



# **‘Affirmative Consent’ in the Law of Sexual Offences in Commonwealth Jurisdictions**

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# INTRODUCTION

## I. PURPOSE AND SCOPE OF THE RESEARCH

1. Right to Equality, a non-profit organisation operating in the United Kingdom, has asked OPBP to prepare a report on how commonwealth jurisdictions have incorporated ‘affirmative consent models’ into the law of sexual assault. The model defines consent as active, explicit, mutual, and voluntary agreement to participate in a sexual act. Thus, the focus of consent changes from showing ‘active dissent’ to showing ‘absence of communicated agreement’.<sup>1</sup> Consequently, under this model the defendant needs to adequately investigate that their partner is willing to have sexual contact by taking reasonable steps to seek such consent.<sup>1</sup>
2. Right to Equality has the stated aim of highlighting the inequalities that women, girls and marginalised people suffer and raising awareness of the legal mechanisms available to protect them through policy advocacy. Right to Equality is interested in exploring whether incorporating an affirmative consent model in the sexual offence law of England and Wales may facilitate a shift towards ensuring that all the parties involved in a sexual interaction have consented to the sexual activity. OPBP’s contribution to Right to Equality’s overarching aim is focused on the position of the law of sexual consent in some, not all, of the commonwealth jurisdictions that have introduced affirmative consent standards in law.
3. This report seeks to understand how affirmative consent models have been adopted and interpreted in the following jurisdictions: **Australia**—with a focus on New South Wales (‘NSW’); the United States of America—**Vermont, Wisconsin, and New Jersey**; and **Canada**. For each of the jurisdictions, the report introduces the criminal law in operation in brief and looks at the legal trajectory of the shift towards the model of affirmative consent. It then highlights the relevant legislative provisions and the judicial decisions, where applicable, that introduced affirmative consent standards into the law on sexual offences. Particular attention is paid to the way in which different jurisdictions construe the elements of affirmative consent and the distribution of evidentiary burdens. The report also considers and analyses the definitions of affirmative consent in the disciplinary proceedings on sexual violence in **American Universities**.

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<sup>1</sup> Helen Mary Cockburn, ‘The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials’ <<https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf>> accessed April 1 2023, 5.

While these definitions are not criminal in nature, they share commonalities with the definitional elements in other jurisdictions. Additionally, in this chapter the report provides a brief overview of the international human rights law standards in place for sexual offences and binding on the United Kingdom and the law on sexual consent in England and Wales. This is in view of the fact that the comparative research in this report is being conducted to enable Right to Equality to assess the viability of introducing affirmative consent standards for sexual offences. The international human rights law standards are important as they constitute the overarching norms that bind the United Kingdom.

4. Understanding the definition of consent becomes more significant when the sexual assault faced by women is not perceived as ‘real rape’.<sup>2</sup> Real rape—as pointed out by feminist criminologists—refers to the stereotypical understanding of rape as ‘a violent act committed by a stranger...in a deserted public place’<sup>3</sup> and contributes to myths about rape that are simply prejudices, stereotypes, or false beliefs about rape, rape victims, and rapists.<sup>4</sup> Despite statistics consistently showing that most victims know their perpetrator,<sup>5</sup> the ‘stranger rape myth’—the notion that rape is committed by a stranger lurking in the bush—persists.<sup>6</sup> The National Intimate Partner and Sexual Violence Survey 2016/2017 in the USA, for example, confirms that across all forms of sexual violence, the perpetrator tends to be someone known to the victim, both male and female, most often the intimate partner and acquaintances.<sup>7</sup> The statistics on rape reveal that more than half (51.1%) of female victims of rape reported being raped by an intimate partner and 40.8% by an acquaintance.<sup>8</sup> Similarly, more than half (52.4%) of the male victims reported being raped by an acquaintance.<sup>9</sup> The statistics in Australia confirm the pattern; the perpetrator is known to the victim. Of the 8 million Australians, an estimated 22% women have suffered

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<sup>2</sup> Susan Estrich, *Real Rape* (1<sup>st</sup> edn, Harvard University Press 1987).

<sup>3</sup> Clare Wilkinson ‘Real rape and the coverage of sexual violence in Dutch newspapers, 1880 to 1930’ (2022) 31 *7 Women's History Review*, 1190, at 1191

<sup>4</sup> Ryan W. (1971) *Blaming the victim* (Pantheon Books 1971).

<sup>5</sup> Crime Victims Research and Treatment Center, ‘Rape in America: A Report to the Nation’ (*EVAWT*, 23 April 1992) <[https://evawintl.org/wp-content/uploads/rape\\_in\\_america.pdf](https://evawintl.org/wp-content/uploads/rape_in_america.pdf)> accessed April 28 2023.

<sup>6</sup> Melissa Swauger, Dana Hysock Witham and Diane Shinberg, ‘No Stranger in the Bushes: The Ambiguity of Consent and Rape in Hook up Culture’ (New York) 68 *Sex Roles* 629; Genevieve Waterhouse, Ali Reynolds and Vincent Egan, ‘Myths and Legends: The Reality of Rape Offences Reported to a UK Police Force’ 8 *The European Journal of Psychology Applied to Legal Context* 1; Genevieve F. Waterhouse, Ali Reynolds, and Vincent Egan, ‘Myths and legends: The reality of rape offences reported to a UK police force,’ (2016) 8 *The European Journal of Psychology Applied to Legal Context*, (1), pp. 1–10.

<sup>7</sup> The National Intimate Partner and Sexual Violence Survey, ‘2016/2017 Report on Sexual Violence’ (*Center for Disease Control and Prevention*, June 2022) <<https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>> accessed on May 1 2023, 16.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

sexual violence and 35% have experienced violence at the hands of a person known to them.<sup>10</sup> In Australian states where the relationship between the victim and perpetrator was recorded, 77% cases involved a known offender as compared to 23% cases where the offender was a stranger.<sup>11</sup> In Canada, over half the sexual assault incidents (52%) were perpetrated by a known person (a friend, acquaintance, or neighbour of the victim), as per the 2014 General Social Survey.<sup>12</sup> Similarly, the survey of American campuses similarly reveals the harasser tends to be someone they regularly interact with: friend (38%), classmate (34.9%), other acquaintances (39.6%).<sup>13</sup> In England and Wales for the years ending March 2017 and March 2020, 81% of the perpetrators were known to the women victims of rape or sexual assault by penetration as against 15% instances where the perpetrator was a stranger.<sup>14</sup> Of the 81%, there was a high likelihood of being assaulted by one's partner or ex-partner.<sup>15</sup> Given these statistical trends, Right to Equality seeks an investigation into the legal standards of sexual consent, where an affirmative consent standard has been adopted.

## II. WHAT IS 'AFFIRMATIVE CONSENT'?

5. As mentioned above, the affirmative consent standard defines sexual consent as the active, explicit, mutual, and voluntary agreement to participate in a sexual act.<sup>16</sup> The standard reflects a shift in the law's approach to sexual consent, namely, from understanding non-consensual interaction as one in which the victim displays 'active dissent' to one in which there is an 'absence of communicated agreement.'<sup>17</sup> Under an active dissent standard, the burden to refuse is placed

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<sup>10</sup> Australian Bureau of Statistics, 'Personal Safety, Australia' (*Australian Bureau of Statistics*, 2021-22) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/2021-22#key-statistics>> accessed 21 April 2023.

<sup>11</sup> Australian Institute of Health and Welfare, 'Sexual Assault in Australia' (*Australian Government*, August 2020) <<https://www.aihw.gov.au/getmedia/0375553f-0395-46cc-9574-d54c74fa601a/aihw-fdv-5.pdf.aspx?inline=true>> accessed 21 April 2023, 8.

<sup>12</sup> Research and Statistics Division, 'JustFacts Sexual Assault' (*Government of Canada*, April 2019) <<https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html>> accessed 21 April 2023.

<sup>13</sup> David Cantor and others, 'Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct' (*The Association of American Universities*, 17 January 2020) <[https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7\\_\(01-16-2020\\_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf)> accessed 21 April 2023, 50.

<sup>14</sup> The Office for National Statistics, 'Nature of Sexual Assault by Rape or Penetration, England and Wales: Year Ending March 2020' (*Office for National Statistics*, 18 March 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020#nature-of-sexual-assault-data>> accessed 21 April 2023. See Section 9 'Nature of Sexual Assault Data', Figure 2.

<sup>15</sup> *ibid.*

<sup>16</sup> Cockburn (n 1) 5.

<sup>17</sup> *ibid.* 5.



on the victim.<sup>18</sup> As Hilgert explains, the refusal must be unequivocal because any form of miscommunication counts against the victim's assertion that there was no consent. By contrast, under the affirmative consent standard 'anything less than "yes" does not qualify as consent.'<sup>19</sup> Consequently, the obligation is placed on the accused to investigate whether their partner is willing to participate in sexual contact by taking reasonable steps to seek consent.<sup>20</sup> In other words, affirmative consent requires that 'someone must ask for, and earn, enthusiastic approval' for sexual activity with another person.<sup>21</sup>

6. The introduction of the affirmative consent standard into law in some jurisdictions has triggered a debate around its perceived strengths and weaknesses. On the one hand, affirmative consent has been praised for its potential to promote a respectful culture in the context of sexual encounters<sup>22</sup> and creating incentives to ensure that a sexual partner is providing consent.<sup>23</sup> Gotell notes how some normalized but harmful behaviour, such as pressuring a woman to submit to sexual intercourse, would not reach the standard of affirmative consent.<sup>24</sup> In addition, Vandervort points out that the standard may provide more protection when sexual assault occurs in the context of close interpersonal relationships. Considering that a victim's everyday conduct is often accused of being 'seductive' when unwanted sexual touching occurs with acquaintances, Vandervort explains, requiring active communication to prove consent may offer more protection.<sup>25</sup>
7. On the other hand, critics have noted at least two concerns about affirmative consent. The first relates to the complexity of ascertaining what it means for consent to be 'affirmative'. If it simply means a verbal agreement, Hilgert explains, the standard could capture interactions where sexual contact is desired but consent is not expressed verbally.<sup>26</sup> The alternative is to imply affirmative consent from actions and circumstances. However, the standard would introduce a high degree

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<sup>18</sup> Lucinda Vandervort, 'Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory' 23 *Columbia Journal of Gender and Law* 395, 404.

<sup>19</sup> Noah Hilgert, 'The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws' (2016) 58 *Arizona Law Review* 867, 874.

<sup>20</sup> Cockburn (n 1) 31.

<sup>21</sup> Jane Im and others, 'Yes: Affirmative Consent as a Theoretical Framework for Understanding and Imagining Social Platforms' (Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems, 8-13 May 2021) <<https://dl.acm.org/doi/pdf/10.1145/3411764.3445778>> accessed 28 April 2023, p. 1.

<sup>22</sup> Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press 2009), 77.

<sup>23</sup> Janet Halley 'The Move to Affirmative Consent' (2016) 42(1) *Journal of Women in Culture and Society* 257, 258.

<sup>24</sup> Lise Gotell 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual subjects and Risky Women' (2008) 41(4) *Akron Law Review* 865, 872.

<sup>25</sup> Lucinda Vandervort, 'Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory' (n 18), 405-406.

<sup>26</sup> Hilgert (n 19) 876-877, 882.

of subjectivity, as the test to ascertain consent would largely rely on social conventions and how the parties involved understand them.<sup>27</sup> The ambiguities plaguing the definition of affirmative consent has led some authors to claim that the standard is empty and to conclude that ‘the real debate lies in whether and how to limit *what* counts as evidence of internal or external consent.’<sup>28</sup>

8. The second concern relates to how affirmative consent may affect procedural rights. Some critics suggest that the affirmative consent standard infringes the accused’s right to be presumed innocent because it shifts the burden of proof to the accused.<sup>29</sup> Furthermore, Halley argues that the accused will likely not have concrete and tangible evidence to prove the victim’s internal state of mind, nor of the objective steps he took to ascertain consent.<sup>30</sup> The risk, she suggests, is that the change will disproportionately impact groups thought to be ‘sexually dangerous’, namely people of colour or of lower socio-economic class.<sup>31</sup>
9. Consent-based definitions of sexual offences vary widely. For the purposes of this report, we adopt the understanding of affirmative consent based on five core properties, as developed by Im et. al.<sup>32</sup> Thus, affirmative consent is understood as being:
  - (i) *Voluntary*:<sup>33</sup> The voluntary nature of consent requires free and willing agreement where in addition to being ‘freely given’ the consent must also be enthusiastically<sup>34</sup> given. The Rape Abuse and Incest National Network (RAINN) explains enthusiastic consent as ‘looking for the presence of a “yes” rather than the absence of a “no”.’<sup>35</sup>
  - (ii) *Informed*:<sup>36</sup> The consent should be given with correct information that should be accessible. There should not be any deception about facts that are material to consent, misinformation, or any false promises to obtain consent.

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<sup>27</sup> Hilgert (n 19) 876-877.

<sup>28</sup> Aya Gruber, ‘Not Affirmative Consent’ (2016) 47 *The University of the Pacific Law Review* 683, 687.

<sup>29</sup> Hilgert (n 19) 882.

<sup>30</sup> Halley (n 23) 276.

<sup>31</sup> Halley (n23) 278.

<sup>32</sup> Im and others (n 21) section 3.

<sup>33</sup> *ibid*, Section 3.1

<sup>34</sup> Jaclyn Friedman and Jessica Valenti, *Yes means Yes!: Visions of Female Sexual Power and a World without Rape* (Seal Press 2019); Hilgert (n 19) 874, 898.

<sup>35</sup> Rape, Abuse & Incest National Network, ‘What Consent Looks Like’ (RAINN)

<<https://www.rainn.org/articles/what-is-consent>> accessed 28 April 2023.

<sup>36</sup> Im and others (n 21) Section 3.2.

- (iii) *Revertible*:<sup>37</sup> The consent must be revertible and revokable at any point in the sexual activity to be truly affirmative. This points to the conceptions of consent as ‘ongoing’ and the need for ‘active participation’ by people.<sup>38</sup> This assumes importance in cases where the parties are uncertain about the extent to which they want to interact sexually.
  - (iv) *Specific*:<sup>39</sup> Consent to one person or certain sexual activity is not automatic consent to sex with another person or other activities with the same person. Thus, affirmative consent is specific in the sense that it asserts that people consent to a particular action (or a particular person), and not to a series of actions or people.<sup>40</sup>
  - (v) *Unburdensome*:<sup>41</sup> Finally, consent must be understood in the context of the power relations that impact decision-making, including decisions involving sexual autonomy. Thus, the consent that is given in conditions of undue influence, authority or power imbalance can be vitiated.
10. Additionally, we analyse how the law of sexual assault treats the issue of capacity to consent to sexual activity. The provisions that govern capacity to consent play an important role in ascertaining whether the parties involved were legally competent to give consent, as they affect scenarios concerning people’s age, mental health, level of intoxication, and lack of consciousness, among others. Capacity to consent is an important prerequisite to determine that consent was affirmatively given. For instance, if alcohol, drugs, or other intoxicants have impaired the victim’s capacity to make decisions, then affirmative consent was lacking.<sup>42</sup> To put another example, it may be said that consent has not been given at all if one of the parties is underage. This is the case of minors, whom some statutes deem to be legally unable to consent.<sup>43</sup>
11. In section IV below, we analyse the extent to which the laws in our select jurisdictions meet the five core properties of affirmative consent and whether they contain provisions on capacity to consent to sexual activity. The aim is not to make a normative judgment that a law on affirmative

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<sup>37</sup> *ibid*, Section 3.3.

<sup>38</sup> Melanie A. Beres, ‘“Spontaneous” Sexual Consent: An Analysis of Sexual Consent Literature’ (2007) 17(1) *Feminism & Psychology* 93; Melanie A. Beres, ‘Sexual Miscommunication? Untangling Assumptions About Sexual Communication between Casual Sex Partners’ (2010) 12(1) *Culture, Health and Sexuality* 1.

<sup>39</sup> *Im* and others (n 21) Section 3.4.

<sup>40</sup> *ibid*.

<sup>41</sup> *ibid*, Section 3.5.

<sup>42</sup> This is the case in Australia, *Crimes Act (No 40) 1900* (NSW) s 61HJ(b)(c) and Vermont 13 VSA s 3254(4)(5)(a)(c).

<sup>43</sup> See, for example, *State v Bellanger*, 183 A3d 550 (Vt 2018), 27.

consent must have these properties; rather, it is an attempt to break down the definition of consent to identify the elements of affirmative consent that different jurisdictions have adopted. The findings are presented in Table A.

### III. JURISDICTIONS COVERED

12. The following jurisdictions are considered in this report:
  1. Australia—New South Wales
  2. Canada
  3. United States of America (USA)
    - a. Vermont
    - b. Wisconsin
    - c. New Jersey
  4. Certain University Campuses in the USA
13. The selection of jurisdictions focused on the common law and commonwealth jurisdictions which have specifically adopted ‘affirmative consent’ as the model of consent in their sexual offence laws, either through legislative reform or via judicial interpretation of the consent standard. While several civil law countries,<sup>44</sup> such as Finland, Spain, Slovenia and Denmark have also recently adopted affirmative consent laws, Right to Equality was primarily interested in common law jurisdictions which are most similar to the law in England and Wales.
14. We canvassed the sexual offence laws in all the commonwealth countries (53),<sup>45</sup> ex-commonwealth countries (Zimbabwe, Gambia, and Ireland) as well as the laws in different states of the USA. The relevant text of the sexual offence provisions in each of these countries is attached as an appendix to this report.<sup>46</sup> Of these countries, we used preliminary research to narrow the scope of inquiry to the countries that have legislatively adopted or judicially read in

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<sup>44</sup> Amnesty International, ‘Let’s Talk About “Yes”: Consent Laws in Europe’ (*Amnesty International*, 17 December 2020) <<https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/>> accessed 23 March 2023.

<sup>45</sup> Commonwealth Network, ‘All Member Countries’ (*Commonwealth of Nations*) <<https://www.commonwealthofnations.org/country/>> accessed 23 March 2023.

<sup>46</sup> See Appendix below.

an element of affirmative or communicative consent. In addition to the jurisdictions chosen for close examination in this report, other common law jurisdictions have adopted elements of the affirmative consent standard. Guyana, for example, defines consent to mean ‘words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or other sexual contact’.<sup>47</sup> Similarly, in India consent is defined to mean ‘an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific act’.<sup>48</sup> Other countries like Nauru, New Zealand, Ireland,<sup>49</sup> Northern Ireland, include either a list of non-exhaustive circumstances which cannot be construed as consent or specify that the accused person should have taken steps to ascertain consent.<sup>50</sup> In the interest of choosing more explicit framings of affirmative consent, the inquiry was limited to the chosen jurisdictions where discussion on affirmative consent—legislative, judicial, and academic—has been persistent over the last few years.

15. Right to Equality was particularly interested in the developments in the states of the USA and the policies used by several American universities, sometimes mediated by state law, as the communicative standard of consent or affirmative consent was first popularised in the USA. The organisation was also interested in the law in other commonwealth countries such as Canada and Australian states which also apply the affirmative consent standard in trying sexual offences.

#### IV. RESEARCH QUESTIONS

16. The report is structured around two primary research questions:
  - (i) What is the legal trajectory of adoption of an affirmative consent model in the chosen common law jurisdiction?
  - (ii) What legal standard is used to prove sexual offences in jurisdictions that apply the affirmative consent model?

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<sup>47</sup> Guyana: Section 2 and Sections 7-8, Sexual Offences Act 2010 (amended in 2013).

<sup>48</sup> India: Section 375, Explanation—3, Indian Penal Code.

<sup>49</sup> ‘Lack of consent is rape. Consent is the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse.’ See: *The People (DPP) v CO’R* [2016] IESC 64 [36].

<sup>50</sup> See Appendix A

17. The first research question on legal trajectory aims to outline the legal context and the background of sexual offence laws in the designated jurisdictions. It aims to assess if the shift in laws towards affirmative consent was gradual or triggered by a particular incident. As part of this assessment the report outlines the key events involved, if any, and the role played by key legal players responsible for the changes in law, such as the parliament, the law commission, or the judiciary.
18. The second research question aims to analyse the content of the legal standard of affirmative consent law and evaluate the test used in the designated jurisdictions to prove the sexual offence. To address this question, the following sub-questions are important to the inquiry:
  1. What is the standard or test to prove a sexual offence in the jurisdictions that apply an affirmative consent model? What specifically constitutes the *actus reus* and the *mens rea* for the offence? Who bears the burden of proof for proving these elements?
  2. How has the affirmative consent model been adopted in the designated jurisdictions?
    - (i) If adopted through legislation, what is the specific wording and key terms employed to draft affirmative consent provisions? How have the Courts applied these provisions, if applicable?
    - (ii) If adopted through judicial decisions, how did the courts introduce the affirmative consent model in reported cases?
19. Considering the overlaps between these two questions, each jurisdiction divides the material under the following elements and considers the relevant judicial decisions under these heads:
  1. *Definition of Consent:* This section asks certain preliminary questions about consent in sexual offence law, through legislation or judicial pronouncement such as: Is consent defined in law? Does the law require that parties have legal capacity to consent? Are illustrations provided of what does or does not constitute valid consent? Is silence or submission viewed as consent? What evidentiary considerations are relevant in proving these elements?

2. *Communication of Consent*: This section evaluates if the overt communication of consent through words or action, i.e., a communicative model of affirmative consent is applicable. If not, how is affirmative consent signified?
  3. *Defence of Reasonable Belief*: This section assesses the mental state of the accused, the *mens rea* element of the sexual offence in question, including, the defence of consent used by the accused. The report evaluates if such a defence exists and if so, whether the standard is objective, subjective, or hybrid.
  4. *Burden of Proof*: Finally, the standard of proof evaluates if there is a shift in the burden of proof in cases of affirmative consent.
20. Thus, to answer the second question, the report looks at how the legislative provisions define consent, whether there is an explicit communicative standard to signal affirmative consent, the possibility of using reasonable belief in the consent by the complainant as a defence, and the standard of proof required for proving the offence. Where relevant, the report considers the most significant judicial decisions in each jurisdiction to identify how affirmative consent has been shaped or applied by the courts.
21. While relevant statistics for sexual assault are not available in each jurisdiction, the report includes a section on the same, where applicable.
22. *Note*: In case of the American universities surveyed, the questions are answered to the extent applicable. Since the adjudicative procedures for sexual assault complaints on campuses are not criminal proceedings, the standards need to be viewed in light of the nature of the proceedings.

## V. SUMMARY

23. From the analysis of the jurisdictions that are covered in this report, some commonalities and divergences can be observed. The individual summaries below try to capture the questions raised above in brief: the mode and trajectory of change in law, the definition of consent and its broad elements, the requirement to communicate consent, and the evidentiary burdens involved.
24. The first research question concerns the mode in which the affirmative consent standards were adopted. While Australia, Wisconsin, and Vermont, brought about the changes solely and

primarily through legislative measures, in Canada the Supreme Court has played an important role in shaping the contours of the Criminal Code's definition of consent, which applies across the country.<sup>51</sup> As for individual trajectories, the triggers in most jurisdictions have been legal cases which may or may not have a judicial component asserting an affirmative definition of consent.

25. Second, as regards the definitional elements of affirmative consent in these jurisdictions, we have mapped them against the five core features of affirmative consent, as defined above,<sup>52</sup> in Table A. While consent is defined as voluntary in each of the jurisdictions, there are differences in the extent to which other elements of affirmative consent are captured by the statutory definitions. Regarding the 'informed' nature of consent, where there must not be any deception or misinformation, Vermont<sup>53</sup> lacks statutory basis to this effect, while New Jersey's Code of Criminal Justice does not recognise consent when it is 'induced by force, duress, or deception.'<sup>54</sup> In Canada the code lacked express statutory provisions on informed consent but the judiciary has held, for example, that there are scenarios where the failure to disclose information on HIV status may vitiate consent.<sup>55</sup> New South Wales and American campuses have provisions requiring the consent to be properly informed. Although in Wisconsin the statute does not clarify whether consent ought to be informed, the jury instructions suggest that consent should be informed, that is, with an understanding of the 'the act and its consequences.'<sup>56</sup> While other jurisdictions specify that consent is revocable at any point of time before or during the sexual activity, the criminal statute in Wisconsin<sup>57</sup> and New Jersey lack provisions that expressly include revocability

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<sup>51</sup> See para 159.

<sup>52</sup> See para 9.

<sup>53</sup> Chapter 72 of Title Thirteen of Vermont's Statutes and Court Rules does not have provisions stating that consent needs to be informed. Section 3252 (a)(4) prohibits engaging in sexual activities when the person 'is unaware that the act is occurring' and section 3254 states that there is no consent where the actor 'should have known that the other person was unaware that a sexual act...was being committed.' These provisions could be said to imply that consent must be informed. However, lack of awareness is distinct to informed consent which requires that consent is given with correct, accessible information and without deception, misinformation and false promises.

<sup>54</sup> In the case of New Jersey, the rules applying to sexual offenses do not expressly state that consent has to be informed. However, Title 2C 2-10 c(3) of the NJ Criminal Code of Justice, which outlines the general principles of liability, provides that consent is ineffective if it is induced by force or deception. This is why Table A states that New Jersey partially requires informed consent.

<sup>55</sup> The Supreme Court has held that consent is vitiated if the accused did not disclose to the complainant information such as his or her HIV status, if transmission is a 'realistic possibility'. See *R v Cuerrier* [1998] 2 RCS 371, at 372; *R v Mabior* 2012 SCC 47 [2012] 2 SCR 584, [4] [84].

<sup>56</sup> See Wisconsin Jury Instructions Committee 'Wisconsin Criminal Jury Instructions (Wis JI-Criminal)1200C' (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>57</sup> Wisconsin's statutes do not expressly recognise that consent can be revoked at any time. Chapter 939.22 defines consent negatively, that is, it establishes three scenarios where there is no consent: where there is fear or threats, where the actor claimed to act under legal authority, or where the victim did not understand the nature of the act. On the



as an element of affirmative consent.<sup>58</sup> Similarly, every jurisdiction other than Vermont and Wisconsin clarify that consent is specific, i.e., given for a particular act and/or to a particular person and consent given in a certain circumstance cannot be read as consent given to that act or to that person otherwise. As regards the unburdensome nature of consent where the consent is not given due to an abuse of trust or power, for instance, all jurisdictions acknowledge this power imbalance, even if partially as is the case of Vermont or Wisconsin.

26. Third, the explicit requirement that consent be communicated to the partner, verbally or by gestures, is also true of all jurisdictions *albeit* partially for Vermont and Canada.
27. Fourth, regarding the evidentiary burdens, apart from university proceedings which are civil in nature, all jurisdictions apply the criminal law standard of beyond reasonable doubt. The burden of proof is borne by the Prosecutors and the burden does not shift to the accused at any point. Similarly, even though the standard of proof is preponderance of probabilities in American campus disciplinary proceedings, the burden is borne by the University officials rather than the accused student.

**TABLE A**

**ELEMENTS OF AFFIRMATIVE CONSENT IN THE REPORTED JURISDICTIONS**

Jurisdiction	Elements of Affirmative Consent					
	Voluntary	Informed	Revertible	Specific	Unburdensome	Communicative
Australia-NSW	Yes	Yes	Yes	Yes	Yes	Yes
USA-Wisconsin	Yes	Partially	Not specified	Not specified	Partially	Yes
USA-Vermont	Yes	Not specified	Yes	Not specified	Partially	Partially
USA-New Jersey	Yes	Partially	Not specified	Yes	Partially	Yes

other hand, Chapter 940.225 (4) defines consent positively but does not include ‘revocability’ as an element of consent. It understands consent as ‘words or overt actions by a person who is competent to give informed consent indicating a freely given agreement.’

<sup>58</sup> Title 2C: 14-2 of the New Jersey Statutes defines formulates consent as ‘affirmative and freely-given permission.’

Canada	Yes	Yes	Yes	Yes	Yes	For <i>mens rea</i>
USA-College Campuses	Yes	Yes	Yes	Yes	Not specified	Yes
England and Wales	Yes	Yes	Partially <sup>59</sup>	Partially <sup>60</sup>	Partially	No

28. The summaries of the findings in relation to each jurisdiction are provided below:

**(a) Australia—New South Wales**

29. The New South Wales government in Australia passed the Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021<sup>61</sup> which introduced the definition of consent as affirmative. It was enacted in November 2021 and brought in force from June 1, 2022. In addition to substantively amending the Crimes Act 1900 No 40, changes were also made in procedural laws. The amending act also inserted new jury directions on misconceptions about consent in sexual assault trials, for trials commencing on and from 1 June 2022, into the *Criminal Procedure Act* 1986 in sections 292–292E. The Mullins case was a major catalyst for the reform of the laws, discussed in depth in the Australia section below. The amended law directly addresses the lack of response—the ‘freeze’ response—in victim-survivors, a common response to trauma caused by sexual assault, which is often misconstrued as implied consent.

30. The amendment was premised on three foundational principles, right to choose whether or not to participate in sexual activity, consent should never be presumed (including in matrimonial or other ongoing relationships), and consensual sexual activity involves ongoing and mutual communication, decision-making and agreement between participants. Section 61HI(1) of the amended Crimes Act 1900 No 40 defines consent ‘at the time of the sexual activity’ as free and

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<sup>59</sup> It may be appropriate to describe the UK law on consent regarding reversibility and specificity as a partially fulfilled requirement due to the lack of explicit statutory guidance and limited legal precedent in this specific context, as further clarified in Paragraph 64 in the text below.

<sup>60</sup> *ibid.*

<sup>61</sup> Parliament of New South Wales, ‘Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021’ (*Parliament NSW*, 2021) <<https://www.parliament.nsw.gov.au/bill/files/3906/Passed%20by%20both%20Houses.pdf>> accessed 29 March 2023.

voluntary agreement. Such consent can be withdrawn at any time 'by words or conduct'.<sup>62</sup> Lack of physical or verbal resistance to a sexual activity is not to be taken as consent 'by reason only of that fact'.<sup>63</sup> The law requires consent to be ongoing as well as specific, i.e., consent to a particular person or sexual activity and gives example of stealthing.<sup>64</sup> In addition to defining consent, the law also specifies the circumstances in which there is no consent, such as due to lack of capacity or misinformation or deception or due to the abuse of a relationship of authority, trust or dependence, amongst other such circumstances which can vitiate consent.<sup>65</sup>

31. The law incorporates affirmative consent by using a communicative standard that there will be no consent in the circumstances if 'the person does not say or do anything to communicate consent'.<sup>66</sup> It also clarifies that the belief of the accused person in consent is unreasonable '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'.<sup>67</sup> The only exception to this is for accused persons who had a cognitive or mental health impairment, provided 'the impairment was a substantial cause of the accused person not saying or doing anything'.<sup>68</sup>
32. The burden of proof lies with the prosecution to prove both the lack of consent and knowledge of such lack of consent, i.e., prove that the accused person knew that the victim did not consent.

### **(b) United States - Wisconsin**

33. The introduction of affirmative consent into the law of Wisconsin was the result of legislative action. In 1976, the legislature repealed several statutes that criminalised rape offences and instead enacted a new statute that introduced two important changes. First, the new statute categorised sexual intercourse without consent as four degrees of sexual assault offences. Second, it defined consent as 'words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact'.<sup>69</sup> This

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<sup>62</sup> Australia, *Crimes Act (No 40) 1900* (NSW) s 61HI(2).

<sup>63</sup> *Ibid*, s 61HI(4).

<sup>64</sup> *Ibid*, ss 61HI(5)-(6).

<sup>65</sup> *Ibid*, s 61HJ.

<sup>66</sup> *Ibid*, s 61HJ(1)(a).

<sup>67</sup> *ibid*, s 61HK(2).

<sup>68</sup> *Ibid*, s 61HK(3).

<sup>69</sup> Wisconsin Legislative Council, 'Analysis of Current Wisconsin Laws Relating to Sexual Assault' (*US Department of Justice, National Institute of Justice*, 1990) <<https://www.ojp.gov/pdffiles1/Digitization/126156NCJRS.pdf>> accessed 18 March 2023.

is the current definition of consent for the purpose of sexual assault offences, established in Wisconsin Statute § 940.225 (4).

34. The definition of affirmative consent is found in § 940.225 (4) which provides that consent is a ‘freely given agreement.’ The statute specifies that consent can only be provided by a person ‘who is competent to give informed consent’.<sup>70</sup> Although the statute does not clarify whether there is a standard for consent to be deemed ‘informed’, the jury instructions establish that ‘informed consent’ should be understood as ‘the ability to understand the act and its consequences.’<sup>71</sup> The statute indicates scenarios in which ‘consent is not an issue’ which means that consent is not an element of the offence. For instance, when capacity to appraise conduct is compromised due to a mental illness, an intoxicant or lack of consciousness, consent is not an element of the offence but indications of consent may be used to prove that capacity to appraise conduct was compromised. On the other hand, consent is not an element at all when the accused is a law enforcement officer and the victim is detained; the accused is a parole or probation agent and the victim is under the accused’s supervision; the accused is a correctional staff member at the organisation in which the victim is confined, or the accused is an employee of a caregiving facility and the victim is a patient or resident there.<sup>72</sup>
35. The Supreme Court established a communicative standard in *State v Clark* by holding that freely given consent is demonstrated through ‘affirmative assent’ of ‘words’ or ‘overt actions’.<sup>73</sup> Further, the Court held that if the victim’s actions are ambiguous, the jury may nonetheless find that there was no consent if it concludes that the victim participated in the sexual conduct out of fear. Thus, failure to resist does or to say no do not amount to consent.<sup>74</sup> The Supreme Court clarified in *State v Long* that ‘in the context of sexual assault, consent in fact requires an affirmative indication of willingness.’<sup>75</sup>
36. The Wisconsin Jury Instructions Committee explains that if the jury finds that sexual intercourse occurred without consent ‘it apparently is no defense that the defendant believed there was

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<sup>70</sup> Wisconsin Statutes Annotated (WSA) s 940.225 (4).

<sup>71</sup> See Wisconsin Jury Instructions Committee ‘Wisconsin Criminal Jury Instructions (Wis JI-Criminal)1200C’ (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>72</sup> WSA s 940.225 (2)(c)(cm)(d)(g)(h)(i)(4). See also Wisconsin Jury Instructions Committee ‘Wisconsin Criminal Jury Instructions (Wis JI-Criminal)1200C’ (*Wisconsin State Law Library*, revised in 2023)

<<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>73</sup> *State v Clark* 87 Wis 2d 804 (1979) 275 NW 2d 715, 6, 7.

<sup>74</sup> *ibid* at 6, 7.

<sup>75</sup> *State v Long* 317 Wis 2d 92 (2009) 765 NW 2d 557, 12.

consent, even if the defendant's belief is reasonable.<sup>76</sup> According to the Committee, this is because the statute criminalizing sexual assault does not employ any of the 'intent words' that would indicate that the defendant's knowledge or belief of consent is an element of the crime.<sup>77</sup> However, evidence indicating knowledge of consent may be used, for example, to establish whether the accused 'knew' of a victim's inability to evaluate her conduct in case of mental illness, and whether the accused knew the victim was unconscious.<sup>78</sup>

37. The burden of proof is always borne by the prosecution.<sup>79</sup> Prosecutors must prove beyond a reasonable doubt that the victim did not consent freely to a sexual act. 'Reasonable doubt' does not rule out every single doubt but requires the exclusion of doubts 'as to the existence of a different conclusion based on reasons.'<sup>80</sup> In *Gates v State* the Wisconsin Court of Appeals held that the statute's definition of consent does not shift the burden of proof to the defendant. The Court concluded that there is no presumption of non-consent.<sup>81</sup>

### (c) United States – Vermont

38. The introduction of affirmative consent in Vermont took place in 1977 through an amendment to the statute criminalizing rape. The statute defined consent as: 'words or actions by a person indicating a voluntary agreement to engage in a sexual act.'<sup>82</sup> In *State v Snow*, the Supreme Court confirmed the trial court's view that clarified a victim is 'compelled' to participate in a sexual act when there is no indication showing that the victim 'is freely willing to participate.'<sup>83</sup>
39. The definition of affirmative consent was amended in 2021 and defines consent as: 'affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any

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<sup>76</sup> See Wisconsin Jury Instructions Committee 'Wisconsin Criminal Jury Instructions (Wis JI-Criminal)1218A' (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>77</sup> See *ibid* and Wisconsin Statute Annotated (WSA) s 939.23 (on criminal intent) and WSA s 939.43 (on mistake as a defense).

<sup>78</sup> See WIS JI-Criminal 1211 in conjunction with WSA s 940.225 (2)(c) and WIS JI-Criminal 1213 in conjunction with WSA s 940.225 (2)(d). Available at Wisconsin Jury Instructions Committee 'Wis JI-Criminal' (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>79</sup> WSA s 939.70 (Presumption of innocence and burden of proof).

<sup>80</sup> See *State v Trammell* 928 NW2d 564 (Wis2019) 30, 37, 45, 48, 50, 56 and Wisconsin Jury Instructions Committee 'Wis JI-Criminal 140' (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>81</sup> *Gates v State* 91 Wis 2d 512 (1979) 283 NW 2d 474, 5-6.

<sup>82</sup> Tit 13 Vermont Statutes Annotated (VSA) s 3251(3) (2020) (prior to 2021 amendment).

<sup>83</sup> *State v. Snow*, 70 A3d 971 (Vt 2013), 9-12.

time.<sup>84</sup> In *State v Doe* the Supreme Court explained that the law of sexual assault understood consent as agreement to participate in an act, but not as ‘informed consent’ which requires ‘knowledge of the risk of consenting.’<sup>85</sup> The law specifies scenarios in which there is no consent, namely, when the victim is incapable of consenting or when the victim agreed as a result of threats, force or fear, or was sleeping or unconscious.<sup>86</sup> Likewise, a person under the age of sixteen is ‘legally unable to consent’ unless both parties are between 15 and 19 years of age.<sup>87</sup>

40. The statutory definition does not specify how the ‘affirmative, unambiguous, and voluntary agreement’ can be inferred from words, actions, or both. It should be observed, however, that in *State v Snow* the Supreme Court affirmed the trial court’s understanding of the term ‘without consent’ as a lack of ‘indication that the victim was freely willing to participate’, suggesting that consent ought to be communicated.<sup>88</sup>
41. The accused’s knowledge or belief regarding the presence of consent is relevant, according to jury instructions, when (a) the accused knew or reasonably should have known that the victim was incapable of consenting, (b) the accused knew or reasonably should have known that the victim was unaware that a sexual act was being committed or (b) the accused knew or reasonably should have known that alcohol, drugs or other intoxicants impaired the victim’s capacity to consent.<sup>89</sup> Further, the accused’s intention to engage in a sexual act without consent is an essential element of the offence: the accused must not have acted ‘because of mistake, or by accident.’<sup>90</sup> The jury may find that the accused acted intentionally if it was his or her aim to ‘engage in the sexual act with’ the victim without his or her consent. The accused’s intent may be shown ‘by the way in which the person expresses it to others, or by his or her conduct.’ To determine the accused’s intent all the surrounding circumstances should be considered.<sup>91</sup>

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<sup>84</sup> 13 VSA s 3251(3). For a discussion of the context surrounding the amendment see: Greg Sukiennik and Bennington Banner, ‘Bill Seeks Overhaul of State’s Sexual Assault Laws’ (*Bennington Banner*, 11 February 2021) <[https://www.benningtonbanner.com/local-news/bill-seeks-overhaul-of-states-sexual-assault-laws/article\\_103bac80-6cb0-11eb-95f1-8735f8eff1e1.html](https://www.benningtonbanner.com/local-news/bill-seeks-overhaul-of-states-sexual-assault-laws/article_103bac80-6cb0-11eb-95f1-8735f8eff1e1.html)> accessed 19 March 2023.

<sup>85</sup> *State v Doe*, 249 A3d 658 (Vt 2020), 13-19.

<sup>86</sup> 13 VSA s 3254 (2)(4)(5) and 3251 (10).

<sup>87</sup> *State v Bellanger*, 183 A3d 550 (Vt 2018), 27.

<sup>88</sup> *State v Snow*, 70 A3d 971 (Vt 2013), 10-12.

<sup>89</sup> Vermont Model Criminal Jury Instructions, ‘CR27-211 Sexual Assault (Lack of Consent)’ (*Vermont Bar Association*, 2023) <<http://www.vtjuryinstructions.org/criminal/MS27-211.htm>> accessed 19 March 2023.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

42. The state bears the burden of proof throughout the trial.<sup>92</sup> The accused is presumed to be innocent, and the state must prove beyond a reasonable doubt that the accused is guilty.<sup>93</sup> The jury instructions clarify that a ‘reasonable doubt’ does not mean ‘beyond all possible doubt’ but only a doubt ‘based on reason and common sense’ coming from a rational assessment of the evidence.<sup>94</sup> The state must prove that the accused intentionally engaged in a sexual act with the victim without consent. Four essential elements must be demonstrated: (1) that the accused is the person that committed the act; (2) the accused engaged in a sexual act with the victim; (3) the accused engaged in the sexual act with the victim without the victim’s consent, and (4) that the accused acted intentionally.<sup>95</sup>

#### **(d) United States – New Jersey**

43. The introduction of affirmative consent into the law of New Jersey was triggered by the landmark case of *State of New Jersey in the Interest of M.T.S.*<sup>96</sup> In 2014 the New Jersey Law Revision Commission recommended an amendment to the law of sexual assault to make it consistent with current case law.<sup>97</sup> The amendment to the New Jersey Code of Criminal Justice Section 2C:14-2 was made effective in January 2020, and it understands consent as ‘affirmative and freely given permission.’<sup>98</sup>
44. The definition of affirmative consent was established by the Supreme Court of New Jersey in *M.T.S.* as ‘affirmatively and freely-given’ permission to ‘the *specific act* of sexual penetration.’<sup>99</sup> Further, in *State v Cuni* the Court held that when a person is not able—mentally or emotionally—to understand the nature of a sexual act and to refuse it, that person lacks the capacity to give affirmative and free permission.<sup>100</sup> Title 2C 2-10c(3) partially requires that consent is informed, as consent is deemed ineffective when it is the result of deception.<sup>101</sup> Moreover, Title 2C 14-2a

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<sup>92</sup> Vermont Model Criminal Jury Instructions, ‘CR04-101 Burden of Proof and Reasonable Doubt’ (*Vermont Bar Association*) accessed 10 March 2023

<sup>93</sup> Vermont Model Criminal Jury Instructions ‘CR04-061 Presumption of Innocence’ (*Vermont Bar Association*) accessed 10 March 2023

<sup>94</sup> Vermont Model Criminal Jury Instructions ‘CR04-101 Burden of Proof and Reasonable Doubt’ (*Vermont Bar Association*) accessed 10 March 2023.

<sup>95</sup> Vermont Model Criminal Jury Instructions, ‘CR27-211 Sexual Assault (Lack of Consent)’ (*Vermont Bar Association*, 2023) <<http://www.vtjuryinstructions.org/criminal/MS27-211.htm>> accessed 19 March 2023.

<sup>96</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266

<sup>97</sup> Senate Bill No. 2924, State of New Jersey, 218th Legislature (2019).

<sup>98</sup> New Jersey Statutes Annotated Title 2C: The New Jersey Code of Criminal Justice 14-2 (NJSA 2C:14-2).

<sup>99</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266, 444.

<sup>100</sup> *State v Cuni* 159 NJ 584 (1999) 733 A2d 414.

<sup>101</sup> NJSA 2C:2-10c(3).

acknowledges scenarios in which refusing consent may prove burdensome, namely: (a) if the accused is related to the victim, (b) has supervisory or disciplinary power of any nature over the victim, (c) the victim was physically helpless or intellectually incapacitated, or (d) the victim is a pupil of 18-22 years and the accused a teaching staff. These scenarios, however, are treated as aggravating circumstances.<sup>102</sup> Finally, in *CR v MT* the Supreme Court held that the standard of affirmative consent should also be applied under the Sexual Assault Survivor Protection Act, which offers relief through civil protection orders.<sup>103</sup>

45. The Criminal Code does not clarify whether a communicative standard, like ‘words’ or ‘actions’, is required. However, the Supreme Court clarified in *M.T.S.* that there does not need to be express permission; accordingly, the ‘affirmative and freely-given permission’ can be inferred ‘from acts or statements reasonably viewed in light of the surrounding circumstances.’<sup>104</sup> Further, in *M.T.S.* the court ruled out that a failure to resist does not establish permission and that the law ‘places no burden on the alleged victim to have expressed non-consent.’<sup>105</sup>
46. The Supreme Court held in *M.T.S.* that ‘a defence based on consent would require the *presence* of affirmative and freely given permission.’<sup>106</sup> This is because, according to the test set out by the Supreme Court in *M.T.S.*, the focus throughout the trial is always on the defendant’s belief that the victim gave affirmative and free permission.<sup>107</sup> The accused can show there was permission when there is enough evidence to show that it was reasonable to believe that the victim gave permission affirmatively and freely. Any permission to engage in sexual activity that does not satisfy the affirmative permission standard is unlawful and ‘cannot constitute a defence.’<sup>108</sup>
47. The burden of proof is always borne by the state. The Supreme Court held in *M.T.S.* held that the state must prove two elements beyond a reasonable doubt: first, that there was sexual penetration, and second, that the penetration was performed without free and affirmative permission.<sup>109</sup> The evidence should demonstrate ‘conduct or words in light of surrounding circumstances.’<sup>110</sup> It should be able to show that ‘a reasonable person would not have believed

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<sup>102</sup> NJSA 2C:14-2 subsection (a).

<sup>103</sup> *CR v MT* 248 NJ 428 (2021) 239 A3d 830 .

<sup>104</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266, 444.

<sup>105</sup> *ibid*, 448.

<sup>106</sup> *ibid*, 449 (emphasis on the original).

<sup>107</sup> *ibid*, 448.

<sup>108</sup> *ibid*, 449.

<sup>109</sup> *ibid*, 448.

<sup>110</sup> *ibid*, 449.



that there was affirmative and freely-given permission.<sup>111</sup> If the evidence indicates the presence of a reasonable belief of permission, then the state can either (a) show that the accused did not hold the belief or (b) show that, considering the circumstances, the belief was not reasonable.<sup>112</sup>

#### (f) Canada

48. The introduction of affirmative consent into the law of Canada was the result of an amendment to the Criminal Code in 1992 and its interpretation by the Supreme Court. According to the Constitution Act (1867) the Parliament of Canada has exclusive legislative authority over the criminal law and criminal procedural law.<sup>113</sup> Thus, ‘the criminal law applies across the country’.<sup>114</sup> A significant portion of the criminal law is contained in the Criminal Code. The definition of consent in the Canadian Criminal Code was amended in 1992 to read as ‘the voluntary agreement of the complainant to engage in the sexual activity in question’.<sup>115</sup> Meanwhile, the Canadian judiciary took important steps in clarifying, for instance, that ‘not saying yes is equivalent to saying “no”’, that absence of resistance does not amount to consent, and that consent must be active and unambiguous.<sup>116</sup>
49. The definition of affirmative consent in Canada provides that consent must be voluntary and freely given. In Canadian law consent can also be revoked. The Supreme Court has held that when the complainant, at any point of the encounter, has expressed unwillingness, the accused cannot rely on ‘the mere lapse of time’ to ascertain whether the victim has changed her mind and ‘consent now exists’.<sup>117</sup> Moreover, consent is specific to the ‘specific physical sex act’.<sup>118</sup> Finally, the Criminal Code rules out consent in some circumstances where refusing a sexual advance

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<sup>111</sup> *ibid*, 449.

<sup>112</sup> *ibid*, 448-449.

<sup>113</sup> See section 91(27) of the Constitution Act 1867, which reads ‘[I]t is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.’

<sup>114</sup> Government of Canada, ‘The Criminal Code of Canada’ (*Canada’s System of Justice*, June 4<sup>th</sup> 2021)

<[<sup>115</sup> An Act to Amend the Criminal Code \(sexual assault\), SC 1992, c38, s273.1 cited by the Supreme Court of Canada in \*R v Ewanbuk\* \[1999\] 1 SCR 330 \[47\] \[74\].](https://www.justice.gc.ca/eng/csjsjc/ccc/index.html#:~:text=Canada%27s%20constitution%20gives%20the%20federal,for%20enforcing%20the%20criminal%20law.> accessed October 2023.</a></p></div><div data-bbox=)

<sup>116</sup> *R v M (ML)* [1994] 2 SCR 3; *R v Park* [1995] 2 SCR 836 ; *R v Stender* [2005] 1 SCR 914; *R v RR* [2001] OJ No 4254 at para [44].

<sup>117</sup> *R v Ewanbuk* [1999] 1 SCR 330 [52].

<sup>118</sup> *R v Hutchinson* 2014 SCC 19, [2014] 1 SCR 346, [54] [55]; *R v Kirkpatrick*, 2022 SCC 33 [42] [44].

would be burdensome for the victim. For instance, where the victim agrees to the sexual act because of an exercise of authority or the abuse of a position of trust.<sup>119</sup>

50. The Supreme Court has established two different communication standards by distinguishing consent for the purposes of the *actus reus*, on the one hand, and for the purpose of *mens rea*, on the other. In relation to the *actus reus* consent is purely subjective: it refers to the victim's internal state of mind, that is, whether the victim wanted the sexual act to take place. But for the purposes of *mens rea* consent means that the victim 'affirmatively communicated by words or conduct' the agreement to participate in the sexual act.<sup>120</sup>
51. When the accused claims that he or she honestly believed that the victim had communicated her consent, the accused must demonstrate that he or she took reasonable steps to investigate whether the victim consented.<sup>121</sup> Steps will not be reasonable if they are based on rape myths or stereotypical assumptions.<sup>122</sup> The defence is not available where the belief arose from 'self-intoxication', 'recklessness', or 'wilful blindness'.<sup>123</sup>
52. The burden of proof is borne by the Crown<sup>124</sup>, who must prove beyond a reasonable doubt that the offence has been committed and that the victim did not consent to a specific sexual act. A reasonable doubt is based on 'reason and common sense...it is a doubt that arises logically from the evidence or from the absence of evidence.'<sup>125</sup>

#### **(e) United States –Certain University Campuses**

53. The introduction of affirmative consent standards in American university campuses has increased in the recent years with the states of California and New York defining affirmative consent in the state education laws. These laws require universities and colleges to establish an affirmative standard of consent for sexual assault on their campuses. In addition to the recent debates, colleges in USA also assume important role in the discussion of affirmative consent as the first known affirmative consent policy was enforced in Antioch College in 1990.<sup>126</sup>

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<sup>119</sup> Canadian Criminal Code 265 (3); Canadian Criminal Code 273.1 (2).

<sup>120</sup> *R v Ewanbuck* [1999] 1 SCR 330, [49].

<sup>121</sup> *R v JA* 2011 SCC 28 [2011] 2 SCR 440 [42]; *R v Barton* 2019 SCC 33 [2019] 2 RCS 579 [101]-[104].

<sup>122</sup> *R v Barton* 2019 SCC 33 [2019] 2 RCS 579 [107].

<sup>123</sup> See Canadian Criminal Code 273.2 and *R v Barton* 2019 SCC 33 [2019] 2 RCS 579 [101]-[104], [107].

<sup>124</sup> *R. v. Oakes* [1986] 1 SCR 103 [35].

<sup>125</sup> *R. v. Lijchus* [1997] 3 SCR 320 [30].

<sup>126</sup> See discussion in paras 178 ff.

54. The definition of affirmative consent varies from college to college and there are salient differences even in the way the states of California and New York have defined it in their education laws. However, the definitions in both states share several features: (a) consent is defined as voluntary; (b) consent is revocable at any time; (c) silence or lack of resistance is not consent; (d) consent is specifically given—to an act or to a person; (e) incapacity of any kind (sleep, unconsciousness, intoxication, etc) vitiates consent to the sexual activity; (f) past sexual activity or romantic relation cannot be construed as consent; (g) the consent has to be communicated by words or actions.
55. The burden of proof is borne by the school or the university, as clarified by the Department of Education.<sup>127</sup> The evidentiary standard used in disciplinary proceedings for sexual assault and violence is one of preponderance of evidence requiring proof that the allegation is more likely to be true than false. This can be contrasted with the ‘reasonable doubt’ standard used in criminal trials in the above jurisdictions.

## CONSENT IN INTERNATIONAL HUMAN RIGHTS LAW

56. Providing a brief overview of consent in international human rights law serves the dual purpose of outlining the state obligations of the United Kingdom concerning the law of consent in sexual offences and to note the shift in consent towards an affirmative and communicative standard in international human rights law more generally. The report focuses on the standards generated by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), as its jurisprudence has addressed the role of consent in sexual assault legislation in more detail.<sup>128</sup>
57. The text of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) does not make any explicit reference to gender-based violence against women, including rape or sexual violence. However, the CEDAW Committee understands gender-based

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<sup>127</sup> US Department of Education, ‘Summary of Major Provisions of the Department of Education’s Title IX Final Rule’ (*Department of Education*, 14 August 2020) <<https://www2.ed.gov/about/offices/list/oer/docs/titleix-summary.pdf>> accessed 23 March 2023.

<sup>128</sup> Relative to the jurisprudence of the European Court of Human Rights. The leading case regarding consent in sexual assault legislation is *M.C. v. Bulgaria* (2003). Here, the court concluded that it is part of the state’s positive obligations under Article 3 and 8 to require effective criminal laws and the prosecution of any sexual assault performed without consent, even if the victim did not resist. See *M.C. v Bulgaria* (2005) EHR 20, para 166.

violence as a crucial way in which inequality between women and men is entrenched.<sup>129</sup> Thus, from the publication of General Recommendation 19 (1992) onwards, the Committee has maintained that gender-based violence is a form of discrimination included under Article 1 of the CEDAW.<sup>130</sup>

58. The Committee's General Recommendation 35 provides that states should ensure (1) that their criminal law adopts provisions that criminalise sexual assault and rape<sup>131</sup>, (2) that the offence is understood as an infringement of the right to personal security and bodily and emotional integrity<sup>132</sup>, and crucially (3) that the definition of the offences that address sexual assault are based '*on the lack of freely given consent*' and take due regard of facts that indicate the presence of coercion.<sup>133</sup>
59. Notably, the first official statement of the Committee's consent-based definition of rape was made as a result of litigation. In *Karen Tayag Vertido v. Philippines* (2010)<sup>134</sup> the CEDAW Committee established the standard of consent-based definitions of rape as part of its jurisprudence. The Committee recommended the Philippines to (1) review the legislation criminalising rape to ensure its definition places lack of consent at its centre, (2) remove from the legislation any requirement of proof of penetration and that sexual assault be committed by force or violence, (3) minimize secondary victimization of the complainant by enacting a definition of sexual assault that requires either: (a) the existence of 'unequivocal and voluntary agreement' and of the steps the accused took to ascertain whether the complainant/survivor was consenting, or (b) the action

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<sup>129</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 19: Violence Against Women' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1, para 6-7, 11. See also 'General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) CEDAW/C/GC/35, para 10.

<sup>130</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 19: Violence Against Women' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1, para 6-7.

<sup>131</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, Committee, 'General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) CEDAW/C/GC/35, 29 (e).

<sup>132</sup> *ibid* 29 (e).

<sup>133</sup> *ibid* 29 (e) emphasis added.

<sup>134</sup> UN Committee on the Elimination of Discrimination against Women, *Tayag Vertido v Philippines* (2008) CEDAW/C/46/D/18/2008.

takes place in ‘coercive circumstances’ together with a broad interpretation of the range of coercive circumstances.<sup>135</sup> The Committee reiterated this position in *R.P.B. v Philippines*.<sup>136</sup>

60. In *A.F. v Italy* (2022) the CEDAW Committee took its approach to consent one step further. The Committee recommended that Italy, among other measures, amend ‘the definition of all sexual offences involving victims capable of giving legal consent to ensure that the burden of proof is not onerous or vague, leading to overly broad or far-reaching interpretation, to include consent as the defining element.’<sup>137</sup> Particularly, the amendment should follow the following standards:

1. The definition of all sexual offences involving victims capable of giving legal consent should include consent as the defining element;
2. Where consent is raised as a defence, the burden of proof should not be on the victim to show that she communicated an unequivocal lack of consent. Instead, it must shift to the accused, *who must substantiate a well-founded belief in affirmative consent*, and
3. The requirement to prove penetration, force or violence as defining elements of sexual crimes should be removed unless it is required to establish an additional or aggravating offence.<sup>138</sup>

## LAW ON SEXUAL CONSENT IN ENGLAND AND WALES- A BRIEF OVERVIEW

61. The offences of rape, assault by penetration, and sexual assault in England and Wales are governed by statute— the Sexual Offences Act (‘SOA’) enacted in the year 2003. Though part of the United Kingdom, the law governing sexual offences in Scotland and Northern Ireland is found, respectively, in the Sexual Offences (Scotland) Act 2009 and the Sexual Offences (Northern Ireland) Order 2008. The recent Gillen Review into the laws on sexual offences in

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<sup>135</sup> The Committee’s jurisprudence in *Vertido*, *R.P.B.* and *A.F.* is in line with the UN Women’s Handbook for Legislation on Violence Against Women (2012). See UN Women, *Handbook for Legislation on Violence Against Women* (2012) 24.

<sup>136</sup> UN Committee on the Elimination of Discrimination against Women, *R. P. B. v Philippines* (2011) CEDAW/C/57/D/34/2011, para 8.5 and para 8.10.

<sup>137</sup> UN Committee on the Elimination of Discrimination against Women, *AF v Italy* (2022) CEDAW/C/82/D/148/2019, para 9.

<sup>138</sup> *ibid*, para 9 (iii). Emphasis added.

Northern Ireland has recommended amendments which ‘impose a discernible shift towards a measure of affirmative expression of consent.’<sup>139</sup> The law in Scotland largely mirrors the provisions in the English statute.

62. SOA 2003 differentiates between the offence of rape (Section 1), assault by penetration (Section 2), sexual assault (Section 3) and causing sexual activity without consent (Section 4). The primary difference between the offence of rape and assault by penetration lies in the gender of the perpetrator.<sup>140</sup> While rape has been made gender neutral with regards to victims, it remains gendered as regards the perpetrator who must be a male.<sup>141</sup> The other offences are gender-neutral both as regards the victim and the perpetrator. The question of victim’s consent raises issues of both *actus reus* and *mens rea*. The lack of consent by the victim forms part of the *actus reus* in all offences,<sup>142</sup> in addition to the physical act described in the provisions. The “intentional”<sup>143</sup> penetration or touching or causing victim to engage in sexual activity by the perpetrator is one element of *mens rea*. The perpetrator’s lack of reasonable belief that the victim consents is the other.<sup>144</sup> The reasonableness of such belief has to be determined considering ‘all the circumstances, including any steps A has taken to ascertain whether B consents’.<sup>145</sup> The extent of punishment differs for different offences. While rape and assault by penetration are liable to indictment to imprisonment for life, sexual touching and activity are punishable ‘on indictment, to imprisonment for a term not exceeding 10 years’.<sup>146</sup>
63. Consent is defined in Section 74 as agreement ‘by choice’ and the ‘freedom and capacity to make that choice’. The evidential and conclusive presumptions about consent, contained in Sections 75 and 76, apply to all the above-mentioned offences. If the evidential presumptions of no consent in Section 75(2) apply, the jury must find there was no consent, and that the perpetrator could not have reasonably believed that the victim consented unless the perpetrator has introduced evidence which indicates there was consent. The relevant circumstances in which

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<sup>139</sup> Sir John Gillen, ‘Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1’ ( *The Law Society of Northern Ireland*, April 2019) <[https://www.lawsoc-ni.org/DatabaseDocs/new\\_8655264\\_\\_gillen-review-report-into-the-law-and-procedures-in-serious-sexual-offences-in-.pdf](https://www.lawsoc-ni.org/DatabaseDocs/new_8655264__gillen-review-report-into-the-law-and-procedures-in-serious-sexual-offences-in-.pdf)> See p. 30, para 9. Accessed 23 March 2023,

<sup>140</sup> Teodora Nizirova, Melanie Stockton-Brown, Karolina Szopa and Jamie Fletcher, ‘Moving Towards an Agendered Perpetrator, Time For Change to the Sexual Offences Act 2003’ (*STARS*, 9 February 2022) <<https://www.starsdorset.org/blog/sexual-offences-act-2003#:~:text=%5B8%5D%20This%20distinction%20is%20likely,gendered%20as%20to%20the%20perpetrator>> accessed 23 March 2023.

<sup>141</sup> *ibid.*

<sup>142</sup> SOA 2003, ss 1(1)(b); 2(1)(c); 3(1)(c); 4(1)(c)

<sup>143</sup> *ibid.*, ss 1(1)(a); 2(1)(a); 3(1)(a); 4(1)(a)

<sup>144</sup> *ibid.*, ss 1(1)(c); 2(1)(d); 3(1)(d); 4(1)(d)

<sup>145</sup> *ibid.*, ss 1(2); 2(2); 3(2); 4(2)

<sup>146</sup> *ibid.*, ss 1(4); 2(4); 3(4)(b); 4(4)(b)

evidential presumptions become applicable involve use or fear of immediate violence against the complainant or another person, the complainant being unconscious or asleep, unlawful detention of the complainant, lack of communication of consent due to complainant's physical disability, consumption of a substance causing the complainant to be stupefied or overpowered.<sup>147</sup> In case the conclusive presumptions, about intentional deception or impersonation of a known person, in Section 76(2) apply, the jury must find that there was no consent. However, the court acknowledged that it would be a rare case in which Section 76 would apply as the section has to be strictly construed.<sup>148</sup>

64. Under English law, submission or not resisting or opposing the act was held to not constitute consent.<sup>149</sup> The complainant is under no requirement to demonstrate or communicate to the defendant a lack of consent and the evidence can be used to demonstrate the lack of consent to the jury.<sup>150</sup> This primarily addresses issues raised by circumstances where the complainant lacked the capacity to consent—was unconscious or under the influence of drugs or drinks. However, the law does not have any requirements of communication of positive consent as a prerequisite for consensual sexual activity, which is a key demand in many affirmative consent reform proposals. The SOA 2003 does not have provisions that require consent to be reversible at any point of time or clearly provides for specificity of consent as to a particular action or a particular person/(s). There are some evidential and conclusive presumptions that cover specific instances such as deception, the victim being unconscious or asleep at the time. In some cases, the courts have read in the requirement of ostensible consent not being true consent, such as in cases of stealthing or defying an explicit condition or by virtue of a material deception (of the kind not covered under section 76), for instance misrepresenting one's gender.<sup>151</sup> Thus, where the consent was conditional, the breach of the condition implies the act was done without the victim's consent. However, the issues of reversibility and specificity remain largely unaddressed in legal precedent. As such, these requirements can be described as only partially fulfilled in the current legal framework. For consent to be unburdensome, there must be no power differentials that make the costs associated with saying no very high.<sup>152</sup> While some of the presumptions regarding consent in Sections 75 and 76 account for situations such as fear of violence, or unlawful

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<sup>147</sup> *ibid*, s 75(2)(a-f)

<sup>148</sup> *R v Bingham* [2013] EWCA Crim 823

<sup>149</sup> *R v Olugboja* [1982] QB 320; Distinction between consent and submission reiterated in *Doyle* [2010] EWCA Crim 119.

<sup>150</sup> *R v Malone* [1998] 2 Cr App R 447

<sup>151</sup> *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849; *The Queen (on the app of F) v DPP* [2013] EWHC 945 (Admin); *R v Justine McNally* [2013] EWCA Crim 1051; *R v Lawrence (Jason)* [2020] EWCA Crim 971

<sup>152</sup> Im and others (n 21) Section 3.5.

detention, they do not explicitly account for other situations where the perpetrator might be in a position of trust or authority over the victim.

65. As regards the international human rights law obligations of the United Kingdom, it seems to be in broad compliance with international legal norms. The CEDAW Committee did not raise any issue regarding the definition of sexual crime in the United Kingdom and Northern Ireland in the latest concluding observations (2019).<sup>153</sup> United Kingdom is a signatory to all the major instruments, having recently ratified the Istanbul Convention in November 2022.<sup>154</sup> Likewise, the report by the special rapporteur on violence against women with respect to UK and NI makes no mention of amending the definition of sexual crimes.<sup>155</sup> The definitions comply with the requirement of lack of consent as the centre of the offences. The centrality of penetration in defining *actus reus* in the crimes of rape and assault by penetration is seemingly in conflict with the principle that sexual offences should not rely on penetration. However, as discussed above, the CEDAW Committee clarified in *A.F. v. Italy*<sup>156</sup> that penetration can be used to define a crime provided it is for establishing an additional or aggravating offence. In England and Wales, sexual offence cases where penetration does not take place are punished as sexual assault and sexual activity without consent.<sup>157</sup>
66. Regarding the burden of proof in England and Wales, the prosecution bears the burden to prove the defendant/accused's guilt 'beyond reasonable doubt' to a lay jury of 12 jurors.<sup>158</sup> The prosecution must both prove that the complainant did not consent to the sexual activity in question as well as prove that the accused defendant did not reasonably believe that the complainant consented.<sup>159</sup> Even for the evidential and conclusive presumptions in Sections 75 and 76, the prosecution must first prove the defendant did the relevant act and prove the existence of the circumstances which raise the presumption. Additionally for the evidential presumptions under Section 75, the prosecution must demonstrate the defendant knew that the

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<sup>153</sup> UN Committee for the Elimination of All Forms of Discrimination against Women 'Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (14 March 2019) CEDAW/C/GBR/CO/8.

<sup>154</sup> Council of Europe Treaty Office 'Chart of Signatures and Ratifications of Treaty 210' (*Council of Europe*, status as of 19 April 2023) <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&tratynum=210>> accessed 19 April 2023.

<sup>155</sup> UNHRC 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo' (31 March-15 April 2014) A/HRC/29/27/Add.2.

<sup>156</sup> *ibid*, para 9 (iii).

<sup>157</sup> SOA 2003, ss 3 and 4.

<sup>158</sup> *Woolmington v DPP* [1935] AC 462, 480-482; *R v Hunt* [1987] AC 352, 353.

<sup>159</sup> Picton and others (eds) *The Crown Court Compendium* (Judicial College 2022) Part I, jury directions 16 and 17, p 20-20 <<https://www.judiciary.uk/wp-content/uploads/2022/07/Crown-Court-Compendium-Part-I-June-2022.pdf>> accessed 23 April 2023.



circumstances existed. Even then, the defendant can rebut the presumptions u/s 75 by adducing further evidence. As regards the presumptions the Bench Book states, ‘in reality these criteria seldom arise’.<sup>160</sup> Overall, the position of law as regards burden of proof is not in compliance with the CEDAW Committee recommendation that in cases where consent is raised as a defence, the burden of proof should shift to the accused.

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<sup>160</sup> *ibid*, 20-21.

# AUSTRALIA—NEW SOUTH WALES

## INTRODUCTION

67. Australia is a multi-jurisdictional country where relevant criminal laws relating to sexual assault, rape, and ‘affirmative consent’ are set by the six State and the two Territory Governments in Australia (rather than the National/Commonwealth level). It follows the adversarial model of criminal justice, as is customary in common law countries. The trial of criminal cases ordinarily involves a jury unless circumstances require determination by a judge alone.<sup>161</sup> While the content of sexual assault laws and the penalties they attract vary in the different jurisdictions in Australia, the crime of sexual assault is gender-neutral across the country and is defined as sexual act without consent which is defined as free and voluntary in all 8 jurisdictions.<sup>162</sup>
68. A positive standard of consent seeks to affirm the right of women to choose when to engage in sex and with whom and establish mutuality and reciprocity in sexual relations. The first legal standard of affirmative consent in Australia was introduced in the state of Victoria in 1991 in the form of jury directions. The reform was prompted by the belief that ‘it is not acceptable for men to cling to outdated myths about seduction, sexual conquest and female sexuality’. The standard implied that without a physical or verbal indication of consent by the complainant, consent cannot be presumed:

**Section 37(a)** The fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without a person’s free agreement.<sup>163</sup>

69. Tasmania was the next state to incorporate the communicative standard of consent in its amended criminal code in 2004. For consent to be valid, it needs to be communicated by words or actions and the defendant should have taken reasonable steps to ascertain such consent.<sup>164</sup> It must be noted that communication is a feature of affirmative consent standard but by no means

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<sup>161</sup> *Criminal Procedure Act (No 209) 1986* (NSW) sections 131-132.

<sup>162</sup> Indira Rosenthal and others, ‘Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation – The Pacific’ (*The Human Dignity Trust*, March 2020) <<https://www.humandignitytrust.org/reform/countries/australia>>.

<sup>163</sup> *Crimes Act 1958* (Vic) s 37(a), as inserted by *Crimes (Rape) Act 1991* (Vic), sch 1 item 3.

<sup>164</sup> *Criminal Code Act 1924* (Tas), s 14A (c).

an exhaustive feature: ‘2A(2) ...a person does not freely agree to an act if the person – (a) does not say or do anything to communicate consent.’<sup>165</sup>

70. Cockburn’s research showed that despite the adoption of a progressive standard of consent, the lawyers and judges continue to rely on pre-reform notions of consent and the jury draws on preconceptions and myths about rape and rape victims.<sup>166</sup> She pins the responsibility of the failure of Tasmanian reform not on the shortcomings of the legislative change but the structural apparatus accompanying it—the societal attitudes and the inability of lawyers and judges to change and engage with the motives of the reform.<sup>167</sup> Cockburn’s research also points to the low standards jury apply for communication of consent: ‘It has apparently been met inter alia by evidence that the complainant moved over in bed (Geeves’ Case), that she accepted a lift home with the defendant (Savage’s Case) and that she failed to resist the defendant’s overtures with sufficient force (Brennan’s Case).’<sup>168</sup> Similarly in another case involving ex-partner violence (Riley’s), the jury did not convict despite ‘reasonableness and genuineness of her fear and a lack of evidence of positively communicated consent’.<sup>169</sup>
71. Studies show that the changes in Victoria and Tasmania did increase the reporting rates, but not the conviction.<sup>170</sup> Thus, ‘the rapist’s belief that the victim had consented has continued to take precedence over whether consent was actually “given”.’<sup>171</sup> Like Cockburn, Otlowski also argues that the prevailing sexist ideas, affects juries and judges and they hold victims to be at fault if they were intoxicated, flirting or froze before or during the assault.<sup>172</sup>
72. Three states in Australia have recently introduced affirmative consent laws to reform their laws on sexual assault. New South Wales (NSW), which is the largest state by population in Australia, has led the recent changes in ‘affirmative consent’ across Australian jurisdictions by introducing the amendment on affirmative consent in 2021.<sup>173</sup> This amendment ‘enhances the communicative model of consent that is embodied in the criminal law, guiding the application of the law and

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<sup>165</sup> *Criminal Code Act 1924* (Tas), sch 1 section 2A(2)(a).

<sup>166</sup> Cockburn (n 1)193-194.

<sup>167</sup> *ibid*, 188.

<sup>168</sup> *ibid*, 207.

<sup>169</sup> *ibid*, 190.

<sup>170</sup> Monica Otlowski ‘A Critical Assessment of Consent to Sexual Intercourse: Is the Law at Odds with Current Realities?’(NSW Law Reform Commission, 2018-2020)

<<https://www.lawreform.justice.nsw.gov.au/Documents/Currentprojects/Consent/Preliminarysubmissions/PCO45.pdf>> accessed 25 May 2023.

<sup>171</sup> Caitlin Doyle, ‘Will Communicative Consent Laws Keep Women Safe?’ (*Solidarity*, 29 June 2021)

<<https://solidarity.net.au/sexism/will-communicative-consent-laws-keep-women-safe/>> accessed 1 April 2023.

<sup>172</sup> *ibid*.

<sup>173</sup> *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* No 43.

aiding the understanding of consent in the general community'.<sup>174</sup> Changes have also been made in Victoria<sup>175</sup> and the Australian Capital Territory (ACT)<sup>176</sup> and are proposed in Queensland. This note focuses on the changes in NSW as the other amendments mirror the changes made in NSW. Another reform has been with respect to the crime of stealthing, the non-consensual removal of condom during sex.<sup>177</sup> It breaches the conditional consent given for protected sex with a person and is criminalised in four Australian jurisdictions—NSW, Tasmania, and Victoria following the lead of the ACT.<sup>178</sup>

73. In August 2022, the federal and state attorneys-general endorsed the 'Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-27' which prioritises 'strengthening legal frameworks to ensure victim-survivors have improved justice outcomes and protections, wherever necessary and appropriate, across Australia'.<sup>179</sup> In furtherance of this, a Senate inquiry is underway into the current and proposed sexual consent laws in Australia, with the report expected in September 2023.<sup>180</sup>
74. In NSW, all the sexual crimes are part of the general criminal statute—the Crimes Act 1900 (NSW). It has been one of the frontrunners in reforming sexual offence laws and abolished the common law offences of rape and attempted rape in 1981 with a graded series of offences called sexual assaults.<sup>181</sup> Today, a range of sexual offences against children and adults are criminalised in NSW under the crime of sexual assault.<sup>182</sup> Sexual offences include all non-penetrative non-consensual acts that meet the definition of non-consensual sexual intercourse, sexual act, and sexual touching under the statute.<sup>183</sup> The other relevant statutes used in the criminal process are Evidence Act 1995 No 25 and Criminal Procedure Act 1986 No 209 which lay down the evidentiary and procedural rules for the sexual assault trials.

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<sup>174</sup> New South Wales, *Parliamentary Debates*, Second Reading Speech, Legislative Assembly, October 2021, p 7508 (Attorney General).

<sup>175</sup> *Justice Legislation Amendment (Sexual Offences and Other Matters) (No 38) Act 2022* (Vic).

<sup>176</sup> *The Crimes (Consent) Amendment Act (A2022-7) 2022* (ACT).

<sup>177</sup> *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* No 43, see section 61H1 (5).

<sup>178</sup> See *The Crimes (Consent) Amendment Act (A2022-7) 2022* (ACT) section (j).

<sup>179</sup> The Meeting of Attorneys-General 'Work Plan to Strengthen Criminal Justice Responses to Sexual Assault' (*Australian Government Attorney-General's Department* 12 August 2022) <<https://www.ag.gov.au/crime/publications/work-plan-strengthen-criminal-justice-responses-sexual-assault-2022-27>> accessed April 1 2023.

<sup>180</sup> Senate Legal and Constitutional Affairs Committee, 'Current and Proposed Sexual Consent Laws in Australia' (*Parliament of Australia, Parliamentary Business*, 29 November 2022) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/sexualcontentlaws/Terms\\_of\\_Reference](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/sexualcontentlaws/Terms_of_Reference)> accessed 1 April 2023.

<sup>181</sup> *Crimes Act (No 40) 1990* (NSW) ss 61B–E, as amended by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 item 4.

<sup>182</sup> *Crimes Act (No 40) 1900* (NSW), divs 10, 10A, and 10B.

<sup>183</sup> *ibid*, ss 61 HA, HB and HC

## I. WHAT WERE THE KEY LEGAL INSTITUTIONS IN NEW SOUTH WALES THAT TRIGGERED A SHIFT IN THE LAW TOWARDS AN AFFIRMATIVE CONSENT MODEL?

75. In the recent years, sexual assault has received heightened public attention in Australia with several public campaigns demanding reform of laws and justice system. Salient amongst these are the #TeachUsConsent<sup>184</sup> campaign, set in motion by Chanel Contos in 2021, calling for holistic and early consent and sexual education in schools, and #LetHerSpeak<sup>185</sup> campaign of 2018-20 challenging the victim gag-laws in Tasmania. The leading campaign around consent in sexual assault laws in 2018, which finally led to the passing of affirmative consent laws in NSW was the result of advocacy by Saxon Mullins, Director of Advocacy at Rape and Sexual Assault Research and Advocacy (RASARA).<sup>186</sup> In addition to the Mullins case, the global #metoo movement has also gained a lot of traction which shows that that ‘the concern with what constitutes consent is real and far-reaching’.<sup>187</sup> Thus, affirmative consent standard was introduced into the NSW criminal law through the Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021,<sup>188</sup> following recommendations made by the NSW Law Reform Commission in ‘Report 148: Consent in relation to sexual offences’ dated September 2020.<sup>189</sup>
76. In 2018, Saxon Mullins shared her story of being raped in an alley next to a night club in Sydney by the son of the club’s owner, Luke Lazarus.<sup>190</sup> The case involved a trial, a retrial and two appeals over five years, after which the prosecution of Lazarus was vacated as the NSW Court of Appeal determined that any further prosecution of Lazarus would be unfair and oppressive to him.<sup>191</sup> Mullins advocated for legislative change to introduce affirmative consent as an aspect of the

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<sup>184</sup> ‘Teach us Consent’ <<https://www.teachusconsent.com/>> accessed April 1 2023.

<sup>185</sup> Nina Funnell, ‘About the Gag Laws’ (#LetHerSpeak) <<https://www.letusspeak.com.au/about-the-gag-laws/>> accessed 1 April 2023.

<sup>186</sup> ‘New South Wales Consent Laws Review’ (Rasara, 2022) <<https://www.rasara.org/projects/rape-law-reform-nsw>> accessed 1 April 2023.

<sup>187</sup> NSW Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148 September 2020) (‘LRC Consent Report’), 6 [1.27].

<sup>188</sup> ‘NSW Government: Sexual Consent Laws’ (NSW Government) <<https://dcj.nsw.gov.au/justice/reform-of-sexual-consent-laws.html>> accessed 20 March 2023. See Crimes Legislation Amendment (Sexual Consent Reform) Bill 2021 (NSW) <<https://www.parliament.nsw.gov.au/bill/files/3906/Passed%20by%20both%20Houses.pdf>> accessed 1 April 2023.

<sup>189</sup> LRC Consent Report (n 187).

<sup>190</sup> Tiffanie Turnbull, ‘Saxon Mullins: The woman changing Australia’s rape laws’ (9 June 2022) <<https://www.bbc.co.uk/news/world-australia-61714818>> accessed 1 April 2023; See also ABC Four Corners, ‘I Am That Girl’, (ABC, 7 May 2018) <[www.abc.net.au/4corners/i-am-that-girl/9736126](http://www.abc.net.au/4corners/i-am-that-girl/9736126)> accessed 20 March 2023.

<sup>191</sup> *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (NSWDC, Tupman DCJ), 4 May 2017); *R v Lazarus* [2017] NSWCCA 279, 270 A Crim R 378.

NSW criminal statute, particularly as the law did not understand the ‘freezing up’ response to the assault, leaving her unable to communicate that she does not consent to sexual activity. Her ‘freeze response’ was subsequently relied upon by the defence (i.e., the defence arguing that Mullins had not indicated at any point to not consent to the sexual activity, and consequently that the jury and the court should conclude that Lazarus formed the requisite belief that the sexual activity was consensual).<sup>192</sup>

77. The NSW Government sought a review in May 2018 from the NSW Law Reform Commission into consent in relation to sexual offences and how laws could be amended to more clearly set standards for consensual sexual activity.<sup>193</sup> The resulting NSW Law Reform Commission Report in November 2020 made a series of 44 recommendations.<sup>194</sup> The NSW Government supported or supported in principle all of the recommendations and additionally introduced the affirmative consent standard.<sup>195</sup> The report identified three foundational principles upon which suggested legal reforms were based:

1. every person has a right to choose whether or not to participate in sexual activity,
2. consent should never be presumed (including in matrimonial or other ongoing relationships), and
3. consensual sexual activity involves ongoing and mutual communication, decision-making and agreement between participants.

78. These principles have been incorporated verbatim as objectives in the amended statute under section 61HF.

79. While consent has meant ‘free and voluntary agreement’<sup>196</sup> since the 2008 amendment, the new amendment reflects a definition of consent that involves ‘ongoing and mutual communication’

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<sup>192</sup> *ibid.*

<sup>193</sup> See LRC Consent Report (n 187).

<sup>194</sup> *ibid.*

<sup>195</sup> ‘NSW Government: Sexual Consent Laws’ (NSW Government) < <https://dcj.nsw.gov.au/justice/reform-of-sexual-consent-laws.html> > accessed 20 March 2023.

See Crimes Legislation Amendment (Sexual Consent Reform) Bill 2021

(NSW) < <https://www.parliament.nsw.gov.au/bill/files/3906/Passed%20by%20both%20Houses.pdf> > accessed April 1 2023.

<sup>196</sup> *Crimes Act (No 40) 1900* (NSW), s 61HI(1).

and ‘is not to be presumed’.<sup>197</sup> It includes acts such as stealthing within the ambit of criminality by clarifying that ‘consent to a particular sexual activity, is not, by reason only of that fact, to be taken to be consent to any other sexual activity’.<sup>198</sup> Similarly, consenting to a sexual activity with a person on one occasion is not in itself enough to be taken as consent for sexual activity with that person on another occasion or with another person on that or another occasion.<sup>199</sup>

80. Finally, the law incorporates the *affirmative consent standard* by stating that there will be no consent in the circumstances if ‘the person does not say or do anything to communicate consent’<sup>200</sup>. Further, reliance by an accused person on the belief that the other person consents to the 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’.<sup>201</sup> The only exception to this is for accused persons who had a cognitive or mental health impairment, provided ‘the impairment was a substantial cause of the accused person not saying or doing anything’.<sup>202</sup> These changes address the lack of response—the ‘freeze’ response—in victim-survivors, a common response to trauma caused by sexual assault and significantly changes the reasonable belief aspect in the knowledge element of consent.
81. In addition to substantively amending the Crimes Act, changes were also made in procedural laws. The amending act also inserted new jury directions on misconceptions about consent in sexual assault trials, for trials commencing on and from 1 June 2022, into the *Criminal Procedure Act* 1986 in ss 292–292E.

### **(b) Reception in NSW**

82. The amendments have been broadly accepted across NSW, both by the legal profession and politicians from across the political spectrum.<sup>203</sup> The NSW Government has also undertaken

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<sup>197</sup> *ibid*, s 61HF.

<sup>198</sup> *ibid*, s 61HI(5).

<sup>199</sup> *ibid*, s 61HI(6).

<sup>200</sup> *ibid*, s 61HJ(1)(a).

<sup>201</sup> *ibid*, s 61HK(2).

<sup>202</sup> *ibid*, s 61HK(3).

<sup>203</sup> Caitlin Cassidy, ‘What do the affirmative sexual consent law reforms passed in NSW and proposed in Victoria mean for each state?’ (*The Guardian*, 24 November 2021) <<https://www.theguardian.com/global/2021/nov/24/what-do-the-affirmative-sexual-consent-law-reforms-passed-in-nsw-and-proposed-in-victoria-mean-for-each-state>> accessed 1 April 2023.

education campaigns for the general public<sup>204</sup> and also within schools<sup>205</sup> on the meaning of consent and the nature of the legislative changes. Additionally, the NSW Bureau of Crime Statistics and Research (**BOCSAR**) is undertaking research into the experiences of complainants of sexual offences within the criminal justice system, specifically looking into why many sexual offence complaints do not result in criminal proceedings or are withdrawn early in proceedings.<sup>206</sup> The BOCSAR has already published some preliminary findings on this topic (predating the legislative changes outlined above).<sup>207</sup> Some of the statistics above reflect the trends in sexual assault incidence and prosecution.

## II. HOW HAS NSW INCORPORATED THE AFFIRMATIVE CONSENT MODEL IN THE LAW THAT ADDRESSES SEXUAL OFFENCES?

83. The discussion of the legislative changes brought in by the amendment on affirmative consent in NSW can be analysed in terms of the following four categories:

1. *Free and voluntary consent:*

84. A statutory definition of consent as free and voluntary agreement was first adopted with the passing of the Crimes Amendment (Consent-Sexual Assault Offences) Act in 2007 by the NSW Parliament:<sup>208</sup>

### S 61HA Consent in relation to sexual assault offences

(2) **Meaning of consent** A person *consents* to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.<sup>209</sup>

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<sup>204</sup> See, for example, ‘Check consent, every time’ (NSW Government 2023) <<https://www.nsw.gov.au/family-and-relationships/make-no-doubt>> accessed 1 April 2023.

<sup>205</sup> NSW Government ‘Statement of Intent: our Shared Commitment’ (NSW Government - Education, 26 March 2021) <<https://education.nsw.gov.au/student-wellbeing/whole-school-approach/statement-of-intent-our-shared-commitment>> accessed 1 April 2023.

<sup>206</sup> NSW Government ‘BOCSAR Research Project’ (NSW Government – Communities and Justice, (1 June 2022) <<https://dcj.nsw.gov.au/justice/reform-of-sexual-consent-laws/bocsar-research-project.html>> accessed 1 April 2023.

<sup>207</sup> NSW Bureau of Crime Statistics and Research ‘Sexual Assault Offences’ (Bureau of Crime Statistics and Research, 2 March 2023) <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Sexual-offences.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Sexual-offences.aspx)> accessed 1 April 2023.

<sup>208</sup> *Crimes Amendment (Consent-Sexual Assault Offences) Act 2007* (NSW) amending the *Crimes Act (No 40) 1900* (NSW).

<sup>209</sup> *Crimes Act (No 40) 1900* (NSW), s 61HA as at 1-17 January 2008.



85. This amendment also expanded the circumstances whereby consent would be negated or vitiated<sup>210</sup> and adopted an objective<sup>211</sup> fault element. It must be noted that even without the express statutory definition of consent, the courts have relied on free and voluntary nature of consent in the case-law, such as in *R v Clark*<sup>212</sup> and *R v Mueller*,<sup>213</sup> and the NSW Bench Book at the time of amendment already contained directions for the jury that ‘consent involves conscious and voluntary permission by the complainant to engage in sexual intercourse with the accused’.<sup>214</sup> While *Clark* held that mere submission to sexual intercourse as a consequence of terror or threat by the inmate is not consent, in *Mueller* the court held that the direction given by the trial judge to the jury that consent must be freely and voluntarily given is not erroneous or misdirected.<sup>215</sup> Viewed in light of these, the amendment merely puts the existing definition of consent in a statutory form.
86. The affirmative consent amendment was adopted in 2021 as the Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 and implemented as law on June 1, 2022. As discussed above, this seeks to clarify that consent cannot be presumed, involves ongoing and mutual communication, and can be withdrawn at any stage. The amended definition of consent adds an element of temporality by stating the consent must be ‘at the time of sexual activity’. Its current statutory form in the Crimes Act 1900 No 40 is as below:

**“61HI Consent generally**

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

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<sup>210</sup> *ibid*, S HA(4): Negation of consent A person does not consent to sexual intercourse:

- (a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
- (c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- (d) if the person consents to the sexual intercourse because the person is unlawfully detained.

<sup>211</sup> *ibid*, s HA(3).

<sup>212</sup> *R v Clark* (unpublished) (NSWCCA, Simpson J, 18 April 1998) ‘for the purpose of NSW law, consent meant ‘consent freely and voluntarily given’ as cited in Criminal Law Review Division Attorney General’s Department, *The Law of Consent and Sexual Assault* (Discussion Paper May 2007)

<<https://www.justice.nsw.gov.au/justicepolicy/Documents/consentdp.doc>> (‘Discussion Paper’).

<sup>213</sup> [2005] 62 NSWLR 476.

<sup>214</sup> Discussion Paper (n 212) 7.

<sup>215</sup> *ibid*, 7-8.

87. The amended law notes that consent to a sexual activity can be withdrawn at any point of time by the person verbally or by conduct.<sup>216</sup> It illustrates the free and voluntary nature of consent by clarifying that lack of physical or verbal resistance to a sexual activity is not to be construed, ‘by reason only of that fact,’ as consent.<sup>217</sup> Further, consent given under certain conditions or circumstances or to certain people cannot be construed as consent otherwise.<sup>218</sup> Stealthing is used as an example here.<sup>219</sup>
88. In addition to outlining consent generally in Section 61HI, the amended law lists the circumstances where there is no consent in Section 61HJ in a non-exhaustive manner. The main grounds can be understood as lack of communication, lack of capacity (mental or affected by drug/alcohol or consciousness), fear of force or harm, coercion, blackmail or intimidation, abuse of relationship, or mistaken belief about identity of the person, or the nature or purpose of sexual activity, and fraudulent inducement.<sup>220</sup> Another line of discussion on free consent has revolved around the question of persuasion. The Bench Book guidance states that consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.<sup>221</sup>

2. *A ‘communicative’ standard for consent:*

89. The communicative standard of consent is viewed as one of the main features of affirmative consent where consent is shown by doing or saying something. In NSW reform, the communicative standard of actions or words is not reflected in the main definition but is stated in the negative under the list of circumstances where there is no consent.

**“Section 61HJ**

61HJ Circumstances in which there is no consent

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

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<sup>216</sup> *Crimes Act (No 40) 1900* (NSW), s 61HI(2).

<sup>217</sup> *ibid*, s 61HI(4).

<sup>218</sup> *ibid*, s 61HI(5-6).

<sup>219</sup> *ibid*, s 61HI(5) Example.

<sup>220</sup> *ibid*, s 61 HJ

<sup>221</sup> Judicial Commission of New South Wales, ‘Criminal Trial Courts Bench Book’ (Judicial Commission of NSW, current as of April 2023) <<https://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html>> (‘NSW Bench Book’) accessed 20 April 2023, s 5-910.

90. As the experience of Tasmania and Victoria shows, the real impact of this change in standard would only be clear when the law is tested in courts.

3. *Knowledge of consent and the defence of mistaken belief*

91. The knowledge of consent under the amended law continues to recognise the three states of mind by which the accused person's knowledge that consent was absent may be proved. Thus, 'actual knowledge', 'recklessness', and a hybrid subjective/objective test remain part of the mental element of knowledge of non-consent. With the exception of the addition of the word 'actually' in s 61HK(1)(a), s 61HK(1)(a) and 61HK(1)(b) are in relevantly identical terms to s 61HE(3)(a) and 61HE(3)(b) of the earlier law. The 'no reasonable grounds' test in s 61HE(3)(c) of the Crimes Act has been replaced with the "no reasonable belief" test.

92. The amended Section 61HK(1) provides:

“[T]he accused is taken to know that another person does not consent to a sexual activity if—

(a) the accused **actually** knows the other person does not consent to the sexual activity, or

(b) the accused is reckless as to whether the other person consents to the sexual activity, or

(c) **any belief** that the accused has, or may have, that the other person consents to the sexual activity is **not reasonable** in the circumstances.”

93. S 61HK(2) clarifies the application of the 'no reasonable belief' test and guides the fact finders by stating that: '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' [Emphasis supplied]. What constitutes 'reasonable time' has not been defined.<sup>222</sup> Further, NSW retained the

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<sup>222</sup> *ibid*, s 5-920 [19].

‘one-step approach’<sup>223</sup> to proving the offence and did not expressly introduce the requirement on part of the accused person to ‘take steps’ to determine that the complainant consented. Thus, the current law only requires fact finders to consider whether the accused person said or did something to ascertain consent. NSW Law Commission was influenced by the review in Northern Ireland which recommended against introducing such a step as it unreasonably shifted the burden on the accused that was found to be an insurmountable obstacle.<sup>224</sup>

94. Further, S 61HK(2) is not applicable if the accused person shows that they had a cognitive<sup>225</sup> or mental health<sup>226</sup> impairment that was ‘a substantial cause of the accused person not saying or doing anything’.<sup>227</sup> But, the onus of proving this lies on the accused person using the standard of ‘balance of probabilities’.<sup>228</sup> In addition to accounting for the above impairments, the law allows ‘consideration of all the circumstances of the case’<sup>229</sup> in determination of the mental element such that any of accused’s personal characteristics that affect their perception or understanding of the situation.<sup>230</sup>

#### 4. *Burden of proof*

95. As regards the burden of proof, the state bears a dual burden of proof. First concerns the complainant’s state of mind and the Crown must prove beyond reasonable doubt that the complainant did not consent to the sexual act. Second concerns the accused’s state of mind. The Crown has the obligation to prove beyond reasonable doubt that the accused knew the complainant did not consent to the sexual act alleged. This is deduced based on the three mental elements in S 61HK which outline the provisions on the knowledge of consent, including a consideration of the facts and all the circumstances of the case, including what the accused said or did but ignoring the self-induced intoxication of the accused.

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<sup>223</sup> “The absence of a reasonable belief in consent is an element of the offence that the prosecution must prove” NSW LCR (n 187) 136.

<sup>224</sup> Sir John Gillen, ‘Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1’ (*The Law Society of Northern Ireland*, April 2019) <[https://www.lawsoc-ni.org/DatabaseDocs/new\\_8655264\\_\\_gillen-review-report-into-the-law-and-procedures-in-serious-sexual-offences-in-.pdf](https://www.lawsoc-ni.org/DatabaseDocs/new_8655264__gillen-review-report-into-the-law-and-procedures-in-serious-sexual-offences-in-.pdf)> [11.59] Accessed 23 March 2023.

<sup>225</sup> See definition of ‘Cognitive impairment’ in *Crimes Act (No 40) 1900* (NSW), s 23A(8).

<sup>226</sup> See definition of ‘Mental health impairment’ *ibid*, s 4C.

<sup>227</sup> *ibid*, s 61HK(3).

<sup>228</sup> *ibid*, s 61HK(4).

<sup>229</sup> *ibid*, s 61HK(5)(a).

<sup>230</sup> *R v Mrzljak* [2004] QCA 420, [2005] 1 Qd R 308 [89]– [93]; *Aubertin v Western Australia* [2006] WASCA 229, 33 WAR 87 [43], as cited in NSW LCR (n 187) 141.

96. Thus, there is no onus on the accused. One exception to this is the cognitive or mental health impairment of the accused, as outlined above, which shifts the burden on accused to prove the impairment.
97. The subjective aspect of the hybrid test used to ascertain the ‘reasonable belief’ test considers the relevant belief of the accused person.<sup>231</sup> If the evidence points to the possibility that the accused had, or may have had, a belief that the complainant consented, the Crown must prove beyond reasonable doubt that the belief was not reasonable in the circumstances. The reasonableness is judged as per community standards.<sup>232</sup> In *Aubertin v Western Australia* (2006) WAR 87, it was held that ‘reasonableness is ordinarily assessed having regard to the personal characteristics or attributes of the particular accused’. This is included in the text of the statute and adverts to the hybrid standard adopted in deciphering knowledge.
98. The NSW Criminal Trials Courts Bench Book,<sup>233</sup> directed at judicial officers and how they should ensure the requisite elements of the offence are understood by juries, outlines the amended law on affirmative consent—the relevant elements of the offence relating to consent, and the relevant standard of proof. The jury directions on misconceptions about consent in sexual assault trials, for trials commencing on and from 1 June 2022, were brought in via amendments to the *Criminal Procedure Act 1986* in ss 292–292E. It includes directions which speak to the prevalent myths such as the stranger rape myth by asking the jury to bear in mind that non-consensual activity can happen in different circumstances and between different kind of people including between those known to or married to or in an established relationship with each other.<sup>234</sup> The Bench Book also clarifies that there is no obligation upon the accused to prove anything.<sup>235</sup>

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<sup>231</sup> *O’Sullivan v R* [2012] NSWCCA 45 at [124]–[126].

<sup>232</sup> *ibid.*

<sup>233</sup> NSW Bench Book (n 221).

<sup>234</sup> *Criminal Procedure Act (No 209) 1986* (NSW), s 292A; s 5-200.

<sup>235</sup> NSW Bench Book (n 221), s 3-600.

# UNITED STATES OF AMERICA— WISCONSIN

## INTRODUCTION

99. The transition towards an affirmative model in Wisconsin took place through legislative action. In 1976, the legislature of Wisconsin repealed several statutes that criminalised rape offences and instead enacted a comprehensive statute that criminalised sexual assault.<sup>236</sup> The new statute categorised sexual intercourse without consent not as rape but as four degrees of sexual assault offences.<sup>237</sup> Notably, the new statute defined consent as ‘words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.’<sup>238</sup> This is the definition employed in Wisconsin’s current law on sexual assault: Statute § 940.225.
100. Statute § 940.225 defines ‘sexual intercourse’ broadly. That is to say that it encompasses any penetration of another person’s body, however slight.<sup>239</sup> As mentioned before, ‘consent’ is understood as a ‘freely given agreement’ and can be demonstrated by ‘words or overt actions.’<sup>240</sup> The matter is heard by a jury of up to 12 people.<sup>241</sup> The jurors are provided with ‘Criminal Jury Instructions’ for each of the offences that they are required to decide on. These instructions detail the state’s burden of proof, how consent operates, and whether mistaken belief is admissible as a defence, among other clarifications.<sup>242</sup>

## I. WHAT WERE THE KEY LEGAL INSTITUTIONS IN WISCONSIN THAT TRIGGERED A SHIFT IN THE LAW TOWARDS AN AFFIRMATIVE CONSENT MODEL?

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<sup>236</sup> Wisconsin Legislative Council, ‘Analysis of Current Wisconsin Laws Relating to Sexual Assault’ (*US Department of Justice, National Institute of Justice*, 1990) <<https://www.ojp.gov/pdffiles1/Digitization/126156NCJRS.pdf>> accessed 18 March 2023, p. 3.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid, p. 5.

<sup>239</sup> WSA s 940.225 (5)(c).

<sup>240</sup> WSA s 940.225 (4).

<sup>241</sup> WSA s 756.06 2(b) and 972.01.

<sup>242</sup> Wisconsin Jury Instructions Committee ‘Wis JI-Criminal’ (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

101. In Wisconsin, affirmative consent was introduced in 1976 by the state's legislative power as part of the law addressing sexual assault. The law on rape before 1976 only recognised forcible sex on a female victim by a male accused.<sup>243</sup>
102. The legal interpretation set by the Supreme Court of Wisconsin played an important role in determining the standard to prove rape before the 1976 reform. In 1906 the Supreme Court of Wisconsin decided a case involving sexual assault and set a high bar for assessing whether the offence of rape had been proved. In *Brown v. State* the Supreme Court found that, despite vehemently refusing to engage in sexual intercourse, the victim 'had not resisted enough.'<sup>244</sup> The implication was that the Supreme Court effectively created the standard of 'utmost resistance', which consisted in 'the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person.'<sup>245</sup> Moreover, the victim had to be able to prove the intensity of resistance had been maintained until the crime was consummated.<sup>246</sup>
103. In 1938 the Supreme Court held in *State v. Hoffman* that there had to be an element of fear for rape to be proved. By so doing, the Supreme Court effectively created the standard of 'paralysing fear', that is: 'a fear so great as to terrify [the woman] and render her practically incapable of resistance.'<sup>247</sup> However, in 1971 the standard of paralysing fear was rejected by the Supreme Court in *State v. Herfel*, where it held that a woman's will to resist need not be expressed through incapacitating fear.<sup>248</sup>
104. During the ongoing conversations around rape reform across the United States during the 1970's, Wisconsin saw a massive change in their sexual assault legislation.<sup>249</sup> The Legislature of Wisconsin repealed several legal instruments that dealt separately with rape, sexual intercourse without consent, and sexual intercourse with a child and replaced them with a single statute: Wisconsin

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<sup>243</sup> Daryl Olszewski, 'Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform' (2006) 89 *Marquette Law Review* 693, 696.

<sup>244</sup> Jody Clay-Warner and Callie Harbin Burt, 'Rape Reporting After Reforms: Have Times Really Changed?' (2005) 11 *Violence Against Women* 150, fn 2 at 174.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Brown v. State* [1906] 127 Wis 193, 199.

<sup>247</sup> *State v. Hoffman* [1938] 228 Wis 235, 240, 280 NW 357, 359.

<sup>248</sup> *State v. Herfel* [1971] 49 Wis 2d 513, 182 NW2d 232, 518-519.

<sup>249</sup> Leigh Bienen, 'Rape III - National Developments in Rape Reform Legislation' (1980) 6 *Women's Rights Law Reporter* 170, 182-183.

State Statute § 940.225.<sup>250</sup> The statute was drafted in 1975 and enacted in 1976. The statute replaced the existing law on rape with a comprehensive law on sexual assault.<sup>251</sup>

105. The new statute categorised sexual intercourse without consent not as rape offences but rather as four categories of sexual assault offences against bodily security.<sup>252</sup> For the offence to be proved under the new statute, it was only necessary to show that the sexual intercourse took place without the consent of the victim. In other words, there was no requirement for the prosecution to prove the existence of force, fear, threat, or intoxication.<sup>253</sup>
106. Crucially, the enacted statute was based on a bill that defined consent as ‘words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.’<sup>254</sup> The definition was entirely accepted and, therefore, introduced in § 940.225.

## **II. HOW HAS WISCONSIN INCORPORATED THE AFFIRMATIVE CONSENT MODEL IN THE LAW THAT ADDRESSES SEXUAL OFFENCES?**

107. The law that addressed the crime of rape was replaced in Wisconsin State Statute § 940.225 by an offence of sexual assault that comprehends a broad range of circumstances in which sexual contact and intercourse may occur. § 940.225 (5) defines ‘sexual intercourse’ broadly. That is to say that it encompasses any penetration, however slight, ‘of any part of a person’s body or of any object into the genital or anal opening.’ Thus, intercourse encompasses ‘cunnilingus, fellatio or anal intercourse’ and the emission of semen is not required.<sup>255</sup>
108. The statute classifies the set of circumstances in which sexual intercourse may take place without consent into three degrees.<sup>256</sup> The offence of having sexual intercourse without consent is categorised as ‘third degree sexual assault’ and provides that:

### **(3) Third degree sexual assault.**

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<sup>250</sup> Wisconsin Legislative Council, ‘Analysis of Current Wisconsin Laws Relating to Sexual Assault’ (*US Department of Justice, National Institute of Justice*, 1990) <<https://www.ojp.gov/pdffiles1/Digitization/126156NCJRS.pdf>> accessed 18 March 2023, p. 3.

<sup>251</sup> *ibid.*

<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*, 4-5,14.

<sup>254</sup> *ibid.*, 5.

<sup>255</sup> WSA s 940.225 (5).

<sup>256</sup> Fourth degree sexual assault criminalizes sexual *contact* without consent. See WSA s 940.225 (3m).



(a) Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony.

(b) Whoever has sexual contact in the manner described in sub. (5)(b)2. or 3. with a person without the consent of that person is guilty of a Class G felony.<sup>257</sup>

109. The statute also contemplates offences of second and first-degree sexual assault, which criminalize specific scenarios in which sexual contact or intercourse without consent takes place. A person commits a second-degree sexual assault if threats or use of force were employed, if the assault results in an injury, if the person had a mental illness or was under the effects of an intoxicant or if the person was unconscious, among others.<sup>258</sup> A person commits a first-degree sexual assault if the assault results in ‘pregnancy or great bodily harm’, if a dangerous weapon is used, if the accused received assistance of others by use or threat of force, or if the victim was 60 years of age.<sup>259</sup>

#### *1. Definition of consent*

110. The statute adopts an affirmative definition of consent in § 940.225 (4) which applies to all offences in § 940.225, with eight specific exceptions that will be addressed below. In short, consent is understood as a ‘freely given agreement’ and can be demonstrated by ‘words or overt actions’. § 940.225 (4) defines consent as follows:

#### **(4) Consent.**

“Consent”, as used in this section, means *words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact*. Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i).

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<sup>257</sup> WSA s 940.225 (3).

<sup>258</sup> The statute also criminalizes scenarios where the accused; received assistance from others; worked in a healthcare facility or residence and the victim was a resident; worked in a correctional institution and the victim was confined there; worked as parole agent and the victim was under their supervision; was a licensee or employee of a child welfare agency, foster home, shelter or facility providing long-term care and the victim was a client there, or was a law enforcement officer and the person was detained. See WSA s 940.225 (2).

<sup>259</sup> See WSA s 940.225 (1).

The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.<sup>260</sup>

111. Although the statute does not clarify whether there is a standard for consent to be deemed ‘informed’, the Wisconsin Jury Instructions Committee took the view that ‘informed consent’ should be understood as ‘the ability to understand the act and its consequences.’<sup>261</sup> The Committee explained:

4. Section 940.225(4) does not define "competent to give informed consent." There is no indication whether the classes of persons described in § 940.225(4)(b) and (c) are those who are not "competent to give informed consent," or whether a different category of individuals is contemplated. The Committee took the view that a broader category was intended and defined "competent to give informed consent" by reference to the general principles that apply to "informed consent" in other contexts – the ability to understand the act and its consequences.<sup>262</sup>

112. The Wisconsin Statute presumes that individuals are incapable of providing consent when they are unconscious, unable to communicate willingness to participate in a sexual act, or when their capacity to assess their conduct is impaired. In addition, the statute indicates scenarios in which ‘consent is not an issue’ which means that consent is not an element of the offence.<sup>263</sup> For instance, when capacity to appraise conduct is compromised due to a mental illness, an intoxicant or lack of consciousness, consent is not an element of the offence but indications of consent may be used to prove that capacity to appraise conduct was compromised. On the other hand, consent is not an element in consideration at all when the accused is a law enforcement officer

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<sup>260</sup> WSA s 940.225 (4) emphasis added.

<sup>261</sup> See Wisconsin Jury Instructions Committee ‘Wis JI-Criminal 1200C’ (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>262</sup> *ibid.*

<sup>263</sup> WSA s 940.225 (4) and WSA s 940.225 (2)(c), (cm), (d), (g), (h), and (i).

and the victim is detained; the accused is a parole or probation agent and the victim is under the accused's supervision; the accused is a correctional staff member at the organisation in which the victim is confined, or the accused is an employee of a caregiving facility and the victim is a patient or resident there.<sup>264</sup>

## 2. *Communication of consent*

113. The Supreme Court established a communicative standard in *State v Clark* by holding that freely given consent is demonstrated through 'affirmative assent' of 'words' or 'overt actions'.<sup>265</sup> The Court held that if the victim's actions are ambiguous, the jury may nonetheless find that there was no consent if it concludes that the victim participated in the sexual conduct out of fear. Thus, failure to resist does not amount to consent.<sup>266</sup> Along the same lines, the Supreme Court reiterated in *State v Long* that:

[C]onsent is defined in the sexual assault statute as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have...sexual contact" (...). In the context of sexual assault, consent in fact requires an affirmative indication of willingness. A failure to say no or to resist does not constitute consent in fact.<sup>267</sup>

114. The Wisconsin criminal jury instructions add that, in ascertaining whether the victim did or did not consent, what the victim 'said and did' must be considered 'along with all the other circumstances'.<sup>268</sup>

## 3. *Knowledge of consent and the defence of mistaken belief*

115. The Wisconsin Jury Instructions Committee explains that if the jury finds that sexual intercourse occurred without consent, 'it apparently is no defense that the defendant believed there was

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<sup>264</sup> WSA s 940.225 (2)(c)(cm)(d)(g)(h)(i)(4). See also Wisconsin Jury Instructions Committee 'Wisconsin Criminal Jury Instructions (Wis JI-Criminal)1200C' (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>265</sup> *State v Clark* 87 Wis 2d 804 (1979) 275 NW 2d 715, para 6-7.

<sup>266</sup> *Ibid.*

<sup>267</sup> *State v Long* 317 Wis 2d 92 (2009) 765 NW 2d 557, para 31.

<sup>268</sup> Wisconsin Jury Instructions Committee 'Wis JI-Criminal 1218A' (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

consent, even if the defendant’s belief is reasonable.<sup>269</sup> According to the Committee, this is because § 939.23 of the statute provides that criminal intent is an element of a crime when ‘intent words’—e.g., ‘intentionally’ ‘know’ or ‘believe’—are used in the definition of the offence.<sup>270</sup> As the Committee notes § 940.225, which criminalizes sexual assault, does not employ ‘intent words’ that would indicate that the defendant’s knowledge or belief of consent is an element of the crime.<sup>271</sup>

116. Likewise, for an honest mistake to be a defense it must negate ‘the existence of a state of mind essential to the crime.’<sup>272</sup> As the Wisconsin Legislative Council indicates, a defendant’s claim of mistake in relation to the victim’s consent to sexual intercourse ‘is not a defense because the error would not negate a state of mind essential to the crime.’<sup>273</sup> However, the jury instructions clarify that evidence indicating knowledge of consent may be used, for example, to establish whether the accused ‘knew’ of a victim’s inability to evaluate her conduct in case of mental illness, and whether the accused knew the victim was unconscious.<sup>274</sup>

#### 4. *Burden of proof*

117. The prosecution always bears the burden of proof. Indeed, the Wisconsin statute states that no legal provision ‘shall be construed as changing the existing law with respect to presumption of innocence or burden of proof.’<sup>275</sup> Thus, prosecutors must prove beyond a reasonable doubt that the victim did not consent freely to a sexual act. ‘Reasonable doubt’ means ‘a doubt based upon reason and common sense’ rather than a doubt based on ‘mere guesswork or speculation’ or one that ‘arises merely from sympathy or fear.’<sup>276</sup>

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<sup>269</sup> See *ibid.*

<sup>270</sup> See *ibid.* and WSA s 939.23 (criminal intent).

<sup>271</sup> But note that the defendant’s knowledge of the victim’s mental illness, incapacity to consent due to the effects of an intoxicant, and unconsciousness, is expressly required by WSA s 940.225 (2) (c) (cm) (d).

<sup>272</sup> WSA s 939.43 (mistake).

<sup>273</sup> Wisconsin Legislative Council, ‘Analysis of Current Wisconsin Laws Relating to Sexual Assault’ (*US Department of Justice, National Institute of Justice*, 1990) <<https://www.ojp.gov/pdffiles1/Digitization/126156NCJRS.pdf>> accessed 18 March 2023, p. 15.

<sup>274</sup> See WSA 940.225 (2)(c)(d) and WIS JI-Criminal 1211 and 1213 available at Wisconsin Jury Instructions Committee ‘Wis JI-Criminal’ (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023.

<sup>275</sup> WSA s 939.70 (Presumption of innocence and burden of proof).

<sup>276</sup> Wisconsin Jury Instructions Committee ‘Wis JI-Criminal 140’ (*Wisconsin State Law Library*, revised in 2023) <<https://wilawlibrary.gov/jury/criminal/index.php#42>> accessed 18 March 2023. The definition of ‘reasonable doubt’ in Wis JI-Criminal 140 was upheld in *State v Trammell* 928 NW2d 564 (Wis2019) 30, 37, 45, 48, 50, 56.

118. The constitutionality of the statute’s definition of consent was challenged in *Gates v State*. Gates argued that § 940.225 (2)(a)—which criminalizes sexual intercourse without consent by use of threat or force—read in conjunction with the statute’s definition of consent, shifted the burden of proof to the defendant.<sup>277</sup> The Wisconsin Court of Appeals held that the statute’s definition of consent does not shift the burden of proof to the defendant. The Court held:

In the absence of proof on the issue of consent, the State cannot obtain a conviction for second-degree sexual assault. The State must introduce evidence that there was no consent, and this evidence must be sufficient to convince the jury beyond a reasonable doubt. There is no presumption, as Gates asserts, that all acts of sexual contact or intercourse are without consent unless shown to have been preceded by words or overt actions of consent.<sup>278</sup>

119. The Court of Appeals explained that by amending the definition of consent, Wisconsin’s legislature intended to relieve the victim of demonstrating that she satisfied the standard of ‘utmost resistance’ to the assault or that the victim submitted as a result of bodily harm or threats of violence. The change, the Court clarified, does not relieve the state of proving that the sexual intercourse happened without consent: the state ‘is still required to prove the victim did not by either words or overt actions freely agree to have sexual contact or intercourse.’<sup>279</sup>

120. Similarly, in *State v. Lederer* (1980) the defendant challenged Wis. Stat. §. 940.225(3), which criminalised sexual intercourse without the consent of the victim, due to its overbreadth.<sup>280</sup> The Court of Appeals rejected the claim that a person could be convicted under the statute merely for engaging in sexual intercourse. The Court explained that the statute requires the state to prove that the act of sexual intercourse must be without consent and the evidence must convince the jury beyond reasonable doubt. Thus, ‘[i]n so defining consent the legislature has relieved the state of the burden of proving that the victim resisted in order to establish that the act was non-consensual.’<sup>281</sup>

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<sup>277</sup> *Gates v State* 91 Wis 2d 512 (1979) 283 NW 2d 474, para 4.

<sup>278</sup> *Gates v State* 91 Wis 2d 512 (1979) 283 NW 2d 474, para 5-6.

<sup>279</sup> *ibid*, 6.

<sup>280</sup> *State v Lederer* 99 Wis.2d 430 (1980) Wisconsin NW2d 457, at 433.

<sup>281</sup> *Ibid*, at 434.

# UNITED STATES OF AMERICA—VERMONT

## INTRODUCTION

121. Vermont includes affirmative consent in its criminal statute. It defines consent as ‘affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time.’<sup>282</sup> The change was introduced through a bill passed in the Vermont Legislature (Bill H-183), enacted in May 2021.<sup>283</sup> The criminal code in Vermont can be found in the ‘2011 Vermont Code Title 13 - Crimes and Criminal Procedure’. Sexual assault offences can be found in Chapter 72 of Title 13. The text of the provisions that define consent is gender neutral, as it employs the term ‘person’.
122. Criminal matters in Vermont are heard by a jury, in which 12 members of the community participate.<sup>284</sup> The defendant may participate in their selection. Before the defendant can be convicted, all 12 members of the jury must agree on the defendant's guilt.<sup>285</sup> Where a jury is waived, the court alone decides guilt or innocence in accordance with the facts and the law.<sup>286</sup>

### **I. WHAT WERE THE KEY LEGAL INSTITUTIONS IN VERMONT THAT TRIGGERED A SHIFT IN THE LAW TOWARDS AN AFFIRMATIVE CONSENT MODEL?**

123. Before Vermont enacted the affirmative consent law, the criminal statute defining rape was amended in 1977 and defined consent as ‘words or actions by a person indicating a voluntary agreement to engage in a sexual act.’<sup>287</sup> ‘Sexual assault’ was defined as – ‘compels [a] person to participate in a sexual act: (a) Without the consent of [that] person; or (b) By threatening or coercing the other person; or (c) by placing [that] person in fear that any person will be harmed

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<sup>282</sup> VSA Tit. 13, s3251(3).

<sup>283</sup> Vermont General Assembly ‘H.183 (Act 68)’ (*Vermont General Assembly – Bills and Resolutions*, May 2021) <<https://legislature.vermont.gov/bill/status/2022/H.183>> accessed March 19 2023; Greg Sukiennik and Bennington Banner, ‘Bill Seeks Overhaul of State’s Sexual Assault Laws’ (*Bennington Banner*, 11 February 2021) <[https://www.benningtonbanner.com/local-news/bill-seeks-overhaul-of-states-sexual-assault-laws/article\\_103bac80-6cb0-11eb-95f1-8735f8eff1e1.html](https://www.benningtonbanner.com/local-news/bill-seeks-overhaul-of-states-sexual-assault-laws/article_103bac80-6cb0-11eb-95f1-8735f8eff1e1.html)> accessed 19 March 2023.

<sup>284</sup> Vt. R. Crim. P. 23 ‘Trial by Jury or by the Court’ (*Casetext*, 6 March 2023) <<https://casetext.com/rule/vermont-court-rules/vermont-rules-of-criminal-procedure/vi-trial/rule-23-trial-by-jury-or-by-the-court>> accessed 19 March 2023.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> VSA Tit. 13, s3251(3) (effective until 2021).

imminently.<sup>288</sup> The Vermont statute, however, specifically eliminated the need for resistance by the victim, in a separate section.<sup>289</sup>

124. The 1977 amendment in Vermont took place in the context of the nationwide rape law reform and part of the anti-rape movement that started in 1960.<sup>290</sup> The movement was a culmination of the first rape workshops and conferences being held across the country that included speak-outs by rape victims.<sup>291</sup>
125. The 2021 amendment to the sexual assault law in Vermont materialised in May through the Bill H-183 that was introduced in February 2021.<sup>292</sup> Vermont State Senator Ruth Hardy played a key role in ensuring that the Bill redefining consent was passed. Senator Hardy addressed her experience as a sexual assault survivor during discussions of the Bill in the Senate and stressed the importance of ensuring sexual violence is understood and prosecuted.<sup>293</sup>
126. According to Senator Hardy, the three reasons that the definition of the law was changed in Vermont law was – first the #MeToo movement; second, the presence of women in strategic positions in Vermont’s legislature; and third, feedback from community members pointing towards the need to change the law on sexual assault.<sup>294</sup>
127. Civil society organisations contributed to the debate through legislative advocacy. For instance, the Vermont Network—a network of 15 independent non-profit organisations that work against domestic and sexual violence<sup>295</sup>—acknowledged in their 2021 ‘policy wrap up’ their contribution to the sexual violence reform that led to the inclusion of affirmative consent in the law.<sup>296</sup> They

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<sup>288</sup> VSA Tit. 13, s 3252 (effective until June 2021).

<sup>289</sup> Christina Tchen, ‘Rape Reform and a Statutory Consent Defense’ (1983) 74 *Journal of Criminal Law and Criminology* 1518, fn 157.

<sup>290</sup> For a brief account of rape law reform in the 1970s see Vicki McNickle Rose, ‘Rape as a Social Problem: A Byproduct of the Feminist Movement’ (1977) 25 *Social Problems* 75, 80-82

<sup>291</sup> *ibid*, 82-85

<sup>292</sup> Vermont House Bill H 183 ‘An Act Relating to Sexual Violence’, (*Open States*, 2021-2022 Regular Session) <<https://openstates.org/vt/bills/2021-2022/H183/>> accessed 19 March 2023.

<sup>293</sup> Emma Auer, ‘What do Vermont’s New Sexual Consent Laws Mean’ (*WomenSafe*, 23 July 2021) <<https://www.womensafe.net/blog/act68>> accessed 18 March 2023.

<sup>294</sup> *ibid*.

<sup>295</sup> Vermont Network Against Domestic and Sexual Violence, ‘Our Story’ (*VT Network*) <<https://www.vtnetwork.org/our-story/>> accessed 19 March 2023.

<sup>296</sup> Vermont Network Against Domestic and Sexual Violence, ‘2021 Policy Wrap up’ (*VT Network*, 2021) <<https://www.vtnetwork.org/2021policywrapup/>> accessed 19 March 2023.

noted that only in 2020 they received calls for support from 17,000 Vermonters who were affected with domestic and sexual violence.<sup>297</sup>

128. H-183 Bill also establishes a campus sexual harm prevention force.<sup>298</sup> This was closely connected to the massive protests against the University of Vermont’s inability to tackle sexual violence on college campus.<sup>299</sup> The aim of the force would be to help colleges, survivors and advocates come together to think about best practices and big-picture solutions to the problem of sexual violence on campuses.<sup>300</sup>

## II. HOW HAS VERMONT INCORPORATED THE AFFIRMATIVE CONSENT MODEL IN THE LAW THAT ADDRESSES SEXUAL OFFENCES?

129. The first step towards affirmative consent in Vermont took place in 1977 through an amendment that defined consent as: ‘words or actions by a person indicating a voluntary agreement to engage in a sexual act.’<sup>301</sup> In *State v Snow*, the Supreme Court examined the allegation that the accused sexually assaulted the victim while she was unconscious. With regards to the definition of consent, the Court stated:

In Hazelton, we observed: The victim is “compelled” to engage in a sexual act in violation of § 3252 . . . as the result of an offender’s conduct to unilaterally engage another in a sexual act “without consent,” that is without any indication that the victim is freely willing to participate.<sup>302</sup>

130. In 2021, the General Assembly of the State of Vermont amended the law on sexual violence to incorporate affirmative consent. The amendment changed Title 13 on Crimes and Criminal Procedure in Vermont, modifying the definition of consent —discussed below— and sexual assault. The definition of sexual assault now reads:

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<sup>297</sup> Ellie French, ‘Sexual Assault Bill Would Redefine Consent in State Law’ (*VTDigger*, 10 February 2021) <<https://vtdigger.org/2021/02/10/sexual-assault-bill-would-redefine-consent-in-state-law/>> accessed 19 March 2023.

<sup>298</sup> Ellie French, ‘Senate Approves Updated Sexual Consent Laws’ (*VTDigger*, 13 May 2021) <<https://vtdigger.org/2021/05/13/senate-approves-updated-consent-laws-intercollegiate-sexual-violence-prevention-council/>> accessed 19 March 2023.

<sup>299</sup> *ibid.*

<sup>300</sup> *ibid.*

<sup>301</sup> 13 VSA s 3251(3) (2020) (prior to 2021 amendment).

<sup>302</sup> *State v Snow*, 70 A3d 971 (Vt 2013), para 9-12.



**§3252. Sexual assault**

(a) No person shall engage in a sexual act with another person

(1) without the consent of the other person;

(2) by threatening or coercing the other person;

(3) by placing the other person in fear that any person will suffer imminent bodily injury; or

(4) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.

(b)(1) No person shall administer any alcohol, drugs, or other intoxicants to another person without the person's knowledge or against the person's will and, while the person is impaired by the alcohol, drugs, or intoxicants, engage in a sexual act with that person.

(2) No person shall engage in a sexual act with another person when the other person is incapable of consenting to the sexual act due to:

(A) impairment by alcohol, drugs, or other intoxicants and that condition is known or reasonably should be known by the person; or

(B) psychiatric or developmental disability and that condition is known or reasonably should be known by the person.

(f)(1) A person who violates subsection (a), (b), (d), or (e) of this section 2 shall be imprisoned not less than three years and for a maximum term of life, and, in addition, may be fined not more than \$25,000.00.<sup>303</sup>

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<sup>303</sup> VSA Tit. 13, s 3252.

131. The amendment also incorporated a new clause indicating circumstances in which a person lacks ability to consent within the definition of ‘sexual assault’, a new clause to indicate inability to consent. The clause read as, ‘(4) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.’<sup>304</sup>

*1. Definition of consent*

132. The definition of affirmative consent was amended in 2021 and defines consent as:

[T]he affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time.<sup>305</sup>

133. The law specifies scenarios in which there is no consent, namely, when the victim is incapable of consenting or when the victim agreed as a result of threats, force or fear, was sleeping or unconscious, or the assailant ‘knew or reasonably should have known’ that the victim was incapable of consenting, was not aware of the sexual act or was incapacitated by an intoxicant.<sup>306</sup> Likewise, a person under the age of sixteen is ‘legally unable to consent’ unless both parties are between 15 and 19 years of age.<sup>307</sup>
134. In 2020 the Supreme Court explained that the law of sexual assault understood consent as agreement to participate in an act, but not as ‘informed consent’. In *State v Doe* the State appealed a trial court’s finding that there was no probable cause to find that the accused committed aggravated sexual assault by misrepresenting his HIV status. According to the State, the accused’s deception about his HIV status vitiated the victim’s consent. The Supreme Court held that the trial court was correct because the Legislature had ‘not indicated [in the statute] that fraud undermines consent’.<sup>308</sup> When examining how consent is to be understood according to the criminal law, the Court noted:

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<sup>304</sup> Ibid.

<sup>305</sup> 13 VSA s 3251(3). For a discussion of the context surrounding the amendment see: Greg Sukiennik and Bennington Banner, ‘Bill Seeks Overhaul of State’s Sexual Assault Laws’ (*Bennington Banner*, 11 February 2021) <[https://www.benningtonbanner.com/local-news/bill-seeks-overhaul-of-states-sexual-assault-laws/article\\_103bac80-6cb0-11eb-95f1-8735f8eff1e1.html](https://www.benningtonbanner.com/local-news/bill-seeks-overhaul-of-states-sexual-assault-laws/article_103bac80-6cb0-11eb-95f1-8735f8eff1e1.html)> accessed 19 March 2023.

<sup>306</sup> VSA 13 s 3254 (2)(4)(5) and 3251 (10).

<sup>307</sup> *State v Bellanger*, 183 A3d 550 (Vt 2018), 27.

<sup>308</sup> *State v Doe*, 249 A3d 658 (Vt 2020), para 23.

As an initial matter, we note that §3251(3) is concerned with consent, not informed consent. A person gives consent to another to engage in an act (...) Informed consent, however, refers to whether the person gave consent “with full knowledge” of the risks involved and the alternatives” (...) Section 3251(3) of Title 13 defines consent by reference to the sexual act, not the consequences of the sexual act. This is significant for our understanding of consent as defined in §3251(3). Consent is not undermined because a person did not have an adequate understanding of the risks involved in engaging in the sexual act.<sup>309</sup>

## *2. Communication of consent*

135. The statutory definition does not specify how the ‘affirmative, unambiguous, and voluntary agreement’<sup>310</sup> can be inferred from words, actions, or both. It should be observed, however, that in *State v Snow* the Supreme Court affirmed the trial court’s understanding of the term ‘without consent’ as a lack of ‘indication that the victim was freely willing to participate’, suggesting that consent ought to be communicated.<sup>311</sup>

## *3. Knowledge of consent and the defence of mistaken belief*

136. The accused’s knowledge or belief regarding the presence of consent is relevant, according to jury instructions, when (a) the accused knew or reasonably should have known that the victim was ‘incapable of consenting’, (b) the accused knew or reasonably should have known that the victim ‘was unaware that a sexual act was being committed’ or (c) the accused knew or reasonably should have known that alcohol, drugs or other intoxicants impaired the victim’s capacity to consent.<sup>312</sup>
137. Further, the accused’s intention to engage in a sexual act without consent is an essential element of the offence: the accused must not have acted ‘because of mistake, or by accident.’<sup>313</sup> The jury may find that the accused acted intentionally if it was his or her aim to ‘engage in the sexual act with’ the victim without his or her consent.<sup>314</sup> The accused’s intent may be shown ‘by the way in

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<sup>309</sup> *State v Doe*, 249 A3d 658 (Vt 2020), paras 13-19.

<sup>310</sup> VSA 13 s 3251(3).

<sup>311</sup> *State v Snow*, 70 A3d 971 (Vt 2013), 10-12.

<sup>312</sup> Vermont Model Criminal Jury Instructions, ‘CR27-211 Sexual Assault (Lack of Consent)’ (*Vermont Bar Association*, 08 December 2022) <<http://www.vtjuryinstructions.org/criminal/MS27-211.htm>> accessed 10 March 2023.

<sup>313</sup> *ibid.*

<sup>314</sup> *ibid.*

which the person expresses it to others, or by his or her conduct.’ To determine the accused’s intent all the surrounding circumstances should be considered.<sup>315</sup>

#### 4. *Burden of proof*

138. The state bears the burden of proof throughout the trial.<sup>316</sup> The accused is presumed to be innocent, and the state must prove beyond a reasonable doubt that the accused is guilty.<sup>317</sup> The jury instructions clarify that a ‘reasonable doubt’ does not mean ‘beyond all possible doubt’ but only a doubt ‘based on reason and common sense’ coming from a rational assessment of the evidence.<sup>318</sup> The state must prove that the accused intentionally engaged in a sexual act with the victim without consent. Four essential elements must be demonstrated: (1) that the accused is the person that committed the act; (2) the accused engaged in a sexual act with the victim; (3) the accused engaged in the sexual act with the victim without the victim’s consent, and (4) that the accused acted intentionally.<sup>319</sup>

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<sup>315</sup> *ibid.*

<sup>316</sup> Vermont Model Criminal Jury Instructions, ‘CR04-101 Burden of Proof and Reasonable Doubt’ (*Vermont Bar Association*, 25 May 2005) <<http://www.vtjuryinstructions.org/criminal/MS04-101.htm>> accessed 10 March 2023.

<sup>317</sup> Vermont Model Criminal Jury Instructions, ‘CR04-061 Presumption of Innocence’ (*Vermont Bar Association*, 10 January 2005) <<http://www.vtjuryinstructions.org/criminal/MS04-061.htm>> accessed 10 March 2023.

<sup>318</sup> Vermont Model Criminal Jury Instructions (n 309).

<sup>319</sup> Vermont Model Criminal Jury Instructions, ‘CR27-211 Sexual Assault (Lack of Consent)’ (*Vermont Bar Association*, 08 December 2022) <<http://www.vtjuryinstructions.org/criminal/MS27-211.htm>> accessed 10 March 2023.

# UNITED STATES OF AMERICA—NEW JERSEY

## INTRODUCTION

139. The law of New Jersey first saw an evolution in the courts, who expanded the definitions of consent to make the law clearer. The affirmative consent model for evaluating cases of sexual assault were first established in the landmark case *State Of New Jersey in the Interest of M.T.S* (1992).<sup>320</sup> The decision not only created a precedent that established affirmative consent as a framework, but also paved the way for a change in the legislation that took place in 2019.<sup>321</sup> The criminal code of New Jersey can be found in Title 2C which is titled ‘The New Jersey Code of Criminal Justice’. Section 14 of Title 2C includes the law on sexual assault and the definition of consent.
140. Criminal matters in New Jersey are heard by a jury, unless a jury trial is waived by the accused.<sup>322</sup> The jury consists of 12 members of the community and the defendant may participate in their selection. For the defendant to be convicted, all 12 members of the jury must agree on the defendant’s guilt.<sup>323</sup> The members of the jury are provided with an instruction manual that helps them understand the various elements of a crime and how they should adjudicate on technical matters of law.<sup>324</sup>

### **I. WHAT WERE THE KEY LEGAL INSTITUTIONS IN NEW JERSEY THAT TRIGGERED A SHIFT IN THE LAW TOWARDS AN AFFIRMATIVE CONSENT MODEL?**

141. The landmark case of ‘*State Of New Jersey in the Interest of M.T.S.*’ (MTS case), was the triggering point that marked change in the legal understanding of consent in cases involving sexual assault. In the case, the Supreme Court of New Jersey expanded on the meaning of physical force as well as consent while deciding if the absence of force was sufficient to establish consent.<sup>325</sup>

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<sup>320</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266.

<sup>321</sup> Senate Bill No. 2924, State of New Jersey, 218th Legislature (2019), as introduced in 17 September 2018.

<sup>322</sup> New Jersey Court Rules, 1969 R. 1:8-1.

<sup>323</sup> New Jersey Court Rules, 1969 R. 1:8-2.

<sup>324</sup> New Jersey Court Rules, 1969 R. 1:8-8.

<sup>325</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266.

142. The first set of reforms to sexual assault laws in New Jersey took place in 1978 and they significantly altered the way in which cases were termed and referred to in the jurisdiction. Prior to this change the law in effect was, for the most part, like the rape statute that had been enacted in 1796.<sup>326</sup> The rape law reform was triggered by advocacy of women’s rights groups who argued that the laws of the state were preventing women from filing formal charges.<sup>327</sup>
143. The recommendations adopted by the legislature in 1978 that relate to sexual offences were drafted by a coalition of feminist groups assisted by the National Organization of Women’s (NOW) National Task Force on Rape that was modelled on the 1976 Center for Rape Concern Model Sex Offense Statute.<sup>328</sup> After extensive public hearings in May and June of 1978, the Senate Judiciary Committee made a number of important substantive amendments to the New Jersey Penal Code of 1971 and the Assembly Judiciary Committee adopted the code without making any major changes in 1978.<sup>329</sup>
144. Through the reform in 1978, the age of consent was reduced, the victims would be protected from giving information about their sexual history, and marriage would not be a defence against sexual assault.<sup>330</sup> The law was controversial, for the change in age of consent, and many parents thought the state was encouraging sex among children.<sup>331</sup> Through the years, the law underwent numerous changes: ‘rape’ was replaced by ‘sexual assault’, ‘penetration’ replaced ‘sexual intercourse’, and ‘force or coercion’ replaced ‘submission or resistance’.<sup>332</sup>
145. After the establishing of the affirmative consent model in New Jersey through various judicial decisions, following the precedent set by Justice Handler in the MTS case, the legislature made relevant changes in 2019 to align the law with the court.<sup>333</sup>
146. In the MTS case, Justice Handler discussed the difference between physical force and consent – cautioning that reintroducing force as extrinsic to a sexual act will negate what the 1978 revisions

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<sup>326</sup> Leigh Bienen, ‘Rape III - National Developments in Rape Reform Legislation’ (1980) 6 *Women’s Rights Law Reporter* 170, 207.

<sup>327</sup> Martin Waldron, ‘Women Predict Victory in Rape-Law Reform Fight’ (*The New York Times*, 11 June 1978) <<https://www.nytimes.com/1978/06/11/archives/new-jersey-weekly-women-predict-victory-in-rape-law-reform-fight.html>> accessed 16 March 2023.

<sup>328</sup> Leigh Bienen, (n 319).

<sup>329</sup> *Ibid*, 207-208.

<sup>330</sup> *ibid*.

<sup>331</sup> ‘A Look at New Jersey’s Controversial New Sex Law for Minors’ (1979) 1 *Child Legal Rts J* 31, 32.

<sup>332</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266, at 440-441.

<sup>333</sup> Senate Bill No. 2924, State of New Jersey, 218th Legislature (2019), as introduced in 17 September 2018.

to the sexual assault statutes had done away with.<sup>334</sup> It set the standard for criminal courts weighing consent, noted that not being able to prove free and affirmative consent would constitute the element of force, and set the burden of proof for consent as ‘beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission.’<sup>335</sup>

147. Prior to 2019 the New Jersey Code of Criminal Justice through their criminal law statute, N.J.S.A. 2C:14-2c (1), defined sexual assault as ‘the commission of sexual penetration with another person with the use of physical force or coercion.’<sup>336</sup> However, in 2014 the New Jersey Law Revision Commission recommended an amendment to the law of sexual assault to make it consistent with current case law.<sup>337</sup>
148. Senator Linda R. Greenstein introduced a bill in the State of New Jersey legislature that, among other changes, proposed to replace the text – ‘The actor is aided or abetted by one or more other persons and the actor uses physical force or coercion’, to the text, ‘The actor is aided or abetted by one or more other persons and the actor commits the act using coercion or without the victim's affirmative and freely-given permission’<sup>338</sup> The Bill also proposed to make the law on sexual assault gender neutral, by replaced ‘he’ with ‘the actor’ and ‘she’ with ‘the victim’. In 2020, the Bill passed, revising the New Jersey Code of Criminal Justice Section 2C:14-2 - Sexual assault.<sup>339</sup> This made affirmative consent a statutory requirement for conviction on sexual assault.

## **II. HOW HAS NEW JERSEY INCORPORATED THE AFFIRMATIVE CONSENT MODEL IN THE LAW THAT ADDRESSES SEXUAL OFFENCES?**

149. The amendment to the New Jersey Code of Criminal Justice Section 2C:14-2 was made effective in January 2020. The statute categorises sexual assault into three different offences: subsection (a) establishes the offence of aggravated sexual assault, subsection (b) establishes the offence of sexual assault by ‘sexual contact with a victim who is less than 13 years old and the actor is at

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<sup>334</sup> ‘Rape Law. Lack of Affirmative and Freely-Given Permission. New Jersey Supreme Court Holds That Lack of Consent Constitutes “Physical Force.”. State ex rel. M. T. S., 609 A.2d 1266 (N. J. 1992)’ (1993) 106 *Harvard Law Review* 951, 969; *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266, at 441.

<sup>335</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266, at 449.

<sup>336</sup> NJSA 2C:14-2 (effective from May 2014 to May 2019).

<sup>337</sup> Senate Bill No. 2924, State of New Jersey, 218th Legislature (2019).

<sup>338</sup> *ibid.*

<sup>339</sup> Title 2C: the New Jersey Code of Criminal Justice, New Jersey Revised Statute s 2C:14-2 (2020).

least four years older’, and subsection (c) establishes the offence of sexual assault by penetration. Title 2C:14-2 subsection (c)(1) reads as follows:

**Sexual assault.**

c. An actor is guilty of sexual assault if the actor commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The actor commits the act *using coercion or without the victim's affirmative and freely-given permission*, but the victim does not sustain severe personal injury;<sup>340</sup>

150. In addition, the statute also criminalises as sexual assault the following circumstances: the victim is on parole or detained and the accused has ‘supervisory or disciplinary power over the victim’; the victim is between 16 to 18 years old and the accused is related to the victim, has supervisory power, or is the victim’s parent or guardian; the victim is between 13 to 16 years and the accused is four years older, the victim is a student of 18 to 22 years old and the accused is member of the teaching staff.<sup>341</sup> Note that, with the exception of subsection (c)(1) the statute does not mention the victim’s permission in defining the circumstances that constitute sexual assault by penetration.

*1. Definition of consent*

151. The definition of affirmative consent was first established by the Supreme Court of New Jersey in *M.T.S* as ‘affirmatively and freely-given’ permission to ‘the *specific act* of sexual penetration.’<sup>342</sup> Further, in *State v Cuni* the Court held that when a person is not able—mentally or emotionally—to understand the nature of a sexual act and to refuse it, that person lacks the capacity to give affirmative and free permission.<sup>343</sup> In *State v Olivio*, the Supreme Court held that the capacity to understand only involves knowledge of physical aspects of a sexual act and does not extend to a moral assessment of the act or an appraisal of likely consequences, like pregnancy or disease.<sup>344</sup>

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<sup>340</sup> NJSA 2C:14-2 subsection (c)(1) (emphasis added).

<sup>341</sup> *ibid* subsection (c).

<sup>342</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266, at 445.

<sup>343</sup> *State v Cuni* 159 NJ 584 (1999) 733 A2d 414, 423-424.

<sup>344</sup> *State v Olivio*, 123 NJ 550 (1991), 563-564.



However, the Code of Criminal Justice establishes that consent is ineffective when it is the result of deception.<sup>345</sup> Hence the law partially requires that consent is, to an extent, informed.

152. Consent is defined in Title 2C:14-2 as ‘affirmative and freely given permission.’<sup>346</sup> Title 2C 14-2a acknowledges scenarios in which there was sexual penetration in the context of a relationship between the victim and the accused that may prove burdensome for the latter, namely: (a) if the accused is related to the victim, (b) has supervisory or disciplinary power of any nature over the victim, (c) the victim was physically helpless or incapacitated, or (d) the victim is a pupil of 18-22 years and the accused a teaching staff. However, note that with the exception of (d) these scenarios are treated as aggravating circumstances and the statute does not provide that the act must be committed ‘without the victim’s affirmative and freely-given permission.’<sup>347</sup>
153. Notably, in *CR v MT* the Supreme Court held that the standard of affirmative consent should also be applied under the Sexual Assault Survivor Protection Act (SASPA), which offers relief through civil protection orders.<sup>348</sup> The Court held:

The appropriate standard to determine whether sexual activity was consensual under SASPA is not the prostration of faculties standard, which focuses on the mental state of the defendant, but rather the standard articulated in *State in Interest of M.T.S.* 129 N.J. 422 (1992), which is applied from the perspective of the alleged victim. The M.T.S. standard requires a showing that sexual activity occurred without the alleged victim’s freely and affirmatively given permission to engage in that activity. The standard for consent for an alleged victim in a SASPA case should be no different than the standard for consent for an alleged victim in a criminal sexual assault case.<sup>349</sup>

## 2. *Communication of consent*

154. The Criminal Code does not clarify whether a communicative standard, like ‘words’ or ‘actions’, is required. However, the Supreme Court clarified in *M.T.S.* that the ‘affirmative and freely-given

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<sup>345</sup> NJSA 2:C2-10(c)3.

<sup>346</sup> NJSA 2C:14-2. The same definition of consent is employed in subsection a (aggravated sexual assault) and subsection c (sexual assault).

<sup>347</sup> *ibid* subsection (a).

<sup>348</sup> *CR v MT* 248 NJ 428 (2021) 239 A3d 830, at 837-838.

<sup>349</sup> *CR v MT* 248 NJ 428 (2021) 239 A3d 830, 831.

permission’ can be inferred ‘from acts or statements reasonably viewed in light of the surrounding circumstances.’<sup>350</sup> Further, in *M.T.S.* the court ruled out that a failure to resist does not establish permission and that the law ‘places no burden on the alleged victim to have expressed non-consent.’<sup>351</sup>

155. The Court clarified, however, that:

Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words.<sup>352</sup>

*3. Knowledge of consent and the defence of mistaken belief*

156. The Supreme Court held in *M.T.S.* that ‘a defence based on consent would require the *presence* of affirmative and freely given permission.’<sup>353</sup> This is because the focus throughout the trial is always on the defendant’s belief that the victim gave affirmative and free permission.<sup>354</sup> The accused can show there was permission when there is enough evidence to show that it was reasonable to believe that the victim gave permission affirmatively and freely.<sup>355</sup> Any permission to engage in sexual activity that does not satisfy the affirmative permission standard is unlawful and ‘cannot constitute a defense.’<sup>356</sup>

*4. Burden of proof*

157. The burden of proof is always borne by the state. The Supreme Court held in *M.T.S.* held that the state must prove two elements beyond a reasonable doubt: first, that there was sexual penetration, and second, that the penetration was performed without free and affirmative permission.<sup>357</sup> The evidence should demonstrate ‘conduct or words in light of surrounding circumstances.’<sup>358</sup> It should be able to show that ‘a reasonable person would not have believed

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<sup>350</sup> *State of New Jersey in the Interest of MTS* 129 NJ 422 (1992) 609 A2d 1266, at 445.

<sup>351</sup> *ibid*, 448.

<sup>352</sup> *ibid*, 445.

<sup>353</sup> *ibid*, 449 (emphasis on the original).

<sup>354</sup> *ibid*, 448.

<sup>355</sup> *ibid*, 449.

<sup>356</sup> *ibid*, 449.

<sup>357</sup> *ibid*.

<sup>358</sup> *ibid*.

that there was affirmative and freely-given permission.<sup>359</sup> If the evidence indicates the presence of a reasonable belief of permission, then the state can either (a) show that the accused did not hold the belief or (b) show that, considering the circumstances, the belief was not reasonable.<sup>360</sup>

158. The New Jersey model instructions for jury members highlights the way in which adjudication for affirmative consent is to be navigated. The model instructions state:

You must decide whether the defendant's alleged act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the victim had freely given affirmative permission to the specific act of sexual penetration. Simply put, affirmatively given permission means the victim did or said something which would lead a reasonable person to believe [he/she] was agreeing to engage in the act of sexual penetration, and freely given permission means the victim agreed of [his/her] own free will to engage in the act of sexual penetration. Freely and affirmatively given permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person that affirmative and freely given permission for the specific act of sexual penetration had been given.

Proof that the act of sexual penetration occurred without the victim's permission can be based on evidence of conduct or words in light of surrounding circumstances, and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate beyond a reasonable doubt either that the defendant did not actually believe that such permission had been freely given, or that such a belief was unreasonable under all of the circumstances.<sup>361</sup>

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<sup>359</sup> *ibid.*

<sup>360</sup> *ibid.*, 448-449.

<sup>361</sup> See 'Model Criminal Jury Charges, Sexual Assault (Force/Coercion), s 2C:14-2c(1)' (*New Jersey Courts*, 2005) <<https://www.njcourts.gov/sites/default/files/2022-09/sexual008.pdf>> Note that the text of the instructions does not contemplate the 2020 reform. However, the instructions remain relevant as they reflect the test set out by the Supreme Court in MTS.

# CANADA

## INTRODUCTION

159. According to the Constitution Act (1867) the Parliament of Canada has exclusive legislative authority over the criminal law and criminal procedural law.<sup>362</sup> Thus, ‘the criminal law applies across the country’.<sup>363</sup> A significant portion of the criminal law is contained in the Criminal Code. However, there are other federal laws that contain criminal legislation despite not being part of the Criminal Code.<sup>364</sup> Likewise, some defences and elements of crimes have been elaborated by the judiciary.<sup>365</sup> The law governing sexual offenses can be found in the Criminal Code. Hence the focus of the report on the Criminal Code and its interpretation by the Supreme Court of Canada.
160. The Code defines sexual assault indirectly, as it only establishes a general offence of assault in s. 265(1). The offence constitutes *sexual* assault if the conduct is committed in ‘circumstances of a sexual nature’ and in a way that infringes the ‘sexual integrity’ of a person.<sup>366</sup> Section 273 creates the offence of aggravated sexual assault which occurs when the person assaulted is wounded, maimed, disfigured, beaten or in danger of losing their life while being sexually assaulted.<sup>367</sup> The Canadian criminal justice system makes use of juries for cases of sexual assault.<sup>368</sup>
161. The introduction of affirmative consent into the law of Canada was the result of an amendment to the Criminal Code in 1992 and its interpretation by the Supreme Court. The definition of consent in the Canadian Criminal Code was amended in 1992 to read as ‘the voluntary agreement of the complainant to engage in the sexual activity in question’.<sup>369</sup> Then, the Canadian judiciary

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<sup>362</sup> See section 91(27) of the Constitution Act 1867, which reads ‘[I]t is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.’

<sup>363</sup> Government of Canada, ‘The Criminal Code of Canada’ (*Canada’s System of Justice*, June 4<sup>th</sup> 2021)

<<https://www.justice.gc.ca/eng/csjsjc/ccc/index.html#:~:text=Canada%27s%20constitution%20gives%20the%20federal,for%20enforcing%20the%20criminal%20law.>> accessed October 2023.

> accessed October 2023.

<sup>364</sup> For example, the Firearms Act (1995) or the Youth Criminal Justice Act (2002).

<sup>365</sup> Government of Canada, ‘The Criminal Code of Canada’ (*Canada’s System of Justice*, June 4<sup>th</sup> 2021)

<<https://www.justice.gc.ca/eng/csjsjc/ccc/index.html#:~:text=Canada%27s%20constitution%20gives%20the%20federal,for%20enforcing%20the%20criminal%20law.>> accessed October 2023.

> accessed October 2023.

<sup>366</sup> As explained by the Supreme Court in *R v Ewanchuk* [1999] 1 SCR 330 [24].

<sup>367</sup> *Canada Criminal Code* (Criminal Code), RSC 1985, C-46, S 273.

<sup>368</sup> The right to be tried by a jury is established by article 11(f) of the *Canadian Charter of Rights and Freedoms*.

<sup>369</sup> An Act to Amend the Criminal Code (sexual assault), SC 1992, c38, s273.1 cited by the Supreme Court of Canada in *R v Ewanchuk* [1999] 1 SCR 330 [47] [74].

took important steps in clarifying, for instance, that that absence of resistance does not amount to consent, and that consent must be active.<sup>370</sup>

## I. WHAT WERE THE KEY LEGAL INSTITUTIONS IN CANADA THAT TRIGGERED A SHIFT IN THE LAW TOWARDS AN AFFIRMATIVE CONSENT MODEL?

162. Prior to 1992, there existed no statutory definition for consent in Canada and the applicable common law definition emphasised the state of mind of complainants at the time of the alleged sexual offence.<sup>371</sup> Victims of sexual assault were reluctant to report these instances to the authorities, and many of these cases did not go to trial. These concerns resulted in amendments to the Criminal Code, which established an affirmative standard for consent in Canada.<sup>372</sup> The Canadian judiciary has also played an important role in clarifying the codified standard.<sup>373</sup> The substantive changes to the law were well-received on account of illuminating the meaning of consent and respecting the right of individuals to sexual self-determination and physical autonomy. However, commentators have suggested that the relevant actors in the criminal process continue to let gender stereotypes inform their decisions.<sup>374</sup>
163. The Canadian experience with sexual assault laws during the 1980s reveals that the accused often made two interrelated claims in their defence: first, that the complainant had in fact consented to sexual activity; second, that in any case it was their belief that the complainant had consented.<sup>375</sup> The first claim intended to establish a lack of *actus reus*, while the second claim aimed to establish a lack of *mens rea*.<sup>376</sup> Many of these cases did not go to trial, as it was difficult for the prosecution to prove a lack of consent and it was generally thought that the accused may have mistakenly believed that the complainant had consented or that the accused's alleged belief in consent, even if dishonest, may nonetheless be found sufficiently credible at trial.<sup>377</sup> In addition, complainants feared that a charge that did not result in prosecution or conviction could damage their reputation or even place them at further risk of an attack.<sup>378</sup>

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<sup>370</sup> See, for instance, *R v M (ML)* [1994] 2 SCR 3, 4 and *R v Park* [1995] 2 SCR 836, 855, 863; *R v Ewanbuke* [1999] 1 SCR 330 [27].

<sup>371</sup> Lucinda Vandervort (n 18) at 407-408.

<sup>372</sup> *ibid*, at 410.

<sup>373</sup> *ibid* at 414.

<sup>374</sup> *ibid* at 438.

<sup>375</sup> *ibid* fn 1 at 395-396.

<sup>376</sup> *ibid*.

<sup>377</sup> *ibid*, fn 1, 410.

<sup>378</sup> *ibid*, 410.

164. An indirect but important development that paved the way for reform was that the Supreme Court of Canada had in 1992 struck down restrictions on the admission of sexual history evidence. The issue in *R v Seaboyer* was whether ‘rape-shield provisions’ were opposed to the right to a fair trial. The Court held that some rape-shield provisions resulted in a blanket prohibition that could potentially exclude relevant proof for the defence.<sup>379</sup> This led feminist activists to claim that sexual history evidence shifts the focus of the trial from the defendant’s alleged actions to the past sexual activities of the complainant, violating their right to personal security by publicising intimate aspects of their private lives.<sup>380</sup> The discussion around the legal definition of consent as well as the concerns associated with the expanded admissibility of sexual history evidence placed pressure on Parliament to reform the statutory law regulating sexual offences.<sup>381</sup>
165. After a period of intense lobbying and public consultations, the Federal Department of Justice tabled Bill C-49 on 12 December 1991 which codified the framework of affirmative sexual consent through amendments to the Criminal Code by including a statutory definition of consent and introducing limits on use of the defense of belief in consent.<sup>382</sup>

## **II. HOW HAS CANADA INCORPORATED THE AFFIRMATIVE CONSENT MODEL IN THE LAW THAT ADDRESSES SEXUAL OFFENCES?**

166. The Canadian Criminal Code provides a definition of ‘assault’ that applies to all manifestations of assault, including ‘sexual assault, sexual assault with a weapon (...) and aggravated sexual assault.’<sup>383</sup> Section 265(1) provides that:

(1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

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<sup>379</sup> *R v Seaboyer* [1991] 2 SCR 577, 578, 582.

<sup>380</sup> Sheila McIntyre, ‘Redefining Reformism: The Consultations that Shaped Bill C-49’ in Renata Mohr and Julian Roberts (eds), *Confronting Sexual Assault: A Decade of Legal and Social Change* (University of Toronto Press 1994), 295-298.

<sup>381</sup> *ibid* 300-306.

<sup>382</sup> *ibid* 306.

<sup>383</sup> *Criminal Code*, RSC 1985, C-46, S 265 (2).

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.<sup>384</sup>

167. Thus, a sexual assault is an assault within any of the definitions in section 265(1) which is committed in circumstances of a sexual nature.<sup>385</sup> The Criminal Code goes on to define ‘sexual assault with a weapon’ and ‘aggravated sexual assault.’ Section 272 (1) penalizes sexual assault that was carried out using or threatening to use a weapon, threatens to hurt a person other than the victim, inflicts physical harm on the victim, or ‘is a party to the offence’ with another person.<sup>386</sup> Cases where the accused ‘chokes, suffocates or strangles’ the victim are captured by section 272.<sup>387</sup> Meanwhile, section 273(1) penalizes ‘aggravated sexual assault’ when the accused ‘wounds, maims, disfigures, or endangers the life’ of the victim.<sup>388</sup> The Canadian Criminal Code introduces a statutory definition of consent to be employed in all sexual assault offences. Let us now turn to its analysis.

### *1. Definition of consent*

168. The definition of affirmative consent in the Criminal Code is established in section 273.1, which reads:

#### **Meaning of *consent***

**273.1 (1)** Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

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<sup>384</sup> *Criminal Code*, RSC 1985, C-46, Section 265(1).

<sup>385</sup> John Gibson and Henry Waldoock, 3 Canadian Criminal Code Offences S39:4, 5.

<sup>386</sup> *Criminal Code*, RSC 1985, C-46, S 272 (1).

<sup>387</sup> *Criminal Code*, RSC 1985, C-46, S 272 (1).

<sup>388</sup> *Criminal Code*, RSC 1985, C-46, S 273(1).

(1.1) Consent must be present at the time the sexual activity in question takes place.<sup>389</sup>

169. The Canadian judiciary has clarified the definition of consent codified in the Criminal Code in at least three ways. First, in 1994 the Supreme Court held that the absence of resistance does not amount to consent and that consent could not be ‘honestly perceived by the accused’ in the absence of conduct that communicates the presence of consent.<sup>390</sup> Crucially, in the landmark case *R v Ewanchuk* the Supreme Court held that consent must be freely given. In the context of the *actus reus* of sexual assault this is determined by the victim’s state of mind.<sup>391</sup> The Ontario Court of Appeal has relied on *Ewanchuk* to interpret the meaning of section 273.1 (1) of the Criminal Code.<sup>392</sup> In *R v S* the Court of Appeal held that the victim had not consented to sexual intercourse, as ‘voluntary agreement’ required freedom of choice. Because the victim in the case at hand ‘did not believe [she had] the choice to decline participation’, it could not be said that ‘she was knowledgeable about her options’ and voluntarily agreed with awareness of those options.<sup>393</sup>
170. Second, in *Ewanchuk* the Supreme Court understood that consent can be revoked. In *Ewanchuk* the Court held that when the complainant, at any point of the encounter, has expressed unwillingness, the accused cannot rely on ‘the mere lapse of time’ to ascertain whether the victim has changed her mind and ‘consent now exists’.<sup>394</sup>
171. Third, consent is specific to the ‘specific physical sex act.’<sup>395</sup> In *R v Goldfinch*, the Supreme Court examined whether evidence of the complainant’s previous relationships could be admitted under the Criminal Code’s rules of evidence for cases of sexual assault. Section 276(1) of the Criminal Code provides that evidence of sexual history is inadmissible when it is used to show that, given ‘the sexual nature’ of past behavior, the complainant was ‘more likely to have consented’ or ‘is less worthy of belief.’<sup>396</sup> The Supreme Court explained that section 276(1) aims to exclude evidence that intends to support the myth that ‘women with sexual experience are more likely to

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<sup>389</sup> *Criminal Code*, RSC 1985, C-46, S 273.1 (1).

<sup>390</sup> *R v M (ML)* [1994] 2 SCR 3, 4; *R v Park* [1995] 2 SCR 836, 839-840 .

<sup>391</sup> *R v Ewanchuk* [1999] 1 SCR 330, [27] [36].

<sup>392</sup> *R v S (DG)* 72 OR (3d) 223 [2004] OJ no 3440 (QL) at [47]-[57].

<sup>393</sup> *R v S (DG)* 72 OR (3d) 223 [2004] OJ no 3440 (QL) at [53] [54]. Note that, on appeal, the Supreme Court agreed with the Court of Appeal’s conclusion. See *R v Stender*, 2005 SCC 36 [2005] 1 SCR 914, at 915.

<sup>394</sup> *R v Ewanchuk* [1999] 1 SCR 330, [52].

<sup>395</sup> *R v Hutchinson*, 2014 SCC 19, [2014] 1 SCR 346 [54] [55]; *R v Kirkpatrick*, 2022 SCC 33 [42] [44].

<sup>396</sup> *Criminal Code*, RSC 1985, C-46, 276 (1). Note that subsection (2) sets out four conditions the accused must satisfy if he or she wishes to introduce evidence of sexual history for other purposes.



consent’ or ‘are less worthy of belief.’<sup>397</sup> The Court explained that it is a mistake to infer that prior sexual activity supports the view that there is consent in: ‘an accused may no longer argue that consent was implied by a relationship: contemporaneous, affirmatively communicated consent *must be given for each and every sexual act* (...) [n]othing less than positive affirmation is required.’<sup>398</sup>

172. Finally, the Criminal Code indicates two scenarios where consent is deemed legally ineffective. First, section 273.1(2) provides that there is no consent when the agreement is expressed by another person; the victim is unconscious; the victim lacks the capacity to consent; the accused secures consent by abusing his or her power, authority or a relationship of trust, or the victim manifests her lack of consent to take part, or to continue to take part, in the sexual act.<sup>399</sup>
173. Second, section 265(3) considers the reasons for which the victim may have agreed or ‘submitted’, providing that no consent is obtained when the victim agrees by reason of an application of force, threats or fear, an exercise of authority or fraud.<sup>400</sup> Notably, the Supreme Court has held that affirmative consent is vitiated by fraud if the accused did not disclose to the complainant his or her HIV status, if the transmission of HIV was a ‘realistic possibility’ at the time of the sexual activity at issue.<sup>401</sup>

## 2. Communication of consent

174. One of the main features of affirmative consent is that it must be ‘communicative’, which is to say that consent is shown by doing or saying which signifies the agreement to participate in the sexual act. In *Ewanbuck*, the Supreme Court established two different approaches to consent by distinguishing consent for the purposes of the *actus reus* and *mens rea*.
175. In relation to the *actus reus*, the Court said, consent is subjective: it refers to the victim’s internal state of mind, that is, whether the victim wanted the sexual act to take place. Thus, when considering the *actus reus* the ‘accused’s perception of the complainant’s state of mind is not relevant.’<sup>402</sup> Here, the victim’s testimony is ‘the only source of direct evidence as to her state of

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<sup>397</sup> *R v Goldfinch* 2019 SCC 38 [2019] 3 RCS 3at [34].

<sup>398</sup> *ibid*, 44 (emphasis added).

<sup>399</sup> *Criminal Code*, RSC 1985, C-46, 273.1 (2).

<sup>400</sup> *Criminal Code*, RSC 1985, C-46, 265(3) (a)(b)(c)(d).

<sup>401</sup> *R v Cuerrier* [1998] 2 RCS 371, at 372; *R v Mabior* 2012 SCC 47 [2012] 2 SCR 584, [4] [84].

<sup>402</sup> *R v Ewanbuck* [1999] 1 SCR 330, [30].

mind' and its credibility must be weighed 'in light of all the evidence.'<sup>403</sup> Consequently, if the victim testifies (and the trier of fact accepts) that the sexual activity took place without consent, 'then there was no consent'.<sup>404</sup> The Court clarified in *R v JA* that, in relation to the actus reus, the victim 'is not required to *express* her lack of consent or her revocation of consent for the *actus reus* to be established.'<sup>405</sup>

176. By contrast, for the purposes of *mens rea* consent means that the victim 'affirmatively communicated by words or conduct' the agreement to participate in the sexual act.<sup>406</sup> Indeed, in *R v Barton* the Supreme Court explained that the analysis at this point shifts to the perspective of the accused. The inquiry is whether the accused held an honest belief that the victim 'effectively said "yes" through her words and/or actions.'<sup>407</sup>

### *3. Knowledge of consent and the defence of mistaken belief*

177. The Criminal Code provides that if the accused claims they believe the victim consented the judge can instruct the jury to consider 'the presence or absence of reasonable grounds for that belief'.<sup>408</sup> But the instruction is conditional on whether the judge is satisfied that (1) 'there is sufficient evidence' and (2) 'if believed by the jury, the evidence would constitute a defence.'<sup>409</sup> However, the code also limits the scope of the defence of belief in the following scenarios:

#### **Where belief in consent is not a defence**

**273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from
- (i) the accused's self-induced intoxication,

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<sup>403</sup> *ibid* [29].

<sup>404</sup> See *R v Barton*, 2019 SCC 33 [2019] 2 RCS 579 [80]-[90] citing *R v Ewanchuk* [1999] 1 SCR 330.

<sup>405</sup> *R v JA*, 2011 SCC 28 [2011] 2 SCR 440 [37].

<sup>406</sup> *R v Ewanchuk* [1999] 1 SCR 330, [49].

<sup>407</sup> *R v Barton*, 2019 SCC 33 [2019] 2 RCS 579 [80]-[90] citing *R v Ewanchuk* [1999] 1 SCR 330.

<sup>408</sup> *Criminal Code*, RSC 1985, C-46, S 265(4).

<sup>409</sup> *Criminal Code*, RSC 1985, C-46, S 265(4).

- (ii) the accused’s recklessness or wilful blindness, or
  - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- (c) there is no evidence that the complainant’s voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.<sup>410</sup>

178. In *Ewanchuk* the Supreme Court held that there does exist a defence for mistake of fact where the accused honestly but mistakenly believed that they had obtained consent to touch the complainant.<sup>411</sup> When the accused claims that he or she honestly believed that the victim had communicated her consent, the accused must demonstrate that he or she took reasonable steps to investigate whether the victim consented.<sup>412</sup> With regard to the ‘reasonable steps’ requirement, the Court established that the accused must have taken active steps to both establish and re-establish consent.<sup>413</sup> Steps will not be reasonable if they are based on rape myths or stereotypical assumptions.<sup>414</sup> The defence is not available where the belief arose from ‘self-intoxication’, ‘recklessness’, or ‘wilful blindness’.<sup>415</sup>

#### 4. Burden of proof

179. The burden of proof is borne by the Crown<sup>416</sup>, who must prove beyond a reasonable doubt that the offence has been committed and that the victim did not consent to a specific sexual act. A reasonable doubt is based on ‘reason and common sense...it is a doubt that arises logically from the evidence or from the absence of evidence.’<sup>417</sup>

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<sup>410</sup> *Criminal Code*, RSC 1985, C-46, S 273.2.

<sup>411</sup> *R v Ewanchuk* [1999] 1 SCR 330R, [42].

<sup>412</sup> *R v JA* 2011 SCC 28 [2011] 2 SCR 440 [42]; *R v Barton* 2019 SCC 33 [2019] 2 RCS 579 [101]-[104].

<sup>413</sup> *R v Ewanchuk* [1999] 1 SCR 330, [58] and [60].

<sup>414</sup> *R v Barton* 2019 SCC 33 [2019] 2 RCS 579 [107].

<sup>415</sup> See Canadian Criminal Code 273.2 and *R v Barton* 2019 SCC 33 [2019] 2 RCS 579 [101]-[104], [107].

<sup>416</sup> *R. v. Oakes*, [1986] 1 SCR 103, [35].

<sup>417</sup> *R. v. Lijchus* 3 SCR 320, [30].

# UNITED STATES OF AMERICA-UNIVERSITIES

## INTRODUCTION

180. While affirmative consent has been discussed in legal scholarship since the 1980s, its first formulation is attributed to Antioch College, a private liberal arts university in Ohio in United States, which introduced affirmative consent in its Sexual Offense Policy in the year 1991.<sup>418</sup> This policy was drafted and driven by the campaign by ‘Womyn of Antioch’ who conceptualised affirmative consent to mean verbally asking and verbally giving or denying consent for all levels of sexual behaviour.<sup>419</sup> It arose in response to incidents of sexual assault on campus and situations created by campus-dating.<sup>420</sup> The standards of affirmative consent have shifted widely from this verbal only definition. It is now understood as requiring free, conscious, and voluntary consent of one’s sexual partner.<sup>421</sup> Consent must also be ongoing, and it should be possible to revoke it at any time during the sexual activity.<sup>422</sup> Though Antioch adopted this early on, it took time for affirmative consent to be adopted by other colleges or under State laws in the USA.<sup>423</sup>

## I. EVOLUTION OF THE AFFIRMATIVE CONSENT STANDARD IN EDUCATIONAL INSTITUTES IN THE USA

181. Universities and colleges also owe obligations under the national law to prohibit sexual harassment. Title IX, signed in 1972 by Richard Nixon, is the name given to the federal law (the Patsy T. Mink Equal Opportunity in Education Act) prohibiting sex discrimination in educational institutions who receive federal assistance.<sup>424</sup> The legislation imposes several obligations on

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<sup>418</sup> See Antioch College, ‘Sexual Offense Prevention Policy (SOPP) & Title IX’ (*Antioch College-Campus Life*) <<https://antiochcollege.edu/campus-life/sexual-offense-prevention-policy-titleix/> # : ~ :text = Affirmative % 20 Consent%20means%20verbally%20asking,not%20tolerated%20at%20Antioch%20College.> accessed 20 April 2023.

<sup>419</sup> Bethany Saltman, ‘We Started the Crusade for Affirmative Consent Way Back in the ‘90s’ (*The Cut-Consent*, 22 October 2014) <<https://www.thecut.com/2014/10/we-fought-for-affirmative-consent-in-the-90s.html>> accessed 20 April 2023.

<sup>420</sup> Nicholas Little, ‘From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law’ (2005) 58 *Vanderbilt Law Review* 1321, p 1348.

<sup>421</sup> Mary Ellen Flannery, ‘Affirmative Consent: “Yes Means Yes” in Sex on Campus’ (*National Education Association News*, 17 November 2016) <<https://www.nea.org/advocating-for-change/new-from-nea/affirmative-consent-yes-means-yes-sex-campus>> accessed 20 April 2023.

<sup>422</sup> *ibid.*

The phrasing of the 1991 Antioch policy regarding this was as below:

‘Obtaining consent is an on-going process in any sexual interaction. Verbal consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction, regardless of who initiates it. Asking “Do you want to have sex with me?” is not enough. The request for consent must be specific to each act.’ Cited in Hilgert (n 23) 875.

<sup>423</sup> Hilgert (n 23) 876.

<sup>424</sup> Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. s1681 *et seq.*

educational institutes, among which is the requirement to keep survivors of sexual violence safe.<sup>425</sup> The educational institutes are also obligated under Title IX to establish complaint procedures and appoint a Title IX coordinator. The protection against sexual harassment is derived from the general prohibitions against sex discrimination in Title IX.<sup>426</sup> While initially envisaged to protect women, the protections under Title IX have also been extended to cases where the violence or bias is on the basis of sexual orientation and gender identity.<sup>427</sup> The Department of Education under Obama administration sent a letter to colleges and universities addressing sexual violence as a form of sexual harassment under Title IX warning them that non-investigation and non-adjudication of sexual harassment or assault cases might be in violation of Title IX risking their federal funding.<sup>428</sup> Under Trump administration some of these measures were seriously undermined by rescinding some of the guidance and shifting the balance of the guidelines and regulations in favour of defendants and against the complainants.<sup>429</sup> However, the 2011 guidance is expected to be re-amended under the Biden administration.<sup>430</sup>

182. The affirmative consent movement gained popularity in the 2000s and is associated with the ‘Yes means Yes’ slogan popularised by Friedman and Valenti.<sup>431</sup> This movement followed the ‘No means No’ movement that was started in Canada in the 1990s by the Canadian Federation of Students to raise awareness about sexual violence in campus and to prevent the occurrence of sexual assaults and rapes.<sup>432</sup> The pervasiveness of campus sexual assault in American universities

<sup>425</sup> US Department of Education, ‘Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You go to School’ (*Office for Civil Rights*) <<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html>> accessed 20 April 2023.

<sup>426</sup> US Department of Justice, ‘Title IX’ (Civil Rights Division) <<https://www.justice.gov/crt/title-ix#D.%C2%A0%20Sexual%20Harassment>> accessed 20 April 2023.

<sup>427</sup> Department of Education, ‘Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*’ (*Federal Register – Rules and Regulations*, 22 June 2021) <<https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>> accessed 20 April 2023.

<sup>428</sup> United States Department of Education ‘Dear Colleague Letter’ (*Office for Civil Rights*, 4 April 2011) <[https://obamawhitehouse.archives.gov/sites/default/files/dear\\_colleague\\_sexual\\_violence.pdf](https://obamawhitehouse.archives.gov/sites/default/files/dear_colleague_sexual_violence.pdf)> accessed 20 April 2023.

<sup>429</sup> O’Melveny & Myers, ‘Biden Executive Order on Title IX: Where We’ve Been and Where We’re Going’ (*O’Melveny & Myers Alerts and Publications*, 9 March 2021) <<https://www.omm.com/resources/alerts-and-publications/alerts/biden-executive-order-on-title-ix/>> accessed 20 April 2023.

<sup>430</sup> Department of Education, ‘Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance’ (*Office of Information and Regulatory Affairs*, Fall 2022) <<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1870-AA16>> accessed 20 April 2023; Kayla Jimenez, ‘Biden Administration will release new Title IX rules in May – What to Expect’ (*USA Today*) <<https://eu.usatoday.com/story/news/education/2023/02/08/biden-administration-release-new-title-ix-rules-may/11163003002/>> accessed 20 April 2023.

<sup>431</sup> Jaelyn Friedman and Jessica Valenti, *Yes Means Yes!: Visions of Female Sexual Power and a World without Rape* (Basic Books 2019); Im and ok others (n 21) section 2.1.

<sup>432</sup> Canadian Federation of Students Ontario ‘Gender-Based Violence’ (CFS Ontario – Campaigns) <<https://cfsontario.ca/campaigns/gender-based-violence/>> accessed 20 April 2023.

has been a significant force driving the conversation around affirmative consent. In launching the ‘It’s on Us’<sup>433</sup> initiative to raise awareness and end campus sexual assault, President Obama noted that an estimated ‘1 in 5’ women have been sexually assaulted during their college years and the rate of reporting remains as low as 12%, of which an even smaller fraction of offenders receives punishment.<sup>434</sup> The Obama administration launched the White House Task Force to protect students from sexual assault and to combat sexual violence on campus, which played a role in popularising affirmative consent.<sup>435</sup> The Obama Administration also recommended that colleges and universities expressly define affirmative consent in the White House’ Checklist for Sexual Misconduct Policies.<sup>436</sup> Affirmative consent is defined as ‘voluntary agreement to engage in sexual activity’ and ‘silence or absence of resistance does not imply consent’.<sup>437</sup> This recommendation was instrumental in many universities and colleges defining consent in campus sexual misconduct policies in an affirmative sense.<sup>438</sup> However, despite the requirement for universities under the Clery Act<sup>439</sup> to disclose sexual crimes that occurs on/around the campus, there was a breach of the minimum reporting standards by at least one in three surveyed college in 2013.<sup>440</sup> In 2017, the Education department had released the names of 85 institutions that were under investigation for their inadequate handling of sexual assault cases on campuses,<sup>441</sup> including universities of Princeton, Amherst, Harvard, Swarthmore, Chicago, among others.<sup>442</sup>

183. Many colleges and universities have now adopted affirmative consent in campus sexual violence policies. The National Centre for Higher Education Risk Management reports that an estimated 1,500 higher educational institutions now use some type of affirmative consent definition in their sexual assault policies.<sup>443</sup> For example, Princeton University, that was under investigation in 2017

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<sup>433</sup> Civic Nation ‘It’s On Us’ (*It’s On Us*, 2014) <<https://www.itsonus.org/>> accessed 25 April 2023.

<sup>434</sup> Tanya Somanader, ‘President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus’ (*The White House*, 19 September 2014) <<https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>> accessed 25 April 2023.

<sup>435</sup> Wendy Adele Humphrey, *Let’s Talk about Sex: Legislating and Educating on the Affirmative Consent Standard*, (2016) 50 U.S.F. L. Rev. 35, 51.

<sup>436</sup> *ibid*, p 54

<sup>437</sup> *ibid*.

<sup>438</sup> *ibid*.

<sup>439</sup> The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act 1990 amended by Campus Sexual Violence Elimination Act 2013, 20 U.S.Code s 1092(f).

<sup>440</sup> Kuylman, Erick ‘A Constitutional Defense of “Yes Means Yes” - California’s Affirmative Consent Standard in Sexual Assault Cases on College Campuses’ (2016) 25 (2) *Southern California Review of Law and Social Justice* 211, p. 218.

<sup>441</sup> Tyler Kingkade, ‘85 Colleges are Now Under Federal Investigation for Sexual Assault Cases’ (*HuffPost*, 15 October 2014) <[https://www.huffingtonpost.co.uk/entry/colleges-federal-investigation-sexual-assault\\_n\\_5990286](https://www.huffingtonpost.co.uk/entry/colleges-federal-investigation-sexual-assault_n_5990286)> accessed 25 April 2023.

<sup>442</sup> Nicolaus Mills, ‘How Antioch College got Rape Right 20 Years Ago’ (*Daily Beast*, 14, April 2017) <<https://www.thedailybeast.com/how-antioch-college-got-rape-right-20-years-ago>> accessed 25 April 2023.

<sup>443</sup> Bonnie Miller Rubin, ‘To Combat Sexual Assault, Colleges say yes to Affirmative Consent’ (*Chicago Tribune*, 29 October 2015) <<https://www.chicagotribune.com/news/ct-college-sexual-assault-affirmative-consent-met-20151029-story.html>> accessed 25 April 2023.

changed its definition of consent in its 2020 policy to mean ‘voluntary, informed, un-coerced agreement through words and actions freely given, which a reasonable person would interpret as a willingness to participate in mutually agreed-upon sexual acts’.<sup>444</sup> It also clarifies that consensual sexual activity involves willing and affirmative participation.<sup>445</sup> Similarly, Yale University’s policy requires affirmative consent that is defined as a ‘positive, unambiguous and voluntary’ agreement and such consent is to engage in a specific sexual activity and is ongoing as it must be present ‘throughout a sexual encounter’.<sup>446</sup> It also necessitates ‘a clear “yes,” verbal or otherwise’.<sup>447</sup> Columbia University’s guidelines understand consent as ‘a knowing, voluntary, and mutual decision among all participants to engage in sexual activity’.<sup>448</sup> Harvard is one of the few major universities to not have embraced an affirmative consent standard. Harvard University’s guidelines define consent as ‘agreement, assent, approval, or permission given voluntarily and may be communicated verbally or by actions’.<sup>449</sup> It highlights that consent must be specific and ‘that a person welcomes some sexual contact does not necessarily mean that person welcomes other sexual contact’.<sup>450</sup>

## II. STATE LAWS DEFINING AFFIRMATIVE CONSENT STANDARDS FOR COLLEGES AND UNIVERSITIES

184. The states of California and New York in the USA were amongst the first states to adopt a definition of affirmative consent in law, even as the scope of application only extends to policies and enforcement in colleges and universities.<sup>451</sup> Realising that the “no means no” standard for

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<sup>444</sup> Princeton University, ‘Understanding Consent’ (*Sexual Harassment/ Assault Advising, Resources and Education*) <<https://share.princeton.edu/anti-violence-education/understandingconsent#:~:text=Consensual%20sexual%20activity%20happens%20when,includes%20consent%20and%20bystander%20intervention.>> accessed 25 April 2023.

<sup>445</sup> *ibid.*

<sup>446</sup> Yale University, ‘Preventing and Responding to Sexual Misconduct: Building a Climate of Safety and Respect at Yale’ (*Sexual Misconduct Response*, August 2017) <[https://dhr.yale.edu/sites/default/files/files/w3\\_156409\\_Preventing\\_and\\_Responding\\_to\\_Sexual\\_Misconduct\\_Aug2017.pdf](https://dhr.yale.edu/sites/default/files/files/w3_156409_Preventing_and_Responding_to_Sexual_Misconduct_Aug2017.pdf)> accessed 25 April 2023.

<sup>447</sup> *ibid.*

<sup>448</sup> Columbia University, ‘Gender-based Misconduct and Interim Title IX Policies and Procedures for Students’ (*Gender-based Misconduct Office*, Revised 26 August 2022) <<https://studentconduct.columbia.edu/sites/default/files/content/documents/GBMITIXPoliciesAndProceduresforStudents.pdf>> accessed 25 April 2023, p 18.

<sup>449</sup> Harvard University, ‘Interim Title IX Sexual Harassment Policy’ (*Harvard University*, 15 September 2022) <<https://oge.harvard.edu/files/oge/files/interim-title-ix-sexual-harassment-policy.pdf>> accessed 25 April 2023.

<sup>450</sup> *ibid.*

<sup>451</sup> California Education Code (amended 2015), Chapter 15.5. Student Safety [67380 - 67386], <[https://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=EDC&sectionNum=67386.](https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=EDC&sectionNum=67386)> accessed 28 May 2023 (‘California Affirmative Consent Law’), s 67386; New York Education Law, Article 129-B, <[https://www.health.ny.gov/prevention/sexual\\_violence/docs/regulations.pdf](https://www.health.ny.gov/prevention/sexual_violence/docs/regulations.pdf)> accessed 25 May 2023 (‘NY Affirmative Consent Law’), s 6441.

sexual consent was unsatisfactory, the Californian government enacted SB 967 in 2014 which made ‘yes means yes’, an affirmative consent model, the standard on college campuses.<sup>452</sup> The law required each college to adopt policies which introduced the affirmative consent standard and implement comprehensive prevention and outreach programs to address sexual assault, domestic violence, dating violence and stalking. In 2015, the Californian Governor adopted new laws which requires public high schools to develop a curriculum that introduces the affirmative model for sexual consent, covers the consequences of sexual violence and presents the important of developing healthy peer relationships built on mutual respect.<sup>453</sup> One of the aims of introducing the affirmative consent policies on campus, according to California lawmakers, is to create a ‘culture of respect’.<sup>454</sup>

185. In 2015, New York passed a law entitled ‘Enough is Enough’ which requires all colleges in the state to adopt a uniform definition of affirmative consent as a ‘knowing, voluntary, and mutual decision among all participants to engage in sexual activity’.<sup>455</sup> It also created a statewide amnesty policy to encourage reporting by ensuring that students reporting incidents of sexual assault are granted immunity for certain campus policy violations such as drug and alcohol abuse.<sup>456</sup> Furthermore, it sought to expand access to law enforcement by creating a sexual assault victims unit within the State Police where officers have advanced and specialised training in responding to sexual assaults.<sup>457</sup> Similar laws are under consideration in states like Michigan,<sup>458</sup> New Mexico,<sup>459</sup> albeit with limited aims of introducing affirmative consent education in schools.
186. The below sections outline the provisions of the affirmative consent laws introduced in California and New York and the relevant evidentiary proof used in the adjudication of the

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<sup>452</sup> Senate Bill No 967 ‘Student Safety: Sexual Assault’ (California Legislative Information, 2014) <[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967)> accessed 25 April 2023.

<sup>453</sup> Chris Nichols, ‘California Governor Signs Bill Requiring High Schools Teach “Affirmative Consent”’ (*Capradio*, 1 October, 2015) <<https://www.capradio.org/articles/2015/10/01/california-governor-signs-bill-expanding-sexual-education/>> accessed 25 April 2023.

<sup>454</sup> Kevin de León and Hannah-Beth Jackson, ‘Why we Made “Yes Means Yes” California Law’ (*The Washington Post*, 13 October 2015) <<https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/>> accessed 25 April 2023.

<sup>455</sup> NY Affirmative Consent Law (n 451).

<sup>456</sup> *ibid*, s 6442.

<sup>457</sup> New York Consolidated Laws, Executive Law, Sexual Assault Victims Unit, s232.

<sup>458</sup> Kathleen Gray, ‘Yes Means Yes: Affirmative Consent to Sex would be Taught in Schools’ (*Detroit Free Press*) <<https://eu.freep.com/story/news/local/michigan/2018/03/25/yes-means-yes-affirmative-consent-michigan-house-bill/453937002/>> accessed 25 April 2023.

<sup>459</sup> Megan Taros ‘Affirmative Consent Bill Stalled in Senate Committee’ (*Source NM*, 14 March 2023) <<https://sourcenm.com/2023/03/14/affirmative-consent-bill-stalled-in-senate-committee/>> accessed 25 April 2023.



complaints filed by the students who suffer some form of sexual assault, dating violence, domestic violence and stalking on or off campus. While the nature of these proceedings is different from criminal justice proceedings that involve penalty, the below highlights how consent is defined and what factors are important in considering if the parties consented or did not consent to the sexual activity.

## A. CALIFORNIA

### *1. Definition of affirmative consent*

187. The introduction of affirmative consent standard for determination of whether both parties consented to sexual activity in under the chapter on student safety under Section 67386 in the California Education Code. ‘Affirmative Consent’ is defined as ‘affirmative, conscious, and voluntary agreement to engage in sexual activity’ and *importantly* imposes responsibility on each of the parties involved to ensure they have the affirmative consent of the other/s.<sup>460</sup> It is also specified that silence or lack of protest or resistance does not mean consent. The consent is revokable and must be ongoing throughout the sexual activity. Further, the fact of past sexual relations or the existence of a dating relationship is not by itself assumed to be an indicator of consent.<sup>461</sup>

### *2. Communication of Consent*

188. There is no explicit provision requiring communication of consent verbally or through conduct in Section 67386 in the California Education Code.

### *3. Reasonable belief defence*

189. The statute clarifies that the defence of belief that the complainant consented is not available to the accused if the belief is a result of ‘the intoxication or recklessness of the accused’ and if the accused did not take any reasonable steps to ascertain affirmative consent, given the circumstances known.<sup>462</sup> The belief defence is not available to the accused if they knew or should have reasonably known that the complainant was unable to consent due to being ‘asleep or

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<sup>460</sup> California Affirmative Consent Law (n 451), s 67386(a)(1).

<sup>461</sup> *ibid*.

<sup>462</sup> *ibid*, s 673836(a)(2)(A)-(B).

unconscious’, ‘incapacitated due to the influence of drugs, alcohol, or medication’ that impacted the understanding of ‘the fact, nature, or extent of the sexual activity’, and being unable to communicate because of a mental or physical condition.<sup>463</sup> Hilgert points out that these provisions rule out a reasonable belief defence and remove the possibility to claim that the defendant had a reasonable belief that they had obtained affirmative consent, even if it was mistaken.<sup>464</sup>

190. These provisions apply to both on campus and off campus incidents of sexual assault, domestic violence, dating violence, amongst others.<sup>465</sup> The law also requires provision of assistance and make services such as counselling, mental health services,<sup>466</sup> formulation of prevention strategies such as outreach programming.<sup>467</sup> The law is victim-centric and requires post-secondary institutions to adopt comprehensive policies tackling issues of gender-based violence.

#### 4. *Burden of proof*

191. As regards the burden of proof, the standard for determination of the complaints is ‘the preponderance of the evidence’.<sup>468</sup> The Department of Education has clarified that the onus of collecting the evidence as well as the burden of proof lies on the school conducting the investigation.<sup>469</sup>

## **B. NEW YORK**

### 1. *Definition of affirmative consent*

192. Affirmative consent standard was introduced in the state of New York in 2015 by addition of Article 129-B to the Education Law.<sup>470</sup> This relates to implementation of Sexual Assault, Dating Violence, Domestic Violence and Stalking Prevention and Response Policies and Procedures by Colleges and Universities. Section 6441 defines affirmative consent to sexual activity and requires

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<sup>463</sup> *ibid*, s 673836(a)(4)(A)-(C).

<sup>464</sup> Hilgert (n 23) 880.

<sup>465</sup> California Affirmative Consent Law (n 451), s 673836(a).

<sup>466</sup> *ibid*, s 673836(c).

<sup>467</sup> *ibid*, s 673836(d)-(e).

<sup>468</sup> *ibid*, s 673836(a)(3).

<sup>469</sup> US Department of Education, ‘Summary of Major Provisions of the Department of Education’s Title IX Final Rule’ (*Department of Education*, 14 August 2020) <<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>> accessed 23 March 2023.

<sup>470</sup> NY Affirmative Consent Law (n 455) added by the Laws of New York 2015, ch. 76, Sec. 1, eff. 10/5/2015.

it to be adopted as part of the code of conduct of every educational institution governed by the Education Law. Under Section 6441(1), affirmative consent is “a knowing, voluntary, and mutual decision among all participants to engage in sexual activity”. Both words or actions can be used to give consent with the only caveat that these words or actions ‘create clear permission regarding willingness to engage in the sexual activity’.<sup>471</sup> Like the California statute, the provisions in New York also clarify that ‘silence or lack of resistance, in and of itself, does not demonstrate consent’.<sup>472</sup> An added feature of this definition clarifies the gender neutrality of the standard stating that there is no variation in the definition of consent based upon a participant’s sex, sexual orientation, gender identity, or gender expression.<sup>473</sup>

193. Section 6441(2) clarifies some of the principles guiding the application of affirmative consent standards. The consent must be specifically given and prior consensual sexual activity ‘does not necessarily constitute consent to any other sexual act’.<sup>474</sup> The accused being under the influence of drugs and/or alcohol cannot be an excuse to not require consent.<sup>475</sup> Further, a person who is incapacitated by reason of ‘the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent’ vitiates consent as it undermines one’s ability to knowingly choose to participate in sexual activity.<sup>476</sup> While all forms of intoxication are not regarded as incapacity, the degree of intoxication can determine if someone was incapacitated and unable to consent.<sup>477</sup> It is clarified that consent is revertible and revocable at any time.<sup>478</sup> Further, sexual activity “must stop” in case consent is withdrawn or can no longer be given.<sup>479</sup> Finally, the principle that any coercion, intimidation, force, or threat of harm vitiates consent is meant to guide the community.<sup>480</sup>

## 2. *Communication of Consent*

194. The New York law contains a clear communicative standard in section 6441(1) acknowledging that ‘consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.’

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<sup>471</sup> *ibid*, s 6441(1).

<sup>472</sup> *ibid*.

<sup>473</sup> *ibid*.

<sup>474</sup> *ibid*, s 6441(2)(a).

<sup>475</sup> *ibid*, s 6441(2)(b).

<sup>476</sup> *ibid*, s 6441(2)(d).

<sup>477</sup> *ibid*.

<sup>478</sup> *ibid*, s 6441(2)(c).

<sup>479</sup> *ibid*, s 6441(2)(f).

<sup>480</sup> *ibid*, s 6441(2)(e).

### 3. Reasonable belief defence

195. The provisions of the New York laws are silent on the reasonable belief defence.

### 4. Burden of proof

196. As regards the burden of proof, the law requires the institution to advise the reporting individual of their right to have emergency access to a Title IX Coordinator or other appropriate official and notify the student of the different standards of proof and evidence requirements in the criminal justice process.<sup>481</sup> The students have a right to a ‘prompt response’ to their complaint and for its impartial, timely and thorough investigation and adjudication.<sup>482</sup> However, as part of this investigation the respondent has “the right to a presumption that the respondent is “not responsible” until a finding of responsibility is made pursuant to the provisions of this article and the institution’s policies and procedures”.<sup>483</sup> The Department’s guidance on who bears the burden of proof applies to New York law similarly and the university or the higher education institute in question bears the burden of proof.<sup>484</sup>

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<sup>481</sup> *ibid*, s 6444(1)(b).

<sup>482</sup> *ibid*, s 6444(5)(c)(ii).

<sup>483</sup> *ibid*.

<sup>484</sup> US Department of Education, ‘Summary of Major Provisions of the Department of Education’s Title IX Final Rule’ (*Department of Education*, 14 August 2020) <<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>> accessed 23 March 2023.