Mistaken Beliefs about Consent

Andrew Dyer[*]

A. Introduction

Australian commentators tend to commence any discussion of the mental element for rape and like offences with the House of Lords' controversial decision in *Morgan v Director of Public Prosecutions.*[1] As is well-known, in that case, a majority of their Lordships held that a man would only 'rape a woman' within the meaning of s 1(1) of the *Sexual Offences Act*[2] if he had non-consensual sexual intercourse with her, knowing that she was not consenting or 'not caring'[3] whether she was a willing participant. In other words, a man would be acquitted of rape if he may have had a genuine, though mistaken, belief in consent; such a belief need not also have been reasonable.[4]

For many years after *Morgan*, certain Australian jurisdictions followed the approach stated in that case.[5] In New South Wales ('NSW'), for example, the law stated until 2008 that a person would only be guilty of 'sexual assault'[6] if, at the time s/he had non-consensual sexual intercourse with another person, s/he knew of the complainant's non-consent, or was 'reck-

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1 *DPP v Morgan* [1976] AC 182 ('*Morgan*').

2 *1956*, 4 & 5 Eliz 2 c 69 (repealed).

3 *DPP v Morgan* [1976] AC 182, 215 (Lord Hailsham). See also at 203–4 (Lord Cross).

4 Ibid. 203–4 (Lord Cross), 214 (Lord Hailsham), 237–9 (Lord Fraser).

5 That said, certain Australian jurisdictions did not. When *Morgan* was decided, it had long been the case in Tasmania, Western Australia and Queensland that a person accused of rape would not be excused simply because he might have believed that the complainant was consenting. It also had to be possible that it was reasonable for him to believe that she was participating willingly. Those jurisdictions maintained that approach after *Morgan*. See, eg, *Snow v The Queen* [1962] Tas SR 271; *Arnol v The Queen* [1981] Tas R 157; *Attorney-General's Reference No 1 of 1977* [1979] WAR 45; *R v Thompson* [1961] Qd R 503, 516.

6 *Crimes Act 1900* (NSW) s 61I.

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less' as to the relevant circumstance.[7] Because recklessness entailed (a) an actual realisation that the complainant might not be consenting or (b) a failure to advert at all to the question of consent,[8] an accused who might have believed, however unreasonably, that a non-consenting complainant was consenting, would be excused.

In 2008, however, the NSW Parliament altered this position. According to the then Attorney General, the *Morgan* test was 'outdated'.[9] From now on, he announced, the law would state that a person would have the mens rea for sexual assault, not merely if s/he knew that the complainant was not consenting or was reckless as to her or his consent, but also if s/he believed unreasonably that the complainant was consenting.[10] Furthermore, the Minister said that, when assessing whether a particular accused had the requisite mens rea, the trier of fact would be required to take into account 'any steps taken by the [accused] … to ascertain whether' consent had been granted.[11] This remained the law in NSW until 1 June 2022;[12] and the position is much the same in the majority of Australian jurisdictions:[13] if the Crown can prove that the accused had non-consensual intercourse with the complainant, believing unreasonably that s/he was consenting, the accused will be guilty of rape/sexual assault/sexual penetration without consent.[14]

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7 *Crimes Act 1900* (NSW) s 61R(1) (repealed). At the time of writing, two Australian jurisdictions continue to follow the *Morgan* approach: see *Criminal Code Act 1983* (NT) s 192(3); *Criminal Law Consolidation Act 1935* (SA) s 48(1).

8 See, e.g., *Mitton v R* (2002) 132 A Crim R 123, 129 [28]. In a case of such inadvertence, the Crown additionally had to prove that the risk of non-consent would have been obvious to a person of the accused's mental capacity had s/he turned his or her mind to the relevant matter.

9 New South Wales, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (John Hatzistergos, Attorney General).

10 Ibid. 3586.

11 Ibid.

12 As noted in the latter sections of this chapter, on that date certain changes to the NSW law regarding non-consensual sexual offending came into effect. It remains the case that a person will be liable for sexual assault if s/he had non-consensual sexual intercourse with the complainant believing unreasonably that the complainant was consenting: *Crimes Act 1900* (NSW) s 61HK(1)(c). But s 61HK(2) severely limits the availability of honest and reasonable mistake of fact to those accused of non-consensual sexual offending.

13 See, e.g., *Crimes Act 1958* (Vic) s 38(1)(c); *Criminal Code Act 1899* (Qld) ss 24, 348A. Cf *Criminal Law Consolidation Act 1935* (SA) ss 47–48.

14 The terminology used to describe such offending differs as between the various Australian jurisdictions. See, e.g., *Criminal Code Act 1899* (Qld) s 349(1), creating the offence of 'rape', *Crimes Act 1900* (NSW) s 61I, creating the offence of 'sexual

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In this chapter, I consider recent Australian proposals to tighten up the mental element for non-consensual sexual offending still further, or to remove it completely.[15] I argue that many of these proposals are objectionable – essentially because, if they were enacted (as they essentially now have been in two jurisdictions[16]), they would have the potential to cause blameless actors to be convicted of very serious offences.[17] That said, one can see what is motivating those who have campaigned for such reforms. In the face of very low conviction rates for sexual offences in Australia,[18] it is understandable that people should look for ways to ensure that those who commit such offences are held to account. And, given 'the ease with which [a person] … can ascertain the consent of his partner',[19] it is perhaps unsurprising that some believe that *all* those who fail to take this step should be convicted if their respective partners are unwilling.[20] It is argued here that the law can respond to the concerns voiced by such commentators while also upholding 'the rights of accused persons'.[21] It can do this by providing that juries must *take into account* an accused's failure to do or say something to ascertain whether the complainant was consenting, when those juries assess whether it might have been reasonable for the accused

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assault'; and *Criminal Code Act 1913* (WA) s 325(1), creating the offence of 'sexual penetration without consent'.

15 See, e.g., Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform', 39 *University of Queensland Law Journal* 1, especially 25–31 (2020); Wendy Larcombe et al, ''I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law', 25(5) *Social and Legal Studies* 611, 623 (2016).

16 *Crimes Act 1900* (NSW) ss 61HK(2)-(3); *Crimes Act 1900* (ACT) s 67(5). See also *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), which at the time of writing has not yet come into force.

17 As I have argued at length elsewhere. See, e.g., Andrew Dyer, 'Contemporary Comment: Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism?', 45(3) *Criminal Law Journal* 185 (2021); Andrew Dyer, 'Progressive Punitiveness in Queensland', 48 *Australian Bar Review* 326 (2020).

18 See, e.g., New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences*, Report No 148 (2020) 15–22 [2.10]-[2.36].

19 David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law*, 15th edition 2018, 791.

20 See, e.g., Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform', *59 British Journal of Criminology* 296, 302 (2019); Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?', 32(3) *Current Issues in Criminal Justice* 346, 354–6 (2020).

21 See, e.g., New South Wales Law Reform Commission (note 18), 139 [7.120].

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mistakenly to believe that s/he was.[22] It should go no further than this, however.

B. Recent reform campaigns in Australia

It is necessary at this stage briefly to note the events that have led to calls in various Australian jurisdictions – most particularly, NSW and Queensland – for amendments to the mental element for rape/sexual assault and like offences.

The NSW campaign resulted primarily from 'community concern'[23] arising from litigation involving Luke Andrew Lazarus, who had been charged with one count of sexual assault after an encounter that he had had with a young woman in a Sydney laneway in May 2013. Within minutes of meeting each other on the dancefloor of a nightclub that was part-owned by Lazarus's father, Lazarus and the complainant had repaired to a laneway near the premises, where consensual kissing took place.[24] 'I should get back to my friend', said the complainant, after a while.[25] 'No, stay with me, your friend won't miss you', came the reply.[26] The complainant stayed in the laneway.[27] After some more kissing, Lazarus directed the complainant to put her hands against a nearby wall.[28] His tone, the judge at his second trial found, was neither 'aggressive' nor 'intimidatory'.[29] The complainant complied with the request that Lazarus had made, whereupon he pulled her stockings and underpants down.[30] The complainant did nothing to resist this.[31] Lazarus then attempted unsuccessfully to engage in penile-vaginal intercourse with the complainant.[32] 'Shit you're tight', he announced.[33] 'What do you expect?' the complainant replied. 'I'm a

22 Ibid. 141.
23 Ibid. 5 [1.25].
24 *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017) ('*Lazarus trial*').
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid. However, the complainant had pulled her undergarments up when Lazarus had tried to pull them down at a previous stage in the laneway.
32 Ibid.
33 Ibid.

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fucking virgin'.[34] After a further attempt to penetrate the complainant's vagina, Lazarus had penile-anal intercourse with her.[35]

At Lazarus's first trial, a jury convicted him as charged, and Judge Huggett sentenced him to a minimum period of three years' imprisonment.[36] However, Lazarus then successfully appealed to the NSW Court of Criminal Appeal ('NSWCCA') against his conviction. The trial judge, their Honours found, had misdirected the jury about the mental element for sexual assault.[37] At a second trial, heard by Judge Tupman sitting alone,[38] the judge acquitted the accused. While the Crown had proved that the complainant was not consenting to the intercourse that occurred, her Honour found, Lazarus might have believed on reasonable grounds that she *was* consenting.[39] Crucial to Judge Tupman's conclusion on this point were two factual findings that she had made, namely, that (a) Lazarus had not behaved aggressively and (b) the complainant had not said 'stop' or 'no' or resisted in any other way.[40]

The problem, however, was that, when assessing whether Lazarus had the mens rea for sexual assault, Judge Tupman had failed to comply with her obligation, then imposed by s 61HA(3)(d) of the *Crimes Act 1900* (NSW), to have regard to any 'steps' that Lazarus had 'taken … to ascertain whether' the complainant was consenting.[41] On a prosecution appeal to the NSWCCA, that Court held that this failure amounted to an error; but their Honours also held that it would be oppressive to Lazarus to order

34 Ibid.
35 Ibid.
36 *Lazarus v The Queen* [2016] NSWCCA 52, [19].
37 Ibid. [156]. The trial judge's error was to imply that the jury should convict Lazarus if it was satisfied that a *hypothetical reasonable person* would have realised that the complainant was not consenting. The correct question is, in fact, whether any belief that the accused had in consent was a reasonable one *for him or her* to hold. This distinction has often been drawn in Australian cases where the accused's liability has hinged on whether his or her conduct or beliefs might have been reasonable: see, e.g., *R v McCullough* (1981) 6 A Crim R 274, 281; *Aubertin v Western Australia* (2006) WAR 87, 96 [41]-[43]; *R v Wilson* [2009] 1 Qd R 476, 482–3 [19]-[20] (McMurdo P), 488 [38]-[39], 490 [52] (Douglas J).
38 The trial was heard by judge alone due to the publicity that the case had attracted and the consequent risk of jury prejudice; *Lazarus trial* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017).
39 Ibid.
40 Ibid.
41 *R v Lazarus* (2017) 270 A Crim R 378, 406–7 [143]-[148].

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that he be tried for a third time.[42] As a result, the question of whether Lazarus was guilty of sexual assault was left unresolved.[43]

This outcome was unpopular with the public, which had long been encouraged by the press to regard Lazarus as a spoilt and entitled individual who had behaved disgracefully in the laneway.[44] Moreover – and most relevantly for the purposes of this chapter – certain commentators were critical of the reasoning that Judge Tupman had deployed when acquitting the accused. According to these commentators, the judge had not *only* wrongly failed to take into account any 'steps' that Lazarus took to ascertain whether the complainant was consenting, when her Honour determined whether his asserted belief in consent might have been reasonable. In addition, it was said, Judge Tupman placed undue emphasis on the complainant's failure to resist, when her Honour made the findings that she did about the accused's mental state. For Horan and Goodman-Delahunty, because 'genuine victims of sexual assault … [do not always] 'say 'stop' or 'no' and will [not always] attempt to escape or fight back',[45] it was wrong for the judge to attach any significance to the complainant's passivity when resolving the mens rea question. For Cossins, likewise, the complainant's 'lack of physical resistance' did not rationally bear on whether Lazarus had made a reasonable mistake.[46] '[T]he law on rape',[47] she said, was deficient. It was deficient because it allowed a 'fact-finder to decide that sexual intercourse with a non-consenting person is not a criminal offence'.[48]

In my view, these comments are misconceived. It was perfectly rational for Judge Tupman to find that the complainant's failure to resist Lazarus

42 Ibid. 411 [168].
43 As noted by Mark Speakman and Pru Goward, 'Sexual Consent Laws to be Reviewed' (Media Release 8 May 2018) https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/sexual-assault-consent-laws-to-be-reviewed.pdf (accessed August 25, 2022).
44 A prominent Sydney-based radio announcer seemed to sum the situation up accurately when he told Lazarus in an interview that 'the court of public opinion views you as scum': 'Ben Fordham Confronts Luke Lazarus' https://www.2gb.com/exclusive-ben-fordham-confronts-luke-lazarus/ (accessed August 25, 2022).
45 Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned', 43(2) *UNSW Law Journal* 707, 708 (2020).
46 Annie Cossins, 'Why Her Behaviour is Still on Trial', 42(2) *UNSW Law Journal* 462, 489 (2019).
47 Ibid. 477.
48 Ibid.

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was relevant (though no more than that) to whether he might have believed on reasonable grounds that she was consenting. That is because, as Duff has pointed out, it is only where there is no resistance – and no aggression from the accused – that a person can make a reasonable mistake about consent.[49] Or, to put the matter in a different way, if the complainant's failure to resist could *not* be taken into account when resolving the reasonable belief question, it is hard to see how an accused could ever be excused on the basis of a lack of mens rea. Cossins's suggestion that, in fact, an accused *should* never be excused on this basis – that is, her apparent contention that there should be a conviction in *all* cases where an accused engages in non-consensual intercourse with another person – must be rejected. Before elaborating on this point, however, it is necessary to note that Cossins is not the only commentator who has made such claims. In recent years, for instance, two Queensland commentators have argued that Parliament should render the honest and reasonable mistake of fact excuse 'inapplicable to the issue of consent in rape and sexual assault cases' in that State.[50] Like Cossins, these commentators are troubled by the fact that, while a person who fails to resist is not necessarily consenting, her or his lack of resistance may provide the foundation for 'the mistake of fact excuse'.[51]

C. *Why Mens Rea Is Important – and Why Certain Australian Rape/Sexual Assault Law Reform Proposals Are Therefore Untenable*

In *Sweet v Parsley*, Lord Reid referred to 'the public scandal of convicting [a person] on a serious charge'[52] without the prosecution's first proving that that person had a blameworthy state of mind when s/he performed the relevant conduct. And in *Thomas v The King*, Dixon J stated, similarly, that 'the most fundamental element in a rational and humane criminal code'[53] is the requirement that a person be convicted of serious criminal wrongdoing only upon proof that s/he has *culpably* inflicted the relevant harm. But *why* is the matter so fundamental? And *why* is imposing criminal liability without fault so 'scandal[ous]'?

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49 RA Duff, 'Recklessness and Rape', 3(2) *Liverpool Law Review* 49, 62 (1981).
50 Crowe and Lee (note 15), 4–5.
51 Ibid. 9.
52 *Sweet v Parsley* [1970] AC 132, 150.
53 *Thomas v The King* (1937) 59 CLR 279, 309 ('*Thomas*').

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Ashworth has answered these questions in clear and persuasive terms. There are, he says, 'two principal' reasons[54] why it is objectionable for the state to punish the blameless. The first reason concerns the rule of law and the avoidance of state arbitrariness. The criminal law, Ashworth observes, should be a 'guide to action':[55] it should respect individual autonomy by warning the citizen in advance of the consequences that will ensue if s/he does what the law prohibits. But the law displays 'contempt'[56] for individual autonomy when it punishes those who, though they have been warned, could in reality have done nothing more than what they did to heed that warning. In such circumstances – in circumstances, that is, where we punish those who had no 'fair opportunity'[57] to avoid doing what the law proscribes – the state's compliance with the fair warning requirement is illusory. The second reason concerns state censure[58] and can be stated briefly. Quite simply, a person should not be subject to harsh punishment and all of the stigma that goes with it, unless s/he has acted culpably. In other words, if we punish without culpability, we visit hard treatment upon and expose to 'public condemnation'[59] those who are morally innocent.[60]

It follows that it is impossible to agree with those Australian commentators who support an absolute liability[61] standard for rape and similarly stigmatic sexual crimes. No one would consider convicting of a homicide offence those who blamelessly kill,[62] so why should the position be different regarding those who blamelessly engage in non-consensual sexual relations with others? Certainly, such persons exist. Take, for example, the person with an intellectual disability[63] who believes, reasonably for him

54 Andrew Ashworth, 'Should Strict Criminal Liability Be Removed from All Imprisonable Offences?', 45 *Irish Jurist* 1, 5 (2010).
55 Ibid. 5.
56 Ibid. 6.
57 HLA Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in HLA Hart, *Essays in the Philosophy of Criminal Law*, 2nd ed. 2008, 136, 152.
58 Ashworth (note 54), 5.
59 Ibid. 7.
60 See, e.g., Kimberley Kessler Ferzan, 'Consent, Culpability and the Law of Rape', 13(2) *Ohio State Journal of Criminal Law* 397, 421 (2016).
61 Liability without fault is commonly referred to in Australia as 'absolute liability': cf the English practice of referring to such liability as 'strict liability': see, e.g., *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 469 (Lord Steyn).
62 Ferzan (note 60), 422.
63 Note, eg, the accused's accounts in cases such as *R v Mrzljak* [2005] 1 Qd R 308 and *Butler v Western Australia* [2013] WASCA 242.

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or her, that a non-consenting complainant is consenting. To say that the conviction of such an individual is acceptable,[64] because his or her 'lack of culpability … [can] be reflected in his [or her] sentence',[65] is to ignore the fact that s/he should not be being sentenced in the first place.[66]

For like reasons, we should reject 'affirmative consent' proposals that, if enacted, would have the law state that a person may be acquitted of rape or a like offence on the basis of a lack of mens rea, only if s/he has first 'ensure[d]'[67] that the complainant was consenting. For, in truth, such proposals attempt to achieve indirectly what the proposal just discussed would achieve directly: the removal of a culpability requirement for non-consensual sexual crimes. If the only person who could successfully rely on honest and reasonable mistake of fact were the person who had 'obtain[ed] clear, expressed indications of consent [from the complainant] before engaging in the acts(s)',[68] that 'excuse' would in fact be preserved in form only. It would have no actual operation.[69] That is because the person who has obtained 'clear ... and positive'[70] expressions of consent is having consensual sex, and therefore does not need to rely on a claim that s/he reasonably though *mistakenly* believed that the complainant was consenting.

With all that said, however, it is necessary to make two observations. The first observation is that we should not exaggerate the number of defendants who do, in fact, blamelessly engage in non-consensual sexual activity. Given the defendant's proximity to the complainant at the time of the relevant conduct, it will in many cases not be reasonable for him or her wrongly to believe that consent has been granted.[71] The second observation is a related one. However critical we might be of 'affirmative consent' provisions, it is easy to 'agree that best sexual practices involve clear communication'.[72] And it can readily be conceded that, often, it is

64 Jonathan Crowe and Bri Lee, 'Mental Incapacity', *Consent Law in Queensland* (Web Page) https://www.consentlawqld.com/mental-incapacity (accessed Agusut 25, 2022).

65 See *R v Hess* [1990] 2 SCR 906, 955 (McLachlin J) ('*Hess*').

66 Ibid. 924 (Wilson J). See also *CC v Ireland* [2006] 4 IR 1, 76 [34] (Hardiman J).

67 Burgin, (note 20), 302.

68 Ibid.

69 As I have argued on a number of occasions elsewhere. See, e.g., Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr', 7(1) *Griffith Journal of Law and Human Dignity* 1, 11–12 (2019).

70 Crowe and Lee (note 15), 28.

71 Duff (note 49), 62.

72 Aya Gruber, 'Consent Confusion', 38 *Cardozo Law Review* 415, 445 (2016).

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not unduly burdensome to the initiator of sexual activity to check with the other person whether this is something that s/he is willing to do. To be sure, there are cases where it is unfair to hold a person liable for non-consensual sexual offending simply because s/he has neither said nor done anything to ascertain whether the other participant is consenting. Defendants with intellectual disabilities, mental illnesses, or autism spectrum disorders are perhaps the most obvious exemplars of this point.[73] But, if we return to *Lazarus*, it seems reasonable for commentators to have argued[74] that the defendant there ought to have checked whether the complainant, whom he knew to be a virgin, and whom he had met only minutes before, was 'willing to have anal intercourse'.[75] Given this, it would also seem reasonable for the law to require triers of fact to *have regard to* such defendants' passivity when deciding whether they might have believed on reasonable grounds that the complainant was consenting. I shall develop this point in the next section.

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73 See, e.g., Dyer, 'Contemporary Comment' (note 17), 190.

74 See, e.g., Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases', 31(1) *Current Issues in Criminal Justice* 24, 33 (2019).

75 *Lazarus* [2016] NSWCCA 52, [130]. What if Lazarus had succeeded in having penile-vaginal intercourse with the complainant the first time he attempted to do so? My own view is that, in those circumstances, it might have been reasonable for him to believe that she was consenting. In the absence of aggression from him, or resistance from the complainant (although she had pulled her underwear up the first time Lazarus tried to pull it down), and without any knowledge on his part that the complainant was a virgin, his failure to ask 'are you consenting?' might have been more understandable than was his same failure when events unfolded as they in fact did. Note the similar example in Janet Halley, 'The Move to Affirmative Consent', 42(1) *Signs: Journal of Women in Culture and Society* 257, 266 (2016); and note, too, that as Hörnle has suggested, we should be circumspect about inflicting 'potentially life-destroying criminal conviction[s]' on those who 'fail … to deal appropriately with ambiguity': Tatjana Hörnle, 'The New German Law on Sexual Assault and Sexual Harassment', 18(6) *German Law Journal* 1309, 1320 (2017). With that said, however, I have no difficulty in accepting that, even on those facts, Lazarus would have acted with a 'troubling insensitivity' (to use the words of Kyron Huigens, 'Is Strict Liability Rape Defensible?' in RA Duff and Stuart Green, *Defining Crimes: Essays on the Special Part of the Criminal Law*, 2005, 196, 207). And I maintain that any person who is found by a judge to have engaged in non-consensual intercourse with another person should examine his or her conduct and beliefs: Andrew Dyer, 'Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need for s 61HE of the Crimes Act to be Changed (Except in One Minor Respect)', 43(2) *Criminal Law Journal* 78, 86 (2019).

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D. Consideration of a defendant's 'steps' to ascertain whether the complainant was consenting

We have seen that, on a prosecution appeal against Judge Tupman's decision to acquit Luke Lazarus, the NSWCCA found that her Honour had erred by failing to consider which 'steps', if any, Lazarus took to ascertain whether the complainant was consenting. Section 61HA(3)(d) of the *Crimes Act 1900* (NSW) made it perfectly clear that, when a trier of fact assessed whether the accused might have had a reasonable belief in consent, it (or s/he) was *required* to have regard to such steps.[76] But what is a 'step'? According to the NSWCCA, a person could take a 'step' within the meaning of the relevant sub-section without either saying anything or performing any 'physical … act'.[77] Rather, the Court held, 'a "step" … extends to include a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.'[78] Under such an approach, Judge Tupman would have committed no error if she had taken into account in Luke Lazarus's favour, when her Honour resolved the reasonable belief question, his formation of a positive belief that the complainant was consenting. As many commentators have argued, this would seem to defeat the purpose of the 'steps' provision.[79] For so long as triers of fact can take into account in the accused's favour the fact that s/he formed a positive belief in consent, when assessing whether that same belief might have been reasonable, little encouragement is provided to people to take more active measures to determine whether their sexual partners are consenting.

Shortly after the Lazarus litigation had concluded, the NSW government required the NSW Law Reform Commission ('NSWLRC') to consider whether reforms should be made to the NSW law relating to consent and knowledge of non-consent for the purposes of sexual assault and similar offences.[80] In its Final Report, issued in September 2020,[81] the

76 This provision stated that, '[f]or the purpose of making any … finding' about mens rea in a sexual assault case, 'the trier of fact *must* have regard to … any steps taken by the [accused] … to ascertain whether' the complainant was consenting. (Emphasis added).

77 *Lazarus* (2017) 270 A Crim R 378, 407 [147].

78 Ibid.

79 See, e.g., Mason and Monaghan (note 74), 33; Dyer, 'Sexual Assault Law Reform in New South Wales' (note 75), 97–99.

80 Speakman and Goward (note 43).

81 New South Wales Law Reform Commission (note 18).

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NSWLRC recommended that a number of reforms be made. Relevantly to the present discussion, one of those recommendations was that 'the concept of "steps" be clarified to direct the attention of fact finders [at sexual offence trials] to whether the accused person said or did anything to ascertain whether the complainant consented and, if so, what.'[82] In other words, according to the Commission, trial judges should be required to instruct juries that they must consider whether the accused took any *verbal or physical* steps to ascertain whether the complainant was consenting, when those juries determine whether it might have been reasonable for the accused mistakenly to believe in the existence of consent.[83]

It is submitted that this recommendation is eminently reasonable. It is inevitable that, when resolving the reasonable belief question, juries will focus to an extent on what the complainant did and did not do around the time of the relevant sexual activity. If s/he did not resist, then, depending on the circumstances, that might mean that the accused had a reasonable basis for any mistake s/he has made about consent.[84] It seems only fair to require juries also to consider the accused's omissions when answering the same question. If the accused did not ask, by word or gesture, 'are you consenting?', this might, in a particular case, allow the jury more readily to conclude that it was not reasonable for him or her to think that s/he was.

It is, however, regrettable that the NSW government decided to 'go further' than the NSWLRC urged it to go.[85] Responding to the NSWLRC's proposals, the NSW Attorney General on 25 May 2021 announced that the government intended to alter the law, so as to have it provide that an accused's belief in consent was not reasonable unless he or she 'said or did … something to ascertain consent'.[86] 'This means that we will have an affirmative model of consent', the Attorney General said, 'which will address issues that have arisen in sexual offence trials about whether an

82 Ibid. 146 [7.160].

83 Note the similar recommendation of the Queensland Law Reform Commission, which has also recently issued a Report about consent and mistake of fact in non-consensual sexual offence cases: Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (2020) 189 [7.108]. The Queensland government has now acted on this recommendation: *Criminal Code Act 1899* (Qld) s 348A(2).

84 See, e.g., *R v IA Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).

85 Mark Speakman, 'Consent Law Reform' (Media Release, 25 May 2021) https://www.dcj.nsw.gov.au/news-and-media/media-releases/consent-law-reform (accessed August 25, 2022).

86 Ibid.

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accused's belief that consent existed was actually reasonable.'[87] 'No one', he continued, 'should assume that someone is saying 'yes' just because they don't say 'no' or don't resist physically'.[88]

It is true that the resulting Bill,[89] which was passed by the NSW Parliament on 23 November 2021 and became law on 1 June 2022, was marginally less draconian than some[90] had feared it would be. I referred above to defendants with intellectual disabilities, mental illnesses or other cognitive impairments. Due to the inability of such persons to perceive events accurately, they might mistakenly, but reasonably for them, believe that their respective partners are consenting to sexual activity – and that there is therefore no need to 'say or do anything' to ascertain whether such consent has been granted. It 'would not be rational to impute blame' to such persons;[91] indeed, it would be deeply unjust. The NSW government has, to a limited extent, acknowledged this difficulty. Certainly, NSW law does now hold an accused's belief in consent not to have been reasonable if he or she '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 [was] consent[ing] … to the sexual activity'.[92] But this does not apply to those who, at the time of the sexual activity, had a 'cognitive impairment' or 'mental health impairment' that was 'a substantial cause' of their failure to 'say … or do … anything'.[93] That said, it is for such an

87 Ibid.

88 Ibid.

89 *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* (NSW).

90 See, e.g., Dyer, 'Contemporary Comment' (note 17), especially 190–1; Stephen Odgers SC, 'Peril in Sexual Consent 'Reform'', *Sun Herald*, 30 May 2021, 25. Others, however, failed to perceive any difficulties with the Attorney General's proposal: see, e.g., Justin Gleeson SC, 'Sexual Consent Reforms Will Brings Laws into Line with Community Standards', *The Sydney Morning Herald*, 3 June 2021 <https://www.smh.com.au/national/nsw/sexual-consent-reforms-will-bring-laws-into-line-with-community-standards-20210602-p57xgn.html> (accessed August 25, 2022); Eden Gillespie, ''Cautiously Optimistic': Experts Respond to NSW Consent Law Reform', *SBS*, https://www.sbs.com.au/news/the-feed/cautiously-optimistic-experts-respond-to-nsw-consent-law-reform> (accessed August 25, 2022).

91 *R v Lavender* (2005) 222 CLR 67, 108 [128] (Kirby J).

92 *Crimes Act 1900* (NSW) s 61HK(2).

93 *Crimes Act 1900* (NSW) s 61HK(3). Note that, in the Australian Capital Territory, a new 'affirmative consent' provision contains no such exception. *Crimes Act 1900* (ACT) s 67(5) simply states that the belief in consent of a person accused of non-consensual sexual offending is 'taken not to be reasonable … if the accused person did not say or do anything to ascertain whether the other person consented.' This means that the person with, say, an intellectual disability, whose mistaken

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accused to prove on the balance of probabilities that his or her cognitive difficulties did substantially contribute to his or her passivity[94] (which of course constitutes an attack on the presumption of innocence and has the potential to facilitate the conviction of blameless actors[95]); and there are other problems with the new law.

All of these problems stem from the one cause: the law states to be true that which is not.[96] In other words, according to it, an accused who has failed to 'say or do anything' to ascertain whether a non-consenting complainant is consenting, can only possibly have a reasonable belief in consent if that accused had a 'cognitive impairment' or a 'mental health impairment' at the relevant time. But this is wrong. It is easy to think of cases where an accused's mistaken belief in consent might be reasonable, though s/he (a) has neither said nor done anything to determine whether

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belief in consent is a reasonable one for *him or her* to hold, will nevertheless be convicted of a very serious offence if s/he failed to say or do anything to work out whether his or her partner was consenting.

94 *Crimes Act 1900* (NSW) s 61HK(4).

95 The point was made well by Dickson CJ in *R v Oakes* [1986] 1 SCR 103, 132. 'If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence,' his Lordship said, 'it would be possible for a conviction to occur despite the existence of a reasonable doubt'. It is true that s 61HK(4) does not require the accused to disprove an *essential element of an offence*. But it does require him or her to prove a matter before the jury may consider whether the Crown has proved the mental element of sexual assault and like offences. Accordingly, it leaves open the possibility of a conviction in a case where it is reasonably possible that the accused lacked mens rea. In a case where it is possible, but not probable, that the accused's 'cognitive impairment' or 'mental health impairment' was a 'substantial cause' of his or her failure to say or do anything to ascertain whether the complainant was consenting, it might also be possible that the accused reasonably believed that the complainant was consenting: i.e. lacked mens rea. Yet such an accused will now be convicted in NSW.

96 A case that comes to mind here is the Supreme Court of Canada's decision in *Vaillancourt v The Queen* [1987] 2 SCR 636. In that case, the impugned provision allowed a person who had caused the death of another to be convicted of murder without proof of subjective fault on his or her part. It was enough for the Crown to prove, for instance, that s/he had 'a weapon upon … his [or her] person' at the time that s/he performed the relevant conduct: at 646. Crucial to the majority's conclusion that the provision breached ss 7 and 11(d) of the *Canadian Charter of Rights and Freedoms 1982* was its finding that it enabled murder convictions in cases where the accused had displayed neither subjective nor objective culpability: at 656–9. As I argue below, the NSW provision suffers from the same vice. It allows convictions for serious sexual offending in cases where the accused displayed no fault: that is, where s/he might have had a reasonable belief in the existence of consent.

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the complainant was consenting to the sexual activity and (b) was experiencing no cognitive or mental health problems when the non-consensual activity occurred.

Consider, for example, the youth, who, because of his or her inexperience, mistakenly believes that his or her sexual partner is an enthusiastic participant, and who therefore never asks that person, by word or gesture, 'are you consenting?' Is it really accurate to say that such a person's belief in consent will *never* possibly be reasonable?

Consider, too, that the new provision will apply, not just to penetrative sexual activity, but also to sexual touching and sexual act offences.[97] If a person, while kissing a person with whom s/he has recently engaged in sexual activity, intentionally touches that person sexually, is it necessarily unreasonable for him or her to believe that that other person is consenting to the touching? And if a person kisses, or attempts to kiss, a person whom s/he wrongly thinks will welcome such attentions, is s/he invariably acting culpably? The answer that NSW law delivers to both of these questions is 'yes'. It is submitted that such a response is an irrational one that, additionally, reflects an unrealistic approach to how certain morally unproblematic sexual activity occurs.[98]

E. Conclusion

At the conference at which I delivered the paper upon which this chapter is based, no participant commented unfavourably on the argument that I have just presented; indeed, various participants were surprised to hear that there is now so much enthusiasm in jurisdictions such as NSW and Queensland for rape and like offences to become (or effectively to become) offences of absolute liability. How different this response was from the response that I have received from some Australian commentators when I have expressed similar ideas.[99]

Contrary to what those latter commentators have argued, proposals to remove a culpability requirement for very serious sexual offences, either di-

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97 *Crimes Act 1900* (NSW) s 61HG(1). The sexual touching offences are created by *Crimes Act 1900* (NSW) ss 61KC and 61KD. The sexual act offences are created by ss 61KE and 61KF.

98 See New South Wales Law Reform Commission (note 18), 138 [7.114].

99 The same sentiment exists in other Anglophone jurisdictions, as is demonstrated by the country reports in this volume for the United States and England and Wales.

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rectly or by stealth, are not in the least bit 'progressive'.[100] And nor is it objectionably conservative to insist that we honour our centuries-long commitment to the 'humane [and] … liberal'[101] notion that those responsible for a harm, however grave, should only be imprisoned if they have displayed some form of culpability.[102] To be sure, the law should place some onus on those who initiate sexual activity to show a proper concern for the welfare and interests of those who are the object of their attentions. Moreover, there is much to be said for the view that, the more information an accused person has, and the more accurately s/he perceives the events with which s/he is confronted, the less understandable it might be for him or her to refrain from taking verbal or physical steps to ascertain whether his or her partner is consenting.[103] But to criminalise all mistakes about consent would be a punitive and retrograde response.[104] Even if such a policy were to increase conviction rates for sexual offences by very much – and it is doubtful whether it *would*[105] – such pragmatic considerations cannot justify the abandonment of our principled objections to punishment without fault.

100 Larcombe et al (note 15), 624.
101 *Thomas* (1937) 59 CLR 279, 302 (Dixon J).
102 See, e.g., *Hess* [1990] 2 SCR 906, 918 (Wilson J).
103 Huigens (note 75), 209.
104 See, e.g., Halley (note 75), especially 276–8; Hörnle (note 75), 1320.
105 This is because, at most non-consensual sexual offence trials, the only controversial question is whether the complainant consented. Only at a minority of such trials will the accused claim that, even if the complainant was not consenting, the accused believed (reasonably) that s/he *was*. On this point, see, e.g., *Director of Public Prosecutions for the Northern Territory of Australia v WJI* (2004) 219 CLR 43, 77 [107] (Kirby J).

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