25. Sexual Offences

Contents

Introduction 1129
Overview of sexual offences 1130
   Legislative framework 1130
‘Rape’: the penetrative sexual offence 1130
   Commissions’ views 1135
Sexual offences against children and young people 1136
   Persistent sexual abuse of a child 1142
   Sexual offences against people with cognitive impairment 1146
Consent 1147
   Statutory definition of consent 1147
   Circumstances where consent is vitiated 1150
   The fault element 1158
   Commissions’ views 1168
   Jury directions about consent 1170
   Guiding principles and objects clauses 1176

Introduction

25.1 This chapter outlines the legal framework of sexual assault offences, summarises the range of existing offences across Australian jurisdictions and identifies inconsistencies in relation to elements of these offences—notably concerning the issue of consent. It also discusses the symbolic, educative and practical role that guiding principles and statements of objectives can play in the interpretation of law and the application of rules with respect to sexual offences.

25.2 The summary of offences is not comprehensive, but focuses on those sexual offences that are most likely to be committed by a current or former intimate partner or family member. For example, sexual offences proscribed in the Commonwealth criminal law such as those relating to child sex tourism,1 or rape or sexual violence in the context of war or as a crime against humanity2 are not included.3

25.3 Despite extensive reform of the laws relating to sexual offences, there remain some significant gaps and inconsistencies between jurisdictions in the construction of offences. While some of these are examined in this chapter, the focus of the

---

1 Crimes Act 1914 (Cth) pt IIIA.
2 Criminal Code (Cth) ss 268.14, 268.19, 268.59, 268.64.
3 See also Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth).
Commissions’ work has been on inconsistency in interpretation or application of laws in those areas with most direct impact on victims of sexual assault in a family violence context—in relation to the reporting and prosecution of offences as well as pre-trial and trial processes. These issues are discussed in Chapters 26 to 28.

25.4 The purpose of summarising sexual assault offences in this chapter is to illustrate the range of sexually coercive behaviour that is proscribed in various criminal laws and, in some instances, to point to promising approaches to counter such conduct. The discussion also provides background for later examination of pre-trial and trial processes in sexual assault proceedings.

Overview of sexual offences

25.5 Extensive reforms of the laws relating to sexual offences over the last 25 years have resulted in a new range of sexual offences in most jurisdictions.4 Key areas of law reform have included a move away from the language of ‘rape’ to that of ‘sexual assault’ as a way of emphasising sexual offences as acts of violence. Related to this was the grading of sexual offences to take account of different circumstances and aggravating factors. The scope of the penetrative offence has also been broadened in all jurisdictions.

Legislative framework

25.6 Each Australian jurisdiction has its own set of substantive and procedural criminal laws. The main point of divergence between jurisdictions is whether the criminal law is codified or remains guided by the common law. Within that distinction, there is a further differentiation as to whether the jurisdiction has adopted the uniform Evidence Acts.5

25.7 In the criminal code jurisdictions—Queensland, Western Australia, Tasmania and the Northern Territory—statutes comprehensively set out the criminal law such that ‘all crimes now exist in statutory form as defined by the various codes which have specifically supplanted common law crimes’.6 In the common law jurisdictions—NSW, Victoria, South Australia and the ACT—any legislation is ‘interpreted in the light of common law precepts unless Parliament has expressly, or by necessary implication, evinced a clear intention to displace the common law’.7

‘Rape’: the penetrative sexual offence

25.8 Under the common law, rape was defined as carnal knowledge of a woman against her will and was subject to narrow and restrictive definitions of ‘sexual intercourse’. Statutory extensions and modifications to the common law crime of rape have been made in all jurisdictions to varying degrees,8 but with resulting

---

5 The uniform Evidence Acts are: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (Ntl). See Ch 27.
7 Ibid, 18.
8 See Thomson Reuters, *The Laws of Australia*, vol 10, Criminal Offences, 10.3, [140].
inconsistency across jurisdictions. The penetrative sexual offence is no longer gender-specific and, despite some inconsistencies, generally includes penetration of the genitalia by a penis, object, part of a body or mouth.

25.9 A number of jurisdictions also prohibit a person from compelling another person to take part in sexual penetration. In addition, common law understandings of consent, and the conditions or circumstances that are seen as negating consent, have been considerably modified.

25.10 The penetrative sexual offence is described as: ‘rape’ in Victoria, Queensland, South Australia and Tasmania, ‘sexual intercourse without consent’ in the ACT and the Northern Territory, and ‘sexual penetration without consent’ in Western Australia. The offence includes the continuation of sexual intercourse after penetration in order to address cases where consent has subsequently been withdrawn.

25.11 The penalty for sexual intercourse without consent ranges from 12 years to life imprisonment, depending on the jurisdiction and the presence of aggravating factors.

9 For example, there is some inconsistency between jurisdictions with respect to penetration of vagina/female genitalia or anus by a body part or object as well as penetration of the mouth by a penis. Western Australia is the only state in which the penetrative sexual offence includes the use of a victim’s body for penetration of the offender in the definition of penetration/sexual intercourse: Criminal Code (WA) s 319(1).

10 In some jurisdictions it is specified as penetration of the vagina or anus: eg, Crimes Act 1990 (ACT) s 50. Penetration of a surgically constructed vagina is not included in legislative definitions in Western Australia or the ACT, nor is it included with respect to penetration of a surgically constructed vagina by an object in Tasmania (Criminal Code (Tas) s 1). For other jurisdictions, see Crimes Act 1990 (NSW) s 61H(1); Crimes Act 1958 (Vic) s 35; Criminal Code (Qld) s 1; Criminal Law Consolidation Act 1935 (SA) s 5(3); Criminal Code (NT) s 1.

11 For example, in NSW, it includes ‘sexual connection occasioned by the penetration to any extent of the genitalia … of a female person or the anus of any person’ by ‘any part of the body of another person, or any object manipulated by another person’: Crimes Act 1990 (NSW) s 61H(1). See also the definition of sexual penetration in the Model Criminal Code: Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), app 2, cl 5.2.1.

12 See, eg, Crimes Act 1958 (Vic) s 38A. See also Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), app 2, cl 5.2.7.

13 Crimes Act 1958 (Vic) s 38.

14 Criminal Code (Qld) s 48.

15 Criminal Law Consolidation Act 1925 (SA) s 48.

16 Criminal Code (Tas) s 185.

17 Crimes Act 1900 (NSW) s 61L.

18 Crimes Act 1900 (ACT) s 54; Criminal Code (NT) s 192.

19 Criminal Code (WA) s 325.

20 Non-consensual continuation of sexual intercourse is recognised in all jurisdictions except Queensland. See: Crimes Act 1990 (NSW) s 61H(1)(d); Criminal Code (WA) s 319(1); Criminal Law Consolidation Act 1935 (SA) s 5; Criminal Code (Tas) s 1; Crimes Act 1900 (ACT) s 50(e); Criminal Code (NT) s 1. Crimes Act 1958 (Vic) s 38(2)(b) refers to the failure to withdraw after becoming aware that a person is not consenting.

21 Crimes Act 1900 (ACT) s 54(1).
25.12 In all jurisdictions the prosecution must prove that sexual penetration took place without the consent of the complainant. These are the physical elements of the offence, or actus reus. In the common law jurisdictions—NSW, Victoria, South Australia and the ACT—the prosecution must also prove that the accused knew that the victim was not consenting or was reckless about whether there was such consent.24 This is known as the mental element of the offence, or mens rea. Similar provisions apply in the Northern Territory.25 By contrast, in the code jurisdictions—Queensland, Western Australia and Tasmania—the prosecution need only prove intention.26

25.13 Until recently, in all the common law jurisdictions, a defendant who could prove an honest albeit unreasonable belief in consent would be acquitted of the offence. In the code jurisdictions, a defendant may raise the defence of an honest and reasonable belief in consent. Key changes in relation to the definition of consent and the mental element relating to consent are discussed later in this chapter.

Aggravated sexual assaults

25.14 Each jurisdiction provides in some way for aggravating factors for the penetrative offence (as well as for other sexual offences). These may be outlined in a definition section,27 articulated as a separate aggravating offence,28 as a subsection of the substantive offence,29 or as an entirely separate offence.30 The Model Criminal Code provides for increased penalties for all sexual offences when certain aggravating factors are present.31

25.15 Factors that are commonly nominated as aggravating include: causing injury; using a weapon; detaining the victim; the victim’s age; if the victim had a disability or cognitive impairment; or where the accused was in a position of authority in relation to the victim.32

25.16 For example, the penetrative sexual offence is supplemented with the separate crimes of ‘aggravated sexual assault’ in NSW and ‘aggravated sexual penetration

---

22 Criminal Code (Qld) s 349(1); Criminal Law Consolidation Act 1935 (SA) s 48(1); Criminal Code (NT) s 192(3).
23 Under the Model Criminal Code it is proposed that the penalty would be imprisonment for a maximum of 15 years which would increase to 20 years if aggravating factors were present: Standing Committee of Attorneys-General, Model Criminal Code (1st edn, 2009) pt 5.2, div 2, cl 5.2.6.
24 Crimes Act 1900 (NSW) s 61HA(3); Crimes Act 1958 (Vic) s 38(2); Criminal Law Consolidation Act 1935 (SA) s 48; Crimes Act 1900 (ACT) s 54.
25 Criminal Code (NT) s 192(3)(b).
26 Thomson Reuters, The Laws of Australia, vol 10, Criminal Offences, 10.3, [320].
27 Criminal Code (WA) s 319.
28 See, eg, Crimes Act 1900 (NSW) s 61J, aggravated sexual assault. See also: Crimes Act 1900 (NSW) s 61JA, which combines sexual assault perpetrated in company with another aggravating factor; Crimes Act 1958 (Vic) s 60A, sexual offence while armed with an offensive weapon; Criminal Code (WA) s 326, aggravated sexual penetration without consent.
29 See, eg, Crimes Act 1958 (Vic) s 45, sexual penetration of a child under 16.
30 See, eg, Criminal Code (WA) s 330, which creates an offence of having sexual intercourse with persons, other than children, incapable of consent.
32 See, eg, Crimes Act 1900 (NSW) s 61J; Criminal Code (WA) s 326. A number of jurisdictions also have separate offences for sexual assaults taking place in these circumstances, eg, where the victim has a cognitive impairment or where the accused is in a position of authority in relation to the victim—these are discussed later in this chapter.
without consent’ in Western Australia. These carry a higher maximum penalty than the basic offence. One of a range of aggravating factors must be proved including, for example, the infliction of harm, the use of a weapon or being in company with another.

25.17 In the ACT, the law provides for different offences ranging from sexual assault in the first degree—the most serious—to sexual assault in the third degree, depending on the existence of aggravating factors. In the Northern Territory, the maximum punishment for the basic offence increases where there are aggravating factors—defined as where ‘harm’ or ‘serious harm’ is caused.

**Indecent assault and acts of indecency**

25.18 Indecent assault covers sexual acts that do not constitute rape. Indecent assault is an offence in all states. For example, in Victoria, a person commits indecent assault if ‘he or she assaults another person in indecent circumstances’, and in NSW the offence applies where any person ‘assaults another person and … commits an act of indecency on or in the presence of the other person’. To establish this offence there must be an assault—actual or threatened—in addition to indecency. Some jurisdictions also have offences for aggravated indecent assault.

25.19 The territories have adopted a different approach. The ACT has an offence for ‘acts of indecency without consent’, which does not require an assault. Other jurisdictions also proscribe acts of indecency, including in aggravated circumstances. In the Northern Territory, instead of an offence of indecent assault, the legislation increases the maximum penalty for assault where the victim is assaulted in an indecent manner.

25.20 Indecency is not defined in any of the legislative schemes. It is considered a word of ‘ordinary meaning’ for the jury to assess in the circumstances of the case and according to the standards of the day.

---

33 Crimes Act 1900 (NSW) s 61J; Criminal Code (WA) s 326.
34 In NSW, there is also a separate offence of aggravated sexual assault in company, which carries a maximum penalty of life imprisonment: Crimes Act 1900 (NSW) s 61JA.
35 Crimes Act 1900 (ACT) ss 51–53.
36 Criminal Code (NT) s 192(7)–(8).
37 Crimes Act 1900 (NSW) s 61L; Crimes Act 1958 (Vic) s 39; Criminal Code (Qld) s 352; Criminal Code (WA) s 323; Criminal Law Consolidation Act 1935 (SA) s 56; Criminal Code (Tas) s 127.
38 Crimes Act 1958 (Vic) s 39.
39 Crimes Act 1900 (NSW) s 61L.
40 Ibid s 61M; Criminal Code (WA) s 324; Criminal Code (Tas) s 127A.
41 Crimes Act 1900 (ACT) s 60.
42 Crimes Act 1900 (NSW) s 61N(2); Criminal Code (Qld) s 227; Criminal Code (Tas) s 137.
43 Crimes Act 1900 (NSW) s 61O(1A): aggravating circumstances include where the act is performed in company; s 61O(3): where the accused is in a position of authority over the victim, or where the victim has a physical disability or cognitive impairment. As for sexual intercourse without consent, in relation to acts of indecency without consent the ACT provides for three further offences that relate to circumstances of aggravation, first, second and third degree: Crimes Act 1900 (ACT) ss 57–59. See also Criminal Code (WA) s 324.
44 Criminal Code (NT) s 188(2).
Assaults with intent to commit sexual acts

25.21 In addition to crimes of sexual assault and indecent assault, some jurisdictions have offences involving assaults or acts with intent to commit sexual acts. These offences apply where the accused uses violence or threatens to use violence in order to facilitate a sexual act.

25.22 The impetus for such offences was to ‘place primary emphasis on the violence factor in sexual assault, rather than on the element of sexual contact and consent’. For example, in NSW, it is an offence for any person ‘with intent to have sexual intercourse with another person’ to inflict or threaten to inflict ‘actual bodily harm on the other person or a third person who is present or nearby’.48

25.23 Some jurisdictions also provide for offences where drugs or other substances have been administered to the victim in order to render that person unable to resist the sexual activity.49

Submissions and consultations

25.24 In the Consultation Paper, the Commissions asked whether significant gaps or inconsistencies arise among jurisdictions in relation to sexual offences against adults in terms of the:

- definition of sexual intercourse or penetration;
- recognition of aggravating factors;
- penalties applicable if an offence is found proven;
- offences relating to attempts; and/or
- definitions of indecency offences.50

25.25 Stakeholders highlighted gaps and inconsistencies across jurisdictions in relation to sexual offences, expressing the view that the Commissions should ‘be seeking to achieve fairness and consistency’ with respect to the formulation of sexual assault offences. Overall, stakeholders who addressed the questions in this area focused on the definitions, aggravating factors and penalties for sexual offences.

46 See, eg, Crimes Act 1900 (NSW) ss 61K, 61P; Crimes Act 1958 (Vic) s 40; Criminal Code (Qld) s 351.
47 Thomson Reuters, The Laws of Australia, vol 10, Criminal Offences, 10.3, [780].
48 Crimes Act 1900 (NSW) s 61K.
49 See, eg, Crimes Act 1958 (Vic) s 53; Criminal Code (Qld) s 218(1)(c). See also Crimes Act 1900 (NSW) s 38A which is a general offence relating to ‘drink spiking’.
51 Law Society of New South Wales, Submission FV 205, 30 June 2010. This sentiment was echoed in submissions by the Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010 and National Association of Services Against Sexual Violence, Submission FV 195, 25 June 2010.
25.26 While there is much commonality among jurisdictions in the definitions of penetration and sexual intercourse, there are also ‘discrepancies resulting in different entitlements to justice depending on where the sexual assault occurs’.  

25.27 This also appears to be the case with aggravating factors. It was emphasised that ‘the range of circumstances of aggravation vary considerably between jurisdictions’, and those circumstances which are more likely to be present as elements in intimate partner assault—such as threats to life, the presence of third parties or children and harm—are not universally recognised, resulting in the inconsistent application of aggravating circumstances between jurisdictions.

25.28 Finally, concerns were expressed about inconsistency in maximum penalties for sexual assault offences. However, the National Association of Services Against Sexual Violence (NASASV) highlighted the minimal impact this has on sexual assault in the family violence context. NASASV instead emphasised the need for guidance in relation to minimum penalties because the maximum penalty is rarely applied in such sexual assaults, which ‘seem to attract even lower sentences than, for example, stranger perpetrated sexual assaults’.

**Commissions’ views**

25.29 Legislative reform is only one of a number of mechanisms available to respond to problems arising from the response of the legal system to sexual assault. Nonetheless, to the extent that reform of the content of sexual offences can help ensure fairness through consistent expectations and treatment of sexual assault matters across jurisdictions, the Commissions support further harmonisation of sexual assault offence provisions.

25.30 In line with this policy, the Commissions recommend that the definition of sexual intercourse or penetration should be broad and not gender-specific, and should be made more consistent across jurisdictions. The definition recommended below is in keeping with the shift away from historically gendered and restrictive definitions of sexual intercourse and is consistent with the definition in the Model Criminal Code.

25.31 While other gaps and inconsistencies have been identified, in particular with respect to the recognition of aggravating factors and penalties, the Commissions do not make recommendations in relation to these issues. The Commissions suggest, however, that when state and territory governments review sexual assault offences, they should have regard to inconsistency in these areas—particularly where offences arise in a family violence context.

---

53 Ibid.
54 Ibid.
**Recommendation 25–1** State and territory sexual assault provisions should include a wide definition of sexual intercourse or penetration, encompassing:

(a) penetration (to any extent) of the genitalia (including surgically constructed genitalia) or anus of a person by the penis or other body part of another person and/or any object manipulated by a person;

(b) penetration of the mouth of a person by the penis of a person; and

(c) continuing sexual penetration as defined in paragraph (a) or (b) above.

**Sexual offences against children and young people**

25.32 Each jurisdiction provides a range of offences concerning sexual conduct with children. These include, for example: sexual intercourse;\(^{55}\) attempts to have sexual intercourse;\(^{56}\) acts of indecency;\(^{57}\) procuring or grooming a child for ‘unlawful sexual activity’;\(^{58}\) and abducting a child with the intention of engaging in unlawful sexual activity.\(^{59}\)

25.33 Offences against children are commonly expressed in terms of the age of the victim. For example, there are offences against young children—under the age of 10, 12 or 13 years of age, depending on the jurisdiction\(^{60}\)—and offences against older children—generally under the age of 16,\(^{61}\) but in some cases 17,\(^{62}\) or 18 years of age.\(^{63}\)

---

55 NSW: *Crimes Act 1900* (NSW) s 66A—under the age of 10 years; s 66C—aged between 10 and 16 years. 
Victoria: *Crimes Act 1958* (Vic) s 45—under the age of 16 years. 
Queensland: *Criminal Code* (Qld) s 215—offences of ‘carnal knowledge of a child’ relating to children under 16 years of age; s 208(1)—sodomy relating to children under the age of 18 years. 
Western Australia: *Criminal Code* (WA) s 320(2)—children under the age of 13 years; s 321(2)—children aged between 13 and 16 years. 
South Australia: *Criminal Law Consolidation Act 1935* (SA) s 49(1)—under the age of 14 years; s 49(3)—under the age of 17 years. 
Tasmania: *Criminal Code* (Tas) s 124—under the age of 17 years. 
ACT: *Crimes Act 1900* (ACT) s 55(1)—under the age of 10 years; s 55(2)—under the age of 16 years. 
Northern Territory: 
*Criminal Code* (NT) s 127 under the age of 16 years.

56 *Crimes Act 1900* (NSW) ss 66B, 66D.

57 Ibid s 61N(1); *Crimes Act 1958* (Vic) s 47; *Criminal Code* (Qld) s 210—indecent treatment of a child under the age of 16 years; *Criminal Code* (WA) s 320(4)—indecently dealing with a child under the age of 13, s 321(4)—indecently dealing with a child aged 13 to 16; *Criminal Law Consolidation Act 1935* (SA) s 58—acts of gross indecency; *Criminal Code* (Tas) s 125B; *Crimes Act 1990* (ACT) s 61; *Criminal Code* (NT) s 127—gross indecency, s 132—indecent dealing with a child.

58 *Crimes Act 1900* (NSW) s 66EB. See also: *Crimes Act 1958* (Vic) s 58; *Criminal Code* (Qld) s 217—procuring child for carnal knowledge; *Criminal Code* (Qld) s 218A—using the internet to procure children; *Criminal Code* (WA) ss 320(3), 320(5), 321(3), 321(5); *Criminal Code* (Tas) ss 125C–125D; *Criminal Code* (NT) s 131. Western Australia also has an offence of using electronic communication to procure or expose a child to indecent material: *Criminal Code* (WA) s 204B.

59 *Crimes Act 1958* (Vic) s 56; *Criminal Code* (NT) s 201. See also Queensland which has an offence of ‘taking a child for immoral purposes’: *Criminal Code* (Qld) s 219.

60 Under the age of 10 years: *Crimes Act 1900* (NSW) s 66B; *Crimes Act 1958* (Vic) s 45(2)(a); *Crimes Act 1990* (ACT) s 55(1). Under 12 years of age: see *Criminal Code* (Qld) s 215(3). Under the age of 13 years: *Criminal Code* (WA) s 320.

61 *Crimes Act 1958* (Vic) s 45(2)(b); *Criminal Code* (Qld) s 215(1); *Crimes Act 1990* (ACT) s 55(2); *Criminal Code* (NT) s 127. NSW creates two age groups: *Crimes Act 1900* (NSW) s 66C(1)—victims
This gradation generally reflects the seriousness of offences against very young children. Accordingly, the sentences attached to those offences are higher than for those against older children. For example, in NSW, different penalties are provided where the child is under the age of 10 years (25 years imprisonment); between the ages of 10 and 14 years (16 years imprisonment); and between the ages of 14 and 16 years (10 years imprisonment). As for offences against adults, aggravating factors are also applicable to offences against children.

25.34 In some jurisdictions, consent by a person who is under the age of consent to sexual activity is excluded from operating as a defence to sexual offence charges, regardless of any similarity in age between the victim and the accused. However, many jurisdictions recognise that consent may play a role in such situations, and consequently there are a range of statutory formulations involving consensual sexual activity between young people under the age of consent but similar in age. For example, in Victoria, consent may be a defence to the offence of sexual penetration or an indecent act where the victim is aged 12 years and over and the accused is not more than two years older than the victim. In South Australia similarity in age is recognised as a defence where the victim is over the age of 16 years and the accused is under the age of 17 years. In Tasmania, consent is a defence, except in relation to anal sexual intercourse, where the victim is aged 15 years and over and the defendant is not more than five years older, or where the victim is aged 12 years or over and the defendant is not more than three years older.

25.35 A related issue, of particular relevance in cases involving older children, is that of the age of consent. Historically, there were significant inconsistencies within and across jurisdictions with respect to the age of consent—the age at which young people are considered able to consent to sexual activity—based on gender, sexuality and other factors. Despite significant reforms, some inconsistency remains. For example,
Commonwealth legislation sets the age of consent at 16 years of age, which is consistent with legislation in NSW, Victoria, Western Australia, ACT and the NT. However, the age of consent is 17 years of age in South Australia and Tasmania, and legislation in Queensland distinguishes between vaginal sex and sodomy, in relation to which the age of consent is 16 and 18 years of age respectively.

Offences by a family member

25.36 State and territory criminal law provides for a range of incest offences, where the victim and the accused are closely related. For example, Victorian legislation provides that a person must not take part in an act of sexual penetration with a person whom he or she knows to be:

- his or her child or other lineal descendant or his or her stepchild;
- the child or other lineal descendant or the stepchild of his or her de facto spouse;
- his or her father or mother or other lineal ancestor or his or her stepfather or stepmother; or
- his or her sister, half-sister, brother or half-brother.

25.37 Similarly, in most other jurisdictions sexual activity occurring in the context of biological and adoptive relationships or involving half-sisters and brothers or step-sisters and brothers is covered by the incest provisions. However, legislation across jurisdictions is inconsistent with respect to whether incest offences also cover conduct arising in the context of de facto relationships or those arising from fostering and other legal arrangements. Overall, incest type offences do not tend to make provision for offences arising in communities which may have extended family and kinship definitions and structures—as is the case within Aboriginal and Torres Strait Islander and some CALD communities.

---

71 See, for example, Criminal Code (Cth) s 272.8.
72 Crimes Act 1900 (NSW) s 66A; Crimes Act 1958 (Vic) s 45; Criminal Code (WA) s 321; Crimes Act 1900 (ACT) s 55; Criminal Code (NT) s 127.
73 Criminal Law Consolidation Act 1935 (SA) s 49; Criminal Code (Tas) s 124.
74 Criminal Code (Qld) ss 208, 210.
75 See, Standing Committee of Attorneys-General, Model Criminal Code (1st edn, 2009), pt 5.2, div 6. There is considerable debate about the use of the term incest: Victorian Law Reform Commission, Sexual Offences: Interim Report (2003), [8.3]–[8.4]. In Western Australia, this offence is referred to as sexual offences by a ‘relative and the like’: Criminal Code (WA) s 329.
76 Crimes Act 1958 (Vic) s 44(1)-(4).
77 See Crimes Act 1900 (NSW) s 78A; Criminal Code (Qld) s 222(5)-(7A); Criminal Code Act Compilation 1913 (WA) s 329; Criminal Law Consolidation Act 1935 (SA) s 72; Criminal Code Act 1924 (Tas) s 133; Crimes Act 1900 (ACT) s 62; Criminal Code Act 1983 (NT) s 134.
78 For example, Queensland is one of the few jurisdictions in which the incest provisions cover sexual activity in the context of adopted, step, de facto, foster and other ‘legal arrangement’-based relationships: Criminal Code Act 1899 (Qld) s 222(5)-(7A). In some jurisdictions, rather than being incorporated into incest provisions, the provisions that create an offence against a child where the accused is in a position of trust or authority specifically apply where the accused is a step-parent, guardian or foster parent: see, eg, Crimes Act 1900 (NSW) s 73(3)(a).
25. Sexual Offences

25.38 In some jurisdictions, these offences apply to all age groups—that is, children and adults.\(^79\) In others, general offences in respect of children are applicable, and the incest offence relates to cases where the victim is over 16 years of age.\(^80\)

**Offences where the accused is in a position of trust or authority**

25.39 A number of jurisdictions have introduced offences that apply to a defendant who has a special relationship with the victim as a result of the defendant’s position or authority, or the care that he or she provides to the child—for example, as a teacher, religious guide, doctor, employer or sports coach.\(^81\) The former Standing Committee of Attorneys-General Model Criminal Code Officers Committee (MCCOC)—now the Model Criminal Law Officers Committee—recommended offences of this kind in relation to sexual penetration, indecent touching, and indecent acts directed at a young person by a person in a position of trust or authority, and considered that young people up to two years over the age of consent may be vulnerable in this context.\(^82\)

**Consultation Paper**

25.40 In the Consultation Paper, the Commissions proposed that the age of consent for all sexual offences should be set at 16 years of age.\(^83\) The Commissions also asked questions about sexual offences against children and young people, including with respect to the availability and content of defences involving similarity in age, and honest and reasonable belief as to age.\(^84\)

25.41 Some stakeholders supported the proposal that the age of consent for all sexual offences should be 16 years of age.\(^85\) It was noted, however, that a higher or lower age of consent may be appropriate in some situations. For example, NASASV supported a higher age of consent where there is a care relationship or incest.\(^86\)

---

\(^79\) Crimes Act 1958 (Vic) s 44; Criminal Code (Qld) s 222; Criminal Law Consolidation Act 1935 (SA) s 72; Criminal Code (Tas) s 133; Crimes Act 1900 (ACT) s 62; Criminal Code (NT) s 134. This last section also provides for harsher penalties where the victim is a child under the age of 10, or between 10 and 16 years of age. See also Standing Committee of Attorneys-General, Model Criminal Code (1st edn, 2009), pt 5.2, div 6, cl 5.2.34.

\(^80\) Crimes Act 1900 (NSW) s 78A.

\(^81\) The relationships included vary across the jurisdictions, see, eg, Crimes Act (NSW) s 73(3); Crimes Act 1958 (Vic) s 49(4); Criminal Law Consolidation Act 1935 (SA) s 49(5a); Criminal Code (NT) s 128(3).


\(^83\) Consultation Paper, Proposal 16–1.

\(^84\) Ibid, Questions 16–3, 16–4.

\(^85\) For example, Legal Aid NSW, Submission FY 219, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, Submission FY 212, 28 June 2010; J Stubbs, Submission FY 186, 25 June 2010; Women’s Legal Service Queensland, Submission FY 185, 25 June 2010; Women’s Legal Services NSW, Submission FY 182, 25 June 2010; Canberra Rape Crisis Centre, Submission FY 172, 25 June 2010; N Ross, Submission FY 129, 21 June 2010; Better Care of Children, Submission FY 72, 24 June 2010; Confidential, Submission FY 162, 25 June 2010.

25.42 Stakeholders also highlighted issues arising from underage consensual sexual activity. Legal Aid NSW noted that

an age of consent of 16 may well be out of touch with the sexual habits of many teenagers below this age and a fixed age of consent means that many teenagers engaging in consensual sex are committing a criminal offence.\(^{87}\)

25.43 Other stakeholders echoed this view, emphasising the need for provisions to ‘reflect contemporary practices in sexual relations between young people’,\(^{88}\) provided such relations are consensual.

25.44 Legal service providers in the Northern Territory, including the North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission (NTLAC), expressed particular concern about the prosecution of non-exploitative consensual (but under-age) teenage sexual behaviour following the Northern Territory Emergency Response and in light of mandatory sentencing provisions for sexual offences.\(^{89}\) NSW stakeholders highlighted similar concerns about the operation of NSW legislation on the basis that

all sexual contact with a child under 16, even consensual contact, is an offence, even where both parties are under 16. Secondly, an offence involving two juveniles is automatically ‘aggravated’ because it is designated as a ‘child sex offence’ which places the offence in a more serious category, attracting higher penalties. In addition, child sex offences attract the provisions of the Child Protection Register set up under the Child Protection (Offenders Registration) Act 2000 (NSW), even where the offender and the victim are both children.\(^{90}\)

25.45 Related to this issue, the Commissions asked how ‘similarity in age’ of the complainant and defendant should be dealt with.\(^{91}\) Some stakeholders opposed similarity in age being used as a defence, despite operating as a defence in many jurisdictions.\(^{92}\) Others emphasised that consent should remain a relevant consideration, or favoured the inclusion of lack of consent as an element of the offence in such circumstances.\(^{93}\) Other stakeholders suggested that there should not be an offence

\(^{87}\) Legal Aid NSW, Submission FV 219, 1 July 2010.  
\(^{90}\) Law Society of New South Wales, Submission FV 205, 30 June 2010.  
\(^{91}\) Consultation Paper, Question 16–3.  
\(^{92}\) Law Society of New South Wales, Submission FV 205, 30 June 2010; National Association of Services Against Sexual Violence, Submission FV 195, 25 June 2010; Canberra Rape Crisis Centre, Submission FV 172, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, Submission FV 179, 25 June 2010; Education Centre Against Violence, Submission FV 90, 3 June 2010; Family Voice Australia, Submission FV 73, 2 June 2010; C Pragnell, Submission FV 70, 2 June 2010.  
where the age gap is two years or less, or that similarity in age could be a relevant sentencing consideration.

25.46 Stakeholders held differing views about the defence of honest and reasonable belief that a person was over a certain age. For example, the Law Society of NSW, Legal Aid NSW and NTLAC suggested that such a defence should be available at any age. The Canberra Rape Crisis Centre and NASASV expressed the opposite view, arguing that it should not be available at any age. The Canberra Rape Crisis Centre observed that “the impact on the young victim is the same regardless of the belief of the perpetrator and this should be the primary consideration”. NASASV stated that “an honest and reasonable belief that a person was over a certain age is at best irrelevant and at worst likely to be used as a difficult-to-challenge defence of the heinous crime of engaging sexually with children”.

Commissions’ views

25.47 In considering offences involving children and young people there is a need to strike an ‘appropriate balance between the need to protect vulnerable persons from sexual exploitation, and the need to allow for sexual autonomy’, and to recognise the realities of sexual behaviour.

25.48 Issues of age of consent, similarity in age, or honest or reasonable belief that a person was over a certain age are much less likely to arise where sexual assault occurs in a family violence context and are, therefore, somewhat peripheral to this Inquiry. Accordingly, these issues were not matters on which the Commissions consulted widely.

25.49 The Commissions suggest that the age of consent for sexual offences should be set at 16 years of age. This is consistent with legislation in many jurisdictions and the approach taken by MCCOC, which considered the issue at length and received numerous submissions from a range of stakeholders. The Commissions’ recommendation, however, is that the age of consent for sexual activity should be made uniform both within and across jurisdictions, and that no distinction be made based on gender, sexuality or any other factor.

94 Legal Aid NSW, Submission FV 219, 1 July 2010; Law Society of New South Wales, Submission FV 205, 30 June 2010.
95 Women’s Legal Service Queensland, Submission FV 185, 25 June 2010; Family Voice Australia, Submission FV 75, 2 June 2010.
96 Legal Aid NSW, Submission FV 219, 1 July 2010; Law Society of New South Wales, Submission FV 205, 30 June 2010; National Association of Services Against Sexual Violence, Submission FV 195, 25 June 2010; Canberra Rape Crisis Centre, Submission FV 172, 25 June 2010.
97 Canberra Rape Crisis Centre, Submission FV 172, 25 June 2010.
99 Explanatory Memorandum, Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth).
100 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 119–123.
25.50 Similarly, the Commissions do not make any recommendation with respect to how similarity in age should be dealt with or the age at which a defendant should be able to raise an honest and reasonable belief that a person was over a certain age. The Commissions emphasise, however, that any review of the relevant legislative provisions or the exercise of prosecutorial discretion should recognise contemporary realities of consensual and non-exploitative sexual activity between young people.

**Recommendation 25–2** Federal, state and territory sexual offence provisions should provide a uniform age of consent for all sexual offences.

**Persistent sexual abuse of a child**

25.51 All jurisdictions have introduced offences in relation to the ‘persistent sexual abuse of a child’,101 ‘maintaining a sexual relationship with a young person’,102 or the ‘persistent sexual exploitation of a child’.103

25.52 The impetus for the enactment of these offences was recognition of the practical difficulties encountered in successfully prosecuting child sexual offences. The requirement of particularity in child sexual offences—that is, precise details of single incidents—fails to capture the multiple, repetitive experiences of many children, particularly in the context of sexual abuse by family members.104

25.53 As then NSW Attorney General Jeff Shaw QC explained in the second reading speech for the Crimes Legislation (Child Sexual Offences) Bill 1998:

> children are often unable to give precise details of offences, particularly where the alleged sexual assaults took place over many years, involved numerous occasions of abuse, and the accused was in a position of trust or authority. … [I]f the prosecution is unable to prove particulars of the time, date and place of an allegation of child sexual abuse, then the accused cannot be prosecuted. … The Government is of the firm view that the time has come to introduce legislation to better protect children. This bill accomplishes that purpose. By creating the offence of persistent sexual abuse of a child, we recognise the reality of continuing or prolonged child sexual abuse.105

25.54 Generally these offences capture a number of unlawful sexual acts106—not necessarily of the same kind—against a child within the one indictment. The provisions stipulate that ‘it is not necessary to specify or to prove the dates and exact

---


102 *Criminal Code* (Qld) s 229B; *Criminal Code* (Tas) s 125A; *Crimes Act 1900* (ACT) s 56; *Criminal Code* (NT) s 131A, maintaining a relationship of a sexual nature.

103 *Criminal Law Consolidation Act 1935* (SA) s 50.


106 Generally three or more, although in Queensland and South Australia it is simply more than one unlawful act: *Criminal Code* (Qld) s 229B(2); *Criminal Law Consolidation Act 1935* (SA) s 50(1).
circumstances of the alleged occasions on which the conduct constituting the offence occurred’. Instead, reasonable particularity for the period during which the offences are alleged to have taken place is required, and there must be a description of the ‘nature of the separate offences alleged to have been committed by the accused during that period’. Judicial criticism of the provisions has highlighted the problems associated with such lack of particularity, specifically the potential to jeopardise the defendant’s right to a fair trial and the impact on the admissibility of evidence.

25.55 Most Australian jurisdictions require the approval of the Attorney-General or Director of Public Prosecutions (DPP) before proceedings for the offence may be commenced; and the maximum penalty for the offences is relatively similar across the jurisdictions—ranging from life imprisonment in Queensland and South Australia, to 20 years imprisonment in Western Australia.

25.56 Various inquiries and reviews have indicated that the persistent sexual abuse provisions are rarely charged and that the specific provisions do not address the problems in the area. This view was echoed in submissions to this Inquiry and is discussed further below.

Consultations and submissions

25.57 In the Consultation Paper the Commissions asked whether the offence of ‘persistent sexual abuse’ or ‘maintaining a relationship’ had achieved its aims in assisting the prosecution of sexual offences against children in the family context, where there are frequently multiple unlawful acts.

25.58 The majority of stakeholders were supportive of the policy rationale underlying the introduction of ‘persistent sexual abuse’ type offences, particularly in a family violence context, but highlighted that this is an area in which there ‘is an

---

107 Crimes Act 1900 (NSW) s 66EA(4). See also, Crimes Act 1958 (Vic) s 47A(3); Criminal Code (Qld) s 229B(4); Criminal Code (WA) s 321A(5)(b); Criminal Law Consolidation Act 1935 (SA) s 50(4); Criminal Code (Tas) s 125A(4)(a); Crimes Act 1900 (ACT) s 56(4); Criminal Code (NT) s 131A(3).

108 Crimes Act 1900 (NSW) s 66EA(5).


110 See, eg, Crimes Act 1900 (NSW) s 66EA(11); Crimes Act 1958 (Vic) s 47A(7); Criminal Code Act 1899 (Qld) s 229B(6); Criminal Code (WA) s 321A(7); Criminal Code Act 1924 (Tas) s 125A(7); Crimes Act 1900 (ACT) s 56(9); Criminal Code Act 1983 (NT) s 131A(9).

111 Criminal Code (Qld) s 229B(1); Criminal Law Consolidation Act 1935 (SA), s 50(1).

112 Criminal Code (WA) s 321A(4).


114 Consultation Paper, Question 16–5.
implementation gap between written law and its practice’. Most stakeholders who addressed the issue indicated that the provisions are ‘profoundly under utilised’.

25.59 Some stakeholders outlined concerns about the potentially oppressive operation of the provisions and their impact on the rights of the accused, given the absence of particularity and resulting difficulties for the defence. Similar concerns have been raised in the past, including by the MCCOC.

25.60 The Office of the Director of Public Prosecutions (NSW ODPP) expressed the view that the NSW provision requires recasting because it is under-utilised for three reasons:

Firstly the reading down of the nature and purpose of the section by the Court of Criminal Appeal, secondly the failure of the section to sufficiently relieve the burden on the complainant to particularise offences and thirdly, by the requirement that the DPP sanction the laying of the charge.

25.61 In relation to the requirement for DPP approval, the NSW ODPP stated that: while the reasoning behind the sanction requirement was sound in 1998, as the offence was of a novel nature and should only be used in cases of substantial abuse, the [Sexual Assault Review Committee] question that the sanction is still necessary to commence proceedings. It does seem, by reference to the Police complaints that the charge is not being considered, that the practicalities and the resources involved in sanctioning the charge are prohibitive to the proper application of the section.

25.62 Women’s Legal Service Queensland identified another practical limitation of the provisions where persistent sexual abuse occurs over a lengthy period, during which time the victim becomes an adult. Acts which occur after the child becomes 18 years of age are either consensual, in which case no offence has been committed unless it is incest, or non-consensual, and therefore constitute a separate criminal offence. However, the Legal Service emphasised that this assumes that victims of persistent sexual abuse have the capacity to consent—which in many instances neither recognises nor reflects the reality of the lives of young people who are subjected to such abuse.
25.63 National Legal Aid and Legal Aid NSW suggested that persistent sexual abuse offences would ‘benefit from further investigation by the NSW Bureau of Crime Statistics and Research or the Australian Institute of Criminology’.  

Commission’s views

25.64 The Commissions reaffirm the need for ‘persistent sexual abuse’ type offences in recognising and responding to the realities of child sexual abuse—particularly in a family violence context. As discussed by the MCCOC, the question in considering such offences is one of appropriate balance between addressing the difficulties faced by the prosecution in particularising sexual abuse and protecting the defendant’s right to a fair trial.

25.65 The current legislative provisions in this area appear to be under-utilised, in part due to the limits of current legislative formulations, and factors related to judicial interpretation and the exercise of prosecutorial discretion. In a general sense it appears that the provisions, in at least some jurisdictions, have not been effective in overcoming the need to particularise offences, which was the rationale behind their introduction.

25.66 Jurisdictions such as Victoria and South Australia have enacted amendments intended to address under-utilisation of these offences. For example, in the revised South Australian provision, reference to ‘persistent sexual abuse of a child’ was replaced with ‘persistent sexual exploitation of a child’. The offence now focuses on acts of sexual exploitation that comprise a course of conduct, rather than requiring a series of separate particularised offences. The NSW Attorney General has referred the issue of recasting the persistent sexual abuse provisions in NSW to a government Sex Offences Working Party.

25.67 Further work is required across jurisdictions to establish why persistent sexual abuse type offences are not being used, and in jurisdictions where they are, how the offences can be reformed to address the difficulties faced by both the prosecution and defendants in these cases. The Commissions, therefore, recommend that the Australian and state and territory governments review the utilisation and effectiveness of these offences, with a particular focus on offences committed in a family violence context.

---

122 National Legal Aid, Submission FV 232, 15 July 2010; Legal Aid NSW, Submission FV 219, 1 July 2010.
123 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 135–137.
124 Criminal Law Consolidation Act 1935 (SA) s 50.
125 Crimes Act 1900 (NSW) s 66EA.
126 Office of the Director of Public Prosecutions NSW, Submission FV 158, 25 June 2010. At the time of writing the report of the Working Party had not been released.
Recommendation 25–3 The Australian, state and territory governments should review the utilisation and effectiveness of persistent sexual abuse type offences, with a particular focus on offences committed in a family violence context.

Sexual offences against people with cognitive impairment

25.68 Specific offences have been enacted to address the particular vulnerabilities to sexual assault of people with a cognitive impairment.127 These specific offences may supplement other sexual offences where offending against a victim with a cognitive impairment is an aggravating factor. The offences often regulate people in a particular position, for example those who have a role in caring for the person,128 or are providers of medical or therapeutic services129 or special programs.130

25.69 The additional complexities surrounding sexual assault of adults with a cognitive impairment are particularly evident with respect to the issue of consent. In some jurisdictions, where the accused is a person responsible for the care of the person with the cognitive impairment, or where sexual intercourse was conducted with the intention of taking advantage of that person, consent is not a defence to the charge.131

25.70 In the case of sexual assault in a family violence context, the key question with respect to the construction of offences is one of balance—reconciling the need to protect people with a cognitive impairment from sexual exploitation while at the same time acknowledging their agency.

25.71 While legislative amendments have addressed some problematic areas in the engagement of victims of sexual assault with a cognitive impairment with the criminal justice system, the key issues appear to arise in relation to barriers to reporting sexual assault and in the tendency for crimes against people with a cognitive impairment to be ‘dealt with by administrative’ rather than legal channels, particularly within an institutional setting.132 In light of this, and in the absence of any significant

---

127 Crimes Act 1900 (NSW) s 66F; Crimes Act 1958 (Vic) ss 51–52; Criminal Code (Qld) s 216; Criminal Code (WA) s 330; Criminal Law Consolidation Act 1935 (SA) s 49(6); Criminal Code (Tas) s 126; Criminal Code (NT) s 130. See also Standing Committee of Attorneys-General, Model Criminal Code (1st edn, 2009) pt 5.2, div 5.

128 Crimes Act 1900 (NSW) s 66(F)(2); Criminal Code (Tas) s 126.

129 Crimes Act 1958 (Vic) s 51.

130 Ibid s 52; Criminal Code (NT) s 130.

131 See, eg, Crimes Act 1900 (NSW) s 66F(5)–(6); Crimes Act 1958 (Vic) ss 52–52; Criminal Code (Tas) s 126(2).

132 J Pestersilia, ‘Crime Victims with Developmental Disabilities: A Review Essay’ (2001) 28 Criminal Justice and Behavior 655. See Ch 26 for further discussion of the barriers faced by victims of sexual assault who have a cognitive impairment. See also, S Murray and A Powell, Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response (2008), prepared for the Australian Centre for the Study of Sexual Assault. Several inquiries and reports have examined the response of the criminal justice system to sexual assault of people with a cognitive impairment, see for example: Criminal Law Review Division Attorney General’s Department (NSW), Intellectual Disability and the Law of Sexual Assault: Discussion Paper (2007); Victorian Law Reform Commission, Sexual
stakeholder comment on this issue, the Commissions do not make any recommendations with respect to specific sexual offences against persons with a cognitive impairment.

Consent

25.72 Sexual offences against adults generally require the prosecution to prove that the complainant did not consent to the sexual conduct. This is a matter for the jury to determine by reference to the complainant’s actual state of mind at the time the sexual conduct occurred.

25.73 In adult sexual assault trials, it is common for the defendant to admit sexual activity but assert a belief that it was consensual. This is a matter for the jury to determine by reference to the defendant’s actual state of mind—and, in some jurisdictions, by reference to whether that state of mind was reasonable—at the time the sexual conduct occurred. In a family violence context, where the complainant and the defendant know each other, the issue of consent is complex.

25.74 The report of the National Council to Reduce Violence Against Women and their Children (Time for Action) noted variations across Australia in terms of:

- the definition of consent;
- the conditions or circumstances that are seen as negating consent;
- the way in which a defendant’s ‘honest belief’ in consent is dealt with; and
- the use of judicial directions as a way in which to inform and educate the jury about what amounts, or does not amount, to consent.133

Statutory definition of consent

25.75 Statutory definitions of consent seek to provide legal clarity, make clear that resistance and injury are not required to prove lack of consent, and educate the general community about ‘the boundaries of proscribed sexual behaviour’.134 They may, however, be criticised as inflexible—because the dividing line between real consent and mere submission may be difficult to draw—and as introducing greater complexity.135

---


134 Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 33, 35. See also: Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), Responding to Sexual Assault: The Way Forward (2005), 34. A definition of consent was subsequently inserted in the NSW legislation.

25.76 With the exception of the ACT, every Australian jurisdiction has a statutory definition of consent based on one of the following formulations:

- free agreement;
- free and voluntary agreement; or
- consent freely and voluntarily given.

25.77 The legislation of all jurisdictions—except Queensland—also specifically addresses the continuation of sexual intercourse after consent has been withdrawn.

25.78 The Australian definitions accord with the recommendation of the United Nations Division for the Advancement of Women that legislation should approach consent as ‘unequivocal and voluntary agreement’ and that the accused should be required to prove the steps taken to ‘ascertain whether the complainant/survivor was consenting’.

25.79 The United Kingdom definition of consent explicitly requires agreement: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’. This model was initially recommended by the NSW Criminal Law Review Division in 2007 and included in its consultation draft bill.

Consultation Paper

25.80 In the Consultation Paper, the Commissions proposed that federal, state and territory sexual offences legislation should provide statutory definitions of consent based on ‘free and voluntary agreement’.

---

136 Crimes Act 1900 (ACT) s 67 lists a range of circumstances in which there is no consent. In 2001, the ACT Law Reform Commission recommended the enactment of a statutory definition, which was supported by the ACT Government: ACT Law Reform Commission, Sexual Offences, Report No 17 (2001), 71.

137 Crimes Act 1958 (Vic) s 36; Criminal Code (Tas) s 2A(1).

138 Criminal Code (Cth) s 192(1); Crimes Act 1900 (NSW) s 61HA(2); Criminal Law Consolidation Act 1935 (SA) s 46(2); Criminal Code (NT) s 192(1). See also Criminal Code (Cth) ss 268.14, 268.19, 268.59, 268.64, 268.82, 268.87. As these are all sexual violence or rape offences in the context of war crimes or crimes against humanity, they are not discussed in this chapter.

139 Criminal Code (Qld) s 348(1); Criminal Code (WA) s 319(2). Criminal Code (Qld) s 348(1) further provides that consent means ‘consent freely and voluntarily given by a person with the cognitive capacity to give the consent’. See also Michael v Western Australia (2008) 183 A Crim R 348 for a discussion of the statutory definitions of consent and the role of deceit and fraud.

140 Continuation is not explicitly addressed in Queensland legislation but the ‘weight of authority supports treating the continuation of sexual intercourse as satisfying the physical act required for a charge of rape’: Thomson Reuters, The Laws of Australia, vol 10, Criminal Offences, 10.3, [190].

141 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, Handbook for Legislation on Violence Against Women (2009), 27. See also discussion of this approach in Time for Action, 108, n 183 referring to earlier work by the Division of the Advancement of Women. The latter component of this definition regarding the steps taken by the accused is discussed below.

142 Sexual Offences Act 2003 (UK) s 74.


144 Consultation Paper, Proposal 16–2. Alternative formulations of the penetrative sexual offence, which seek to focus the offence away from issues of consent and instead focus on the circumstances under which
25.81 Stakeholders generally expressed support. The Australian Institute of Family Studies (AIFS), for example, observed that a positive and communicative model of consent defined by legislation is an important step to take because it contributes to ‘a shift in how the offence of sexual assault is understood—from an offence that is committed forcibly and against the will of another person to an offence against a person’s agency’.  

25.82 Professor Patricia Easteal considered that a definition of consent based on free and voluntary agreement recognises the difficulty of proving lack of consent in the context of sexual assault by a partner. Jenny’s Place Women and Children Refuge supported the proposal and considered that uniformity across all jurisdictions in relation to the definition of consent would provide ‘a clear standard and statement of the law that can be used to educate the community, and in particular victims of sexual assault’.  

25.83 Some stakeholders expressed concerns that the Consultation Paper proposal gives rise to issues of interpretation that may cause greater uncertainty about the law and does not appropriately reflect the reality of sexual interactions—which are best conceived as a spectrum from consensual sex to criminal behaviour.

**Commissions’ views**

25.84 The Commissions support the adoption of a statutory definition of consent across all Australian jurisdictions. In taking this view, the Commissions are informed by the MCCOC’s discussion of the relative merits of a statutory or common law definition of consent.

25.85 As discussed above, the Commonwealth, NSW, South Australia and the Northern Territory have already adopted ‘free and voluntary agreement’ as the current statutory definition of consent. That definition is also consistent with the Model Criminal Code. Few stakeholders have expressed reservations about the adoption of a statutory definition of consent.

---


146 Australian Institute of Family Studies, Submission FV 222, 2 July 2010.

147 P Easteal, Submission FV 38, 13 May 2010.

148 Jenny’s Place Women and Children Refuge, Submission FV 54, 28 May 2010.


150 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 41–47.

151 Criminal Code (Cth) s 192(1); Crimes Act 1900 (NSW) s 61HA(2); Criminal Law Consolidation Act 1935 (SA) s 46(2); Criminal Code (NT) s 192(1).

152 Law Society of New South Wales, Submission FV 205, 30 June 2010.
The Commissions agree that a definition based on agreement properly reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing both positive and communicative understandings of consent through use of the term agreement. A majority of stakeholders similarly considered that consent should be conceived as a positive state of mind.

To the extent that introducing the concept of ‘agreement’ to the definition of consent may give rise to interpretation issues and problems in practice, the Commissions consider that supplementing any legislative provision that defines consent with a provision that includes a list of circumstances where free agreement may not have been given will assist, in practice, to clarify the meaning and expression of ‘agreement’.

The legislative definition of consent sets the standard to inform the community about the boundaries of proscribed sexual behaviour. The Commissions acknowledge criticisms that legislation alone is too blunt a tool to effectively inform community understandings, attitudes and beliefs about appropriate sexual interactions, and for this reason suggest that law reform driven by communicative understandings of consent should be supported by community education.

**Recommendation 25–4** Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.

**Circumstances where consent is vitiated**

In every Australian jurisdiction, legislation prescribes some circumstances where consent to a sexual act is defined not to exist. If the prosecution proves the presence of such a circumstance in a particular case, consent is deemed to be vitiated, or the complainant is to be regarded as not consenting.

Many of the circumstances prescribed are common to all Australian jurisdictions. There is, however, considerable variation in scope and approach. Some codify the position at common law, others go beyond the common law position—rectifying anomalies, deficiencies or gaps.

---

154 For example, education and training about the myths, facts and law in relation to sexual assault could be delivered to school students, teachers, parents and carers, social workers, guidance officers, nurses, doctors, police recruits and journalists.
156 Ibid, 43.
157 See, eg, the discussion in Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 36; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 43–49. For a general discussion of the common law’s resistance to
Use of force and threat of the use of force

25.91 In all jurisdictions, where force is used or threatened to be used against the complainant or another person there is deemed to be no consent.\(^{158}\) The use of force or threatened use of force against another person is of particular relevance in the family violence context—for example, force or threats of force against children may be made to force the mother to agree to sexual intercourse.

25.92 Similarly, in some jurisdictions, there is no consent in circumstances of ‘fear of harm of any type’, \(^{159}\) ‘fear of bodily harm’, \(^{160}\) ‘threats of terror’, \(^{161}\) and ‘reasonable fear of force’. \(^{162}\) South Australia specifically provides that a ‘threat of the application of force’ may be express or implied. \(^{163}\)

Intimidation, coercion, extortion, deceit or fraud

25.93 In a small number of jurisdictions, there is or may be no consent where agreement to engage in the sexual activity is obtained by intimidation, \(^{164}\) coercive conduct,\(^{165}\) extortion,\(^{166}\) deceit\(^{167}\) or fraud.\(^{168}\)

Other threats

25.94 In South Australia, there is no consent when it is obtained because of ‘an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person’.\(^{169}\)

25.95 In the ACT, there is no consent where it is caused ‘by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person’.\(^{170}\)

\(^{158}\) Crimes Act 1900 (NSW) s 61HA(4)(c); Crimes Act 1958 (Vic) s 36(a); Criminal Code (Qld) s 348(2)(a); Criminal Code (WA) s 319(2)(a); Criminal Law Consolidation Act 1935 (SA) s 46(3)(a)(i); Criminal Code (Tas) 2A(2)(b); Crimes Act 1900 (ACT) s 67(1)(a)-(c); Criminal Code (NT) s 192 (2)(a). In the ACT, this other person is required to be ‘present or nearby’—no other jurisdiction has this qualification around the use or threat of the use of force to a person other than the complainant. See also Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 38, app 2, cl 5.2.3.

\(^{159}\) Crimes Act 1958 (Vic) s 36(b); Criminal Code (NT) s 192(2)(a).

\(^{160}\) Criminal Code (Qld) s 348(2)(c).

\(^{161}\) Crimes Act 1900 (NSW) s 61HA(4)(c).

\(^{162}\) Criminal Code (Tas) s 2A(2)(b).

\(^{163}\) Criminal Law Consolidation Act 1935 (SA) s 46(3)(a)(i).

\(^{164}\) Criminal Code (Qld) s 348(2)(b); Criminal Code (WA) s 319(2)(a). See also Crimes Act 1900 (NSW) s 61HA(6)(b): ‘if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force’.

\(^{165}\) Crimes Act 1900 (NSW) s 61HA(6)(b).

\(^{166}\) Crimes Act 1900 (ACT) s 67(1)(c), including extortion against another person.

\(^{167}\) Criminal Code (WA) s 319(2)(a).

\(^{168}\) Ibid s 319(2)(a); Criminal Code (Tas) s 2A(f); Crimes Act 1900 (ACT) s 67(1)(g).

\(^{169}\) Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008 (SA) s 46(3)(a)(ii).

\(^{170}\) Crimes Act 1900 (ACT) s 67(1)(d).
25.96 Some jurisdictions seek to prescribe non-physical threats and acts as circumstances in which there is, or may be, no consent by including threats ‘that do not involve a threat of force’,171 ‘of harm of any type’172 or ‘of any kind’.173

**Asleep, unconscious or affected by drugs**

25.97 In NSW, Victoria, South Australia, Tasmania and the Northern Territory, there is no consent when the complainant is asleep or unconscious.174

25.98 In Victoria, South Australia, Tasmania and the Northern Territory, there is no consent where the complainant is so affected by alcohol or other drugs as ‘to be incapable of freely agreeing’ to the sexual activity.175 In the ACT, the effect of alcohol or other drugs is less qualified; there is no consent if it is caused by ‘the effect of intoxicating liquor, a drug or anaesthetic’.176 In NSW, there may be no consent where a complainant was ‘substantially intoxicated by alcohol or any drug’.177 This formulation adopts the view expressed in the report of the Criminal Justice Sexual Offences Taskforce that the degree of intoxication and whether it was such that a person was ‘unable to consent’ are matters for the jury.178

**Mistaken identity**

25.99 In all jurisdictions—except Western Australia179—there is no consent where the complainant is mistaken as to the identity of the person with whom he or she has engaged in sexual activity.180 In addition, NSW provides that there is no consent where the complainant mistakenly believed that he or she was married to the person.181

---

171 *Crimes Act 1900 (NSW)* s 61HA(6)(b).

172 *Crimes Act 1958 (Vic)* s 36(b), which covers a threat against another person; *Criminal Code (NT)* s 192(2)(a). See also *Criminal Code (Qld)* s 348(2)(c), which includes ‘fear of bodily’ harm.

173 *Criminal Code (Tas)* s 2A(2)(c).

174 In some jurisdictions, being asleep or unconscious is specified on its own as a circumstance that negates consent: *Crimes Act 1900 (NSW)* s 61HA(4)(b); *Criminal Law Consolidation Act 1935 (SA)* s 46(3)(c). These jurisdictions deal with the lack of consent in the context of the effect of alcohol and other drugs separately. Other jurisdictions specify being asleep or unconscious along with the effect of alcohol and other drugs: *Crimes Act 1935 (Vic)* s 36(d); *Criminal Code (Tas)* s 2A(2)(b); *Criminal Code (NT)* s 192(2)(c). See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), cl 5.2.3, 38.

175 *Crimes Act 1958 (Vic)* s 36(d); *Criminal Law Consolidation Act 1935 (SA)* s 46(3)(d); *Criminal Code (Tas)* s 2A(2)(h); *Criminal Code (NT)* s 192(2)(c). See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), cl 5.2.3.

176 *Crimes Act 1900 (ACT)* s 67(1)(e).

177 *Crimes Act 1900 (NSW)* s 61HA(6)(a).

178 Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 37.

179 Western Australia does however specify that consent is negated where it has been obtained by ‘deceit, or any fraudulent means’: *Criminal Code (WA)* s 319(2)(a).

180 *Crimes Act 1900 (NSW)* s 61HA(5)(b); *Crimes Act 1935 (Vic)* s 36(f); *Criminal Code (Qld)* s 348(2)(f); *Criminal Law Consolidation Act (SA)* s 46(3)(g); *Criminal Code (Tas)* s 2A(2)(g); *Criminal Code Act 1900 (ACT)* s 67(1)(f); *Criminal Code (NT)* s 192(e).

181 *Crimes Act 1900 (NSW)* s 61HA(5)(b). See also *Criminal Code (Qld)* s 348(2)(f) which specifies that there is no consent where the person agrees to the sexual activity when they had the ‘mistaken belief induced by the accused that they were sexual partners’.
25. Sexual Offences

Mistaken about the sexual nature of the act
25.100 In Victoria, South Australia, Tasmania and the Northern Territory there is no consent where the person agreed or submitted to sexual activity being mistaken about the sexual nature of the act. Other specific factors in this category include:

- in NSW, Victoria and the Northern Territory—mistaken belief that sexual intercourse is for medical or hygienic purposes; and
- in NSW and Queensland—agreeing or submitting to an act because of false or fraudulent representations about the nature or purposes of the act.

Capacity to understand nature of the act
25.101 Most jurisdictions prescribe that there is no consent where the person who has agreed or submitted to the sexual act does not have the capacity to understand the sexual nature of the act. The question of capacity is part of the Queensland definition of consent.

Abuse of position of authority or trust
25.102 There is no consent when the accused person is in a position of authority or trust over the complainant in Queensland, Tasmania and the ACT. There may be no consent where the accused has abused a ‘position of authority or trust’ in NSW.

25.103 In addition, the Crimes Act 1900 (NSW) specifies that consent is not a defence to a range of sexual offences occurring within relationships of authority or trust. For example, it is an offence for a person who is ‘responsible for the care’ of a person with a cognitive impairment to have sexual intercourse with that person, and consent is not a defence.

---

182 Crimes Act 1958 (Vic) s 36(f); Criminal Law Consolidation Act 1935 (SA) s 46(3)(h); Criminal Code (Tas) s 2A(g), where the complainant must have been ‘reasonably mistaken about the nature or purpose of the act’; Criminal Code (NT) s 192(2)(e). See also Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), cl 5.2.3, 38.

183 Crimes Act 1900 (NSW) s 61HA(5)(c); Crimes Act 1958 (Vic) s 36(g); Criminal Code (NT) s 192(1)(f).

184 Crimes Act 1900 (NSW) s 61HA(5)(c); Criminal Code (Qld) s 348(2)(e).

185 Crimes Act 1900 (NSW) s 61HA(4)(c); Crimes Act 1958 (Vic) s 36(e); Criminal Law Consolidation Act 1935 (SA) s 46(f); Criminal Code (Tas) s 2A(2)(i); Crimes Act 1900 (ACT) s 67(1)(i); Criminal Code (NT) s 192(2)(d). See also MCCOC, cl 5.2.3, 38. Crimes Act 1900 (NSW) s 61HA(4)(a) specifically provides that a person does not consent to sexual intercourse where that person ‘does not have the capacity to consent to the sexual intercourse, including because of age or cognitive capacity’.

186 Criminal Code (Qld) s 348(1).

187 Ibid s 348(2)(d); Criminal Code (Tas) s 2A(2)(e); Crimes Act 1900 (ACT) s 67(1)(h).

188 Crimes Act 1900 (NSW) s 61HA(6)(c).

189 Ibid s 66F(2). (5) The penalty applicable for this offence, a maximum of 10 years imprisonment, is less than that for sexual assault without consent (14 years).
Unlawful detention

25.104 In most jurisdictions a person unlawfully detained does not consent to sexual activity.\textsuperscript{190}

Communicating consent

25.105 Tasmania is the only jurisdiction in which there is no consent in the absence of verbal or physical communication as to free agreement.\textsuperscript{191} In other jurisdictions, such as Victoria, the implications of communicating consent are dealt with by directions to the jury.\textsuperscript{192}

Consultation Paper

25.106 In the Consultation Paper, the Commissions proposed that federal, state and territory sexual offences legislation should prescribe a non-exhaustive list of circumstances where consent may be vitiated—that is, made legally invalid or defective. The proposal stated that the circumstances ‘need not automatically negate consent, but the circumstances must in some way be recognised as vitiating consent’.\textsuperscript{25.107} The proposal stated that, at a minimum, the non-exhaustive list of vitiating factors should include:

- lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;
- the actual use of force, threatened use of force against the complainant or another person, which need not involve physical violence or physical harm;
- unlawful detention;
- mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused); and
- any position of authority or power, intimidation or coercive conduct.\textsuperscript{193}

25.108 The Commissions also asked to what extent the circumstances vitiating consent set out in current legislation are appropriate to sexual assault committed in a family violence context, and whether any amendments are required to draw attention to the coercive environment created by family violence, or whether the current provisions are sufficient.\textsuperscript{194}

\textsuperscript{190} Ibid ss 61HA(4)(d); Crimes Act 1958 (Vic) s 36(c); Criminal Law Consolidation Act 1935 (SA) s 46(3)(b); Criminal Code (Tas) s 2a(2)(d); Crimes Act 1900 (ACT) s 67(1)(j); Criminal Code (NT) s 192(2)(b). See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), cl 5.2.3, 38.

\textsuperscript{191} Criminal Code (Tas) s 2A(2)(a).

\textsuperscript{192} See Crimes Act 1958 (Vic) s 37AA.

\textsuperscript{193} Consultation Paper, Proposal 16–3.

\textsuperscript{194} Ibid, Question 16–6.
Submissions and consultations

25.109 Stakeholders generally supported the proposal. There was near unanimous support from stakeholders for the idea that legislation should prescribe a non-exhaustive list of circumstances in which there may not be consent. Points of difference arose, however, in respect to the legal effect of the existence of a prescribed circumstance—that is, whether in the circumstances prescribed consent is automatically negated or may be negated—and the adequacy of the proposed circumstances.

25.110 AIFS commented that a non-exhaustive list of circumstances where there can be no consent is an important step to support the conception of consent as ‘free agreement’. Legal Aid NSW agreed this is consistent with a communicative model of consent, but argued that the existence of a prescribed circumstance should give rise to a rebuttal presumption of no consent. The Law Council of Australia (the Law Council) considered the Consultation Paper proposal to be ‘internally inconsistent’ and opposed it to the extent that it attempted to specify circumstances in which the tribunal of fact must find there is no consent. The Law Council did not object, however, to a list of circumstances that would be ‘material’ to a finding of absence of consent.

25.111 Stakeholders expressed a range of views about the circumstances proposed to be specified. In relation to threats of force, NASASV and the Canberra Rape Crisis Centre submitted that the legislation should prescribe ‘implied threats of use of force’ as a relevant circumstance.

25.112 Other stakeholders provided anecdotal evidence suggesting the importance of including threats against others as a circumstance where there is no consent—


196 Australian Institute of Family Studies, Submission FV 222, 2 July 2010.

197 Legal Aid NSW, Submission FV 219, 1 July 2010.

198 That is, because the proposal stated that legislation should provide a non-exhaustive list of ‘circumstances where there is no consent to sexual activity, or where consent is vitiated’ and that those circumstances ‘need not automatically negate consent’: Law Council of Australia, Submission FV 180, 25 June 2010. Also Queensland Law Society, Submission FV 178, 25 June 2010.


especially as some women’s partners threaten to abuse the children if the woman does not comply with her partner’s demands.201

25.113 Women’s Legal Service Queensland considered that the circumstance of ‘any position of authority or power, intimidation or coercive conduct’ would cover most sexual assault perpetrated in a family violence context.202 NASAV suggested that legislation should also provide illustrative examples of such circumstances; and that the circumstance should be modified so as to capture any person in a position of authority or trust.203

25.114 Stakeholders emphasised that the issue of consent in the context of family violence and intimate relationships is complex; and that complexity is magnified where there is a history of violence and coerced ‘consent’.204 The disjunction between the criminal justice system’s focus on isolated incidents, as opposed to a pattern or history of family violence, was identified as a particular challenge in proving lack of consent.205

25.115 Professor Patricia Easteal referred to research that identified four types of coercion in ‘wife rape’: social coercion, interpersonal coercion, threat of physical force and physical force. She noted that the literature suggests victims of sexual assault by an intimate partner ‘may experience a combination of these types of coercion, and the nature of the coercion may change over the course of the relationship, in the context of changing abuse patterns’.206

25.116 Stakeholders had different views about how legislation can best address these realities. Easteal argued that vitiation of consent needs to be defined specifically to include the type of intimidation that can be generated in a marital or intimate relationship.207

25.117 Some stakeholders suggested that legislation should either prescribe family violence as a circumstance where there is no consent, or recognise family violence as an environment characterised by threats of force or terror and prescribe that there is no consent where it is obtained by such threats.208 Others emphasised that the family violence context is such that actual threats or coercive behaviour need not be immediately present to affect the validity of consent and that the prescribed

---

206 P Easteal, Submission FV 38, 13 May 2010.
207 Ibid.
208 Women’s Legal Services NSW, Submission FV 182, 25 June 2010; Jenny’s Place Women and Children Refuge, Submission FV 54, 28 May 2010. As in Crimes Act 1900 (NSW) s 61HA(4)(c).
circumstances should refer to a history of force and intimidation. Rather than recognising the coercive nature of family violence as a circumstance affecting the validity of consent, the Magistrates’ Court and Children’s Court of Victoria and Professor Julie Stubbs considered that this issue should be dealt with as part of an objects clause to assist in the interpretation of the relevant provisions.

25.118 Stakeholders also suggested that the circumstances vitiating consent set out in the Commissions’ proposal should be expanded to include:

- economic abuse;
- where consent is purported to be given by persons with a cognitive impairment to sexual activity with a carer;
- fear of force or fear of harm of any type;
- threats to harm animals, and
- threats to damage property.

Commissions’ views

25.119 Identifying the circumstances where there can be no consent, and where there may be no consent, as determined by the jury, has been a key concern of law reform in this area.

25.120 The approach to circumstances vitiating consent varies across Australia. The ACT identifies the most circumstances and Western Australia the least. The Victorian approach is similar to that recommended by the MCCOC. NSW is unique in separately specifying circumstances where there: (a) can be no consent; (b) may be no consent in the circumstances of the case—which is a question for the jury to decide.

210 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; J Stubbs, Submission FV 186, 25 June 2010.
214 Confidential, Submission FV 69, 2 June 2010.
215 Ibid.
217 Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 49. However, since the MCCOC report, NSW has legislated in a different way from other jurisdictions, as discussed below.
218 Crimes Act 1900 (NSW) s 61HA(4)–(6).
25.121 The Commissions’ view remains that, at a minimum, federal, state and territory legislation should recognise certain specified circumstances as ones where consent may be vitiated. The recommendation below intentionally leaves it open to the Commonwealth, state and territory parliaments to decide whether particular circumstances should be considered as automatically negating consent. The list of circumstances is non-exhaustive, as is presently the case in all Australian jurisdictions. This allows juries to find, on the evidence, that there was no consent, even if a case does not fall within one of the listed circumstances.\(^{219}\)

25.122 The recommendation below incorporates minor changes of wording from the proposal, including to refer to abuse of a position ‘of authority or trust’; and to threats against the ‘complainant or any other person’—better reflecting circumstances that may arise in a family violence context.

**Recommendation 25–5** Federal, state and territory sexual offence provisions should set out a non-exhaustive list of circumstances that may vitiate consent including, at a minimum:

(a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;

(b) where a person submits because of force, or fear of force, against the complainant or another person;

(c) where a person submits because of fear of harm of any type against the complainant or another person;

(d) unlawful detention;

(e) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused);

(f) abuse of a position of authority or trust; and

(g) intimidating or coercive conduct, or other threat, that does not necessarily involve a threat of force, against the complainant or another person.

**The fault element**

25.123 The discussion below focuses on the fault elements\(^ {220}\) of sexual offences and the relationship between fault and lack of consent.

25.124 The penetrative sexual offence, or ‘rape’, comprises physical elements and fault elements. In all jurisdictions, the physical elements of the offence require the


\(^{220}\) Referred to as the ‘mental’ element in the Consultation Paper, [16.69]–[16.110].
prosecution to prove that sexual penetration took place without the consent of the complainant.

25.125 The fault element—the ‘state of mind of the accused which must be established beyond reasonable doubt before the accused can be convicted’—differs among Australian jurisdictions.

25.126 In Queensland, Western Australia and Tasmania, the fault element for rape is merely an intention to have intercourse. In the remaining jurisdictions, the fault element for rape is both an intention to have intercourse and:

- in NSW, the ACT and the NT, that the accused ‘knows that the other person does not consent’ or is ‘reckless as to whether the other person consents’;
- in Victoria, that the accused commits the act ‘while being aware that the person is not consenting or might not be consenting’ or ‘while not giving any thought to whether the person is not consenting or might not be consenting’; and
- in South Australia, that the accused ‘knows, or is recklessly indifferent to, the fact that the other person does not so consent’.

25.127 It is these additional fault elements—knowledge and recklessness—that have raised the most contentious questions for law reform, both as elements of offences and in the context of the defences based on an accused’s ‘reasonable belief’ or ‘honest and reasonable belief’ that the complainant was consenting.

25.128 In all jurisdictions except NSW, the accused may raise a defence that he or she honestly believed that the complainant was consenting. In Victoria, South Australia, and the ACT, where this defence is under the common law, the honest belief in consent need not be reasonable. In Queensland, Western Australia, Tasmania, and the Northern Territory, the belief must be both honest and reasonable.

---

222 This is the only mental element required: Criminal Code (Qld) s 349; Criminal Code (WA) s 325; Criminal Code (Tas) s 13.
223 Crimes Act 1900 (NSW) s 61HA(3); Crimes Act 1900 (ACT). Similar terminology to that set out in the text is used in the Northern Territory: Criminal Code (NT) s 192(4). In NSW, it is also sufficient if the accused has no reasonable grounds for believing that the other person consents to sexual intercourse: Crimes Act 1900 (NSW) s 61HA(3)(c).
224 Crimes Act 1958 (Vic) s 38(2)(a).
225 Criminal Law Consolidation Act 1935 (SA) s 48(1).
227 Director of Public Prosecutions v Morgan [1976] AC.
228 Criminal Code (Qld) s 24; Criminal Code (WA) s 24; Criminal Code (NT) s 32. See also Tasmania which has included recklessness within its treatment of a mistaken belief: Criminal Code (Tas) s 14A(1)(b). See discussion in Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 71; and Victorian Law Reform Commission, Sexual Offences: Final Report (2004), [8.4].
Defences of mistaken belief in consent, or honest and reasonable belief in consent, are no longer relevant under the NSW legislation. Instead, the *Crimes Act 1900* (NSW) definition of consent refers to the accused’s knowledge about consent in such a way that it is relevant to that legislation’s definition of consent.

**Recklessness**

The concept of ‘recklessness’, in the context of sexual offences, differs substantially among Australian jurisdictions.

Recklessness is not defined in the NSW legislation, but may be established where the accused:

- ‘realised the possibility that the complainant was not consenting’ but went ahead regardless;
- ‘failed to consider whether or not the complainant was consenting … notwithstanding the risk that the complainant was not consenting would have been obvious to someone with the accused’s mental capacity if they had turned his or her mind to it’.

Both of these kinds of recklessness—‘advertent’ or ‘non-advertent’ recklessness respectively—are ‘wholly subjective’.

By criminalising ‘non-advertent’ recklessness, NSW is said to ‘go further’ than other jurisdictions. The policy reasons why non-advertent recklessness should be included were expressed by Kirby P in *R v Kitchener*:

> To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment’s thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrong-doing, such total indifferance to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today … Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women.

In South Australia, ‘recklessly indifferent’ is defined in the following way:

A person is recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—

---

229 *Crimes Act 1900* (NSW) s 61HA(3).
25. Sexual Offences

(a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or

(b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or

(c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.235

25.135 The Victorian provision refers to a person who did not give ‘any thought’ as to whether or not the complainant was consenting.236 This provision addresses the position in *R v Ev Costa*, where it was held that recklessness required conscious advertence to the question of whether the complainant was consenting.237

Defence of ‘honest belief’

25.136 Fault elements, such as knowledge and recklessness, are elements of some defences. That an accused may be acquitted on the basis of an honest, but unreasonable, belief or mistake in consent was established by the House of Lords in *DPP v Morgan*.238 In that case three men were told by the husband of the complainant that they could have sexual intercourse with her and that any resistance (physical or verbal) she made was pretence, with the husband suggesting that his wife found such behaviour exciting. The men proceeded to have intercourse with the woman and were subsequently charged with and found guilty of rape. The men appealed on the basis that they held an honest belief that the woman was consenting. The convictions were ultimately upheld on the basis that a jury ‘would have been extremely unlikely … [to have] accepted this defence on the facts of the case’.239

25.137 The significance of *Morgan* is that a majority of the House of Lords held that where the accused held an honest, albeit unreasonable belief, that the complainant was consenting to the sexual intercourse, the offence of rape was not committed:

to insist that a belief must be reasonable to excuse it is to insist that the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that

235 *Criminal Law Consolidation Act 1935* (SA) s 47. For a discussion of the significance of the accused being aware of the ‘possibility’ as opposed to the ‘probability’ that the other person might not be consenting to the act or has withdrawn consent to the act, see *R v Egan* (1985) 15 A Crim R 20.


237 *R v Ev Costa* [1996] VSC. cf *R v Kitchener* (1993) 29 NSWLR 696, where complete failure to consider or aver to consent was held sufficient to constitute recklessness.

238 Director of Public Prosecutions v Morgan [1976] AC. In the Australian common law jurisdictions see: *Banditt v The Queen* (2005) 224 CLR 262; *R v Brown* [1975] 10 SASR 139. The decision in *Banditt* was made before the most recent legislative change in NSW, which has introduced an objective element. *Morgan* does not apply in the Code jurisdictions.

his state of mind although innocent of evil intent, can convict him if it be honest but
not rational.240

25.138 The decision in Morgan was controversial and generated considerable
debate. It led to the creation in 1975 of an Advisory Group on the Law of Rape,241
which concluded that the test was correct but that there should be clarification of the
significance of ‘reasonableness’ in the legislation.242

25.139 The defence of honest belief is currently available to accused persons in
Victoria, South Australia, and the ACT in respect of the offence of rape or sexual
intercourse without consent.243 In Victoria, judges must direct juries to consider
whether an accused’s belief was reasonable in all the circumstances, including
reference to ‘whether the accused took any steps to ascertain whether the complainant
was consenting’.244

Defence of ‘honest and reasonable belief’

25.140 Generally, where the statutory defence of honest and reasonable belief is
available to an accused, the question of whether a defence is available on the facts of a
case is answered by a two-stage inquiry: (a) did the accused believe that the
complainant was consenting; and (b) if so, was that belief reasonable?245

25.141 The Tasmanian Criminal Code, however, articulates a defence specific to
mistake as to consent. This defence articulates that an accused’s mistaken belief about
the existence of consent is not honest or reasonable if the accused:

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

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

(c) did not take reasonable steps, in the circumstances known to him or her at the
time of the offence, to ascertain that the complainant was consenting to the
act.246

New South Wales approach

25.142 Until recently, the defence of honest belief that the complainant consented
was available in NSW—a common law jurisdiction. Substantive changes in relation to

241 This recommendation was implemented in 1976, and was substantially superseded by later extensive
reform of the law in the UK.
242 See, eg, R v Brown [1975] 10 SASR 139 (decided before Morgan but reaching the same decision);
Banditt v The Queen (2005) 224 CLR 262.
243 Crimes Act 1958 (Vic) s 37AA. This approach was also recommended by Model Criminal Code Officers
Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual
Offences Against the Person (1999), 85.
244 Criminal Code (Qld) s 24; Criminal Code (WA) s 24; Criminal Code (NT) s 32. See also Tasmania
which has included recklessness within its treatment of a mistaken belief: Criminal Code (Tas) s 14A(3)(b). See also, Model Criminal Code Officers Committee–Standing Committee of Attorneys-
General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 73.
245 See also, Model Criminal Code Officers Committee–Standing Committee of Attorneys-
General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 73.
246 Criminal Code (Tas) s 14A.
consent were enacted in 2007. Section 61HA(3) of the Crimes Act 1900 (NSW) now provides:

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

(a) the person knows that the other person does not consent to the sexual intercourse, or

(b) the person is reckless as to whether the other person consents to the sexual intercourse, or

(c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

(d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but

(e) not including any self-induced intoxication of the person.

Subjective and objective fault elements

25.143 Subjective fault elements, such as recklessness, knowledge and honest belief, emphasise the perspective of a particular defendant. Objective elements, such as reasonableness, focus on ‘the actual consequences of an accused’s conduct or the actual circumstances under which the conduct occurred rather than on the accused’s mental state during the performance of the conduct’. In this context, ‘honest and reasonable belief’ incorporates both a subjective and objective element.

25.144 The arguments for and against subjective fault elements have been canvassed in reports by the MCCOC and the VLRC. The main arguments in support of subjective fault elements include the following.

- Consistency with fundamental notions of criminal responsibility—for example, the notion that the criminal law, particularly in relation to serious offences, should not impose guilt where the person did not knowingly transgress the law.

---

247 Crimes Amendment (Consent—Sexual Assault Offences) Act 2007 (NSW).
248 See, Director of Public Prosecutions v Morgan [1976] AC, in relation to the classification of honest belief in consent as a subjective test.
249 M Findlay, S Odgers and S Yeo, Australian Criminal Justice (2005), 15.
Avoiding the practical difficulties of formulating objective standards—for example, the ‘reasonable person’ test raises issues in relation to whether the jury ought to consider what they would have done in the situation or whether the standard is that of a ‘reasonable man’. In addition, questions arise in relation to the qualities and attitudes about men and women that are ascribed to a ‘reasonable person’.252

The view that the trier of fact, in determining whether a subjective mental state existed, may take into account the reasonableness of the mental state.253

In respect of a defendant’s mistaken belief—the focus of only a small number of rape trials—an objective element would ‘jeopardise the principles of criminal responsibility without ensuring that a higher proportion of people who are actually guilty of rape are convicted’.254

25.145 The main arguments in support of objective fault elements include the following.255

Subjective fault elements reinforce myths about men, women and children and sexuality—in particular as to whether sexual access is always available and expectations about how consent is conveyed.256

An objective test is in accordance with the communicative model of consent established in the definitional frameworks.257

A defendant should not ‘be able to avoid culpability’ on the basis that ‘he did not give any thought at all as to whether the complainant was consenting or not’.258

The law ‘ought to impose a higher standard of care in sexual circumstances’,259 because ‘it is possible for a man to ascertain whether a woman is consenting or not with minimal effort’;260 and to have sexual intercourse with a woman without her consent is ‘to do her great harm’.261

---

255  See discussion in Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 79.
256  The defence of honest belief ‘supports the attitude that a person is entitled to have sex, unless the other person actively indicates they do not wish to do so. This places the onus on a person approached for sex to indicate lack of consent, instead of requiring the initiator to ascertain whether the other person is consenting’: Victorian Law Reform Commission, Sexual Offences: Final Report (2004), [8.7].
258  Victorian Law Reform Commission, Sexual Offences: Final Report (2004), [8.11]. See, eg, the Victorian decision of R v Ev Costa [1996] VSC 27, compared to the position in NSW stated in R v Kitchener (1993) 29 NSWLR 696, which found that failure to consider or advert to consent at all is reckless.
261  Ibid, 15–16.
Subjective tests are difficult because they contain a ‘double subjective element’: that is, both the complainant’s (was she consenting?) and defendant’s (did he know she was not consenting?) states of mind. This difficulty is compounded because the jury often must make its decision on the basis of the competing evidence of the complainant and the accused.

**Consultation Paper**

25.146 In the Consultation Paper, the Commissions proposed that federal, state and territory sexual offences legislation should adopt legislation based on the NSW approach to the fault element. That is, legislation should provide that a person who performs a sexual act with another person, without the consent of the other person, knows that the other person does not consent to the act if the person has no reasonable grounds for believing that the other person consents. Further, for the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case, including any steps taken by the person to ascertain whether the other person consents, but not including any self-induced intoxication of the person.

25.147 To better determine the impact of the defence of honest belief on complainants who have, or have had, an intimate relationship with the accused, the Commissions asked whether an honest belief in consent is more likely to be raised in cases where the complainant has or has had an intimate relationship with the accused; whether the insertion of an objective element would assist in such cases; and whether any other measures are required to clarify or restrict the defence of honest belief in such cases.

**Submissions and consultations**

25.148 Some stakeholders expressed support for the proposal but did not give reasons for their view. Others supported the proposal, expressly or impliedly, by reason of the objective elements. One stakeholder commented that, while there needs to be an objective element, even objective elements are not immune to bias and

---

263 Ibid, [7.99].
267 Legal Aid NSW, *Submission* FV 219, 1 July 2010; National Association of Services Against Sexual Violence, *Submission* FV 195, 25 June 2010; Women’s Legal Service Queensland, *Submission* FV 185, 25 June 2010; Women’s Legal Service NSW, *Submission* FV 182, 25 June 2010; Jenny’s Place Women and Children Refuge, *Submission* FV 34, 28 May 2010; M Condon, *Submission* FV 43, 18 May 2010. The NASASV supported the proposal as ‘a step forward for jurisdictions where the law does not currently require that belief there was consent be reasonable’ but also went further, arguing that criminal liability should turn on the question of whether or not there was consent and a mere intention to have intercourse.
prejudice about sexuality, including the sexuality of certain groups, such as Indigenous women.268

25.149 Some stakeholders noted than an objective element would make it easier for the prosecution to discharge the onus of proof.269 Jenny’s Place Women and Children Refuge stated that the legislation should require proof by the accused of the steps taken to ascertain whether the complainant was consenting, as recommended by the United Nations Division for the Advancement of Women.270

25.150 The Magistrates’ Court and Children’s Court of Victoria did not express an opinion about the proposal, but noted that:

a communicative model of consent … can be difficult to reconcile with a purely subjective mental element. There is a perception that reconciling these elements makes it extremely difficult to give comprehensible jury directions.271

25.151 AIFS commented that legislative measures that require a belief in consent to be reasonable ‘set up a situation in which the victim’s behaviour can be used as evidence … [of] the defendant’s state of mind at the time’ and have ‘frequently resulted in the defence counsel drawing on information about the complainant’s sexual history, or to appeal to rape myths in order to show that the defendant could have held that belief’.272

25.152 The Law Council and the Law Society of NSW strongly opposed the proposal to the extent that it ‘provides for a single offence where alternative subjective and objective fault elements are applicable’.273 The Law Council stated that, under the proposal:

a person who knows that consent is absent is convicted of the same offence and liable to the same maximum penalty as the person who honestly believes that there is consent but is found to have been negligent (that is, the tribunal of fact is satisfied that the person did not have ‘reasonable grounds’ for that belief).274

25.153 Both organisations criticised the approach because a negligent offender is not equally culpable as a deliberate offender and should not be liable to the same maximum penalty.275 This, it was said, creates a situation where, after a jury trial resulting in a conviction, the sentencing judge will not know the basis upon which the

---

268 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, Submission FV 212, 28 June 2010.
269 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; Jenny’s Place Women and Children Refuge, Submission FV 54, 28 May 2010; P Eastal, Submission FV 39, 13 May 2010.
271 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.
272 Australian Institute of Family Studies, Submission FV 222, 2 July 2010.
jury found the accused guilty and could proceed to sentence on a more serious basis than in fact determined by the jury.\textsuperscript{276}

25.154 In the Law Council’s view, if an objective fault element is to be adopted, ‘it must be in a discrete offence with a considerably lower maximum penalty than the penalties currently applicable to intentional or reckless sexual assault’.\textsuperscript{277} The Law Society of NSW also submitted that:

\begin{itemize}
  \item sexual assault is a serious crime with severe maximum penalties and it should be reserved for behaviour that is ‘so seriously wrong as to be deserving of criminal punishment’;
  \item although there are negligence offences with substantial penalties within the criminal law, this is the exception, rather than the rule with the vast majority of criminal offences requiring a ‘guilty mind’; and
  \item an accused who lacks the capacity of a hypothetical reasonable person (for example, an accused with a cognitive impairment) and who mistakenly believes that consent is present should not be held to the standard of people who have full capacity.\textsuperscript{278}
\end{itemize}

25.155 Some stakeholders considered the proposal’s treatment of the self-induced intoxication of the accused to be problematic. Generally stakeholders agreed that self-induced intoxication is irrelevant to the question of whether a belief in consent is ‘reasonable’, but argued that it is relevant to the question of whether the accused ‘honestly’ held that belief:\textsuperscript{279}

\begin{quote}
If the person does not know that consent is absent nor is reckless in that regard, then the person should not be found guilty of such an offence. It makes no difference whatsoever that the person was intoxicated. The necessary guilty mind is absent. There is no justification whatsoever for imposing liability for such a serious offence on the basis that, if the person had not been intoxicated, he or she would have known that consent was absent.\textsuperscript{280}
\end{quote}

25.156 NTLAC observed that the proposal’s treatment of self-induced intoxication is ‘out of kilter with patterns of actual sexual conduct (including misconduct) in the Northern Territory’ and favoured the retention of the current Northern Territory fault provisions.\textsuperscript{281}

\textsuperscript{281} Northern Territory Legal Aid Commission, \textit{Submission FV 122}, 16 June 2010.
25.157 The Canberra Rape Crisis Centre also preferred an alternative approach, namely, making available the defence of honest and reasonable belief in all jurisdictions.282

25.158 There is some anecdotal evidence that the defence of honest belief is more likely to be raised in cases where there has been an intimate relationship283 and may be ‘treated as more credible’ in the family violence context than other contexts.284 Some stakeholders considered that other measures are required to clarify or restrict the defence of honest belief in this context. Women’s Legal Services NSW, for example, considered that ‘community education is a key aspect of ensuring the mutuality of consent in adult sexual relations’.285

Commissions’ views

25.159 ‘Honest belief’ is rarely the main or predominant issue in sexual offence proceedings, but the centrality of consent to sexual assault trials means that it invariably plays some role in how the legal system, its key players and jury members, understand and approach consent.286 For this and other reasons, the VLRC recommended that the fault element should be changed to ensure that an accused takes reasonable steps to ascertain that the complainant was consenting. In addition, the VLRC recommended that a mandatory jury direction on consent should be required by legislation.287 Only the latter of these recommendations has been implemented.288

25.160 In contrast, the MCCOC recommended that criminal liability for sexual offences should be determined on the basis of the subjective mental state of the accused. That is, that an accused should not be found guilty of sexual penetration without consent ‘unless the prosecution proves’ that the accused:

- knew that the victim was not consenting;
- was ‘reckless to the absence of consent’; or
- ‘failed to give any thought to the question of consent’.289

25.161 As such, the MCCOC approach permits an accused to rely on an honest, albeit unreasonable, belief in consent. Its reasons for this were based on the fact that the extent to which such a belief is unreasonable goes to the question of whether it has been established as a genuine or honest belief in consent. The MCCOC, like the

---

282 Canberra Rape Crisis Centre, Submission FV 172, 25 June 2010.
283 Legal Aid NSW, Submission FV 219, 1 July 2010.
287 Crimes Act 1958 (Vic) s 37AA. This approach was also recommended by Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 85.
VLRC, recommended that juries be directed in relation to whether the mistake or belief in consent was reasonable in all the circumstances.290

25.162 In the Commissions’ view, the issues are best addressed by legislation providing that it is a defence to the charge of rape that the accused held an honest and reasonable belief that the complainant was consenting. In addition, legislation should require that judges direct juries in relation to the evidence presented about that belief and whether, as part of the honesty requirement, the accused took any steps to ascertain whether consent was present.291

25.163 In forming this view, the Commissions have sought to promote the communicative model of consent and reconcile it with the general proposition of law that the onus of proof in criminal trials lies with the prosecution.

25.164 The insertion of an objective fault element, or the modification of the subjective fault element by requiring reasonable steps to ascertain consent, has also been adopted by various overseas jurisdictions, for example, in New Zealand,292 the United Kingdom293 and Canada.294 In the United Kingdom, the fault element is simply that a person commits rape when ‘A does not reasonably believe that B consents’.295

25.165 The recommendation is consistent with the basic position in the Australian criminal code jurisdictions.296 For complainants in non-code jurisdictions, it will introduce a second standard to be met by an accused who seeks to avoid criminal culpability because of their belief that the complainant consented. The introduction of an objective fault element discourages the assumption of consent, including in the context of a previous consensual relationship or family violence.297

25.166 In relation to the intoxication of the accused, the Commissions’ view is that intoxication is relevant to the honesty of the accused’s belief. The effect of intoxication on the accused, however, should not be a relevant factor in assessing the reasonableness of the accused’s belief.

290 Ibid, 85.
291 Jurors, when assessing the honesty and reasonableness of a belief, would have two tasks: assessing the honesty of the belief, including any steps taken by the accused to ascertain whether the complainant was consenting; and assessing the reasonableness of the belief, an objective factor to be judged by the standard of a reasonable person familiar with all the circumstances that were known to the accused at the relevant time.
292 Crimes Act 1961 (NZ) s 128(2).
293 Sexual Offences Act 2003 (UK) s 1. See also, s 75(1).
294 Criminal Code RSC 1985 C-46 s 273.2 However, see discussion of the effectiveness of these provisions in the context of sexual assault by a current or former intimate partner in M Randall, ‘Sexual Assault in Spousal Relationships,”Continuous Consent” and the Law, Honest but Mistaken Judicial Beliefs’ (2008) 32 University of Manitoba Law Journal 144.
295 Sexual Offences Act 2003 (UK) s 1.
296 Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), Responding to Sexual Assault: The Way Forward (2005), 49.
Recommendation 25–6  Federal, state and territory sexual assault provisions should provide that it is a defence to the charge of ‘rape’ that the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

Jury directions about consent

25.167  Judicial directions to the jury on consent are an important mechanism for addressing the ‘stereotypical views of sexual roles in … [the] assessment of consent, which some ‘jurors and judges continue to bring to bear’. 298 Where jury directions are directly responsive to continuing myths and misconceptions about sexual violence—for example, that physical resistance is necessary to convey lack of consent and that ‘true victims’ sustain injuries—they are also an important mechanism to reinforce the communicative model of consent. As the VLRC stated:

The jury direction performs an educative function by clarifying the law and establishing standards of behaviour for sexual relations which are based on principles of communication and respect. 299

25.168  Victoria and the Northern Territory have legislated jury directions about consent. The MCCOC also recommended mandatory jury directions on consent in relevant cases. 300

25.169  The Victorian model, introduced in 1991 and subsequently amended on a number of occasions, 301 has been referred to as ‘the most significant and progressive reform’. 302 In Victoria, the judge must direct the jury on consent only where it is ‘relevant to the facts in issue in a proceeding’. 303 The judge must relate any such direction to ‘the facts in issue in the proceeding’ and the ‘elements of the offence being tried … so as to aid the jury’s comprehension of the direction’. 304 The matters about which the judge must direct the jury include the meaning of consent (free agreement) and the circumstances, prescribed by legislation, in which the complainant does not consent, as well as:

(d)  that the fact that the person did not say or do anything to indicate free agreement to a sexual act at the time which the act took place is enough to show that the act took place without that person’s free agreement;

(e)  that the jury is not to regard a person as having freely agreed to a sexual act just because—

299  Ibid, [7.61].
301  Between 2001 and 2004 the VLRC reviewed the law concerning sexual offences and recommended further reform of jury directions about consent. These recommendations were subsequently enacted, see Crimes (Sexual Offences) Act 2006 (Vic).
303  Crimes Act 1958 (Vic) s 37.
304  Ibid s 37.
25. Sexual Offences

(i) she or he did not protest or physically resist; or
(ii) she or he did not sustain physical injury; or
(iii) on that or an earlier occasion, she or he freely agreed to engage in
another sexual act (whether or not of the same type) with that person,
or a sexual act with another person.305

25.170 There is considerable controversy about the Victorian model in the literature
and the case law.306 Concerns include that the directions may be seen to usurp the
function of the jury in deciding the factual issue of consent, that they present an
inaccurate picture of sexual activity and how people agree to such activity, that they are
convoluted and confusing, and in some cases may contradict other aspects of the law—
for example, the subjective test for an honest belief in consent.

25.171 The Northern Territory direction to the jury about consent is similar, but of
more limited scope. In a relevant case, the judge must give a direction that a person is
not to be taken as having consented to sexual intercourse simply because the person:

(a) did not protest or physically resist;
(b) did not sustain physical injury; or
(c) had, on that or an earlier occasion, consented to:
   (i) sexual intercourse; or
   (ii) an act of gross indecency,

whether or not of the same type, with the accused.307

25.172 The Victorian legislation also requires a judge to direct juries about the
accused’s knowledge and awareness about the presence of consent where the defence
raises in evidence, or asserts that, the accused believed that the victim was consenting
to the sexual act.308 In such circumstances, the judge must direct the jury that:

in considering whether the offence has been proved beyond reasonable doubt that the
accused was aware that the complainant was not consenting, the jury must consider—

(a) any evidence of that belief; and
(b) whether that belief was reasonable in all the relevant circumstances having
   regard to—

   (i) [in a case where one of the circumstances that vitiate consent exists]
       whether the accused was aware that that circumstance existed in
       relation to the complainant; and

305  Ibid s 37AAA.
306  See discussion in J Willis, ‘Legislatively Mandated Jury Directions in Sexual
307  Criminal Code (NT) s 192A. This was introduced in the Northern Territory in 1994.
308  Crimes Act 1958 (Vic) s 37AA.
(ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and

(iii) any other relevant matters.309

25.173 The Queensland Taskforce on Women and the Criminal Code considered that ‘compulsory directions would not necessarily overcome undesirable attitudes held by judges or juries’, but endorsed the Victorian model to the extent of recommending that the jury be directed to consider the steps taken by the accused to ensure that the complainant consented in cases where honest and reasonable belief in consent is raised.310

25.174 The MCCOC recommended a provision which follows the Victorian model, except for a significant amendment to the first clause.311 This provision stated:

(1) … the judge must, in a relevant case, direct the jury (if any) that a person is not to be regarded as having consented to a sexual act just because:

(a) The person did not say or do anything to indicate that she or he did not consent; or

(b) The person did not protest or physically resist; or

(c) The person did not sustain physical injury; or

(d) On that or an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type) with that person, or a sexual act with another person.

(2) …the judge must, in a relevant case, direct the jury (if any) that in determining whether the accused was under a mistaken belief that a person consented to a sexual act the jury may consider whether the mistaken belief was reasonable in the circumstances.312

Consultation Paper

25.175 In the Consultation Paper, the Commissions proposed that state and territory legislation should provide that a direction must be made to the jury on consent in sexual offence proceedings where it is relevant to a fact in issue. Such directions must be related to the facts in issue and the elements of the offence and expressed in such a way as to aid the comprehension of the jury. Such directions should cover:

(a) the meaning of consent (as defined in the legislation);

---

309 Ibid.
310 Taskforce on Women and the Criminal Code (Qld), Report of the Taskforce on Women and the Criminal Code (2000), Rec 64.3.
311 This recommendation was made before the term ‘normally’ was removed from Crimes Act 1958 (Vic) s 37(1)(a). See discussion of problems with the term ‘normally’ in Victorian Law Reform Commission, Sexual Offences: Interim Report (2003), [7.34]-[7.40].
312 Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), app 2, cl 5.2.43. Most of the submissions received by the MCCOC generally supported its approach. Some considered the Victorian model should be followed more closely: Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 265.
25. Sexual Offences

(b) the circumstances that vitiate consent, and that if the jury finds beyond reasonable doubt that one of these circumstances exists then the complainant was not consenting;

(c) the fact that the person did not say or do anything to indicate free agreement to a sexual act when the act took place is enough to show that the act took place without that person’s free agreement; and

(d) that the jury is not to regard a person as having freely agreed to a sexual act just because she or he did not protest or physically resist, did not sustain physical injury, or freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person, on an earlier occasion.

25.176 The Commissions also proposed that, where the defence asserts that the accused believed that the complainant was consenting to the sexual act, then the judge must direct the jury to consider:

(e) any evidence of that belief; and

(f) whether that belief was reasonable in all the relevant circumstances having regard to (in a case where one of the circumstances that vitiate consent exists) whether the accused was aware that that circumstance existed in relation to the complainant;

(g) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and

(h) any other relevant matters. 313

Submissions and consultations

25.177 Many stakeholders supported the Consultation Paper proposal. 314 The main reasons stakeholders gave for supporting a jury direction about consent were the need to educate the jury, 315 to assist jurors to understand and apply the legal definition of consent, 316 to redress juror bias, where it exists, 317 to debunk myths about sexual assault, 318 and to reinforce a communicative model of consent. 319

316 Legal Aid NSW, Submission FV 219, 1 July 2010; Canberra Rape Crisis Centre, Submission FV 172, 25 June 2010.
317 Legal Aid NSW, Submission FV 219, 1 July 2010.
319 Legal Aid NSW, Submission FV 219, 1 July 2010.
25.178 Some stakeholders strongly opposed a direction that the fact that the person did not say or do anything to indicate free agreement is enough to show that the act took place without the person’s free agreement. Concerns included that the direction goes too far—because such circumstances are material to the question of consent but cannot be determinative—and because the direction creates a presumption that a sexual act is unlawful unless proved otherwise.

25.179 The Law Society of NSW also specifically opposed a direction that consent is not to be regarded as having been freely given just because the complainant freely agreed to engage in another sexual act on an earlier occasion. It considered that such a direction ‘is fraught with difficulty if the fairness of the trial … is to be maintained’, and concerns matters for the jury. For example, where the accused may have made an honest and reasonable mistake about consent because of the nature of a previous relationship, it would be relevant for the jury to consider how consent had been shown in the past, rather than being directed that this evidence was irrelevant to the issue of consent. In contrast, Women’s Legal Services NSW supported a broader direction, directing the jury that it is irrelevant to the issue of consent that the complainant ‘was previously or at the time of the sexual act in a sexual relationship with that person or another person’. 322

25.180 To the extent that the proposed direction addresses the accused’s belief that the complainant was consenting, some stakeholders commented that the proposal reflected current practice. The NASASV supported this aspect of the proposal on the basis that the limitations of the defence of honest and reasonable belief should be clearly understood by the jury. 324

25.181 Jenny’s Place Women and Children Refuge specifically supported a direction that the jury consider whether the accused took any steps to ascertain whether the complainant was consenting in order to quash ‘conjecture and assumptions about continuous consent in intimate relationships’. 325

Commissions’ views

25.182 Research suggests that jurors find consent a difficult concept to understand and apply, and that jurors’ pre-existing attitudes have been found to influence their judgments more than the facts of the case and the manner in which the evidence was given. For these reasons, the Commissions support enacting positive judicial directions on consent: its meaning; the circumstances where there may be no consent;
and the relevance of not communicating consent, physical resistance, physical injury and consent to other sexual acts. Such directions may assist jurors to determine the facts of the case and apply the law to those facts, and reinforce the communicative model of consent. They may also operate to effect cultural change for those involved in the prosecution of sexual offences and where coupled with education in the community.

25.183 The Commissions’ recommendation largely reflects the Victorian model to the extent that it requires a judge to direct the jury about the meaning of consent, the circumstances where there may be no consent and an accused’s belief that the complainant was consenting. The manner by which the recommendation requires a judge to direct the jury about the relevance of certain factors to a jury’s determination of whether a complainant consented in a particular case reflects the Model Criminal Code provisions.

**Recommendation 25–7** State and territory sexual offence provisions should provide that the judge must, if it is relevant to the facts in issue in a sexual offence proceeding, direct the jury:

(a) on the meaning of consent, as defined in the legislation;
(b) on the circumstances where there may be no consent, and the consequence of a finding beyond reasonable doubt that one of these circumstances exists;
(c) that a person is not to be regarded as having consented to a sexual act just because:
   (i) the person did not say or do anything to indicate that she or he did not consent; or
   (ii) the person did not protest or physically resist; or
   (iii) the person did not sustain physical injury; or
   (iv) on that, or an earlier, occasion the person consented to engage in a sexual act—whether or not of the same type—with that person or another person.

Where evidence is led, or an assertion is made, that the accused believed that the complainant was consenting to the sexual act, then the judge must direct the jury to consider:

(d) any evidence of that belief;
(e) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps;
(f) the reasonableness of the accused’s belief in all the circumstances, including the accused’s knowledge or awareness of any circumstance that may vitiate consent; and

(g) any other relevant matter.

**Guiding principles and objects clauses**

25.184 The *Time for Action* report drew attention to the important role that guiding principles can play in the interpretation of the law relating to sexual offences and in the application of rules of evidence in sexual offence proceedings. Victoria is currently the only Australian jurisdiction which provides an objects statement and guiding principles in relation to sexual offences and related procedural and evidentiary matters.

25.185 The *Crimes Act 1958* (Vic) provides that the objectives of its sexual offences provisions are:

(a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;

(b) to protect children and persons with a cognitive impairment from sexual exploitation.328

25.186 In addition, guiding principles were included within the legislation, which set out the facts that the court should have regard to when interpreting the various sexual offences in that Act. These are that:

(a) there is a high incidence of sexual violence within society; and

(b) sexual offences are significantly under-reported; and

(c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and

(d) sexual offenders are commonly known to their victims; and

(e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.329

25.187 There are identical provisions in the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) to assist the court when interpreting the provisions relating to confidential communications,330 and in the *Criminal Procedure Act 2009* (Vic) to assist

---


328 *Crimes Act 1958* (Vic) s 37A.

329 Ibid s 37B.

330 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32AB.
25. Sexual Offences

25.188 These objects statements and guiding principles were introduced following the recommendations of the VLRC. The VLRC considered that such provisions are an important educative tool, addressing the need for cultural change and the implementation gap discussed in Chapter 24. The VLRC articulated three main arguments for including guiding principles:

- The criminal law has both a regulatory and an educative function. It should emphasise that people have a right to make decisions about their sexual activity and to choose not to engage in sexual activity. The interpretation clause will ensure that the provisions of sexual offences laws are interpreted consistently with the goals of the legislation.
- A statement of principles of interpretation will give added weight to any directions or instructions that a judge gives to the jury. The judge and jury can refer to the principles to shed light on where any ambiguity may exist in the interpretation of particular sections.
- Sexual assault continues to be under-reported, and the serious social harm of sexual assault has only recently begun to be given the recognition that it deserves. The unique nature and context of sexual assault should be clearly stated by the legislature, so that this underwrites the interpretation of the particular provisions in the legislation.

25.189 Some states and territories have also incorporated objects clauses and/or guiding principles in their family violence protection order legislation. While there is some question about the extent to which such provisions have been effective in practice, such principles may provide an important symbolic statement about the nature of such violence, the community’s lack of tolerance for such violence, and the response of the law.

---

331 In *Director of Public Prosecutions (Vic) v Theophanous* [2009] VSC, the Supreme Court of Victoria considered the applicability of the guiding principles contained in, what was then, the *Evidence Act 1958* (Vic) s 32AB. This case considered, in part, whether the magistrate had applied those guiding principles when allowing the publication of certain parts of the complainant’s evidence given in a committal proceeding. The court rejected the argument that s 32AB, and its intention to encourage the reporting of sexual assault, would necessarily mean that there could be no publication of evidence from a sexual assault proceeding.


334 See Ch 7.

335 In the family violence context see J Wangmann, “‘She Said …’ ‘He said …’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009, 55–56.

25.190 In the Consultation Paper, the Commissions proposed that state and territory sexual offence legislation should include a statement that the objectives of the legislation are to:

- uphold the fundamental rights of people to make decisions about their sexual behaviour; and
- protect children and persons with a cognitive impairment from exploitation.337

25.191 The Commissions also proposed that state and territory sexual offences, criminal procedure or evidence legislation should provide for guiding principles, to which courts should have regard when interpreting sexual offence provisions, which should at a minimum refer to the following:

- the high incidence of sexual violence within society;
- under-reporting of sexual offences;
- a significant number of sexual offences are committed against women, children and other vulnerable persons;
- sexual offenders are commonly known to their victims; and
- sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.338

25.192 Finally, the Commissions asked whether a statement of guiding principles should make reference to other factors, such as recognising specific vulnerable groups of women or acknowledging that sexual violence constitutes a form of family violence.339

Submissions and consultations

25.193 Many stakeholders supported the inclusion of statements of objectives340 and guiding principles.341 For example, AIFS emphasised that the introduction of a statement of objectives and guiding principles would be of benefit in providing:

25. Sexual Offences

accurate, objective information on sexual assault, and may assist in counteracting any misperceptions or adherence to rape myths in jury members or members of the judiciary.342

25.194 The Magistrates’ Court and Children’s Court of Victoria also supported the inclusion of statements of objectives and guiding principles, which ‘provide useful guidance to the court in determining an approach to construing the meaning of relevant provisions’. 343

25.195 Some stakeholders considered that ‘it is desirable to specifically acknowledge that sexual violence constitutes a form of family violence’ 344 and emphasised the need to refer explicitly to Aboriginal and Torres Strait Islander women and children, those from CALD communities, and persons with a disability.345

25.196 For example, Hannah McGlade emphasised that the fact that Aboriginal and Torres Strait Islander women and children are more vulnerable to sexual assault should be expressly acknowledged in guiding principles.346 Other stakeholders agreed but urged caution, emphasising the importance of not undermining the sexual autonomy of vulnerable groups of women,347 and that ‘consultation is critical with respect to wording’.348 NASASV submitted that:

groups should not just be tokenly listed as where the reader is otherwise ignorant of the factors this may feed existing prejudices, and potentially lead to further


342 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.


disempowerment/reinforcement of stereotypes and racism. It would be preferable if the dynamics that make these groups of women more vulnerable could be identified so that they can then be recognised for what they are in the evidence.\(^{349}\)

25.197 Stakeholders suggested other matters be included in any statement of objectives and or guiding principles.\(^{350}\) Suggestions included reference to:
- the occurrence of sexual violence in the context of intimate relationships;\(^{351}\)
- the need to protect young people as well as children from sexual exploitation;\(^{352}\)
- the impacts of sexual assault, with particular emphasis on the fact that ‘there is no “typical” sexual assault, and no typical response to having been assaulted’;\(^{353}\)
- sexual assault constituting a human rights violation, including reference to international human rights standards.\(^{354}\)

25.198 Some stakeholders opposed the proposals. National Legal Aid argued that appropriate education and training should instead be provided to law enforcement authorities, prosecutors, lawyers, judicial officers, and other relevant service providers.\(^{355}\) The Law Society of NSW proposed including reference to the right of the accused to a fair trial, but stated that guiding principles are not needed because judges already take these matters into account on sentence in NSW. The danger with enunciating these principles in legislation is that they may be given added weight thus leading to a double-counting effect in relation to matters that are already regarded as aggravating factors on sentence.\(^{356}\)

**Commissions’ views**

25.199 Statements of objectives and guiding principles can perform an important symbolic and educative role in the application and interpretation of the law, as well as in the general community. While much more is required to change culture, such


\(^{350}\) AIFS, for example, suggested including: emphasis on the fact that there is no ‘typical’ sexual assault, and no typical response to having been assaulted; that overt force and violence not being the norm in sexual offences; that the fact there is an ongoing sexual relationship does not negate the fact that non-consensual sex occurs; and that being sexually ‘experienced’ does not decrease the harm of sexual violence, nor does it mean a woman is more likely to have consented to an unwanted encounter: Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.


\(^{353}\) Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010. Other submissions, such as Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010 suggested adding reference to the trauma of sexual assault and resulting impacts on complainants’ capacity to report and participate in legal processes.


statements provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and provide a benchmark against which to assess the implementation of the law and procedure.

25.200 In the Commissions’ view, the statements of objectives and guiding principles articulated in the Victorian legislation are an instructive starting point for similar provisions in other jurisdictions.

25.201 While such objectives and principles are, however, intended to provide a contextual framework for the legislative response to sexual assault, rather than any exhaustive list of issues to which judicial officers and jurors should have regard, the recommendations below expand on the Victorian provisions to incorporate certain other matters.

25.202 In particular, the Commissions consider that it is desirable to acknowledge that sexual violence constitutes family violence, as it is precisely these cases that criminal justice systems deal with least effectively.\(^{357}\) Further, it is important to recognise the particular vulnerability of certain groups of women and, as a result, specifically recognise Aboriginal and Torres Strait Islander women, those from CALD backgrounds and women with a cognitive impairment as victims of sexual violence.\(^{358}\)

25.203 The Commissions recommend that legislative statements of objectives should underline the aims of upholding individual sexual autonomy and agency, while ensuring the protection of vulnerable persons from sexual exploitation. In addition, guiding principles should be incorporated in sexual offences, criminal procedure or evidence legislation, to recognise the nature and dynamics of sexual assault.

<table>
<thead>
<tr>
<th><strong>Recommendation 25–8</strong></th>
<th>State and territory legislation dealing with sexual offences should state that the objectives of the sexual offence provisions are to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and</td>
<td></td>
</tr>
<tr>
<td>(b) protect children, young people and persons with a cognitive impairment from sexual exploitation.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Recommendation 25–9</strong></th>
<th>State and territory legislation dealing with sexual offences, criminal procedure or evidence, should contain guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) sexual violence constitutes a form of family violence;</td>
<td></td>
</tr>
<tr>
<td>(b) there is a high incidence of sexual violence within society;</td>
<td></td>
</tr>
</tbody>
</table>

---


358 See also, Recs 5–1(b), 7–1.
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(c)</td>
<td>sexual offences are significantly under-reported;</td>
</tr>
<tr>
<td>(d)</td>
<td>a significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Indigenous and culturally and linguistically diverse backgrounds, and persons with a cognitive impairment;</td>
</tr>
<tr>
<td>(e)</td>
<td>sexual offenders are commonly known to their victims; and</td>
</tr>
<tr>
<td>(f)</td>
<td>sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.</td>
</tr>
</tbody>
</table>