HARMONISING SEXUAL CONSENT LAW IN AUSTRALIA: GOALS, RISKS AND CHALLENGES

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The 2021 Australian of the Year, Grace Tame, sought to persuade 'all governments across Australia to adopt the same definitions of consent, grooming, the age of a child, and sexual intercourse'. However, sexual consent law harmonisation in Australia faces formidable obstacles. We argue that an affirmative consent standard represents the appropriate goal of harmonisation, while potential risks include levelling-down reforms and undermining the role of competitive federalism. We identify four main obstacles to legal harmonisation, including strong advocacy coalitions, jurisdictional differences, historical failures and political disincentives. We conclude these obstacles do not mean harmonisation is undesirable or impossible, but it would require prolonged attention, resources and political will, as well as a nuanced understanding of the difficulties involved.

I INTRODUCTION

Sexual consent law harmonisation in Australia has attracted considerable recent attention. Grace Tame, the 2021 Australian of Year, sought to use her position to encourage 'all governments across Australia to adopt the same definitions of consent, grooming, the age of a child, and sexual intercourse'.[1] Tame's Harmony Campaign has now narrowed its focus to naming of child sexual offences, age of consent inconsistencies and the definition of sexual intercourse, but the broader

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1 Katina Curtis, 'Tame to Push for Uniform Consent Definition, Payne Implores Nonpartisan Approach to Women's Safety', *The Sydney Morning Herald* (online, 7 September 2021) <https://www.smh.com.au/politics/federal/tame-to-push-for-uniform-consent-definition-payne-implores-nonpartisan-approach-to-women-s-safety-20210907-p58pjd.html>.

issue of harmonising sexual consent law remains on the agenda.[2] This is not the first call for harmonising major criminal law concepts in Australia. The *Model Criminal Code* ('*MCC*') was a significant project introduced during the mid-1990s and intended to be adopted in all jurisdictions.[3] However, the *MCC* 'has not been as significant, nor as successful, as its drafters had hoped'.[4] Previous attempts have demonstrated the difficulty of harmonisation of criminal law due to strong advocacy coalitions actively preserving the status quo. These advocacy coalitions have individual and systemic attitudes, beliefs and responses that can stall harmonisation and reforms for decades.

Sexual violence law reform is a pressing issue across Australia. The Australian Bureau of Statistics found in 2017 that 'one in five women (18% or 1.7 million) and one in twenty men (4.7% or 428,800) experienced sexual violence' with 87% of women not reporting such incidents to the police.[5] A recent investigation by the Australian Broadcasting Corporation highlighted the high attrition rates in police reports of sexual violence in all Australian jurisdictions, while conviction rates also remain low.[6] There is a body of recent scholarship highlighting shortcomings in existing legal frameworks, particularly in relation to the continuing role played by rape myths in shaping the arguments presented at trial and appellate court interpretations of the law.[7]

Harmonisation of sexual consent law is not a new objective. A submission to the Australian Law Reform Commission in 2010 advocated that sexual consent law harmonisation is critical for a 'clear standard and statement of the law that can be used to educate the community, and in particular victims of sexual assault'.[8] The

2 'The Harmony Campaign', *The Grace Tame Foundation* (Web Page) <https://www.thegracetamefoundation.org.au/the-harmony-campaign>.

3 Arlie Loughnan, '"The Very Foundations of Any System of Criminal Justice": Criminal Responsibility in the Australian Model Criminal Code' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 8, 9.

4 Ibid.

5 Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017).

6 Inga Ting, Nathanael Scott and Alex Palmer, 'Rough Justice: How Police Are Failing Survivors of Sexual Assault', *ABC News* (online, 28 January 2020) <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>.

7 See, eg, Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334; Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1; Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?' (2020) 32(3) *Current Issues in Criminal Justice* 346; Annie Cossins, 'Why Her Behaviour Is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(2) *University of New South Wales Law Journal* 462; Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296 ('Persistent Narratives of Force and Resistance').

8 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Final Report No 114, NSWLRC Final Report No

importance of legal predictability and consistency offers a presumptive case for harmonisation. Australia has a highly geographically mobile population[9] and is estimated as the highest 'residentially mobile' nation worldwide.[10] Counterterrorism law has been harmonised through referred legislation, offering hope for further advances in harmonising criminal law.[11]

Nonetheless, harmonising sexual consent law raises several important questions and challenges. Two main questions arise: first, what would the harmonisation standard be; and second, what are the obstacles to achieving this harmonisation? The standard is important because harmonisation to the lowest common denominator risks slowing needed reforms and undermining the role of competitive federalism. It is also essential to consider the obstacles to identify the best strategic approach to harmonisation and effectively allocate resources and time. Recent reform efforts in this area have been stalled to various extents due to the strong advocacy coalitions in the Australian criminal law landscape. Any future harmonisation efforts must respond to this phenomenon.

Evidence of strong advocacy coalitions in criminal law has been demonstrated by the failure to implement the *MCC*, which has been attributed to 'parochial codiphobia'[12] and persistent resistance to changes in Australian criminal law.[13] As a consequence of this characteristic of Australian federalism:

> [M]any carefully researched and considered recommendations of standing law reform bodies remain unimplemented. The precise extent of this 'implementation deficit' is unknown, which is surprising in the modern era of new public management with its emphasis on impact and performance measurement in the public sector.[14]

128, October 2010) vol 1, 1149 [25.82] <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114_WholeReport.pdf> ('*Family Violence*'), quoting Jenny's Place Women and Children Refuge, Submission No FV 54 to Australian Law Reform Commission (28 May 2010).

9 Graeme Hugo, Janet Wall and Margaret Young, 'Migration in Australia and New Zealand' in Michael J White (ed), *International Handbooks of Migration and Population Distribution* (Springer, 2016) vol 6, 333.

10 Graeme Hugo, Helen Feist and George Tan, 'Internal Migration and Regional Australia, 2006–11' (Policy Brief Vol 1 No 6, Australian Population and Migration Research Centre, The University of Adelaide, June 2013) 1 <https://web.archive.org.au/awa/20150622235801mp_/http://www.adelaide.edu.au/apmrc/pubs/policy-briefs/APMRC_Policy_Brief_Vol_1_6_2013.pdf>.

11 *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Northern Territory) Request Act 2003* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act 2002* (WA).

12 Simon Bronitt, 'Is Criminal Law Reform a Lost Cause?' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 133, 141.

13 Guzyal Hill, 'How Does the Area of Law Predict the Prospects of Harmonisation?' (2020) 41(1) *Adelaide Law Review* 267, 282 ('Prospects of Harmonisation?').

14 Bronitt (n 12) 141.

This article begins by considering in detail the goals and risks of sexual consent law harmonisation in Australia. We argue that an affirmative consent standard represents the appropriate goal of harmonisation, with recent reforms in New South Wales ('NSW') and the Australian Capital Territory ('ACT') indicating a potential consensus model, while potential risks of harmonisation include levelling-down reforms and undermining the role of competitive federalism. The article then identifies four main obstacles to legal harmonisation: advocacy coalitions, jurisdictional differences, historical failures and political disincentives. We apply advocacy coalition theory to untangle the complex interplay of obstacles and evaluate the potential for progress on a uniform national standard.

Advocacy coalition theory offers a powerful explanation of the temporal political and policy dynamics of reform decision-making. Advocacy coalitions use policy learning to reinforce their cognitive and behavioural aspects and resist harmonisation.[15] Indeed, due to the tendency to select, interpret and even distort information, such learning may reinforce existing fragmented regulations rather than beneficial changes. Institutions (and the advocacy coalitions within them) are still predominantly path dependent and foster the stability of historically entrenched positions, thus frustrating attempts at socially beneficial reforms.[16] These factors can be observed in the context of sexual consent law reform. This does not mean harmonisation in this area of law is undesirable or impossible. However, it would require prolonged attention, resources and political will, as well as a nuanced understanding of the difficulties involved.

II GOALS AND RISKS OF HARMONISATION

'Consent' is the 'linchpin legal concept'[17] for rape law — the 'defining element of rape'.[18] It is crucial to get the definition of consent right because it defines sexual relationships between two consenting or non-consenting people and affects the whole societal system of sexual relations. Sexual consent can be a 'grey area of human behaviour where forms of persuasion, coercion and/or abuse of power are commonly used to gain someone's consent'.[19] Clarity in the legal definition of consent is therefore critical. The definition of consent is also important for education campaigns, preventing sexual violence, the self-regulation of potential perpetrators and victims' self-assessments. Experts have emphasised that consent

15 Christopher M Weible, Paul A Sabatier and Kelly McQueen, 'Themes and Variations: Taking Stock of the Advocacy Coalition Framework' (2009) 37(1) *Policy Studies Journal* 121, 124.

16 Mala Htun and S Laurel Weldon, 'When Do Governments Promote Women's Rights? A Framework for the Comparative Analysis of Sex Equality Policy' (2010) 8(1) *Perspectives on Politics* 207, 212.

17 Julia Quilter, 'Getting Consent "Right": Sexual Assault Law Reform in New South Wales' (2020) 46(2) *Australian Feminist Law Journal* 225, 229.

18 Anna High, 'Sexual Dignity and Rape Law' (2022) 33(2) *Yale Journal of Law and Feminism* 1, 4.

19 Cossins (n 7) 494.

should not be the only focus of sexual education,[20] but it remains a pivotal concept shaping social attitudes to sexual relations. A harmonised definition of consent would benefit educational campaigns as the 'law's educative promise depends on the state's preparedness to create policy that fosters the public's appreciation of the sexual standards embedded in legal rules'.[21] This is particularly the case given the increasingly prominent role of social media and technology in the commission[22] and prevention of sexual violence.[23]

It is partly for these reasons that Tame chose to use her influence as 2021 Australian of the Year to push for harmonisation of sexual consent law across Australia.[24] This initiative, however, immediately raises two important questions. The first is what standard of sexual consent should be the model for national harmonisation. All Australian jurisdictions define rape or the equivalent offence as sexual intercourse without 'free and voluntary' consent (or words to similar effect).[25] However, the precise constructions placed on this concept differ between jurisdictions. Specifically, a divide has emerged between those jurisdictions that have adopted or otherwise endorsed an affirmative consent model (Tasmania, NSW, the ACT and Victoria) and those that have yet to do so. We argue below that the clear trend in Australian law is towards affirmative consent, so any attempt at national harmonisation should also aim at an affirmative consent standard.

The second question confronting harmonisation of sexual consent law concerns the risks involved. Harmonisation offers evident benefits in terms of clarity and consistency, but does it also come with potential drawbacks? We draw attention in the second section of this Part to two interrelated risks: namely, levelling-down the law to the lowest common denominator, and undermining competitive federalism. These risks underline the importance that any push for harmonisation adopts the correct legal model as its goal. Careful study is therefore needed to formulate an

20 Jennifer S Hirsch et al, 'Social Dimensions of Sexual Consent among Cisgender Heterosexual College Students: Insights from Ethnographic Research' (2019) 64(1) *Journal of Adolescent Health* 26; Eva S Goldfarb and Lisa D Lieberman, 'Three Decades of Research: The Case for Comprehensive Sex Education' (2021) 68(1) *Journal of Adolescent Health* 13.

21 Gail Mason, 'Sexual Assault Law and Community Education: A Case Study of New South Wales, Australia' (2021) 56(3) *Australian Journal of Social Issues* 409, 409.

22 Nicola Henry and Anastasia Powell, 'Beyond the "Sext": Technology-Facilitated Sexual Violence and Harassment against Adult Women' (2015) 48(1) *Australian and New Zealand Journal of Criminology* 104; Anastasia Powell, 'Configuring Consent: Emerging Technologies, Unauthorised Sexual Images and Sexual Assault' (2010) 43(1) *Australian and New Zealand Journal of Criminology* 76.

23 Bianca Fileborn, Phillip Wadds and Stephen Tomsen, 'Sexual Harassment and Violence at Australian Music Festivals: Reporting Practices and Experiences of Festival Attendees' (2020) 53(2) *Australian and New Zealand Journal of Criminology* 194.

24 Curtis (n 1).

25 *Crimes Act 1900* (ACT) s 50B ('*ACT Crimes Act*'); *Crimes Act 1900* (NSW) s 61HI ('*NSW Crimes Act*'); *Criminal Code Act 1983* (NT) sch 1 s 192(1) ('*NT Criminal Code*'); *Criminal Code Act 1899* (Qld) sch 1 s 348(1) ('*Qld Criminal Code*'); *Criminal Law Consolidation Act 1935* (SA) s 46(2) ('*SA Crimes Act*'); *Criminal Code Act 1924* (Tas) sch 1 s 2A(1) ('*Tas Criminal Code*'); *Crimes Act 1958* (Vic) s 36(1) ('*Vic Crimes Act*'); *Criminal Code Act Compilation Act 1913* (WA) sch s 319(2)(a) ('*WA Criminal Code*').

appropriate model law based on affirmative consent before harmonisation occurs. Otherwise, harmonisation can act as a drag on progressive law reform and stall legal innovation by specific jurisdictions.

A *The Goal: Affirmative Consent*

A precise and uniform Australia-wide legal position on sexual consent would benefit existing and potential victims and the broader community by clarifying the standard because the 'legislative definition of consent sets the standard to inform the community about the boundaries of proscribed sexual behaviour'.[26] However, what should the uniform standard be? The trend in Australia is clearly towards an affirmative consent standard. Tasmania was the first jurisdiction to adopt such a standard in 2004.[27] NSW did similarly in 2021,[28] while the ACT[29] and Victoria followed suit in 2022.[30] The Queensland Women's Safety and Justice Taskforce has also advised the adoption of an affirmative consent standard in that state.[31] There is, as such, clear impetus across Australia for such a model. An affirmative consent standard has also been widely endorsed by academic commentators in Australia and internationally,[32] although some significant criticisms of the trend remain.[33]

The most feasible standard for consent laws would therefore mean harmonising affirmative consent in Australian jurisdictions. It is important to be clear what we

26 *Family Violence* (n 8) 1150 [25.88].

27 *Criminal Code Amendment (Consent) Act 2004* (Tas) ('*CCAC Act*').

28 *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) ('*CLASCR Act*'). The amendments took effect on 1 June 2022.

29 *Crimes (Consent) Amendment Act 2022* (ACT) ('*CCA Act*').

30 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) ('*JLASO Act*').

31 Kate Kyriacou and Stephanie Bennett, 'Women's Safety and Justice Taskforce Recommends Overhaul of Sex Crimes and Consent Laws', *The Courier-Mail* (online, 1 July 2022) <https://www.couriermail.au/truecrimeaustralia/police-courts-qld/womens-safety-and-justice-taskforce-recommends-overhaul-of-sex-crimes-and-consent-laws/news-story/861e2487c70b3bc3395364db3006c784>.

32 See, eg, Crowe and Lee (n 7); Burgin and Crowe (n 7); Burgin, 'Persistent Narratives of Force and Resistance' (n 7); Cossins (n 7); Nicholas J Little, 'From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law' (2005) 58(4) *Vanderbilt Law Review* 1321; Deborah Tuerkheimer, 'Affirmative Consent' (2016) 13(2) *Ohio State Journal of Criminal Law* 441.

33 See, eg, Allison L Marciniak, 'The Case against Affirmative Consent: Why the Well-Intentioned Legislation Dangerously Misses the Mark' (2015) 77(1) *University of Pittsburgh Law Review* 51; Aya Gruber, 'Not Affirmative Consent' (2016) 47(4) *University of the Pacific Law Review* 683; David Gurnham, 'A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts' (2016) 19(2) *New Criminal Law Review* 141; Janet Halley, 'The Move to Affirmative Consent' (2016) 42(1) *Signs: Journal of Women in Culture and Society* 257; Andrew Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43(3) *Criminal Law Journal* 159; Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law and Human Dignity* 17; Andrew Dyer, 'Progressive Punitiveness in Queensland' (2020) 48(3) *Australian Bar Review* 326.

are arguing here. There is no scope in this article to defend affirmative consent against all the criticisms that have been advanced against it; nor is it necessary for our argument to do so.[34] Our point is rather one about the political realities of consent law reform in Australia. If harmonisation of sexual consent law is deemed an important goal, then the most practical way of achieving this is to follow the clear national law reform trend and seek to implement a uniform national affirmative consent standard. There is little prospect of the jurisdictions that have adopted such a standard agreeing to roll back hard-won reforms and revert to a previous model. There is, by contrast, as we argue below, evidence that those jurisdictions that have not yet adopted affirmative consent remain open to it.

It is also not part of our task in this article to argue in favour of a particular version of an affirmative consent model. There are, as we will discuss in detail in Part III(B), significant differences between the affirmative consent provisions adopted in Tasmania, NSW, the ACT and Victoria. This is, we argue, a significant challenge that the harmonisation movement must surmount. We do not take a position here on which of these models should be adopted as a uniform standard. Our contention is rather that any uniform standard must, given national trends and the political realities behind them, represent some variety of affirmative consent model; the variation in such models, meanwhile, represents a barrier to harmonisation that will require concerted effort to overcome.

Affirmative consent is the progression from 'no means no' to 'yes means yes', defining sex as consensual 'when all parties have explicitly agreed'.[35] It focuses on the steps taken by the perpetrator to ascertain consent.[36] Affirmative consent seeks to clarify the law by reducing reliance on 'implied consent narratives' and redirecting 'attention to steps that the perpetrator took to ensure the other party was consenting'.[37] Annie Cossins has highlighted the predominance of freeze responses and unequal power relations in sexual violence scenarios and emphasised that 'the notion of consent must be reconfigured to take into account

34 One of the present authors has argued in both academic work and public advocacy for an affirmative consent standard, but this article stands independently of those arguments. See, eg, Crowe and Lee (n 7); Burgin and Crowe (n 7); Jonathan Crowe, 'Queensland Rape Law "Loophole" Could Remain after Review Ignores Concerns about Rape Myths and Consent', *The Conversation* (online, 4 August 2020) <https://theconversation.com/queensland-rape-law-loophole-could-remain-after-review-ignores-concerns-about-rapemyths-and-consent-141772> ('Queensland Rape Law "Loophole"').

35 Rona Torenz, 'The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective' (2021) 22(5) *German Law Journal* 718, 718.

36 Victorian Law Reform Commission, *Sexual Offences* (Final Report, July 2004) Ixxii. Recommendation 174 stated at Ixxii that:

> The accused must produce some evidence that he had an honest belief that the complainant consented before this matter can be left to the jury. The mere assertion by an accused that he believed the complainant was consenting shall not constitute sufficient evidence of an honest belief as to consent.

This was also recommended by the United Nations Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, UN Doc ST/ESA/329 (July 2010) 26 ('*Division for the Advancement of Women*').

37 Burgin and Flynn (n 7) 334.

physiological as well as cultural responses to fear, intimidation and coercion'.[38] Rachael Burgin and Jonathan Crowe have likewise argued that affirmative consent must ensure 'that a defendant cannot escape responsibility for having sex with someone against her will by claiming to have made a mistake, unless he took positive steps to communicate with the other person and ascertain her willingness to take part'.[39]

An affirmative consent model, placed within the context of Australian rape law, can be understood as having two primary components. The first of these relates to the definition of sexual consent and when it will be negated. Affirmative consent, at a minimum, requires consent to be positively communicated; it cannot be assumed or inferred from passivity or non-resistance. A stronger form of affirmative consent standard, which has not been implemented in Australia, would provide that consent is not present unless each party takes steps to ensure the other is consenting.[40] The second facet of affirmative consent concerns mistaken beliefs in consent. An honest and reasonable mistaken belief in consent is potentially exculpatory in all Australian jurisdictions;[41] however, an affirmative consent model, at a minimum, qualifies this excuse so that it does not apply where the accused did not say or do anything to ascertain consent. A stronger approach, which again has not been adopted in Australia, would remove the excuse of mistaken belief in consent altogether.[42]

The recent reforms to sexual consent law in NSW,[43] the ACT[44] and Victoria[45] are designed to give effect to the minimum components of an affirmative consent standard. The NSW amendments inserted a new objective into the subdivision of the *Crimes Act 1900* (NSW) dealing with sexual crimes stating that 'consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual

38 Cossins (n 7) 493.

39 Burgin and Crowe (n 7) 348.

40 Amendments to the *Qld Criminal Code* (n 25) drafted by Jonathan Crowe, Asher Flynn and Bri Lee and moved in the Queensland Parliament by Amy MacMahon provide an example of this approach. See Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 2021, 882–5 (Amy MacMahon). Further information regarding the drafting of the amendments is contained in personal email correspondence on file with the authors.

41 *ACT Crimes Act* (n 25) ss 54(1), (3); *NSW Crimes Act* (n 25) s 61HK; *NT Criminal Code* (n 25) ss 32, 43AW; *Qld Criminal Code* (n 25) s 24; *Tas Criminal Code* (n 25) ss 14–14A; *Vic Crimes Act* (n 25) s 38(1)(c); *WA Criminal Code* (n 25) s 24. South Australia deals with this matter differently from the other jurisdictions; in that state, the definition of rape requires that the accused person knows or is recklessly indifferent to the fact that the other person does not consent: *SA Crimes Act* (n 25) ss 47–8. An honest and reasonable mistaken belief in consent may negate this element: Jessica Schaffer, 'Narratives of Force, Resistance and Mistaken Belief in Consent in South Australian Rape Cases' (2023) 44(2) *Adelaide Law Review* 608, 615. For general discussion, see Crowe and Lee (n 7); Burgin and Crowe (n 7).

42 For discussion of this option, see Crowe and Lee (n 7) 25–7.

43 *CLASCR Act* (n 28). The amendments took effect on 1 June 2022.

44 *CCA Act* (n 29).

45 *JLASO Act* (n 30).

activity'.[46] They go on to provide that a person does not consent to sexual activity if 'the person does not say or do anything to communicate consent'.[47] Furthermore, a defendant cannot rely on a mistake about consent if they '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'.[48] The ACT and Victorian amendments have a broadly similar effect, although there are some significant differences between the provisions, as discussed later.

Affirmative consent is consistent with the United Nations Division for the Advancement of Women's recommendation that legislation should approach consent as an 'unequivocal and voluntary agreement' and that the accused should be required to prove the steps taken to 'ascertain whether the complainant/survivor was consenting'.[49] Commentators have also noted that affirmative consent reflects current societal standards where consent is a 'continuous process of mutual decision making'[50] with the law considering 'the substantive question of whether or not the acts were mutual … and how they were negotiated'.[51] The arguments from critics that affirmative consent threatens the human rights of defendants in relation to a fair trial have been considered and rejected by the governments and legislatures that have endorsed this model. Critics may suggest that this consideration was not as rigorous or considered as it might have been, but there is little prospect of these jurisdictions revisiting the issue and rolling back their reforms.

The Australian jurisdictions that have so far not endorsed affirmative consent — Queensland, Western Australia ('WA'), South Australia ('SA') and the Northern Territory ('NT') — show little sign of being implacably opposed to it. The Queensland Law Reform Commission ('QLRC') did reject a move to an affirmative consent model in 2020,[52] but that report was heavily criticised for its conservative and unscholarly content,[53] particularly its finding that there is no strong evidence that rape myths play a role in Queensland rape trials.[54] That

46 *NSW Crimes Act* (n 25) s 61HF(c).

47 Ibid s 61HJ(1)(a).

48 Ibid s 61HK(2).

49 *Division for the Advancement of Women*, UN Doc ST/ESA/329 (n 36) 27.

50 Sarah Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26(3) *New Zealand Universities Law Review* 614, 630, citing Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8(2) *Law and Philosophy* 217, 235.

51 Sharon Cowan, 'Choosing Freely: Theoretically Reframing the Concept of Consent' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, 2007) 91, 101 (emphasis omitted), citing Michelle J Anderson, 'Negotiating Sex' (2005) 78(6) *Southern California Law Review* 1401.

52 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) v [28]–[32].

53 See, eg, Crowe, 'Queensland Rape Law "Loophole"' (n 34).

54 Queensland Law Reform Commission (n 52) 210.

finding was in contradiction to a significant body of Australian literature,[55] little of which the QLRC cited. The QLRC did rely on a study of jurors from the United Kingdom,[56] but those findings, even if sound, reveal nothing directly about the attitudes of jurors in Queensland. The QLRC report was almost immediately followed by the commissioning of another overlapping review by the Queensland government. The recent outcome of that review, as mentioned previously, recommended the adoption of an affirmative consent standard, contradicting the QLRC's earlier finding.[57] WA has also announced a forthcoming review in this area, signalling an openness to potential law reform.[58]

B *The Risks: Levelling-Down and Competitive Federalism*

The importance of adopting the correct model for uniform sexual consent law is underscored by the potential risks of harmonisation. First, harmonisation risks what we term the 'levelling-down problem' where more progressive jurisdictions are obliged to adopt legal principles favoured by less reform-oriented systems to reach a consensus on common standards. Harmonisation can, in this respect, serve as a drag on innovation as well as a potential impetus for needed reforms. The term 'levelling-down' here is drawn from an objection to egalitarianism influentially formulated by Derek Parfit.[59] One way of making people equal is to replace an unequal distribution with an equal one achieved by making the more advantaged people in the original distribution worse off. However, it seems counterintuitive to view this as an improvement overall. Similarly, one way of harmonising jurisdictions is to take the legal frameworks of the more progressive jurisdictions backwards to match the less progressive ones. However, that seems perverse, for similar reasons.

There might, of course, be dispute about what reforms should be regarded as progressive or otherwise in a specific context. As emphasised previously, we do not claim to establish in this article that affirmative consent is objectively preferable to other models of rape law. We also, to avoid a possible

55 See, eg, Burgin, 'Persistent Narratives of Force and Resistance' (n 7); Burgin and Flynn (n 7); Anastasia Powell et al, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456. For evidence of the role of rape myths in New Zealand trials, see Yvette Tinsley, Claire Baylis and Warren Young, '"I Think She's Learnt Her Lesson": Juror Use of Cultural Misconceptions in Sexual Violence Trials' (2021) 52(2) *Victoria University of Wellington Law Review* 463.

56 Cheryl Thomas, 'The 21st Century Jury: Contempt, Bias and the Impact of Jury Service' [2020] (11) *Criminal Law Review* 987. For criticism of Thomas' study, see James Chalmers, Fiona Leverick and Vanessa E Munro, 'Why the Jury Is, and Should Still Be, Out on Rape Deliberation' [2021] (9) *Criminal Law Review* 753. For Thomas' response, see Cheryl Thomas, 'A Response to "the Jury Is Still Out"' [2021] (9) *Criminal Law Review* 772.

57 Women's Safety and Justice Taskforce, *Hear Her Voice* (Report No 2, 2022) vol 1, ch 2.7.

58 Government of Western Australia, 'Two Major Reviews to Examine WA's Sexual Offence Laws' (Media Statement, 8 February 2022), archived at <https://web.archive.org/web/20221205221032/https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/02/Two-major-reviews-to-examine-WAs-sexual-offence-laws.aspx>.

59 Derek Parfit, 'Equality or Priority?' (Lindley Lecture, University of Kansas, 21 November 1991) 17.

misunderstanding, do not mean to imply by the preceding paragraph that affirmative consent represents a progressive model of reform while alternative models are less progressive. Some critics of affirmative consent have, indeed, argued that it should not be viewed as a progressive reform;[60] establishing the contrary would require arguments beyond the scope of this article. Rather, we are making a general point here about the risks of harmonisation. It runs the danger of entrenching suboptimal legislative models for the sake of consensus and frustrating needed reforms, whatever those might be. Harmonisation campaigns should bear this risk in mind.

Second, harmonisation risks undermining the constructive role that competitive federalism can play in promoting law reform. Competitive federalism occurs where different federal units adopt different laws or policies, enabling a real-world comparison between them. Residents and businesses can 'vote with their feet' (or their money) by choosing to live or invest in those jurisdictions with more effective or favourable laws. This allows laws to evolve as 'emergent properties of an institutional framework'.[61] Competitive federalism has occurred in Australia in the context of sexual consent law, with Tasmania leading the way in adopting affirmative consent and effectively serving as a test case for other jurisdictions to observe and follow.[62] NSW, the next state to adopt similar reforms (albeit 17 years later),[63] provided impetus for subsequent changes in the ACT and Victoria.[64] Advocates pointed to these reforms in submissions to the Queensland Women's Safety and Justice Taskforce as evidence of the workability of an affirmative consent model in Queensland, contrary to the findings of the QLRC in 2020.[65]

This kind of legal testing and advocacy would not be possible if sexual consent law were harmonised across Australia. It would, of course, be possible to look to overseas jurisdictions — as Tasmania did by mirroring Canada's affirmative consent law — but those comparisons are complicated by legal and cultural differences. This risk is not, in itself, a decisive reason not to pursue harmonisation, but it underscores the importance of adopting a well-considered model. We therefore suggest that any move to harmonise Australian sexual consent law should be preceded by research comparing approaches in different Australian and foreign jurisdictions to identify the best way of incorporating affirmative consent into Australian law. This may or may not consist in wholly adopting the current model in a specific Australian affirmative consent jurisdiction.

60 See, eg, Halley (n 33); Dyer, 'Progressive Punitiveness in Queensland' (n 33).

61 Richard E Wagner, 'Competitive Federalism in Institutional Perspective' in Donald P Racheter and Richard E Wagner (eds), *Federalist Government in Principle and Practice* (Springer Science+Business Media, 2001) 19, 20.

62 *CCAC Act* (n 27).

63 *CLASCR Act* (n 28).

64 *CCA Act* (n 29); *JLASO Act* (n 30).

65 Women's Safety and Justice Taskforce (n 57) ch 2.7.

III OBSTACLES TO HARMONISATION

We have argued so far that harmonisation of sexual consent law in Australia should adopt an affirmative consent model and that the content of this model should be carefully designed to mitigate the risks of harmonisation. We now turn to the practical challenges harmonisation faces. We identify four main obstacles: the influence of advocacy coalitions in this area of law; jurisdictional differences in criminal law; the fraught historical record of criminal law harmonisation; and the political disincentives to adopt uniform laws. The combination of these factors explains why criminal law harmonisation in general and sexual consent harmonisation in particular represent highly challenging projects. The obstacles are not insurmountable but they must be deliberately and carefully confronted.

Guzyal Hill previously studied 84 sets of uniform acts in Australia and identified four links between theories and the harmonisation of laws: (1) the 'incrementalism and policy cycle model', which 'explain[s] harmonisation that may take decades'; (2) the 'multiple streams framework', which 'explain[s] legislation that emerges as sustainably uniform' due to an opportunity that opens due to a combination of favourable conditions; (3) '"pragmatic federalism" solutions, such as skeletal legislation and the conferral of powers, which … [develop during] inter-jurisdictional negotiations when uniformity is required but is particularly difficult to achieve'; and (4) 'the "advocacy coalition" framework, which … explains situations where jurisdictions hold firm views about retaining diversity'.[66] In what follows, we rely particularly on advocacy coalition theory to analyse and evaluate the obstacles and prospects for sexual consent harmonisation. We also offer recommendations on the most promising route to overcome the challenges in this area.

A *Obstacle 1: Strong Advocacy Coalitions*

While legislation can suffer from inertia in general,[67] criminal laws and especially sexual consent laws have proved particularly recalcitrant. What is behind this resolute resistance to change? Hill has described a model for achieving harmonisation in Australia and identified three methods for achieving uniformity and one scenario when uniformity is unachievable.[68] Similarly, Rosalind Dixon

66 Guzyal Hill, 'Categories of the "Art of the Impossible": Achieving Sustainable Uniformity in Harmonised Legislation in the Australian Federation' (2020) 48(3) *Federal Law Review* 350, 350 ('Categories of the "Art of the Impossible"'). See also Guzyal Hill, 'Untapped Opportunities for the Use of Artificial Intelligence in Comparing Legislation for National Reforms' in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 215; Guzyal Hill and John Garrick, 'The Power of "National Uniform Legislation": What Is Its Rate of Proliferation and What Factors Are Driving It?' (2021) 95(4) *Australian Law Journal* 286; Guzyal Hill, 'Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation' (2019) 31(1) *Bond Law Review* 81.

67 Mirit Eyal-Cohen, 'Unintended Legislative Inertia' (2021) 55(3) *Georgia Law Review* 1193, 1193.

68 Hill, 'Categories of the "Art of the Impossible"' (n 66).

has identified two main categories of legislative inertia: priority-driven and coalition-driven inertia.[69] We argue that advocacy coalition theory can help clarify the reasons why sexual consent law has proved, until relatively recently, resistant to widespread and systematic reform. Advocacy coalitions continue to pose a formidable barrier to the push for national harmonisation in this area.

In pursuing consent law reforms, it is crucial to understand and work with the advocacy coalitions consisting of law reform bodies, police, judges, legal practitioners, legal services, government officials and other advocacy groups in each jurisdiction. These coalitions have a set of beliefs, assumptions and views based on working within the criminal law parameters in each jurisdiction that are somewhat divergent throughout Australia. These beliefs, views and assumptions are difficult to change — even new data can be perceived as reinforcing the status quo because coalitions view the world through a prism of pre-existing beliefs. Ignoring the strong advocacy coalitions might halt valuable reforms, as occurred with the *MCC* and other harmonisation reforms in criminal law.

The point made in the previous paragraph about the entrenched role of pre-existing beliefs should not be interpreted as a slight against any perspective in the debate about consent law reform. It is a general observation about advocacy coalitions, noted in the literature on that topic,[70] and applies equally to all the advocacy groups mentioned above. This observation is also supported by a body of literature in social psychology concerning how people form judgments on normative issues, including policy debates. Empirical studies by authors such as Jonathan Haidt and his collaborators have found that people tend to approach normative issues by forming initial judgments based on their existing belief systems; these may sometimes be reconsidered, but there is a tendency for people to seek post hoc rationalisations for their initial assessments, rather than revise them.[71]

Individuals such as Tame and Saxon Mullins, the complainant in the widely publicised NSW case of *R v Lazarus*,[72] as well as national bodies such as Rape and Sexual Assault Research and Advocacy ('RASARA'), are known advocates for consent law reform; there is also a variety of advocates and coalitions that safeguard the status quo and reinforce the entrenched position of fragmented regulations. It would be simplistic, however, to take a binary view of advocacy coalitions, dividing them into those who favour reform and those who oppose it. To start with, pro-reform groups may not necessarily be pro-harmonisation;

69 Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38(6) *Cardozo Law Review* 2193, 2209–10.

70 Paul A Sabatier, 'Policy Change over a Decade or More' in Paul A Sabatier and Hank C Jenkins-Smith (eds), *Policy Change and Learning: An Advocacy Coalition Approach* (Westview Press, 1993) 13, 36 ('Policy Change').

71 See, eg, Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108(4) *Psychological Review* 814; Jonathan Haidt, '"Dialogue between My Head and My Heart": Affective Influences on Moral Judgment' (2002) 13(1) *Psychological Inquiry* 54; Jonathan Haidt, 'The New Synthesis in Moral Psychology' (2007) 316(5827) *Science* 998.

72 (2017) 270 A Crim R 378 ('*Lazarus*').

RASARA, for example, has so far refrained from endorsing Tame's push for uniform laws. At a deeper level, however, it is the entrenched positioning of advocacy coalitions on all sides of the issue that poses a challenge for securing reforms. Governments must strike a difficult balance in engaging these diverse groups and appearing to hear their viewpoints without seeming beholden to specific interests. This task is made more complex due to the different strategies employed by these stakeholders: some prefer to engage in public advocacy and media work, while others rely on informal networks and lobby behind the scenes.

The role of advocacy coalitions is aptly illustrated by the events surrounding the QLRC's 2020 report into sexual consent and the mistake of fact excuse. The 295-page report provided five recommendations and stated that the Commission did not otherwise 'consider that section 348 should be amended to give effect to an "affirmative consent" model'.[73] The overall approach of the QLRC was to preserve the status quo: '[t]he interests of justice are best served by maintaining the status quo, which in the Commission's view strikes the right balance between the rights of the individual and the wider interests of the community.'[74] This followed trenchant opposition to change from the Queensland Law Society and Bar Association, both of which publicly advocated against the need for reform.[75] Commentators observed that the QLRC's amendments did not make any substantive legal changes; rather, they codified principles established in Queensland case law.[76]

The QLRC report was endorsed by the Queensland Labor government and its proposed reforms enacted into law.[77] An amendment moved by Amy MacMahon MLA of the Greens, drafted by academics and advocates Jonathan Crowe, Asher Flynn and Bri Lee, which would have implemented an affirmative consent model, was voted down by the government and opposition parties.[78] The Attorney-General, Shannon Fentiman, criticised the amendment for not being accompanied by a statement of compatibility under the *Human Rights Act 2019* (Qld),[79] echoing the contentions of critics of affirmative consent who argue it undermines the

73 Queensland Law Reform Commission (n 52) v.

74 Ibid 179–80.

75 Queensland Law Society, 'QLS Opposes Changes to 120-Year-Old Sexual Consent Laws' (Media Release, 3 September 2019) <https://www.qls.com.au/Media-releases/2019/QLS-opposes-change-to-120-year-old-sexual-consent->; Rebecca Treston, 'Need for Balance Amid Calls to Get Tough on Crime' (Media Release, 8 July 2019) <https://qldbar.asn.au/baq/v1/viewDocument?documentId=839>.

76 Crowe, 'Queensland Rape Law "Loophole"' (n 34); Jonathan Crowe et al, Submission to Women's Safety and Justice Taskforce, Parliament of Queensland, *Mistake of Fact Excuse in Queensland Rape and Sexual Assault Law* (13 December 2021).

77 *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld).

78 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 2021, 882–5 (Shannon Fentiman and Melissa MacMahon). Further information regarding the drafting of the amendments is contained in personal email correspondence on file with the authors.

79 Ibid 885 (Shannon Fentiman).

human rights of defendants.[80] The Queensland government evidently was unable or unwilling to support more ambitious reforms in the face of a conservative QLRC report and opposition from legal professional bodies. This illustrates how legislative inertia 'creates an extensive barrier for statutory action because upholding legislative action is more time-consuming and politically costly than inaction'.[81]

The story of sexual consent law reform in Queensland may yet have a different ending with the recent release of the report of the Women's Safety and Justice Taskforce. The Taskforce, which was established shortly after the QLRC report was handed down, recommended the adoption of an affirmative consent standard.[82] This recommendation, however, was not unanimous, with two Taskforce members filing a dissenting statement on this issue.[83] The Taskforce observed:

> Legal stakeholders … strongly supported the methodology, findings and recommendations of the QLRC Report and the retention of the status quo, opposing any kind of reform of the law on consent and mistake of fact. … Their strong view that the law should not be changed at all, however, is in stark contrast with almost every other stakeholder group. Almost all other stakeholder groups … supported legislative change that reflects a more affirmative model of consent. Some submissions were highly critical of the QLRC's approach to its review …[84]

These comments further illustrate the difficulties of achieving legal reform in the face of entrenched positioning by advocacy bodies. Coalitions opposed to change may succeed in maintaining the status quo for significant periods even in the face of strong support for change from other key stakeholders. The existence of diverse groups with different interests and viewpoints risks entrenching legislative inertia. A somewhat different story emerges from the NSW Law Reform Commission ('NSWLRC') review that was prompted after Mullins (the complainant in *Lazarus*) appeared on the *Four Corners* television program.[85] The defendant in the case, Luke Lazarus, was initially found guilty of sexual assault following a jury trial; however, the conviction was overturned on appeal.[86] He was then tried a second time before a single judge and acquitted.[87] In the acquittal, Tupman DCJ accepted that Mullins had not consented to the sexual activity but found that the

80 See, eg, Dyer, 'Progressive Punitiveness in Queensland' (n 33).

81 Eyal-Cohen (n 67) 1270.

82 Women's Safety and Justice Taskforce (n 57) ch 2.7.

83 Ibid 214, 222–4.

84 Ibid 207.

85 'I Am That Girl', *Four Corners* (Australian Broadcasting Corporation, 7 May 2018) <https://www.abc.net.au/news/2018-05-08/i-am-that-girl/9736126>.

86 *Lazarus v The Queen* [2016] NSWCCA 52.

87 *Lazarus* (n 72) 381 [8], discussing *R v Lazarus* (District Court of New South Wales, Tupman DCJ, 4 May 2017).

accused held a genuine and reasonable, albeit mistaken, belief that she had.[88] The acquittal was upheld on appeal because it was deemed that a retrial would 'give rise to oppression and unfairness'.[89]

The NSWLRC's report provided substantial consideration of affirmative consent but fell short of recommending it. However, the NSW Liberal government went further than the NSWLRC's recommendations: the Attorney-General, Mark Speakman, 'presented reforms that go beyond the Law Reform Commission's recommendations and, if enacted, would legislate affirmative consent in NSW'.[90] Thus, it was not the recommendations of the NSWLRC but a political decision resulting from public pressure and high-profile advocacy that led to the adoption of affirmative consent laws in NSW. This was an exceptional circumstance owing a great deal to the persistent, articulate and persuasive advocacy of Mullins and her supporters. Queensland, by contrast, did not initially reach a similar outcome despite advocacy for change by high profile figures such as author and sexual violence survivor Bri Lee preceding the referral to the QLRC.[91]

Advocacy coalitions theory 'was developed to study complex, enduring public policy processes involving multiple actors'.[92] Advocacy coalitions include interest groups, administrative agencies and legislative committees at various levels of government, as well as journalists, advocates, researchers and many others who

88 *Lazarus* (n 72) 399–400 [110] (Bellew J), quoting *R v Lazarus* (District Court of New South Wales, Tupman DCJ, 4 May 2017) 73.

89 *Lazarus* (n 72) 411 [168] (Bellew J).

90 Rachael Burgin, 'NSW Adopts Affirmative Consent in Sexual Assault Laws. What Does This Mean?', *The Conversation* (online, 25 May 2021) <https://theconversation.com/nsw-adopts-affirmative-consent-in-sexual-assault-laws-what-does-this-mean-161497> ('NSW Adopts Affirmative Consent in Sexual Assault Laws').

91 Lee's advocacy with legal academic Jonathan Crowe was featured widely in media reports prior to the referral: see, eg, Nina Funnell, 'Queensland Is Australia's Worst State for Sexual Abuse Survivors to Find Justice', *The Courier-Mail* (online, 13 December 2018) <https://www.couriermail.com.au/news/national/queensland-is-australias-worst-state-for-sexual-abuse-survivors-to-find-justice/news-story/78709cd641121410a57e27c266cb33d3>; Bri Lee, 'If You've Been Abused As a Child, Queensland Is the Unluckiest State to Be in', *The Guardian* (online, 13 December 2018) <https://www.theguardian.com/commentisfree/2018/dec/13/if-youve-been-abused-as-a-child-queensland-is-the-unluckiest-state-to-be-in>; Hayley Gleeson, 'Mistake of Fact Defence: The Legal Loophole Stopping Queensland Rape Complainants from Getting Justice', *ABC News* (online, 13 May 2019) <https://www.abc.net.au/news/2019-05-13/bri-lee-mistake-of-fact-campaign-queensland-sexual-consent/11095306>; Ben Smee, 'Campaign for Change Puts Queensland's Rape Laws under the Spotlight', *The Guardian* (online, 24 May 2019) <https://www.theguardian.com/world/2019/may/24/queensland-rape-laws-under-the-spotlight-police-courts>; Natasha Bita, 'Sex Assault Survivor Slams State Government over Rape Defence Review', *The Courier-Mail* (online, 5 June 2019) <https://www.couriermail.com.au/news/queensland/sex-assault-survivor-slams-state-government-over-rape-defence-review/news-story/dd5c85e3b7782ac848e74a1534b45f80?btr=123daa7950b8fc7d3fdbba748c89fe6e>.

92 Bethany Stich and Chad R Miller, 'Using the Advocacy Coalition Framework to Understand Freight Transportation Policy Change' (2008) 13(1) *Public Works Management and Policy* 62, 62.

influence policy processes.[93] Paul Sabatier identified that they consist of 'actors from a variety of [governmental] and private organizations' at different levels of government who share a set of policy beliefs and seek to realize them by influencing the behaviour of multiple governmental institutions over time.[94] The central proposition is that actors, including public servants, 'always perceive the world through a lens consisting of their preexisting beliefs'.[95]

On the individual level, these beliefs can be divided into three categories. The first is 'core' beliefs which are fundamental beliefs that are unlikely to change (such as religious or political conversion) but are too broad to guide detailed policies (such as one's views on human nature). These are 'largely normative issues inculturated in childhood and largely impervious to empirical evidence'.[96] The second is 'policy core' beliefs which are more specific but are still unlikely to change. The third is 'secondary aspects' beliefs relating to implementing policies. These are the most likely to change when people learn about the effects of, for example, regulations versus economic incentives. Based on these three categories of beliefs, policymakers explain reality using 'selective perception and partisan analysis'.[97] Paul Cairney has defined these belief systems as a 'complex mix of theories about how the world works, [and] how it should work'.[98]

Advocacy coalitions may be vocal or not, but they typically work by 'romanticiz[ing] their own cause and demoniz[ing] their opponents'.[99] The advocacy coalition framework model has been applied to study changes in the United Kingdom's domestic violence policy between 1975 and 1995,[100] the rise and stall of prison privatisation in the USA[101] and freight transportation policy changes.[102] In sexual consent law reforms, advocacy coalitions favouring change may often rely on individual survivor stories to present an emotionally charged narrative around the need for reform.[103] Advocacy groups opposing change, on the

93 Hank C Jenkins-Smith and Paul A Sabatier, 'Evaluating the Advocacy Coalition Framework' (1994) 14(2) *Journal of Public Policy* 175, 179.

94 Sabatier, 'Policy Change' (n 70) 17. See also at 18.

95 Paul A Sabatier, 'The Advocacy Coalition Framework: Revisions and Relevance for Europe' (1998) 5(1) *Journal of European Public Policy* 98, 109.

96 Sabatier, 'Policy Change' (n 70) 36.

97 Ibid 34.

98 Paul Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan, 2012) 204.

99 Paul Cairney and Tanya Heikkila, 'A Comparison of Theories of the Policy Process' in Paul A Sabatier and Christopher M Weible (eds), *Theories of the Policy Process* (Westview Press, 3rd ed, 2014) 370.

100 Stefania Abrar, Joni Lovenduski and Helen Margetts, 'Feminist Ideas and Domestic Violence Policy Change' (2000) 48(2) *Political Studies* 239.

101 Richard F Culp, 'The Rise and Stall of Prison Privatization: An Integration of Policy Analysis Perspectives' (2005) 16(4) *Criminal Justice Policy Review* 412.

102 Stich and Miller (n 92).

103 See, eg, above n 91.

other hand, can disregard or denigrate an advocate deemed too emotional or unruly (as Tame experienced) or reiterate the dangers of rapid or untested reforms to the criminal law, seeking to associate the existing law with traditional principles of the criminal justice process.[104] Homogenous belief systems ensure stability and reinforce stasis or incremental policy changes by dominant coalition groups in the policy subsystem.[105] These contrasting strategies are therefore often sufficient to preserve the status quo.[106]

B *Obstacle 2: Jurisdictional Differences*

Any discussions about criminal law reforms in Australia must include an understanding of where criminal law sits in the federal system. Section 51 of the *Australian Constitution* does not expressly empower the Commonwealth to legislate criminal law matters. Therefore, criminal law has traditionally been the remit of the states and territories. The Commonwealth's criminal law legislation is mostly ancillary to other heads of power under s 51 of the *Australian Constitution*, with the *Crimes Act 1914* (Cth) regulating offences against the Commonwealth. The states have a plenary power to pass criminal legislation; however, under s 109 of the *Australian Constitution*, if a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails.[107] In criminal law, this provision was utilised when the Commonwealth overrode sodomy laws in Tasmania through the *Human Rights (Sexual Conduct) Act 1994* (Cth). The federal framework has only been considerably expanded once using s 51(xxxvii) of the *Australian Constitution* (referral of legislative power from the states to the Commonwealth), with the major addition of counterterrorism legislation.[108] Therefore, the definitions of consent and rape arise in the context of state and territory laws.

The divergence between the rape laws among the state and territories begins with the names of the offences themselves. The crime of engaging in sexual intercourse without consent is labelled 'sexual assault' in NSW;[109] 'rape' in Victoria, Queensland, SA and Tasmania;[110] 'sexual intercourse without consent' in the ACT

104 See, eg, Gurnham (n 33); Dyer, 'Progressive Punitiveness in Queensland' (n 33); Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns' (2010) 36(1) *Signs: Journal of Women in Culture and Society* 45.

105 Hank C Jenkins-Smith et al, 'The Advocacy Coalition Framework: An Overview of the Research Program' in Christopher M Weible and Paul A Sabatier (eds), *Theories of the Policy Process* (Routledge, 4th ed, 2018) 135.

106 Again, we take no position here on the merits of these respective strategies or arguments. Our point is rather that the entrenched positions of advocacy coalitions of all stripes can create an obstacle to change and therefore tend to favour the existing law.

107 For an overview, see Jonathan Crowe, *Australian Constitutional Law: Principles in Movement* (Oxford University Press, 2022) ch 7.

108 See above n 11.

109 *NSW Crimes Act* (n 25) s 61I.

110 *Qld Criminal Code* (n 25) s 349; *SA Crimes Act* (n 25) s 48; *Tas Criminal Code* (n 25) s 185; *Vic Crimes Act* (n 25) s 38.

and 'sexual intercourse and gross indecency without consent' in the NT;[111] and 'sexual penetration without consent' in WA.[112] The jurisdictions further extend their discrepancies in describing the actus reus of the crime of rape. The NT, SA, the ACT and Tasmania identify rape as sexual intercourse without consent.[113] Conversely, Victoria, WA and Queensland define it as sexual penetration without consent.[114] These terminological differences overlay substantial agreement on the actus reus across jurisdictions, leading to unnecessary confusion. This bolsters the case for harmonisation, but at the same time illustrates the difficulty in attaining consensus even at the relatively shallow level of terminology.

The absence of consent is an 'essential element of sexual offences in Australian law'.[115] All jurisdictions require the prosecution to establish beyond a reasonable doubt that the accused engaged in sexual intercourse *without* consent. Queensland and WA require that consent be 'freely and voluntarily given',[116] SA and NSW state a person must 'freely and voluntarily [agree]' to the sexual activity,[117] Tasmania and Victoria assert that consent must be a 'free agreement',[118] and the NT states that consent should be a 'free and voluntary agreement'.[119] Each state and territory provides a legislative list of circumstances that will vitiate consent to sex for legal purposes, but these differ between jurisdictions. For example, the types of fraud recognised as vitiating consent range from any material fraud (WA, Tasmania and the ACT) to only mistakes concerning identity and the sexual nature or purpose of the act (SA, Victoria and the NT).[120] Jurisdictions also differ in the extent to which they implement an affirmative consent model. Section 2A(2)(a) of the *Criminal Code Act 1924* (Tas) provides that a 'person does not freely agree to an act' if they do not 'say or do anything to communicate consent' and s 36(2)(l) of the *Crimes Act 1958* (Vic) states that consent does not exist where 'the person

111 *ACT Crimes Act* (n 25) s 54; *NT Criminal Code* (n 25) s 192.

112 *WA Criminal Code* (n 25) s 325.

113 *ACT Crimes Act* (n 25) s 54(1); *NT Criminal Code* (n 25) s 192(3)(a); *SA Crimes Act* (n 25) ss 48(1)(a)–(b); *Tas Criminal Code* (n 25) s 185(1).

114 *Qld Criminal Code* (n 25) ss 349(2)(b)–(c); *Vic Crimes Act* (n 25) ss 38(1)(a)–(b); *WA Criminal Code* (n 25) s 325(1).

115 Brendon Murphy, 'Constructing Consent in the Australian Capital Territory' (2020) 17(1) *Canberra Law Review* 23, 23.

116 *Qld Criminal Code* (n 25) s 348(1); *WA Criminal Code* (n 25) s 319(2)(a).

117 *NSW Crimes Act* (n 25) s 61HI(1); *SA Crimes Act* (n 25) s 46(2).

118 *Tas Criminal Code* (n 25) s 2A(1); *Vic Crimes Act* (n 25) s 36(1).

119 *NT Criminal Code* (n 25) s 192(1).

120 *ACT Crimes Act* (n 25) s 67(1)(i); *NT Criminal Code* (n 25) ss 192(2)(d)–(g); *SA Crimes Act* (n 25) ss 46(3)(g)–(h); *Tas Criminal Code* (n 25) s 2A(2)(f); *Vic Crimes Act* (n 25) ss 36(2)(g)–(i); *WA Criminal Code* (n 25) s 319(2)(a). For an overview, see Jonathan Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38(4) *Criminal Law Journal* 236, 238–9.

does not say or do anything to indicate consent to the act'.[121] NSW and the ACT have now introduced similar provisions but other jurisdictions have yet to do so.[122]

We mentioned previously that Tasmania, NSW, the ACT and Victoria have now all adopted some form of affirmative consent standard. This makes such a standard the most plausible candidate for harmonisation. However, the versions of affirmative consent adopted by these jurisdictions differ significantly in their details. This can be illustrated, to take one example, by their approaches to mistaken beliefs in consent. The ACT legislation provides that a person will not have a reasonable belief in consent if they 'did not say or do anything to ascertain whether the other person consented'.[123] The NSW and Victorian laws contain a similar principle but provide qualifications and exceptions. They state that a person will not have a reasonable belief in consent if they did not say or do anything to ascertain consent 'within a reasonable time before or at the time' of sexual activity;[124] this provision does not apply where the accused person can prove they had a cognitive impairment or mental health condition that caused their failure to meet this standard.[125] Another area of difference, as noted in the previous paragraph, concerns what kinds of fraudulently induced participation in sexual activity will be deemed non-consensual.

Deep-seated differences also exist between common law and code jurisdictions.[126] NSW, the ACT, Victoria and SA are common law states, while the NT, WA, Queensland and Tasmania are code jurisdictions.[127] The common law jurisdictions adopt varying definitions of the mens rea for the crime of rape, including the prospect of the mens rea being negated if the defendant makes a genuine and reasonable mistake about the existence of consent.[128] The code states, by contrast, simply define rape as sexual intercourse without free and voluntary consent, without any mental element.[129] However, mistakes about consent may be exculpatory due to the mistake of fact excuse, which provides that a person who makes an honest and reasonable mistake about a matter of fact will not be liable to

121 See also *Jury Directions Act 2015* (Vic) s 46(3)(a).

122 *ACT Crimes Act* (n 25) s 50B; *NSW Crimes Act* (n 25) s 61HJ(1)(a).

123 *ACT Crimes Act* (n 25) s 67(5).

124 *NSW Crimes Act* (n 25) s 61HK(2); *JLASO Act* (n 30) s 8.

125 *NSW Crimes Act* (n 25) s 61HK(3); *JLASO Act* (n 30) s 8.

126 Thomas Crofts, 'Rape, the Mental Element and Consistency in the Codes' (2007) 7(1) *Queensland University of Technology Law and Justice Journal* 1.

127 Stella Tarrant, 'Building Bridges in Australian Criminal Law: Codification and the Common Law' (2013) 39(3) *Monash University Law Review* 838, 838.

128 *ACT Crimes Act* (n 25) ss 54(1), (3); *NSW Crimes Act* (n 25) s 61HK; *Vic Crimes Act* (n 25) s 38(1)(c). The position in South Australia (*SA Crimes Act* ss 47–8) is discussed further in n 41 above.

129 *NT Criminal Code* (n 25) s 192(1); *Qld Criminal Code* (n 25) s 348(1); *Tas Criminal Code* (n 25) s 2A(1); *WA Criminal Code* (n 25) s 319(2)(a).

a greater extent than if the mistaken belief had been true.[130] This difference means that, while broadly similar principles of criminal responsibility apply across the jurisdictions, drafting uniform legislative amendments is far from a straightforward matter.

The divergent definitions of the crime of rape and the central concept of consent are reinforced by differences between penalties. Queensland, SA and the NT penalise perpetrators with a maximum sentence of life imprisonment,[131] whereas Victoria provides a maximum penalty of 25 years,[132] Tasmania follows with 21 years,[133] and WA and NSW cap it at 14 years.[134] The ACT has the lowest maximum penalty, with rapists facing sentences of 12 years.[135] These jurisdictional variations underscore the difficulties posed by harmonisation in this area. These include the complexity of agreeing on a common model that all jurisdictions can adopt, as well as the challenge of drafting uniform amendments that dovetail with the varying approaches to criminal law legislation that have long persisted in the states and territories.

C *Obstacle 3: Historical Difficulties*

The history of criminal law harmonisation in Australia is not encouraging. One of the most prominent examples of national uniform legislation in criminal law was the attempt to introduce the *MCC*, which was 'intended to be a Code for all Australian jurisdictions'.[136] In the 1990s, the *MCC* represented 'a high point of faith in the value and possibility of systematising, rationalising and modernising criminal law'.[137] As John Devereux observes:

> The *Criminal Code Act 1995* (Cth), which commenced on 1 January 1997, implemented some recommendations of the Model Criminal Code Officers Committee. In particular, the Code included Chapter II, which, for the first time, provided a uniform set of criminal responsibility rules which would apply to all federal criminal trials, no matter where held.[138]

130 *NT Criminal Code* (n 25) ss 32, 43AW; *Qld Criminal Code* (n 25) s 24; *Tas Criminal Code* (n 25) ss 14–14A; *WA Criminal Code* (n 25) s 24. For discussion, see Crowe and Lee (n 7); Burgin and Crowe (n 7).

131 *NT Criminal Code* (n 25) s 192(3); *Qld Criminal Code* (n 25) s 349(1); *SA Crimes Act* (n 25) s 48(1).

132 *Vic Crimes Act* (n 25) s 38(2).

133 *Tas Criminal Code* (n 25) s 389.

134 *NSW Crimes Act* (n 25) s 61I; *WA Criminal Code* (n 25) s 325(1).

135 *ACT Crimes Act* (n 25) s 54(1).

136 Loughnan (n 3) 8.

137 Ibid 9.

138 JA Devereux, 'Callinan, the Constitution and Criminal Law: A Decade of Pragmatism' (2008) 27(1) *University of Queensland Law Journal* 71, 78.

The *MCC* took the form of mirror legislation that is partially uniform in an attempt to accommodate the jurisdictional differences discussed in the previous section. However, the *MCC* has so far failed to win many adherents, having only been implemented by the Commonwealth, the ACT and the NT.[139]

The *MCC* was provided by the Standing Committee of Attorneys-General (predecessor of the Meeting of Attorneys-General)[140] to harmonise the key concept of criminal responsibility by codifying the 'best practice basic criminal law provisions'.[141] The *MCC* was intended to represent 'ideal law', 'devoid as much as possible of local, parochial, political considerations'.[142] In contrast with consent law reforms, the Commonwealth considered the *MCC* 'remarkably uncontentious'.[143] However, the Code's over-reliance on reforming criminal law through codification, similar to the *Model Penal Code* in the United States, was probably one reason for the lack of implementation in common law jurisdictions (NSW, Victoria and SA).[144] As Arlie Loughnan argued, it was partly 'because the mode of reform of the criminal law as a code was taken for granted that greater attention was not given to principles of interpretation' that would apply under the *MCC*.[145]

Loughnan further argued that the *MCC* 'oriented the principles of criminal responsibility around subjective fault', a 'top-down' approach to drafting, '[t]he language of physical and fault elements (rather than the language of the existing criminal codes of will, accident and chance), and the embrace of subjectivism'; thus, rejecting the 'principles of criminal responsibility as they applied in the Australian code jurisdictions'.[146] This disappointed lawyers from the code states: a critic of the reforms stated that the *MCC* opted for 'systematic subjectivism'.[147] The jurisdictional divergences mentioned earlier are therefore one source of the historical difficulties that have arisen in this area, spawning accusations of

139 *Criminal Code Act 1995* (Cth); *Criminal Code 2002* (ACT); *NT Criminal Code* (n 25) pt IIAA. See also Loughnan (n 3) 19.

140 Loughnan (n 3) 10.

141 MR Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26(3) *Criminal Law Journal* 152, 163.

142 Graeme Scott, 'A Model Criminal Code' (1992) 16(5) *Criminal Law Journal* 350, 351.

143 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1995, 1348 (Daryl Williams).

144 Loughnan (n 3) 11.

145 Ibid 12.

146 Ibid 15, citing Eric Colvin, 'Unity and Diversity in Australian Criminal Law: A Comment on the Draft Commonwealth Code' (1991) 15(2) *Criminal Law Journal* 82.

147 Loughnan (n 3) 16, quoting Colvin (n 146) 85.

'parochial codiphobia'[148] by proponents of harmonisations and accusations of excessive centralisation and lack of consultation by the other.[149]

Similar resistance to harmonisation was encountered when the following sets of uniform acts were drafted and implemented as low-uniformity mirror legislation: a DNA database, forensic procedures, child protection (offender prohibition orders) and child protection (offender registration).[150] The single exception to the inertia of criminal law harmonisation is counterterrorism legislation, which was implemented in the most rigid, referred structure and is an example of the most uniform approach to Australian criminal law.[151] The Australian government commissioned the then secretary of the Attorney-General's Department, Robert Cornall, to lead a review of counterterrorism arrangements in the wake of the September 11 attacks to ensure that Australia had sufficient capability to respond to a terrorist threat.[152] The event changed the long-held views of the advocacy coalitions interested for various reasons in retaining the status quo.

As observed in the literature studying advocacy coalitions, '[e]xternal shocks can foster change in a subsystem by shifting and augmenting resources, tipping the power of coalitions, and changing beliefs'.[153] Shocks are 'necessary, but not sufficient' to cause changes in the policy core attributes of a governmental program.[154] An external event will not cause subsystem changes unless at least one coalition has the skill to exploit its new opportunity.[155] A significant shock such as a terrorist attack is unlikely to occur in the area of sexual consent laws, although the 2021 March 4 Justice, prompted by several high profile incidents of sexual assault and harassment (including some perpetrated within the Australian Parliament), had some of the characteristics of an external shock.

The March 4 Justice included events in 40 cities across Australia, with an estimated 110,000 people attending, including politicians from major parties.[156]

148 Bronitt (n 12) 141.

149 The beliefs are so persistent that they almost carry the nature of tradition: Martin Painter and B Guy Peters, 'The Analysis of Administrative Traditions' in Martin Painter and B Guy Peters (eds), *Tradition and Public Administration* (Palgrave Macmillan, 2010) 3.

150 Hill, 'Prospects of Harmonisation?' (n 13) 282–4.

151 See above n 11.

152 Attorney-General (Cth), 'Upgrading Australia's Counter-Terrorism Capabilities' (News Release 1080, 18 December 2001).

153 Weible, Sabatier and McQueen (n 15) 124.

154 Ibid 128.

155 Ibid, citing Carl F Ameringer, 'Federal Antitrust Policy and Physician Discontent: Defining Moments in the Struggle for Congressional Relief' (2002) 27(4) *Journal of Health Politics, Policy and Law* 543.

156 Alicia Nally, 'Women's March 4 Justice: Thousands March at Rallies around Australia to Protest against Gendered Violence', *ABC News* (online, 15 March 2021) <https://www.abc.net.au/news/2021-03-15/live-blog-canberra-women-march-4-justice-sexual-assault/13246896>; Matilda Boseley, 'Women's March 4 Justice: Brittany Higgins Addresses Canberra Protest as Crowds Mass in Sydney and Melbourne — As It Happened', *The Guardian*

Harmonising consent laws was not one of the demands of the March. The main demands included: (1) safety of all women with First Nations women being the priority; (2) safety at work and at home; (3) the 'real action to end gendered violence and promote gender equality across Australia'; and (4) national criminal justice reform.[157] The March 4 Justice was an unprecedented event, but was still not sufficient to produce genuine impetus for nationwide legal reforms.

A powerful enough shock to ensure consent laws are harmonised is unlikely to occur in the national arena. What is more probable is the occurrence of high-profile cases at a state or territory level that can be brought to the forefront of public scrutiny by journalists. This occurred in NSW through the advocacy of Mullins, who was substantially responsible for driving the adoption of an affirmative consent model in that state.[158] Numerous media reports in Queensland also drew attention to cases where the current rape law appeared to have failed complainants,[159] but these were insufficient to overcome the conservatism exemplified in the QLRC report. Even where they have a meaningful impact, these types of case studies are more likely to drive local reforms than spark national harmonisation.

(online, 15 March 2021) <https://www.theguardian.com/australia-news/live/2021/mar/15/march-4-justice-live-updates-melbourne-sydney-canberra-womens-march4justice-protests-parliament-house-brisbane-newcastle-hobart-latest-news>; Shaimaa Khalil, 'Australia March 4 Justice: Thousands March against Sexual Assault', *BBC News* (online, 15 March 2021) <https://www.bbc.com/news/world-australia-56397170>; Rachel Pannett, 'Women March for Justice in Australia as Rape Claims Hit Highest Levels of Office', *The Washington Post* (online, 15 March 2021) <https://www.washingtonpost.com/world/asia_pacific/australia-women-protests-march-justice/2021/03/15/2b685fdc-8536-11eb-be4a-24b89f616f2c_story.html>.

157 'FAQs', *March4Justice* (Web Page), archived at <https://web.archive.org/web/20240308053243/https://www.march4justice.org.au/about/faq/>.

158 Burgin, 'NSW Adopts Affirmative Consent in Sexual Assault Laws' (n 90).

159 These include the media reports cited above at n 91. For further examples, see Alexandria Utting and Sarah Vogler, '"Rapists Walk Free": LNP Pushes for Reform of "Archaic" Sexual Consent Laws', *The Courier Mail* (Brisbane, 6 July 2019) 6; Natalie Wolfe, 'Gold Coast Mum's Rape Case Dropped by Police after Man Uses Mistake of Fact Defence', *News.com.au* (online, 12 July 2019) <https://www.news.com.au/national/queensland/news/gold-coast-mums-rape-case-dropped-by-police-after-man-uses-mistake-of-fact-defence/news-story/8c4faedcd12e5c91526cfc9b52440275>; Madeline Hislop, 'Archaic Rape Defence "Loophole" to Come under Review in Queensland', *Women's Agenda* (online, 9 July 2019) <https://womensagenda.com.au/latest/archaic-rape-defence-loophole-to-come-under-review-in-queensland/>; Natalie Wolfe, 'The Few Seconds and Hair Touch that Let a Rapist Go Free', *News.com.au* (online, 10 July 2019) <https://www.news.com.au/national/queensland/courts-law/the-few-seconds-and-hair-touch-that-let-a-rapist-go-free/news-story/ceecea73968b729569d376b5523ef3df>; Nicole Precel and Eleanor Marsh, 'Sexual Consent: Why "No" Is Not Enough in Some States', *The Sydney Morning Herald* (online, 3 April 2021) <https://www.smh.com.au/national/sexual-consent-why-no-is-not-enough-in-some-states-20190805-p52e1p.html>; Leanne Edmistone, 'Battered by Twin Traumas: When Rape Victims Say the Anguish They Suffer from the Legal System Is Almost as Bad as the Crime Itself, Something Needs to Be Done', *The Courier Mail* (Brisbane, 13 July 2019) 12–14; Ann Wason-Moore, 'Lawyer's Bid to Overturn Get-Out-of-Jail Rape Rule', *Gold Coast Bulletin* (Southport, 11 January 2020) 34–5.

D *Obstacle 4: Political Disincentives*

Criminal law is a traditional political field full of established and developing advocacy coalitions. Over the years, the 'politicisation of the criminal law and criminal justice policy at all levels of government has only amplified'.[160] In these circumstances, the reasons for delayed amendments to rape laws has become apparent. The area has suffered from 'harmonisation inertia' in which jurisdictions have chosen to avoid or delay actions for an extended period rather than antagonising groups that benefit from the status quo.[161] In political terms,

> [i]f party members or factions are divided on an issue, this can mean that legislative party leaders have an interest in keeping an issue off the legislative agenda — even in the face of clear demands for legal change from the broader constitutional culture.[162]

In other words, the ministers, who are also legislators, 'do not want to risk alienating more constituents than they befriend by opining on controversial questions'.[163]

A dividing line is the balance between the human rights of accused persons and victims. Under Article 14 of the *International Covenant on Civil and Political Rights*, every accused person has the right to a fair trial — that is, every person is 'equal before the courts and tribunals' and has the right to a 'fair and public hearing by a competent, independent and impartial' court or tribunal established by law.[164] All victims possess the right to dignity and equal treatment under the *International Covenant on Civil and Political Rights*, *Universal Declaration of Human Rights* and *International Covenant on Economic, Social and Cultural Rights*.[165] Based on the European Court of Human Rights' decisions, the right to dignity is linked to the 'respect due to every person solely by virtue of belonging to the human race and because of the equality of all human beings'.[166] However, reforms to rape law

160 Loughnan (n 3) 19.

161 John Armstrong and Sheldon Kamieniecki considered institutional inertia in relation to climate change legislation, but it can also be applied to legislation in other areas — in this case, defamation: John H Armstrong and Sheldon Kamieniecki, 'Strategic Adaptive Governance and Climate Change: Policymaking during Extreme Political Upheaval' (2017) 9(7) *Sustainability* 1244.

162 Dixon (n 69) 2210, citing Mark A Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary' (1993) 7(1) *Studies in American Political Development* 35, 40 and FL Morton, 'Dialogue or Monologue?' in Paul Howe and Peter H Russell (eds), *Judicial Power and Canadian Democracy* (McGill-Queen's University Press, 2001) 111, 115.

163 Eyal-Cohen (n 67) 1207, citing Richard Pierce, 'Institutional Aspects of Tort Reform' (1985) 73(3) *California Law Review* 917, 919.

164 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

165 Ibid; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

166 Beate Rudolf and Andrea Eriksson, 'Women's Rights under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence' (2007) 5(3)

may be presented, particularly by opponents of reform, as involving a conflict of rights, creating a situation where governments are reluctant to advocate widespread change.[167]

Our point here is not to adjudicate the claim that consent law reform involves a conflict of rights. It clearly does involve, at the least, a conflict of *interests*, since complainants and prosecutors have an interest in securing convictions and accused persons have an interest in not being convicted. The question of whether this tension implicates a conflict of *rights* depends on whether and to what extent the interests in question are normatively protected;[168] this is, to some extent, exactly what is at issue in debates surrounding reform. Our claim, for present purposes, is not that rights-claims in this context are correct or incorrect, but that appeals to rights create a political disincentive to undertake reforms. Rights talk tends to exacerbate entrenched positions, since it ties those positions to the entitlements of specific people or groups, raising the spectre of rights violations. This feature of rights discourse has been widely discussed, forming a centrepiece of philosophical critiques of rights advanced by theorists such as Alasdair MacIntyre.[169]

The Australian criminal law system inherently protects the human rights of accused persons through the presumption of innocence and the standard of proof beyond reasonable doubt in criminal proceedings. It also advances the interests of victims of crime in securing justice, but this is potentially undermined by the adversarial structure of the criminal law system, which ensures that defendants, but not victims, are personally represented in the courtroom. Advocacy coalitions resisting reform to sexual consent law have appealed to the 'traditional values' of the criminal law to reject changes seen as removing potential defence arguments.[170] Appeals have been made to the importance of the presumption of innocence and the standard of beyond reasonable doubt, even in relation to reforms that did not modify either of these standards.[171] Andrew Dyer, a vocal and persistent critic of affirmative consent, argued that proposed reforms in Queensland would violate the *Human Rights Act 2019* (Qld) in their implications for defendants' right to a fair trial.[172]

International Journal of Constitutional Law 507, 511, citing *Vo v France* [2004] VIII Eur Court HR 67, 109 [84] and *Cyprus v Turkey* (2001) IV Eur Court HR 1, 80 [309].

167 See, eg, Dyer, 'Progressive Punitiveness in Queensland' (n 33).

168 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 99-100.

169 See, eg, Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition* (University of Notre Dame Press, 1990) 164; Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Open Court Publishing Company, 1999) 114.

170 See, eg, Queensland Law Society (n 75); Treston (n 75).

171 Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 47 (Judith Jackson, Attorney-General).

172 Dyer, 'Progressive Punitiveness in Queensland' (n 33).

The persistence of rights arguments makes it risky for government or opposition parties to advocate for reform. Governments around Australia have traditionally adopted a conservative attitude to criminal law reforms, with the recent adoption of affirmative consent in NSW a striking exception. Lee has argued that the strong opposition of the Queensland Law Society to consent law reforms in that state largely explains the reluctance of a state Labor government with a female Premier and Attorney-General to push legal changes.[173] There are signs this barrier to change may be shifting with the emergence of a clear national trend, led by the south-eastern jurisdictions, towards an affirmative consent standard. However, it nonetheless represents a formidable challenge to harmonisation, which requires all jurisdictions to adopt the same model.

IV CONCLUSION

A lack of consent is a 'defining element of rape'[174] and affirmative consent is emerging as the future of this contested legal arena in Australia. However, if advocates for harmonising sexual consent laws continue their work, there will be many obstacles to overcome before this future becomes a reality for a new generation of Australians. Amendments to Australian rape laws have suffered from harmonisation inertia, in which jurisdictions have chosen to avoid or delay action for an extended period rather than antagonise the groups that benefit from the status quo.[175] This is due to the intricate balance of conflicting rights and interests of the new and existing advocacy coalitions, which can use events and policy lessons to resist uniformity for decades. Affirmative consent, as we noted previously, is being adopted by an increasing number of Australian jurisdictions, but a *uniform* affirmative consent law across the nation still seems a challenging aim.

There is no deficit of proposals or high-quality research on consent law; however, there is a persistent gap in implementing reforms. As Julia Quilter reflected, there has been a '40 year concerted effort to modernise the criminal offence of rape that has largely failed to achieve the desired transformation'.[176] This article has examined the slow pace of such reforms, focusing on the role of advocacy coalitions, which comprise law reform bodies, police, judges, government officials, legal services and legal practitioners in each jurisdiction. These advocacy coalitions that have beliefs, assumptions and views that are strongly resistant to change. Ignoring the influence of powerful advocacy coalitions is dangerous for reforms, as demonstrated by the *MCC* and other harmonisation efforts in criminal

173 Bri Lee, 'The Old Guard Preventing Reform to Consent Laws', *The Saturday Paper* (online, 15 August 2020) <https://www.thesaturdaypaper.com.au/opinion/topic/2020/08/15/the-old-guard-preventing-reform-consent-laws/159741360010278>; Bri Lee, 'Queensland Affirmative Consent Laws Follow NSW Example', *The Saturday Paper* (online, 9 July 2022) <https://www.thesaturdaypaper.com.au/news/health/2022/07/09/queensland-affirmative-consent-laws-follow-nsw-example>.

174 High (n 18) 4.

175 Armstrong and Kamieniecki (n 161) 3.

176 Quilter (n 17) 248.

law. The advocacy coalitions within different jurisdictions must be recognised and lessons from working with similar advocacy coalitions must be adopted if the current push for harmonisation of sexual consent law is to ultimately prevail.

In rape law reforms, victims' advocates tend to be more visible while the less vocal advocacy coalitions preserving the status quo or protecting the rights of accused persons exercise their main influence behind the scenes. The tensions between and among these groups actively inhibit reforms. After almost a decade of largely failed attempts to adopt and implement structural changes, the 2021 March 4 Justice exposed the painful reality of divergent rape law regimes and the ongoing plight of rape victims. This event, combined with Tame's unprecedented speech to the Meeting of Attorneys-General, led the meeting to state that the Australian government 'will lead a national discussion with state and territory governments, to develop a joint program of work to strengthen the justice response to sexual assault, sexual harassment and coercive control'.[177]

This development places sexual violence law reform, including harmonisation, on the national legislative agenda. However, history shows that this promising start may yet result in failure due to the powerful advocacy coalitions both challenging and defending the status quo. Advocacy coalitions favouring harmonisation must exploit pathways to policy change such as internal/external shocks, negotiated agreements and mobilisation efforts to promote their objectives and translate their beliefs to policy outcomes.[178] Viewing existing organisations as all belonging to diverse advocacy coalitions helps understand the gatekeeping strategies and resistance to change. This applies even to putatively independent governmental bodies such as the courts. As Rebecca Harris notes: 'If we think of judicial gatekeeping outcomes at the state supreme court level as gatekeeping policy for the jurisdiction, we can step back from the narrow question of admissibility to the broader question of policy outcomes'.[179]

This point partially explains the finding of Helen Cockburn that the adoption of affirmative consent law in Tasmania was not fully implemented at trial level due to the failure of trial judges to adapt their practices.[180] Similarly, Anthony Gray points out that if juries are not given careful direct instructions during trials, especially in Queensland, there is a grave danger of jurors falling back on personal assumptions.[181]

177 Attorney-General (Cth), 'Leading a National Approach to Justice for Victims and Survivors of Sexual Assault, Harassment and Coercive Control' (Media Release, 17 May 2021) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7965388/upload_binary/7965388.PDF;fileType=application%2Fpdf#search=%22media/pressrel/7965388%22>.

178 Jenkins-Smith et al (n 105).

179 Rebecca C Harris, *Black Robes, White Coats: The Puzzle of Judicial Policymaking and Scientific Evidence* (Rutgers University Press, 2008) 143.

180 Helen Mary Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, June 2012).

181 Anthony Gray, 'Reform to the Law of Consent: A Tale of Two States' (2022) 31(4) *Journal of Judicial Administration* 229, 245.

It is vital for advocates of change to understand and work with advocacy coalitions in each jurisdiction. We can learn here from successful reforms; for example, those that have successfully implemented law reforms in the USA regarding sexual trauma in the military. In a thorough evaluation, Patricia Harnois-Church identified eight powerful strategies that can help break through the status quo, including

> direct advocacy (cultivating relationships, putting a face on the problem, giving voice to survivors), mobilizing support (heightening public awareness, bringing pressure to bear), and engagement in the policy process (providing factual information, connecting the dots, involvement in [military sexual trauma] legislation).[182]

This analysis is arguably borne out by the groundbreaking NSW sexual consent reforms, which resulted from a convergence of direct advocacy, particularly by Mullins;[183] high profile national media reports giving rise to public pressure; and existing work over a long period by researchers and frontline workers in multiple jurisdictions to provide the evidence-base for potential reforms. Harnois-Church also identified several factors that challenge reforms, such as 'resistance to change, competing issues, [the] size of [the] agency or department, and costs', as well as '[c]hanges in administration, party control, and seniority [that] could either facilitate or impede policy change'.[184] The Queensland state election in 2020, which came shortly after the release of the QLRC report, arguably contributed to the reluctance of the government to risk political controversy by going beyond the report's reforms, as the NSW government later did in response to the NSWLRC report.

Change advocates can also learn from successful reform efforts by advocates of the domestic and family violence responses. Researchers found that continued focus (over 41 years), adaptability to changing political landscapes and policy cycle stages, consistent mobilisations, policy formulations and sharing 'information to increasingly emphasize policy implementation and evaluation' were important strategies in securing lasting reforms.[185] Advocates for harmonisation in sexual consent law can benefit from the groundwork laid by advocates and researchers over previous decades, which is reflected in the current surge of affirmative consent reforms in specific jurisdictions. However, it is necessary for advocates to consciously adopt and learn from this prior work. Sexual consent harmonisation cannot succeed in a vacuum, but must be linked to previous law reform efforts, which is one reason why it should reflect an affirmative consent model.

182 Patricia A Harnois-Church, 'The Role of Interest Groups in Shaping US Governmental Responses to Military Sexual Trauma' (PhD Dissertation, University of New Mexico, May 2019) vii.

183 See Burgin, 'NSW Adopts Affirmative Consent in Sexual Assault Laws' (n 90).

184 Ibid.

185 Kimberly Kay Wiley, 'Leveraging Political Resources: Applying the Advocacy Coalition Framework to the National Coalition against Domestic Violence' (2022) 13(1) *Nonprofit Policy Forum* 1, 1.

Criminal law harmonisation is difficult and '[t]he idea that one code might encapsulate it all and serve as a model for each Australian jurisdiction seems somewhat [u]topian'.[186] However, a uniform definition of consent for all Australian jurisdictions is not a utopian ideal. There is existing and growing support for an affirmative consent model, as well as independent reasons why harmonisation is a worthy goal. A country with a residentially mobile and largely homogenous population requires nationwide implementation of an affirmative consent standard if reforms in individual jurisdictions are to take full effect and lead to corresponding changes in social attitudes and practices. Strong advocacy coalitions must be overcome to make this objective a reality, but the current legal and political environment, including recent legislative reforms as well as political movements such as the March 4 Justice, ensures that these coalitions cannot simply ignore the case for reform. The legislative momentum for affirmative consent also makes it more difficult to argue the model is unworkable or abhorrent to the fundamental precepts of the criminal law. Sexual consent law harmonisation, then, may be an idea whose time is soon to come.

186 Loughnan (n 3) 19.