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RECENT CONSENT REFORMS (NSW)

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1. Introduction

1.1. For at least the past decade, the law of sexual assault in NSW has been in a seemingly constant state of flux. With almost nauseating regularity, Parliament has made numerous amendments to the substantive, procedural and evidentiary law regarding sex crimes. Some of these have been a genuine attempt to deal with the persistent and undoubtedly real problem of sexual violence against women, others had the pungent aroma of a cynical attempt to appease some or other interest group for political advantage.

1.2. The sweeping changes introduced by the *Crimes Legislation Amendment (Sexual Consent) Reform Act 2021* (the Amending Act) represent yet another instalment in this saga. It is these reforms which are the subject of this paper. The writer will leave it to each individual reader to form a view as to the purity of the intentions of the proponents of the reforms[1]. The main purpose of this paper is to inform practitioners about the reforms and their effect.

1.3. While the paper does not intend to criticise the motives of the architects of these reforms, as will become evident to the reader, it is critical of the process by which the reforms were arrived at as well as some of the new provisions which are the centrepiece of these reforms. The, likely unintended, consequences of the reforms are an excellent example of what can happen when parliament chooses to ignore the advice of the Law Reform Commission, arrived at after a lengthy and thorough process of consultation and consideration, and to adopt instead the views promulgated by advocates whose sole qualification is that they are a survivor of a non-consensual sexual encounter[2].

2. Overview of the reforms

[1] For the record, the writer's view is that the advocates of the reforms were well intentioned and motivated by a desire to address the epidemic of sexual misconduct which seems sadly all to prevalent in our society.
[2] This comment is not intended to suggest that the voices of those with lived experience of sexual assault are irrelevant- merely that there ought to be a recognition of the limitations of the ability of a person with no legal training to frame legislation.

2.1. Broadly speaking, the Amending Act introduces two principal reforms. First, it overhauls the substantive law of consent to sexual activity by replacing the former section 61HE of the *Crimes Act* 1900 with a new sub-division dealing with consent. The cornerstone of that sub-division is the introduction of an "affirmative consent" model of sexual consent. It does so mainly by introducing a requirement for sexual partners to take positive steps to ascertain whether the other person or persons involved in the encounter consents to it. Stated at this level of abstraction, this sounds like a perfectly reasonable requirement. As will be seen however, upon closer scrutiny, it presents a real danger of injustice to accused persons. Second, the Amending Act also introduces new mandatory directions which judges will generally be required to give to juries in sex trials, which are designed to dispel prevalent "rape myths".

2.2. This paper will deal exclusively with these two principal reforms. The Amending Act also makes other minor amendments to the definition of sexual intercourse and linguistic changes to other provisions of relevant legislation. These are of little practical significance and will not be discussed in this paper.

3. Brief background

3.1. The impetus for the reforms ushered in by the Amending Act came from a sexual assault law reform advocate by the name of Saxon Mullins, and the litigation relating to her alleged rape[3]. Briefly, in 2013 Ms. Mullins, who was a virgin at that time, was party to a sexual encounter with a young man (Mr. Lazarus) in a back alley outside a Kings Cross nightclub. Following this encounter, Ms. Mullins complained to police alleging that she did not consent to the sexual activity, resulting in Mr. Lazarus being charged with sexual assault offences.

3.2. There was no issue at trial that the sexual encounter took place. The main issue was whether Mr. Lazarus had a reasonable belief that Ms. Mullins consented to it. Mr

[3] See second reading speech to Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, Legislative Assembly Hansard, 20 October 2021; Saxon Mullins Bio: https://www.rasara.org/team/saxon-mullins; Saxon Mullins Catalysed NSW's Affirmative Consent Bill, But Her Work Isn't Done Yet, https://www.mamamia.com.au/saxon-mullins-consent/, Isabella Ross, 28 November 2021

Lazarus was found guilty after a jury trial. That finding was overturned on appeal by the Court of Criminal Appeal and the matter was remitted for re-trial.

3.3. At the second trial, which was heard by a judge alone, Her Honour found Mr. Lazarus not guilty on the basis that, in all the circumstances, he had a reasonable belief that Ms. Mullins consented. That finding was appealed by the Crown and the Court of Criminal Appeal again overturned the verdict on the basis that Her Honour misdirected herself as to the issue of consent. Rather than remitting the matter for retrial however, the Court discharged Mr. Lazarus, finding that after two trials and two appeal proceedings, it would be too onerous to put Mr. Lazarus through a third trial.

3.4. Following this saga, Ms. Mullins' story was the subject of a Four Corners report. In due course, she became a campaigner for reform of the law of consent, and an ardent advocate for affirmative consent[4].

3.5. Following the Four Corners story, the NSW government tasked the Law Reform Commission to review the law of consent in relation to sexual offences. As part of its review, the Commission gave anxious consideration to the question of whether there ought to be introduced into the law a requirement for an accused person to take positive steps to ascertain consent, as the affirmative model of consent dictates. Ultimately, the commission concluded that:

> *"We remain of the view that there should not be a requirement to take steps. We understand the reasons why submissions support this approach. However, we are concerned about the potential effect of such a requirement on the rights of accused persons."*[5]

3.6. Despite this advice, the Amending Act does introduce a requirement for an accused to take steps to ascertain consent. It seems that, on this issue, the advocacy of Ms. Mullins (amongst others no doubt) had the ascendency.

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[4] In fact, Ms. Mullins advocate the need for not jut "affirmative" consent, but "enthusiastic" consent.
[5] NSW Law Reform Commission, Report No. 148 "Consent in relation to sexual offences" at [7.120].

4. **The new sexual consent provisions**

4.1. As stated above, the Amending Act introduced a new legislative scheme with respect to the consent element of sexual offences, including the *mens-rea* in relation to consent. It does so by repealing the former s61HE of the *Crimes Act 1900* (in this section of the paper, the Act), which dealt with consent, and inserting in its stead a new subdivision on the same topic (being sub-division 1A of Division 10, Par 3).

4.2. Rather than laboriously setting out the entirety of the new division in the body of this paper, the full text of the subdivision is contained in appendix A. What follows below is a summary of the new provisions along with commentary on their potential effect, where that is considered useful. In reading the commentary that is offered here, the reader ought to bear in mind that because of the novelty of this sub-division there is as yet no jurisprudence concerning it. Until the various provisions of this sub-division receive judicial consideration in the superior courts, any commentary is necessarily speculative. It is inconceivable that the writer will accurately predict every aspect of the jurisprudence which will inevitably develop in relation to the new provisions and therefore at least some of the commentary herein is likely to age poorly.

4.3. S61HE- This section sets out three objectives of the subdivision. The first two are unremarkable, the third may prove of some significance in the construction of some of the subsequent provisions. It is to recognise that:

> *"consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity."*

4.4. S61HE deals with the offences to which the subdivision applies. It's effect is, unsurprisingly, that it applies of the whole gambit of sexual offences in the Act, from sexual touching to aggravated sexual intercourse without consent.

4.5. S61HH defines the term "sexual activity" as sexual intercourse, sexual touching or a sexual act.

4.6. S61HI deals with the concept of consent at generally. It provides that consent must involve free and voluntary agreement, and that it can be withdrawn at any time.

4.7. Of significance are sub-sections (5) and (6). SS (5) provides that a person who consents to a particular sexual activity is not, by reason of that fact, to be taken to consent to any other sexual activity. Superficially, this may seem like an appropriate principle of sexual consent however, its rigidity denies the reality of ordinary human sexual behaviour and risks unjust outcomes.

4.8. While it is inarguable that consent to one type of sexual activity cannot be assumed to constitute consent to another activity of equal or greater level in intimacy, it is not unusual and, the writer suggests, not unreasonable, for sexual partners to infer that a person who consents to a highly intimate sexual act also consents to a significantly less intimate act. For example, if a person consents to oral sex, is it unreasonable to assume that they also consent to kissing?

4.9. SS(6) may also prove problematic, particularly for long term partners. It provides *inter alia*, that consent on one occasion does not constitute consent on another occasion. This is certainly a sensible provision in the context of a nascent or short term sexual relationship but, what of long term partners who have been party to a committed relationship for many years, or even decades? They may have over that time developed a well-established sexual routine and be acutely aware of the ground rules of what activity is permissible and what is off limits. It is unrealistic in the extreme to require that partners in this position must not make any assumptions about what their partner consents to and must make a fresh enquiry of each other on each and every occasion they are partake is sexual activity.

4.10. S61HI(1) Contains a list of 11 circumstances which vitiate consent. Most are obvious and follow logically from the definition of consent S61HI. A few however deserve special mention. The first of these is ss (a). It provides that there is no consent where:

"(a) the person does not say or do anything to communicate consent."

4.11. In his second reading speech, the Attorney General explained that this provision is intended to address the "freeze response" to sexual assault[6]. Unfortunately, on a plain interpretation, this provision does much more. It radically alters the pre-existing position. Hitherto, consent was always regarded as a mental process. The communication of consent was a separate and distinct matter.

4.12. It appears that this position has now changed. A person's mental assent to sexual activity is no longer regarded as consent unless and until it is communicated to the other person(s) participating in the sexual activity. This may be thought to be of no practical significance. After all, if a person mentally agreed to a sexual activity, they are unlikely to complain about it to police, or so the argument may go.

4.13. This ignores two uncommon but distinctly possible circumstances. It is possible that a person who agreed to a particular activity at the time of participating in it, possibly when their sexual inhibitions were loosened by alcohol, may change their mind in the cold light of day. This is a scenario not unfamiliar to experienced criminal practitioners, particularly when the sexual activity in question is on the more "wild" end of the spectrum and the complainant is normally a sexually conservative person. In such a circumstance, a person may now be able to be found guilty of "rape" despite the fact that the complainant actually agreed to the activity at the time, simply because she/he did not communicate that consent. The other circumstance where this provision may lead to injustice is where the crown case at trial is that the complainant did not assent mentally to the sexual activity, but the evidence in the trial shows that they in-fact did assent to it but did not communicate their assent. In those circumstances, the law as it stands in NSW at present would require the tribunal of fact to return a finding of guilt.

4.14. SS(e) is also potentially problematic. It provides that a person does not consent where:

> *"the person participates in the sexual activity because of force, fear of force or fear of serious harm* ***of any kind*** *…"* emphasis added.

[6] See second reading speech to Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, Legislative Assembly Hansard, 20 October 2021.

4.15. The emphasized words suggest that where the crown relies on fear of serious harm to engage this provision, there is no limit to the kind of harm that can be relied on, so long as it can be characterised as "serious". Yet, there are some forms of harm which are arguably serious, but ought not result in criminal liability for a sexual offence.

4.16. One example of such harm might be where one partner indicates to the other that unless their relationship is sexual or involves a particular sexual activity, they propose to terminate the relationship. If the other partner is deeply in love with the that person, they may participate in a sexual activity with them out of fear of the emotional harm that would result from a termination of the relationship. Perhaps the answer to this conundrum is that the emotional anguish engendered by a termination of a romantic relationship can never be characterised as serious. On the other hand, this approach would seem to fly in the face of reality. After all, some people can be so traumatised by the termination of a relationship that they fall into clinical depression or even suicide.

4.17. SS(h) provides that consent is vitiated where a person is :

"overborne by the abuse of a relationship of authority, trust or dependence"

4.18. This provision throws up a number of potential problems. There is no guidance in the legislation as to what constitutes being "overborne". Nor odes the Second Reading speech comment on this issue. One possible construction of this term is that it requires a situation where the will of the complainant is so compromised that they are operating as an automaton, similar to the test for lack of voluntariness. More likely however, the intention is that something short of a complete incapacity of free will suffice. It remains to be seen how the court interpret this provision.

4.19. SS(k) also deserves closer scrutiny. It provides that there no consent where:

"the person participates in the sexual activity because of fraudulent inducement"

4.20. This provision must be read in concert with s61HJ(3) which is to the effect that for the purposes of s61HJ(3) **:**

"fraudulent inducement *does not include a misrepresentation about a person's income, wealth or feelings."*

4.21. These are very sensible exclusions. It is submitted however that they do not go far enough. Depending on how the superior courts construe the concept of a "fraudulent misrepresentation", there is potential for serious injustice.

4.22. For time immemorial, people have told each other all manner of misrepresentations in order to get them into bed. Some misrepresentations are of such gravity that they are (and always have been) rightly regarded as vitiating consent- an example of such a misrepresentation is where a sexual partner misrepresents themselves to be the complainant's regular sexual partner in circumstances where the other person has no opportunity to see them, or where a person misrepresents that the sexual activity is necessary for medical reasons or as a religious observance.

4.23. On the other hand, it does not take a vivid imagination to conceive of many misrepresentations one which might be made in order to persuade a person to participate in sex which are not of a quality which ought to result in the maker of those representations being guilty of a heinous sexual offence.

4.24. One such (the writer suspects reasonably frequent) example it of a man misrepresenting the size of his penis in the course of seeking to persuade a woman or man to engage in sexual activity with them. Another is a woman who wants to get pregnant but has a partner who does not want to father children misrepresenting to her partner that she is on the contraceptive pill in order to encourage him to participate in sex without a condom.

4.25. Yet another example might be a partner's misrepresentation of fidelity. In a circumstance where one partner engages in a sexual relationship with the other on the representation that their relationship is sexually exclusive, but the other partner is in

fact being unfaithful. On one view, every act of intercourse in that relationship could now be found to be non-consensual.

4.26. It is not suggested here that making misrepresentations of this kind is a laudable or even acceptable practice, merely that it ought not constitute a sexual offence. Indeed, the exclusions in s61HJ(3) show that parliament recognised that some misrepresentations ought not be capable of vitiating consent. It is not clear why only the three representations listed in that paragraph, amongst the almost infinite panoply of misrepresentations that can be made, were considered to be worthy of a carve-out.

4.27. It ought to be noted that the Second Reading speech contains a useful passage which supports a more restrictive interpretation of the term "fraudulent misrepresentation". In it, the Attorney General stated:

"Pick-up lines or white lies, without more, are unlikely to satisfy the legal criteria for fraud, and would be unlikely to satisfy the causative element of the provision. That includes claims like "it will be the best sex you will ever have" or "I'm rich", "I own this bar", "I can bench press 300 kilograms" or "I'm single". While some of the misrepresentations are immoral, it is not the intention of the bill to criminalise conduct that is not sufficiently serious or closely connected to the complainant's consent as to warrant attributing criminal responsibility. Only very serious deceit is intended to fall within the scope of this section."[7]

4.28. It is impossible to predict whether the jurisprudence in relation to this provision adopts the Attorney's comments as decisive. This question is not simple. On the one hand, courts regularly have regard to second reading speeches to ascertain the intention of parliament. On the other, the carve outs in sub-section (3) may have the paradoxical effect of limiting the circumstances which are said to be outside the ambit of fraudulent inducement because of the operation of the statutory interpretation maxim: *inclusio unis est exclusio alterius*[8]. Than again, the second reading speech refers to the exclusions in s61HJ(3) as non-exhaustive, which may possibly be said to displace the operation of that maxim.

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[7] *Ibid*

[8] To include one is to exclude the other.

4.29. For reasons which are beyond the scope of this paper to properly elucidate, the writer is of the view that the common law will give the concept of fraudulent inducement a construction consistent with the attorney generals comments. Ultimately however, only time will tell how far reaching ss61HJ(1)(j) will turn out to be.

4.30. SS61HJ2- this sub section provides that the list of circumstances in sub section (1) of the section is not exhaustive of the grounds on which an absence of consent can be established.

4.31. S61HK deals with the *mens-rea* element of consent. In other words, it provides when a person it taken to know that another person does not consent to sexual activity. It was described by the Attorney General as the cornerstone of the reforms[9]. Sub section (1) provides for the three ways in which the Crown can establish "knowledge" of an absence of consent, namely:

a) actual knowledge- if it can be established that the accused actually knew that the complainant did not consent, or

b) recklessness- if the accused was reckless as to whether the complainant consented, or

c) unreasonableness- if the accused's belief in the complainant's consent was not reasonable in the circumstances.

4.32 This sub-section substantially replicates the former s61HE(3) and does not therefore alter the pre-existing position. The only point of difference is that under the former provision, the unreasonableness ground required that there be "no reasonable ground" for the belief in consent. That was thought to potentially allow an accused person to escape criminal liability if they could point to a singular reasonable ground for their belief even where there may have been multiple other

[9] See second reading speech to Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, Legislative Assembly Hansard, 20 October 2021.

grounds making that belief unreasonable[10]. To overcome this potential issue, the new provision casts the focus on the overall reasonableness of the accused's belief.

4.33 In contrast to sub-section (1), sub-section (2) is entirely new and, it is submitted, ill-considered and misconceived. It reads:

"Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity".

4.34 Clearly enough, this provision is intended to institute the requirement for "affirmative consent". Regrettably, but not surprisingly given that is was the brainchild of well-meaning advocates with no legal training, it ignores some obvious practical realities of human sexual behaviour.

4.35 Self-evidently, every sexual encounter which can result in an allegation of a sexual offence involves two or more persons. Yet, each participant has a separate obligation to make a positive enquiry, through words and/or actions, of the other to ascertain consent, even if the other partner(s) have already expressed their consent. To illustrate how farcical this proposition can be, consider a situation wherein two adults are alone in a bedroom together. Person A undresses, says to person B "lets have sex" and lays down on the bed in a clearly sexual position. On a plain interpretation of the new provision, person B has no reasonable grounds for believing that person A consents to sexual intercourse with him/her because he/she (i.e. person A) has not said or done anything to ascertain person A's consent. They were a merely a passive observer of person A's actions and words.

4.36 It is suggested that the cumulative effect of the reforms in question has the real potential to cause injustice. The overall flaw in the new regime is that it seeks to impose a rigid, one-size fits all approach to a very nuanced and complex human behaviour. The reforms seem to have been developed with the kind of situation in mind that occurred in the Lazarus matter- two drunk strangers having a casual

[10] *Lazarus v R* [2016] NSWCCA 52 at [156]

sexual encounter in a back alley. In a situation of that kind, the approach adopted by the reforms may work well enough. What the framers of the reforms appear to have overlooked is that the majority of sexual encounters occur under very different circumstances, that is to say, between two long term partners who know each other very well and are well acquainted with their respective sexual preferences and limits.

4.37 By way of an illustration of the problems the new regime causes, consider the following scenario. The accused is charged with sexual touching. The complainant is the ex-wife of the accused. She alleges that on one occasion during the course of their 20 year relationship, while she and the accused were out for what was supposed to be a romantic walk along a beach, he unexpectedly put his hand in the back pocket of her pants without her consent. The accused is charged with the offence of sexual touching.

4.38 At hearing, the defence case is that during their relationship it was the usual practice for the complainant and the accused that when out for a romantic walk on the beach one or the other puts their hand in the back pocket of the other's pants, effectively touching their spouses back-side (through clothing). This is a habitual and instinctive action, and no words or gestures are exchanged leading up to it. The accused says that this is what happen of this occasion and that after he put his hand in the complainant back pocket, they continued strolling along the beach and the complainant clearly welcomed the gesture, as she had done hundreds of times before.

4.39 Assume that following hearing all of the evidence, the magistrate hearing the case accepts the accused's version of events and argument that the complainant welcomed the accused's gesture. Under the reforms, the magistrate would be compelled to find the accused guilty.

4.40 Because the accused did not say or do anything to ascertain the complainant's consent, pursuant to s61HK(2), he is deemed to have had no reasonable grounds for believing that the complainant consented to the touching, therefore the *mens rea* element is established.

4.41 Moreover, the sexual touching is deemed by the legislation to have been non-consensual. For one thing, the complainant did not communicate her consent and therefore pursuant to s61HJ (1)(a), the activity is deemed to be without consent, even though the magistrate accepts that the complainant actually did mentally assent to, and indeed welcomed, the touching. The fact the complainant had consented on hundreds of previous occasions, and did not say or do anything to indicate that this occasion was any different is also to no avail because of s61HI(4) and (6).

4.42 In the final analysis, in the circumstance posited above, all elements of the offence of sexual touching are present, and the offence is therefore made out. It is suggested that this is not a just outcome in all the circumstances.

4.43 A further consequence of the reforms is that fresh affirmative consent is required for every new type of sexual activity during a sexual encounter. It is fanciful to think that both (or all) participants in a sexual encounter can seek their partner's consent for each new type of activity. In the second reading speech, the attorney general sought to downplay this problem. He acknowledged that consent is required for every different type of sexual activity during a sexual encounter but denied that partners will need seek consent during an encounter because it is possible to give consent to a range of activities before the sexual activity begins. While technically correct, this proposed solution is at odds with the way most people behave. Most people do not engage in a discussion about which activities they consent to and which they do not before engaging in intercourse. Sexual activity between most humans is a fluid, spontaneous process. Further, sexual activity between long term partners usually relies heavily on their knowledge of each other's sexual practices and limits, derived from previous encounters and a shared understanding that if one of them does not consent a particular activity the other is embarking upon, they will indicate as much.

5 MANDETORY DIRECTIONS

5.1 The second key reform contained in the Amending Act is the introduction of new mandatory consent directions. To this end, the Amending Act inserts into

the *Criminal Procedure Act* 1986 a new subdivision 3 of division 1, part 5, chapter 6.

5.2 The new sub-divisions sets out new mandatory directions which judges will be required (in most cases) to give to a jury. The new directions are referred to as "consent directions" although, as will be seen, one of them is arguably of broader application. The consent directions are intended to address "common misconceptions about consent"[11].

5.3 The new subdivision is sufficiently brief to enable it to be reproduced in full in the body of this paper.

5.4 The new subdivision commences with s292, which is in the following terms:

"292 Directions in relation to consent

(1) This Subdivision applies to a trial of a person for an offence, or attempt to commit an offence, against the Crimes Act 1900, section 61I, 61J, 61JA, 61KC, 61KD, 61KE or 61KF.

(2) In a trial to which this Subdivision applies, the judge must give any 1 or more of the directions set out in sections 292A–292E (a consent direction)—

(a) if there is a good reason to give the consent direction, or

(b) if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction."

A judge is not required to use a particular form of words in giving a consent direction.

(4) A judge may, as the judge sees fit—

(a) give a consent direction at any time during a trial, and

[11] Ibid

(b) give the same consent direction on more than 1 occasion during a trial."

5.5. Sub section (1) effectively provides that the new subdivision applies to the full gambit of sexual offences. Sub section (2) is self-explanatory. No doubt the question of what constitutes a good reason not to give a consent direction will be the subject of much argument and judicial consideration in the ensuing years. The balance of the section is self-explanatory and requires no elaboration.

5.6. S292 A is in the following terms:

292A Circumstances in which non-consensual sexual activity occurs

Direction—

"Non-consensual sexual activity can occur—

(a) in many different circumstances, and

(b) between different kinds of people including—

(i) people who know one another, or

(ii) people who are married to one another, or

(iii) people who are in an established relationship with one another."

5.5 It seems to the writer that this direction is appropriate and uncontroversial.

5.6 S292B reads:

"292B Responses to non-consensual sexual activity

Direction—

(a) there is no typical or normal response to non-consensual sexual activity, and

(b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and

(c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity."

5.7 Sub-paragraph (c) of this section is potentially problematic because of the mandatory language it is couched in. The writer does not cavil with contemporary research which suggests that victims can respond to sexual assault in many different, and sometimes unexpected, ways. The argument advanced here is that this is a good reason for a jury to exercise great caution with respect to making any inferences based on the complainant's response to the alleged sexual assault, but not a reason to forbid altogether any consideration of the victim's conduct during or immediately following the alleged assault.

5.8 On one view, the use of the word "must" in ss(c) means that the jury is not entitled to use the response of the complainant to the alleged assault in determining the question of consent, no matter how counter-intuitive it may be. This construction is further supported when one compares this provision with the more ambiguous expression "does not necessarily mean that" is s292C- 292D. If that construction is adopted, evidence about the complainant's response would be inadmissible on the question of consent on the basis that it is irrelevant.

5.9 Section 292C reads:

292C Lack of physical injury, violence or threats

Direction—

(a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and

(b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

5.10 It is noteworthy that the concluding words of sub-section (b) seem to suggest that this direction is not confined to the fact finder's consideration of the question of consent, but rather applies generally to the assessment of the complainant's credibility relating to all aspects of the alleged assault, including the question of whether it occurred at all.

5.11 There may be circumstances where such a broad direction is clearly inappropriate. This may be so where the crown case is that the alleged assault was so violent that one would expect an injury, or that there was indeed an injury and/or there was a threat of violence. In those circumstances if a jury found that there was no such injury or that the alleged threats were not in fact made, that finding would obviously be highly relevant to the question of the complainant's credit. This may be a circumstance where there is good reason not to give this direction.

5.12 Section 292D reads:

"292D Responses to giving evidence

Direction—

(a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and

(b) the presence or absence of emotion or distress does not necessarily mean that a person in not telling the truth about an alleged sexual offence."

5.13 It would be wrong to be critical of this direction in so far as it will make it more difficult for the defence to seek to undermine a complainant's credit on the basis of an apparent lack of emotion or distress while giving evidence. Indeed, in this regard, it echoes the caution which the superior

courts have long urged in placing undue weight on a witness's demeanour[12]. In so far as there is a valid criticism, it is that the direction is very one sided. It encourages the fact finder to be cautious about making an **adverse** inference about a complainant's credit based on the absence of emotion but does not urge similar caution about making **favourable** inferences based on the presence of apparent distress. This asymmetry runs the danger of conveying, by omission, the message that the presence of distress is highly supportive of a complainant's credit.

5.14 Section 292E

"292E Behavior and appearance of complainant

Direction—

It should not be assumed that a person consented to a sexual activity because the person—

(a) wore particular clothing or had a particular appearance, or

(b) consumed alcohol or another drug, or

(c) was present in a particular location."

5.15 It seems to the writer that no reasonable person could argue with the correctness of this direction.

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3/02/2023

[12] See *Fox v Percy* [2003] HCA 22 at [20]

APPENDIX A

CRIMES ACT 1900 - SECT 61HF

Objective

61HF OBJECTIVE

An objective of this Subdivision is to recognise the following--

(a) every person has a right to choose whether or not to participate in a sexual activity,

(b) consent to a sexual activity is not to be presumed,

(c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

CRIMES ACT 1900 - SECT 61HG

Application of Subdivision

61HG APPLICATION OF SUBDIVISION

(1) This Subdivision applies to offences, or attempts to commit offences, against sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.

(2) This Subdivision sets out--

(a) the circumstances in which a person consents or does not consent to a sexual activity, and

(b) the circumstances in which a person knows or is taken to know that another person does not consent to a sexual activity.

CRIMES ACT 1900 - SECT 61HH

Definitions

61HH DEFINITIONS

In this Subdivision--

"consent" has the same meaning as in section 61HI.

"sexual activity" means sexual intercourse, sexual touching or a sexual act.

CRIMES ACT 1900 - SECT 61HI

Consent generally

61HI CONSENT GENERALLY

(1) A person
"consents" to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.

(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.

(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.

(4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.

(5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.
Example--: A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with--
(a) that person on another occasion, or

(b) another person on that or another occasion.

CRIMES ACT 1900 - SECT 61HJ

Circumstances in which there is no consent

61HJ CIRCUMSTANCES IN WHICH THERE IS NO CONSENT

(1) A person does not consent to a sexual activity if--
(a) the person does not say or do anything to communicate consent, or

(b) the person does not have the capacity to consent to the sexual activity, or

(c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or

(d) the person is unconscious or asleep, or

(e) the person participates in the sexual activity because of force, fear of force or fear of serious 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, or

(f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of--
(i) when the coercion, blackmail or intimidation occurs, or

(ii) whether it occurs as a single instance or as part of an ongoing pattern, or

(g) the person participates in the sexual activity because the person or another person is unlawfully detained, or

(h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or

(i) the person participates in the sexual activity because the person is mistaken about--
(i) the nature of the sexual activity, or

(ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or

(j) the person participates in the sexual activity with another person because the person is mistaken--
(i) about the identity of the other person, or

(ii) that the person is married to the other person, or

(k) the person participates in the sexual activity because of a fraudulent inducement.

(2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.

(3) In this section--

"fraudulent inducement" does not include a misrepresentation about a person's income, wealth or feelings.