

A REVIEW OF THE NEW LEGISLATIVE DEFINITION OF CONSENT IN QUEENSLAND: AN OPPORTUNITY FOR WESTERN AUSTRALIA?

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This article examines recent amendments to the definition of consent in the Queensland Criminal Code, with a view to recommending amendments to the Western Australia Criminal Code. Shortcomings in the definition of consent in the Western Australian Code are highlighted and suggestions are provided as to how these might be remedied. Given the different origins and form of criminal law across Australian states and territories, the definition of consent has naturally varied. In some instances, these variations are semantic, and the content of the law is uniform. In other cases, interpretive ‘grey areas’ exist, with the very real consequence that the concept and content of ‘consent’ may operate differentially across state borders. Given the shared genesis (and current similarity) of the Queensland Criminal Code and the Western Australia Criminal Code, there are few reasons for their definitions of consent to vary in form and substance.

I INTRODUCTION

The 2021 Australian of the Year, Grace Tame, has worked tirelessly to highlight the invidious problem of sexual violence in Australia. In particular, Tame acknowledges that there are nine different definitions of consent across the country and argues that understanding consent is critical to preventing sexual violence.¹ The debate about the scope of consent is topical. New South Wales and Victoria are currently taking steps to strengthen their definition of consent by

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¹ Kate Ainsworth, ‘Grace Tame Urges Action on Matters of Consent, Condemns Reputational Damage Control in Wake of Tasmania Sexual Harassment Investigation’, ABC News (online, 25 August 2021) <<https://www.abc.net.au/news/2021-08-25/grace-tame-urges-action-on-matters-of-consent/100407774>>.

legislating an affirmative consent model.² Queensland and Western Australia have not adopted an affirmative consent model, although the Queensland Law Reform Commission recently completed a review of consent laws as they relate to sexual offending ('QLRC Final Report').³ This led to a new definition of consent being inserted into the *Criminal Code Act 1899* (Qld) Sch 1 ('Queensland Criminal Code' or 'QCC') in April 2021.⁴ This article focuses on the definition of consent in Queensland and Western Australia because the criminal codes operative in these jurisdictions are colloquially described as 'Griffith Codes' and share the same genesis.⁵ The Law Reform Commission of Western Australia announced in December 2021 that it would be reviewing ch 31 of the *Criminal Code Compilation*

² The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) received royal assent on 8 December 2021 and will commence on a date to be proclaimed. See also New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020). Victoria is planning to adopt an affirmative consent model, which was recommended by the Victorian Law Reform Commission: Margaret Paul, 'Affirmative Consent Laws to be Introduced in Victoria for Sexual Assault Cases', *ABC News* (online, 12 November 2021) <<https://www.abc.net.au/news/2021-11-12/victorian-affirmative-consent-sexual-offences-justice-reform/100615234>>; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021).

³ Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) ('QLRC Final Report').

⁴ *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) Pt 3; *Criminal Code Act 1899* (Qld) sch 1 ('QCC') ss 347, 348, 348A. In 2019, the Queensland Government referred the issue of consent for the purposes of sexual offences to the Queensland Law Reform Commission: Queensland Government, *Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence* (Report, 2019) 4, 21. At the time of writing, the Queensland Supreme and District Court Criminal Directions Benchbook did not accurately reflect the significant legislative changes to the definition of consent that came into effect in the *Criminal Code* (Qld) in April 2021 as a result of the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld). The Queensland Supreme and District Court Criminal Directions Benchbook on the topic of 'Rape s 349 (Offences Occurring after 27 October 2000)' was out of date by more than six months. Ideally, the Benchbook should be reviewed and updated accordingly after each amendment to the criminal law. See Queensland Courts, 'Supreme and District Courts Criminal Directions Benchbook', *Rape s 349 (Offences Occurring after 27 October 2000)* (Web Page, November 2020) 168 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/86179/sd-bb-168-rape-s349-offences-occurring-after-27-october-2000.pdf>. There is no equivalent (publicly available) Directions Benchbook in Western Australia.

⁵ The English criminal law was codified in Queensland and Western Australia more than 100 years ago by Sir Samuel Griffith: Michael Kirby, 'Foreword' in Thomas Crofts and Kelley Burton, *The Criminal Codes: Commentary and Materials* (Lawbook Co, 6th ed, 2009). Today, authors continue to explore the fundamental principles of the Griffith Codes in Queensland and Western Australia together in textbooks, even though the criminal law in the two jurisdictions has been dynamic over time and, at times, evolved differently in response to changing social attitudes. See Eric Colvin, John McKechnie and Elizabeth Greene, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 9th ed, 2021); Kelley Burton, Thomas Crofts and Stella Tarrant, *Principles of Criminal Law in Queensland and Western Australia* (Lawbook Co, 3rd ed, 2020); Thomas Crofts et al, *The Criminal Codes: Commentary and Materials* (Lawbook, 7th ed, 2018); John Devereux and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 9th ed, 2016); Kelley Burton, *Criminal Law in Queensland and Western Australia: LexisNexis Questions and Answers* (LexisNexis Butterworths, 2nd ed, 2015); Andrew Hemming, *Criminal Law Guidebook: Queensland and Western Australia* (Oxford University Press, 2015); Thomas Crofts, *Criminal Law in Queensland and Western Australia: Study Guide* (LexisNexis Butterworths, 2nd ed, 2014). Even though Tasmania and the Northern Territory are also referred to as Code jurisdictions, they differ in significant ways from the Queensland and Western Australian Codes.

Act 1913 (WA) (*Western Australia Criminal Code* or ‘WACC’), with a focus on the meaning of consent as it relates to sexual activity.⁶ The overarching goal of this article is to analyse the definition of consent in Queensland with a view to identifying law reform opportunity in Western Australia.⁷ Advocating for change so that the criminal law reflects contemporary social values and promotes sexual autonomy is preferable to a Griffith Code jurisdiction in Australia being left behind and again being labelled as an ‘anachronism’.⁸

Preventing sexual violence is an overdue priority in Queensland and Western Australia. In the 2020 calendar year, 7,144 sexual offences were recorded in Queensland and 7,724 were recorded in Western Australia.⁹ There has been a general uptrend in the incidence of sexual offending in both states since 2010.¹⁰ While there is no doubt that sexual violence has received increased media coverage in Australia over the previous years, the recent data trends in Queensland and Western Australia do not provide an accurate picture of sexual violence in these jurisdictions. The prevalence of sexual violence is likely far worse than shown in the statistics, as this data only reflects the victims of sexual offending who actually report an offence to police.

Both the *QLRC Final Report* and the earlier Queensland Government Report, ‘*Prevent. Support. Believe. Queensland’s Framework to Address Sexual Violence*’ (‘*Queensland’s Framework to Address Sexual Violence*’), acknowledge that sexual offences are significantly under-reported.¹¹ There are myriad barriers to reporting sexual offences. These include victims fearing discrimination, the offender, or both; victims fearing being stigmatised; victims feeling shame or blame; victims feeling like they will not be believed if they report what has happened; victims not trusting authorities; victims not considering the sexual violence as a serious crime; and the challenges in reporting sexual violence due to language competency and cultural concerns.¹² In a milieu where some victims struggle to report and others choose not to report sexual violence, there is a clear and urgent need for appropriate support services and a coordinated, holistic,

⁶ Law Reform Commission of Western Australia, ‘Project 113 — Sexual Offences’, *Western Australia Government* (Web Page, 8 December 2021) <<https://www.wa.gov.au/government/publications/project-113-sexual-offences>>.

⁷ A discussion of the excuse of mistake of fact in relation to consent for sexual offences is beyond the scope of this article (but see *QCC* (n 4) s 348A). Instead, the focus of this article is on the legislative definition of consent as it relates to the elements of sexual offences in Queensland and Western Australia.

⁸ Andrew Hemming, ‘Why the Queensland, Western Australian and Tasmanian Criminal Codes are Anachronisms’ (2012) 31(2) *University of Tasmanian Law Review* 1, 1.

⁹ Queensland Police, ‘Sexual Offences Numbers for All Queensland since 2001’, *Queensland Crime Statistics* (Web Page, 2022) <<https://mypolice.qld.gov.au/queensland-crime-statistics/>>. See also Queensland Government Statistician’s Office, *Crime Report, Queensland, 2019–2020* (Report, 26 May 2022) 7; Western Australia Police Force, ‘Crime in Western Australia’, *Crime Statistics* (Web Page, 28 April 2022) 3 <<https://www.police.wa.gov.au/crime/crimestatistics#/>>.

¹⁰ Queensland Government, *Prevent. Support. Believe. Queensland’s Framework to Address Sexual Violence* (Report, 2019) 5 (‘*Queensland’s Framework to Address Sexual Violence*’).

¹¹ *QLRC Final Report* (n 3) 48; *Queensland’s Framework to Address Sexual Violence* (n 10) 9.

¹² *QLRC Final Report* (n 3) 48, 50.

inter-disciplinary national response to prevent sexual violence. The criminal law in each state and territory in Australia forms an important part of this national response.

Despite the fact that the criminal codes in Queensland and Western Australia share the same genesis, sexual offences in these two jurisdictions are labelled differently and comprise different elements. The appropriate labelling of offences serves to communicate to the community what an offender has done wrong without needing to be a lawyer.¹³ In Queensland, the key sexual offences include rape, sexual assaults, attempt to commit rape and assault with intent to commit rape.¹⁴ Rape expressly contains the element of consent and, correspondingly, this is imported into the offence of attempt to commit rape.¹⁵ In addition, some types of sexual assault contain the element of consent.¹⁶ Other types of sexual assault do not mention the element of consent, but it is still relevant due to the definition of assault in the QCC, which in turn refers to consent.¹⁷ The equivalent sexual offences in Western Australia include sexual penetration without consent, aggravated sexual penetration without consent, indecent assault and aggravated indecent assault.¹⁸ For these Western Australian offences, sexual penetration without consent and aggravated sexual penetration explicitly contain the element of consent.¹⁹ While consent is not an explicit element of indecent assault and aggravated indecent assault, it is still relevant as an element of ‘assault’.²⁰ The definition of consent is therefore critical to several sexual offences in Queensland and Western Australia, and requires clear and articulate treatment in the both jurisdictions.

This article consists of five parts, each of which analyses aspects of Queensland law-reform relating to sexual offending, and the potential applicability of these changes to the WACC. Part II of this article discusses the desirability of having a singular definition of consent for sexual offences in both the QCC and the WACC. The QCC was recently amended to ensure that the same definition of consent applied to a range of sexual offences, where previously this had not been the case. The wording of the WACC is examined to see if similar amendments are required in that State. Part III considers recent legislative amendments in Queensland that explicitly reflect common law principles

¹³ James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) *Modern Law Review* 217.

¹⁴ See QCC (n 4) ss 349, 352, 350, 351.

¹⁵ QCC (n 4) ss 349–50.

¹⁶ QCC (n 4) s 353(1)(b)(i)–(ii).

¹⁷ QCC (n 4) s 353(1)(a), (2)–(3). See QCC (n 4) s 245 regarding the definition of assault.

¹⁸ See *Criminal Code Act 1913* (WA) (‘WACC’) ss 325, 326, 323, 324. In Western Australia, circumstances of aggravation include pretending to be armed or armed with a dangerous or offensive weapon or instrument, being in the company of another person, the accused does bodily harm to another person, the accused does an act that is likely to seriously and substantially degrade or humiliate the victim, the accused threatens to kill the victim, and the victim is 13 years of age or over but under 16 years of age: WACC s 319.

¹⁹ WACC (n 18) ss 325–6.

²⁰ *Ibid* ss 323–4. See *ibid* s 222 regarding the definition of assault.

regarding consent for the purpose of sexual offences. The focus is on the absence of consent when a complainant does not say or do anything to communicate a lack of consent. It is argued that Queensland could have taken stronger steps in the drafting of its new s 348(3) and that the WACC would benefit from adopting a more strongly worded provision.

Part IV of this article acknowledges the longstanding common law principle that a person may withdraw from sexual activities at any point through words or conduct. Where a person continues to engage in sexual activity after another person has withdrawn their consent to sexual activity, then there is no ongoing consent. This longstanding principle is now reflected in the QCC as a result of the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) amendments to the definition of consent. Finally, further opportunities for refining the Western Australian legislative definition of consent are explored in Part V. Particular focus is placed on circumstances where fraud vitiates consent and the difficulties encountered by the Western Australian Court of Appeal when dealing with the issue of fraud and consent.

II GIVING A CONSISTENT MEANING TO CONSENT FOR ALL SEXUAL OFFENCES

An important and sensible amendment made by the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) relates to the applicability of the definition of consent in s 348 to different sexual offences contained in ch 32 of the QCC. Historically, there was an assumption that the definition of consent in s 348 applied to all offences in ch 32 of the QCC.²¹

In the Queensland Court of Appeal decision of *R v BAS* ('BAS'),²² Fryberg J concluded as a matter of statutory interpretation that the definition of consent only applied to offences in ch 32 of the QCC where the word 'consent' was expressly mentioned.²³ The case of *BAS* involved the appellant touching or making contact with the breasts and vaginas of seven young women over a period of approximately six months. He was found guilty after trial on nine counts of indecent dealing, 12 counts of sexual assault and three counts of rape. The appellant had engaged in indecent touching and digital penetration of some of the women, under the pretence that he was performing a form of alternative therapy to help with sports injuries and issues of posture. The Crown case was argued on the basis that consent to the acts was not freely and voluntarily given, as that consent was obtained by false and fraudulent representations about the nature or purpose of the acts.²⁴ The fact that the offences of both rape and sexual assault

²¹ *R v BAS* [2005] QCA 97 ('BAS').

²² *Ibid.*

²³ *Ibid* [51]–[52].

²⁴ *Ibid* [84].

were present in the case allowed Fryberg J to consider whether the meaning of consent was identical for both offences. As a matter of statutory construction, his Honour held that the definition of consent in s 348 applied to the offence of rape, but not to the offence of sexual assault in s 352(1)(a).²⁵

The precedential effect of this decision was that the definition of consent in s 348 was applicable to the offences of rape,²⁶ attempt to commit rape²⁷ and one form of sexual assault,²⁸ but not to the offences of assault with intent to commit rape²⁹ and an alternative form of sexual assault.³⁰ The approach of Fryberg J gave primacy to a literal interpretation of the text of s 348 and ch 32 more broadly. Section 348 begins with the words '[i]n this chapter, consent means ...'. According to Fryberg J, as the word 'consent' does not directly appear in some offences within the ch 32, the s 348 definition cannot be applied to those offences.

Consent is, of course, relevant to s 351 and s 352(1)(a) of the QCC, because assault is an element of these offences. Both forms of assault in s 245 of the QCC³¹ must occur without the consent of the victim. As 'consent' is mentioned in s 245, which is part of ch 26 of the QCC, Fryberg J concluded that the definition of consent provided for the purpose of ch 32 cannot be used.

While there is some logic to the interpretive approach of Fryberg J in *BAS*, the case created a precedent that lacked coherence. Why was it the case that some sexual offences used one definition of consent, whereas other sexual offences relied on a different definition of consent? Duffy has previously argued that:

From a practical (and law reform) viewpoint, there is no reason in principle for the meaning of consent to differ, depending on the precise nature and severity of sexual offending. This is currently the situation in Queensland, regarding consent to rape on the one hand, and consent to sexual assault on the other. The definition of consent in s 348 is more complete and helpful than the definition of consent currently relevant under s 352(1)(a) (ie, the meaning of consent as an element of assault under s 245 of the Queensland Criminal Code). This fact is acknowledged in the current trial directions relating to sexual assault in the Supreme and District Courts Criminal Directions Benchbook, which continue to reference the language of consent as found in s 348.³²

The Queensland Law Reform Commission was alive to this potential anomaly and, in the *QLRC Final Report*, recommended legislative change to ensure that the s 348 definition of consent applied to every offence in ch 32 of the QCC.³³ Interestingly,

²⁵ Ibid [51]–[52].

²⁶ QCC (n 4) s 349.

²⁷ Ibid s 350.

²⁸ Ibid s 352(1)(b).

²⁹ Ibid s 351.

³⁰ Ibid s 352(1)(a).

³¹ In s 245 of the QCC, type 1 assault involves a direct application of force and type 2 assault involves an attempted or threatened application of force.

³² James Duffy, 'Sexual Offending and the Meaning of Consent in the Queensland Criminal Code' (2021) 45(2) *Criminal Law Journal* 93, 112.

³³ *QLRC Final Report* (n 3).

one month after the QLRC *Final Report* was published, but before the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) became law, the case of *R v Sunderland* ('Sunderland')³⁴ was decided in the Queensland Court of Appeal.

Sunderland was another case where an accused was tried on counts of sexual assault and rape. The case is significant, because it directly overruled the decision in *BAS* that the definition of consent in s 348 did not apply to the offence of sexual assault under s 352(1)(a). According to Sofronoff P:

Chapter 32 cannot sensibly be read so that the definition of consent in s 348 applies only when the word 'consent' appears expressly as part of the definition of an offence in Ch 32, as it does in s 349. If it were read that way it would mean that although lack of consent is an element of every one of the offences referred to in Chapter 32, namely s 349 (rape), s 350 (attempted rape), s 351 (assault with intent to commit rape) and s 352 (sexual assault), the definition in s 348 only applies to s 349 and s 350 and to the element of rape in s 351, but not to s 352 or to the element of assault in s 351 (but it will apply to the other element in that section, rape).³⁵

Sofronoff P held that, under s 578 of the QCC, sexual assault is an alternative verdict to rape on an indictment. According to his Honour, it would be 'absurd' for a jury to consider one definition of consent for the offence of rape, and a different definition of consent for sexual assault, when they are potentially alternative verdicts.³⁶ Even though Sofronoff P did not specifically refer to seminal statutory interpretation passages from cases such as *Project Blue Sky v Australian Broadcasting Authority*,³⁷ his interpretive approach better accords with the modern approach to statutory interpretation.³⁸ The context of words in a statute and the consequences of a literal or grammatical construction have meant that words in a section are sometimes required to be read in a way that does not strictly correspond with their literal or grammatical meaning.³⁹ Sofronoff P

³⁴ (2020) 5 QR 261 ('Sunderland').

³⁵ *Ibid* 271–2 [40].

³⁶ *Ibid* 272 [41].

³⁷ (1998) 194 CLR 355, 384 ('*Project Blue Sky*'): 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

³⁸ The first Australian case to refer to the 'modern approach' to statutory interpretation was *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315, when Mason J stated: 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.' More recent cases that have highlighted this approach include *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Project Blue Sky* (n 37); *Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.

³⁹ *Project Blue Sky* (n 37).

acknowledged the literal interpretation of the applicability of the consent definition, but concluded that the consequences of such an interpretation were undesirable and impractical. A competing interpretation was open on the language of the provision, and that interpretation should be preferred in order to achieve harmony between related sections (sexual assault as an alternative verdict to rape) and within an individual section (section 351 assault with intent to commit rape).

On 7 April 2021, the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) became law. This amendment Act confirmed the applicability of the s 348 definition of consent to all offences in ch 32 of the QCC. This was achieved by inserting a definition of assault in s 1 of the Code, and inserting a definition of assault in s 347 of the Code:

1 Definitions

assault —

- (a) generally — see section 245; or
- (b) for chapter 32 — see section 347.

...

347 Definitions for ch 32

In this chapter —

assault has the meaning given by s 245 as if a reference in section 245 to consent were a reference to consent within the meaning given by section 348.

While this drafting was not the most elegant way to achieve consistency in meaning for the word ‘consent’ in ch 32 of the Code, its meaning is reasonably clear. Despite the decision reached in *Sunderland*, there was value in legislating for this outcome. Without legislative amendments, the Queensland Court of Appeal (or the High Court of Australia) may have overruled *Sunderland* and reaffirmed the approach to consent taken by Fryberg J in *BAS*.⁴⁰

The WACC is susceptible to the same inconsistency of interpretation regarding the meaning of consent across different sexual offences. Section 319(2) of the WACC states that ‘[f]or the purposes of this Chapter ... consent means ...’. Sexual offences are contained in ch 31 of the WACC. The word consent is specifically used in the offence of sexual penetration without consent (s 325) but is not used in defining the offence of indecent assault in s 323. In the case of *Higgins v Western Australia*,⁴¹ the Supreme Court of Western Australia Court of

⁴⁰ The ability of State courts of appeal to overrule their own earlier decisions was discussed in the High Court case of *Nguyen v Nguyen* (1990) 169 CLR 245. According to the High Court, as State courts of appeal are often courts of last resort (absent the grant of a special leave to appeal to the High Court), ‘it would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions. In cases where an appeal is not available or is not taken to [the High] Court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty’: 269–70.

⁴¹ (2016) 263 A Crim R 474.

Appeal considered whether the s 319(2)(a) definition of consent applied to sexual offences involving assault in ch 31 of the Code. The Court held that this definition of consent applied to the offence of indecent assault, even though the word consent is not specifically used in the offence of indecent assault in s 323. This outcome was justified with reference to the text, context and purpose of the WACC,⁴² with context understood broadly to encompass extrinsic materials such as a second reading speech and explanatory memorandum.

The legislative drafting of s 319(2)(a) is slightly different to s 348 of the QCC. While s 348 uses the language ‘[i]n this Chapter ...’ when defining consent, s 319(2)(a) uses the language ‘[f]or the purposes of this Chapter ...’ when defining consent. This difference in the wording of ch 32 of the definition of consent in the WACC (‘[i]n this Chapter’ versus ‘for the purposes of this Chapter’) gave the Court of Appeal more confidence in concluding that the definition of consent in s 319(2)(a) applied to the offence of indecent assault.⁴³ That said, a differently composed Court of Appeal may take a different view as to the meaning of consent for the purpose of s 323 of the WACC, similar to that expressed by Fryberg J in *BAS*. To exclude this possibility, the WACC should, in our view, be amended in a similar way to the QCC.

III EXPLAINING THE APPROACH TO CONSENT WHEN THERE IS AN ABSENCE OF WORD OR ACTION TO COMMUNICATE CONSENT

The *QLRC Final Report* recommended the insertion of a new subsection in s 348 of the QCC.⁴⁴ Section 348(3) now reads:

(3) A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.

This amendment was very modest, and the wording of the subsection itself is highly caveated. The drafting is also awkward (and if the word ‘not’ had been used one more time, the drafters could be accused of tying the reader in (k)nots). Section 348(3) does not create new law in Queensland. It reflects the common law position already established in the cases of *R v Shaw* (‘*Shaw*’)⁴⁵ and *R v Makary* (‘*Makary*’).⁴⁶ In *Shaw*, the Queensland Court of Appeal stated that a ‘complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it.’⁴⁷ In *Makary*, Sofronoff P confirmed that:

⁴² Ibid. See in particular McLure P at 476 [5]–[11] and Mazza JA at 495–7 [125]–[137].

⁴³ Ibid 497 [135].

⁴⁴ *QLRC Final Report* (n 3) 94, 105.

⁴⁵ [1996] 1 Qd R 641 (‘*Shaw*’).

⁴⁶ [2019] 2 Qd R 528 (‘*Makary*’).

⁴⁷ *Shaw* (n 45) 646.

An absence of objection is not the same as giving consent. There is no *a priori* consensus to having sexual intercourse by reason of a person's submission to unwelcome, but mild, sexual overtures and these do not, by the lapse of time, metamorphose into the giving of consent to sexual intercourse.⁴⁸

One suggestion for Western Australian reform is to introduce a more strongly worded provision that deals with the circumstance where an accused does not say or do anything to signal consent (or lack of consent). The Queensland provision is concentrated on a failure to communicate a *lack* of consent. The focus should be on a failure to communicate consent. Case law and legislation aside, as a matter of logic, a failure to communicate dissent does not equal consent. That is all that the newly inserted s 348(3) is saying.

Instead, we argue that Western Australian should consider adopting the same drafting utilised in Victoria and Tasmania.⁴⁹ With respect to the meaning of consent, both states confirm in legislation that a person does not consent to an act if they do not say or do anything to communicate/indicate consent. This law requires a positive communication of consent for consent to be present. Just like in Queensland, the WACC defines consent to mean consent freely and voluntarily *given*.⁵⁰ If Western Australian courts adopt the same approach to this definition as the Queensland Court of Appeal in *Makary*, they acknowledge that consent is both a state of mind and something that must be *given* through the making of a representation about that state of mind. On one view, a law that requires a positive communication of consent for consent to be present is a law that sits quite comfortably with a requirement that consent be *given*.

There was, however, reticence on the part of the QLRC to recommend a law that 'a person who does not say or do anything to communicate consent' does not consent.⁵¹ For that reason, such a provision was not inserted into the QCC. The Western Australian Parliament now has the luxury of examining these reasons for not including such a provision and deciding for itself whether those reasons are persuasive. Chief amongst the reasons why the QLRC did not recommend such a provision was the assertion that the law should not criminalise consensual sexual activity.⁵² As a principle of law, this statement is true and trite. The concern of the QLRC appears to be the situation where a person may be mentally/internally consenting to sexual activity but does not do or say anything to communicate that consent. One answer to this concern is that consent is defined in the QCC as a state of mind that must be freely and voluntarily given. If that consent is not given through the making of some type of representation, then it does not meet the legal

⁴⁸ *Makary* (n 46) 546–7 [70].

⁴⁹ *Crimes Act 1958* (Vic) s 36(2)(1); *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a). See also *Crimes Act 1900* (NSW) s 61HK(2): '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'.

⁵⁰ WACC (n 18) s 319(2).

⁵¹ QLRC *Final Report* (n 3) 93–4.

⁵² *Ibid* 94.

definition of consent as provided for in s 348. In such a circumstance, consent (as legally understood) would be absent, so there would be no criminalisation of a 'consensual' sexual activity. A second practical answer to this concern is that if a person is, in reality, mentally consenting to sexual activity, but does not say or do anything to communicate this consent, then who would bring any subsequent sexual activity to the attention of the police? Surely not the person who was mentally consenting.

A further stated concern of the QLRC is that such a provision may create unintended consequences.⁵³ It is difficult to test this assertion because the *QLRC Final Report* does not detail what these unintended consequences might be. There is some suggestion that '[r]elevant circumstances like the nature and duration of the relationship between the parties involved in the sexual activity and how that relationship might impact on the ways in which those parties might communicate may be given less weight by the trier of fact.'⁵⁴

This suggestion is speculative at best. The nature and duration of a relationship, and how that may impact upon communication styles surrounding sexual activity, will always be a key focus in sexual offence proceedings. These factors provide a broader context that is essential to better understanding the meaning of words or actions used by people during sexual activity.⁵⁵ A section that states 'a person who does not say or do anything to communicate consent does not consent', means what it says. It does not capture the parties in a pre-existing relationship who give consent in subtle and nuanced ways, based on a pattern of previous behaviour.⁵⁶ The giving of consent can of course be subtle and nuanced. But it must be given somehow. The person who does not say or do anything to indicate consent, does not *give* consent in any material form. For these reasons, it is hard to understand why the QLRC thought that the inclusion of such a section in the QCC might be problematic.

One final concern is how a provision of this type might alter the law as expressed in *Makary*. The following statement from Sofronoff P (discussing the definition of consent in s 348) is provided in full to give context:

First, there must in fact be 'consent' as a state of mind. This is also because the opening words of the definition define 'consent' tautologically to mean, in the first instance, 'consent'. The complainant's state of mind remains elemental. Second, consent must also be 'given' in the terms required by the section.

The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ *Sunderland* (n 34) 272–3 [44].

⁵⁶ *Makary* (n 46) 543 [50].

nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour.⁵⁷

In particular, his Honour appears to be stating that, in some circumstances, saying nothing and doing nothing can be understood as a positive representation of consent to sexual activity. It may well be that the authors of this article lack imagination, but we cannot envisage a situation where consensual sexual activity occurs, involving one party who does not say or do anything to signal consent. For the sake of clarity, it is our opinion that consent *can* be given in subtle or nuanced ways, and that the broader context of the sexual activity will often further an understanding as to the meaning of words or actions. As Duffy has previously stated:

The existence or non-existence of consent as a matter of fact, is a by-product of verbal and non-verbal communication, governed by context. It is this unique interplay of communication and context, that will determine whether the words or actions of an individual in a particular case, are sufficient to meet the legal meaning of consent as described in the *Queensland Criminal Code* and further explicated through case law.⁵⁸

The most sensible conclusion to draw is that a provision which states, ‘a person who does not say or do anything to communicate consent, does not consent’, cannot be reconciled with a small part of President Sofronoff’s judgment in *Makary*, where his Honour held that a representation might also be made by remaining silent and doing nothing.⁵⁹

The strongest articulation of why a provision of this nature should not be added into legislation comes from Dyer, who has been prolific in his writing on sexual offending in Australian law over the last five years.⁶⁰ According to Dyer, sections like s 2A(2)(a) of the *Tasmanian Criminal Code* and s 36(2)(1) of the *Crimes Act 1958* (Vic) may not have much effect, because in the vast majority of contested sexual offending cases, a complainant has said or done something that may communicate consent.⁶¹ Instead, these provisions may unduly focus attention on whether particular words or actions were used *for the purpose* of communicating

⁵⁷ Ibid 543 [49]–[50].

⁵⁸ Duffy (n 32) 103.

⁵⁹ *Makary* (n 46) 543 [50].

⁶⁰ 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)’ (2019) 43(2) *Criminal Law Journal* 78; Andrew Dyer, ‘Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr’ (2019) 7(1) *Griffith Journal of Law & Human Dignity* 17; Andrew Dyer, ‘Mistakes That Negate Apparent Consent’ (2019) 43(3) *Criminal Law Journal* 159; Andrew Dyer, ‘The Mens Rea for Sexual Assault, Sexual Touching and Sexual Offences in New South Wales: Leave It Alone (Although You Might Consider Imposing an Evidential Burden on the Accused)’ (2019) 48(1) *Australian Bar Review* 63; Andrew Dyer, ‘Progressive Punitiveness in Queensland’ (2020) 48(3) *Australian Bar Review* 326; Andrew Dyer, ‘Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism?’ (2021) 45(3) *Criminal Law Journal* 185.

⁶¹ Dyer, ‘Sexual Assault Law Reform in New South Wales’ (n 60) 79 fn 8.

consent.⁶² We accept both of these arguments, but believe on balance that inserting such a provision still has value, for the following reasons:

1. It makes clear that a failure to communicate about consent (whether that be the absence of dissent or the absence of positively communicated consent) means that consent is not present.
2. A person who is initiating sexual contact is encouraged to take positive communicative steps to ascertain whether another person is consenting, if that has not already been made clear.⁶³
3. The individual who does not say or do anything to communicate consent is protected, if this absence of communication is due to a freeze response (tonic immobility),⁶⁴ or a decision that shutting down and doing nothing is the best way to survive/endure an unwanted sexual encounter.
4. Explicit legislative acknowledgment that a person does not consent if they do not say or do anything to communicate consent limits the ability of a defendant to rely on the mistake of fact excuse when a complainant says or does nothing to indicate consent.⁶⁵

⁶² Ibid 87. We would, however, make the point that a focus on the complainant's words and conduct before and during sexual activity in a contested sexual offence case is an important line of inquiry for defence counsel. Dyer's concern is that a sexual encounter may be broken down into many parts of communication, and it may be undesirable to focus so minutely on the complainant's conduct which is said to communicate consent. We accept that this may involve a difficult line of questioning between a defence counsel and a complainant. That said, one of the roles of defence counsel in hearings of this type is to point to a list of words or actions given by a complainant that suggest consent was given. This list of words or actions may alternatively form the basis of an honest and reasonable, yet mistaken belief in the existence of communicated consent. This focus on the complainant's conduct must also be counterbalanced with a focus on the conduct of the accused, and the prosecution has an important role to play in examining the steps an accused took to ascertain/confirm that consent to the sexual activity was present.

⁶³ QLRC Final Report (n 3) 85.

⁶⁴ Susan Suarez and Gordon Gallup, 'Tonic Immobility as a Response to Rape in Humans: A Theoretical Note' (1979) 29(3) *The Psychological Record* 315; Grace Galliano et al, 'Victim Reactions During Rape/Sexual Assault: A Preliminary Study of Immobility Response and its Correlates' (1993) 8(1) *Journal of Interpersonal Violence* 109; Jennifer Heidt, Brian Marx and John Forsyth, 'Tonic Immobility and Childhood Sexual Abuse: A Preliminary Report Evaluating the Sequela of Rape-Induced Paralysis' (2005) 43(9) *Behaviour Research and Therapy* 1157; Bianca Fileborn, *Sexual Assault Laws in Australia* (Resource Sheet, February 2011); Avigail Moor et al, 'Rape: A Trauma of Paralyzing Dehumanization' (2013) 22(10) *Journal of Aggression, Maltreatment & Trauma* 1051; Anna Möller, Hans Peter Söndergaard and Lotti Helström, 'Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression' (2017) 96(8) *Acta Obstetrica et Gynecologica Scandinavica* 932.

⁶⁵ It is suggested that such a provision would limit the ability of an accused to rely on the mistake of fact excuse, but not completely remove the possibility. Where the law requires a positive communication of consent, there still remains the possibility that an accused has an honest and reasonable but mistaken belief that consent has been communicated.

IV ACKNOWLEDGING THE WITHDRAWAL OF CONSENT BY WORDS OR CONDUCT

Queensland case law has been clear for many years that a person who continues to sexually penetrate a complainant after consent has been withdrawn commits the crime of rape. The more recent Queensland Court of Appeal decisions of *R v Johnson*,⁶⁶ *R v OU*⁶⁷ and *R v Kellett*⁶⁸ affirm this principle, and are consistent with the earlier decision of the Queensland Court of Criminal Appeal in the case of *R v Mayberry*.⁶⁹ While so much is clear from the case law, however, this legal position was not previously clear on the face of the QCC. The QCC has never explicitly defined the offences of rape or sexual assault as continuing offences.⁷⁰ This differs from other Australian jurisdictions where an offence involving sexual intercourse or sexual penetration is defined to include the *continuation* of sexual intercourse or penetration. In Western Australia, for example, the offence of sexual penetration without consent reads:

325. Sexual penetration without consent

(1) A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.⁷¹

Pursuant to s 319 of the WACC, to sexually penetrate means, inter alia, 'to continue sexual penetration'.⁷² Read together, these sections would capture an accused who *continues* to sexually penetrate another person without the consent of that person.

The *QLRC Final Report* suggested that a new subsection be inserted into s 348 of the QCC, to expressly provide that, if a sexual act is done or continues to be done after consent is withdrawn, it occurs without consent.⁷³ This recommendation was accepted by the Queensland Parliament, and is now reflected in s 348(4) of the QCC.⁷⁴ The purpose of this change was not to effect any change to the law of Queensland, but to make that law more visible and more readily understood by members of the public.⁷⁵

One benefit that Western Australia may obtain by including a similar provision in s 319(2) (definition of consent for the purpose of ch 31), is that it would be made clear that withdrawal of consent is relevant to all offences in ch 31,

⁶⁶ [2015] QCA 270.

⁶⁷ [2017] QCA 266.

⁶⁸ [2020] QCA 199, [139].

⁶⁹ [1973] Qd R 211.

⁷⁰ Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 5th ed, 2018) 313.

⁷¹ WACC (n 18) s 325.

⁷² WACC (n 18) s 319(1)(e) (definition of 'sexually penetrate').

⁷³ *QLRC Final Report* (n 3) 103–6.

⁷⁴ This subsection now reads: 'If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.'

⁷⁵ *QLRC Final Report* (n 3) 103–4.

where consent is an issue. At present, it is clear in the WACC that continued sexual penetration after consent has been withdrawn is an offence under s 325.⁷⁶ Unlike the definition of ‘sexually penetrate’, which includes ‘to continue sexual penetration’, there is no provision that states that indecent assault includes a continued indecent assault after consent has been withdrawn.⁷⁷

Assume a male is intimately touching a female on the breasts during foreplay (and consent has been given). After a while, the female says ‘do you mind stopping that, my breasts are starting to hurt?’. If the male continues to touch the woman’s breasts, then it is assumed, based on the wording of WACC s 323, that an indecent assault has occurred. Adding a declaratory provision to s 319(2) to the same effect of s 348(4) of the QCC, would address any concerns about the applicability of withdrawn consent to sexual offences in ch 31 of the WACC.

V IDENTIFYING OTHER OPPORTUNITIES FOR WESTERN AUSTRALIA TO REFINE ITS LEGISLATIVE DEFINITION OF CONSENT

Parts II, III and IV have focused on the recent legislative changes to the definition of consent in the QCC and how the WACC may benefit from these changes. This part will consider additional drafting challenges that are unique to the Western Australian definition of consent. Table 1 maps the scope of the Western Australian legislative definition of consent against the equivalent definition in Queensland.⁷⁸ Given their shared origin, there is much overlap between the two definitions. Both jurisdictions state that consent must be freely and voluntarily given by a person with the cognitive capacity to give the consent, and that consent is not freely and voluntarily given if it is obtained by force, threat or intimidation.⁷⁹

In Table 1, the shaded cells indicate where the Western Australian definition of consent is different to the Queensland definition. These shaded cells signify where the Western Australian definition of consent could be amended to better align with the current legislative definition of consent in Queensland. The following discussion focuses on the factors that negative consent, with particular attention paid to consent obtained through deceit or any fraudulent means.

⁷⁶ See also *Ibbs v The Queen* (1987) 163 CLR 447.

⁷⁷ This can be compared with *Crimes Act 1900* (NSW) s 61HB(1A): ‘The continuation of sexual touching as defined in subsection (1) is also “sexual touching” for the purposes of this Division.’

⁷⁸ QCC (n 4) ss 347–8; WACC (n 18) s 319(2).

⁷⁹ QCC (n 4) ss 348(1), 348(2)(a)–(b); WACC (n 18) s 319(2)(a).

Table 1: The Scope of Western Australian Legislative Definition of Consent Mapped against the Queensland Legislative Definition of Consent.

Queensland Legislative Definition of Consent	Queensland Legislative Provision	Western Australian Legislative Definition of Consent	Western Australian Legislative Provision
Assault defined for the purpose of sexual offences	QCC s 347 Assault definition	There is an opportunity in Western Australia to improve the legislative definition of consent here.	
Consent means freely and voluntarily given by a person with the cognitive capacity to give the consent	QCC s 348(1)	Consent means a consent freely and voluntarily given	WACC s 319(2)(a)
Without limiting those words [in the cell immediately above], a person's consent to an act is not freely and voluntarily given if it is obtained by:	QCC s 348(2)	Without in any way affecting the meaning attributable to those words [in the cell immediately above], a consent is not freely and voluntarily given if it is obtained by:	WACC s 319(2)(a)
• Force	QCC s 348(2)(a)	• Force	WACC s 319(2)(a)
• Threat or intimidation	QCC s 348(2)(b)	• Threat, intimidation	WACC s 319(2)(a).
• Fear of bodily harm	QCC s 348(2)(c)	There is an opportunity in Western Australia to improve the legislative definition of consent here as 'fear of bodily harm' is not explicitly referred to in the Western Australian definition of consent. Depending on what causes the fear of bodily harm, the consent may be vitiated by 'force', 'threat' or 'intimidation'. This may also be covered by the introductory words to the Western Australian definition of consent, that is, 'consent freely and voluntarily given'.	
• Exercise of authority	QCC s 348(2)(d)	There is an opportunity in Western Australia to improve the legislative definition of consent by being more explicit as 'exercise of authority' is not expressly provided in the Western Australian legislative definition of consent. This may be covered by the	

		introductory words to the Western Australian definition of consent, that is, 'consent freely and voluntarily given'; or another example negating consent such as 'threat', 'intimidation', 'deceit, or any fraudulent means'.
<ul style="list-style-type: none"> False and fraudulent representations about the nature or purpose of the act 	QCC s 348(2)(e)	There is an opportunity in Western Australia to improve the legislative definition of consent by being more explicit as 'false and fraudulent representations about the nature or purpose of the act' is not expressly provided in the Western Australian legislative definition of consent. This is currently covered by 'deceit, or any fraudulent means': <i>Criminal Code 1913 (WA) s 319(2)(a)</i> ; <i>Michael v State of Western Australia (2008) 183 A Crim R 348</i> .
<ul style="list-style-type: none"> Mistaken belief induced by the accused person that the accused person was the person's sexual partner 	QCC s 348(2)(f)	There is an opportunity in Western Australia to improve the legislative definition of consent and be more explicit here. In <i>Michael v State of Western Australia (2008) 183 A Crim R 348</i> , 'deceit, or any fraudulent means' in <i>Criminal Code 1913 (WA) s 319(2)(a)</i> was interpreted broadly and covers a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

The Queensland and Western Australian legislative definitions of consent take diverse approaches to excluding false and fraudulent representations about the nature or purpose of the act, as a factor that negates consent. In Queensland, the legislative definition of consent explicitly provides that a person's consent to sexual activity is not free and voluntary if the offender made false and fraudulent representations about the nature or purpose of the act.⁸⁰ The reference to the word 'purpose' was intended to capture, for example, a radiographer who advises a patient that he is using an ultrasound transducer to conduct an internal

⁸⁰ QCC (n 4) s 348(2)(e).

examination of a vagina for a diagnostic medical purpose, when the real purpose is his own sexual gratification.⁸¹

In contrast, the Western Australian legislative definition of consent does not refer to false and fraudulent representations about the *nature or purpose* of the act. Instead, the Western Australian provision states that consent is not freely and voluntarily given if it is obtained by ‘deceit, or any fraudulent means’.⁸² Consequently, if a sexual offender in Western Australia did make false and fraudulent representations to the victim about the nature and purpose of the sexual act, then the victim did not give free and voluntary consent. The outcome in the radiographer example described above would be the same in Queensland and Western Australia, but the interpretive process in arriving at that outcome would be different. In Western Australia, greater judicial interpretation of the legislative definition of consent is required. The phrase ‘any fraudulent means’ in the Western Australian definition of consent is potentially much broader in scope than the equivalent Queensland provision and thereby has the capacity to capture a wider range of circumstances that fall within the realm of deceit or fraud. From a law reform perspective, the question becomes whether the ‘fraudulent means’ exception to consent in the Western Australian provision is too broad and should be limited in a similar way to the Queensland provision.

More than a decade ago, the breadth of the phrase ‘deceit, or any fraudulent means’ was discussed in the Western Australian Court of Appeal decision of *Michael v Western Australia* (‘*Michael*’).⁸³ President Steytler reflected on the historical origin of the phrase, noting that its broad wording was designed to capture a wider set of circumstances in which fraud could vitiate consent, compared to the common law.⁸⁴ His Honour reinforced this view by stating:

The court is, of course, bound by the legislation enacted by the Parliament. Resort to the common law, when interpreting a statute, is appropriate only when its language is ambiguous or in other special circumstances (which are not presently applicable).⁸⁵

Accordingly, Steytler P did not interpret the phrase ‘deceit, or any fraudulent means’ narrowly, as did the High Court did in *Papadimitropoulos v The Queen*,⁸⁶ where it was held that

it is the consent to [penetration] which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the

⁸¹ *R v Mobilio* [1991] 1 VR 339 (‘*Mobilio*’). See also Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (Report, February 2000) 240. For a Queensland example, see *BAS* (n 21), where a male practitioner of natural medicine digitally raped female patients and touched their breasts for his own sexual gratification rather than therapeutic purposes.

⁸² WACC (n 18) s 319(2)(a).

⁸³ (2008) 183 A Crim R 348 (‘*Michael*’).

⁸⁴ *Ibid*; Michael Murray, *The Criminal Code: A General Review* (Report, June 1983).

⁸⁵ *Michael* (n 83) 370–1 [88].

⁸⁶ *Papadimitropoulos v The Queen* (1957) 98 CLR 249 (‘*Papadimitropoulos*’).

character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.⁸⁷

In *Michael*, Steytler P did not need to provide an opinion on the scope of the phrase 'deceit, or any fraudulent means'.⁸⁸ However, his Honour expressed concern that the phrase is 'susceptible to an interpretation that is dramatic in its reach' and 'the most appropriate solution is that the legislation should be amended'.⁸⁹ At this point in 2008, the Western Australian legislature should have been on notice that the wording of the provision was uncertain in scope, and had the potential to create interpretive difficulties for judges. Since *Michael*, there have been no legislative changes to the Western Australian definition of consent to clarify the scope of the phrase 'deceit, or any fraudulent means'.

In contrast and in dissent, EM Heenan AJA stated:

[I]t would be quixotic in the extreme for any person in the current age to ignore the inevitable, that there will always be, however unsatisfactory it may be from any moral viewpoint, many instances in which men or women engage in sexual intercourse with each other when that activity is preceded, and to an extent induced, by some form of deception such as 'I am not married'; 'I am not seeing anyone else'; or with false and exaggerated protestations of wealth, importance or status. Examples could be multiplied of promises being made which were never intended to be kept, and of facts or conditions concealed which, if revealed, would almost certainly lead to rejection. Conduct of this kind which I think can safely be said, has probably been common since the earliest times of recorded human history, however deplorable, has not previously been regarded as criminal, or at least so criminal as to justify a conviction for the most serious form of sexual offence prevailing from time to time. That is a powerful indication that such misconduct or deceit has not generally been regarded as criminal and it would be surprising indeed if, by such an indirect means, as the amendment to s 319(2) of the *Criminal Code*, Parliament had intended to effect such a far-reaching change to the law which is likely to affect and criminalise types of conduct which had not previously been treated as the most serious of the indictable sexual offences.⁹⁰

This judicial interpretation suggests that construction of the phrase 'deceit, or any fraudulent means' should be subject to some limitation. His Honour suggested the following scope of the provision:

I consider that the scope of deceit or any fraudulent means in s 319(2) should be treated as referring to those frauds or misrepresentations which deprived the person concerned of a full comprehension of the nature and purpose of the proposed activity

⁸⁷ Ibid 261.

⁸⁸ *Michael* (n 83) 371 [89].

⁸⁹ Ibid.

⁹⁰ Ibid 432 [373].

or his or her legal status of the person as a spouse, or his or her identity as an acceptable sexual partner.⁹¹

Heenan AJA's interpretation of 'deceit, or any fraudulent means' is therefore broader than the common law position in *Papadimitropoulos*, which only recognised fraud as to the identity of the person or the nature of what they were doing, as factors that override consent.⁹² His Honour read down an otherwise broad provision, limiting it to circumstances of fraud mentioned in *Papadimitropoulos*, with an updated recognition of fraudulent representations as to the purpose of an act, such as those made in *R v Mobilio*.⁹³ The net result of the *Michael* decision involved one judge calling for legislative reform of the provision, and another judge reading the provision down, in order to render it practicably workable and to avoid any antecedent fraudulent representation (no matter how benign) from overriding an otherwise freely given consent. The inaction of the Western Australian Parliament with respect to the confusion this provision has caused is difficult to understand. Given that Heenan AJA's interpretation of the phrase 'deceit, or any fraudulent means' accords almost perfectly with the current drafting of the QCC, it is suggested that the WACC adopt the more precise language of the QCC and delete the reference to 'deceit, or any fraudulent means'. In its place, the following factors should be held to negative consent:

1. false and fraudulent representations about the nature or purpose of the act;
2. a mistaken belief induced by the accused person that the accused person was the person's sexual partner.⁹⁴

⁹¹ Ibid 432–3 [376]. In *R v Winchester* (2011) 222 A Crim R 1, Muir JA stated that '[a] person's consent may be influenced, for example, by a belief engendered by words and/or conduct on the part of the other person that the other person is promising or offering: an enduring relationship; an engagement or marriage; jewellery; emotional support; a house for children of a previous marriage; financial assistance; a paid vacation; or a combination of those things ... it cannot be supposed that, at least as a general proposition, there can be no free and voluntary consent where the consent is influenced by such a promise or offer which is part of normal social interaction' (at 29 [82]). In this case, the offender fraudulently promised to give a horse to the victim in return for sexual intercourse, but that was insufficient to vitiate the victim's consent.

⁹² *Papadimitropoulos* (n 86).

⁹³ *Mobilio* (n 81). See also *R v Williams* [1923] 1 KB 340.

⁹⁴ This is the exact wording found in the QCC (n 4) s 348(2)(e) and (f). It should be noted that if the broad words 'deceit, or any fraudulent means' are removed from the Western Australian legislative definition of consent, each type of fraud that vitiates consent would need to be specifically covered in the definition. The Western Australian definition of consent could be more explicit by stating consent is not freely and voluntarily given if it is obtained by the fear of bodily harm or the exercise of authority: QCC (n 4) s 348(2)(c)–(d). However, the other heads that negate consent or the overarching introductory words that consent is 'freely and voluntarily given' are adequate to capture such behaviour.

VI CONCLUSION

Understanding consent is a critical step towards preventing sexual violence.⁹⁵ This article has analysed the Queensland legislative definition of consent with a view to recommending changes to the WACC definition of consent. This issue is timely given that the Queensland legislative definition of consent changed in April 2021 as a result of the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld). Based on these amendments, several key areas for legislative improvement have been identified regarding the Western Australian definition of consent:

1. The legislative definition of consent should be applied consistently for all sexual offences throughout the WACC.
2. A provision should be introduced that states: 'A person does not consent to an act, if they do not say or do anything to communicate/indicate consent.'
3. A provision should be inserted that provides that if a sexual act is done or continues to be done after consent is withdrawn, it occurs without consent.
4. The phrase 'deceit, or any fraudulent means' as a circumstance that negatives consent should be deleted and replaced with:
 - a. False and fraudulent representations about the nature or purpose of the act;
 - b. A mistaken belief induced by the accused person that the accused person was the person's sexual partner.

When Grace Tame commented on the nine different definitions of consent across the states and territories in Australia, there was a temptation to push back against this criticism from a criminal law perspective. The definitions of consent in each state and territory are a by-product of their form (Criminal Code States v non-Code States), and the text, context and purpose of the legal document in which they reside. That said, when the criminal law of Queensland and Western Australia is considered, there are few good reasons why the definition of consent as it relates to sexual offending should be different between the two States. Western Australia now has the opportunity to review its laws relating to consent. If this opportunity is taken, it will lead to an updated and harmonised definition of consent in the WACC.

⁹⁵ Ainsworth (n 1).