

Sexual assault laws in Australia

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Every jurisdiction in Australia has its own legislation for sexual offences. The sexual offences legislation table (located at the end of this document) is a compilation of the current legislation for each state and territory pertaining to sexual assault.

In the legislation table, the language of the legislation is used, which is quite technical at times. The information in this Resource sheet is designed to “debunk” the technical language often associated with legislation, so that individuals without a legal background are able to make sense of sexual assault legislation. We briefly describe the Australian legal system, explain the structure of criminal offences and flag key issues relevant to the prosecution of sexual offences. It may be helpful to read this Resource sheet alongside other legislative commentaries and guides for victim/survivors encountering the legal system, including Heath (2005) and Taylor (2004).

This Resource sheet is concerned only with sexual assaults involving adults, and it should be noted that some of the information contained in this document might not be relevant or accurate for sexual offences involving children (see Holzer & Bromfield, 2010; Lamont, 2010). Gender neutral legal terminology is predominantly used to describe the victims (complainant) and perpetrators (defendant) of sexual assault. However, it should be noted that sexual assault is a gendered crime—men are overwhelmingly the perpetrators and women the victims, although the reverse of this can also be true.

The term “sexual assault” has been used for consistency throughout the commentary to describe all types of sexual offences. However, it should be noted that there is variation in the terminology and definitions used to describe sexual offences between states and territories; for example, different states and territories define rape, sexual assault, and sexual penetration or intercourse without consent in different ways.

The Australian legal system: An overview

It is well established that sexual assault is one of the most—if not *the* most—difficult offences to successfully prosecute (i.e. to obtain a conviction); approximately 85% of sexual assaults never come to the attention of the criminal justice system (Lievore, 2003; VLRC, 2004; Heath, 2005; ABS, 2005). Of those offences that are reported, only a small proportion proceed to trial, with an even smaller percentage of these cases resulting in a successful conviction (ABS, 2004; Lievore, 2003; Heath, 2005; Heenan & Murray, 2006). According to current research, this difficulty in obtaining successful

convictions may be attributed to a number of factors, including:

- low rate of reporting sexual offences;
- attrition of sexual assault cases at various stages of the justice system and trial procedure (Lievore, 2003; Heath, 2005; Heenan & Murray, 2006);
- treatment of complainants throughout the trial;
- distrust of women/survivors by the criminal justice system;
- difficulty in obtaining evidence/providing sufficient evidence (e.g., the availability of forensic medical or DNA evidence) (Briody, 2002–2003); and
- belief in sexual assault myths and stereotypes (Heath, 2005).

In the following sections, we provide an overview of the general principles and structure of the justice system. This provides an important step in understanding how sexual assault is addressed within the justice system, and in developing an understanding of why sexual offences are so notoriously difficult to successfully prosecute.

Key players in the criminal courts

Table 1 provides an overview of the roles of the key individuals in a criminal trial. These “key players” will be discussed throughout this commentary, and Table 1 will serve as a reference point to remind you of their function and role.

Philosophical underpinnings

The Australian criminal legal system is based on an adversarial model of justice. The prosecution and defence act as adversaries (or opponents), presenting alternative “sides” or accounts of a case. The judge makes decisions about questions of law (such as what legislation is relevant to a case) and ensures that trial procedures are followed, as well as determines the sentence for a defendant that has been found guilty (Legal Services Commission of South Australia, 2004). The jury decides on the facts of a case, and is responsible for determining whether the defendant is guilty or not guilty. A magistrate performs the tasks of both the judge and jury.

The State is represented as the adversary of the defendant in a criminal trial. That is, criminal offences are viewed as harm against the State, rather than against the individual (individual harms such as defamation, damages etc. are instead addressed through civil proceedings).

Common law and statute-based law

In Australia there are two sources of law: statute-based law and common law.

Common law is formed from the decisions of judges; it is based on the principles and reasoning used by judges in determining the outcome of a case. If a judge makes a decision about a case and at a later date the courts hear

Table 1 Key players and their roles in the criminal courts

Key player	Role(s)
Judge/Magistrate	Presides over the criminal trial Determines the legal guilt or innocence of the defendant, or directs the jury in its role to do so Determines appropriate punishment for a defendant who is convicted of an offence
Jury	Represents the community Determines the legal guilt or innocence of the defendant Fulfils the due process right to be judged by one’s peers
Defence counsel	Acts as legal representative on behalf of the defendant
Prosecution/Crown	Presents the case against the defendant Acts on behalf of the state
Defendant	Individual accused of committing a criminal offence(s)
Witness	Individual who may have seen, or has other relevant information about, a criminal offence
Complainant	Individual against whom the offence was committed

Offence/trial type	Description	Presiding court
Summary offences	Typically include "minor" offences, such as traffic offences	Magistrates' Court
Indictable offences triable summarily	Some indictable offences fall under the jurisdiction of both the County and Magistrates' Court. In these instances the defendant may choose whether to have the matter tried as a summary or indictable offence.	County or Magistrates' Court
Committal hearing	This is a form of "test" hearing, used for indictable offences. The purpose of the committal hearing is to test the evidence for a case to ensure that, <i>prima facie</i> , or "on the face of it", there is sufficient evidence for a trial to proceed.	Magistrates' Court
Indictable offences	Typically include more "serious" crimes; for example: <ul style="list-style-type: none"> ▪ murder; ▪ sexual assault/rape; and ▪ armed robbery Indictable offences are generally heard in the County/District Court, with a few exceptions; e.g., murder, which is heard in the Supreme Court.	County/District or Supreme Court
Appeals from County/District Court and Supreme Court	The prosecution or defence may appeal a decision made in a lower court, arguing on a point of law; for example: <ul style="list-style-type: none"> ▪ that the trial judge made an error in his/her instructions to the jury; or ▪ that the trial judge incorrectly interpreted a section of legislation, or incorrectly applied common law precedent. Appeals may also be made on the basis that a punishment handed down was too lenient or too harsh.	Supreme Court of Appeals
Final appeals	Appeals from the Supreme Court of Appeal, contesting a point of law	High Court

a case involving similar circumstances, the judge in that case must follow the reasoning used by the judge in the previous case. This is known as the system of precedent, or "like cases are treated alike". Lower courts are bound by the decisions of higher courts.

Statute-based law is law created by State, Territory and Commonwealth Governments (legislature), and takes the form of legislation or "Acts". State, Territory and Commonwealth Governments have the power to legislate in a wide range of areas. Legislation often acts to reverse common law principles (e.g., if they are outdated) and also limits the decisions judges can make and how they apply the law. However, the content of legislation is often ambiguous, or may be interpreted in a number of different ways. Judges and magistrates consequently still need to interpret the meaning of legislation when applying it to a case.

High Court judges also have the power to declare a piece of legislation as unconstitutional, or as falling outside the

legislative jurisdiction of the relevant State, Territory or Commonwealth Government (Australian Capital Territory Government, 2001).

Categories of offence and trial types

Criminal offences are divided into two categories: summary (minor) offences or indictable (serious) offences. Sexual offences generally fall into the category of indictable offences. The category of offence determines the court that will hear the offence. Table 2 provides an overview of the different offence and trial types.

Structure of the courts

The Australian state and commonwealth courts are hierarchical in nature, allowing for the ability to appeal to higher courts on behalf of either the prosecution or defendant, and providing for a "division of labour" regarding the types of offences heard in each court.

Figure 1 shows the hierarchy of Australian courts.

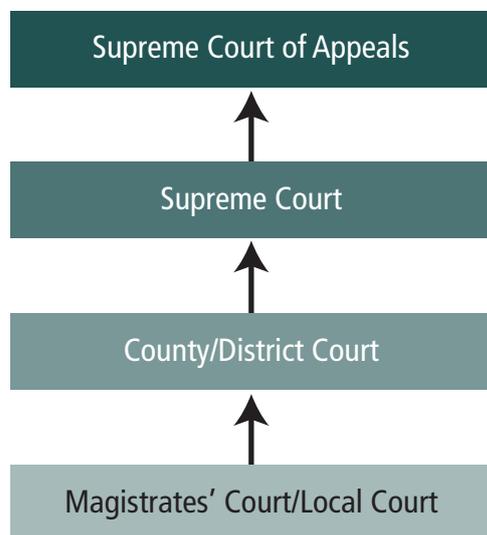


Figure 1 Hierarchy of Australian courts (criminal jurisdiction)

Bringing a case to trial: The role of the public prosecutor

Once the police have formally charged a defendant, the public prosecutor in the particular state or territory makes a decision as to whether the case will proceed to the criminal courts. There are two overarching factors that guide prosecutorial decision-making:

- Evidence—this refers to whether there is sufficient evidence to allow for a reasonable chance of successful conviction. Factors that are considered to be “sufficient evidence” from a legal perspective may include the presence of the defendant’s DNA at the crime scene; or physical “evidence”, such as bruising and other forms of physical harm, that can be seen on the complainant’s body (Briody, 2002–2003; Lievore, 2005).
- Public interest—a number of factors contribute to decisions about whether a case is in the public interest, including the seriousness of the offence and the need to uphold public confidence in the criminal justice system (Lievore, 2005, p. 1).

While the best interests of, and the impact of the sexual assault on, the victim may also be a factor in prosecutorial decisions, these are not

necessarily pertinent factors in bringing a case before the courts. Due to the primary focus on the factors listed above, prosecutorial decision-making may be influenced by:

- the relationship between the victim and offender (“stranger-rapes” are more likely to proceed to trial);
- additional physical harm caused to the victim in the course of the attack; and
- evidence that the victim actively resisted her attacker (demonstrated in the form of physical injury or verbal resistance) (Lievore, 2005).

The influence of the above factors is not entirely unwarranted, but it should be remembered that the influence of these factors can actually negatively impact on the chances of some cases proceeding to trial. Evidence of physical injury *can* indicate the severity of an assault, and presumably more severe or serious assaults are more likely to proceed to trial. Likewise, factors such as the victim/offender relationship and evidence of active resistance may influence jury decision-making or the “convictability” of a particular perpetrator of sexual assault, resulting in cases that are perceived as more likely to result in successful conviction proceeding to trial (Orenstein, 2007). However, this decision-making schema is problematic given that the overwhelming majority of sexual assaults are perpetrated by assailants who are known to the victim, and that the majority of victims do not acquire additional injury in the course of a sexual assault. It must therefore be acknowledged that the influence of these factors on the decisions made by prosecutors can be major barriers to a sexual assault complaint reaching the courts (Lievore, 2003; 2005).

Due process/procedural fairness

As we know, the State plays the role of the “wronged” party in a criminal trial, and holds the responsibility for proving the guilt (or otherwise) of a defendant and enforcing any punishment determined by the courts. A series of technical and practical rules (known as procedural rules) and defendant’s rights have been established in order to limit the power of the State (prosecution), and to ensure the criminal trial is a just procedure for

the defendant. These rights and procedural obligations are referred to as “due process” or, more commonly in Australia, as “procedural fairness”.

Procedural fairness includes many commonly recognised civil rights, and restraints on State power, including:

- the right to silence;
- the right to legal representation;
- the right to a fair trial;
- the right to be judged by one’s peers (represented by the jury);
- acknowledgement that the defendant is innocent until proven guilty;
- acknowledgement that the burden of proof is on the prosecution; and
- the standard of proof is beyond reasonable doubt.

The burden of proof in a criminal trial is located with the prosecution. This means that the prosecution is responsible for establishing that the defendant committed the offence (for example, through the admission of evidence collected by the police). Consequently, the defendant is not required to do or say anything to prove that they did *not* commit the offence.

The standard of proof in a criminal trial is “beyond reasonable doubt”. That is, it must be a near certainty that a defendant committed the offence. If the judge, magistrate or jury (in a jury trial) has any reasonable doubt as to the version of events and evidence presented by the prosecution, then the defendant should be found not guilty.

The standard of proof is crucial in checking the power of the State. Given that the State may enforce punishment upon the defendant, including the removal of liberty through imprisonment, it is of utmost importance that we are sure that the defendant is guilty of the offence and deserving of his/her punishment. However, in the context of a sexual assault trial, the standard of proof, and what counts as “strong” evidence, can be problematic when the two competing versions of events are constituted solely by the words of the complainant and defendant, with no witnesses and often no significant physical evidence.

Understanding the laws of sexual assault

Although each jurisdiction has its own sexual offences legislation, there are some common elements to any criminal offence that tell us how the offence is defined and what must be proven by the prosecution in order to find someone guilty.

This section describes the elements of an offence with specific reference to sexual assault, describes some trends shaping sexual assault law reform, and highlights some of the key debates and controversies relating to sexual assault law and criminal trials.

Key elements of a criminal offence

Definitions of sexual assault and rape vary slightly across jurisdictions. There is no universally accepted definition of “sexual assault” and, as such, there are variations in the type of behaviour that constitutes sexual assault or rape depending upon the state or territory one is in.

For legal purposes, establishing that a sexual assault has occurred actually depends on how four important elements come together, as shown in Table 3.

These are the general principles of most serious criminal offences. If the prosecution cannot prove one or more of these principles beyond reasonable doubt (the standard of proof in criminal law), a defendant cannot be held criminally responsible. That is, all four components of the offence in Table 3 must be established beyond reasonable doubt.

Reforms and trends

In the last 30 years, there have been major changes to the law concerning sexual offences in every state and territory in Australia. These changes generally reflect a shift *away* from a reliance on common law to guide judicial decision-making and, more specifically, a shift in how the offence of sexual assault is understood. There have been a range of changes introduced that encompass many aspects of sexual assault and rape laws, and this Resource Sheet will discuss some of them

Table 3 Elements of criminal offences

Element	Definition/description	What needs to be established in a sexual assault case
<i>Actus reus</i> or physical element	The prohibited (criminal) act	Engaging in the defined behaviour without consent; for example, penetration of the vagina with a body part or object without the consent of the victim Two components need to be established to demonstrate <i>actus reus</i> : <ul style="list-style-type: none"> ▪ Sexual activity occurred; and ▪ it occurred without consent. Presence/absence of consent, rather than the actual occurrence of sexual activity, is generally contested in trials.
<i>Mens rea</i> or mental element	The defendant's intention, recklessness or knowledge of the prohibited act	The defendant intended to do the physical act, and the defendant was aware that the victim was not consenting, or was reckless* towards whether or not the victim was consenting. It is not enough for the complainant to know in themselves that they do not consent—the defendant must have <i>knowledge</i> of this non-consent to be considered legally guilty.
Voluntariness	The defendant's actions cannot have been involuntary Involuntary actions may include: <ul style="list-style-type: none"> ▪ reflex actions; ▪ sleep walking; or ▪ being in a state of altered consciousness. 	Extreme self-induced intoxication is not considered evidence that a <i>defendant's</i> actions were involuntary. It is generally accepted that individuals so affected by alcohol would be unable to perform a sexual act.
Temporal coincidence	The <i>actus reus</i> and <i>mens rea</i> must occur at the same point in time for the defendant to be criminally liable for his actions.	The defendant had sexual intercourse with the complainant, without her consent, <i>at the same time</i> as knowing that, or being reckless towards whether, she was not consenting.

Notes *Recklessness refers to a situation in which the defendant intentionally penetrates the complainant while being aware that she is not, or foreseeing that she might not be, consenting (Rush, 1997). That is, he does not necessarily intend to have non-consensual intercourse with the complainant, but is aware nonetheless (or should be, under the circumstances) that she might not be consenting to the sexual activity.

more closely in the next section. However, some of the major developments include:

- a move towards a more statute-based model of law (i.e., legislation made by government);
- a shift in the previous conceptualisation of sexual assault (these shifts in the understanding of sexual assault have resulted in consent becoming the key focus and matter of contestation in a sexual assault trial) (see Table 4).
- acknowledgement of the circumstances in which a complainant is incapable of giving consent, or that undo any consent given, and the representation of this in the legislation of various states; for example:
 - use of force;
 - threats of violence or force;
 - use of fear/intimidation; and
 - complainant is asleep or otherwise unconscious (including as a result of voluntary consumption of drugs/alcohol);
- introduction of limitations in regard to the type of evidence that may be introduced about a complainant (such as in relation to their sexual history), in order to minimise the traumatic nature of the trial process for the complainant; and
- recognition that rape in marriage constitutes a criminal offence.

While these reforms have resulted in many positive changes to the way sexual assault cases are handled by the criminal justice system, victim/survivors navigating the legal system still encounter significant difficulties

Table 4 Changing conceptualisations of sexual assault

Conceptualisation	Description
Sexual assault as a property offence	Historically, sexual assault and rape were defined as property offences. Women were considered the property of either their father or husband. Consequently, raping a woman made her “less valuable” if she were not married, or was considered as damaging her husband’s property if she were married. The woman’s desire for the sexual interaction, and therefore consent, was typically not considered in these cases. The notion that a woman was the “property” of her husband remained enshrined in law until as late as the 1980s when marital immunity to rape was abolished in Australia (SECASA, 2009).
Sexual assault as an offence committed forcibly and against the will of the person	Under this conceptualisation of sexual assault and rape, these offences occurred “against the will” of the woman. Consent became relevant to the case in that it was believed that a woman who was not consenting would show active resistance. This resistance would be illustrated by physical injury. Likewise, physical injury would provide evidence of use of force by the defendant, thus providing insight into his awareness of the complainant’s non-consent.
Sexual assault as an offence against a person’s agency	Current conceptions of sexual assault are based on the premise of “positive” consent. That is, if a person wishes to engage in sexual activity they will actively demonstrate their willingness either verbally or through their physical actions. Submission to sexual advances is not enough to demonstrate consent. This indicates a shift away from the belief that a woman not consenting to sexual activity will actively “fight back” or resist. This also requires each party to ensure their partner is consenting to the sexual activity—it is not enough to merely assume consent has been given.

and barriers throughout the court process, often as a direct result of the way in which criminal offences are structured, as the next section will explore.

Consent and non-consent

Consent is the crucial concept in sexual assault. It is also one of the most complex. Consent is the issue that divides legal from illegal sexual interaction—the prohibited act is not just sexual penetration of or touching another person, but engaging in sexual touching or penetration *without the consent of the other person*.¹

Consent’s centrality to what is legally considered to be sexual assault and the culpability of the defendant has long been a source of controversy and difficulty (Lievore, 2005). Extensive reforms have occurred both in Australia and internationally in recent years in an attempt to amend some of these difficulties (VLRC, 2004).

Because of the elements of the offence and the role of the prosecution, it must be proven beyond reasonable doubt that:

- the victim was not consenting; and

- the defendant was aware at the time that the victim was not consenting.

This means that it is not just the victim’s experience that determines whether a sexual assault has occurred, but also the defendant’s mental state and knowledge. If the defendant held a belief in the complainant’s consent (even if she was not in fact consenting), then a sexual assault has not occurred in the eyes of the law. This has often resulted in men’s actions being excused on account of their belief in consent—even if this belief is unreasonable—although recent legislative amendments have moved away from this.

The next section will provide an overview of some of the recent reforms to the understanding and definition of consent in legislation. Given that the absence of consent is the crux of a sexual assault case, the relationship between consent, actus reus (physical element) and mens rea (mental element) will be discussed.

Establishing the absence of consent creates many of the problems associated with the traumatic nature of sexual assault trials. These issues will be considered here in detail.

¹ The exception is statutory rape, where, if the victim is below a certain age, then consent, and consequently the defendant’s belief in consent, becomes irrelevant.

Legislative approaches to consent

Changing conceptions

As we have already seen, there have been significant shifts in recent years in the way the criminal justice system conceptualises consent. Extensive legislative reform has occurred throughout Australia and across the globe (VLRC, 2004).

Each jurisdiction has particular ways of defining consent or lack of consent and the type of knowledge the defendant needed to have at the time of the assault. Recent legislative changes have tended to shift towards a more “positive” model of consent (see the “Non-consent” section of the legislation table for more detailed information). Positive consent means that:

- there is a free agreement between all parties involved, with no coercion, force or intimidation of any kind; and
- an individual will actively display his/her willingness to participate and consent to sexual activity. Consequently:
 - submitting to sexual activity, or not actively saying “no”, is not enough to demonstrate consent; and
 - the consent of the other party in a sexual encounter should never be assumed, and should be actively sought after and affirmed.

These recent legislative changes are, in part, an attempt to move away from previous “passive” models of consent, which were based on the assumption that unless there is active resistance (e.g., fighting, screaming etc.), consent may be assumed.

Consent and *actus reus*

The *actus reus*, or “physical act”, in sexual assault is engaging in a defined sexual act without the consent of the other person. In the process of establishing that the defendant has committed a criminal offence it must be demonstrated that the complainant was not consenting to the sexual act. However, how this non-consent is actually established has been the source of much controversy.

Under previous models of consent it was assumed that a woman who was not consenting would actively resist her attacker, resulting in physical evidence of her

non-consent in the form of cuts and bruises. The physical injury was then used as evidence in the courtroom to demonstrate that the sexual incident was not consensual. However, this model was problematic, as the majority of sexual assault victims do not receive additional physical injury during the course of the assault (Lievore, 2003). The lack of physical evidence made it difficult to prove non-consent and meant that only sexual offences fitting a certain model of rape (violent, stranger etc.) were likely to be convicted.

This model of consent also suggested that unless a woman physically resisted a sexual advance, it could be assumed that she was consenting. That is, mere submission (or freezing up or remaining compliant to decrease the risk of further injury) was enough to demonstrate consent. By conceptualising consent in this way, the courts denied women autonomy over their sexual experiences, and constructed women as the passive recipients of men’s sexual advances.

Recent legislative changes towards a “positive” model of consent have meant that mere submission to sexual activity is no longer enough to demonstrate consent. In order to establish that the complainant was consenting, it must be demonstrated that she actively communicated her consent, either verbally or through her actions. It is important to note that this construction of consent still places focus on the actions of the complainant, ensuring that her behaviour and actions remain the point of focus in the criminal trial.

In attempting to discredit the complainant’s version of events, it is common for the defence to insinuate that the complainant was in fact consenting. Research indicates this has occurred in recent sexual assault trials (Heenan, 2002–2003; Taylor, 2004). If the defence counsel is able to cast doubt as to the reliability of the complainant’s version of events, or her credibility as a witness, then the occurrence of a sexual act *without consent* cannot be established beyond reasonable doubt, and the defendant cannot be found criminally responsible for his actions.

This has frequently resulted in the defence counsel drawing on information about the complainant’s sexual history, and a host of other information appealing to a jury’s

belief in rape myths (Taylor, 2004). Rape myths consist of inaccurate, “commonsense” understandings of what sexual assault is and what causes it. Rape myths may include beliefs such as:

- women “ask” to be raped by dressing seductively or acting in a promiscuous manner; or
- men have a “right” to sexually access their partners.

As such, by introducing evidence that the complainant is, for example, sexually “promiscuous”, this may cause the jury to believe the complainant was likely to have been consenting to the sexual encounter under examination in the trial as well. That is, the defence counsel falsely uses such “evidence” to construct consent where there otherwise was none. As a result, many complainants have labelled the criminal trial process as akin to a “second rape”, as their behaviour and sexual history, rather than the defendant’s, is scrutinised throughout the trial (see Taylor, 2004 for a detailed overview of the tactics used by the defence counsel in attempting to discredit the complainant’s version of events and construct consent).

Recent amendments have been introduced (in Victoria, for example) that aim to reduce the ability of the defence to construct the presence of a complainant’s consent through:

- her past sexual behaviour and history;
- her clothing prior to the assault;
- consumption of alcohol—in many states individuals are now considered incapable of consenting if they are extremely intoxicated; and
- appealing to a jury’s acceptance of rape myths to make it appear that the defendant had reasonable grounds for believing that the complainant was consenting.

However, such legislation prevents the introduction of information to varying degrees, and there is no state or territory legislation that imposes a *total* ban on the introduction of sexual history as evidence in sexual assault trials (Heenan, 2002–2003; Taylor, 2004). While these reforms are positive, and may reduce the traumatic nature of the trial, there is still evidence to suggest that information regarding factors such as a complainant’s sexual history is raised as a matter of course during sexual

assault trials (see, for example, Loughman, van de Zandt, Saw, & Hunter, 2007a & b; Heenan, 2002–2003; Taylor, 2004; Heath, 2005). For instance, a Victorian study found that evidence relating to sexual history and reputation was included in 76.5% of cases observed (Heenan, 2002–2003); although it should be noted that other studies have indicated that such evidence is introduced at a lower, though still significant, rate (see Heath, 2005). Likewise, in many cases the complainant’s behaviour prior to, and during, the sexual assault are considered relevant in demonstrating her consent, or lack thereof.

Consent and *mens rea*

Having established beyond reasonable doubt that sexual activity occurred to which the complainant did not consent, fulfilling the requirement for the *actus reus*, the court examines the mental state of the defendant, the *mens rea*. (Note that if the *actus reus* is not established beyond reasonable doubt, the defendant is acquitted and the trial terminated.)

The non-consent of the complainant alone is not sufficient to demonstrate that a criminal offence has occurred. The defendant must have also had knowledge of her non-consent and intentionally engaged in the sexual activity without her consent, or have been reckless towards whether or not she was consenting. That is, the presence or absence of consent is dependent not just on the complainant’s experience of the assault, but also the defendant’s interpretation of her mental state, even if that interpretation is an inaccurate one. However, recent legislative reforms have seen several states (such as Queensland and Tasmania) require that the defendant’s mistaken belief in consent be a *reasonable* one. This must be demonstrated by evidence such as the steps the defendant took to ascertain consent.

Certainly, establishing the *mens rea* requires some examination of the behaviour of the defendant, particularly under current “positive” notions of consent, as it is appropriate to expect that the defendant will have taken active steps to ascertain whether or not the complainant was consenting. However, the process of establishing the mental state of the defendant often results in an examination of the behaviour of the complainant. That is,

it is through the complainant and her actions that we can figure out the likely mental state, and belief in consent, of the defendant. This raises similar issues to those discussed in the “Consent and *actus reus*” section of this commentary: namely, that the trial is focused on the actions and behaviour of the complainant, rather than the defendant; and that the “reasonableness” or likelihood that the defendant’s belief in the complainant’s consent may be based on “commonsense” (and inaccurate) understandings of normative heterosexual interaction (e.g., that a woman who has previously been sexually active will be consenting to any sexual encounter).

Indeed, a defendant may construct his entire defence on the basis of his knowledge of the complainant’s sexual history, and consequently his belief that she was consenting to having intercourse with him also (Heenan, 2002–2003). Likewise, a complainant’s belief in outdated notions of sexuality and gender roles, or misinterpretation of a woman’s actions, may be used as grounds for establishing belief in consent. This is illustrated by a case observed by Heenan (2002–2003, p. 8), where the defendant posited that “his knowledge of her sexual conduct with other men allowed him to confidently presume she would also agree to have sex with him”. (Note that the introduction of this sexual history evidence would also be relevant to establishing *actus reus*, as it also insinuates that the sexually “promiscuous” woman is more likely to have been consenting in the first place.) As Heenan notes, the true intention of this sexual history evidence is consequently difficult to decipher. While the outcome of this trial (and hence the success of this tactic) is not documented, it nonetheless demonstrates how inaccurate or stereotypical understandings of heterosexual sex and sexually active women may be commandeered to establish the defendant’s belief in consent, or to create reasonable doubt as to the defendant’s knowledge of the complainant’s non-consent.

While establishing the *mens rea*² of the defendant is a mandatory component of most

2 It should be noted that there are differences in how different states and territories establish *mens rea* in sexual offences, and in some instances the defendant’s belief in consent is raised as a defence rather than a component of the *mens rea* – refer to the legislation table for an overview.

criminal offences, the preceding discussion indicates that the manner in which *mens rea* is constructed in sexual assault trials poses particular difficulties. This is because a woman’s experience of sexual assault may be denied based on the mental state and knowledge of the defendant. That is, a defendant’s honest but inaccurate belief in consent is privileged above a woman’s actual knowledge of her non-consent.

How “reasonable” the defendant’s belief in consent must be has varied across time and jurisdictions. The Morgan precedent,³ in which it was established that the defendant’s belief in consent need only be honest but not reasonable, has been followed by various states and territories in Australia, though recent law reforms have tended to move away from this principle. The subjective approach to belief in consent established by the Morgan precedent has been criticised as the “more drunk, insensitive, boorish or self-delusional the male, the more likely that an acquittal will ensue” (Rolfes, 1998, p. 124). In order to overcome this, states such as Victoria have established jury directions compelling members of the jury to, for instance, consider any evidence supporting the defendant’s belief in consent and to consider whether the belief was reasonable under the circumstances. However, it is unclear what factors jury members take into account in determining the reasonableness of the belief. Given that research suggesting that evidence relating to sexual history is still submitted in criminal trials, and given that a significant minority of community members hold belief in myths and stereotypes about violence against women (VicHealth, 2010), it is plausible that juror decision-making still draws on these stereotypes and beliefs in determining reasonableness.

Concluding remarks and further information

The information provided, while detailed, is not an exhaustive discussion of the legal process, or of all the factors influencing the outcome of a sexual assault trial. For example, issues such as jury directions, rules

3 DPP v Morgan [1976] AC 182

of evidence and cross-examination procedures have not been considered in this resource sheet; nor have we considered the role of the police or the impact of other systems occurring at the beginning of the criminal justice process. The difficulties faced by victim/survivors are the result of a complex interplay of factors, of which the structure of criminal offences and criminal trial processes is a component that in reality cannot be viewed in isolation. However, given their technical nature, the areas of criminal law and the criminal justice system are perhaps the most difficult to comprehend in this subject, and we hope that this commentary has assisted your understanding of these in relation to sexual assault.

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Glossary of terms

<i>Actus reus</i>	The prohibited criminal act
Committal hearing	Hearing held in the Magistrates' Court to determine if an indictable offence will proceed to trial
Common law	Legal reasoning used by judges that influences the decisions made in subsequent cases that are similar in circumstance
Complainant	Individual against whom an offence was committed
Consent	An individual's free agreement to participate in a sexual activity
Defence counsel	Legal representative(s) for the defendant
Defendant	Individual who has been charged with a criminal offence
Due process	Series of procedural rules and rights ensuring the defendant receives a fair trial
Indictable offence	Offence that fits into the indictable, or serious, category of offences; sexual assault is an indictable offence
Judge	Presides over criminal trials in County and Supreme Courts; determines points of law
Jury	Representatives of the community responsible for determining the guilt or innocence of a defendant
Legislation	Source of law enacted by government
Magistrate	Presides over the Magistrates' Court; fulfils the role of both judge and jury
Mens rea	The defendant's mental attitude or knowledge of the criminal act
Prosecution	Presents the case against the defendant on behalf of the State
Sexual assault	Sexual activity that occurs without the consent of the other (non-assaulting) party (Note that what constitutes "sexual activity" may vary depending on the prescribed legal criteria in each state and territory.)
Summary offence	Offence that fits into the summary, or minor, category of offences; such offences are heard in the Magistrates' or Local Court
Temporal coincidence	Legal requirement that the <i>actus reus</i> and <i>mens rea</i> occurred at the same time in a sexual offence
Voluntariness	Term that states that the criminal/prohibited actions of the defendant must have been voluntary
Witness	Individual who has seen, or has knowledge of, a criminal offence



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