accused could succeed on the basis of honest and reasonable mistake of fact. That is because the accused who has ensured that his or her partner is consenting, has made no mistake. He or she is engaging in consensual sexual activity and so has no need to rely upon any claim that, though the complainant was not consenting, the accused lacked mens rea. If the only person who can rely on honest and reasonable mistake of fact is a person who has made no mistake and has no need for that "defence", then logically that "defence" has in substance been abolished. Indeed, in Queensland recently, two commentators provided us with a strong indication that the real purpose of affirmative consent advocates is to prevent a person accused of non-consensual sexual offending ever from being able to raise honest and reasonable mistake of fact.[39] They argued that Parliament should take direct legislative action to render honest and reasonable mistake of fact "inapplicable to the issue of consent in rape and sexual assault cases" in that state.[40]

The problem is that, once honest and reasonable mistake of fact *is* rendered inapplicable to such proceedings – either directly or in substance – all of those who are proved to have engaged in non-consensual sexual activity will be convicted of an offence. Why is that a problem?

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[35] See, eg, Dyer, "Yes! To Communication about Consent", n 1, 10-12.

[36] NSW Law Reform Commission, n 3, 138 [7.115].

[37] See, eg, James Duffy, "Sexual Offending and the Meaning of Consent in the Queensland Criminal Code" (2021) 45(2) *Criminal Law Journal* 93, 104; Arlie Loughnan et al, *Submission to the NSW Law Reform Commission's Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences* (1 February 2019).

[38] See, eg, Burgin, "Persistent Narratives of Force and Resistance", n 21, 302.

[39] See too, eg, Wendy Larcombe et al, ''I Think It's Rape and I Think He Would Be Found Not Guilty': Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 623-4.

[40] Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1, 4-5. I was critical of them – see Andrew Dyer, 'Progressive Punitiveness in Queensland' (2020) 48 *Australian Bar Review* 326 – but at least they faced up squarely to what they were trying to achieve.

Surely, as Annie Cossins has suggested,[41] they all *should* be convicted? The problem is that, if a person can never be acquitted of a crime because of the absence of mens rea, that crime is one of absolute liability[42] – and our law has long rightly regarded absolute liability for serious offending as anathema.[43] Why has it been right to take this approach? This is largely because, consistently with what Andrew Ashworth has argued,[44] if we convict all those who kill, we convict some morally innocent actors.[45] And, as hard as it might be for some people to accept, the same goes for sexual offences.[46] If we convict all those who engage in non-consensual sexual relations, we expose to great stigma some people who have not acted culpably.

Now, the NSW government's proposed "affirmative consent" provision might not quite create an effective absolute liability standard for the crimes to which it applies. Consider, for example, the facts of the old Queensland case of *R v Lyons*.[47] In that case, the accused was a gay man at a gay beat. An undercover police officer, dressed in "clothing ... not inconsistent with what a homosexual might be expected to wear in such circumstances"[48] approached him in the public toilet block in question. To the accused's enquiry "what are you here for?" the police officer made no direct response. He instead said to the accused "what are *you* here for?" The accused was more direct. "I am here for this," he said, grabbing the police officer's groin.[49] He was charged with an indecent assault offence. It seems to me that, in this scenario, the accused "said something to ascertain consent." For, what else was the purpose of the question that he directed at the police officer? And, if this is so, these facts would seem to provide us with a concrete example of a case where honest and reasonable mistake of fact could[50] arise as an issue despite

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[41] 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) *UNSW Law Journal* 462, 477.

[42] See, eg, *R v Wampfler* (1987) 11 NSWLR 541, 546.

[43] See, eg, *The Queen v Tolson* (1889) 23 QBD 168, 182 (Cave J).

[44] Andrew Ashworth, "Should Strict Criminal Liability Be Removed from All Imprisonable Offences?" (2010) 45 *Irish Jurist* 1, 15.

[45] See also, eg, Kimberley Kessler Ferzan, "Consent, Culpability and the Law of Rape" (2016) 13 *Ohio State Journal of Criminal Law* 397, 422.

[46] Ibid 421-2.

[47] (1987) 24 A Crim R 298.

[48] Ibid 300 (Williams J).

[49] Ibid 301.

[50] I say "could", not "would", because it is well-established that trial judges need only direct juries about the real issues in the case: *Alford v Magee* (1951) 85 CLR 437, 466. It is possible that, like the Queensland Court of Criminal Appeal in *Lyons* (see ibid 300 (Williams J), 302 (Moynihan J, with whom Andrews CJ concurred at 300), the trial judge would find that these facts were not such as to make honest and reasonable mistake of fact a "real issue".

the existence of the NSW government's new provision. In such a case, once the jury had satisfied itself that the accused might have made the relevant utterance, it would have to go on to decide whether, on the facts, the accused might have honestly and reasonably but mistakenly believed that the complainant was consenting to the touching. The ambiguity of the police officer's response would leave some room for the accused to argue that he had made an exculpatory mistake.

That said, honest and reasonable mistake of fact failed on the facts in *Lyons*[51] and – this is the real point – it would seemingly have an extraordinarily narrow scope of operation under the law that the NSW government wishes to enact. Usually, when a person "says or does something" to ascertain whether another person is consenting, the response that he or she receives is unambiguous. Indeed, the very purpose of a provision such as the NSW government's one is to prevent such ambiguity from arising. It is for the accused to resolve ambiguity before proceeding;[52] and if he or she does not – if he or she acts before asking[53] – the accused will be guilty of a serious offence if the other person is unwilling.

In *Tame v New South Wales*,[54] one question that the High Court of Australia was required to consider was whether liability for negligently inflicted psychiatric injury could arise at common law even if the plaintiff had not directly perceived a distressing phenomenon or its immediate aftermath. The Court found that it could. An absolute rule to the contrary might not operate unfairly in most cases. But, as Gleeson CJ observed, the problem with rigid rules is that "sooner or later, a case is bound to arise that will expose the dangers of inflexibility."[55] Should a mother be prevented from recovering damages for such injury simply because, even if the defendant health authority failed adequately to diagnose or treat a sexual offender, she did not directly perceive her daughter's murder by him and only identified the girl's body a week afterwards, once the police had managed to locate it?[56]

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[51] More precisely, as suggested in n 50, the Court held that there was no evidence of honest and reasonable mistake of fact.

[52] See, eg, Burgin, "Persistent Narratives of Force and Resistance", n 21, 302.

[53] See Gleeson, n 17.

[54] (2002) 211 CLR 317.

[55] Ibid 337 [35].

[56] Ibid 393 [222] (Gummow and Kirby JJ), referring to *Palmer v Tees Health Authority* [1999] Lloyd's Rep Med 351.

The same applies to mandatory sentencing.[57] And the same applies to a requirement for a person to have "done or said something to ascertain consent" if he or she is to be acquitted on the basis of honest and reasonable mistake of fact in a case of alleged non-consensual sexual offending. In many cases, the rule will produce no injustice. But there are exceptions. Take, for example, the following accused persons:

- the accused with an intellectual disability[58] who, because of his or her inability properly to perceive events, thinks, reasonably for him or her, that he or she has gained a clear indication of consent and therefore does not, by word or gesture, ask "are you consenting?"
- the accused with a mental illness[59] who, because of his or her inability properly to perceive events, thinks, reasonably for him or her, that he or she has gained a clear indication of consent and therefore does not, by word or gesture, ask "are you consenting?"
- the accused with an autism spectrum disorder[60] who, because of his or her inability properly to perceive events, thinks, reasonably for him or her, that he or she has gained a clear indication of consent and therefore does not, by word or gesture, ask "are you consenting?"
- the youthful accused[61] who, because of his or her inexperience, thinks, reasonably for him or her, that he or she has gained a clear indication of consent and therefore does not, by word or gesture, ask "are you consenting?"
- the accused who, while kissing a person with whom he or she has recently engaged in consensual sexual activity, touches that person sexually only to be told "no" (and who then immediately desists)[62]
- the accused who kisses, or attempts to kiss, a person, in circumstances where he or she has reasonably but mistakenly developed a belief that the other person will welcome such attentions (and who, upon finding out that he or she was wrong, immediately desists)

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[57] As has been noted by one of the twenty-three barristers who has expressed the view that the NSW government's consent proposals are "sound in principle." See Desmond Manderson and Naomi Sharp, "Mandatory Sentences and the Constitution: Discretion, Responsibility and the Judicial Process" (2000) 22 *Sydney Law Review* 585.

[58] Note the accused's account in, eg, *R v Mrzljak* [2005] 1 Qd R 308 and *Butler v State of Western Australia* [2013] WASCA 242.

[59] See *R v Dunrobin* [2008] QCA 116 (though note that, on the facts of that case, the accused's belief in consent might have been unreasonable even for a person suffering from schizophrenia).

[60] Note the remarks of the English Court of Appeal in *R v B(MA)* [2013] 1 Cr App R 36, [41].

[61] See *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [43].

[62] It has been put to me that this accused *has* "done something" to ascertain whether the complainant was consenting to the touching. That thing, it is said, was the accused's act of kissing the complainant. I doubt whether this is a plausible interpretation of the NSW government's proposed provision, the intention of which is surely to make it impossible for the trier of fact to acquit the accused in a case such as *Lazarus*. Surely, when Mr Lazarus kissed and then touched the complainant, he was not "doing something" to ascertain whether she was consenting to sexual intercourse?

It is submitted that, despite the failure of these people to "do or say anything to ascertain whether the other person was consenting", none of these people have exhibited sufficient culpability to be convicted of a serious offence. And it can be added that these examples, between them, show two separate difficulties with the NSW government's proposed provision. The first four examples demonstrate that that provision has the potential to operate harshly with respect to vulnerable defendants, those whose ability to perceive events is, for whatever reason, compromised because of circumstances that are beyond their control. The final two examples show that that provision also takes rather an unrealistic approach to how certain morally unproblematic sexual activity occurs.[63] All of these examples show that there are *sometimes* good reasons why people do not "do or say anything" to ascertain whether then other person is consenting to a particular sexual act.

It is true that those who accept the validity of the argument just presented do have the following response available to them. Under the NSW government's proposed provision, they might say, injustice is only liable to be suffered by a small number of defendants – and such a risk is worth taking if, to use the twenty-three barristers' language, this will "bring about better outcomes for the community as a whole."[64] But it should not be forgotten that the Howard government used very similar reasoning to this when defending draconian measures against alleged terrorists.[65] Human rights breaches – and because of its capacity to cause the conviction of morally innocent actors, the NSW government's proposal does raise a number of human rights issues[66] – do often affect only a small number of (unpopular) people. That does not stop them from being human rights breaches. Or, to put essentially the same point in a different way, it is

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[63] See NSW Law Reform Commission, n 3, 138 [7.114].

[64] Justin Gleeson SC et al, "Media Release: NSW Barristers in Support of Attorney's Sexual Assault Reforms" (Media Release, 1 June 2021).

[65] See, eg, Joo-Cheong Tham and KD Ewing, "Limitations of a Charter of Rights in the Age of Counter-Terrorism" (2007) 31 *Melbourne University Law Review* 462, 471.

[66] Certain commentators have too quickly dismissed the suggestion that a provision such as the one discussed here is consistent with the right to be presumed innocent. See, eg, Jonathan Crowe, "Consent, Power and Mistake of Fact in Queensland Rape Law" (2011) 23(1) *Bond Law Review* 21, 38. While the English and European position is that punishment without fault will amount to no breach of art 6(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ("ECHR") – see, eg, *G v United Kingdom* (ECtHR, Chamber, Application No 37334/08) – the Supreme Court of Canada has accepted that, in such circumstances, there will be a breach of the right to be presumed innocent. See, eg, *R v Vaillancourt* [1987] 2 SCR 636, 645-6 (Lamer J, Dickson CJ, Estey and Wilson JJ agreeing), 661 (Beetz J), 665 (La Forest J). And for the reasons discussed in Dyer, "Progressive Punitiveness", n 39, 361-3, when we punish the morally innocent, we would seem both to impose a grossly disproportionate punishment on them and subject them to arbitrary detention, contrary to guarantees such as *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 7 and 9(1) respectively.

difficult to see any relevant moral distinction between on one hand punishing people for terrorist[67] – or sexual[68] – offences that they have not yet committed, and, on the other, punishing those who have displayed no moral culpability. In each case, we are punishing the innocent to achieve some utilitarian benefit.

4. Conclusion

Ordinarily, when an Australian Attorney General makes an announcement about criminal law reform at a press conference at which he or she appears alongside the Police Commissioner and a victim or alleged victim of crime, the relevant reform is not one that enhances individual freedom. And, ordinarily, "progressive"[69] academic and practising lawyers will quickly make clear their opposition to the measure that has been announced. This is especially so where the government has, consistently with the urgings of a tabloid newspaper, expressed its support for a far more punitive proposal than it was advised to adopt in a Law Reform Commission Report on the matter.

In the case of the NSW Attorney General's 25 May announcement, however, many "progressives" have expressed no such misgivings. On the contrary, they have supported the government's position; and some of them have even suggested, wrongly, that that position is consistent with that advocated by the NSWLRC after "a detailed process of public consultation" and in "a careful report".[70]

It is easy to understand the feeling that something must be done about the "low conviction rates"[71] for sexual offending and the cultural and other factors that cause "only a small proportion of alleged incidents of sexual offending to result in conviction".[72] But in this comment, I have argued that these lawyers are wrong to support a populist reform that has a real capacity to instrumentalise accused persons. The criminal law must do what it can to prevent "wrongful

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[67] See, eg, the Commonwealth preventive detention scheme considered recently in *Minister for Home Affairs v Benbrika* (2020) 388 ALR 1. Essentially because the relevant detention is served in prison, Edelman J seems clearly correct to have held that detention to be punitive: at 58-61 [196]-[204].

[68] See, eg, the State preventive detention scheme considered in *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, and note in particular the reasoning of Kirby J in his dissenting reasons in that case at 632-7 [150]-[162]. See also *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, 8 [7.4], where the United Nations Human Rights Committee accepted his Honour's view that the relevant detention is punitive.

[69] See, eg, Larcombe et al, n 39, 624.

[70] Gleeson, n 17.

[71] NSW Law Reform Commission, n 3, 7 [1.36].

[72] Ibid 15 [2.8].

and destructive behaviour [from] occurring in the first place".[73] But we must always remember how liable to abuse "[t]he preventive function of government" is.[74] That function has been abused here; and if we are to be truly committed to human rights protection, we must acknowledge it.

[73] Gleeson, n 17.

[74] JS Mill, *On Liberty* (Penguin, 1979) 165.