**Submission to the Western Australian Law Reform Commission's Review of Sexual Offences**

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## 1. Summary of this Submission

In this submission, I respond to certain questions posed by the Law Reform Commission of Western Australia ('LRCWA') in its December 2022[1] and February 2023[2] Discussion Papers. In so doing, I make a number of arguments.

First, I argue that consent, in truth, is a state of mind[3] – it is not 'a communicated state of mind'[4] – and that there are no good reasons for the law to depart from the correct moral position regarding this issue. Secondly, I argue that, just as a person consents mentally, withdrawal of consent in fact occurs as soon as a person becomes mentally opposed to the sexual activity that is taking place – and the law should acknowledge that too. Thirdly, after advocating the adoption of certain provisions relating to incapacity to consent, I argue that the law in Western Australia ('WA') should descend into greater particularity than it does[5] about the circumstances in which a person who uses deceit to induce another person to participate in sexual activity, is guilty of a non-consensual sexual offence. Fourthly, I argue that WA law should continue to provide that a person who participates in sexual activity because of 'threat'[6] or 'intimidation'[7] is not consenting, but that it should additionally provide that there is no consent where a person engages in such activity because of 'fear of harm', or 'coercion', or because a person is unlawfully detained or overborne by the abuse of a position of authority, trust or dependence. Fifthly, I argue that, because those who participate in sexual activity due to (a) a mistake or misapprehension and/or (b) threat or intimidation, are in truth never consenting,[8] any liability that arises in such cases should be non-consensual sexual offence liability – and that, partly because of this, the WA

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[1] The Law Reform Commission of Western Australia, 'Project 113 Sexual Offences: Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact' (December 2022).

[2] The Law Reform Commission of Western Australia, 'Project 113 Sexual Offences: Discussion Paper Volume 2: Offences and Maximum Penalties' (February 2023).

[3] As argued by, eg, Larry Alexander et al, 'Consent Does Not Require Communication: A Reply to Dougherty' (2016) 35(6) *Law and Philosophy* 655.

[4] Contra New South Wales Law Reform Commission, 'Consent in Relation to Sexual Offences: Report 148' (September 2020) 84 [6.28].

[5] See *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

[6] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

[7] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

[8] As argued by, eg, Tom Dougherty, 'Sex, Lies and Consent' (2013) 123(4) *Ethics* 717.

Parliament should repeal the offence created by s 192(1) of the *Criminal Code Act Compilation Act 1913* (WA) ('the Code'). Sixthly, I argue that: (a) the mistake of fact excuse for which s 24 of the Code provides should certainly not be 'render[ed] … inapplicable'[9] to sexual offence proceedings in WA; (b) the law should not deny accused persons access to this excuse unless it is reasonably possible that, around the time of the relevant sexual activity, they did or said something to ascertain whether the complainant was consenting;[10] (c) it should remain for the Crown to disprove mistake of fact where there is evidence of it at a non-consensual sexual offence trial;[11] and (d) a 'reasonable person' standard should not be substituted for the current 'hybrid'[12] reasonableness standard. That said, I also argue that the WA government should insert into the Code a provision of the type recommended by the New South Wales Law Reform Commission ('NSWLRC') in 2020. Under such a provision, judges would be required to instruct juries at non-consensual sexual offence trials that, when considering whether the accused might have believed on reasonable grounds that the complainant was consenting, they:[13]

> must have regard to whether the accused … said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person consented to the sexual activity, and if so, what the accused person said or did.

Finally, I argue that the WA Parliament should: preserve the distinction that the Code draws between penetrative and non-penetrative offences;[14] explicitly apply to all of the non-consensual offences in the Code a new section that defines consent and specifies circumstances in which consent is absent;[15] and provide for basic and aggravated forms of the non-consensual offences in the Code.[16]

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[9] Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1, 4.

[10] Cf *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1900* (ACT) s 67(5). Note that the NSW and ACT 'affirmative consent' provisions differ from one another. The latter provides for no exceptions to the rule that it states, whereas *Crimes Act 1900* (NSW) s 61HK(3)-(4) excludes certain persons with a 'mental health impairment' or 'cognitive impairment' from the application of s 61HK(2). I shall argue in this submission that, while the NSW approach is preferable to the ACT one, it is nevertheless undesirable. I shall also argue that, if the WA adopts the NSW approach, it should not require a person who is excepted from the requirement to 'say or do' something to ascertain consent on the basis of his 'mental health impairment' or 'cognitive impairment' to prove that he had such an impairment at the relevant time and this was a 'substantial cause' of his not saying or doing anything: cf *Crimes Act 1900* (NSW) s 61HK(3)-(4). There is no good reason why the onus of proof should be reversed in this way.

[11] See The Law Reform Commission of Western Australia, n 1, 152-154 [5.142]-[5.152].

[12] *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [42] (McLure JA).

[13] New South Wales Law Reform Commission, n 4, 141.

[14] See the discussion in Law Reform Commission of Western Australia, n 2, 17-20 [4.12]-[4.21].

[15] See the discussion in Law Reform Commission of Western Australia, n 1, 116-7 [4.299]-[4.302]. See also Law Reform Commission of Western Australia, n 2, 29-30 [6.24]-[6.26].

[16] See the discussion in Law Reform Commission of Western Australia, n 2, chapter 14.

## 2. Consent and the Withdrawal of Consent

According to a 'popular liberal approach',[17] which the WA government evidently largely accepts,[18] 'imposing sexual contact on someone without her consent is a moral wrong that should be criminalized, but the state should take no interest in sex between consenting adults.'[19] But once this approach *is* accepted, a number of questions arise. One of them is: what conditions must prevail for a person's consent to be real? Another is: assuming that those conditions are fulfilled, what precisely does a person need to do to consent? These questions are of crucial importance because, if the relevant conditions are absent, of if the person does not do the necessary things, her partner will potentially be exposed to the penalties of the criminal law.

The standard answer to the first of these questions is that, because a person consents to sexual activity when she makes an *autonomous choice* to participate in that activity, her consent can only be effective if she is a competent adult whose decision to engage in sexual activity is informed, and free from vitiating pressure.[20] Current s 319(2) of the Code broadly reflects such a philosophy and I shall consider this matter below. Before that, however, it is necessary to deal with the second question.

One possibility – canvassed by Tadros[21] and Dougherty,[22] but accepted by neither of them[23] – is that a person consents only once he *successfully* communicates to his partner his mental willingness to engage in sexual activity. But this approach is counter-intuitive.[24] Most of us feel, for example, that the person who sends an email to X in which she agrees to lend her car to him,[25] consents at least by the time that she sends the email – and that she need not wait until X receives and reads the email for her consent to become real. And it is submitted that such intuitions are right. It has just been noted that a person consents when he makes an autonomous choice. Accordingly, if a person does *not* make an autonomous choice – if her (sexual) autonomy is violated – she has *not* consented. The person who supports the successful communication principle must explain why, in the example just given, there has been even the slightest

[17] Tom Dougherty, 'Consent, Communication and Abandonment' (2019) 38 *Law and Philosophy* 387, 388.

[18] See Law Reform Commission of Western Australia, n 1, 37 fn 3.

[19] Dougherty, n 17, 388.

[20] See, eg, Stuart P Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford University Press, 2020) 28-9; David Archard, *Sexual Consent* (Westview Press, 1998) 44-53.

[21] Victor Tadros, *Wrongs and Crimes* (Oxford University Press, 2016) 205-6.

[22] Tom Dougherty, *The Scope of Consent* (Oxford University Press, 2021) chapter 5.

[23] Tadros, n 21, 206; Dougherty, n 22, chapter 6.

[24] Tadros, n 21, 206.

[25] To borrow an example used by Tadros.

infringement of the emailer's autonomy if, after the email was sent but before it was received, X drove the emailer's car. The emailer had no objection to X's driving the car; indeed, she positively chose to permit her to do so.

Another possibility – which is now reflected in non-consensual sexual offence law in NSW,[26] Victoria,[27] Tasmania[28] and the ACT[29] – is that a person consents only once he 'attempt[s] to communicate'[30] his willingness to engage in the relevant activity. According to such an approach, that is, consent is 'not just a subjective state of mind or attitude, but a communicated state of mind … a permission that is given by one person to another' (to use the NSWLRC's language).[31] Supporters of this approach concede that the consenter's communication need not be received by the person whom she is permitting to perform some act. Nevertheless, they argue that, unless she has 'done or said something' to communicate her mental willingness, she is not consenting. The difficulty with this approach – and, it seems, with Queensland and WA law's similar insistence that, because consent must be 'given',[32] it exists only once a person has *represented* to another his willingness to engage in sexual activity[33] – is that it is based on a faulty premise. Contrary to what the NSWLRC says in the passage just quoted, consent is *not* a permission.[34] Rather, as noted above, the relevant question is whether the complainant has autonomously – that is, has 'freely and voluntarily'[35] – participated in the activity at issue.

*Has* a person freely and voluntarily participated in X only once he has done or said something to communicate – or has in some other way represented – that he is willing to participate in X? I do not think so. Take, for example, 'Sid and Sara', who, Dougherty tell us, are 'sexually inexperienced' and (presumably because of this) 'are both nervous and shy and so do not attempt to communicate [their] … willingness'[36] to engage in sexual activity with one another. If they then have sexual intercourse, Dougherty continues, Sara is not consenting to it. Her failure to protest,

[26] *Crimes Act 1900* (NSW) s 61HJ(1)(a).

[27] *Crimes Act 1958* (Vic) s 36(2)(1).

[28] *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a).

[29] *Crimes Act 1900* (ACT) s 50B(b).

[30] Tadros, n 21, 206.

[31] New South Wales Law Reform Commission, n 4, 84 [6.28].

[32] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a); *Criminal Code Act 1899* (Qld) s 348(1). Note that Dougherty has argued, I think wrongly, that such a view is morally correct: Tom Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43(3) *Philosophy & Public Affairs* 224, 230.

[33] *R v Makary* [2019] 2 Qd R 528, 543 [49]-[50].

[34] *Ibbs v The Queen* [1988] WAR 91, 93 (Burt CJ).

[35] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

[36] Dougherty, n 17, 392.

he indicates, is not a clear enough representation to amount to a communication of consent.[37] But why focus just on Sara? Sid, too, has seemingly not made any clear representation. And, more fundamentally, have these two people *really* failed to participate autonomously in the sex that occurs? Because both were internally willing, neither will feel as though they have been wronged by the other – and rightly so. Neither has done anything to which her or his will stood opposed.

This brings us to the final possibility – namely, that, contrary to the NSWLRC's view, consent *is* 'just a subjective state of mind or attitude.'[38] Many moral philosophers hold such a view to be correct;[39] and it is submitted that they are right. Consider, for example, the man who wakes up to find that 'the woman he had intercourse the night before' is about to perform oral sex on him.[40] Consider, too, that, while he neither does nor says anything to communicate his willingness to engage in such conduct, he regards the sex that ensues to be 'the best alarm clock ever'.[41] Ferzan argues that this man has not been wronged; and it is submitted that she is right. Quite simply, '[h]is autonomy is fully protected':[42] he has done only that which he was fully willing to do.

No doubt, the view the consent is simply a mental state is not particularly politically popular at the moment. But two things should be noted. The first is that, just because a view is morally correct, does not mean that it should be reflected in law. In particular, there might be pragmatic reasons why the law should take a different course. That said, for reasons that I shall state below, I do not think that this is the case here. The second is that the above view has certain implications that the advocates of complainants' interests will find appealing. For, as Alexander, Hurd and Westen have noted, 'if the attitudinal view of consent is correct … then … the revocation of consent will also be attitudinal and will require no communication'.[43] In other words, if, as I think,

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[37] Ibid. Note that, under Queensland and WA law, it would appear that in a case where the representation was made by omission, that representation would have to be *unequivocal* – see Andrew Dyer, 'A Reasonable Balance Disrupted (in New South Wales): The New South Wales and Queensland Law Reform Commissions' Reports about Consent and Culpability in Sex Cases Involving Adults – And the Governments' Responses' (2022) 51(1) *Australian Bar Review* 27, 45 fn 173 – although the same might not to be so where the complainant has made the alleged representation by word or action. If that is wrong, however, the approach taken by WA and Queensland law comes close to adopting the 'successful communication' view, discussed and criticised above. That is because, when a participant in sexual activity makes an unequivocal representation that she is consenting to that sexual activity, she will normally successfully communicate such a willingness to her partner.

[38] New South Wales Law Reform Commission, n 4, 84 [6.28].

[39] See, eg, Alexander et al, n 3; Kimberly Kessler Ferzan, 'Consent, Culpability and the Law of Rape' (2016) 13(2) *Ohio State Journal of Criminal Law* 397, 405-6; Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2(2) *Legal Theory* 121, 135-8; Larry Alexander, 'The Moral Magic of Consent II' (1996) 2(3) *Legal Theory* 165, 165; Larry Alexander, 'The Ontology of Consent' (2014) 55(1) *Analytic Philosophy* 102, 104.

[40] Ferzan, n 39, 405.

[41] Ibid.

[42] Ibid.

[43] Alexander et al, n 3, 657.

'consent and non-consent is an action of the mind',[44] it follows that a person may *withdraw* consent without communicating such a withdrawal to the other party.

Consider, for example, the person who engages in consensual sexual activity with another person, only to change her mind at some point during that sexual activity, so as to become unwilling to participate in it any longer. In NSW and Queensland, if this person 'by words or conduct'[45] communicates her newfound unwillingness to her sexual partner, then she will no longer be consenting. In the ACT, similarly, her revocation of consent will become effective as soon as she 'says or does something to communicate'[46] that revocation. But what if such a complainant cannot communicate this? What if he has 'frozen'? In the jurisdictions just mentioned, he will be consenting as a matter of law until he pulls himself together. The problem with this is that, in truth, such a person's sexual autonomy has been violated from the moment that he resolved mentally that he was no longer willing to participate.

A couple of paragraphs above, I noted that pragmatic considerations do not seem to justify the law's deviating from the morally correct account of what consent is. The main pragmatic reason for having the law state that a person consents only once she does or says something to communicate consent – or represents in some way that she is willing – is that such an approach is apt to: [47]

> shift … the focus of the inquiry at trial. The question is whether the complainant said or did anything to communicate consent [or, alternatively, made a representation of her willingness], rather than whether the complainant resisted or otherwise demonstrated an absence of consent.

But *do* provisions of the sort that we are considering 'shift the focus' in this way? Little or no evidence has been provided that they *do*; and there are reasons to doubt whether they could.

As Crofts and I have noted elsewhere,[48] in sexual offence cases the jury will normally be satisfied that the complainant did and/or said *something* around the time of the sexual activity (even in cases where the complainant has been largely passive). If that something was an act of resistance, it is only natural that those juries will continue to focus on it when resolving the consent enquiry. After all, it is the surest evidence that the complainant was not consenting. And if that something is *not* an act of resistance, it is hard to see why jurors' focus would be different from what it

[44] *R v Middleton* (1873) LR 2 CCR 38, 63 (Brett J).

[45] *Crimes Act 1900* (NSW) s 61HI(2); *Criminal Code Act 1899* (Qld) s 348(4).

[46] *Crimes Act 1900* (ACT) s 67(1)(a).

[47] New South Wales Law Reform Commission, n 4, 88 [6.49].

[48] Andrew Dyer and Thomas Crofts, 'Reforming Non-Consensual Sexual Offences in Hong Kong: How Do the Law Reform Commission of Hong Kong's Proposals Compare with Recent Recommendations in Other Jurisdictions?' (2022 51(3) *Common Law World Review* 145, 157.

would be if the law were to hold that consent is a state of mind. In other words, when determining whether the complainant might have done what he did *to* communicate consent, juries would be very likely to take account of the same kind of evidence as they always have when working out whether consent was present.

To use the well-known case of *R v Lazarus* to exemplify the point: when finding that the complainant was not 'in her own mind'[49] consenting to the relevant act of sexual intercourse, the trial judge placed much emphasis on the complainant's conduct after she left the accused's company. In particular, the judge based her finding of no consent largely on evidence that the complainant had (a) complained immediately of having had non-consensual sex and (b) was 'crying hysterically'[50] around this time. It is difficult to see why her Honour's focus would have been any different had she been required to consider whether the acts of the complainant around the time of the sexual intercourse (such as placing her hands against a wall) were done *to* communicate consent. For, surely, the complainant's distress after the incident, and her complaint, was the most compelling evidence that, whatever acts she performed in Luke Lazarus's company, she did none of them for the purpose of conveying her willingness to him.

As with consent, pragmatic arguments have been used to support the contention that withdrawal of consent should become effective only once it is communicated by 'words or conduct' (or, alternatively, that consent will be revoked only once a person 'says or does something to communicate'[51] such a revocation.) Most particularly, the NSWLRC has argued that, while 'the current law of sexual offences aims to protect sexual autonomy and freedom of choice',[52] and while this requires 'that consent, once given, can be withdrawn':[53]

> [f]airness dictates that, if consent has been freely and voluntarily given, its withdrawal should be communicated before a person acting on the consent that had been given could be convicted of a criminal offence.

But it must be recalled that, in a case where a person has developed an internal unwillingness to proceed with sexual activity, her partner will be liable to be convicted of a sexual offence only if the State can prove that he ought to have known that she was unwilling.[54] In some cases of frozen complainants, it would not be able to do that. In others, it probably would be able to do so. In none of these cases would there be unfairness. There would be no unfairness in the second kind of case, because, if a person proceeds with sexual activity despite lacking a reasonable belief that

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

[50] Ibid.

[51] *Crimes Act 1900* (ACT) s 67(1)(a).

[52] New South Wales Law Reform Commission, n 4, 63-4 [5.39].

[53] New South Wales Law Reform Commission, n 4, 64 [5.39].

[54] Or, more precisely, that he lacked an honest and reasonable but mistaken belief that she was not consenting.

her partner is a willing participant anymore, she has a sufficiently culpable state of mind to be convicted of the relevant sexual offence.[55] Liability without fault for a serious offence is objectionable. But liability with fault is not.[56]

It follows from this discussion that the Code should not require participants in a sexual activity to do or say something to indicate their consent to that sexual activity.[57] And while the Code should explicitly state that a person may withdraw sexual consent, it should also make it clear that such withdrawal becomes effective as soon as that person becomes internally unwilling to engage in the sexual activity at issue.[58] Finally, while the Code should define consent, it should define it differently from how it does at the moment.[59] As indicated above, because current s 319(2)(a) states that 'consent means a consent freely and voluntarily *given*', a consent will only become effective once the complainant has represented in some way that she is willing to engage in sexual activity. But because sexual consent is not the same as a sexual permission,[60] this approach is wrong. The Code should state instead that 'a person consents to sexual activity when he or she freely and voluntarily participates in that sexual activity' (or something similar).[61]

There is more information about both of these matters in the first two Appendices to this submission: i.e. a 2021 *Australian Bar Review* article of mine (**Appendix A**) and a 2022 *Common Law World Review* article that I wrote with Crofts (**Appendix B**).

### 3. Capacity

It was noted above that one of the conditions that must prevail if consent is to be real is that the consenter was, at the time of 'consenting', a competent adult. In my submission, the approach

[55] As argued in, eg, Dyer and Crofts, n 48, 156; Dyer, n 37, 46-7.

[56] Although there should of course be a proper relationship between moral culpability and legal responsibility: see, eg, *Wilson v The Queen* (1992) 174 CLR 313, 327.

[57] See The Law Reform Commission of Western Australia, n 1, 49.

[58] See ibid 115.

[59] See ibid 43.

[60] See ibid 41 [4.20].

[61] I am not in favour of changing the definition of consent in WA to 'free and voluntary *agreement*' (or something similar). See the discussion in ibid 40-3 [4.15]-[4.26]. Such definitions tend to suggest that 'consent is … an agreement between participants' (at ibid 40 [4.15]) – which, even under the approach taken by a provision such as *Crimes Act 1900* (NSW) s 61HJ(1)(a), is simply not true. In other words, even if a person cannot consent, for legal purposes, unless he has done or said something to communicate such consent, he can consent without entering into an agreement with the other person. Indeed, it is quite possible for a person not even to be aware of conduct that was in fact done by her partner to communicate consent. And it is just as possible for a person not to hear, or not to understand (see Tadros, n 21, 207), words that her partner in fact spoke so as to communicate her consent.

tom this issue that is taken by the *Crimes Act 1900* (NSW)[62] seems largely or wholly correct. That approach should therefore largely or wholly be adopted in WA.

More specifically: given the existence of the offences in s 320 of the Code, it is hard to see why there is a need for s 319(2)(c), which provides that a child under the age of 13 is incapable of sexual consent.[63] To use two examples, if a person sexually penetrates a 12 year-old, or 'procures, incites or encourages a 12 year-old' to penetrate him or herself, he is liable to 20 years' imprisonment.[64] But those penalties no higher than the penalties for, respectively, aggravated sexual penetration without consent[65] and aggravated sexual coercion[66] – offences for which, partly because of s 319(2)(c),[67] this person also seems to be liable. In other words, there seems no need for s 319(2)(c). Even without its specification that the persons to whom it refers are not consenting, those persons are the victims of offences that are at least as serious as the non-consensual offences in the Code.

Further, I support the enactment of a provision that would state that a person is not consenting to a sexual activity if she is 'so affected by alcohol or another drug as to be incapable of consenting to the sexual activity'.[68] Commentators sometimes indicate sympathy for the view that, if a person is affected by drugs or alcohol at the time of engaging in sexual activity, she has not participated autonomously in that sexual activity.[69] As the NSWLRC has noted, however, this is often not so. 'It is absurd to suggest, the Commission said, 'that the law should regard all sexual activity involving a complainant who has consumed alcohol or drugs as non-consensual'.[70] For

[62] *Crimes Act 1900* (NSW) ss 61HJ(1)(b)-d).

[63] See The Law Reform Commission of Western Australia, n 1, 57 [4.76].

[64] *Criminal Code Act Compilation Act 1913* (WA) ss 320(2) and 320(3).

[65] *Criminal Code Act Compilation Act 1913* (WA) s 326(1).

[66] *Criminal Code Act Compilation Act 1913* (WA) s 328(1).

[67] See too *Criminal Code Act Compilation Act 1913* (WA) ss 319(1) and 221(1)(b). I am operating under the assumption that, in these cases, a child is present (namely, the victim): see the terms of s 221(1)(b). (On such a view, s 319(1)(b) *confirms* that, if the victim is aged 13-15, that is an aggravating circumstance). If that assumption is incorrect, however, it would seem that the effect (partly) of s 319(2)(c) is to make it clear that this offender is guilty of a *less* serious offence than those created by ss 320(2) and (3). See *Criminal Code Act Compilation Act 1913* (WA) ss 325(1) and 327(1). Note, too, that s 319(1)(b) seems to assume that, in a case of sexual offending against a person aged under 13, the charge would not be a non-consensual one. That provision states that, for the purposes of the non-consensual offences in the Code, it is a circumstance of aggravation if the victim is aged between 13 and 15. Seemingly the only rational explanation for its failure to specify that it is a circumstance of aggravation if the child is *below* the age of 13, is that the legislature assumed that sexual offending against children below that age is covered solely by the child sexual offences in the Code. Section 319(2)(c) confuses this issue and should seemingly be repealed.

[68] *Crimes Act 1900* (NSW) s 61HJ(1)(c).

[69] See, eg, Anthony Gray, 'Reform to the Law of Consent: A Tale of Two States' (2022) 31 *Journal of Judicial Administration* 229, 237.

[70] New South Wales Law Reform Commission, n 4, 93 [6.80].

one thing, if the law were to treat any – or even substantial – intoxication, as a vitiating factor, it would be holding that many sexual offence perpetrators were not consenting at the relevant time.[71] That said, as the NSWLRC has also stated, 'the law should protect complainants who are intoxicated to the point where they cannot consent to sexual activity.'[72] In short, if a person's intoxication renders him incapable of consenting, he of course is not consenting to any sexual activity that takes place while he is in such a state; and the Code should make this clear.

I also support a provision that would state that a person does not consent if she 'does not have the capacity to consent to the sexual activity.'[73] It would seem unnecessary to refer to the cause of that incapacity – essentially for the reasons given by the NSWLRC and referred to by the LRCWA in its first Discussion Paper.[74] But, for the reasons given by the LRCWA,[75] it might be worthwhile to define capacity in the Code (in a manner that accords with the common law definition).

The only NSW incapacity provision that I have some difficulty with is s 61HJ(1)(d) of the *Crimes Act*, which provides that a person does not consent to a sexual activity if 'the person is unconscious or asleep'. As Temkin and Ashworth have pointed out, a provision such as the NSW one just noted, criminalises 'D … if he sexually touched his partner C while C was asleep even though D was in the habit of doing so and C had not objected to this in the past.'[76] Those commentators argue that '[t]hose who are uncomfortable with the full implications of sexual autonomy' might think that this 'cast[s] … the law's net too wide.'[77] Indeed, some might argue that, in fact, the sexual autonomy of at least some sleeping or unconscious complainants has *not* been violated. In *JA v The Queen*, for example, the minority of the Supreme Court of Canada said that, because the complainant there had 'said yes, not no'[78] to penetrative sexual conduct while she was unconscious, she was consenting both in fact and as a matter of law.[79]

While the matter is finely balanced, I tend to support the view taken by the NSWLRC about sleep and unconsciousness. Because a person such as JA does say 'yes', it is on one view paternalistic for the law to hold her partner to have acted criminally. But even many liberals accept that there

[71] See The Law Reform Commission of Western Australia, n 1, 59 [4.84].

[72] New South Wales Law Reform Commission, n 4, 93 [6.80].

[73] *Crimes Act 1900* (NSW) s 61HJ(1)(b).

[74] The Law Reform Commission of Western Australia, n 1, 57 [4.75].

[75] Ibid 58 [4.79].

[76] Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problems of Consent' [2004] (May) *Criminal Law Review* 328, 338.

[77] Ibid.

[78] *JA v The Queen* [2011] 2 SCR 440, 465 [69].

[79] Ibid 465-6 [71].

is some role for paternalism in the criminal law;[80] and, in any case, it is not entirely clear that the prosecution in *JA* was paternalistic. Because the complainant did not say 'yes' at the time of the sexual activity, and because she lacked the freedom to modify or withdraw her 'consent' once she was unconscious, her sexual autonomy was arguably violated.[81]

### 4. Deceit

As argued above, another condition that must prevail if a person's apparent consent is to be real is that she was sufficiently informed at the time of the relevant activity. I have recently written a long article about this matter, and I have appended that article to this submission (see **Appendix C**). While that article focusses on English law, much of the reasoning in it is relevant to the LRCWA's Review. In particular, I submit that the Code should be reformed in essentially the manner set out at pp. 50-7 of the article, essentially for the reasons that I provide earlier in that piece: see especially pp. 36-50. I shall now briefly summarise my position.

First, I submit that, in a case where a person has engaged in sexual activity because of a mistake or misapprehension, he is in fact not consenting, and the law should generally acknowledge this. In other words, in such a case, the accused should normally be guilty of the relevant non-consensual sexual offence in the Code unless she: (a) might reasonably have believed that the complainant was not materially mistaken;[82] or (b) can successfully raise another defence or excuse.

To be more specific, the Code should state that a person does not consent if she 'participates in sexual activity because of a mistake or misapprehension about one of the following matters' – and it should then set out a lengthy list of such matters. That list should be based on all cases that have so far arisen. For, while such an approach is prescriptive, there will continue to be legal uncertainty unless the WA Parliament is willing to draw clear lines in this area.[83] Such uncertainty is antithetical to the interests of accused persons. But it is also unhelpful to complainants. Probably because of persistent ideas that a fraudulently induced 'consent' is still, in most cases at least, a real consent,[84] prosecutors in WA are seemingly not prosecuting sex-by-deception

[80] HLA Hart, *Law, Liberty and Morality* (Stanford University Press, 1963) 30-4. Note, too, the reasoning in *R v M(B)* [2019] QB 1, 11 [39] and in New South Wales Law Reform Commission, n 4, 96-7 [6.98] ('People who are unconscious or asleep are highly vulnerable').

[81] See New South Wales Law Reform Commission, n 4, 96-7 [6.98].

[82] *Criminal Code Act Compilation Act 1913* (WA) s 24.

[83] As the LRCWA has indicated, while, on its face, *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a) treats as non-consensual *all* sexual activity that is obtained 'by deceit … or … fraudulent means', there is significant doubt about the precise reach of these words: The Law Reform Commission of Western Australia, n 1, 66-7 [4.110]-[4.111].

[84] See, eg, Jianlin Chen, 'The Hidden Sexual Offence: The (Mis)Information of Fraudulent Sex Criminalisation in Australian Universities' (2020) 42(4) *Sydney Law Review* 425, 447-8.

cases as frequently as they could.[85] If there were a clear legislative statement that particular cases of fraudulent sexual activity were non-consensual, police and prosecutors would be given far more guidance than they currently are about the circumstances in which an accused who has used such means to induce participation in sexual activity, can be held liable for non-consensual sexual offending.

Secondly, however, the law would risk falling into disrepute if it were to permit convictions in cases where the complainant's mistake or misapprehension was: (a) insufficiently objectively serious to give rise to liability for a sexual offence; or (b) material for her because of her irrational prejudice. Accordingly, the law should provide that 'there is to be no conviction' for a non-consensual sexual offence in such cases. Further, the law should set out non-exhaustive lists of cases where the complainant's mistake or misapprehension was: (a) insufficiently objectively serious; or (b) material for her because of her irrational prejudice. As with the list that I refer to in the paragraph immediately above, these lists should be as lengthy as possible. That is because, again, it is only if Parliament is willing to go into some detail about this matter that there will be a proper degree of legal clarity in this area.

Thirdly, the law should set down a method for resolving unforeseen mistake or misapprehension cases: i.e. cases where a complainant alleges that she participated in sexual activity because of a mistake or misapprehension not specifically referred to in any of the three lengthy lists referred to above. The law should state that *the jury* must decide whether, in such a case, non-consensual sexual offence liability should be capable of arising – or whether, alternatively, the mistake or misapprehension 'concerned a matter that was insufficiently objectively serious to give rise to liability for a sexual offence' or was material for the complainant 'because of her irrational prejudice'. Because juries represent the community, it is more democratic to have them decide such matters than to have the trial judge do so. But, so as to ensure as far as possible that there is consistency in the application of the law – and to provide some measure of legal clarity – the discretion exercised by such juries should be a guided one. The law should state, that is, that when making the decision just noted, juries must, where relevant, have regard to:

i. the above lists of: (a) mistakes and misapprehensions that are insufficiently objectively serious to give rise to liability for a sexual offence and/or (b) cases where irrational prejudice had a decisive influence on the complainant's decision to participate in sexual activity;

ii. any similarity between the person's mistake or misapprehension and any matter or matters on the above lists; and

iii. whether there was a risk of serious consequences for the complainant if she were to engage in the sexual activity that actually occurred (and, if so, what those consequences were and how great that risk was).

[85] See The Law Reform Commission of Western Australia, n 1, 74 [4.150]. See also The Law Reform Commission of Western Australia, n 2, 85 [11.4].

Before leaving the subject of deceit, there is one further matter on which I wish to comment. Under the proposal just noted, liability for sexual penetration without consent would arise where an accused person induced another person to participate in sexual intercourse by lying about, or failing to disclose, that he had a serious[86] bodily disease that he posed a real risk[87] of transmitting to the complainant. In so proposing, I realise that many oppose the criminalisation of such activity.[88] But many support it[89] – and the arguments of those who oppose it are unprincipled and show a limited understanding of how human rights law operates. In particular, to say that a person's 'right to autonomy'[90] makes it permissible for him to deceive his sexual partner(s) about his disease status – whether actively or passively – is to ignore the fact that there is a competing autonomy interest (that of the complainant) that must take priority in such circumstances. And similar comments apply to the defendant's 'right to privacy'.[91] That right, where it exists, is a qualified right.[92] Accordingly, while the state has an obligation to ensure that its citizens' privacy is not infringed, that obligation must give way, in the case of conflict, to its absolute obligation to ensure that its citizens are not treated in an inhuman or degrading way:[93] e.g. by violating their sexual autonomy.[94] If a person does not wish to disclose to her sexual partners that she has a serious bodily disease that she poses a real risk of transmitting to them, she should either take measures to reduce the risk that she poses[95] or refrain from having sex. If she instead chooses to breach the sexual autonomy of another person, she has acted very culpably and should be convicted of a serious sexual offence.

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[86] Cf The Law Reform Commission of Western Australia, n 1, 89 [4.205], where reference is made to 'common STIs such as herpes, chlamydia or gonorrhoea'.

[87] See *The Queen v Mabior* [2012] 2 SCR 584, 622-3 [104].

[88] The Law Reform Commission of Western Australia, n 1, 88-9 [4.205]-[4.206].

[89] See, eg, Rebecca Williams, '*R v Flattery* (1877)' in Philip Handler et al (eds), *Landmark Cases in Criminal Law* (Bloomsbury Publishing 2017) 147, 161, 164; Stephen J Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11(1) *Law and Philosophy* 35, 93; David P Bryden, 'Redefining Rape' (2000) 3 *Buffalo Criminal Law Review* 317, 470-1, 474.

[90] The Law Reform Commission of Western Australia, n 1, 88 [4.205].

[91] Ibid.

[92] See, eg, Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8.

[93] See, eg, Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 3.

[94] See *MC v Bulgaria* [2003] XII Eur Ct HR 1, [166].

[95] In cases where the defendant poses only a negligible risk of transmitting a grievous bodily disease and the complainant would not have had sexual intercourse with her if she had known the truth, there has been a breach of sexual autonomy. But, according to my proposal, there should be no conviction for non-consensual sexual offending in such circumstances. Contrary to what I have previously argued (see, eg, Dyer and Crofts, n 48, 164 fn 189), this is not because the autonomy/privacy interest of the accused outweighs that of the complainant's sexual autonomy interest. Rather, it is because, if there were to be a prosecution in such circumstances, the law would be liable to fall into disrepute.

Moreover, the argument that such criminalisation will deter people from undergoing testing for serious STIs,[96] is speculative. What evidence is there that there would be such a deterrent effect?[97] And why is the same deterrent effect not achieved by the criminalisation of those who actually culpably infect their sexual partners with a grievous bodily disease? Should *that* conduct also be non-criminal? No doubt, there are some who would deliver an affirmative answer to the final of these questions – but, because the conduct at issue is wrongful, culpable and causes serious harm, such an approach does not seem reasonable.

There is also the argument that, if the law were to criminalise certain STI non-disclosure cases as sexual penetration without consent, it would 'inappropriately place … the responsibility for preventing HIV transmission onto the HIV positive person alone, rather than adopting a shared responsibility model.'[98] In other words, the complainant is partly to blame for her own predicament: how could she have been so stupid as not to seek an assurance from the accused that he was free of a serious STI? In the past, such arguments have frequently been used to trivialise the wrong done to complainants by those who have fraudulently induced them to participate in sexual activity. Complainants in such cases, it was said, are 'gullible wom[e]n'[99] who should have treated the accused's fraudulent claims 'with a healthy measure of scepticism'.[100] But, as commentators such as Alldridge[101] and Herring[102] have noted, such reasoning lacks appeal. A person who fails to ask a sexual partner about his disease status might be 'stupid' or 'negligent'.[103] But that has absolutely no relevance to whether that sexual partner should be held criminally liable. Much more relevant to *that* question is the culpability that he has displayed.

### 5. Threats, Intimidation, Fear of Harm and Coercion

Current s 319(2) of the Code provides that 'a consent is not freely and voluntarily given if it is obtained by force, threat … [or] intimidation'. It is submitted that this approach is essentially correct, but that the Code should expand on the circumstances in which a threatened or fearful complainant is not consenting. My first two reform proposals are these. The Code should provide that a person does not consent to a sexual activity if she:[104]

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[96] The Law Reform Commission of Western Australia, n 1, 88 [4.205].

[97] Even if such an effect could be established, it would seem objectionably consequentialist to refrain from criminalising seriously wrongful conduct because of it.

[98] The Law Reform Commission of Western Australia, n 1, 89 [4.206].

[99] Hyman Gross, 'Rape, Moralism and Human Rights' [2007] (March) *Criminal Law Review* 220, 224.

[100] Ibid.

[101] Peter Alldridge, 'Sex, Lies and the Criminal Law' (1993) 44(3) *Northern Ireland Law Quarterly* 250, 266-7.

[102] Jonathan Herring, 'Mistaken Sex' [2005] 7 *Criminal Law Review* 511, 520-1.

[103] Joel Feinberg, 'Victims' Excuses: The Case of Fraudulently Procured Consent' (1986) 96(2) *Ethics* 330, 337.

[104] See *Crimes Act 1900* (NSW) s 61HJ(1)(e) (though note that the proposed provision departs slightly form the terms of s 61HJ(1)(e)).

> participates in the sexual activity because of force, fear of force or fear of harm of any kind to the person, another person, an animal or property, regardless of –
>
> i. when the force or the conduct giving rise to the fear occurs, or
> ii. whether it occurs as a single instance or as part of an ongoing pattern

And it should provide that a person does not consent to a sexual activity if he:[105]

> participates in the sexual activity because of a threat, coercion or intimidation, regardless of –
>
> i. when the threat, coercion or intimidation occurs, or
> ii. whether it occurs as a single instance or as part of an ongoing pattern

A person who participates in sexual activity because of force, or the threat or fear that force will be applied to her or another person, or most[106] animals, is clearly not consenting. That is because she has either made no choice (consider, for example, the person who is 'physically held down, restrained and sexually violated'[107]) or no 'meaningful'[108] one (consider, for example, the person who 'chooses' to engage in sexual activity rather than risk a beating). But academic opinion is divided about whether, when a person consents because he fears something *other than force*, or because of a *non-violent* threat or non-violent coercion, he is invariably not consenting. If a person engages in sexual activity because of a threat, say, to 'steal a penny',[109] or to break off a relationship,[110] can it really be said that her sexual autonomy has been violated?

Some scholars have argued that the answer to the question just posed is 'no.' According to them, consent is only absent if the complainant participated because of a threat or fear, *and a person of ordinary firmness would have done the same.*[111] But others disagree;[112] and it is submitted that they are right. As Schulhofer has indicated,[113] it is unquestionably proper for the law to grant the duress excuse to an individual only if it was reasonable for her to carry out the threatener's demand.[114] After all, such a person will usually have harmed an innocent person or his property:

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[105] See *Crimes Act 1900* (NSW) s 61HJ(1)(f) (though note that the proposed provision departs slightly form the terms of s 61HJ(1)(e)).

[106] If the animal is a goldfish, the matter is not so clear. See Kimberly Kessler Ferzan, 'Consent and Coercion' (2018) 50 *Arizona State Law Journal* 951, 976.

[107] Archard, n 20, 50.

[108] Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998) 102.

[109] Alexander, 'The Ontology of Consent', n 39, 113.

[110] See, eg, The Law Reform Commission of Western Australia, n 1, 99 [4.246]; Sarah Conley, 'Seduction, Rape and Coercion' (2004) 115 *Ethics* 96, 108.

[111] See, eg, Ferzan, n 106, 974-6, but cf 1005.

[112] See, eg, Alexander, 'The Ontology of Consent', n 39, 113.

[113] Schulhofer, n 108, 126. See too Green, n 20, 125.

[114] See *Criminal Code Act Compilation Act 1913* (WA) s 32(2). And see also, eg, the common law case of *R v Abusafiah* (1991) 24 NSWLR 531, 545.

she should only be excused if she could not reasonably be expected to have done otherwise. But, as that commentator has also indicated, when a person submits to sex because of a threat, 'there is quite obviously nothing like the same justification for expecting her to … resist'.[115] 'If one person puts himself in the wrong by making an unjustified threat', he continues, 'why should it be a defence that the person he threatened had alternatives to submission?'[116] More important, surely, is that she participated unwillingly in the sexual activity that took place.[117]

Some scholars think that a threat is 'a proposal to make a person worse off than she has a right to be.'[118] But this definition seems too narrow. Consider, for example, the NSW case of *R v Aiken*.[119] In that case, the Crown alleged that, after witnessing the complainant shoplifting, Aiken had induced her to participate in sexual activity with him by telling her that, if she did not, he would 'inform security' about her misconduct.[120] In the NSW Court of Criminal Appeal, Studdert J (with whom Kirby and Howie JJ agreed) regarded this statement as a threat;[121] and, in my view, he was right to do so. For while, according to the Crown case, Aiken had not informed the complainant that he would make her worse off *than she had a right to be* – he was perfectly entitled to report her for shoplifting – he *had* told her that he would make her 'worse off *in relation to some relevant baseline position*.'[122] He had told her, that is, that he would place her in a worse position than she was currently in.[123]

This is relevant for two reasons.

First, once it is accepted that a person threatens another whenever she states that she will place him in a worse position than he is currently in – or, it can be added, a worse position than he legitimately expects to be, or is entitled to be, placed in[124] – it becomes clear that there is

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[115] Schulhofer, n 108, 126.

[116] Ibid 128.

[117] In other words, if this approach is accepted, the same threat can interfere with choice sufficiently to render conduct non-consensual, while not interfering with it sufficiently to negate culpability or criminal responsibility.

[118] Schulhofer, n 108, 120.

[119] (2005) 63 NSWLR 719.

[120] Ibid 727 [33].

[121] Ibid.

[122] Green, n 20, 121 [emphasis added].

[123] See Archard, n 20, 50; and note also the three examples that Tadros provides of individuals securing sex for themselves by threatening to 'act permissibly' in Tadros, n 21, 228, 232.

[124] If I tell my children that I will buy them an ice-cream and then, when they are refusing to get dressed later on, I say 'get dressed or I won't buy you the ice-cream', I have threatened them. For, while I have not said that I will place them in a worse position than they are currently in, my earlier statement created a legitimate expectation that I would buy them an ice-cream and I am now telling them that, unless they pick up their act, I will defeat that expectation. Similarly, if an actor deserves to be cast in a role, but is told by a producer, 'I will only cast you if you have sex with me', she has been threatened. That is because the producer has told her that, unless she complies with his demand, she will be placed in a worse position than she is entitled to be placed in. Cf Green, n 20 129-130,

significant overlap between a provision that states that there is no consent where a person does X because of a 'fear of harm' and one that states that there is no consent where a person does X because of 'a threat'. In other words, generally where a person threatens another, that other person will fear whatever harm (i.e. setback to his or another's interests) is threatened. But because that might not always be the case,[125] there seems to be utility in having the law provide separately that a person is not consenting where she participates because of 'fear of harm' *or* 'a threat'.[126]

Secondly, even on this broad definition of what a 'threat' is, there are cases where a person induces another to participate in sexual activity by using coercive or intimidatory means that cannot be characterised as a 'threat'. The most obvious example of coercion that does not amount to a threat is a coercive offer. For example, imagine that A is impoverished and needs very expensive treatment to save her son's life.[127] Or imagine that B has lost her job, has no means to pay her mortgage and faces the loss of the modest house in which she is single-handedly bringing up her three children.[128] If a wealthy person, C, were to tell A or B that, in exchange for sex, she was willing to pay for the medical treatment, or pay off the mortgage, she would have made no threat. Because her proposal would be to place the person to whom it was made in a better position, not a worse one, it would be an offer.[129] Nevertheless, as Tadros and Green have separately suggested, because the offeree in such circumstances 'seems to have no real choice',[130] it is 'reasonable to think' of the approach as 'entailing coercion'.[131] And, for the same reason, it also seems that, if the offeree participates in the requested sexual activity because of such coercion, such participation is not free and voluntary.

It follows that, as well as providing that a person does not participate consensually in a sexual activity when she engages in it because of 'a threat', WA law should state that there is no free and voluntary participation where a person participates in a sexual activity because of 'coercion.'[132] And, for similar reasons, WA law should also continue to provide that consent is

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though note that Green seems to be referring to cases where such proposals were made to actors whom it was not clear ought to have been cast.

[125] See, eg, *Brady v Schatzel* [1911] St R Qd 206 – although note that it is difficult to think of a case where a person has participated in sexual activity because of a threat but did not (a) fear the threatened harm and (b) participate because of that fear.

[126] *Crimes Act 1900* (NSW) s 61HJ(1)(f) states, among other things, that a person does not participate consensually in sexual activity if her participation is due to 'blackmail'. I favour the substitution of the words 'a threat' for 'blackmail' because it is broader. In other words, while it is certainly the case that a person who does X because of blackmail, is not consenting to X, the same is true where there is a threat that does not amount to blackmail.

[127] Tadros, n 21, 233.

[128] Green, n 20, 129.

[129] Ibid 121.

[130] Tadros, n 21, 233. See also ibid 130.

[131] Green, n 20, 130.

[132] It could be argued that, because '[c]oercion is paradigmatically carried out by means of a threat' (ibid 121), there is no need to provide separately that there is no consent where a person participates in sexual activity because of

absent where a person participates in sexual activity because of 'intimidation'. In other words, just as there can be 'coercion' without a 'threat', there have been cases where, while an accused person has used intimidatory means to secure a complainant's participation in sexual activity, it is difficult to locate an actual threat that he has made. For example, Schulhofer refers to a case where a man told a young woman he had just met at an isolated reservoir that his girlfriend did not 'meet his needs' and that he did not want to hurt her, before carrying her into the woods and having sexual intercourse with her.[133] As Schulhofer indicates, while, in this case, the accused does not seem to have issued an explicit threat – when he said that he did not want to hurt the complainant, perhaps he meant only 'we'll both enjoy this'[134] – he created so threatening a situation as to leave the complainant with no real choice other than to comply with his demands. The Code should continue expressly to acknowledge that where, as in a case like this, an accused has used 'intimidation' to induce a person to participate in sexual activity with him, that person is not consenting.[135]

I wish to address one more issue relating to 'coercion.' According to the LRCWA, 'coercive conduct' 'covers a much broader range of conduct than threats or intimidation.'[136] 'For example,' it notes, 'the NSWLRC was of the view that it would cover 'verbal aggression, begging and nagging, physical persistence, social pressuring and emotional manipulation''.[137] But while the LRCWA is right to observe that the NSWLRC thought this,[138] such a view seems wrong in certain respects. As the NSW Attorney General said in his Second Reading Speech for the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* (NSW), 'given the ordinary meaning'[139] of the words 'begging' and 'nagging', such conduct seems different from 'coercion' (or 'intimidation'). It was indicated above that 'coercion' exists where a person engages in sexual activity due to (a) a threat or (b) an offer that she has no real ability to refuse. And, as just noted, 'intimidation' exists where the accused, without issuing an explicit threat, creates a threatening

(a) 'a threat' and (b) 'coercion'. In other words, according to this argument, 'coercion' will always be present where there is a threat, so why not just have the law state that consent is absent when obtained by 'coercion' (as is the case in NSW)? I believe that there is utility in the law's stating that, when a person participates in sexual activity because of 'a threat' *or* 'coercion', she does not consent. The word 'threat' is probably more readily understood by juries than the term 'coercion'; and there is no harm in the law's making it as clear as possible to all participants in the criminal justice system that consent is absent when a person participates in seek activity because of a threat.

[133] Schulhofer, n 108, 1.

[134] Ibid.

[135] It is true that such conduct could be seen as 'coercion' – but, as with the word 'threat', 'intimidation' seems to be a term that juries would more readily understand than 'coercion'; and there seems no harm in making it clear in the Code that a person who participates in sexual activity because of 'intimidation' is not consenting. And while the intimidated person will seemingly always 'fear … harm', there might be cases where the harm feared is unspecific and where, therefore, it is easier to explain to a jury that the person was intimidated into compliance than to explain that she engaged in sexual activity because of a 'fear of harm'.

[136] The Law Reform Commission of Western Australia, n 1, 97 [4.240].

[137] Ibid.

[138] New South Wales Law Reform Commission, n 4, 100 [6.108].

[139] NSW Parliamentary Debates, Legislative Assembly, 20 October 2021, 7510.

situation.[140] 'Begging' and 'nagging' would not normally satisfy such criteria – and the same would be true of much 'social pressuring' and 'emotional manipulation'.[141] That said, as Ferzan has indicated,[142] there is much confusion over whether 'nagging' and 'begging' amounts to 'coercion'; and it would seem a good idea for the WA government to make it clear in the relevant extrinsic materials that it does not intend such conduct to 'reach the threshold of coercion … or intimidation'[143] (as the NSW Attorney General did).

Before leaving the issue of pressure and its effect on consent, there is one last point to note. That point is that I also support the insertion into the Code of provisions that state, respectively, that a person is not consenting to a sexual activity when she participates in that sexual activity 'because she or another person is unlawfully detained'[144] or 'because she is overborne by the abuse of a relationship of authority, trust or dependence'.[145] I support these provisions because, in such situations, the person has not participated in the sexual activity sufficiently autonomously. In the case of unlawful detention, her ability to choose has been seriously constrained by fear[146] (or some like emotion). In the case of abuse of authority (etc), her ability to choose has been seriously constrained[147] by the overbearing conduct of a person upon whom the complainant depends in some way, or to whom she is in some way subordinate.

## 6. The s 192(1) Offence

In this submission, I have argued that a person who participates in a sexual activity because of (a) a mistake or misapprehension or (b) a threat or intimidation, has, as a matter of fact, not consented to that sexual activity. And it follows, in my view, that if such persons are to be convicted of a criminal offence, that offence should be a non-consensual one. The criminal law

[140] This might also be 'coercion': see n 135.

[141] Where it did, then it follows from the above discussion that the complainant who participated in sexual activity because of such conduct would not be consenting.

[142] Ferzan, n 106, 955-6. Ferzan's basic position, with which I agree, is that, while the person who engages in sexual activity because of 'pester[ing]' or 'relentless whin[ing]' (at 972) has engaged consensually in that activity – unlike the person who has been threatened, intimidated or coerced, he has made a genuine choice to do what he has done (at 972-6) – the pesterer or whiner might well have acted reprehensibly: at 976-980.

[143] NSW Parliamentary Debates, Legislative Assembly, 20 October 2021, 7510.

[144] See *Crimes Act 1900* (NSW) s 61HJ(1)(g).

[145] See *Crimes Act 1900* (NSW) s 61HJ(1)(h).

[146] Accordingly, there would be significant overlap between this provision and a provision that stated that a person does not consent to a sexual activity if she participates in it because of 'fear of harm'. That said, just as the harm feared by an intimidated person might be unspecific (see n 133), the same is seemingly true of a person who is unlawfully detained; and, in any case, there seems no harm in the law's specifically stating that there is no consent where a person participates in sexual activity because he is unlawfully detained.

[147] The NSWLRC has said that this person's 'ability to make a free and voluntary decision about sexual activity' has been *removed* (New South Wales Law Reform Commission, n 4, 103 [6.126]) – but, in many cases at least, that would not be so. In the law of duress, a person's mind is said to be 'overborne' by threats of death or violence (see, eg, *R v Lawrence* [1980] 1 NSWLR 122, 143), yet in such cases he will seemingly always have *some* scope for choice. The person with a gun at his head has a choice, albeit not a meaningful or very attractive one.

should apply a label to such persons' wrongdoing that accurately reflects what they have done. (I deal with this issue in the recent article of mine concerning deceit – see **Appendix C** – and I add that it necessarily follows from the reasoning just outlined that the WA Parliament should insert into the Code no offence of breaching conditional consent[148]).

Section 192(1) of the Code makes it criminal for a person, (i) by 'threats or intimidation of any kind' or (ii) by 'any false pretence', to procure a person 'to have unlawful carnal connection with a man either in Western Australia or elsewhere' (unless, in a false pretence case, the deceived person is a female 'common prostitute' or is 'of known immoral character'). The offence is seldom prosecuted;[149] and, in my submission, it should be repealed. As just stated, in the two scenarios just noted, the relevant conduct is non-consensual and there is every reason for the law to recognise this.

It is true that the s 192(1) offence covers a third scenario. That is, in addition to dealing with threats and fraud, s 192(1) provides that it is criminal for a person to administer to another person, or to cause that person to take, 'any drug or other thing with intent to stupefy or overpower' that person so that a man might 'have unlawful carnal knowledge of [him or] her'. But it is hard to see the need for this. If the 'carnal knowledge' were actually to take place, the man who penetrated[150] the complainant would normally be guilty of the far more serious offence of sexual penetration without consent.[151] Or, where the person who administered (etc) the drug (etc) to the complainant was a person other than the man who penetrated her, the person would normally also be guilty of that crime.[152] If the 'carnal knowledge' were not actually to take place, the person who administered (etc) the drug (etc) would usually be guilty of the very serious offence created by s 293 of the Code, namely, administering or attempting to administer a 'stupefying or overpowering drug or thing to a person' 'with intent to commit or to facilitate the commission of an indictable offence.' And even where he was not guilty of that crime – as would be the case, for example, where he 'cause[d]' the complainant to take the drug or thing, but did not administer it to the complainant – he would often be guilty of attempting to commit an indictable offence (sexual penetration without consent)[153] or, in a case where he had acted so as

[148] See The Law Reform Commission of Western Australia, n 2, 102-3 [13.22]-[13.26]. It can be added that, if a person 'only agree[s] to have sex with a person if they will marry them' (at 102 [13.22]), some say that he has in fact consented to that activity if, at the time the relevant statement was made, the person had the intention to marry him. Their reasoning is essentially that, in such a case, the consenter has made no material mistake or misapprehension. He thinks that the other person intends to marry him and he is right. See Mark Dsouza, 'False Beliefs and Consent to Sex' (2022) 85(5) *Modern Law Review* 1191, 1201-2.

[149] Ibid 85 [11.4].

[150] See *Criminal Code Act Compilation Act 1913* (WA) s 6.

[151] *Criminal Code Act Compilation Act 1913* (WA s 325(1).

[152] *Criminal Code Act Compilation Act 1913* (WA) ss 7-8.

[153] *Criminal Code Act Compilation Act 1913* (WA) s 552(1). See also s 4.

to enable another to have 'unlawful carnal knowledge' of the complainant, conspiracy to commit an indictable offence (again, sexual penetration without consent).[154]

## 7. Honest and Reasonable Mistake of Fact

The LRCWA has posed a number of questions about the operation of the mistake of fact excuse in non-consensual sexual offence proceedings.

First, after noting that '[o]ne option for reform would be to provide that the mistake of fact defence does not apply to sexual offences',[155] the Commission has essentially asked whether this would be a good idea. It would not be. As I have argued at length elsewhere – see the article in **Appendix D** (especially 358-365) and the chapter in **Appendix E** (see pp. 109-111) – this is a draconian proposal that, if enacted, would be likely to contravene international human rights norms. That is essentially because, under it, certain morally innocent actors would be liable to be convicted of very serious offences. Take, for example, the person with an intellectual disability[156] who, reasonably for him, mistakenly believes that the complainant is consenting to sexual activity. Because such a person has not acted culpably, he should not be punished or exposed to the stigma that goes with such punishment. That is so even if, as might well not be the case, such punishment achieved some sort of utilitarian benefit.

Secondly, the Commission asks whether the mistake of fact excuse should be 'made more objective by providing that the jury should not take the accused's attributes and characteristics into account when determining whether their mistaken belief in consent was reasonable'.[157]In my submission, it should not be. Normally, when an accused's criminal liability depends on whether she has acted reasonably, the question will not be whether she has met the standards of a hypothetical reasonable person. It will instead be whether she has acted reasonably *for her*, taking into account *her* perceptions[158] and any factor personal to her that has affected her ability to perceive events accurately.[159] There is a very good reason for this. As the NSWLRC has indicated,[160] it would not be just – and neither would it be rational[161] – to hold a person criminally liable because of his failure to meet a standard of conduct that, because of a circumstance

[154] *Criminal Code Act Compilation Act 1913* (WA) s 558.

[155] The Law Reform Commission of Western Australia, n 1, 123 [5.27].

[156] Note, eg, the evidence in cases such as *R v Mrzljak* [2005] 1 Qd R 308 and *Butler v Western Australia* [2013] WASCA 242.

[157] The Law Reform Commission of Western Australia, n 1, 125.

[158] See, eg, *R v Lazarus* [2016] NSWCCA 52, [156]; *R v Wilson* [2009] 1 Qd R 476, 482-3 [20] (McMurdo P), 488-489 [39]-[41] (Fraser JA), 490 [52] (Douglas J).

[159] See, eg, *R v Mrzljak* [2005] 1 Qd R 308, 321 [53] (Williams JA), 329-330 [89]-[92] (Holmes J); *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [43].

[160] New South Wales Law Reform Commission, n 4, 128 [7.62].

[161] *The Queen v Lavender* (2005) 222 CLR 67, 108 [128] (Kirby J).

beyond his control, he was unable to meet.[162] In other words, as with the proposal to take mistake of fact away from persons accused of sexual offending, the proposal to grant mistake of fact to a sexual offence accused only if the mistake he might have made, might also have been made by a reasonable person, could quite easily lead to the conviction of some morally innocent actors.

Thirdly, the LRCWA asks whether the Code should provide guidance to assist juries to determine whether a mistaken belief in consent might have been reasonable.[163] With one presently relevant exception, I do not think that it should do so. That exception relates to self-induced intoxication. As is essentially the case in Queensland, the Code should provide that, for the purposes of mistake of fact, the trier of fact, when deciding whether the accused's alleged belief in consent was reasonable, must not have regard to her voluntary intoxication.[164] That is consistent with the current legal position[165] and, where an accused has voluntarily reduced his capacity to perceive events accurately, it seems fair to hold him to the standards that a person of ordinary capacities could be expected to have reached. That said, it is fictitious to prevent juries from having regard to an accused's intoxication when assessing whether she might *actually* have believed in the existence of the relevant circumstance (i.e. consent).[166] The current Western Australian legal position – that juries may take account of such intoxication when determining whether the accused might have believed in consent[167] – should be maintained.

There is one further matter that I want to comment on at this stage. It is this. The Code should not specify that a belief in consent is unreasonable if it arose from the accused's recklessness.[168] As the LRCWA notes, recklessness at common law can be either advertent or inadvertent. And, as the LRCWA also notes, it is only an advertently reckless accused who might be thought to be able to rely on the s 24 excuse.[169] That said, the possibility that she would be able to do so seems more theoretical than real. Because a person exhibits advertent recklessness only if he realises that there is a *real* risk that a circumstance exists,[170] it is hard to see how such a person could realistically hope to benefit from honest and reasonable mistake of fact. If a jury is sure that an accused realised that there was a real risk of non-consent, it would seem most unlikely to find it possible that he nevertheless might *reasonably* have believed that the complainant was

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[162] See too, eg, HLA Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2009) 136, 136.

[163] The Law Reform Commission of Western Australia, n 1, 138.

[164] *Criminal Code Act 1899* (Qld) s 348A(3).

[165] *Daniels v The Queen* (1989) 1 WAR 435, 445; *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [44].

[166] See Women's Safety and Justice Taskforce, 'Hear Her Voice: Women's and Girls' Experiences Across the criminal Justice System' (2022, Report II, Volume I) 221.

[167] *Daniels v The Queen* (1989) 1 WAR 435, 445.

[168] The Law Reform Commission of Western Australia, n 1, 136-7 [5.91]-[5.96].

[169] Ibid 136 [5.93]-[5.94].

[170] *R v Banditt* (2004) 151 A Crim R 215, 232 [92]. See too *Miller v The Queen* (2016) 259 CLR 380, 402 [44].

consenting.[171] The circumstances giving rise to the accused's appreciation of the real risk of non-consent would be very likely to lead a jury to conclude that any belief that he might have had in consent was not a reasonable one. Indeed, in most cases of advertent recklessness, juries would seem very likely to find that, additionally, the accused did not believe, even 'on balance',[172] that consent was present.

Fourthly, the LRCWA asks whether the Code should state that a person accused of non-consensual sexual offending is not entitled to rely on the s 24 excuse unless he took 'reasonable steps',[173] or 'did or said something',[174] to ascertain whether the complainant was consenting. In my submission, it should not. It is unclear whether a person can take 'reasonable steps' without doing or saying something to ascertain whether the other person was consenting,[175] although the Supreme Court of Canada has seemingly come close to holding that she can. While 'an accused cannot point to his reliance on the complainant's silence, passivity or ambiguous conduct as a reasonable step',[176] four justices in *Barton v The Queen* said, their Lordships also noted that 'the reasonable steps enquiry is highly fact-specific'[177] – and, in *The Queen v Morrison*,[178] seven justices accepted that a person might take 'reasonable steps' to ascertain another person's age by 'observing conduct or behaviour suggesting the other person is of legal age'. Perhaps it is the case in Canada, then, that if person merely observes the complainant's conduct and thinks that she has unambiguously done or said something to communicate consent, he has (depending on the circumstances) taken 'reasonable steps'.

That said, partly because[179] it is possible that a WA Court would hold that a person does not take 'reasonable steps' unless he does or says something to ascertain consent, a 'reasonable steps' provision should not be adopted in WA. And this brings us to provisions in jurisdictions such as the ACT and NSW that *do* prevent all,[180] or most,[181] persons accused of non-consensual sexual

[171] See The Law Reform Commission of Western Australia, n 1, 137 [5.96].

[172] Ibid 136 [5.94].

[173] See, eg, *Criminal Code Act 1924* (Tas) sch 1 s 14A(1)(c).

[174] See, eg, *Crimes Act 1900* (NSW) s 61HK(2).

[175] See the discussion in *Barton v The Queen* [2019] 2 SCR 579, 634-8 [101]-[109].

[176] Ibid 637 [107].

[177] Ibid 636 [106]. See also 637 [108].

[178] [2019] 2 SCR 3, 53 [112]. See also *R v Lazarus* (2017) 270 A Crim R 378, 406-7 [146]-[147], although the question in that case was what a 'step' was within the meaning of *Crimes Act 1900* (NSW) s 61HA(3)(d) (repealed), not what the taking of 'reasonable steps' might entail.

[179] Another reason is that a provision like *Criminal Code Act 1924* (Tas) sch 1 s 14A(1)(c) requires the jury to answer a complex, reasonable steps, question before it reaches the ultimate enquiry, namely, 'might the accused have believed on reasonable grounds that the complainant was consenting?' It seems simpler for the jury to take into account whether the accused said or did anything to ascertain whether the complainant was consenting, when deciding whether the accused might have had a reasonable belief in consent. See New South Wales Law Reform Commission, n 4, 141.

[180] *Crimes Act 1900* (ACT) s 67(5).

[181] *Crimes Act 1900* (NSW) s 61HK(2)-(4).

offending from relying on honest and reasonable mistake of fact unless they have taken verbal or physical measures to 'find out'[182] whether the complainant was consenting.

In an article published in the *Criminal Law Journal* in 2021, I stated my reasons for not agreeing with a provision along the lines of s 67(5) *Crimes Act 1900* (ACT). That sub-section provides that *no* person accused of non-consensual sexual offending can access honest and reasonable unless he might have done or said something to ascertain whether his partner was consenting. I have appended that article to this submission (see **Appendix F**) and I stand by my reasoning in it. Ultimately, the main problem with a provision such as s 67(5) is that, under it – and, as with the proposal, discussed above, to take the s 24 excuse away from those accused of non-consensual sexual offending – morally innocent persons are liable to be convicted of very serious offences. For example, the accused with an intellectual disability might, because of that disability, fail to realise that it is necessary to ask by word or gesture whether her partner is consenting to sexual activity. This accused person's reduced ability to perceive events accurately might lead her to think that consent has already clearly been granted. If such a person were then to engage in non-consensual sexual activity, she would not be culpable and it would be wrong to convict her of a serious offence. (In my submission, there are many other problems with 'affirmative consent' – including that it is conservative and takes an unrealistic approach to how some morally unproblematic sexual activity occurs. I discuss those problems in the article to which I have just referred, as well as an article that I published in the *Griffith Journal of Law and Human Dignity* in 2019: see **Appendix G**. See too some of the American literature on this point.[183])

Section 61HK(3)-(4) of the *Crimes Act 1900* (NSW) tries to avoid the problem that I have just noted. According to these provisions, a person who has not done or said anything to ascertain consent might[184] still be able to succeed on the basis of honest and reasonable mistake of fact in non-consensual sexual offence proceedings if she can prove on the balance of probabilities that, at the time of the relevant sexual activity, she had a 'cognitive impairment' or 'mental health impairment' that was 'a substantial cause' of her failure to say or do anything. But the question arises: why should *she* have to prove this? It is true that the party who seeks to raise the defence of insanity must prove that defence.[185] It is also true that Australian legislatures seem to be

[182] *Crimes Act 1900* (NSW) s 61HK(2).

[183] For example, Aya Gruber, 'Rape, Feminism and the War on Crime' (2009) 84(4) *Washington Law Review* 581; Aya Gruber, 'A Neo-Feminist Assessment of Rape and Domestic Violence Law Reform' (2012) 15(3) *Journal of Gender, Race & Justice* 583; Alison L Marciniak, 'The Case Against Affirmative Consnet: Why the Well-Intentioned Legislation Dangerously Misses the Mark' (2015) 77 *University of Pittsburgh Law Review* 51; Aya Gruber, 'Consent Confusion' (2016) 38(2) *Cardozo Law Review* 415; Ferzan, n 39; Janet Halley, 'The Move to Affirmative Consent' (2016) 42(1) *Signs* 257 (arguing that affirmative consent does not deserve its 'progressive reputation': at 278). Another problem with provisions such as *Crimes Act 1900* (ACT) s 67(5) and *Crimes Act 1900* (NSW) s 61HK(2)-(5) is that they create much complexity for jurors. A provision that simply requires juries to have regard to whether the accused said or did to ascertain whether the complainant was consenting, when resolving the honest and reasonable mistake of fact enquiry, creates a much more straightforward task for those juries.

[184] See *Crimes Act 1900* (NSW) s 61HK(5).

[185] *Criminal Code Act Compilation Act 1913* (WA) ss 26-27.

creating reverse onuses in criminal proceedings with increasing regularity.[186] But the reverse onus for insanity has been persuasively criticised;[187] the more serious the offence is, the harder a reverse onus is to justify;[188] and it is not convincing to argue that the reverse onus in s 61HK(4) is justified by any 'tremendous difficulty'[189] the Crown would encounter in disproving the matters referred to in s 61HK(3). That is because, especially if independent experts were required to provide reports about whether accused persons really might have had a 'cognitive impairment' or 'mental health impairment' that was a substantial cause of their failure to seek 'affirmative consent',[190] it would actually be quite difficult for an undeserving accused person to create a reasonable possibility that this was so. The idea that it is easy[191] for an accused person to fake a 'mental health impairment' or 'cognitive impairment' is not accurate.[192]

Moreover, a provision like s 61HK(4) creates the potential for a morally innocent person to be held liable for serious offending. Consider, for example, the person who might have had a 'cognitive impairment' or a 'mental health impairment' that was a substantial cause of her failure to 'seek affirmative consent'. If this accused were unable to prove this on the balance of probabilities, it might[193] be that he would be convicted in spite of a reasonable doubt as to his guilt.[194]

It follows that, if the WA Parliament is to adopt something similar to the NSW model, it should not insert into the Code a provision such as s 61HK(4). But the WA Parliament should not adopt that model at all. That is essentially because, while ss 61HK(2)-(4) are an improvement on the ACT position, the effect of a provision such as s 61HK(2) is to deem to be culpable certain accused who are not. In certain situations, that is, the accused who has neither done nor said anything to ascertain consent to a sexual activity, in fact has a reasonable belief in consent.[195] That is especially so where sexual touching is concerned – if a person is kissing a person she slept with the night before, for example, is it really blameworthy for her to touch his bottom without first seeking 'permission'? – but it also applies in certain cases of sexual penetration.

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[186] For one example, see *Criminal Code Act 1899* (Qld) s 304(9).

[187] See, eg, Timothy H Jones, 'Insanity, Automatism and The Burden of Proof on the Accused' (1995) 111 (July) *Law Quarterly Review* 475. See, too, the judgment of Wilson J in *R v Chaulk* [1990] 3 SCR 1303.

[188] See, eg, David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66(1) *Cambridge Law Journal* 142, 149-151.

[189] *R v Chaulk* [1990] 3 SCR 1303, 1337.

[190] See Women's Safety and Justice Taskforce, n 166, 216.

[191] See *R v Chaulk* [1990] 3 SCR 1303, 1342.

[192] As noted by, eg, Hamer, n 188, 162-3.

[193] I say 'might because this person would only be morally innocent if, as well as possibly satisfying the s 61HK(3) criteria, he might have believed reasonably that the complainant was consenting.

[194] If that were to happen, there would be a violation of the presumption of innocence: see, eg, *R v Oakes* [1986] 1 SCR 103, 134.

[195] See the examples provided at Women's Safety and Justice Taskforce, n 166, 223.

When sex occurs, the participants often perform a large number of acts. And a person is undoubtedly culpable if, during such activity, he notices, or ought to notice, that the other person is uncomfortable and continues with sexual activity even so. But, in the absence of such a sign of discomfort – which in many cases would be obvious – I do not accept that it is always blameworthy, during sexually penetrative activity, for a person to fail to 'do or say something' to ascertain whether her partner is consenting to all acts that take place. Women and men frequently do not seek consent before performing certain such acts. And, in my view, such conduct will be acceptable more frequently than some would concede.

Certainly, it is *not* acceptable for a person to: (a) fail to desist from a sexual activity once there is something to put her on notice that the other person is unwilling to continue to engage in that sexual activity; or (b) commence a sexual activity that there is a significant enough risk his partner will be unwilling to engage in, without first doing or saying something to ascertain whether his partner is willing to participate. But it is submitted that, if a provision were inserted into the Code that required juries in such cases, when dealing with the issue of honest and reasonable mistake of fact, to consider:[196]

> whether the accused … said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person consented to the sexual activity, and if so, what the accused person said or did.

most of these cases would be likely to result in convictions. Take, for example, a case such as *Lazarus*,[197] where the risk of non-consent seemed significant enough to render the accused culpable. In such a case, if a provision were in force, the trial judge would tell the jury that, when it came to assess the accused's claim of honest and reasonable mistake, it would have to take account of his failure to make any 'enquiry of the complainant before or during intercourse as to whether she was willing to have anal intercourse'.[198] As I have argued elsewhere (see the article in **Appendix F)**, a jury so instructed would seem likely to resolve the reasonable belief enquiry against the accused. In other words, a provision such as the one just noted would be likely to achieve many of the benefits of provisions such as s 67(5) *Crimes Act 1900* (ACT) and ss 61HK(2)-(5) of the *Crimes Act 1900* (NSW), without creating any of the injustice that those provisions are apt to produce (or the complexity that they do produce[199]).

Finally, the Commission asks whether it should be for the accused in non-consensual sexual trial, where honest and reasonable mistake of fact is in issue, to prove that excuse on the balance of probabilities.[200] It should not be. As noted above, the more serious the offence is, the more difficult it is to justify a reverse onus – it is objectionable to allow a person to be convicted of a

[196] New South Wales Law Reform Commission, n 4, 141.

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

[198] *R v Lazarus* [2016] NSWCCA 52, [130].

[199] See n 183.

[200] See The Law Reform Commission of Western Australia, n 1, 154.

serious offence despite the existence of a reasonable doubt as to his guilt – and, as Lawton LJ noted in *R v Edwards*,[201] if it were acceptable to reverse the onus of proof simply because the accused was 'best placed to provide proof'[202] of the relevant matter, 'anyone charged with doing an unlawful act with a specified intent would find himself having to prove his innocence.'[203] No doubt, it is difficult in some cases for the Crown to disprove honest and reasonable mistake. But it is better that it fails to do so in certain cases where the accused was in fact culpable than that some morally innocent actors are subjected to the stigma of imprisonment.

## 8. Offences

Very briefly, I also note that the Code should continue to distinguish between penetrative and non-penetrative acts. That is because, generally speaking, acts of penetration are more seriously intrusive than non-penetrative conduct and, where they are non-consensual, generally cause more harm than non-consensual non-penetrative acts.[204]

Further, I submit that the Code should continue to have aggravated and non-aggravated forms of the non-consensual sexual offences that it creates. As I have argued in the article in **Appendix A**, where a person (a) sexually penetrates or touches (etc) another person without consent *and* (b) applies, or threatens to apply, force to that person or causes that person to fear that force will applied to her, there are two wrongs. There is a breach of sexual autonomy and there is also the wrong that is criminalised by an offence such as common assault. On the other hand, where there is sexual penetration without consent, on its own, there is one wrong (a breach of sexual autonomy). The law should acknowledge that the offending in the first of these cases is generally even worse than the offending in the first. That said, where 'the offender does an act which is likely seriously and substantially to degrade or humiliate the victim'[205] it might be queried whether there is always a second wrong (though I am not sure how this provision has been interpreted). And the same might go for some of the possible further aggravating circumstances listed in the LRCWA's second Discussion Paper.[206] In short, I would have thought that it is only where a second wrong has been committed that non-consensual sexual offending should be aggravated.

Finally seems a good idea to have a separate section in the Code that provides, for the purposes of all of the non-consensual sexual offences: what consent is; when a person withdraws consent; and a non-exhaustive list of circumstances in which a person does not consent to a sexual activity.

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[201] [1975] 1 QB 27, 35.

[202] Ibid 153 [5.147].

[203] See too on this point Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 123(1) *South African Law Journal* 63, 87.

[204] See Law Reform Commission of Western Australia, n 2, 19-20 [4.21].

[205] *Criminal Code Act Compilation Act 1913* (WA) s 319(1)(a)(iv).

[206] Law Reform Commission of Western Australia, n 2, 106 [14.8].

This is essentially for the reasons stated by the Commission in its first Discussion Paper.[207] And, if my submissions were accepted, it would also be necessary for a section, similar to s 348A of the *Criminal Code Act 1899* (Qld), to be inserted into the Code. That provision would state that a person's self-induced intoxication cannot be taken into account, for the purposes of the s 24 excuse, when assessing the reasonableness of his belief in consent. It would also state that, when considering whether the accused might have believed on reasonable grounds that the complainant was consenting, juries[208]

> must have regard to whether the accused … said or did anything, at the time of the sexual activity or immediately before it, to ascertain whether the other person consented to the sexual activity, and if so, what the accused person said or did.

[207] Law Reform Commission of Western Australia, n 2, 116 [4.300].
[208] New South Wales Law Reform Commission, n 4, 141.