

RECKLESS RAPE IN VICTORIA

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[This article examines 'reckless' rape in light of the November 2007 amendment to s 38(2) of the Crimes Act 1958 (Vic). It distinguishes three types of recklessness — awareness that the complainant might not be consenting ('possibility recklessness'), indifference as to whether the complainant is consenting ('indifference recklessness') and failure to give any thought as to whether the complainant is consenting ('inadvertence recklessness') — and examines whether each of these is, and should be, sufficient to satisfy the fault element for rape in Victoria. In doing so, the author seeks to clarify the concept of recklessness in Victorian rape law, arguing that these types of recklessness are often inadequately distinguished. The author also expresses concern about the precise test of inadvertence recklessness adopted in Victoria and argues for explicit recognition of indifference recklessness. Finally, it is contended that possibility recklessness is more problematic than is commonly thought, although a way of alleviating the problems with this type of recklessness is suggested.]

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I INTRODUCTION

In recent years, there have been numerous calls to reform the fault element for rape in Victoria. Several options have been touted. Some commentators have suggested that the prosecution should have to show only that the accused did not *reasonably* believe that the complainant was consenting (rather than having to show that the accused was aware that the complainant was not or might not have been consenting).¹ Others have suggested that the prosecution should not have to show either of these things and that a defence should instead be created which enables the accused to avoid liability if the accused honestly and reasonably believed that the complainant was consenting.²

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¹ For example, the Violence Against Women Integrated Services, the Domestic Violence Incest Resource Centre and the Department of Human Services made submissions to the Victorian Law Reform Commission's (VLRC) recent review of sexual offences that all recommended variations on this approach: see VLRC, *Sexual Offences: Final Report* (2004) 420–1. This is now the position in the United Kingdom: see *Sexual Offences Act 2003* (UK) c 42, s 1(1)(c).

² One submission (by Nola Martin) to the VLRC review of sexual offences supported this approach: see VLRC, *Final Report*, above n 1, 420. This has long been the position in the Code jurisdictions of Australia: see *Criminal Code Act 1899* (Qld) ss 24(1), 349(2); *Criminal Code Act*

The push to change the fault element for rape in Victoria gained further momentum with the final report of the Victorian Law Reform Commission ('VLRC') on sexual offences.³ The VLRC recommended that the law be changed so that, to satisfy the fault element, the prosecution need show only that the accused intended to sexually penetrate the complainant. This would be supplemented by a new defence enabling the accused to avoid liability if they honestly believed that the complainant was consenting. The accused would have to satisfy an evidential burden before this defence could be considered by the jury and there would be circumstances in which the defence could not be made out (including where the accused did not take reasonable steps to ascertain whether the complainant was consenting).⁴

While the Victorian Parliament implemented most of the VLRC's other recommendations, it did not implement this recommendation. Indeed, it did not change the fault element in any of the ways mentioned above. Instead, in November 2007, it amended s 38(2) of the *Crimes Act 1958* (Vic) ('the Act') by creating a new way of satisfying the fault element for rape — namely, where the accused fails to give any thought to whether the complainant is not or might not be consenting.⁵ I shall argue that this is best conceived of as a type of recklessness. If this is so, Parliament responded to the calls for reform by expanding the categories of recklessness recognised in Victorian rape law.

As a result of this amendment, there are three types of recklessness that could arguably satisfy the fault element for rape in Victoria:

- (1) awareness that the complainant might not be consenting ('possibility recklessness');
- (2) indifference to whether the complainant is consenting ('indifference recklessness'); and
- (3) failure to give any thought to whether the complainant is consenting ('inadvertence recklessness').

One might baulk at the characterisation of these three states of mind as types of 'reckless rape'. In particular, one might regard 'inadvertence recklessness' as a type of *negligent* rape, since the accused is being punished for the absence of a certain state of mind (that is, for failing to consider whether the complainant is consenting), rather than for the presence of a particular state of mind (such as awareness that the complainant might not be consenting). However, 'inadvertence recklessness' is best regarded as a type of reckless rape because the focus is on the presence or absence of a particular mental state, rather than on whether the accused met a standard of reasonableness imposed by the law.⁶ More generally, while the word 'reckless' does not appear in the relevant provisions of

1924 (Tas) ss 14, 185(1); *Criminal Code Act Compilation Act 1913* (WA) ss 24, 325. The Northern Territory is an exception: see *DPP (NT) v WJI* (2004) 219 CLR 43.

³ VLRC, *Final Report*, above n 1.

⁴ This is a very brief summary of the VLRC's interesting and intricate proposal. For the full proposal, see *ibid* 421–31.

⁵ *Crimes Act 1958* (Vic) s 38(2)(a)(ii), as amended by *Crimes Amendment (Rape) Act 2007* (Vic) s 5(1). Equivalent changes were made to other sexual offences in the Act: see below Part VI.

⁶ See VLRC, *Sexual Offences: Interim Report* (2003) 340 fn 745.

the Act, 'reckless rape' is a useful label for a certain type of rape case — that is, one in which the accused was not aware that the complainant was not consenting, and yet is still liable because of the accused's state of mind at the time. This is quite different to liability being imposed for failing to meet a standard of reasonableness imposed by the law.

As Parliament has responded to the calls for reform by expanding the categories of reckless rape recognised in Victorian law, now is an opportune time to explore the topic of reckless rape. My aim in doing so is twofold. First, I seek to clarify the concept of recklessness in Victorian rape law, particularly in light of the recent amendment to s 38(2) of the Act. I argue that the three types of recklessness listed above are not always properly distinguished. For example, while inadvertence recklessness now satisfies the fault element in Victoria, it is unclear whether indifference recklessness is sufficient, precisely because Parliament did not carefully distinguish between these two states of mind. Secondly, I will assess whether — if the fault element for rape must consist of either intention or recklessness, as Parliament has effectively decided — the current law governing reckless rape is satisfactory. In other words, if there is to be no objective test in this area, should any or all of the three states of mind distinguished above be sufficient to satisfy the fault element for rape? I will argue that both indifference and inadvertence recklessness should be sufficient, although I will express some concerns about the precise test of inadvertence recklessness adopted in Victoria. I contend, however, that possibility recklessness is more problematic than is commonly thought, before suggesting a way of alleviating the problems I identify.

II SECTION 38(2) OF THE *CRIMES ACT 1958* (VIC)

First, we need to consider in more detail the recent amendment to s 38(2) of the Act. Section 38(2) now states:

A person commits rape if —

- (a) he or she intentionally sexually penetrates another person without that person's consent —
 - (i) while being aware that the person is not consenting or might not be consenting; or
 - (ii) while not giving any thought to whether the person is not consenting or might not be consenting; or
- (b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

As a result of this change, the fault element for rape differs depending on whether the physical element is satisfied by an act of sexual penetration ('sexual penetration' cases) or by a failure to withdraw from a person who is not consenting ('failure to withdraw' cases). In sexual penetration cases, there are now three ways to satisfy the fault element:

- (i) awareness that the other person is not consenting;
- (ii) awareness that the other person might not be consenting; or

(iii) not giving any thought to whether the other person is not consenting or might not be consenting.

The change is represented by (iii). Previously, only (i) or (ii) was sufficient to satisfy the fault element for rape.⁷ Now, the fault element will also be satisfied if the accused sexually penetrates the complainant without giving any thought as to whether the complainant is not, or might not be, consenting.

With reference to my taxonomy in Part I of the article, (i) is generally regarded as intentional, rather than reckless, rape, and so falls outside the scope of this article. By contrast, (ii) is possibility recklessness, while (iii) is a variant of inadvertence recklessness.⁸ Thus, before the recent change to s 38(2), possibility recklessness was the only type of recklessness that clearly satisfied the fault element for rape in Victoria; as a result of this change, a variant of inadvertence recklessness is now also sufficient in sexual penetration cases.

By contrast, the fault element in failure to withdraw cases has not been changed. It remains the case that only (i) or (ii) is sufficient to satisfy the fault element in such cases. I consider in Part III(A) below why Parliament did not change the fault element in failure to withdraw cases.

The motivation behind the change to s 38(2), as explained by the Attorney-General, was 'to clearly support the communicative model of consent.'⁹ While there is disagreement about the precise content of this model, the basic idea is that consent is not demonstrated by the absence of a refusal or physical resistance, but rather by the presence of verbal or non-verbal indications that one agrees to the sexual act.¹⁰ This is reflected in the new s 37AAA(d), which requires the judge (in an appropriate case) to direct the jury that:

the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement ...

The Attorney-General did not explain precisely how the change to s 38(2) supports the communicative model of consent. Presumably, the thought is that by requiring one to consider whether the other person is consenting before engaging in an act of sexual penetration, the new s 38(2) encourages one to communicate about whether consent exists. Showing that such communication took place is the most persuasive way of showing that one considered whether the other person was consenting.

⁷ Strictly speaking, neither (i) nor (ii) was sufficient to satisfy the fault element either before or after the change since it is also necessary that the sexual penetration was intentional. I shall not discuss this aspect of the fault element, beyond noting that it is very likely to be satisfied whenever sexual penetration occurs.

⁸ See below Part III(A) for an explanation of why I describe (iii) as a *variant* of inadvertence recklessness.

⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2859 (Rob Hulls, Attorney-General).

¹⁰ Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217. The communicative model is not without its critics: see, eg, ACT Law Reform Commission, *Report on the Laws Relating to Sexual Assault*, Report No 18 (2001) 78–9. However, I shall take as a premise of my discussion that the basic idea behind the communicative model is a sound one.

III INADVERTENCE AND INDIFFERENCE RECKLESSNESS

As a result of the recent change to s 38(2), a variant of inadvertence recklessness now satisfies the fault element for rape in sexual penetration cases. I shall consider in Part III(B) whether indifference recklessness is also sufficient. First, however, I shall consider whether inadvertence recklessness *should* satisfy the fault element for rape.

A *Inadvertence Recklessness*

In its final report into sexual offences, the VLRC stated that '[n]o accused should be acquitted just because he has completely failed to turn his mind to the question of consent.'¹¹

Similarly, in *R v Kitchener*, Kirby P stated:

To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. ... Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women.¹²

I agree. Inadvertence recklessness — that is, a failure to consider whether the complainant is consenting — should be treated as a further way of satisfying the fault element for rape, supplementing possibility recklessness. In the absence of consent, sexual activity causes great harm, and so the accused should have to take the relatively simple step of turning their mind to the issue of consent before proceeding.

In other areas of the criminal law, there may be good reasons not to treat inadvertence as amounting to recklessness. For example, Professors Andrew Simester and Robert Sullivan argue that while the inadvertent defendant may often be unworthy of sympathy (for example, if they were too intoxicated, too temperamental or too uncaring to consider the relevant risk), this will not always be the case. In some cases, the defendant may fail to advert to the risk simply because they were preoccupied or distracted — this should not be enough to render them guilty of a serious offence.¹³ Similarly, Professor Glanville Williams cites the example of someone who swings open their car door without stopping to consider that a cyclist might be riding by and could be injured as a result.¹⁴ Such a person fails to consider a genuine risk of injury, and is perhaps negligent, but should they be regarded as reckless? Williams is reluctant to answer this question in the affirmative, on the basis that our actions constantly give rise to dangers to other people and we cannot be expected consciously to contemplate each of those risks before acting.¹⁵

¹¹ VLRC, *Final Report*, above n 1, 411.

¹² (1993) 29 NSWLR 696, 697.

¹³ A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed, 2007) 137–8.

¹⁴ Glanville Williams, 'The Unresolved Problem of Recklessness' (1988) 8 *Legal Studies* 74, 82–4.

¹⁵ *Ibid* 89–90.

Whatever the merits of these arguments in other contexts, they are not persuasive in sexual penetration cases. While it may be unreasonable always to expect someone to consider the risks involved before opening a car door, it is not unreasonable always to expect someone to consider whether the other person is consenting before engaging in an act of sexual penetration. Unlike opening a car door, an act of sexual penetration is not the sort of act one performs while preoccupied or distracted. Moreover, preceding the act of sexual penetration, there should be communication between the parties (whether verbal or non-verbal), whereas communication cannot be expected in the case of opening a car door. Thus, whatever may be the case with regard to other offences, failing to give any thought to whether the complainant is consenting should be sufficient to satisfy the fault element for rape, at least in sexual penetration cases.

These concerns may, however, explain why Parliament made inadvertence recklessness sufficient to satisfy the fault element only in sexual penetration cases and not in failure to withdraw cases. Parliament may have formed the view that, while the accused should be expected to advert to whether the complainant is consenting when performing the initial act of sexual penetration, they should not be expected to continue to do so throughout the act of sexual intercourse (because, at that point, they might become preoccupied or distracted). Provided that the accused considers whether the complainant is consenting at the time of sexual penetration, and concludes that they are, then the accused is entitled to act on that conclusion without having to constantly reconsider the issue of consent.

This, however, is a problematic view. Once it is conceded that rape can occur not only in sexual penetration cases, but also in failure to withdraw cases, how can it be argued that a duty of advertence should apply only at the time of sexual penetration? The harm done to the complainant should be treated as no less serious where the absence of consent was at the time of the failure to withdraw. The accused should, therefore, be required to consider whether the complainant is still consenting after sexual penetration occurs. Whereas we might have sympathy for the person who was distracted when opening the car door as the cyclist rode by, it is difficult to have sympathy for the accused who is so distracted or preoccupied while engaging in sexual intercourse that, immediately after sexual penetration, they cease to pay any attention to whether the complainant is consenting.

However, in a failure to withdraw case, the accused must have believed that the complainant was consenting at the time of sexual penetration. Otherwise, either inadvertence or possibility recklessness would be made out *at the time of sexual penetration*, and so there would be no need to treat the case as involving a failure to withdraw. (There is one exception to this general rule, which is discussed below.) Moreover, one can continue to hold a belief without constantly thinking about the subject matter of that belief. For example, I continue to believe that the sun rises in the east even when I am not thinking about this issue. (I do not cease to hold this belief every time I think about something else.) This means that the accused can continue to believe that the complainant is consenting even if the accused does not constantly think about the issue of consent.

Therefore, assuming that inadvertence recklessness cannot be made out where the accused believes that the complainant is consenting, it is difficult to see what

role inadvertence recklessness could play in failure to withdraw cases. In such cases, the accused believes (at the time of sexual penetration) that the complainant is consenting, and the mere fact that the accused does not constantly think about the issue of consent subsequently does not show that they have ceased to hold that belief.

Of course, an accused *can* cease to believe that the complainant is consenting, after sexual penetration has occurred but before sexual intercourse is completed. If, for example, the complainant gave a positive indication that consent had been withdrawn (or simply ceased to give any sign that they were still freely agreeing to sexual intercourse), it would be difficult for the accused plausibly to claim that the accused continued to believe the complainant was consenting. However, in such a case, it is possibility — not inadvertence — recklessness that is relevant. The prosecution's argument would not be that the accused went from believing that the complainant was consenting to not adverting to the issue at all; rather, the argument would be that the accused must have realised that there was at least a possibility that the complainant was not consenting.

That said, there is no obvious downside to treating inadvertence recklessness as a way of satisfying the fault element in failure to withdraw cases.¹⁶ Indeed, there is one type of failure to withdraw case in which inadvertence recklessness could play a role — namely, where the accused did not consider the issue of consent at all, but the complainant was consenting at the time of sexual penetration and then withdrew consent before sexual intercourse was completed. In this case, the accused's inadvertence at the time of sexual penetration cannot give rise to liability because the complainant was consenting at that time. Nor is possibility recklessness made out when consent is withdrawn (because the accused continues to give no thought to the issue of consent). While such cases are likely to be rare, an accused should not escape liability for that reason. To close this loophole, inadvertence recklessness should be treated as a way of satisfying the fault element in failure to withdraw cases.

However, it might be argued that inadvertence recklessness is redundant, not only in failure to withdraw cases, but in sexual penetration cases as well. When considering the possibility that an accused might argue that the fault element is not made out because they never turned their mind to whether the complainant was consenting, Williams states:

One way of dealing with this defence would be simple incredulity. No man engaged on sexual congress (unless perhaps he is intoxicated) has a blank mind on the subject of the woman's consent. Either he believes that she is consenting, or believes that she is not, or is aware of his ignorance on the subject (and in the last case he is reckless as to consent).¹⁷

On this view, inadvertence recklessness refers to a state of mind that no-one ever has. An accused will always have an opinion as to whether the complainant is consenting, even if that opinion is 'I don't know' (which would satisfy the test

¹⁶ It might be argued that this would further complicate the law, but arguably the existing law — with a different fault element for sexual penetration and failure to withdraw cases — gives rise to greater complications.

¹⁷ Williams, above n 14, 84.

of possibility recklessness, since it displays an awareness that the complainant might not be consenting). If so, there was no need for the recent change to s 38(2), specifying that inadvertence recklessness satisfies the fault element in sexual penetration cases, and there is also no need to extend inadvertence recklessness to failure to withdraw cases.

However, it may not be true that an accused will always have a view as to whether the complainant is consenting. As Williams acknowledges, it may not be true of an intoxicated accused. Yet if the intoxicated accused was capable of acting voluntarily and of forming an intention to sexually penetrate, they should not escape liability simply because they were so drunk that they failed to consider whether the complainant was consenting.

More generally, there is something worryingly blasé about this objection. Even if we leave intoxicated defendants to one side, whether the accused turned their mind to the issue of consent is a question of psychological fact. Without a clear and unanimous finding by psychologists that no accused could ever fail to consider the issue of consent, it is undesirable for law-makers to design legal rules on the assumption that this is the case (at least in cases such as the present, where we can easily avoid prejudging the factual issue by allowing for inadvertence recklessness). Where possible, law-makers should design legal rules to deal with a broad range of findings of fact (including a possible finding that the accused failed to consider the issue of consent), rather than gambling that certain factual scenarios will never arise in practice.

Therefore, the Victorian Parliament was right to treat inadvertence recklessness as a further way of satisfying the fault element in sexual penetration cases (though it should have done the same in failure to withdraw cases). However, the precise wording of s 38(2)(a)(ii) is of concern. It refers to a person 'not giving any thought to whether the [other] person is not consenting or might not be consenting'. By contrast, I have defined inadvertence recklessness as a failure to give any thought to whether the complainant is consenting. Is this difference significant? In particular, does a requirement to consider whether the complainant *is* consenting differ in any meaningful way from a requirement to consider whether the complainant *is not* consenting?

It might be thought that the answer to these questions is 'no'. On this view, to consider whether the complainant is consenting is necessarily to consider the possibility that they might not be consenting, and so it does not matter which form the requirement takes. However, it is not clear that this view is correct. Take, for example, the following suggestive remark by Bray CJ:

a belief in consent may be formed implicitly and instantaneously and held unquestioningly, or it may be arrived at after some deliberation and canvassing of the pros and cons.¹⁸

This suggests that believing that the complainant is consenting does not necessarily involve giving any thought to whether they are not (or might not be) consenting: the accused might instantaneously form the belief that the complainant is consenting and hold that belief unquestioningly, without adverting to the

¹⁸ *R v Wozniak* (1977) 16 SASR 67, 73 ('Wozniak').

possibility that they are not consenting. If so, it may make an important difference whether the accused is required to consider if the complainant *is* consenting, or whether the accused is required to consider if the complainant *is not* (or might not be) consenting.

Thus, the first problem with s 38(2)(a)(ii) is that it is unclear if we are meant to distinguish between considering whether the complainant is consenting and considering whether they are not consenting. If we *are* meant to draw this distinction, a literal reading of the provision suggests that the latter is required. In other words, an accused must not only turn their mind to the issue of consent, and conclude that the complainant is consenting, but must also consciously advert to the alternative possibility (that the complainant is not, or might not be, consenting).¹⁹

If this is what s 38(2)(a)(ii) requires, it gives rise to a second problem. We have seen that there are valid reasons why someone seeking to engage in sexual activity should be required to consider whether the other person is consenting. Could there be good grounds for also requiring them to consciously advert to the possibility that the other person is *not* consenting? It is much easier to argue that an accused should be found guilty of rape if they did not consider the issue of consent at all than to argue that an accused should be found guilty if they believed that the complainant was consenting but did not consciously advert to the possibility that the complainant was not consenting. Many of the arguments presented at the start of this Part (such as that no accused should be acquitted simply because they completely failed to consider the issue of consent) support only the former claim, not the latter claim.

This is not to suggest that nothing can be said in favour of the latter claim. It might further support the communicative model of consent if the accused were required not only to consider whether the complainant is consenting, but also to advert to the possibility that the complainant is not consenting. Moreover, there might be thought to be something unattractive about the mindset of an accused who is so confident that the complainant is consenting that they do not give any thought to the possibility that the complainant might *not* be consenting. Nevertheless, much more would need to be said to show that such a person is deserving of punishment by the criminal law, let alone deserving of punishment for the very serious offence of rape (as opposed to, say, a new, lesser sexual offence).

B *Indifference Recklessness*

Earlier I distinguished between indifference recklessness (where the accused is indifferent to whether the complainant is consenting) and inadvertence recklessness (where the accused fails to give any thought to whether the complainant is

¹⁹ Both the second reading speech and the explanatory memorandum are silent on this point: see Victoria, *Parliamentary Debates*, above n 9, 2858 (Rob Hulls, Attorney-General); Explanatory Memorandum, Crimes Amendment (Rape) Bill 2007 (Vic). However, we shall see in Part IV that Parliament intended to render liable an accused who believed that the complainant was consenting but who was nevertheless aware of a possibility that they were not consenting. Thus, it is entirely possible that Parliament intended to render liable an accused who, in a sexual penetration case, believed that the complainant was consenting but did not advert to the possibility that they were not consenting.

consenting). Indifference and inadvertence are different states of mind. Whereas inadvertence involves a failure to consider a matter, indifference might be thought of as the absence of a preference one way or the other (in other words, not caring about a matter). However, a better characterisation of indifference in the context of rape is that the accused does not have a strong enough preference that the complainant be consenting that the accused would refrain from proceeding if they knew that the complainant was not consenting. This covers situations in which the accused has no preference one way or the other, but it also covers situations in which they would have preferred that the complainant be consenting but are willing to proceed even though they know that the complainant is not consenting. It would also cover situations in which the accused does not know that the complainant is not consenting, but would have been willing to proceed even if they did know.

Not only are indifference and inadvertence different states of mind, but one can fail to advert to a possibility without being indifferent to it, and one can be indifferent to a possibility despite advertent to it. For example, I am not indifferent to whether there is enough water in my car radiator (I have a strong preference that my car not break down), but I may not consider whether there is enough water in my radiator every time I drive my car. Conversely, I may advert to matters about which I am indifferent (such as which horse will win the Melbourne Cup this year), perhaps as a matter of idle speculation or as part of a conversation with someone who is not indifferent to such matters.

These two states of mind, however, are often conflated in rape law. For example, in the second reading speech for the Crimes Amendment (Rape) Bill 2007 (Vic), the Attorney-General stated that the Bill ‘amends the offence of rape ... to provide that inadvertence *or indifference* to the issue of consent is an alternative fault element.’²⁰ Given that s 38(2)(a)(ii) mentions only a failure to give any thought to whether the complainant is not or might not be consenting, the Attorney-General could believe that it also covers indifference recklessness only if they regarded inadvertence and indifference as identical, or at least as coextensive.

A similar conflation of inadvertence and indifference is rife throughout the judgments in *R v Kitchener*. For example, Kirby P states:

To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment’s thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrongdoing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today.²¹

The reference to ‘such total indifference’ appears to be a reference to a reckless failure to give a moment’s thought to the possibility of non-consent. However, as discussed above, the latter state of mind is one of inadvertence, not indiffer-

²⁰ Victoria, *Parliamentary Debates*, above n 9, 2858 (Rob Hulls, Attorney-General) (emphasis added).

²¹ *R v Kitchener* (1993) 29 NSWLR 696, 697.

ence.²² Similarly, Carruthers J, with whom Smart J agreed, stated that a failure to advert at all to the question of consent is to treat that question as entirely irrelevant.²³ However, the former is inadvertence, while the latter is a form of indifference, and, as demonstrated above, someone may be inadvertent without being indifferent.

This conflation of inadvertence and indifference may have unfortunate consequences in Victoria. Read literally, s 38(2)(a)(ii) treats only inadvertence — not indifference — as satisfying the fault element for rape. It refers only to a situation where the accused does not give any thought to whether the complainant is not or might not be consenting. However, it would be unfortunate if s 38(2)(a)(ii) covered only inadvertence recklessness and not indifference recklessness. It seems that Parliament intended to treat both as satisfying the fault element for rape.²⁴ Moreover, being indifferent to a risk of harm is typically a more culpable state of mind than failing to advert to that risk. In contexts other than rape, we have seen that an inadvertent defendant may simply be distracted or preoccupied; but the same is not true of an indifferent defendant. In the context of rape, it is bad enough if the accused fails to consider whether the complainant is consenting; it is even worse if the accused does not *care* whether the complainant is consenting (or would not care enough to desist if they knew that the complainant was not consenting).

The fact that Parliament appears to have intended that s 38(2)(a)(ii) cover both inadvertence and indifference recklessness might be used to support the claim that, despite its wording, the provision should be interpreted as having that effect. It is not clear, however, that this claim would be accepted by Victorian courts. On one view, evidence of legislative intention is relevant only if there is some ambiguity on the face of the statutory provision. That is not the case here. On its face, s 38(2)(a)(ii) clearly applies to inadvertence recklessness only.

Even if s 38(2)(a)(ii) was interpreted as covering both inadvertence and indifference recklessness, it applies only to sexual penetration cases. Yet the argument for extending indifference recklessness to failure to withdraw cases is even stronger than the argument for extending inadvertence recklessness to failure to withdraw cases. While it could be argued that the accused should not be expected to consciously advert to the issue of consent at every moment during sexual intercourse, it is, however, much harder to argue that the accused should escape liability when they are *indifferent* to consent at any point during sexual intercourse. All that is required here is that the accused have a strong enough preference that the complainant be consenting so that the accused would not persist if they knew that the complainant was not consenting. If an accused ceases to have that preference after sexual penetration has occurred, but before sexual intercourse is completed, the fault element for rape should be satisfied.

²² Cf *R v Tolmie* (1995) 37 NSWLR 660, 667–8, where Kirby P was more sensitive to the difference between inadvertence and indifference and noted that there is some uncertainty as to which state of mind satisfies the requirement of recklessness in New South Wales.

²³ *R v Kitchener* (1993) 29 NSWLR 696, 702, citing *R v Henning* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Gleeson CJ, Campbell and Matthews JJ, 11 May 1990) [31] (Gleeson CJ, Campbell and Matthews JJ).

²⁴ See above n 19 and accompanying text.

It could be argued that while inadvertence and indifference are not identical, in the context of rape, every case of indifference will also be a case of inadvertence. For example, the Attorney-General seems to have assumed that an accused's indifference to consent would cause them not to consider the issue of consent.²⁵ If this is *always* true (that is, if indifference to consent *inevitably* leads to a failure to advert to the issue of consent), then there is no need for a separate reference to indifference in s 38(2).

However, a test of inadvertence recklessness is unlikely to capture *all* cases of indifference recklessness (even if that test applied to both sexual penetration *and* failure to withdraw cases). Sometimes an accused's indifference to consent might lead them not to consider whether the complainant is consenting. On other occasions, however, an accused's indifference to consent might result in the accused proceeding even though they know that the complainant is not, or might not be, consenting.

Admittedly, the latter scenario falls within s 38(2)(a)(i). It might, therefore, be thought that any case of indifference recklessness that does not involve inadvertence recklessness will instead involve possibility recklessness.²⁶ On this view, we need only the two categories of recklessness explicitly allowed for under s 38(2), since any case of indifference recklessness will fall into one of those two categories.

Even if this is correct, there are still good grounds for including indifference recklessness within s 38(2). I suggested above that indifference recklessness is a culpable state of mind in its own right. Therefore, if the prosecution can prove indifference recklessness, it should automatically be able to satisfy the fault element, without having to show that the accused's state of indifference amounted to either possibility or inadvertence recklessness. Indeed, under s 38(2), in cases where the accused's state of indifference led them not to advert to the issue of consent, we have the anomalous situation where the accused's possession of a more culpable state of mind (indifference) has to be used as evidence that they possessed a less culpable state of mind (inadvertence), since the wording of the provision appears to suggest that only the latter satisfies the fault element for rape.

In fact, it is unclear whether every case of indifference recklessness will also be a case of either inadvertence or possibility recklessness. I argue in Part IV that the test for possibility recklessness may require awareness of a real (as opposed to theoretical) possibility that the complainant is not consenting. If so, an accused who is indifferent to consent might not satisfy the test of either inadvertence or possibility recklessness. They might be aware of a possibility that the complainant is not consenting (and so not be inadvertent), but being indifferent to consent might not consider whether that possibility is a real or merely theoretical one (in which case, possibility recklessness may not be made out).

²⁵ See Victoria, *Parliamentary Debates*, above n 9, 2859 (Rob Hulls, Attorney-General).

²⁶ For ease of exposition, I leave to one side the possibility that it may involve awareness that the complainant *is* not consenting.

This suggests that there is a need for this third category of ‘indifference recklessness’ in Victorian rape law to render such an accused liable.²⁷

IV POSSIBILITY RECKLESSNESS

Of the three types of recklessness I have distinguished, possibility recklessness is the least controversial. Whereas inadvertence recklessness has only recently been recognised in Victoria (and only in sexual penetration cases), and it remains doubtful whether indifference recklessness is covered by s 38(2) of the Act, the claim that possibility recklessness is, and should be, sufficient to satisfy the fault element for rape has rarely been challenged.²⁸

It is not hard to see why. There is something intuitively reprehensible about someone who knowingly takes a risk that the person they are having sex with is not consenting. As Professor Andrew Ashworth suggests, such a person places their interests ‘above the well-being of those who may suffer if the risk materializes.’²⁹ Similarly, Professor Antony Duff treats possibility recklessness as displaying ‘practical indifference’ to the complainant’s rights and interests because it involves taking a risk about the complainant’s consent — a matter which should be ‘integral’ to the act of sexual intercourse.³⁰

However, I shall argue that possibility recklessness is more problematic than it appears. I begin with a remark made by the Attorney-General in the second reading speech for the Crimes Amendment (Rape) Bill 2007 (Vic):

an asserted belief in consent, even if accepted by the jury, is not the end of the story. The jury must proceed to decide whether the prosecution have proven beyond a reasonable doubt that the accused was either aware that the complainant was not or might not be consenting. That is to say, belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive.³¹

In other words, even if the accused believes that the complainant is consenting, it might still be the case that they are aware that the complainant might not be consenting (in which case, the fault element for rape is satisfied).

This may strike some readers as puzzling. It is, I think, generally believed that the majority judgments in *DPP v Morgan* (*‘Morgan’*)³² stand for the proposition that the fault element for rape cannot be satisfied if the accused honestly believed that the complainant was consenting, and that in Victoria this means

²⁷ Williams, above n 14, 83 suggests that one ‘cannot be indifferent to [a risk] of which [one is] ignorant’, and so every case of indifference recklessness is also a case of possibility recklessness. However, I characterised indifference in terms of the lack of a sufficiently strong preference that the complainant be consenting, and one can lack such a preference without being aware of the relevant risk.

²⁸ In NSW, it was unsuccessfully challenged in *Banditt v The Queen* (2005) 224 CLR 262 (*‘Banditt’*): see below Part V.

²⁹ Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 183.

³⁰ R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 169.

³¹ Victoria, *Parliamentary Debates*, above n 9, 2859 (Rob Hulls, Attorney-General). The Attorney-General claimed that this is made clear by the new jury directions in s 37AA: see below Part V.

³² [1976] AC 182.

that it is impossible for the accused to be aware that the complainant is not or might not be consenting if the accused believes that the complainant *is* consenting.³³

The Attorney-General's point, however, is that this does not follow. One may believe X to be the case even though one is not *absolutely certain* that X is the case. (After all, there may be few things of which a reflective person is absolutely certain, and yet such a person may hold any number of beliefs.) It is, therefore, entirely possible to believe something while being aware of the possibility that the opposite is the case. For example, having proofread this article carefully, I believe that it contains no typographical errors, but I am aware of the possibility that I might have missed some. Similarly, an accused could believe that the complainant is consenting while being aware of the possibility that they are not consenting,³⁴ in which case the accused is guilty of rape despite their (honest, and perhaps even reasonable) belief in consent.

If this is an accurate statement of the law in Victoria — and it is certainly supported by a literal reading of s 38(2) — it is problematic. Given that I believe that this article contains no typographical errors, I am not culpable for any errors that do exist simply because I am aware of the possibility that my belief may be mistaken. I may be culpable if I have *not* proofread the article as carefully as I should have, but this is a quite different basis of culpability than possibility recklessness. Similarly, an accused who believes that the complainant is consenting is not (morally) culpable simply because they are aware of the possibility that this belief may be mistaken.

There is an obvious objection to this analogy, however. If I have proofread the article carefully, there is no further step I could reasonably be expected to take to eliminate the possibility that some typographical errors remain. By contrast, there *are* steps that an accused could reasonably be expected to take if they are aware that the complainant might not be consenting to sexual intercourse: they can *ask* whether the complainant is consenting. Therefore, the accused *should* be found guilty of rape if the accused believes that the complainant is consenting but is aware of the possibility that they might not be consenting, because it is reasonable to expect the accused to *enquire* as to whether they are consenting. This accords with the Attorney-General's view that '[w]here there is any doubt in the mind of the person instigating the sexual act, there is a responsibility upon that person to communicate with the other person in order to remove that doubt.'³⁵

However, the test of possibility recklessness is whether the accused is aware of the *possibility* that the complainant might not be consenting. No matter how much communication takes place between the parties, it may be insufficient to

³³ Although in *Morgan* itself two of the three majority judges discussed only indifference recklessness, not possibility recklessness: *ibid* 202–3 (Lord Cross), 209–10, 215 (Lord Hailsham). The third, Lord Fraser, did not discuss recklessness at all.

³⁴ This differs from a situation in which the accused initially had some doubt as to whether the complainant was consenting, but cleared that doubt up in the process of forming the belief that the complainant *was* consenting. I am imagining situations in which, even after the accused formed the belief that the complainant was consenting, they remained aware of the possibility that their belief might be mistaken.

³⁵ Victoria, *Parliamentary Debates*, above n 9, 2859 (Rob Hulls, Attorney-General).

eliminate that possibility. Take, for example, a workplace affair where the male colleague is more senior than the female colleague. The male colleague believes that the female colleague is consenting but, being aware of the possibility that she might not be, he asks whether she is consenting. She says 'yes'. It then occurs to him that she might be saying yes because of the pressure she feels due to the difference in seniority. He then raises this matter with her, and asks whether she is feeling this pressure. She says 'no'. Nevertheless, if he is sufficiently reflective, he may be aware of the possibility that she does feel pressure to acquiesce *and also to deny that she feels such pressure*. He may be aware of this possibility even if he regards it as only a slight possibility, and genuinely believes that she is consenting. In this situation, possibility recklessness seems to be made out.³⁶ However, this should not be sufficient to render the male colleague guilty of rape. He has communicated with the female colleague on the issue of consent, and believes that she is consenting. It is unclear what else he could reasonably be expected to do. It is also far from clear that he displays the disregard for her rights and interests that is meant to explain why possibility recklessness is sufficient to satisfy the fault element for rape.

It might be argued that there *is* something else the male colleague could reasonably be expected to do: given his doubts about whether the female colleague is consenting, he could refrain from having sex with her. However, the above discussion suggests that there will often, if not always, be some doubt in the context of a workplace affair between two employees of differing levels of seniority. Does this mean that such affairs should never occur? Such a conclusion would restrict the sexual autonomy of the female colleague, in cases where she *does* want to engage in sexual activity with a more senior colleague.

In fact, the male colleague in my example will be found guilty only because he is reflective enough to realise that there is still a possibility that the female colleague is not consenting, even after the process of communication they have gone through. An accused who was less reflective, and who thus went through the process of communication but did not realise that this left open the possibility that the complainant was not consenting, would not satisfy the test of possibility recklessness. Given the emphasis that the law now places on requiring people to consider the issue of consent before engaging in sexual activity, it would be incongruous if the law penalised the more reflective, but not the less reflective, accused.

In response, it might be argued that the male colleague in my example is aware of only a *theoretical* possibility that the female colleague is not consenting. Once the process of communication has been completed, there may still be a possibility that she is not consenting, but this possibility is not *real* or *genuine*. Surely possibility recklessness requires awareness of a real, not merely theoretical, possibility?

There is no clear answer to this question in Victoria. In *R v Costa* ('Costa'), Callaway JA and Southwell AJA left open the question of whether the accused

³⁶ This assumes that economic and/or social pressures can negate consent. Consent is defined in s 36 of the Act as 'free agreement'. Moreover, under s 36(b), 'free agreement' does not occur in circumstances where 'the person submits because of the fear of harm of any type'.

must be aware of a real, as opposed to a theoretical, possibility that the complainant might not be consenting.³⁷ In the South Australian case of *R v Wozniak* ('*Wozniak*'), Bray CJ stated that he did not think that a jury would regard a fantastic or remote possibility as falling within the scope of the word 'might'.³⁸ However, this effectively leaves it to the jury to determine whether possibility recklessness requires awareness of a real or theoretical possibility.

Even if a real (as opposed to theoretical) possibility is required, the problem identified above is not so easily resolved. Assuming for the moment that we can make sense of the distinction between real and theoretical possibilities, in my proofreading example the possibility of a typographical error is real, not theoretical. I know from experience that, even after careful proofreading, some typographical errors may remain. Nevertheless, having carefully proofread the article, I believe that there are no such errors, and (if I am wrong) I am not culpable merely because I am aware of a real possibility that my belief may be mistaken.

Similarly, an accused could honestly (and perhaps even reasonably) believe that the complainant is consenting, despite being aware of a real possibility that they are not consenting. Indeed, this may be the case in my workplace example. There are undoubtedly cases in which someone agrees to sexual intercourse due to economic and/or social pressures. Moreover, someone who does so may also feel pressure not to admit that this is the reason they are agreeing. Given this, the male colleague in my example may be aware of a real, not merely theoretical, possibility that the female colleague is not consenting.³⁹ Nevertheless, he may believe that she is genuinely consenting.⁴⁰ For the reasons given above, it is far from clear that the male colleague should be found guilty of rape. It is particularly unclear whether he should be found guilty on the basis that he was aware of a real possibility of non-consent (given that he nevertheless believed that consent was present).

There is a further problem with possibility recklessness. This concerns the difficulty in distinguishing between 'real' and 'theoretical' possibilities. In the few cases (such as *Costa* and *Wozniak*) that discuss what the test of possibility recklessness is, little or no guidance is provided as to how to draw this distinction. In the above discussion, I assumed that a real possibility is one that sometimes eventuates in real life, whereas a theoretical possibility does not. For example, I suggested that there is a real possibility that this article may contain typographical errors because we know from experience that, even after careful proofreading, some typographical errors may remain. However, there are serious problems with drawing the distinction in this way. Even the most unlikely event will occur in real life if you repeat the relevant activity enough times. (For example, if you play enough hands of poker, eventually one of your opponents will get a royal flush.) And, if we ask instead *how often* the event occurs in real

³⁷ [1996] VSC 27 (Unreported, Phillips CJ, Callaway JA and Southwell AJA, 2 April 1996) [21] (Callaway JA and Southwell AJA).

³⁸ (1977) 16 SASR 67, 74.

³⁹ Again, this assumes that economic and/or social pressures can negate consent.

⁴⁰ His belief would be based, at least in part, on the process of communication the parties went through, even though that process may not be sufficient to eliminate a real risk of non-consent.

life, we need some non-arbitrary way of deciding how often it must occur for its occurrence to count as a 'real' possibility.

This problem could be avoided by treating awareness of *any* possibility of non-consent as satisfying the fault element for rape. There would then be no need to distinguish between real and theoretical possibilities, because either would be sufficient. However, this would exacerbate the first problem with possibility recklessness. It would be unfair to find an accused guilty of the very serious offence of rape simply because they were aware of a tiny possibility that the complainant was not consenting, especially as we have seen that they may not have been able to eliminate that possibility by communicating further with the complainant.

Nor should the task of distinguishing between real and theoretical possibilities be left to the jury. Where a well-founded distinction is drawn in the law, it is acceptable to leave it to the jury to apply that distinction, even if applying that distinction is sometimes difficult. (Any useful distinction, no matter how well-founded, can be difficult to apply in some cases.) In the present context, however, it is far from clear that any well-founded distinction is being drawn. If we cannot coherently state what it means for a possibility to be real as opposed to theoretical, we cannot expect a jury to apply that distinction coherently.

Perhaps the jury is being asked to determine how great a risk must be before awareness of that risk renders the accused culpable (as opposed to being asked to apply a distinction between real and theoretical possibilities). On this view, rather than the courts determining what level of risk the accused must be aware of, this task is left to the jury.⁴¹ Such an approach may be acceptable in other areas of the law where similar issues arise. However, it is problematic in the context of rape, where people do not share common intuitions about how great a risk must be before the accused should be found guilty for running that risk, and where the VLRC has expressed concern about the extent to which juries are influenced by myths, misconceptions and prejudices.⁴² In this context, more guidance should be provided for the jury than simply leaving them to decide for themselves what degree of risk (of non-consent) the accused must be aware of in order to be culpable.

Despite these problems, we should (for the reasons given at the start of this Part) be reluctant to abandon possibility recklessness as a way of satisfying the fault element for rape. Perhaps the best option is the following: rather than distinguishing between real and theoretical possibilities, we should draw on the communicative model of consent when determining what sort of possibility the accused must be aware of. On this approach, awareness of a possibility of non-consent would amount to possibility recklessness only if that possibility could have been either confirmed or eliminated via further communication between the parties. If the accused was aware of a risk that the complainant was not consenting, and could have resolved the question of whether they were consenting by engaging in further communication with them, then the accused's

⁴¹ This seems to be the approach adopted by Bray CJ in *Wozniak* (1977) 16 SASR 67, 74. See above n 38 and accompanying text.

⁴² VLRC, *Final Report*, above n 1, 410.

awareness of that risk (together with the accused's failure to engage in that communication) should be sufficient to satisfy the fault element. However, if further communication could not have definitively resolved the question of consent, the fact that the accused was aware of a possibility of non-consent should not be sufficient to satisfy the fault element.

Unlike the distinction between real and theoretical possibilities, this approach offers a coherent and non-arbitrary way of determining what sort of possibility the accused must be aware of in order to be reckless. Additionally, this approach may alleviate the first problem I identified with possibility recklessness — namely, that of finding an accused guilty where they believed that the complainant was consenting, simply on the basis that they were aware of a possibility that the complainant was not consenting. This is a problem only in cases where further communication between the parties could not remove (or confirm) the possibility that the complainant is not consenting. In cases where further communication *could* remove the possibility of non-consent, we should expect the accused to engage in that communication. On my suggested approach, awareness of a possibility of non-consent will amount to possibility recklessness only in this latter type of case.

Admittedly, the suggested approach will sometimes be difficult to apply. It requires us to distinguish between those possibilities that could be eliminated through further communication between the parties and those that could not. This, in turn, requires us to determine what information would have been elicited had the accused made further enquiries, which will sometimes be difficult to do. Furthermore, the accused would be required only to make *reasonable* enquiries (as opposed to, say, forcibly connecting the complainant to a lie detector and then asking whether they freely agree to sexual intercourse). It will undoubtedly prove controversial, in some cases, as to what enquiries count as reasonable.⁴³

While the suggested approach will sometimes be difficult to apply, on other occasions its application will be relatively straightforward. For example, it may be clear that there was a reasonable enquiry the accused could have made (they could have asked the complainant whether the latter was consenting) and it may be clear what response they would have received (the complainant would have said 'no'). In such cases, the suggested approach provides a clear and principled basis for determining whether the accused's awareness of a possibility of non-consent should amount to recklessness. In more difficult cases, the sug-

⁴³ At this point, the suggested approach to possibility recklessness might appear to amount to a requirement of due diligence — see *R v Sault Ste Marie* [1978] 2 SCR 1299, 1315 (Dickson J for Laskin CJ, Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ) (regarding strict liability offences) — or even to be a variation on the VLRC's requirement that the accused must have taken reasonable steps to ascertain whether the complainant was consenting if they are to rely on the defence of honest belief in consent: VLRC, *Final Report*, above n 1, 427–9. Certainly, there are similarities. On the suggested approach, possibility recklessness will be satisfied if the accused was aware of a possibility of non-consent that could have been confirmed or eliminated by making reasonable enquiries. This effectively places an onus on the accused to make reasonable enquiries. However, it does so only if they are aware of a possibility that the complainant is not consenting. This focus on the accused's awareness is what makes the suggested approach a version of recklessness and also makes it importantly different from both a requirement of due diligence and from the VLRC's requirement that the accused take reasonable steps to ascertain whether the complainant is consenting.

gested approach at least identifies the right questions to ask: given the accused's awareness of a possibility of non-consent, what further enquiries could they have made, were those enquiries ones they could reasonably be expected to have made, and what information would they have elicited had they made those enquiries?

V LOOKING BEYOND S 38(2)

In this Part, I consider whether my analysis of s 38(2) requires modification when we expand our horizons to consider other provisions in the Act relevant to the fault element for rape. I then examine the High Court of Australia's most recent discussion of reckless rape in *Banditt v The Queen* ('*Banditt*').⁴⁴

I shall start with the new jury directions regarding the fault element for rape. These are contained in s 37AA, which states that:

if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act, the judge must direct the jury that in considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider —

- (a) any evidence of that belief; and
- (b) whether that belief was reasonable in all the relevant circumstances having regard to —
 - (i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
 - (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
 - (iii) any other relevant matters.

Under s 37AA, if the accused claims that they believed that the complainant was consenting, the judge must direct the jury to consider (when deciding whether the accused was aware that the complainant was not, or might not have been, consenting) whether their alleged belief was reasonable. To some extent, this reflects the position in *Morgan*, that whether the alleged belief was reasonable is relevant to assessing whether it was in fact held by the accused.⁴⁵ However, in Victoria the accused may be liable even if they do believe that the complainant is consenting, because they may nevertheless be aware that the complainant might not be consenting. Section 37AA requires the jury also to consider the reasonableness of the accused's belief when determining whether this is the case (presumably because the more unreasonable the belief, the more likely it is that the accused was aware of a possibility that the belief was mis-

⁴⁴ (2005) 224 CLR 262.

⁴⁵ [1976] AC 182, 237 (Lord Fraser).

taken). Moreover, unlike the reasons in *Morgan*, s 37AA(b) sets out factors relevant to determining whether the alleged belief was reasonable.

Let us consider those factors, starting with s 37AA(b)(i). Section 36 lists certain circumstances in which the complainant is deemed not to have consented (for example, if they were unconscious). Section 37AA(b)(i) tells us that, if one of these circumstances existed, the jury must consider whether the accused was aware that it existed when assessing the reasonableness of the accused's alleged belief that the complainant was consenting. It follows that awareness that the circumstance existed is not enough, in itself, to satisfy the fault element for rape. Rather, it goes to whether the accused's alleged belief was reasonable, which in turn goes to whether they were aware that the complainant was not or might not have been consenting.

This provision may provide guidance to a jury in determining whether the accused was aware of a possibility that the complainant was not consenting but it does not assist us in resolving the issues surrounding possibility recklessness discussed in Part IV. For example, it is neutral on the question of whether possibility recklessness requires awareness of a real or merely theoretical possibility of non-consent. Nor does it have any bearing on the issues surrounding inadvertence and indifference recklessness discussed in Part III.

Of greater relevance is s 37AA(b)(ii), which directs the jury to consider, when determining whether the accused's alleged belief in consent was reasonable, what steps (if any) the accused took to determine whether consent was present. This provides some support for my suggested approach to possibility recklessness. Under s 37AA, whether the alleged belief was reasonable is taken into account when determining whether the accused was aware that the complainant was not, *or might not have been*, consenting. Thus, if the accused claims that they believed that the complainant was consenting, the jury must consider what steps they took to determine whether consent was present in order to decide whether possibility recklessness is made out. Similarly, my suggested approach focuses on what steps the accused took (and could have taken) to determine whether consent was present, in order to decide whether possibility recklessness is made out.

There are, however, obvious differences between the approach in s 37AA(b)(ii) and my suggested approach to possibility recklessness. The most important of these is that, under the current approach, what steps the accused took is of only *evidential* relevance to whether possibility recklessness is made out (it goes to whether the alleged belief in consent was reasonable, which in turn goes to whether the accused was aware that the complainant might not be consenting). By contrast, under my suggested approach, it is part of the *test* of possibility recklessness that the accused was not only aware of a possibility that the complainant was not consenting but that there were steps they could have taken to confirm or eliminate that possibility.

However, given the problems identified in Part IV, the test for possibility recklessness needs to be amended. The best way to do this is to take something that is currently of evidential relevance in certain cases (namely, what steps the accused took to determine whether the complainant was consenting) and make it part of the test of possibility recklessness (such that possibility recklessness is

made out only if the accused was aware of a possibility that the complainant was not consenting *and* that possibility could have been confirmed or eliminated through further communication with the complainant).

Finally, the reasoning in *Banditt* ought to be noted. This case concerned what was then s 61R(1) of the *Crimes Act 1900* (NSW), the effect of which was that an accused was to be taken to know that the complainant did not consent if the accused was *reckless* as to whether the complainant consented. The appellant in *Banditt* argued that only indifference recklessness amounted to recklessness for the purpose of s 61R(1); possibility recklessness (and inadvertence recklessness) were insufficient. Unsurprisingly, this argument was rejected (and, given s 38(2), any analogous argument would be rejected in Victoria as well). Moreover, for the reasons given in Parts III(A) and IV, indifference recklessness should *not* be the only type of recklessness that satisfies the fault element for rape.

The joint judgment in *Banditt* of Gummow, Hayne and Heydon JJ discussed various formulations of the concept of recklessness, including:

- (1) 'indifference as to whether or not there is consent';
- (2) 'determination to have intercourse with the person whether or not that person is consenting'; and
- (3) 'awareness of the possibility of the absence of consent and proceeding anyway'.⁴⁶

Their Honours held that a trial judge could use any of these formulations in explaining the concept of recklessness to a jury.⁴⁷ However, it is unclear whether this is because (in their Honours' view) these are three ways of saying the same thing or because these amount to three different ways in which the requirement of recklessness could be satisfied. The respondent, whose argument was accepted in the joint judgment,⁴⁸ left open the question of whether the various formulations differ in substance. Moreover, either interpretation is consistent with the rejection by the joint judgment of the appellant's argument — one could reject that argument because one believes that there are other ways in which the requirement of recklessness can be satisfied, or because one believes that there are other (equivalent) ways of explaining that requirement in a rape trial.

It follows from my characterisation of indifference recklessness that (1) and (2) are two ways of saying the same thing. To say that the accused is indifferent as to whether or not there is consent is to say that they lack a strong enough preference that the complainant be consenting that they would refrain from proceeding if they knew that the complainant was not consenting. In other words, the accused was determined to have intercourse with the complainant whether or not the latter was consenting. However, (1) and (2) differ importantly

⁴⁶ (2005) 224 CLR 262, 269. While inadvertence recklessness was not discussed, the joint judgment does not appear to have sought to compile an *exhaustive* list of formulations of the concept of recklessness.

⁴⁷ *Ibid* 276. By contrast, Callinan J held that the concept of recklessness should not be glossed in any way: at 297–8.

⁴⁸ *Ibid* 276.

from (3), which is possibility recklessness. As previously mentioned,⁴⁹ indifference recklessness can be made out even if possibility recklessness is not. Conversely, at least under the current law, possibility recklessness might be made out even though the accused is not indifferent to consent (as my example of the workplace affair in Part IV shows).

VI CONCLUSION

I have suggested that there are three states of mind — short of an intention that the complainant not be consenting — that could potentially satisfy the fault element for rape. I have also suggested that these states of mind are not always properly distinguished. For example, while inadvertence recklessness is now sufficient to satisfy the fault element in Victoria (in sexual penetration cases), it is unclear whether indifference recklessness is sufficient, precisely because Parliament did not carefully distinguish between these two states of mind. I have argued, however, that both indifference recklessness and inadvertence recklessness *should* be sufficient, although I have expressed concerns about the precise test of inadvertence recklessness adopted in Victoria.

Possibility recklessness is more problematic. If the accused believed that the complainant was consenting, but was aware of a possibility that they were not consenting, the mere fact that the accused was aware of that possibility should not be sufficient to satisfy the fault element for rape. The test of possibility recklessness is also unclear. It is unclear whether the test requires awareness of a real, or merely theoretical, possibility that the complainant is not consenting, and it is unclear how we are to understand this distinction between real and theoretical possibilities. However, I have suggested that both problems may be alleviated if we regard possibility recklessness as satisfied only if the accused was aware of a possibility that the complainant was not consenting and if that possibility could have been either confirmed or eliminated through further communication with the complainant.

While I have focused on reckless rape, the contribution of this article may extend beyond the offence of rape. It was not only the fault element for rape that was amended in November 2007. Equivalent changes were made to the offences of compelled sexual penetration (s 38A) and indecent assault (s 39), making inadvertence recklessness a further way of satisfying the fault element of these offences also. It is likely that the conclusions which I have reached with regard to reckless rape will generally be applicable to these offences as well, for two reasons. First, subject to a qualification discussed below, the fault element is worded in substantively the same way for all three offences. Secondly, in all three cases Parliament's goal is to safeguard the complainant's sexual autonomy whilst finding the accused liable only if they possessed (or lacked) a certain state of mind. There is no obvious reason why this goal should be pursued differently with regard to rape than with regard to the two further offences.

There is, however, one important difference between the fault element for rape and the fault element for these further offences — namely, the distinction

⁴⁹ See above n 27.

between sexual penetration and failure to withdraw cases is relevant only to rape. No equivalent distinction exists with regard to the two further offences, which means that inadvertence recklessness is *always* sufficient to satisfy the fault element of those offences. This means that my discussion of whether inadvertence recklessness should be treated as satisfying the fault element in failure to withdraw cases is not relevant to these further offences. In all other ways, however, my discussion of reckless rape should also be applicable to these further offences.