Submission to the NSW Law Reform Commission's Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences

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Introduction

1. In a press release dated 8 May 2018, the New South Wales (NSW) Attorney-General, Mr Mark Speakman, and the Minister for the Prevention of Domestic Violence and Sexual Assault, Ms Pru Goward, announced that they had decided to initiate the present review 'after a young woman endured two trials and two appeals without final resolution.'[1] The previous night, on the ABC's *Four Corners* television programme, the young woman concerned, Ms Saxon Mullins, had waived her right not to be identified as a complainant in 'prescribed sexual offence proceedings.'[2] In that programme, Ms Mullins stated that she had been raped at Kings Cross on 12 May 2013.[3] There were various criticisms made[4] of the reasoning deployed by Tupman DCJ when acquitting the alleged offender, Mr Luke Andrew Lazarus, on 4 May 2017.[5] And it was suggested that the law concerning consent and knowledge of non-consent in relation to sexual assault offences might be deficient.[6]
2. In the above-mentioned press release, Mr Speakman is quoted as saying that, although '[w]e can't legislate for respect, … we can examine whether the consent provisions in the Crimes Act require simplification and modernisation.'[7] Accordingly, the NSW Law Reform Commission's main task now appears to be to determine whether s 61HA of the *Crimes Act 1900* (NSW), which deals both with consent and knowledge of non-consent for the purposes of the offences created by ss 61I, 61J and 61JA of the Act, should be simplified and/or modernised.[8]
3. In my submission, there is no need for the relevant provisions to be modernised. Some members of the media[9], and certain members of the legal profession,[10] have recently suggested that it might be desirable to insert into s 61HA a provision similar to s

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[1] Mark Speakman and Pru Goward, 'Media Release: Sexual Consent Laws to be Reviewed' (8 May 2018).
[2] See *Crimes Act 1900* (NSW) s 578A(2) and (4)(b). See also Transcript, 'I am that girl' (ABC, *Four Corners*, 7 May 2018) <http://www.abc.net.au/4corners/i-am-that-girl/9736126>.
[3] Ibid.
[4] Ibid.
[5] *R v Lazarus* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ) ('*Lazarus DCNSW*').
[6] 'I am that girl', above n 2.
[7] Speakman and Goward, above n 1.
[8] The Commission's terms of reference provide that, in its review of s 61HA, it 'should have regard to' whether that section 'should be amended, including how the section could be simplified or modernised.'
[9] See, for example, Eleanor Hall, 'Changing sexual consent laws may not change trial outcomes: expert' *ABC* (online) 8 May 2018 <http://www.abc.net.au/radio/programs/worldtoday/changing-consent-laws-may-not-change-rape-trial-outcomes:-expert/9738908>.
[10] See, for example, Louise Milligan and Lucy Carter, 'NSW Attorney-General calls for review of sexual consent laws following Four Corners program' *ABC* (online) 8 May 2018 < http://www.abc.net.au/news/2018-05-08/nsw-attorney-general-calls-for-review-of-sexual-consent-laws/9734988>.

2A(2)(a) of the *Criminal Code Act 1924* (Tas) and s 36(2)(l) of the *Crimes Act 1958* (Vic), which provide that a person does not consent to an act if s/he does not say or do anything to communicate[11]/indicate[12] consent. It has been claimed that, as well as being 'tough',[13] such a provision would be in keeping with, and would promote, the 'communicative model'[14] of consent that seemingly already underlies s 61HA.[15] After anxiously considering the matter, I have come to the view that a reform of this nature is undesirable. Contrary perhaps to what has been suggested in some media reports, the result in the *Lazarus* case would have been no different had a provision such as s 2A(2)(a) or s 36(2)(l) been in force in NSW at the time of the relevant events. More fundamentally, such a provision: would probably lead to even greater emphasis being placed on the conduct of sexual assault complainants than is currently the case; would be apt to distract juries from their essential tasks in some sexual assault trials; and would be unlikely to result in any increase in conviction rates for sexual assault offences.

4. I also do not accept that there is a need for s 61HA to be simplified. One view might be that the mental element for sexual assault should be brought into line with that in the United Kingdom (UK)[16] and Victoria.[17] This could be achieved by amending s 61HA(3)(c) to provide that a person will have the requisite mens rea for the ss 61I, 61J and 61JA offences if s/he 'does not reasonably believe that the other person consents to the intercourse.' But, in my opinion, this would not make the law simpler. In fact, these different statutory words might not have the effect of altering the law at all. I set out my reasons below.
5. I do submit, however, that the NSW Parliament should *clarify* one matter. Section 61HA(3) provides that a person will have the requisite mens rea for the s 61I, 61J and 61JA offences if he or she: (i) knew that the complainant was not consenting; (ii) was reckless as to whether the complainant was consenting; or (iii) had no reasonable grounds for believing that the complainant was consenting. Section 61HA(3)(d) of the *Crimes Act* provides that, for the purpose of finding whether the accused did have any of these mental states, the trier of fact must have regard 'to all the circumstances of the case', including any 'steps' taken by the accused to ascertain whether consent was granted. In *R v Lazarus*,[18] Bellew J (with whom Hoeben CJ at CL and Davies J agreed) held that a 'step' need not be a physical act. For his Honour, a 'step' might

[11] The Tasmanian provision uses this language.
[12] The Victorian provision uses this language.
[13] See Michaela Whitbourn, ''Enthusiastic yes': NSW announces review of sexual consent laws', *Sydney Morning Herald* (online), 8 May 2018 <https://www.smh.com.au/national/nsw/enthusiastic-yes-nsw-announces-review-of-sexual-consent-laws-20180508-p4zdyn.html>.
[14] See 'Consent law needs a careful review', *Sydney Morning Herald* (online), 22 May 2018 < https://www.smh.com.au/national/nsw-sexual-consent-laws-require-careful-review-20180521-p4zgjt.html >.
[15] See James Monaghan and Gail Mason, 'Communicative consent in New South Wales: Considering *Lazarus v R*' (2018) *Alternative Law Journal* (forthcoming); James Monaghan and Gail Mason, 'Reasonable reform: Understanding the knowledge of consent provision in section 61HA(3)(c) of the *Crimes Act 1900* (NSW)' (2016) 40 *Criminal Law Journal* 246, 249.
[16] See *Sexual Offences Act 2003* (UK) s 1(1)(c).
[17] See *Crimes Act 1958* (Vic) s 38(1)(c).
[18] [2017] NSWCCA 279, [147] (*'Lazarus CCA II'*).

merely be the formation of a positive belief that consent has been granted.[19] With great respect, this interpretation does not appear to take sufficient account of the purpose of s 61HA, which, as suggested above, is to encourage communication about consent. In my submission, for the reasons set out more fully below, it should be reversed. Such reversal could be achieved simply by inserting the words 'physical or verbal' before the word 'steps' in s 61HA(3)(d).

Consent

6. On 22 May 2018, the following appeared in the *Sydney Morning Herald*'s editorial:[20]

> The law about sexual consent differs between the states and territories. Laws in Tasmania and Victoria, touted as the toughest in the country, embody an active or communicative model, where a person does not consent if they [sic] do not "say or do anything to communicate consent". There has been debate about whether the result in the Lazarus case would have been different if NSW law adopted the same language.

7. With respect, there is no room for debate about this matter. If there had been a provision in the *Crimes Act 1900* (NSW) of the type to which this editorial writer refers, the result in the second *Lazarus* trial would have been exactly the same as the one actually reached. Provisions such as s 2A(2)(a) of the *Criminal Code Act 1924* (Tas) and s 36(2)(l) of the *Crimes Act 1958* (Vic) are intended to assist the Crown to prove that a complainant in a sexual assault case was not consenting to the sexual intercourse that allegedly occurred. But in *R v Lazarus*,[21] the trier of fact, Tupman DCJ, needed no such assistance. Her Honour accepted that the Crown had proved that the complainant did not consent to the sexual intercourse that took place.[22] The reason why the prosecution failed in that case was that Tupman DCJ thought it reasonably possible that Mr Lazarus had reasonable grounds for believing that Ms Mullins consented to the sexual intercourse.[23] The above-mentioned Tasmanian and Victorian provisions have no bearing on the mental element for sexual assault. Accordingly, a provision of this nature could not have assisted the Crown in *R v Lazarus* to prove that which it did not prove at the trial that in fact took place.
8. This of course does not establish that provisions such as ss 2A(2)(a) and 36(2)(l) lack any utility. But the fact remains: neither would have changed the result in the trial that provoked claims that such a provision should be inserted into the *Crimes Act*. Surely, this should put us on notice that a provision of this nature, if introduced in NSW, might not carry the benefits for complainants that its supporters have claimed it will produce.
9. In fact, it would appear that at most sexual assault trials, a provision like s 2A(2)(a) or s 36(2)(l) would have no operation. The English case of *R v Farid Taran*[24] exemplifies the point. As Hughes LJ (as his Lordship then was) put the matter, at trial,

[19] Ibid.
[20] 'Consent law', above n 14.
[21] *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ).
[22] Ibid.
[23] Ibid.
[24] [2006] EWCA Crim 1498 ('*Taran*').

'the complainant's evidence was that she was struggling to get out of the car and making her lack of consent abundantly plain.'[25] The appellant's case, on the other hand, was that the complainant 'was throwing herself at him.'[26] In such a case, if the jury were to accept the complainant's version of events, there would be no occasion for it to find consent to be absent because s/he 'did not say or do anything to communicate consent': it would instead find that s/he did not consent, because s/he said and did a number of things to communicate her/his unwillingness to participate in sexual activity. If, however, the jury thought it reasonably possible that the accused was telling the truth, the provision would similarly have no role to play. In such a case, its finding that the complainant might have consented would be based on its finding that s/he might have (a) engaged in conduct and/or (b) made utterances that clearly conveyed to the accused that s/he was consenting.

10. The same applies to cases where the Crown's case at trial is that the complainant made it obvious that s/he was not consenting, but the defence denies that the sexual intercourse took place[27] or claims that the accused desisted from sexual intercourse as soon as the complainant withdrew her/his consent.[28] In such cases, if the trier of fact were to accept that the complainant was not consenting, it would do so on the positive basis that s/he said and did things that made it plain that s/he was unwilling to have intercourse. It would not do so on the negative basis that s/he 'did not say or do anything to communicate consent.'
11. Cases of the types just discussed appear to be common.[29] But what about seemingly less common cases, such as *Lazarus*,[30] where, on one view of the facts, the complainant has neither clearly stated that s/he is not consenting, nor engaged in any other conduct that clearly conveys to the accused her/his lack of consent? In such cases, the provision under discussion *would* come into play. But, in my submission, it would lead to an undue focus on the complainant's conduct immediately before and during the intercourse. It would also tend to distract the jury from the real inquiry, namely, whether the complainant was or was not consenting.
12. These points can be demonstrated by considering the facts of *Lazarus*. In that case, the accused did not allege that the complainant actually stated that she was consenting. Nor did he allege that she made any gestures or performed any other conduct that made it 'abundantly plain'[31] that she wished to engage in sexual activity

[25] Ibid [14].
[26] Ibid.
[27] See, for example, *Hemsley v R* (1988) 36 A Crim R 334, 335 (relating to the first complaint) ('*Hemsley*').
[28] See, for example, *Banditt v R* (2004) 151 A Crim R 215, 222 [49]-[50] ('*Banditt*').
[29] In many of the leading cases in this area, the Crown claimed at trial that the complainant made clear her/his non-consent (by, for example, saying 'stop' or 'no', physically resisting the accused's advances and/or crying), while the defence case was that the complainant indicated unequivocally to the accused that s/he was consenting to the intercourse. See, for example, *R v Kitchener* (1993) 29 NSWLR 696, 698-9 ('*Kitchener*'); *R v Tolmie* (1995) 37 NSWLR 660, 661-2 ('*Tolmie*'); *Hemsley* (1988) 36 A Crim R 334, 335 (relating to the second complaint); *Papakosmas v The Queen* (1999) 196 CLR 297, 300 [4]. In other cases, the defence at trial has denied that the sexual intercourse took place, while the Crown has claimed that it did, and that the complainant left the accused in no doubt that that intercourse was non-consensual. See, for example, *Hemsley* (1988) 36 A Crim R 334, 335 (relating to the first complaint).
[30] See also *Tabbah v R* [2017] NSWCCA 55, [110], [118] ('*Tabbah*').
[31] *Taran* [2006] EWCA Crim 1498, [14].

with him. But he did give evidence that, just before the intercourse occurred, the complainant engaged in the following conduct: (a) at the accused's request, she turned away from him and put her hands on a wall;[32] (b) at the same time, she bent over and pointed her buttocks towards the accused;[33] (c) when the accused pulled her stockings and underpants down, the complainant failed to pull them up again;[34] (d) the complainant pushed her buttocks back towards him (he thought, to help him to penetrate her vagina);[35] (e) when the accused was unable to effect penetration of the complainant's vagina – and, again, at the accused's request – the complainant got onto her hands and knees and arched her back;[36] and (f) at this stage, she again pushed her buttocks back towards him (again, he thought, to facilitate penetration). The accused also gave evidence that, as he began having anal intercourse with the complainant, (g) she moved backwards and forwards.[37] According to the accused, he believed that the complainant was doing this to facilitate his penetration of her anus.[38]

13. If a provision such as s 2A(2)(a) or s 36(2)(l) had been in force in NSW at the time of these events, it would have been necessary for the trial judge to consider whether the complainant performed acts (a), (b), (d), (e), (f) and/or (g) *to* communicate/indicate consent (the conduct in (c) would properly be characterised not as 'do[ing] anything', but rather as an omission, thus making it unnecessary for the trier of fact to consider whether it was 'do[ne]' with a view to indicating to the accused that consent had been granted). In my opinion, this would not have benefitted Ms Mullins; nor would it benefit complainants in cases that are factually similar to *Lazarus*.
14. First, as can be seen from *Lazarus*, there is already in such cases a great deal of focus on such complainants' conduct immediately before and during the sexual intercourse. In that case, for example, the trial judge placed significant emphasis on what the complainant did and did not say and do, when her Honour determined whether (leaving the onus of proof to one side): (a) Mr Lazarus believed that Ms Mullins was consenting; and (b) he had reasonable grounds for any such belief.[39] It is true that there is now greater focus than there once was on what *the accused* did and said at the time of the relevant conduct. As noted above, s 61HA(3)(d) of the *Crimes Act* obliges triers of fact to consider any steps that the accused took to ascertain whether consent had been granted, when it determines whether s/he had the mens rea for sexual assault. But the notion that it is for complainants to make it clear that they are not consenting, and that accused persons bear less than full responsibility for establishing whether the person with whom they are having intercourse is a willing participant in such activity, seems to have survived. It is necessary to do what is possible to avoid

[32] *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ); *Lazarus CCA II* [2017] NSWCCA 279, [43].
[33] *Lazarus CCA II* [2017] NSWCCA 279, [43].
[34] *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ); *Lazarus CCA II* [2017] NSWCCA 279, [44].
[35] *Lazarus CCA II* [2017] NSWCCA 279, [45].
[36] *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ); *Lazarus CCA II* [2017] NSWCCA 279, [46].
[37] *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ).
[38] Ibid.
[39] Ibid.

perpetuating such ideas. Provisions such as s 2A(2)(a) and s 36(2)(l) require juries to focus minutely on the complainant's conduct, with a view to determining whether s/he performed that conduct for the purpose of indicating/communicating her/his consent. They are inconsistent with any movement towards placing greater emphasis on the accused's conduct and on his or her obligation to ensure that his or her sexual partner is a consenting party.

15. Secondly, in cases similar to *Lazarus*, the inquiry mandated by such provisions would be distracting – or, at best, pointless. To return to the facts of *Lazarus*, the trier of fact would be required to consider whether, for example, the complainant pushed her buttocks back towards the accused for the purpose of communicating her consent. But how would one know whether she performed this conduct for this purpose? It is submitted that, in determining what the complainant's purpose was, the trier of fact would have to consider the very same evidence that juries already consider when deciding whether the Crown has proved that the complainant was not consenting. In *Lazarus*, as in many other cases,[40] powerful indications that the complainant did not consent were that: (a) she displayed outward signs of distress immediately after the intercourse;[41] and (b) she almost immediately complained, to a number of people, of having had non-consensual intercourse.[42] If a provision such as s 2A(2)(a) or s 36(2)(l) had been in force at the time of the relevant events, this *same* evidence would have led the judge to conclude that the complainant did not do what she did *to* indicate/communicate her consent. In short, in such a case, such a provision would add nothing. All it might do is distract triers of fact from the real inquiry, which of course is whether the complainant freely and voluntarily agreed to the sexual intercourse.[43]
16. It must be conceded that there might be one type of case where a provision such as s 2A(2)(a) or s 36(2)(l) would have some utility. In the cases that I am thinking of, which appear to be rare, the complainant has apparently *done nothing whatsoever* immediately before or during the sexual intercourse. *R v XHR*[44] is a possible example. In that case, the evidence was that, during a commercial massage, the respondent, a massage therapist, had digitally penetrated the complainant's genitalia. At no stage while this was happening did the complainant indicate that she was not consenting to this;[45] indeed, it might be that she neither said nor did *anything* at, or immediately before, this time. Another possible example is *Morgan v R*.[46] In that case, the appellant had performed fellatio on the complainant when the complainant was 12 or 13 years old. As in *XHR*, the complainant neither told the appellant to stop nor pulled

[40] See, for example, *Day v R* [2017] NSWCCA 192, [89]-[90].
[41] *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ).
[42] Ibid.
[43] *Crimes Act 1900* (NSW) s 61HA(2).
[44] [2012] NSWCCA 247 ('*XHR*').
[45] Ibid [29], [32].
[46] [2017] NSWCCA 269 ('*Morgan*').

away.[47] In fact, again, it seems possible that he said nothing and did nothing at the relevant time.[48]

17. If I am right to characterise these cases as I have, a provision such as s 2A(2)(a) or s 36(2)(l) could be used to establish that such complainants were not consenting. Because they did nothing and said nothing, they logically neither said nor did anything *to communicate/indicate consent*. But even without the assistance of such a provision, it seems that, in cases such as this, the Crown would have little difficulty in proving that the complainant did not consent. In both *XHR* and *Morgan*, the relationship between the parties created a powerful inference that consent had not been granted. Women are not usually willing, without any prior notice, to be sexually penetrated by a man who is providing them with a therapeutic massage.[49] Altar boys are not usually willing to have oral sex performed on them by acolytes of the church that they attend,[50] who are many years older than they[51] and have supplied them with alcohol shortly before the relevant conduct.[52]
18. Juries can already be told that the complainant's lack of physical resistance to sexual intercourse does not necessarily mean that s/he was consenting.[53] As a matter of commonsense, too, they can reason that the person who neither does nor says anything during intercourse, and then complains afterwards that s/he has been sexually assaulted, could not have been consenting. In short, it might be that a provision such as s 2A(2)(a) and s 36(2)(l) would make the Crown's task slightly easier in the type of case that is under discussion. But for the reasons given in this paragraph, and in the paragraph immediately above, such provisions would seemingly give the Crown another way of proving that which it can already readily prove in such cases. In my submission, there is no reason to provide the Crown with this extra weapon. Indeed, the negative consequences that might ensue in cases such as *Lazarus* (see paragraphs 14 and 15) make it undesirable that a provision such as s 2A(2)(a) or s 36(2)(l) be inserted into the NSW *Crimes Act.*

Knowledge of non-consent: s 61HA(3)(d)

19. As noted above, in the weeks following the NSW government's decision to initiate the present review, the media has primarily been concerned with the Tasmanian and Victorian provisions just discussed. It has been suggested that the adoption of such a provision in NSW would cause NSW law to 'embody an active or communicative model'[54] of consent. In other words, it has been implied that a provision of this nature

[47] Ibid [20]
[48] See Ibid [11].
[49] See *XHR* [2012] NSWCCA 247, [3].
[50] See *Morgan* [2017] NSWCCA 269, [7], [45].
[51] Ibid [43].
[52] Ibid [10], [49].
[53] *Crimes Act 1900* (NSW) s 61HA(7).
[54] 'Consent law', above n 14.

would make it obligatory – or, in some cases at least, highly desirable and wise[55] – for a person to say ''Do you want to have sex with me?' 'Do you want to be doing what we're doing?''[56], before engaging in sexual intercourse. For Minister Goward:[57]

> You must explicitly ask for permission to have sex. If it's not an enthusiastic yes, then it's a no. I feel that this is where the law in NSW needs to go. This is certainly the case in Tasmania and I'm hopeful that the Law Reform Commission will come to a similar conclusion.

20. In truth, the effect of provisions such as s 2A(2)(a) and s 36(2)(l) is not that a person is guilty of sexual assault if s/he has non-consensual intercourse with another person after failing to enquire whether that person is consenting to the intercourse.[58] Such a person's guilt would hinge on whether the Crown could prove that s/he had no reasonable grounds for believing that the other person was consenting. Rather, the way to achieve what Minister Goward apparently wishes to achieve would be to repeal s 61HA(3)(d) and replace it with a provision that states that 'a person will know that the other person does not consent to the sexual intercourse unless he or she asked that person for permission to engage in the sexual intercourse.' That is, under current s 61HA(3)(d), the fact that a person has not asked for permission is *relevant* to whether s/he has the mens rea for sexual assault. It is not determinative of that question. Under the hypothetical provision just noted, however, a failure to ask for permission *would* be determinative.
21. There are many reasons why such a provision is undesirable. Two of those are as follows.
22. First, it would be apt to produce injustice. As Gleeson CJ observed in *Tame v New South Wales*,[59] the problem with rules that mandate a particular outcome once

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[55] I say this because, under a fully communicative model of consent, the person who did not request permission to engage in sexual activity would not be guilty of sexual assault if his/her sexual partner in fact did consent to the sexual intercourse.

[56] To use the words of Ms Saxon Mullins: see Stephanie Bedo, 'Controversial case that sparked a national debate on sexual consent could lead to a legislative review' *News* (online) 8 May 2018 < https://www.news.com.au/lifestyle/real-life/news-life/controversial-case-that-sparked-a-national-debate-on-sexual-consent-could-lead-to-a-legislative-review/news-story/fa6ccf813fc22c4ad0c761b11a41aaed>.

[57] Whitbourn, above n 13; Jessica Rapana, 'The Way We Have Sex Could Be About To Change' *Whimn* (online) <https://www.whimn.com.au/talk/news/the-way-we-have-sex-could-be-about-to-change/news-story/429f339852c55cfbefe0b90af223f64b>.

[58] Nor does this appear to be the effect of s 14A(1)(c) of the Tasmanian *Criminal Code*, a provision to which Minister Goward might also have been referring in the above quotation. Section 14A(1)(c) provides that 'a mistaken belief as to the existence of consent is not honest or reasonable if the accused … 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.' While I have been unable to find any case law concerning the meaning of s 14A(1)(c) (though see *SG v Tasmania* [2017] TASCCA 12, [7]-[8], [11] ('*SG*')), it would seem that, in a particular case, a person could take '*reasonable* steps, *in the circumstances known to him or her*' [emphasis added] to ascertain whether consent had been granted, without explicitly asking for permission to have intercourse. I do not support the introduction in NSW of a provision along the lines of s 14A(1)(c). This is because it requires juries to answer a question of some complexity before they can reach the ultimate inquiry – which in Tasmania is whether it was reasonably possible that the accused had an 'honest and reasonable, but mistaken, belief that the complainant consented': *SG* at [7]; see also *Criminal Code Act 1924* (Tas) s 14. Such a provision therefore would not simplify the law. And while it is possible that it would produce no different results from the 'physical or verbal steps' provision that I do support (see paragraph 28), it is also possible that it would operate more harshly than such a provision. This is a further reason why I do not support it.

[59] (2002) 211 CLR 317, 337 [35].

particular facts are found to exist, is that 'sooner or later a case is bound to arise that will expose the dangers of inflexibility.' For example, the person of low intelligence who fails to ask permission to have intercourse, might, despite this failure, have reasonable grounds for his or her mistaken belief that consent has been granted.[60] So might a person with Asperger's Syndrome who fails to ask the same question. And so might a person who continues with intercourse despite his/her partner's withdrawal of consent, in circumstances where the partner neither says nor does anything to put the accused on notice that s/he might no longer be a willing participant. But such people would be convicted of sexual assault if there existed a rule of the type apparently supported by Minister Goward.

23. Secondly, a rule of this nature would effectively convert sexual assault into an absolute liability offence. By providing that a person cannot be guilty of sexual assault unless s/he has one of the mental states in s 61HA(3), the NSW Parliament has acknowledged that, in some cases at least, a person should avoid conviction even though s/he has had non-consensual intercourse with another person.[61] If a provision of the type under discussion were introduced, however, this would never be the case. The person asking for permission would either be told 'yes' or 'no.' If s/he were told 'yes', any resulting intercourse would be consensual. If s/he were told 'no', any resulting intercourse would be non-consensual and would amount to sexual assault. The person who failed to ask for permission would, by virtue of this failure, also be guilty of sexual assault if the resulting intercourse were non-consensual. Of course, some people would support a law that criminalised all non-consensual sexual intercourse. But it would amount to a movement back to the 'primitive response of punishment for the actus reus alone.'[62]
24. Even though it would be an error for the NSW government again[63] to create a mandatory criminal law rule in response to public and media excitement over a particular incident, it must be acknowledged that it is highly desirable that people communicate about consent with prospective sexual partners. The apparent purpose of s 61HA(3)(d) of the *Crimes Act 1900* (NSW) is to encourage such communication. As foreshadowed above, however, in *R v Lazarus*,[64] Bellew J found that a person can take a 'step' to ascertain whether another person is consenting, within the meaning of s 61HA(3)(d), without asking the other person whether s/he is consenting to the intercourse, or performing any positive physical act with a view to determining whether that person is a willing participant.[65] His Honour said:[66]

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[60] See *R v Mrzljak* [2005] 1 Qd R 308 ('*Mrzljak*'), where, as well as having an IQ of 56 (see 325 [71]), the appellant was unable to speak English (see 323 [62]).
[61] As Duff has noted, however, '[t]here can be few cases in which, while the *actus reus* of rape is proved, the defendant can plausibly maintain that he did not even realise that the woman *might* be non-consenting': R.A. Duff, 'Recklessness and Rape' (1981) 3(2) *Liverpool Law Review* 49, 56. And there are even fewer cases where the accused can plausibly claim that, also, s/he had reasonable grounds for his/her mistaken belief: see 62.
[62] *O'Connor v The Queen* (1980) 146 CLR 64, 96 (Stephen J) quoting *R v Leary* [1977] 74 DLR (3d), 122 (Dickson J).
[63] See *Crimes Act NSW 1900* (NSW) ss 19B and 25B(1).
[64] [2017] NSWCCA 279.
[65] I thank Professor Gail Mason for bringing this point to my attention.
[66] Ibid [146]-[147].

> The word "steps" is not defined in the Act but in my view there is no warrant to ascribe to it anything other than its natural and ordinary meaning. That meaning connotes doing something positive. The Collins English Dictionary defines the term "take steps" as meaning:
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> > … to undertake measures to do something with a view to the attainment of some end …
>
> It follows that in my view, a "step" for the purposes of s. 61HA(3)(d) must involve the taking of some positive act. However, for that purpose a positive act does not have to be a physical one. A positive act, and thus a "step" for the purposes of the section, extends to include a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.

25. It is true that the natural and ordinary meaning of 'a step' is 'a measure.'[67] It is also probably true that the person who views another person's actions and positively concludes that that person is consenting to sexual intercourse, has taken a 'step' or 'measure' to ascertain whether that person is consenting. But, with great respect, there are reasons to doubt whether the words 'steps' in s 61HA(3)(d) should have been given the meaning that Bellew J ascribed to it.
26. The High Court has recognised that, while:[68]

> [t]he starting point for the ascertainment of the meaning of a statutory provision is the text of the statute … regard is had to its context and purpose. Context should be regarded at the first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

Accordingly, s 33 of the *Interpretation Act 1987* (NSW) requires a construction that would promote the purpose or object underlying a statutory rule to be preferred to one that would not promote that purpose or object. In my submission, contextual considerations indicate that the word 'steps' in s 61HA(3)(d) was not intended to bear its ordinary and natural meaning. And, as suggested above, nor is such a meaning consistent with the statutory purpose.

27. For as long as the person who forms a positive belief that the other person is consenting, has, by so doing, taken a 'step' within the meaning of s 61HA(3)(d) (see paragraph 25), the following result will be produced. The trier of fact will be obliged to take into account the accused's formation of any such belief, when determining whether or not s/he had any reasonable grounds *for the same belief*. It is hard to believe that it was the legislature's intention that, when determining whether the accused had reasonable grounds for his/her belief in consent, the trier of fact should

[67] Oxford English Dictionary (online) < https://en.oxforddictionaries.com/definition/step>.
[68] *STZAL v Minister for Immigration* (2017) 91 ALJR 936, 940-1 [14] (Kiefel CJ, Nettle and Gordon JJ); see also 944-5 [35]-[39] (Gageler J).

take into account the fact that the belief was actually held. Moreover, such a construction does not further the legislative purpose. In his Second Reading Speech, the Minister noted that the reforms that introduced s 61HA(3) into the *Crimes Act* were aimed at 'ensur[ing] … that a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour.'[69] (It is well-established that statements in Second Reading Speeches 'will be of use on matters such as the purpose'[70] of the relevant enactment.[71]) The meaning that Bellew J gave to the word 'steps' does not promote the aim of encouraging individuals to take reasonable care to ascertain whether other people are consenting to intercourse. It instead creates a situation where juries can be told that they may have regard to the accused's taking the 'step' of forming a positive belief that the complainant was consenting, when they determine whether it is reasonably possible that the accused had any reasonable grounds for any such belief.

28. As noted above, in my opinion, it is desirable that the NSW legislature amends s 61HA(3)(d) to reverse the NSWCCA's decision in *Lazarus* concerning the meaning of that provision. As also noted above, one way of doing this would be to insert into s 61HA(3)(d) the words that I have placed in bold below:

> 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 **physical or verbal** steps taken by the person to ascertain whether the other person consents to the sexual intercourse …

Under such a reform, it would be essential[72] for the trier of fact to consider whether the accused had asked the complainant whether s/he was consenting, or taken any other active measures to ascertain whether s/he was doing so, when determining whether the accused had reasonable grounds for any belief that consent had been granted. This would encourage communication about consent, and place some onus on those who initiate sexual activity to ensure that prospective sexual partners 'want to be [t]here.'[73] It would also prevent judges from suggesting to juries that an accused's 'step' of forming a positive belief that consent had been granted, should weigh in his/her favour when those juries assess whether s/he (reasonably possibly) had reasonable grounds.

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[69] NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (Hon John Hatzistergos, Attorney General).
[70] *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [13] (Spigelman CJ).
[71] For some recent examples of the courts taking into account such statements when seeking to divine the legislative purpose, see *Hayward v R* [2018] NSWCCA 104, [11]-[22], [77], [80]; *ZA v R* [2018] NSWCCA 116, [17], [36]; *Graweski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251, [13], [60]; *Harkins v The Queen* (2015) 255 A Crim R 153, 161-2 [30]-[31], 163 [39].
[72] *XHR* [2012] NSWCCA 247, [51], [61]-[65]; *Lazarus* [2017] NSWCCA 279, [142].
[73] Again, to use the words of Ms Saxon Mullins: Rapana, above n 57.

Knowledge of non-consent: s 61HA(3)(c)

29. As noted above (see paragraph 5), s 61HA(3) of the *Crimes Act 1900* (NSW) provides that a person will have the mens rea for the sexual assault offences created by ss 61I, 61J and 61JA if s/he: (i) knows that the complainant is not consenting; (ii) is reckless as to whether the complainant is consenting; or (iii) has no reasonable grounds for believing that the complainant is consenting. Recklessness can be proved in two ways. First, the person who can be proved to have realised that it was possible[74] that the complainant was not consenting, has the mens rea for sexual assault.[75] It is not necessary in such a case also to prove that the accused would have persisted with the sexual intercourse had s/he known that the complainant was not consenting.[76] For, as the High Court has implied, the person who would *not* have persisted still has failed to show 'proper concern'[77] for whether the complainant was consenting.[78] Secondly, the person who can be proved not even to have considered whether the complainant was consenting, will have the requisite mens rea, if the risk that the complainant was not consenting would have been obvious to a person of the accused's mental capacity had s/he turned his/her mind to it.[79] This form of recklessness involves objective fault.[80] The accused has not actually turned his/her mind to whether the guilty circumstance exists;[81] s/he has therefore caused harm unintentionally. Nevertheless, for the reasons advanced by Kirby P (as he then was) in *R v Kitchener*,[82] there can be no doubt that the person who fails even to consider whether his/her sexual partner is consenting, is sufficiently blameworthy to be convicted of sexual assault. Indeed, as his Honour suggested in *R v Tolmie*,[83] this mental state is perhaps even more culpable than that of the person who exhibits advertent recklessness. While the latter has shown 'some attention to the rights of others,'[84] the offender who is inadvertently reckless has displayed an extreme insensitivity to such rights.
30. The mental state for which s 61HA(3)(c) provides, likewise involves objective fault.[85] It is true that this mental state requires the trier of fact to ascertain whether it is

[74] The possibility must seemingly be more than a bare or fanciful one: *Banditt NSWCCA* (2004) 151 A Crim R 215, 232 [92].
[75] *Banditt v The Queen* (2005) 224 CLR 262, 276 [39] (Gummow, Hayne and Heydon JJ) ('*Banditt HCA*'); *Hemsley* (1988) 36 A Crim R 334, 336-8.
[76] *Banditt HCA* (2005) 224 CLR 262, 276 [39] (Gummow, Hayne and Heydon JJ).
[77] To use Duff's language: above n 61, 62. That commentator discusses at 55-6 the position of the advertently reckless offender, who would not persist if s/he knew that consent was absent.
[78] *Banditt HCA* (2005) 224 CLR 262, 269-70[16], 276 [38] (Gummow, Hayne and Heydon JJ).
[79] *Tolmie* (1995) 37 NSWLR 660, 672 (Kirby P); *Banditt NSWCCA* (2004) 151 A Crim R 215, 228-9 [78]; *Tabbah* [2017] NSWCCA 55, [139]. See also *Kitchener* (1993) 29 NSWLR 696, 697 (Kirby P), 701-3 (Carruthers J); *Banditt HCA* (2005) 224 CLR 262, 268-9 [14] (Gummow, Hayne and Heydon JJ); *R v Henning* (Unreported, NSW Court of Criminal Appeal, 11 May 1990).
[80] *Castle v R* (2016) 92 NSWLR 17, 29 [39] (Bathurst CJ), 33 [63] (Hall J); cf. 41-2 [114]-[118] (RA Hulme J).
[81] See, for example, *Macpherson v Brown* (1975) 12 SASR 184, 188 (Bray CJ).
[82] (1993) 29 NSWLR 696, 697.
[83] (1995) 37 NSWLR 660, 671.
[84] Ibid.
[85] As recognised in *Tabbah* [2017] NSWCCA 55, [139]; *Lazarus v R* [2016] NSWCCA 52, [156] ('*Lazarus CCA I*'). See also Ian Dobinson and Lesley Townsley, 'Sexual assault law reform in New South Wales: Issues of consent and objective fault' (2008) 32 *Criminal Law Journal* 152, 166.

reasonably possible that the accused *subjectively* believed that the complainant was consenting. But that is not subjective *fault*: it is a subjective belief in a circumstance that, if it had existed, would have rendered the accused's act *innocent*. As with the inadvertently reckless offender, the person who has no reasonable grounds for his/her belief in consent, causes harm unintentionally.[86]

31. Accordingly, some commentators have expressed doubt about whether such an offender displays sufficient culpability justifiably to be labelled a rapist and convicted of sexual assault.[87] They concede that s/he is blameworthy enough to be held criminally liable.[88] But they argue that a separate, lesser, offence should be created to deal with such offending.[89] It can be observed that, unlike the offender who is inadvertently reckless, such an offender has at least gone to the trouble of considering whether the complainant is consenting. And, unlike the advertently reckless offender, s/he has formed a positive belief that the person is doing so.
32. In my view, the issues here are reasonably finely balanced. It is true that 'culpability is a function of more than whether a defendant's knowledge is actual, reckless, or constructive in the s 61HA(3)(c) manner.'[90] This is what led the NSW Court of Criminal Appeal in *R v Mills*[91] to hold that a person convicted of murder on the basis of the constructive murder rule will not necessarily receive a lesser sentence than a murderer who intended to kill or inflict grievous bodily harm, or was recklessly indifferent to human life. But it is also true that, as von Hirsch notes, an offender's mental state is highly relevant when assessing how blameworthy his/her conduct was.[92] If the act was done with 'knowledge of its consequences', then, all things being equal, that will make it a more culpable act than if it is merely done in 'negligent disregard' of those consequences.[93] This is what led the Victorian Court of Appeal in *Director of Public Prosecutions v Perry*[94] to make it clear that, in a 'constructive murder' case, the absence of intent is nevertheless 'relevant to sentence.'[95] Moreover, the NSW Parliament and courts have chosen to grade some other major personal violence offences on the basis of the fault exhibited by the offender. Leaving the

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[86] See *He Kaw Teh v The Queen* (1985) 157 CLR 523, 566 (Brennan J) quoting *Sherras v De Rutzen* (1985) 1 QB 918, 921 (R.S. Wright J).
[87] See, for example, Dobinson and Townsley, above n 85, 166; Simon H. Bronitt, 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289, 306. For different views, however, see, for example, Monaghan and Mason, 'Reasonable reform', above n 15, 248, 257-261; Celia Wells 'Swatting the Subjectivist Bug' [1982] *Criminal Law Review* 209, 212-4; Duff, above n 61, 56-61; James Faulkner, 'Mens rea in Rape: *Morgan* and the Inadequacy of Subjectivism or Why No Should Not Mean Yes In The Eyes Of The Law' (1991) 18 *Melbourne University Law Review* 60, 69-82.
[88] As s/he clearly is: see, for example, H.L.A. Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008).
[89] See, for example, Dobinson and Townsley, above n 85, 166.
[90] Monaghan and Mason, 'Reasonable reform', above n 15, 258.
[91] (Unreported, NSW Court of Criminal Appeal, 3 April 1995).
[92] Andrew von Hirsch, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' (1983) 74(1) *The Journal of Criminal Law and Criminology* 209, 214; see also Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester, 1986), 64-65.
[93] von Hirsch, 'Commensurability', above n 92, 214.
[94] (2016) 50 VR 686.
[95] Ibid 702 [60]. See also 708 [81] and 712 [94].

constructive murder rule to one side,[96] murder is differentiated from involuntary manslaughter in this way.[97] So too, there are separate *Crimes Act* offences of intentionally inflicting grievous bodily harm,[98] recklessly doing so,[99] and negligently causing such injury.[100] And wounding with intent to cause grievous bodily harm[101] is a more serious matter than reckless wounding.[102]

33. On the other hand, it is not compulsory for the legislature to grade offences in this way.[103] Further, if a lesser offence existed, juries might well convict some 'deliberate rapists' of that offence.[104] And it is probably the case that all of those caught by s 61HA(3)(c) can fairly be described as rapists. Certainly, there is no abuse of language involved in applying this epithet to the defendant Cogan in the well-known English case of *R v Cogan and Leak*.[105] The accused who believes that he has the consent of a person who twice says 'no', sobs throughout intercourse and tries to turn away from him,[106] is surely no less callous than the knowing or reckless rapist.[107] Moreover, it is difficult to see why such an accused's distorted views about female sexuality[108] should result in his criminal liability being downgraded.[109]
34. It is of course unthinkable in the current political environment that an alternative, lesser, offence will be created. But, in any event, as just foreshadowed, it is also probably undesirable. Under the current law, a jury will be told that it must only convict an accused on the basis of the s 61HA(3)(c) mental state if the Crown has proved beyond reasonable doubt that that accused had no reasonable grounds for

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[96] This rule has been criticised – and defended: see, for example, David Lanham, 'Felony Murder — Ancient and Modern' (1983) 7(2) *Criminal Law Journal* 90 (critic); Prue Bindon, 'The Case for Felony Murder' (2006) 9 *Flinders Journal of Law Reform* 149; David Crump, 'Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend Upon the Particular Rule at Issue?' (2009) 32 *Harvard Journal of Law and Public Policy* 1155 (defenders). I have recently criticised the rule: Andrew Dyer, 'The 'Australian Position' Concerning Criminal Complicity' (2018) 40 *Sydney Law Review* 291, 306-310 (forthcoming).

[97] See, for example, *Lane v The Queen* (2013) 241 A Crim R 321, [55], [59].

[98] *Crimes Act 1900* (NSW) s 33(1).

[99] *Crimes Act 1900* (NSW) s 35(2).

[100] *Crimes Act 1900* (NSW) s 54. The negligence required is gross, or criminal, negligence: *R v D* (1984) 3 NSWLR 29.

[101] *Crimes Act 1900* (NSW) s 33(1).

[102] *Crimes Act 1900* (NSW) 35(4).

[103] Indeed, the sexual assault, indecent assault and act of indecency offences in the *Crimes Act* are graded on a different basis: see *Crimes Act 1900* (NSW) s 61I, 61J, 61JA (sexual assault); ss 61L and 61M (indecent assault); and ss 61N and 61O (act of indecency). See also s 35(1) *Crimes Act 1900* (NSW) (reckless grievous bodily harm in company) and s 35(3) *Crimes Act 1900* (NSW) (reckless wounding in company).

[104] Wells, above n 87, 213.

[105] [1976] QB 217.

[106] Ibid 221-2.

[107] As argued by Duff, above n 61, 60.

[108] Mr Cogan proceeded with intercourse on the basis of 'what he had heard about … [the complainant]' from her husband, his co-accused: Ibid 222. See also *Director of Public Prosecutions v Morgan* [1976] AC 182, 206-7.

[109] Certainly, with respect, such conduct seems to warrant a maximum penalty of greater than 5 years' imprisonment: cf. earlier recommendations made by Stephen Odgers SC, recorded at Criminal Law Review Division of the Attorney General's Department, 'The Law of Consent and Sexual Assault: Discussion Paper' (May 2007), 32; Criminal Justice Sexual Offences Taskforce, 'Responding to sexual assault: the way forward' (December 2005), 45, 50. That is, it is hard to view this conduct as merely being of equivalent seriousness to indecent assault (see *Crimes Act 1900* (NSW), s 61L) or assault occasioning actual bodily harm (see *Crimes Act 1900* (NSW) s 59(1)).

his/her belief that consent has been granted. Consistently with Fullerton J's analysis in *Lazarus v R*,[110] this test is likely only to catch those offenders who exhibit a sufficient degree of culpability to warrant being convicted of sexual assault. As her Honour noted, once the jury decides that it is reasonably possible that the accused mistakenly believed that consent had been granted, it does not then consider whether a reasonable person might have held such a belief.[111] Rather, it will convict the accused only if it is satisfied that the Crown has proved that *s/he* had no reasonable grounds for his/her mistaken belief. As her Honour put it:[112]

> In many such contested cases, perhaps all, there might be a reasonable possibility of the existence of reasonable grounds for believing (mistakenly) that the complainant consented and other reasonable grounds suggesting otherwise. A reasonable person might conclude one way or the other but the statutory test is whether the Crown has proved the *accused* "has no reasonable grounds for believing" that there was consent. [original emphasis]

One suggestion in *Lazarus* was that, if a jury were instructed to consider whether a reasonable person might have made the mistake, it would be apt to: focus on the grave consequences for the complainant of the accused's mistake; ignore the accused's perception of the situation; and thus quickly decide this question adversely to the defence.[113] In the above passage, Fullerton J indicates that such a jury would also be required to apply a rigid test.[114] In a particular case, it might be possible for different people *reasonably* to hold different views about whether consent had been granted.[115] In such a case, if *the* reasonable person would have realised that the complainant was not consenting, the accused would be convicted. But under the current NSW approach, he or she would be acquitted.

35. Furthermore, when assessing whether the accused might have had reasonable grounds, the jury must have regard to 'all the circumstances of the case'[116] (though not the accused's self-induced intoxication,[117] if any). This might well mean that, say, an offender with an 'impaired ability' to read 'subtle social signals',[118] would be able to have this impairment taken into account when a determination was made as to whether s/he had no reasonable grounds for his/her mistaken belief.

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[110] [2016] NSWCCA 52, [156].
[111] Ibid.
[112] Ibid.
[113] Ibid (see text accompanying n 133). See also *R v Wilson* [2009] 1 Qd R 476, [23] (McMurdo P) ('*Wilson*').
[114] However suitable a reasonable person standard is when considering whether a person has incurred civil liability for negligence, a more stringent standard seems to be necessary in criminal proceedings: see *Wilson* [2009] 1 Qd R 476, [41] (Fraser JA).
[115] See Ibid [38]-[39] (Fraser JA); *Julian v R* (1998) 100 A Crim R 430, 448 (Dowsett J); *Rope v R* [2010] QCA 194, [46]-[47] (Chesterman JA).
[116] *Crimes Act 1900* (NSW) s 61HA(3). Concerning the meaning of similar words in *Sexual Offences Act 2003* (UK), see David Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press, 14th ed, 2015) 855-6; AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 2015) 489-490; Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016) 367.
[117] *Crimes Act 1900* (NSW) s 61HA(3)(e). Surely, too, if the accused holds misogynous values, for whatever reason, this cannot help him/her to establish that s/he might have had reasonable grounds: see *Aubertin v Western Australia* (2006) 33 WAR 87, 97 [46] (McLure JA) ('*Aubertin*').
[118] See the English case of *R v B(MA)* [2013] 1 Cr App R 36, [41]. See also *Mrzljak* [2005] 1 Qd R 308; *R v Dunrobin* [2008] QCA 116, [39]-[48] (Muir JA), [81]-91] (Lyons J).

36. The question arises, however, whether s 61HA(3)(c) should be amended so as to make it consistent with English[119] and Victorian[120] law. Under such an amendment, s 61HA(3)(c) would be altered so as to read:

> A person … knows that the other person does not consent to the sexual intercourse if:
>
> …
>
> (c) the person does not reasonably believe that the other person consents to the sexual intercourse.

37. It is very doubtful whether this test is any more stringent than the current s 61HA(3)(c) test. Certainly, any differences between these standards should not be overstated. As under the current NSW test, it would seemingly be the belief of *the accused* that would have to be reasonable. It can be noted in this regard that s 24(1) of the *Criminal Code 1899* (Qld) and s 24 of the *Criminal Code Compilation Act 1913* (WA) are in similar terms to the English and Victorian sections – providing, as they do, that a person will not be guilty of an offence if s/he performs conduct 'under an honest and reasonable, but mistaken, belief' that, if it were true, would render him/her innocent of that charge. Neither[121] has been held to create a 'wholly objective hypothetical ordinary or reasonable person test.'[122] Moreover, the same subjective factors of the accused that are presently relevant to the 'reasonable grounds' question, would continue to be relevant to the 'reasonable belief' question.[123] Consistently with what has been noted at paragraph 35, such an outcome would apparently be mandated by the requirement that the trier of fact have regard to 'all the circumstances of the case',[124] when assessing whether the accused had the requisite mens rea.
38. There are three main reasons why I do not support a reasonable belief test.
39. First, even if this test is slightly more stringent than the current standard – and, for the reasons just given, this seems not to be so – it is difficult to imagine the result of a trial turning on which of these tests fell to be applied. Any difference between having 'no reasonable grounds for a belief' and 'not reasonably belie[ving]' would be subtle – especially given that the 'reasonable belief' standard would not be a decontextualised one, but would require the jury to ask whether it was reasonable for *the particular accused* to have that belief.
40. Secondly, in my opinion, the 'reasonable grounds' standard does not prevent the conviction of anyone who should be convicted of sexual assault. R.A. Duff has addressed the question of when a person with a mistaken belief in consent should be

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[119] *Sexual Offences Act 2003* (UK) s 1(1)(c).
[120] *Crimes Act 1958* (Vic) s 38(1)(c).
[121] *Aubertin* (2006) 33 WAR 87, 89 [1] (Roberts-Smith JA), 96 [42]-[43] (McLure JA), 103 [72] (Buss JA); *Wilson* [2009] 1 Qd R 476, [19]-[20] (McMurdo P), [38]-[41] (Fraser JA), [52] (Douglas J); *Mrzljak* [2005] 1 Qd R 308, 315 [21] (McMurdo P), 321 [53] (Williams JA), 326-7 [79]-[81] (Holmes J).
[122] To use the words of McLure JA in *Aubertin* (2006) 33 WAR 87, 96 [42].
[123] See Victorian Criminal Charge Book (Judicial College of Victoria, Melbourne), 'Bench Notes: Consent and reasonable belief in consent', 7.3.B.1, esp. [83]-[91], concerning which of the accused's subjective characteristics might be able to be considered when a jury in that jurisdiction assesses whether the accused might have had a reasonable belief.
[124] See *Crimes Act 1900* (NSW) s 61HA(3).

acquitted. Concluding that 'there can be very few cases' in which this should occur, he argues that such cases are limited to those in which the complainant 'expressed no dissent or resistance because [he or[125]] she was frightened or deceived' *and* the accused has 'not … aimed to frighten or deceive'[126] her/him. For Duff, only in these circumstances will a mistaken accused have cared enough about consent to be justifiably held not to be a rapist.[127] If he is right – and I respectfully think that he probably *is* – it is hard to imagine that anyone who falls foul of his requirements would be held to have had 'reasonable grounds' for believing that consent had been granted.[128] If the complainant resists/expresses dissent, *or* the accused has behaved aggressively or deceptively, the accused's belief in consent would not be supported by 'reasonable grounds.' Indeed, as much is suggested by Tupman DCJ's findings on this point in *Lazarus*. Her Honour's satisfaction that it was reasonably possible that Mr Lazarus had 'reasonable grounds' for his belief, was premised on her Honour's factual findings that: (i) the complainant neither said 'stop' nor 'no';[129] and (ii) Mr Lazarus never 'acted aggressively or roughly, or used any form of physical restraint or force against her, to persuade her to stay.'[130]

41. Thirdly, a reasonable belief test would not make this area of the law less complex. Under such a test, juries would have to work out more or less the same matters as they currently do: (i) whether the accused actually believed that consent had been granted; and (ii) whether it was reasonable for *the accused* to hold any such belief.
42. It was suggested in the *Four Corners* programme mentioned above that there might be a need for s 61HA(3) to be simplified. '[I]f two judges could get it wrong', it was said, 'what hope does a jury have?'[131] But such reasoning tends to overlook the fact that, at the *Lazarus* trials, the respective errors were a product of trial judges ignoring *clear* statutory language.
43. At the first trial, Huggett DCJ gave a direction that was at odds with the language of s 61HA(3)(c). Her Honour implied that, if the jury found that Mr Lazarus believed that consent had been granted, it should only acquit him if it 'consider[ed] that such a belief was a reasonable one.'[132] This was apt to suggest that 'the jury should ask what a reasonable person might have concluded about consent, rather than what the accused might have thought in all the circumstances in which he found himself and

[125] I have added these words to acknowledge that, unlike the UK offence being discussed by Duff, sexual assault in NSW can be committed against either a 'female person' or a male: *Crimes Act 1900* (NSW) s 61H(1).
[126] Duff, above n 61, 62.
[127] Ibid.
[128] In the absence of jury prejudice, anyway, which no legal test can affect.
[129] *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ).
[130] Ibid. Of course, this is not the same as saying that this is actually what happened in Hourigan Lane that night. That having been said, when criticising the first of these factual findings of Tupman DCJ, those responsible for the relevant *Four Corners* episode might not have been entirely fair to her Honour. For one thing, contrary perhaps to what was suggested in the programme (see 'I am that girl', above n 2), the judge did not base this finding merely on the complainant's statement after the events that she 'thought' that she told Mr Lazarus to 'stop.' Rather, her Honour made it clear that that circumstance '*adds* to my previous finding', founded on different circumstances, 'that I was not satisfied that she said "stop"': *Lazarus DCNSW* (Unreported, District Court of NSW, 4 May 2017, Tupman DCJ). [emphasis added].
[131] See 'I am that girl', above n 2.
[132] *Lazarus CCA I* [2016] NSWCCA 52, [145].

then test that belief by asking whether there were reasonable grounds for it.'[133] It was also contrary to the test clearly provided for in s 61HA(3)(c), namely, that the accused 'has no reasonable grounds for believing' in consent.[134] Now that the NSW Court of Criminal Appeal has emphasised, in such a high-profile case, the need for judges to adhere to the precise statutory language, it is hard to believe that Huggett DCJ's error will be repeated.

44. At the second trial, Tupman DCJ overlooked the need to take into account any 'steps' that Mr Lazarus had taken to ascertain whether Ms Mullins was consenting, when determining whether the Crown had proved that he had no reasonable grounds for believing that she consented.[135] This error was not caused by any lack of clarity in the relevant legislation. Section 61HA(3)(d) provides in unmistakably clear language that triers of fact 'must have regard to' any such 'steps.' No amendments to statutory language can prevent such errors from being made.

Conclusion

45. In the *Sydney Morning Herald* editorial referred to above, it is said that:[136]

> The trial and retrial of Luke Lazarus, who was accused of raping an 18-year-old woman in an alley outside his father's nightclub, is a high-profile example of the legal system failing to meet community standards. The NSW Court of Criminal Appeal found legal errors were made both by the judge directing the jury at his first trial … and the judge who presided alone over his retrial … The legal errors were regrettable and undermine public confidence in the legal system. … The question now is whether the NSW Crimes Act, and in particular the provisions governing sexual consent, should be amended following the Lazarus case or whether the circumstances in that case were isolated.

In my view, for the reasons set out above, neither the Lazarus cases nor anything else indicates that any major changes to s 61HA should be made. The errors made in those trials certainly were regrettable, but there is no rational connection between those errors and the reforms that some are now proposing. A NSW provision along the same lines as s 2A(2)(a) of the *Criminal Code Act 1924* (Tas) would have made no difference to the result in the second Lazarus trial. Moreover, as just noted, it is difficult to accept that either of the errors – especially the one made at the second trial – resulted from any lack of clarity in s 61HA(3).

46. I do agree with Monaghan and Mason's contention that '[l]egislative reform … [has] a role to play'[137] in this area. In my submission, alterations to s 61HA(3)(d) of the type suggested above would ensure, as far as possible, that triers of fact are slow to acquit in cases where the accused claims to have believed mistakenly that the complainant was consenting. But I also agree with those commentators when they say that such reforms 'alone will not solve the persistent problems in criminal justice

[133] Ibid [156].
[134] Ibid.
[135] *Lazarus CCA II* [2017] NSWCCA 279, [143]-[149].
[136] 'Consent law', above n 14.
[137] Monaghan and Mason, 'Reasonable reform', above n 15, 261.

responses to sexual assault.'[138] In my opinion, it is a mistake to blame the law for any recent loss of public confidence in the criminal justice system. It would also be a mistake significantly to reform the law in response to a vociferous media campaign against a particular individual, however badly he behaved.

[138] Ibid.