FRAUDULENT SEX CRIMINALISATION IN AUSTRALIA: DISPARITY, DISARRAY AND THE UNDERRATED PROCUREMENT OFFENCE

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This article critically investigates the criminalisation of fraudulent sex across Australia's eight states and territories. Through situating the statutory definition of sexual consent alongside the respective treatment of the procurement offence (a sexual offence that punishes obtaining sex through any false representation), this article identifies the four distinct approaches of criminalising fraudulent sex and demonstrates the surprising stark divergence in legal outcomes. This article argues that the approaches adopted by half of the surveyed jurisdictions are flawed from the perspective of legislative design, and highlights the deficient legislative processes that failed to pay due regard to the procurement offence. In this regard, this article proposes statutory reform to enhance the coherency and clarity of fraudulent sex criminalisation.

I INTRODUCTION

Consider these three scenarios, premised on facts of actual Australian cases:

> Scenario 1: Woman[1] agrees to have sexual intercourse with a man after he tells her that he will pay her a sum of money for the sexual service. The man has no intention to pay the woman.[2]
>
> Scenario 2: Woman agrees to have sexual intercourse with a man after he tells her that he will marry her. The man has no intention to marry the woman.[3]
>
> Scenario 3: Woman, who wants to join the mafia, agrees to have sexual intercourse with a man after he tells her that sexual intercourse is part of

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1 This article adopts gender non-neutral language in the scenarios for two reasons. First, the selected gender (man as perpetrator and woman as victim) reflects the predominant fact patterns of Australian cases on fraudulent sex. Secondly, while the rape (or equivalent) provisions have been expressed in gender-neutral language across Australia, the same cannot be said of the procurement offence: see below Part II(D).

2 *R v Livas* [2015] ACTSC 50; *R v Rajakaruna* (2004) 8 VR 340.

3 *R v McKelvey* [1914] St R Qd 42.

> a mafia initiation ritual. The man is not a mafia member and he is not conducting a mafia initiation ritual.[4]

These three scenarios involve the use of deception to obtain sexual intercourse (ie, fraudulent sex). The criminal liability of the man in each of the scenarios varies significantly across Australia. Depending on which state or territory the scenario occurs in, the man could be convicted of rape (or its equivalent), a lesser sexual offence, or escape criminal liability altogether.[5] Differences in criminal law across the states and territories are inherent in the Australian federal system, yet this stark divergence in legal consequences – a serious offence punishable by a maximum of life imprisonment[6] on one end, and complete exoneration on the other – for the same action, is surprising. That the scenarios involve not specialised economic or commercial undertakings, but arguably mundane activities of common occurrence,[7] accentuates both the unusualness and undesirability of the current state of affairs.[8]

This article critically investigates the criminalisation of fraudulent sex across the eight states and territories from the perspective of legislative design. This article examines both the variations in the statutory definition of sexual consent and the different treatment of the procurement offence. All criminal statutes and codes of the states and territories currently have, or previously had, a provision that criminalises the procurement[9] of sex through fraud as an offence distinct from rape (that is, the procurement offence). The integral element of rape is the victim's lack of consent, which in turn restricts conviction to limited categories of deception in the majority of states and territories.[10] By comparison, the procurement offence covers any form of fraud that materially induces[11] the victim's participation in sexual intercourse.[12] While the variations in the statutory definition of sexual consent are well documented in the literature,[13] there has been no concerted inquiry into the procurement offence, notwithstanding the significant differences among the current versions of the offence in Australia.[14]

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4 *Macfie v The Queen* [2012] VSCA 314.

5 See below Part III(C). The short answer is that New South Wales is the most permissible, with no sexual offences (rape or otherwise) committed for all three scenarios, and no criminal offences in either scenario 2 or 3. The Australian Capital Territory is the most restrictive, with rape committed for all three scenarios. As an example of a middle-ground, all three scenarios constitute the lesser sexual offence in Victoria.

6 See, eg, *Criminal Code Act 1899* (Qld) sch 1, s 349.

7 It is commonly perceived that deception is prevalent in sexual relationships: Hyman Gross, 'Rape, Moralism and Human Rights' [2007] (March) *Criminal Law Review* 220, 224–5; Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122(6) *Yale Law Journal* 1372, 1405. For a collection of various ancient and contemporaneous accounts of deception in sex, see Wendy Doniger, *The Bedtrick: Tales of Sex and Masquerade* (University of Chicago Press, 2000).

8 See below Part III(C).

9 See *Criminal Code Act 1899* (Qld) s 218(4) ('procure means knowingly entice or recruit for the purposes of sexual exploitation'). In the English textbooks, 'procure' in this context is understood as producing by endeavour (ie, obtaining or bringing about): see, eg, Richard Card, *Card, Cross & Jones Criminal Law* (Oxford University Press, 20th ed, 2012) 732.

10 See below Part III(A).

11 The fraud has to be one which, without the fraud, the victim would not have otherwise agreed to the sexual intercourse: JR Spencer, 'Sex by Deception' (2013) 9 *Archbold Review* 6, 8.

12 In some states, the actus reus for procurement has been statutorily expanded to include all 'sexual acts': see below Part II(D).

13 See, eg, Jonathan Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38(4) *Criminal Law Journal* 236.

14 See below Part II(D).

Situating the procurement offence with the respective rape law reform reveals four distinct approaches of criminalising fraudulent sex in Australia. First, the procurement offence is essentially a lesser offence to punish fraudulent sex that does not fall within the limited categories of consent-vitiating fraud. Queensland, South Australia and Victoria fall into this category. Secondly, the procurement offence is abolished after being rendered redundant with the expansion of the definition of consent to include vitiation by all types of fraud. This is the case in the Australian Capital Territory. Thirdly, there is an uneasy co-existence between the procurement offence and a rape provision that, at least on the face of it, is as broad as the procurement offence in terms of types of fraud. Tasmania and Western Australia fall into this category. Fourthly, fraudulent sex is substantially less criminalised with the repeal of the procurement offence without a corresponding expansion of the definition of sexual consent. New South Wales and the Northern Territory fall into this category.

This surprising finding on the four distinct approaches explains the sharp differences in criminal liability for the three scenarios set out at the start of this article. Close examination of the respective legislative process further reveals the haphazard and incongruent nature of sexual offences reform in some jurisdictions that have failed to pay adequate attention to the procurement offence. This has resulted in a structurally ambiguous relationship between the procurement offence and rape (ie, category three). More objectionably, it has also led to inadvertent decriminalisation of a large swathe of fraudulent sex. While abolishing the procurement offence is a plausible and legitimate policy option, this article reveals that the procurement offence was repealed in New South Wales and the Northern Territory without acknowledgment of its substantial decriminalisation effect.

In essence, this article argues that the procurement offence is an integral component of sexual offences reform. Regardless of one's policy preference as to the extent to, and manner in which, fraudulent sex should be criminalised, the formulation of a coherent legislative framework requires careful attention to, and appropriate treatment of, the procurement offence.

This article is organised into six parts. Part I above introduces the article. Part II presents the origin, evolution and understanding of the procurement offence in Australia. Part III juxtaposes those findings with the statutory amendments of sexual consent. Part III further identifies the four distinct approaches towards fraudulent sex criminalisation and demonstrates the surprisingly disparate legal outcomes arising from the three scenarios. Part IV discusses how the approaches adopted by half of the surveyed jurisdictions are flawed from the perspective of legislative design, and highlights the deficient legislative processes that failed to pay due regard to the procurement offence. Part V addresses the statutory reform implications on the various jurisdictions considered by this article. Part VI concludes.

II PROCUREMENT OFFENCE: ORIGIN, EVOLUTION, AND CURRENT MANIFESTATIONS

This Part begins by presenting the existing scholarly and judicial discourse on the procurement offence. This Part then traces the legislative history of the procurement offence to its origins in England, before identifying its varied evolution across different states and territories.

A Scholarly and Judicial Discourse on the Procurement Offence

Copious amounts of ink have been devoted to the issues of fraud and rape (or their equivalents) in both Australia and abroad, in particular the types of fraud that could or should vitiate consent to sustain a rape conviction.[15] In contrast, the procurement offence is given very little attention despite its potential breadth to punish *all* forms of fraudulent sex with lengthy imprisonment.

The most common reference to procurement offences in the literature is a passing reference to mitigation of any perceived harshness that may arise when a narrow conception of consent-vitiating fraud is adopted or advocated. For example, Arenson, Bagaric and Gillies opined that the procurement offence in Victoria is 'designed to cover situations in which consent to intercourse is obtained by fraudulent means that would not vitiate consent for purposes of rape. In our view, this is a sound approach [to avoid trivialising the seriousness of rape]'.[16] Another example is Crofts et al, who wrote that the procurement offence in Victoria '*adequately* covers those cases that cannot properly be treated as rape'.[17]

Indeed, a notable feature of the literature in England after the 2003 sexual offences reform (when the procurement offence was abolished) is the recurring recommendation of re-enacting the procurement offence as a way to legitimise the exclusion of certain forms of fraudulent sex as rape. For example, Simpson argued that the predicament in determining the appropriate interpretation of the post-2003 sexual consent provision was caused not only by 'the statutory definition of consent [being] too vague, but the repeal of the [procurement offence] … and subsequent failure to replace it'.[18] She proposed that 'the most ideal solution to the current situation would be for Parliament to enact a modified version of the [procurement] offence as was initially recommended by the Commission and the Review'.[19] In Australia, Gray and Blokland, in their criminal

15 In Australia: Andrew Dyer, 'Mistakes That Negate Apparent Consent' (2019) 43(3) *Criminal Law Journal* 159; Crowe (n 13); Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26(1) *Western Australian Law Review* 223. In New Zealand: Chris Gallavin, 'Fraud Vitiating Consent to Sexual Activity: Further Confusion in the Making' (2008) 23(1) *New Zealand Universities Law Review* 87. In the UK: Karl Laird, 'Rapist or Rogue? Deception, Consent and the *Sexual Offences Act 2003*' [2014] (7) *Criminal Law Review* 492; Rebecca Williams, 'Deception, Mistake and Vitiation of the Victim's Consent' (2008) 124(1) *Law Quarterly Review* 132. For a critical discussion of the evolution of the concept of consent in English and Australian rape law, see Ian Leader-Elliot and Ngaire Naffine, 'Wittgenstein, Rape Law and the Language Games of Consent' (2000) 26(1) *Monash University Law Review* 48.

16 Kenneth J Arenson, Mirko Bagaric and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 4th ed, 2015) 330.

17 Penny Crofts et al, *Waller & Williams Criminal Law: Text and Cases* (LexisNexis, 13th ed, 2016) 197 (emphasis added). See G Syrota, 'Rape: When Does Fraud Vitiate Consent?' (1995) 25(2) *Western Australian Law Review* 334, 344; Simon H Bronitt, 'Rape and Lack of Consent' (1992) 16(5) *Criminal Law Journal* 289, 302–3. In the English context, see John Smith, *Smith & Hogan Criminal Law* (LexisNexis Butterworths, 10th ed, 2002) 473–4; David W Selfe and Vincent Burke, *Perspectives on Sex, Crime and Society* (Cavendish Publishing, 2nd ed, 2001) 119; Peter FG Rook and Robert Ward, *Rook & Ward on Sexual Offences* (Sweet & Maxwell, 2nd ed, 1997) 79. Cf Kate Warner, 'The Mental Element and Consent Under the New "Rape" Laws' (1983) 7(5) *Criminal Law Journal* 245, 258, supporting the expansion of consent to include all fraud, as recommended by the 1982 Tasmanian Law Commission, on the basis that it is already being punished under the procurement offence.

18 Bethany Simpson, 'Why Has the Concept of Consent Proven So Difficult to Clarify?' (2016) 80(2) *The Journal of Criminal Law* 97, 110.

19 Ibid. For other examples, see Jennifer Temkin and Andrew Ashworth, 'The *Sexual Offences Act 2003*: Rape, Sexual Assaults and the Problems of Consent' [2004] (May) *Criminal Law Review* 328, 345–6; Laird (n 15) 509; Spencer (n 11) 8. See also Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 357, arguing that the repeal of the procurement offence has resulted in judicial difficulties in interpreting the scope of the conclusive presumption relating to consent-vitiating fraud; Celia Wells and Oliver

law textbook on the Northern Territory (where the procurement offence was omitted in 1983) similarly argued that 'the scope of s 192(2)(g) [the statutory definition of sexual consent] should be more clearly defined – or, alternatively and perhaps preferably, a new and less serious offence should be created of procuring sexual intercourse by fraud'.[20]

This conception of procurement offences as a lesser sexual offence that does not constitute rape (and henceforth justifies the common law restrictive approach to consent-vitiating fraud) is reflected in the courts as well. In the English case of *R v Linekar*,[21] the Court of Appeal faced an appeal over the rape conviction of a defendant who had sexual intercourse with a sex worker under a promise of payment, but who made off without paying. After applying the common law position on consent-vitiating fraud and quashing the rape conviction, the Court immediately added that '[i]f anything, the appellant was guilty of [the procurement offence] which was not an alternative that was put to this jury'.[22] In *R v Mobilio* ('*Mobilio*'),[23] the Victorian Court of Appeal held that the complainant's consent was not vitiated in the scenario where a radiographer inserted a transducer into the complainant's vagina under the pretext of internal medical examination, when in fact the insertion was solely for the defendant's own sexual gratification.[24] Having made that finding, the Victorian Court of Appeal was quick to observe that '[i]f he had been charged with the offence of procuring an act of sexual penetration by false representation the applicant might have been open to conviction'.[25]

Finally, in the relatively uncommon instances where the procurement offence is retained during a statutory amendment of sexual consent that ostensibly places no limits on the types of consent-vitiating fraud, the procurement offence may be employed by both scholars and judges to justify a narrow interpretation of the statutory definition of sexual consent. This will be examined in detail below in Part IV(B).

In any event, the prevailing conceptualisation of the procurement offence as a lesser offence does not translate into any concerted inquiry or examination of the procurement offence itself, especially in the Australian context. There is no discussion about the evolving variations of the procurement offence across the eight states and territories, let alone the dynamic with law reform on consent-vitiating fraud. Indeed, it is not uncommon to find inaccuracy in textbook discussions of the procurement offence. For

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Quick, *Lacey, Wells and Quick: Reconstructing Criminal Law* (Cambridge University Press, 4th ed, 2010) 524, arguing that '[t]his [failure to replace the procurement offence] now seems a costly omission'. Cf Catarina Sjölin, 'Ten Years on: Consent under the *Sexual Offences Act 2003*' (2015) 79(1) *Journal of Criminal Law* 20, 31–3, arguing that the current judicial approach, a holistic factual approach to the question of sexual consent, is preferable to the reintroduction of the procurement offence, which criminalised all fraudulent sex regardless of severity and harm.

20 Stephen Gray and Jenny Blokland, *Criminal Laws: Northern Territory* (The Federation Press, 2nd ed, 2012) 252. For a rare example where the procurement offence is criticised, see Ian Cunliffe, 'Consent and Sexual Offences Law Reform in New South Wales' (1984) 8(5) *Criminal Law Journal* 271, 289, arguing that the failure to abolish the procurement offence 'reflects the general failure to reverse the overreach of outmoded sexual offence laws'.

21 [1995] QB 250.

22 Ibid 261 (Morland J).

23 [1991] 1 VR 339 ('*Mobilio*').

24 There was a dispute regarding the defendant's purpose for insertion. The Court of Appeal proceeded according to the analysis which led to the defendant's acquittal, on the basis that it was open for the jury to conclude that the insertion was solely for the defendant's own sexual gratification. For a detailed discussion of the case, see Jenny Morgan, 'Rape in Medical Treatment: The Patient as Victim' (1991) 18(2) *Melbourne University Law Review* 403.

25 *Mobilio* [1991] 1 VR 339, 353 (Crockett, McGarvie and Beach JJ).

example, the recent 2014 criminal law textbook by Arenson, Bagaric and Gillies observed that Victoria has the procurement offence when discussing the three jurisdictions of New South Wales, South Australia and Victoria.[26] They have omitted the fact that South Australia also has the procurement offence.[27]

B Elements of the Offence at the Beginning

Given that the variations among the current procurement offences in the various Australian jurisdictions represent the extent to which the respective jurisdictions have departed from the original archetype of the offence, it is useful to examine the origin of the procurement offence.

The first procurement offence was section 3(2) of the *Criminal Law Amendment Act 1885* (UK). This section provided that:

> Any person who –
>
> …
>
> (2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions;
>
> …
>
> shall be guilty of a misdemeanour …
>
> Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.[28]

As compared to rape, the procurement offence has four notable differences. First, instead of focusing on the lack of consent, the procurement offence simply requires the 'procurement' of sexual intercourse 'by false pretences or false representations'.[29] There is no restriction as to the type and/or category of fraud that could constitute the offence.

Secondly, the procurement offence provides for extraterritorial application vis-à-vis sexual intercourse, arguably the core element of actus reus for a sexual offence.[30] This is an explicit departure from the general principle of territoriality that otherwise governs rape offences.[31]

Thirdly, conviction of the procurement offence requires corroboration of witness testimony where there is only one witness. There is no such requirement, at least as a formal mandatory requirement beyond that of a jury warning,[32] for rape.

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26 Arenson, Bagaric and Gillies (n 16) 330.

27 See also Mirko Bagaric and Kenneth J Arenson, *Criminal Laws in Australia: Cases and Materials* (Oxford University Press, 2nd ed, 2007) 310–11. The authors failed to note that the procurement offence had been abolished in New South Wales by the time of the publication of the first edition of the book in 2004, cited the wrong provision, being s 61R(2)(a1), and failed to acknowledge that the procurement offence is in force in Tasmania and Western Australia, despite discussing those two jurisdictions in the same paragraph.

28 *Criminal Law Amendment Act 1885* (UK) ch 69, s 3.

29 Ibid.

30 Nevertheless, the act of procurement arguably has to take place within the jurisdiction.

31 Simon H Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 96–106.

32 Constance Backhouse, 'The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia' (2001) 26(2) *Queen's Law Journal* 297, 302–3. There is a rich array of literature on how rape myths such as gendered stereotypes of 'real' rape victims and heightened suspicions over possible false allegations have persisted despite reforms of substantive and procedural laws: Lesley McMillan, 'Police Officers' Perceptions of False Allegations of Rape' (2018) 27(1) *Journal of Gender Studies* 9, 11–13; Sokratis Dinos et al, 'A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror

Fourthly, there is a morality requirement for the victim: the victim cannot be 'a common prostitute or of known immoral character'. Again, there is no such requirement, at least formally,[33] for rape. Notably, there is also no such requirement for the two other means stipulated in the same section, be it procurement by threat or intimidation (under section 3(1)) or procurement by administering stupefying drugs (under section 3(3)).

This provision has been replicated in other common law jurisdictions influenced by English criminal law, such as Hong Kong,[34] Jamaica,[35] the Bahamas,[36] and, of course, Australia. There are variations in the wording of the provisions across the different jurisdictions both within Australia and worldwide. However, when first enacted in the respective jurisdictions, the provisions typically shared those four distinct characteristics. For example, section 15 of the *Crimes Act 1891* (Vic) provided that:

> (1) Any person who –
>
> …
>
> (b) by false pretences or false representations procures or attempts to procure any woman or girl not being a common prostitute or of known immoral character to have any unlawful carnal connexion either within or without Victoria –
>
> shall be guilty of a misdemeanour …
>
> (3) No person shall be convicted of an offence under this section upon the evidence of one witness only unless such witness be corroborated in some material particular by evidence implicating the accused.[37]

Similarly, and notwithstanding the codification,[38] section 218 of the *Criminal Code Act 1899* (Qld) provided that:

> Any person who –
>
> …
>
> (1) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Queensland or elsewhere …
>
> is guilty of a misdemeanour …
>
> A person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness.[39]

Decision-Making?' (2015) 43(1) *International Journal of Law, Crime and Justice* 36, 46–7. See 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 a discourse analysis of ten rape trials in Victoria about the persistence of rape myths.

33 For a critical historical perspective on the judicial precedents allowing the use of the sexual history (ie, prostitution, prior relations, or want of chastity) of the complainant to discredit that complainant's rape allegations, see Susan SM Edwards, *Female Sexuality and the Law: A Study of Constructs of Female Sexuality as They Inform Statute and Legal Procedure* (Martin Robertson, 1981) 62–70.

34 *Crimes Ordinance* (Hong Kong) cap 200, s 120. For a discussion of the history and use of the procurement offence in Hong Kong, see Jianlin Chen, 'Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex Under Religious False Pretense in Hong Kong' (2018) 51(3) *Cornell International Law Journal* 553, 563–72.

35 *Sexual Offences Act 2011* (Jamaica) s 19.

36 *Sexual Offences Act 2010* (The Bahamas) ch 99, s 7(a)(vi).

37 *Crimes Act 1891* (Vic) s 15, as enacted.

38 For a discussion of the process and context of criminal law codification in Queensland, see Barry Wright, 'Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples' (2007) 26(1) *University of Queensland Law Journal* 39, 56–63.

39 *Criminal Code Act 1899* (Qld) s 218, as enacted.

C Historical Context

The four distinct characteristics of the procurement offence may seem strange given the current understanding and utilisation of the procurement offence as a lesser offence to target deceptive sex.[40] The explicit corroboration requirement may be understood as a crude (if otherwise still problematic)[41] counterweight against the broad scope of the offence. However, the extraterritorial application vis-à-vis the ostensibly core offending conduct of sexual intercourse – an uncommon provision for criminal law prior to pervasive globalisation[42] – remains superfluous. In addition, the exclusion of victims who are 'common prostitute[s] or of known immoral character' is jarring, even for the Victorian era.[43]

The reason for this disconnect between the elements of the procurement offence and the function of a lesser offence for fraudulent sex is historical. When enacted in 1885, the underlying legislative objective was not to criminalise fraudulent sex, but to tackle the exploitation of women and girls for the purposes of prostitution.[44] Indeed, this purpose may also be explicit in the legislation itself, such as in Victoria where the procurement offence was initially placed under 'Suppression of Prostitution' instead of 'Offences against the Person'.[45]

From the perspective of combating the 'white-slave' trade,[46] the distinctive characteristics of the procurement offence become understandable and perhaps even inevitable. The extraterritorial application is the direct response, as per the Home Office explanatory memorandum, to the 'public outcry against the decoying of women from England to Belgium and other parts of the continent, where they were detained in "*maisons de débauche*"'.[47] The morality requirement was meant to 'avoid the scandal of the criminal law being put in motion by [a common prostitute] to enforce her illicit bargains'.[48] Indeed, the morality requirement was inserted in place of the original proposed exclusion that more draconically prevented conviction if the victims knew that they were having sexual intercourse ('connexion') outside of marriage.[49] Finally, the requirement of corroboration becomes less of a problem because the recruitment of girls

40 See above Part II(A).

41 See Susan Leahy, 'The Corroboration Warning in Sexual Offence Trials: Final Vestige of the Historic Suspicion of Sexual Offence Complainants or a Necessary Protection for Defendants?' (2014) 18(1) *International Journal of Evidence and Proof* 41, 55–7, discussing how the singling out of sexual offences for corroboration warnings reflects problematic signals of sexual offence complainants as a suspect category of witness.

42 Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9(4) *Utrecht Law Review* 68, 69–72; Melissa Curley and Elizabeth Stanley, 'Extraterritorial Jurisdiction, Criminal Law and Transnational Crime: Insights from the Application of Australia's Child Sex Tourism Offences' (2016) 28(2) *Bond Law Review* 169, 193–4.

43 See Edwards (n 33) 62–5, discussing the judicial recognition since the early English cases of *R v Hallett* (1841) 173 ER 1036 and *R v Holmes* (1871) LR 1 CCR 334 that a prostitute can be a victim of rape.

44 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (Report, 2000) vol 1, 29–30 [2.18.1]–[2.18.2].

45 *Crimes Act 1891* (Vic) ss 5, 8, 15.

46 For a discussion of the historical backdrop of the various legislative attempts to combat sex trafficking, see Julia Laite, 'Traffickers and Pimps in the Era of White Slavery' (2017) 237(1) *Past and Present* 237, 240–3.

47 Peter Alldridge, 'Sex, Lies and the Criminal Law' (1993) 44(3) *Northern Ireland Legal Quarterly* 250, 265 (emphasis in original), quoting the Home Office memorandum *PRO HO45/9547/59343K*. Alldridge argues that the problem perceived by the government was not prostitution per se, but that it constituted infringement of property rights of English men by Belgians.

48 Frederick Mead and AH Bodkin, *Criminal Law Amendment Act, 1885, with Introduction, Notes and Index* (Shaw and Sons, 1885) 15.

49 Ibid.

tends to take place in a more public setting as compared to the typical sexual offence. Indeed, the original understanding was that the clause was meant to prosecute the middleman who arranged for the sexual intercourse to happen, rather than the individual who actually engaged in the intercourse.[50] It took an early court case to establish that the provision – as drafted – is applicable in both situations.[51]

Notably, this provision is largely absent in other common law jurisdictions that were English colonies, but in which criminal statutes were inspired by the *Indian Penal Code 1860* (eg, India, Singapore and Malaysia). The *Indian Penal Code 1860* was drafted in 1860 on the basis of English law, with elements from civil law jurisdictions.[52] Given the timing, the Indian Penal Code did not include the procurement offence. When provisions were subsequently added to tackle the problem of using false pretences to lure a woman into prostitution, the provisions were drafted with explicit reference to prostitution.[53] Thus, the provisions could not be interpreted to cover deceptive sex in general, as in the case of the procurement offence.

D Evolution and Current Manifestation

The procurement offence has sometimes been repealed in the course of an overhaul of sexual offence legislation. The procurement offence was repealed in the UK in 2003.[54] In Australia, New South Wales repealed its procurement offence in 2003,[55] while the Australian Capital Territory repealed its procurement offence in 1985.[56] The Northern Territory, upon the grant of responsible government, did not include the procurement offence when enacting its own Criminal Code in 1983.[57] The legislative rationale and the resulting impact on fraudulent sex criminalisation will be critically examined below in Parts III and IV.

The majority of the Australian jurisdictions have not only retained the procurement offence, but have regularly updated the respective provisions over the years. There are five types of amendments that have been made, which can be broadly separated into

50 Selfe and Burke (n 17) 116; Smith (n 17) 474.

51 *R v Williams* (1898) 62 JP 310. See Spencer (n 11) 6–7. In Australia, similar arguments were raised and rejected in *R v McKelvey* [1914] St R Qd 42.

52 Atul Chandra Patra, 'An Historical Introduction to the Indian Penal Code' (1961) 3(3) *Journal of the Indian Law Institute* 351, 357–61; David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32(3) *Modern Asian Studies* 513, 538–45.

53 See, eg, *Penal Code* (Singapore, cap 224, 1998 rev ed) s 373A(a): 'by any false pretence, false representation, or fraudulent or deceitful means, brings, or assists in bringing, into Singapore any woman with intent that such woman may be employed or used for the purpose of prostitution'.

54 Simpson (n 18) 107. For an overview of the 2003 reform, see generally Temkin and Ashworth (n 19).

55 *Crimes Amendment (Sexual Offences) Act 2003 (No 9)* (NSW) sch 1, item 8. The procurement offence in New South Wales is notably different from the procurement offence in other Australian jurisdictions. It did not contain the corroboration and morality requirement. It also had a different structure. Indeed, as discussed by the New South Wales Court of Appeal in *R v Gallienne* [1964] NSWR 919, the New South Wales procurement offence was enacted in 1883, two years prior to what is considered the first procurement offence in England. Nonetheless, scholars and legislative bodies have regarded the New South Wales procurement offence as equivalent to that of the other states: Bagaric and Arenson (n 27); Dennis J Baker, *Textbook of Criminal Law* (Sweet & Maxwell, 3rd ed, 2012); Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 9 of 2016, 21 June 2016) 11 n 29. For the purpose of criminal liability assessment in Part III and the argument of unintentional decriminalisation in Part IV(C), the differences of the New South Wales procurement offence are immaterial.

56 *Crimes (Amendment) Ordinance (No 5) 1985* (ACT) s 7.

57 *Criminal Code Act 1983* (NT) ss 187–93. For a concise history of criminal law in the Northern Territory, see Gray and Blokland (n 20) 10–36.

two categories. The first category is the removal of the distinct restrictive elements of the procurement offence, namely requirement of corroboration and the victim's morality. The second category is the expansion of the procurement offence in line with the general thrust of progressive rape law reform, namely the adoption of gender-neutral language and the expansion of the actus reus beyond sexual intercourse to encompass all sexual acts. The final type of amendment – removing the extra-territorial language – does not fit neatly into either category, as it resulted from a narrowing of the procurement offence by otherwise removing a distinctive characteristic.

The amendments are not uniform across the states and territories. The requirement of corroboration was abolished throughout Australia in the 1990s, though in a somewhat uneven fashion. For example, Victoria abolished the requirement in 1991,[58] while Queensland first diluted the requirement in 1992,[59] before removing the subsection entirely in 1997.[60] The exclusion of women who are 'common prostitute[s] or of known immoral character' was also abolished in the same period, with the sole exception of Western Australia, which still curiously retains the exclusion.[61] Western Australia is again the anomaly vis-à-vis gender-neutral language. While the procurement offence in Western Australia is applicable where the victim is a man, this is achieved through the insertion of a sub-clause (ie, '[d]oes any of the foregoing acts with respect to a man or boy')[62] rather than amending 'woman or girl' to 'person' as is the case for the other states.

The expansion of the procurement offence to include all sexual acts is less common. Only Queensland and Victoria have implemented such an expansion, with amendments being made in 1992[63] and 2016[64] respectively. Finally, only Victoria removed the extraterritorial language of the provision in 1980,[65] although the South Australian version has never had such language.[66]

The current section 45 of the *Crimes Act 1958* (Vic) illustrates a modern manifestation of the procurement offence that integrated all the possible amendments:

> (1) A person (A) commits an offence if –
>
> a) A makes a false or misleading representation; and
>
> b) A knows that –
>
> (i) the representation is false or misleading; or
>
> (ii) the representation is probably false or misleading; and
>
> c) as a result of A's representation, another person (B) takes part (whether at the time the representation is made or at a later time) in a sexual act with A or another person; and
>
> d) A intends that, as a result of A's representation, an outcome mentioned in paragraph (c) will occur.[67]

58 *Crimes (Sexual Offences) Act 1991* (Vic) s 3, amending *Crimes Act 1958* (Vic) s 57.

59 Uncorroborated testimony does not prevent conviction, but the judge must issue a warning to the jury: *Prostitution Laws Amendment Act 1992* (Qld) s 9.

60 *Criminal Law Amendment Act 1997* (Qld) s 29.

61 *Criminal Code Act Compilation Act 1913* (WA) s 192(1)(b).

62 *Law Reform (Decriminalization of Sodomy) Act 1989* (WA) s 13. The contentious context of sodomy decriminalisation may have explained this peculiar choice of language: Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 November 1989, 5764–6 (Pamela Ann Buchanan).

63 *Prostitution Laws Amendment Act 1992* (Qld) s 9.

64 *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 15.

65 *Crimes (Sexual Offences) Act 1980* (Vic) s 5(8D).

66 *Criminal Law Consolidation Act 1935* (SA) s 64, as enacted.

67 *Crimes Act 1958* (Vic) s 45, as inserted by the *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 15.

Table 1 below at the end of Part III(B) sets out the variations of the procurement offence currently in force in Australia. It becomes immediately apparent that the procurement offences deviate significantly, with Queensland being notable for both its breadth (eg, all sexual acts, gender neutrality and no morality requirement) and severity (ie, 14 years imprisonment) on one end, and Western Australia being on the extreme opposite end on those two metrics. However, the significance of these variations becomes even more apparent when the procurement offence is juxtaposed with the respective statutory prescriptions relating to the type of fraud that would vitiate consent for the purpose of rape or its equivalent. As will be explored in the next Part, the states and territories have very different approaches to the basic question of fraudulent sex criminalisation.

III RAPE AND PROCUREMENT OFFENCE IN CONJUNCTION: FOUR APPROACHES AND VARIED OUTCOMES

This Part connects the above findings on the procurement offence with the statutory amendments of sexual consent vis-à-vis fraud/mistake in the respective jurisdictions and identifies the four distinct approaches towards fraudulent sex criminalisation across Australia. This Part further demonstrates the surprisingly disparate criminal liability arising from the three scenarios abovementioned and highlights the associated normative undesirability.

A Rape Law Reform in Australia

Rape in most common law jurisdictions has been defined as sexual intercourse without consent.[68] The core legal question is what *type* of deception will vitiate consent. For a variety of historical and social reasons, the common law has tended to adopt a restrictive approach towards fraudulent sex, especially when compared to property crimes.[69] Beyond spousal impersonation, the English common law courts have traditionally held that deception must relate to the 'nature of the act' in order to vitiate consent for the purpose of rape and indecent assault.[70] This position has been affirmed in Australia. In *Papadimitropoulos v The Queen* ('*Papadimitropoulos*'),[71] the High Court of Australia acquitted the defendant of rape. The High Court held that because the victim comprehended the physical act (ie, she knew she was engaging in sexual intercourse), the victim's consent to sexual intercourse was not vitiated by the

68 Williams (n 15) 133–6. Civil law jurisdictions have traditionally conceived rape as forcible sex and require compulsion as an element of the offence: see Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71(5) *Journal of Criminal Law* 412, 420–5. For case studies on the doctrinal manoeuvre employed by courts to address fraudulent sex in civil law jurisdictions, see Jianlin Chen and Phapit Triratpan, 'Black Magic, Sex Rituals and the Law: A Case Study of Sexual Assault by Religious Fraud in Thailand' *UCLA Pacific Basin Law Journal* (unpublished, copy on file with author); Jianlin Chen, 'Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan' (2018) 13(2) *National Taiwan University Law Review* 183, 193–203.

69 Guyora Binder, *Criminal Law* (Oxford University Press, 2016) 241–84; Leader-Elliot and Naffine (n 15) 72–3.

70 Laird (n 15) 495–8; Williams (n 15) 133–6. The position is similar in the US, where the fraud must be in the *factum* as opposed to fraud in the *inducement*: Ben A McJunkin, 'Deconstructing Rape by Fraud' (2014) 28(1) *Columbia Journal of Gender and Law* 1, 9–12; Patricia J Falk, 'Rape by Fraud and Rape by Coercion' (1998) 64(1) *Brooklyn Law Review* 39, 157–61.

71 (1957) 98 CLR 249 ('*Papadimitropoulos*').

defendant's fraudulent representations that the defendant and the victim were properly married.[72]

This restrictive approach has prompted calls for legislative reform to expand the types of fraud that will vitiate consent. This reform could take the form of piecemeal ad hoc responses to particular unpopular court decisions.[73] The most notorious example is *Mobilio* as discussed above in Part II(A). The public outcry arising from the acquittal of the radiographer prompted swift legislative actions in Victoria[74] and other states[75] to overrule the decision and explicitly prescribe that sexual consent would be vitiated by mistakes as to the medical or hygienic purposes of a sexual act. Another example is New South Wales in relation to the *Papadimitropoulos* decision. When New South Wales initiated its first major modern rape reform in 1981, 'a mistaken belief that the other person is married to the person' was provided as a ground which would vitiate sexual consent.[76]

The reform could also be conducted on a more general level. The Northern Territory[77] and Queensland[78] expanded the category of fraud from 'nature of the act' to encompass 'purpose of the act' in 1994 and 2000 respectively.[79] In this regard, the three Australian jurisdictions of the Australian Capital Territory, Tasmania and Western Australia stand out for amending their respective criminal law statutes in the mid-1980s to prescribe no explicit limitation on the type of fraud or deception that will vitiate consent.[80] This is, on its face, a radical extension of the restrictive common law position. Whether the respective courts would in fact give effect to this broad provision will be discussed in the next Part, which examines the criminal liability arising out of the three scenarios of fraudulent sex. At this juncture, it suffices to note in Table 1 below the different statutory prescriptions of sexual consent as situated under the respective procurement offence.

This juxtaposing of the procurement offence with the statutory definition of sexual consent reveals that there are four different approaches, at least in terms of the type of fraud that is explicitly stipulated, towards fraudulent sex criminalisation in Australia. First (Category 1), the procurement offence is essentially a lesser offence that helps mitigate the restrictiveness of the rape offence vis-à-vis fraud. Queensland, South Australia and Victoria fall into this category. In these three states, the types of fraud which can vitiate sexual consent are limited. In particular, mistake as to non-medical purpose is not included in South Australia[81] and Victoria,[82] while mistake of identity is

72 Ibid 261 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ).
73 Bronitt (n 17) 296–8; Falk (n 70) 65.
74 *Crimes (Rape) Act 1991* (Vic) s 3.
75 See, eg, *Criminal Legislation (Amendment) Act 1992* (NSW) sch 1, s 4; *Criminal Law Consolidation (Rape) Amendment Act 1992* (SA) s 2.
76 *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1, s 4.
77 *Criminal Code Amendment Act (No 3) 1994* (NT) s 12.
78 *Criminal Law Amendment Act 2000* (Qld) s 24.
79 See Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21, 22–4, discussing the 2000 legislative reform of sexual consent in Queensland.
80 *Crimes (Amendment) Act (No 5) 1985* (ACT) s 4; *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) s 4; *Acts Amendment (Sexual Assaults) Act 1985* (WA) s 8. For a discussion of the three distinctive periods of rape law reform in contemporary Australia prior to 2010, see Peter D Rush, 'Criminal Law and the Reformation of Rape in Australia' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 237, 238–43.
81 *Criminal Law Consolidation Act 1935* (SA) s 46.
82 *Crimes Act 1958* (Vic) s 36.

limited to the victim's sexual partner in Queensland.[83] In this context, the procurement offence serves as an important fallback avenue for punishment.

Secondly (Category 2), the procurement offence is abolished after being rendered redundant with the expansion of the definition of consent to include vitiation by all types of fraud. This is the case of the Australian Capital Territory, which repealed the procurement offence amidst the restructuring of sexual offences in favour of a ladder of graded non-consensual sexual offences.

Thirdly (Category 3), there is an uneasy coexistence between the procurement offence and a rape provision that, at least on the face of it, is as broad as the procurement offence in terms of types of fraud. Tasmania and Western Australia fall into this category, notwithstanding complications posed by the legislature's neglect to update its procurement offence in Western Australia.

Fourthly (Category 4), fraudulent sex is substantially less criminalised with the repeal of the procurement offence without a corresponding expansion in the definition of sexual consent. New South Wales and the Northern Territory fall into this category. Notably, the decriminalisation is more pronounced in New South Wales. In both New South Wales and the Northern Territory, consent is vitiated by fraud as to identity, nature of the act, and medical or hygienic purpose. However, fraud relating to any purpose (ie, not limited to medical or hygienic purpose) would also vitiate consent in the Northern Territory.[84] The operation of this additional ground is arguably broader than the unique New South Wales stipulation relating to mistake as to marital status.

B Different State, Different Outcome

These four distinct approaches across Australia will, inevitably, generate different criminal liability. This disparity in legal outcomes is amply illustrated by the three scenarios set out at the start of this article. The three scenarios each embody a particular type of fraudulent representation. Scenario 1 – a deceptive attempt to obtain free sexual services – is a fraud as to considerations of a financial nature. Scenario 2 – a false promise of marriage to get sex – is a fraud as to considerations of a non-financial nature. Scenario 3 – lying that the sex is part of a valid mafia initiation ritual – is a fraud as to a non-medical purpose.[85] Notably, these scenarios are not hypotheticals selectively conjured up. These three scenarios are premised on facts of actual Australian cases. These cases have all resulted in convictions of sexual offences on the basis of the depicted fraudulent sex.

Before mapping the respective criminal liability of each scenario under the laws of the different states and territories, it is important to navigate two complications posed by the judicial interpretations of the statutory provisions.

The first complication arises from the manner in which the statutory definition of sexual consent is structured. In all eight states and territories, the circumstances prescribed in the provision as vitiating consent are explicitly classified as non-exhaustive.[86] Indeed, with the exception of the Australian Capital Territory, the

83 *Criminal Code Act 1899* (Qld) s 348(2)(f).

84 *Criminal Code Act 1983* (NT) s 192(2)(g).

85 The deception in scenario 3 can also be categorised as a fraud as to considerations of a non-financial nature (ie, mafia membership). This alternative categorisation does not affect the resulting criminal liability because fraud as to a non-medical purpose is either more or equally criminalised when compared to fraud as to considerations of a non-financial nature.

86 Crowe (n 13) 238.

stipulated consent-vitiating circumstances are preceded with an overarching definitional requirement that the consent has to be 'freely' given (or, in some cases, 'freely' and 'voluntarily'). This provides a possible avenue for courts to find that fraud which does not fall within the stipulated consent-vitiating circumstances could still vitiate consent because it renders the consent *not* 'freely' given.

An example of judicial recognition of this potential avenue is the 2011 Queensland case of *R v Winchester* ('*Winchester*').[87] A core issue confronting the Court of Appeal in that case was the validity of a jury direction that appeared to indicate to the jury that a false promise of a gift (a horse) would on its own be sufficient to negate the existence of free and voluntary consent. All three judges agreed that the jury direction was flawed and ordered a retrial, but differed in their reasoning.[88] Justice of Appeal Chesterman opined that, unless the fraud relates to the nature or purpose of the act (as so provided in the list of prescribed consent-vitiating circumstances), it is irrelevant to the question of consent.[89] On the other hand, Muir JA and Fryberg J were prepared to further hold that the false promise of the horse might vitiate the consent after taking into account other surrounding factors, such as limitations as to the 'intellect, maturity, psychological and/or emotional state' of the complainant,[90] or where the complainant has 'fall[en] under the control of a man, both physical and psychological'.[91]

The second complication arises in the three jurisdictions (the Australian Capital Territory, Tasmania and Western Australia) that have prescribed no explicit limitation on the type of fraud or deception that could vitiate consent. Would the courts give full effect to the statutory prescriptions that essentially rendered all forms of fraudulent sex punishable as rape? There has been no case law directly on point from Tasmania, but the Australian Capital Territory courts have thus far been receptive. In the 2015 case of *R v Livas*,[92] Penfold J was entirely comfortable to accept the guilty plea to a charge of sexual intercourse without consent from a man who deceived a sex worker regarding payment for sexual service (ie, scenario 1), observing that 'no one should doubt that fraudulently achieving sexual intercourse by this kind of activity constitutes rape, rather than a dishonesty offence, although of course dishonesty is a major element of this fact situation'.[93] Later that year in *R v Tamawiwy [No 2]*,[94] which involved deceptions that do not neatly fall into the established common law categories of consent-vitiating fraud,[95] Refshauge ACJ held there was 'no reason to impose a restrictive or common law view on the provisions … It seems to me that the legislative history and plain words of the provision require a wide interpretation'.[96]

87 (2014) 1 Qd R 44 ('*Winchester*').
88 Ibid 25 [76], 27 [82] (Muir JA), 40 [134] (Fryberg J).
89 Ibid 35 [112] (Chesterman JA).
90 Ibid 28–9 [85]–[86] (Muir JA).
91 Ibid 41 [135] (Fryberg J).
92 *R v Livas* [2015] ACTSC 50.
93 Ibid [34].
94 (2015) 302 FLR 67.
95 Ibid 73 [34], citing *Michael v Western Australia* (2008) 183 A Crim R 348, 432 [373] (EM Heenan AJA) ('*Michael*'). The defendant (a young man) posed as a fictitious young attractive woman to entice the victim (another young man) with the promise of sexual intercourse with her (the fictitious young woman) and her fictitious friend, on the condition that the victim first had sex with the defendant.
96 Ibid 76 [55]. Acting Chief Justice Refshauge did leave open the possibility of future cases prescribing limitations on the 'otherwise apparently boundless width of any relevant fraudulent misrepresentation', but held that the deception in the present case was serious: at 77 [58]–[59].

On the other hand, the Western Australian Court of Appeal in *Michael v Western Australia* ('*Michael*')[97] was split on the type of fraud that would vitiate consent under the new legislative provision, namely 'a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit or *any* fraudulent means'.[98] The case involved a man who pretended to be a policeman to obtain free or discounted sexual services from illegal sex workers. Acting Justice of Appeal Heenan was sceptical of whether the amendments were intended by Parliament to render any kind of fraud capable of vitiating consent, especially given the lack of such indications in the second reading speeches and the existence of section 192(2) (the procurement offence).[99] His Honour proposed limiting vitiation of consent to 'those frauds or misrepresentations which deprived the person concerned of a full comprehension of the nature and purpose of the proposed activity or his or her legal status of the person as a spouse, or his or her identity as an acceptable sexual partner'.[100] On the other hand, Miller JA referred to the articulated purpose (as per the government speech introducing the bill in the second readings) of protecting women through tightening the definition of consent, and embraced the 'dramatic variation from the provisions of the common law'.[101] President Steytler elected not to enter the fray by agreeing to Miller JA's upholding of the conviction on a separate ground (ie, it is threat/intimidation, and not fraud, which is the operating cause of consent vitiation), and merely opined that while some limits should be placed on the type of fraud which would negate consent, this should be done by the legislature.[102]

For the purpose of this article's assessment of criminal liability arising from the three scenarios, these two complications will be largely set aside. The use of 'free' consent to broaden the scope of fraudulent sex criminalisation remains at infancy in Australia. It has yet to be employed to sustain a conviction of fraudulent sex where the deception is not covered by the statutory prescribed consent-vitiating circumstances. As and when it is so employed, it is likely to require exceptional factors that are unique to the case and will not establish a general precedent for the particular form of deception.[103] For the three jurisdictions that have no statutory limitations on the types of consent-vitiating fraud, it will be assumed that all forms of fraudulent sex will indeed constitute rape. The exception to this assumption is Western Australia, reflecting the split decision in *Michael* regarding scenarios involving fraud not relating to the purpose of the act.[104]

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97 (2008) 183 A Crim R 348.

98 Ibid 353 [13] (Steytler P), quoting *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a), as inserted by the *Amendment (Sexual Assaults) Act 1985* (WA) s 8 (emphasis added).

99 Ibid 422 [338]–[341], 426–8 [356]–[358].

100 Ibid 432–3 [376].

101 Ibid 385 [165]–[166]. Justice of Appeal Miller did note that the facts in *Michael* (2008) 183 A Crim R 348 were 'not concerned with fraud', but with a situation where 'consent has been vitiated by a combination of threats, intimidation and deceit': at 387 [178].

102 Ibid 370–1 [88]–[89].

103 For example, even if the jury direction in *Winchester* (2014) 1 Qd R 44 did comply with the requirements of the majority and the conviction was thus upheld, *Winchester* (2014) 1 Qd R 44 would still not establish the precedent that a false promise of a horse (or any other considerations) would, without more, vitiate consent. Justice of Appeal Muir and Justice Fryberg explicitly required additional factors such as limited cognitive capabilities of the victim or domineering influence by the defendant.

104 Acting Justice of Appeal Heenan, the judge with the most conservative approach towards consent-vitiating fraud, was prepared to accept that fraud as to purpose would vitiate consent: *Michael* (2008) 183 A Crim R 348, 432–3 [376].

Having navigated the complications posed by judicial interpretations, mapping the criminal liability arising from the scenarios should be straightforward. As per Table 1, for jurisdictions that have retained the procurement offence, this lesser offence would be constituted in all three scenarios, with the possible exception of Western Australia vis-à-vis scenario 1. The yet-to-be-abolished morality requirement in Western Australia's procurement offence poses an obstacle for sex workers (the primary targets of scenario 1) who might be deemed 'a common prostitute or of known immoral character'.[105] Convictions of rape will be available in all three scenarios for jurisdictions that have no statutory limitations on the types of consent-vitiating fraud. Convictions of rape will also be available for the Northern Territory and Queensland with regard to scenario 3, given that their provisions on consent-vitiating fraud as to the purposes of the act are not limited to medical/hygienic purposes. Finally, all the states and territories have provisions on obtaining financial advantage through fraud/deception that would be applicable to the sexual service fraud demonstrated by scenario 1.[106] 'Property' would be so denoted where no sexual offence is committed.[107]

105 Syrota (n 17) 343–4.

106 *Criminal Code 2002* (ACT) s 333; *Crimes Act 1900* (NSW) s 192E; *Criminal Code Act 1983* (NT) s 227; *Criminal Code Act 1899* (Qld) s 408C; *Criminal Law Consolidation Act 1935* (SA) s 139; *Criminal Code Act 1924* (Tas) s 253A; *Crimes Act 1958* (Vic) s 82; *Criminal Code Act Compilation Act 1913* (WA) s 409.

107 Some of the fraud/deception provisions are potentially broad enough to cover fraudulent sex. The provisions in Queensland, Tasmania and Western Australia would be applicable where 'a detriment, pecuniary or otherwise' is caused by the deception: *Criminal Code Act 1899* (Qld) s 408C; *Criminal Code Act 1924* (Tas) s 253A; *Criminal Code Act Compilation Act 1913* (WA) s 409. Nonetheless, it is questionable whether courts in Australia would be willing to apply these property offences to fraudulent sex that does not involve a financial interest. For the purposes of this article, the point is moot given that there is a procurement offence in these three jurisdictions.

Table 1: Fraudulent Sex Criminalisation in Australia[108]

	Cat 1			Cat 2	Cat 3		Cat 4	
	Qld	SA	Vic	ACT	Tas	WA	NSW	NT
Procurement offence:								
No procurement offence				1985			2003	1983
All sexual acts	*		*					
Gender neutral language	*	*	*		*			
No 'morality' requirement	*	*	*		*			
No mention of outside jurisdiction		*	*					
Maximum penalty (years)	14	7	5		-[109]	2		
Rape includes:								
Any fraud				*	*	*		
Fraud as to any purpose (in addition to medical/hygienic purpose)	*							*
Fraud as to identity of any person (in addition to sexual partner)		*	*				*	*
Fraud as to marital status							*	
Maximum penalty (years)	Life	Life	25	14	-	14	14	Life
Criminal liability:								
Scenario 1 (sexual service)	Procure	Procure	Procure	Rape	Rape or procure	Rape (?)	Property	Property
Scenario 2 (marriage promise)	Procure	Procure	Procure	Rape	Rape or procure	Rape (?) or procure	Nil	Nil
Scenario 3 (mafia initiation)	Rape or procure	Procure	Procure	Rape	Rape or procure	Rape or procure	Nil	Rape

108 The table is inspired by the useful table in Jonathan Crowe's survey of fraud and sexual consent among the eight states and territories: Crowe (n 13) 239.

109 A peculiarity of the *Criminal Code Act 1924* (Tas) is that it does not set out the penalty for each offence. The default maximum penalty for a non-summary offence is 21 years' imprisonment: *Criminal Code Act 1924* (Tas) s 389(3). The rationale for this omission is to preserve judicial discretion and avoid excessive repetition in the Code: Stefan Petrow, 'Modernising the Law: Norman Kirkwood Ewing (1870–1928) and the Tasmanian Criminal Code 1924' (1995) 18(2) *University of Queensland Law Journal* 287, 293, 302. For a discussion of the legislative background behind this reform, see John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases, Volume I* (University of Tasmania Law Press, 1997) 6–7.

C Preliminary Assessment: An Undesirable Surprise?

Uniformity – or at the very least broad consistency[110] – was a core goal of the ambitious Model Criminal Code ('MCC') project that spanned across the 1990s.[111] The advantages for uniformity in criminal law across Australia are readily apparent: equality in treatment of offenders and victims regardless of location, and less shock regarding differences in prohibited conduct and expected norms when one travels across state/territory boundaries. Given the inherent moral dimension in sexual offences and the corresponding implications for social morality, sexual autonomy and gender equality,[112] it is no surprise that the Model Criminal Code Officers Committee drafting the MCC observed that there are 'even stronger arguments for a national approach' with regard to sexual offences.[113]

The limited success of the MCC project has been well documented.[114] In addition to the federal constitutional arrangement that renders criminal law the primary responsibility of each state and territory jurisdiction, Bronitt identified that criminal law reform is particularly susceptible to local 'law and order' politics and its underlying claims of jurisdictional uniqueness.[115] Nonetheless, Larcombe wrote in 2017 that '[t]here has been a strong degree of convergence in the criminal provisions governing sexual offences in the various Australian jurisdictions over the past 10–20 years', and that the major sources of divergence currently are enforcement and corollary support programs for victims and offenders.[116]

Putting together the analysis in Parts II and III, Table 1 reveals that not only is the statutory definition of sexual consent vis-à-vis fraud different across the states and territories, but also that there is a more fundamental disparity as to the extent to which fraudulent sex is a crime. Without trivialising the undoubtedly critical debate about whether a particular act of fraudulent sex should constitute rape or merely the procurement offence,[117] the discrepancy between a legal activity and committing a crime – especially where the crime is punishable by non-trivial length of imprisonment – is even more drastic and undesirable. Notwithstanding the departure from the ideals of uniformity, one might not be overly sympathetic to a Victorian who claimed surprise when he realised that his defrauding of sex workers (ie, scenario 1) in the Australian

110 See Miriam Gani, 'Codifying the Criminal Law: Implications for Interpretation' (2005) 29(5) *Criminal Law Journal* 264, 265–6, noting that Matthew Goode, one of the architects of the Model Criminal Code, has subtly downgraded the purported goal of the Model Criminal Code from the previously articulated goal of 'compulsory uniformity' to 'voluntary consistency'.

111 For an overview of the project, see MR Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26(3) *Criminal Law Journal* 152.

112 Catharine A MacKinnon, 'Rape Redefined' (2016) 10(2) *Harvard Law and Policy Review* 431, 431–6.

113 Model Criminal Code Officers Committee, Parliament of Australia, *Model Criminal Code Chapter 5: Sexual Offences against the Person* (Report, May 1999) 2.

114 Gani (n 110) 265–6.

115 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* (Australian National University Press, 2017) 133, 138.

116 Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017) 143, 151. See also Bronitt and McSherry (n 31) 578–9, observing how rape, together with murder, is often central in law school curricula given the perceived universality of the offence across legal cultures.

117 See, eg, Morgan (n 24) 421–2, critically discussing the suggestion by the Court in *Mobilio* [1991] 1 VR 339 that the defendant should have been prosecuted under the procurement offence, observing that there was large difference between the two offences, and forcefully arguing that the fraud in *Mobilio* [1991] 1 VR 339 was serious enough to vitiate consent.

Capital Territory is rape[118] and not the procurement offence as in his home state.[119] The detriment in terms of equal treatment and legal expectation is starker where someone from New South Wales finds himself charged with a sexual offence in Queensland when he obtained sex by lying about marrying the victim (ie, scenario 2).[120]

Moreover, the normative undesirability of this stark discrepancy is aggravated by its unexpected nature. This article recognises that there remains much controversy in Australia and around the world[121] as to the extent to which fraudulent sex should be criminalised, whether as rape or otherwise. It is perhaps inevitable that the states and territories have taken different approaches. Indeed, the current state of affairs would arguably be tolerable if the scholars and the public are in fact well aware of the difference (eg, New South Wales is the most permissible towards fraudulent sex, while the Australian Capital Territory is the most restrictive). As per a companion article that examines how public universities in the different states and territories present the law relating to fraudulent sex in their public/institutional education documents (eg, sexual assault policy documents, and initiatives to address sexual assault and sexual harassment), there are often incorrect representations or conspicuous omissions of the law relating to fraudulent sex.[122] In the circumstances where such public institutions could not consistently demonstrate an accurate understanding of the law in its own jurisdictions, it is unlikely that scholars and the public are in fact fully aware of the differences in fraudulent sex criminalisation across Australia.

III SEXUAL OFFENCES REFORM: PERILS OF OVERLOOKING THE LESSER OFFENCE

Beyond the arguably surprising and undesirable divergence in criminal liability arising from fraudulent sex, there are also flaws in terms of the legislative design of sexual offences in half of the states and territories. This Part discusses the two shortcomings of incoherent structure and unintended decriminalisation in Category 3 and Category 4 respectively, and highlights the deficiencies in the underlying legislative process.

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118 *R v Livas* [2015] ACTSC 50.

119 *R v Rajakaruna* [2004] 8 VR 340.

120 *R v McKelvey* [1914] St R Qd 42.

121 Fraudulent sex was traditionally not criminalised beyond the narrow exception of marriage-related deception in civil law jurisdictions premised on the German or French criminal law: *Reichsstrafgesetzbuch 1871* [Criminal Code of 1871] (Germany) ss 173–184b [tr Gerhard OW Mueller and Thomas Buergenthal]; *Code Pénal 1810* [Penal Code of 1810] (France) ss 330–340 [tr Jean F Moreau]. For academic discussion, see Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing, 2009) 195–212; Catherine Elliott, *French Criminal Law* (Willan Publishing, 2001).

122 For example, on the student wellbeing informational web page of the Australian National University regarding what consent is, it does not mention that fraud would vitiate consent. This is a conspicuous understatement of the relevant law in the Australian Capital Territory: Australian National University, 'What is Sexual Assault & Sexual Harassment?' (Web Page) <https://www.anu.edu.au/students/health-safety-wellbeing/violence-sexual-assault-support/your-rights-support>. An example in the non-university context is the 'Sexual Assault Information Fact Sheet' prepared by and posted (as of 31 May 2019) on the website of the Western Australia Police Force. The fact sheet states that '[c]onsent is not freely and voluntarily given if you … [h]ave a mistaken belief that the offender was your sexual partner': Western Australia Police Force, 'Your Safety', *Sexual Assault Information Fact Sheet* (Online Fact Sheet, 20 November 2018) <https://www.police.wa.gov.au/Your-Safety/Sexual-assault>. By singling out identity fraud, this is at best a misleadingly selective statement of the law.

A Category 1 and Category 2: (Rightly) Keep It or Leave It

It is apt to begin with the states and territories that have gotten it right. From the perspective of legislative design, category 1 (Queensland, South Australia, and Victoria) and category 2 (Australian Capital Territory) are commendable for the discernible rational logic that underpins their reforms. Both categories represent polar opposites in terms of the policy choice as to whether fraudulent sex should be punished as rape. This is a highly contentious decision without clear consensus in Australia as reflected in current law, and which this article does not take a position on. However, regardless of one's preferred policy choice, the procurement offence in the states and territories in these two categories is given the proper legislative treatment that should otherwise flow from the respective policy choice. For category 1 jurisdictions, the procurement offence is preserved and updated as a lesser offence because the legislature was not prepared to expand the definition of consent beyond limited categories of fraud, but otherwise wanted to preserve the options of criminalising fraudulent sex in general. For category 2, the procurement offence is duly repealed as redundant because the legislature decided to treat all fraudulent sex as rape.

In this regard, among those states in category 1, Victoria deserves to be singled out for commendation. Like Queensland, Victoria has enacted all the possible modernising amendments to significantly expand the scope of its procurement offence. However, Victoria went further to remove the offence's extraterritorial application, the otherwise peculiar element for a provision commonly conceptualised as a lesser provision to punish fraudulent sex. There was no particular explanation or discussion in the parliamentary proceedings, beyond the general allusion of clearing up the archaic language.[123] Nonetheless, if the benefit of hindsight is afforded, the Victorian legislature has successfully transitioned the procurement offence from its historical accidental origin to its current proper role as a lesser offence to rape. Notably, the procurement offence is also in a similar state in South Australia, albeit in somewhat fortuitous circumstances given the extraterritorial wording was somehow excluded when the consolidating statute was drafted in 1935.[124] Nonetheless, as will be discussed below in Part V(A), the failure to expand the actus reus from 'sexual intercourse' to 'sexual activity' in South Australia has resulted in an anomaly of according less legal protection to fraudulently procured indecent acts.

B Category 3: Failure to Decide?

It is probably trite to observe that effective law amendments should take into account the existing legal framework so as to ensure those amendments are situated coherently alongside existing provisions.[125] Indeed, consequential amendments or repeal of related provisions are often integral in resolving any ambiguity, uncertainty or conflict that may arise from the interactions between the proposed amendments and the

123 Victoria, *Parliamentary Debates*, Legislative Council, 18 November 1980, 2871–2 (Haddon Storey, Attorney-General).

124 The updating of the procurement offence in South Australia took place in the context of tackling sexual servitude rather than in light of rape law reform: South Australia, *Parliamentary Debates*, Legislative Council, 21 October 1999, 167–9 (Kenneth Griffin, Attorney-General). Notably, the same is true of Queensland: Queensland, *Parliamentary Debates*, Legislative Assembly, 13 November 1992, 684–6 (Paul Braddy).

125 Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing, 2014) 44–6.

existing laws (including both legislation and judicial precedents).[126] From this perspective, the procurement offence is in a state of legal ambiguity in Tasmania and Western Australia. The removal of any limits as to the types of fraud that can vitiate sexual consent renders the procurement offence redundant. While it is inevitable that there would be some form of overlap among the scope of different criminal law provisions in similar circumstances, it is rare to have such complete overlap of the core element of various offences.

This begs the question: Why was the law amended in such a fashion in Tasmania and Western Australia?

1 Tasmania

In 1987, Tasmania added a new provision dedicated to defining consent. The material portion of this new provision (vis-à-vis fraudulent sex) is that 'a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given … a consent is freely given where … it is not procured by force, fraud, or threats of any kind'.[127] This addition, together with various updates to the procurement offence (ie, gender neutrality and removing the corroboration requirement), was part of a comprehensive reform of sexual offences law largely pursuant to recommendations by the 1982 Tasmanian Law Commission.[128]

However, the *Criminal Code Act 1924* (Tas) ('*Tasmanian Act*') is rather unique to begin with. Unlike in the UK and other Australian jurisdictions, the *Tasmanian Act* has had a singular definition of consent for both sexual offences and non-sexual crimes since its inception in 1924.[129] The same definition of consent is applicable to assault,[130] stealing,[131] and rape,[132] among various other usages throughout the statute. This resulted in a definition of consent that aims to govern property offences.[133] Consent was originally defined as 'a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents. A consent is said to be freely given when it is not procured by force, fraud, or threats of whatever nature'.[134]

This coupling of sexual consent and non-sexual consent, and the apparent breadth of the actual statutory language, should have – in theory, at least – placed Tasmania at the progressive forefront in terms of sexual offences. However, the Law Reform Commission of Tasmania noted that the 1964 Tasmanian case of *R v Schell*[135] chose to follow the traditional common law formulation articulated in *Papadimitropoulos*,[136]

126 Legislation Design and Advisory Committee (New Zealand), *Legislation Guidelines* (2018) 17–20; Ian Dennis, 'The Law Commission and the Criminal Law: Reflections on the Codification Project' in Matthew Dyson, James Lee and Shona Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, 2016) 108, 117–9.

127 *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) s 4.

128 Tasmania, *Parliamentary Debates,* House of Assembly, 15 April 1987, 1487 (John Bennett).

129 *Criminal Code Act 1924* (Tas) sch 1, s 2A.

130 Ibid sch 1, s 182(4).

131 Ibid sch 1, s 226.

132 Ibid sch 1, s 185.

133 See generally Binder (n 69).

134 *Criminal Code Act 1924* (Tas) sch 1 item 1, as enacted.

135 [1964] Tas SR 184.

136 (1957) 98 CLR 249.

while the subsequent case of *Woolley v Fitzgerald*[137] expressed doubt as to the applicability of *Papadimitropoulos* without deciding on the issue.[138] Thus, the Tasmanian Law Reform Commission recommended amendments that would unambiguously extend the types of fraud which would render a consent invalid.[139] In addition, the Law Reform Commission also recommended repealing the procurement offence, given that it is superfluous.[140]

Three issues can be raised with regard to the Tasmanian experience. First, there was no discussion or any acknowledgement throughout the Tasmanian legislative process of the unique nature of the singular definition of consent under the Tasmanian Act. The definition of consent in the *Tasmanian Act* is applicable to all types of offences, including property offences and offences against persons. However, there was no recognition of the potential far-reaching impact of the proposed amendments to the definition of consent in both the Law Reform Commission's report[141] and subsequent parliamentary debate.[142] Indeed, it is particularly unfortunate that the Law Reform Commission extensively discussed and referenced other Australian jurisdictions without ever once considering that the comparison might need to be more circumscribed, particularly given the unique nature of the *Tasmanian Act* vis-à-vis consent.[143]

Secondly, the Tasmanian Law Reform Commission arguably overstated the distorting influence posed by *Papadimitropoulos* on Tasmanian jurisprudence. Justice Crisp in *R v Schell* adopted a two-stage approach as to consent: first, whether there was consent; and secondly, whether consent was freely given. *Papadimitropoulos* was adhered to in the context of the first step, and did not impede the statutory modifying effects of the unique Tasmanian provision on consent.[144] This focus on whether consent was freely given is also how Chambers J in *Woolley v Fitzgerald* side-stepped the issue of *Papadimitropoulos*, observing that 'a consent is said to be freely given when it is not procured by force, fraud or threats of whatever nature. The magistrate has specifically found that the consent of [the complainant] was procured by the fraud [of pretending to be a doctor]'.[145]

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137 [1969] Tas SR 65, 70 (Chambers J).

138 Law Reform Commission, Parliament of Tasmania, *Report and Recommendations on Rape and Sexual Offences* (Report No 31, 9 December 1982) 8–9.

139 Ibid 16.

140 Ibid 19.

141 See ibid 14–6.

142 See Tasmania, *Parliamentary Debates,* 15 April 1987 (n 128) 1487–93 (John Bennett); Tasmania, *Parliamentary Debates,* House of Assembly, 16 April 1987, 1516–32 (John Bennett); Tasmania, *Parliamentary Debates*, House of Assembly, 8 July 1987, 2020–59 (Judith Jackson); Tasmania, *Parliamentary Debates*, House of Assembly, 9 July 1987, 2117 (Frances Bladel); Tasmania, *Parliamentary Debates*, House of Assembly, 23 July 1987, 1584–622 (Tony Fletcher); Tasmania, *Parliamentary Debates*, Legislative Council, 29 July 1987, 1679–730 (Hank Petrusma). The second reading speech by the Attorney-General during the initial enactment of the Code also did not mention this feature when discussing the various major legal changes brought about by it: Blackwood and Warner (n 109) 5–7, quoting the second reading speech, as 'reported in the *Mercury* of 29th February, 1924 at [page] 3'.

143 See Law Reform Commission (n 138). In the only criminal law textbook dedicated to Tasmanian criminal law, this unique significance of the Tasmanian Criminal Code is also overlooked: John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases, Volume II* (University of Tasmania Law Press, 1993) 775–6.

144 *R v Schell* [1964] Tas SR 184, 186–7, where Crisp J opined that '[t]he *Code* definition is rather a statutory statement as to the circumstances in which the consent postulated by the High Court case must be given' (emphasis in original).

145 *Woolley v Fitzgerald* [1969] Tas SR 65, 71. See also Blackwood and Warner (n 143) 785–6, undertaking a similar, and arguably erroneous, interpretation of the two cases.

Thirdly, and with particular relevance to this article's inquiry, is the retention of the procurement offence.[146] This is despite the Law Reform Commission's recommendation to repeal the procurement offence in light of it being superfluous after (re-)expanding the definition of sexual consent.[147] Notably, among the eight provisions which had been recommended by the Law Reform Commission for repeal given their redundancy in light of the proposed amendments,[148] the procurement offence was the only provision which the government chose to keep. In choosing to retain the procurement offence, the then Attorney General explained in his second reading speech that 'there are a number of factual circumstances in which certain conduct should be rendered criminal but which would fall outside other provisions of the code'.[149] There was no elaboration on what those factual circumstances are, even as it was noted in the same paragraph that the section has been utilised at least twice in the past five years.

Somewhat ironically, it was the Australian Capital Territory that faithfully adhered to the recommendations of the Tasmanian Law Reform Commission. The Australian Capital Territory expanded the definition of sexual consent and abolished the procurement offence two years prior in 1985 under the explicit endorsement of the Tasmanian Law Reform Commission report.[150] On the other hand, Tasmanian sexual offence reform continues to be hampered by the unexplained decision to cherrypick recommendations and the government's more fundamental failure to appreciate the unique structure of the Tasmanian Act. This results in the current legal quagmire that is likely to prove perilous for Tasmanian courts to navigate as and when they have to determine the extent of consent-vitiating fraud.

2 Western Australia

Western Australia amended its statutory provision on consent in 1985, changing it to 'a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means'.[151] The final two descriptors (ie, 'deception or fraudulent means') were updated to 'deceit, or any fraudulent means' in 1992[152] without any particular legislative discussion.[153] As compared to Tasmania, this amendment has attracted considerable academic attention as to the actual legal impact of these legislative changes.

In particular, articles by Syrota[154] and Morgan[155] have engaged in in-depth analysis of the issue, both of which have been discussed extensively in the subsequent *Michael* case. The existence of the procurement offence featured prominently in Syrota's argument that consent-vitiating fraud should be limited to fraud as to the nature of the

146 *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) s 13.
147 Law Reform Commission (n 138) 19.
148 Ibid 19–20.
149 Tasmania, *Parliamentary Debates*, 16 April 1987 (n 142) 1518 (John Bennett).
150 Explanatory Statement, *Crimes (Amendment) Ordinance (No 5) 1985* (ACT) 7. For a critical analysis of the relevant legislative process in the Australian Capital Territory, see Jianlin Chen, 'Two Is a Crowd: An Australian Case Study on Legislative Process, Law Reform Commissions and Dealing with Duplicate Offences' (2020) *Statute Law Review* (advance), 8–10.
151 *Acts Amendment (Sexual Assaults) Act 1985* (WA) s 8
152 *Acts Amendment (Sexual Offences) Act 1992* (WA) s 6.
153 See Western Australia, *Parliamentary Debates*, Legislative Council, 6 May 1992, 1801–6 (Joseph Berinson, Attorney-General). Note that the overarching legislative concern underlying the amendments was child sexual abuse.
154 Syrota (n 17).
155 Morgan (n 15).

act.[156] Morgan also alluded to the 'legal analysis' that a wide interpretation of the statutory amendment would 'leave only limited scope for section 192 of the Criminal Code', but chose to focus on the 'even more fundamental' 'policy argument' of not punishing 'failed "seductions"' as sexual assault[157] in arguing for the courts to 'adopt legal rules which delimit the situations in which fraud vitiates consent'.[158] Notably, unlike the court in *Michael*, neither article referred to the actual legislative process. As discussed above, Heenan AJA referred to the lack of indications in the second reading speeches for the 1985 amendments to support his narrow interpretation, while Miller JA cited at length the purposes of the amendments articulated during the Bill introduction speech to support his wide interpretation.[159]

Examination of the actual legislative debate regarding the 1985 amendments reveals that the respective categorisations of the legislative debate by Heenan AJA and Miller JA are both inaccurate. While the speeches introducing the Bill in both the Legislative Assembly and the Legislative Council did play up the otherwise laudable objective of tackling sexual violence against women, there was no mention of any changes in relation to fraud and sexual consent. Indeed, when explaining the new statutory definition of consent, it was merely stated that '[t]his, together with the restricted definition of consent, will ensure that consent cannot be freely and voluntarily given if it is obtained by force or threat'.[160] The omission of the other two grounds (deception and fraudulent means) is conspicuous to say the least. Yet, Heenan AJA's understanding is flawed too. While there was no particular mention of fraud/deception in the second reading speech introducing the Bill, the breadth of the amended provision in relation to fraud was explicitly mentioned in the subsequent parliamentary debate by both supporters and opponents of the Bill. For example, Medcalf pointed out that '[t]his concept of fraud and deception is a very interesting one', and after discussing the fact pattern of *Papadimitropoulos*, opined that '[i]t is very proper that no-one will be able to allege that she had consented in this circumstance. I think that this definition will clear up this type of situation'.[161] On the other hand, Mensaros questioned: 'Of course, this definition includes consent obtained by force, threat, or intimidation and I have no argument with it to that point. However it also includes deception or fraudulent means. What do these terms mean?'[162] He further argued against the inclusion by alluding to how it would criminalise as sexual assault false promises of 'jewellery, payment, or some other compensation in kind'.[163] Thus, there is at minimum a legislative awareness of the potential radical changes to the existing common law position, even if the government did not explicitly respond to these concerns.

Further examination of the legislative history of the procurement offence, especially in the comparative context vis-à-vis other states and territories, highlights the flaws in relying on the retention of the procurement offence to justify a narrow interpretation of sexual consent in Western Australia. During the 1985 amendments, there was no

156 Syrota (n 17) 340–3.
157 Morgan (n 15) 228–9, 240.
158 Ibid 240.
159 See above nn 99–101 and accompanying text.
160 Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 September 1985, 701 (Pamela Beggs); Western Australia, *Parliamentary Debates*, Legislative Council, 26 September 1985, 1653 (Joseph Berinson).
161 Western Australia, *Parliamentary Debates*, Legislative Council, 16 October 1985, 2362–3 (Ian Medcalf).
162 Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 September 1985, 1183 (Andrew Mensaros).
163 Ibid 1183–4 (Andrew Mensaros).

mention of the procurement offence throughout the legislative debates in Western Australia. This is unlike the Tasmanian experience, which at least acknowledged the decision to retain the procurement offence. This suggests that the continued existence of the procurement offence is less a conscious legislative decision, and more so due to neglect. The case for neglect is strengthened by the fact that the procurement offence in Western Australia has remained largely unchanged as other Australian jurisdictions have updated and expanded their respective procurement offences. This resulted in a Western Australian procurement offence that is restricted to women who are 'not a common prostitute or of known immoral character'.[164] In such a context, the continued existence of the procurement offence provides flimsy support for a restrictive interpretation of consent-vitiating fraud.

To be clear, the blame for this conundrum is squarely on the legislative process. It started with an arguably misleading omission on the breadth of the new provision during the introduction of the Bill. Further, despite concerns about the potential implications during the legislative debate, the government did not provide any explicit response to clarify the position. Add to this the thoughtless neglect of the procurement offence both during and after the 1985 amendments, and one is truly sympathetic to any scholars and judges who have to make sense of the resulting statutory arrangement.

C Category 4: Accidental (or Misleading) Decriminalisation

As a matter of first principle, there is nothing wrong per se in abolishing the procurement offence. As discussed in Part II(C), the procurement offence is essentially a historical accident unique to a small handful of jurisdictions. There remains a lack of consensus, both in public and among academics, as to the merits of criminalising *all* fraudulent sex.[165] However, any repeal of the procurement offence should be made with proper acknowledgement that it is in fact a substantial decriminalisation of fraudulent sex, especially where there is no corresponding expansion of sexual consent. Rightly or wrongly, procurement offences are widely perceived as a lesser offence to punish fraudulent sex that fails to constitute rape.[166]

1 New South Wales

In this regard, the repeal of the procurement offence in New South Wales is at best a misunderstanding, and at worst misleading. The explanatory note of the 2003 amendment Bill proclaimed that the legislative objective was to 'provide for the equal treatment of sexual offences irrespective of whether the victim or the perpetrator is male or female', with particular focus on 'provisions that apply solely to male homosexual acts'.[167] This is unquestionably desirable. This also does not readily explain why the procurement offence should be tabled for repeal. The specific explanation offered for the repeal of the procurement offence was that it is 'an obsolete offence of men procuring "illicit carnal connection" by fraud'.[168] However, if the issue of the

164 *Criminal Code Act Compilation Act 1913* (WA) s 192(1)(b).

165 An example is when Jonathan Herring provocatively argued that all fraudulent sex should be criminalised as rape in a 2005 article: Jonathan Herring, 'Mistaken Sex' [2005] (July) *Criminal Law Review* 511, 511. This article triggered forceful objections from Hyman Gross and Michael Bohlander: Gross (n 7) 226–7; Bohlander (n 68) 416.

166 See above Part II(A).

167 Explanatory Note, Crimes Amendment (Sexual Offences) Bill 2003 (NSW) 1.

168 Ibid 2.

procurement offence in New South Wales is that it only punished 'men', then the matter could simply be resolved by updating the procurement offence to use gender neutral language, as other states have done previously (for example, Victoria in 1980,[169] and Queensland in 1992[170]).

The proffered reasons by the Minister in the introductory speech of the Bill is a little different, noting that the procurement offence should be repealed because 'it is an obsolete offence … [and] [t]he issue of fraud is incorporated through amendment of the consent provisions found in section 61R of the Act'.[171] However, the amendment of section 61R was simply an insertion of 'or under any other mistaken belief about the nature of the act induced by fraudulent means'.[172] This is the standard (and conservative) common law position affirmed in *Papadimitropoulos*, and would in all likelihood be applied by New South Wales courts even without the 2003 amendment. To suggest that the 2003 amendment in any way deals with the legal lacuna left by the procurement offence is at best a grossly negligent misunderstanding of both the scope of the procurement offence and the new consent provision.

However, given how the repeal of the procurement offence is presented in the explanatory note and the second reading speech, this otherwise substantial decriminalisation did not attract any discussion in the subsequent legislative debate.[173]

2 Northern Territory

In contrast, the failure to include the procurement offence in the Northern Territory is more excusable. Legislators in the Northern Territory faced the mammoth task of enacting an entirely new criminal code from a messy array of statutes. This array not only included old statutes that had not been amended for nearly a century and which technically remained in force,[174] but also statutes which were at times contradictory to one another. An example of such contradiction is the age of consent. For the primary statute (ie, the *Criminal Law Consolidation Act and Ordinance 1876* (NT)), it was 12.[175] However, in the *Criminal Law Consolidation Amendment Act 1885* (NT), it was 16.[176]

Indeed, at the time of the relevant reforms, there were two concurrent provisions of the procurement offence. The procurement offence of the standard manifestation was provided by s 3 of the *Criminal Law Consolidation Amendment Act 1885* (NT).[177] However, there was also another provision in the primary statute which similarly punished procurement 'by false pretences, false representations, or other fraudulent means' for women under the age of 21 (ie up to 9 years above the age of consent as per the primary statute), but without the exclusion of 'common prostitute or of known immoral character'.[178]

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169 *Crimes (Sexual Offences) Act 1980* (Vic) s 3(8D).

170 *Prostitution Laws Amendment Act 1992* (Qld) s 9.

171 New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 376 (Robert Debus).

172 *Crimes Amendment (Sexual Offence) Act 2003 (No 9)* (NSW) sch 1, ss 4, 8.

173 The main controversy in the legislative debate was the lowering of the age of consent for same-sex intercourse from 18 years old to the same age as heterosexual intercourse (16 years old): see New South Wales, *Parliamentary Debates*, Legislative Council, 27 May 2003, 1081–93, 1106–38; New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 May 2003, 735–55.

174 See, eg, *Criminal Law Consolidation Amendment Act 1885* (NT); *Children's Protection Act 1899* (NT).

175 *Criminal Law Consolidation Act and Ordinance 1876 to 1960* (NT) ss 63, 67.

176 *Criminal Law Consolidation Amendment Act 1885* (NT) s 9.

177 Ibid s 3, which imposed a punishment of two years' imprisonment.

178 *Criminal Law Consolidation Act and Ordinance 1876 to 1960* (NT) s 62, which imposes a punishment of 7 years' imprisonment.

Given the scope of reform, it is perhaps unsurprising that there was so much back and forth over the inevitably numerous controversial issues such that there were a number of Bill withdrawals (followed by the reintroduction of a new Bill) throughout the legislative process that extended over a period of three years.[179] For sexual offences, the discussion centred mainly on marital rape, the age of consent, and penalties for rape.[180] In this context, it is understandable that a provision that is not commonly regarded as a core sexual offence escaped attention and discussion altogether.

D Summary: The Procurement Offence is Integral to Coherent Sexual Offences Reform

In summary, this Part demonstrates how the procurement offence is an integral component of sexual offence reform vis-à-vis fraudulent sex criminalisation. Appropriate treatment of the procurement offence – whether in terms of modernising updates to transition the procurement offence from its peculiar historical origin or repealing the procurement offence in conjunction with statutory expansion of consent-vitiating fraud – is essential for a coherent legislative framework. On the other hand, the failure to accord proper attention to the procurement offence has contributed to the ambiguous structural relationship between rape and the procurement offence in Tasmania and Western Australia, and the unintended decriminalisation in New South Wales and the Northern Territory.

In this regard, Western Australia and New South Wales have to be singled out for special critique. While the uneasy coexistence of the procurement offence and its sexual consent definition in Tasmania is by no means desirable, the situation is not particularly dire given the unique criminal law arrangement where there is generally no individual prescription of penalty.[181] The ostensible severity of the different offences is muted by the lack of explicit differentiation in terms of punishment. In addition, while this overlap does give rise to conceptual ambiguity as to which is the appropriate charge in a given situation, the practical impact from the broad perspective of criminalisation is limited. The scope of activities that could be punished is unaffected, especially with the updating of the procurement offence. On the other hand, continued thoughtless neglect of the procurement offence meant that Western Australia is left with a fraught statutory framework for fraudulent sex: a seemingly radical statutory expansion of the consent definition that has not yet materialised in actual judicial practice and an outdated procurement offence that cannot adequately serve as a lesser offence to mitigate the otherwise restrictive definition of consent.

Likewise, as compared to the experience in the Northern Territory, the decriminalisation in New South Wales is more undesirable both in terms of process and outcome. The arguably accidental repeal in the difficult and complicated law reform context of the Northern Territory is more excusable than the surreptitious repeal under

179 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 August 1981, 2583–4 (Paul Everingham, Attorney-General); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 1983, 778 (Jim Robertson, Attorney-General). For a concise history of the Northern Territory's legislative process, see Andrew Hemming, 'The Criminal Code (Cth) Comes to the Northern Territory: Why Did the Original *Criminal Code 1983* (NT) Last Only 20 Years?' (2010) 35(1) *University of Western Australia Law Review* 119, 120–2.

180 See, eg, Northern Territory, *Parliamentary Debates*, Legislative Assembly, 10 June 1981, 1099–102 (Paul Everingham, Chief Minister); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 August 1981, 2593–4 (Tom Harris).

181 *Criminal Code Act 1924* (Tas) s 389(3).

an erroneous presentation of the existing law and relevant amendments in New South Wales. Moreover, the statutory stipulation of consent-vitiating fraud is now notably broader in the Northern Territory (albeit only expanded in 1994 to include 'purpose')[182] than in New South Wales, such that there is less divergence with the rest of Australia in terms of outcomes for the various fraudulent sex scenarios.[183] If a state or territory is to become the most legally permissible in Australia in terms of fraudulent sex, one would at least hope that it is through a conscious and deliberate legislative process. This is unfortunately not the case for New South Wales.

IV REFORM PROPOSAL: PROCUREMENT OFFENCE AS A PROPER LESSER OFFENCE (OR NOT)

The implication from this article's findings is a call for statutory reform in certain Australian jurisdictions to enhance the coherency and clarity of fraudulent sex criminalisation. It should be a relatively straightforward technical amendment for jurisdictions in Category 1. The main task is to fully transition the procurement offence from its historical accidental origin to its currently perceived role as a lesser offence for fraudulent sex. Specifically, South Australia should expand the actus reus from 'sexual intercourse' to 'sexual act',[184] while Queensland should remove the provision's current extraterritorial application.

For South Australia, the current procurement offence is limited to sexual penetration (ie, penetration of vagina, labia majora or anus), fellatio and cunnilingus.[185] Whether other sexual acts or activities procured by fraud would result in a sexual offence (ie, indecent assault)[186] would be dictated by the statutory definition of consent. This means that if the core act in the three scenarios is changed from sexual intercourse to, say, fondling of the breast, there would suddenly be no sexual offences committed. If South Australia is prepared to punish the fraudulent procurement of sexual intercourse in those three scenarios, it is questionable why similarly procured sexual activities not amounting to sexual intercourse should be exempted. One possible justification is that sexual intercourse deserves greater legal protection from fraud. However, this is not persuasive since South Australia would be the only Australian jurisdiction that *consciously* makes such a distinction.[187]

For Queensland, the removal of the provision's extraterritorial application should be uncontroversial. There is already a chapter in the Criminal Code dedicated to

182 *Criminal Code Amendment (No 3) 1994* (NT) s 12. Gray and Blokland suggested that the legislature intended to broaden the scope of the common law in the 1994 amendments, given the 'extensive discussion on the question of fraud and mistake in both case law and academic writing': Gray and Blokland (n 19) 251–2.

183 See above Part III(B).

184 *Criminal Law Consolidation Act 1935* (SA) s 60. When setting out the definition of consent for sexual offences, South Australia defined it against the phrase 'sexual activity': s 46. However, 'sexual act' is nevertheless used in certain sexual offence provisions: eg, ibid ss 50, 62.

185 Ibid s 5.

186 Ibid s 56.

187 For the Australian Capital Territory, Northern Territory and New South Wales, the same statutory definition of sexual consent is operative for both sexual intercourse and other sexual activities. For Queensland and Victoria, the procurement offence covers 'sexual acts'. Western Australia and Tasmania are possible complications. On one hand, their statutory definitions of consent ostensibly overlap with the procurement offence. On the other hand, there are doubts as to whether judges would give full effect to the provision, especially in Western Australia. Nonetheless, given the analysis of the legislative process above in Part IV(B), the distinction could hardly be regarded as 'consciously' made.

prostitution which criminalises any procurement of prostitution regardless of where the prostitution activity occurs.[188] The extraterritorial application of the procurement offence has also been redundant in practice. The author has yet to come across a procurement offence prosecution – in Australia or otherwise – whereby the sexual act occurs outside of the prosecuting jurisdiction.

Reform for Tasmania and Western Australia is going to be more difficult. The reform in both states would require a substantive policy decision about the approach to fraudulent sex criminalisation. One option is to follow the Australian Capital Territory's example by abolishing the procurement offence and treating all fraudulent sex as rape (ie, Category 2). Another option is to limit the statutory definition of consent-vitiating fraud to selected categories of fraud, and then decide whether to retain a properly updated procurement offence (ie, Category 1) or abolish it altogether (ie, Category 4). This is a controversial issue with no consensus in Australia, but one which has to be confronted by the legislatures in Tasmania and Western Australia to resolve the current statutory ambiguity. In this regard, the procurement offence in Western Australia is in dire need of updating if the legislature decides that it should be retained as part of the Category 1 approach. The non-gender neutral language and the victim morality requirement are embarrassing relics that have no place in a modern statute.

Finally, New South Wales and the Northern Territory should consider whether there should be a re-enactment of the procurement offence. As noted in Part II(A), Gray and Blokland have specifically argued for such a legislative action in the context of the Northern Territory. However, it is important to highlight that the findings and analysis of this article are ambivalent towards re-enactment in these two jurisdictions. On the one hand, the procurement offence and its criminalisation of all fraudulent sex is an oddity from the global perspective and originates from a historical accident. On the other hand, the failure to re-enact the procurement offence would render the scope of fraudulent sex criminalisation in New South Wales and the Northern Territory notably lesser than other states and territories. The reform impetus is primarily to revisit the issue given the dubious manner of the provision's repeal. This article does not normatively object to a jurisdiction consciously and publicly deciding to have a narrower scope of fraudulent sex criminalisation than the rest of Australia. In this regard, the New South Wales Law Reform Commission proposed to add the scenario where 'the person is fraudulently induced to participate in the sexual activity' into the list of consent-vitiating circumstances in its 2019 draft proposal for reforming consent in relation to sexual offences.[189] This is a viable, if radical,[190] way to redress the accidental repeal of the procurement offence 16 years ago.

V CONCLUSION

The prevailing assumption that there is a procurement offence to mitigate any differences in the statutory definitions of sexual consent has thus far obscured the stark divergence in criminal liability for fraudulent sex across Australia. Moreover, the failure

188 *Criminal Code Act 1899* (Qld) s 229G.

189 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (October 2019) 38.

190 If this addition is successfully enacted, the law relating to fraudulent sex criminalisation in New South Wales will transform from being the most permissive in Australia to being the most restrictive (together with the Australian Capital Territory).

to accord due attention to the procurement offence in legislative processes had resulted in either structural incoherency between the rape and procurement offence, or the unmethodical removal of the procurement offence. It is imperative that future law reform vis-à-vis fraudulent sex duly recognises the integral role of this lesser sexual offence.

VI APPENDIX

This Appendix sets out the relevant in-force legislative provisions (ie, statutory definition of sexual consent vis-à-vis fraud and, if not repealed, the procurement offence) from the eight surveyed states and territories.

A AUSTRALIAN CAPITAL TERRITORY

Section 67(1) of the *Crimes Act 1900* (ACT):

> For sections 54, 55(3)(b), 60 and 61(3)(b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused:
>
> …
>
> (f) by a mistaken belief as to the identity of that other person; or
>
> (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person;
>
> …

B NEW SOUTH WALES

Section 61HE of the *Crimes Act 1900* (NSW):

> (2) **Meaning of "consent"**: A person *consents* to a sexual activity if the person freely and voluntarily agrees to the sexual activity.
>
> …
>
> (6) A person who consents to a sexual activity with or from another person under any of the following mistaken beliefs does not consent to the sexual activity –
>
> (a) a mistaken belief as to the identity of the other person,
>
> (b) a mistaken belief that the other person is married to the person,
>
> (c) a mistaken belief that the sexual activity is for health or hygienic purposes,
>
> (d) any other mistaken belief about the nature of the activity induced by fraudulent means.

C NORTHERN TERRITORY

Section 192 of the *Criminal Code Act 1983* (NT):

> (1) For this section, consent means free and voluntary agreement.
>
> (2) Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where:
>
> …
>
> (e) the person is mistaken about the sexual nature of the act or the identity of the other person;
>
> (f) the person mistakenly believes that the act is for medical or hygienic purposes; or
>
> (g) the person submits because of a false representation as to the nature or purpose of the act.

D QUEENSLAND

Section 348 of the *Criminal Code Act 1899* (Qld):

> (1) In this chapter, *consent* means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

(2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained …

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

Section 218 of the *Criminal Code Act 1899* (Qld):

(1) A person who –

…

(b) by a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere;

…

(4) In this section –

procure means knowingly entice or recruit for the purposes of sexual exploitation.

E SOUTH AUSTRALIA

Section 46 of the Criminal Law Consolidation Act 1935 (SA):

(2) For the purposes of this Division, a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity.

(3) Without limiting subsection (2), a person is taken not to freely and voluntarily agree to sexual activity if –

…

(g) the person agrees to engage in the activity with a person under a mistaken belief as to the identity of that person; or

(h) the person is mistaken about the nature of the activity.

Example –

A person is taken not to freely and voluntarily agree to sexual activity if the person agrees to engage in the activity under the mistaken belief that the activity is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene.

Section 60 of the Criminal Law Consolidation Act 1935 (SA):

Any person who –

…

(b) by false pretences, false representations or other fraudulent means, procures any person to have sexual intercourse …

F TASMANIA

Schedule 1, Section 2A of the *Criminal Code Act 1924* (Tas):

(1) In the Code, unless the contrary intention appears, "consent" means free agreement.

(2) Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person –

…

(f) agrees or submits because of the fraud of the accused; or

(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused …

Section 129 of the *Criminal Code Act 1924* (Tas):

Any person who –

…

(b) by any false pretence or false representation procures another person to have unlawful sexual intercourse, either in this State or elsewhere –

…

G VICTORIA

Section 36 of the *Crimes Act 1958* (Vic):

(1) For the purposes of Subdivisions (8A) to (8E), consent means free agreement.

(2) Circumstances in which a person does not consent to an act include, but are not limited to, the following –

…

(h) the person is mistaken about the sexual nature of the act;

(i) the person is mistaken about the identity of any other person involved in the act;

(j) the person mistakenly believes that the act is for medical or hygienic purposes;

…

Section 45 of the *Crimes Act 1958* (Vic):

(1) A person (A) commits an offence if –

(a) A makes a false or misleading representation; and

(b) A knows that –

(i) the representation is false or misleading; or

(ii) the representation is probably false or misleading; and

(c) as a result of A's representation, another person (B) takes part (whether at the time the representation is made or at a later time) in a sexual act with A or another person; and

(d) A intends that, as a result of A's representation, an outcome mentioned in paragraph (c) will occur.

…

(3) For the purposes of subsection (1), a false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit.

H WESTERN AUSTRALIA

Section 192 of the *Criminal Code Act Compilation Act 1902* (WA):

(1) Any person who –

…

(b) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or

…

(d) Does any of the foregoing acts with respect to a man or boy;

…

(2) It is no defence to a charge of an offence against this section that the act of the accused person by which the offence was committed was done with the consent of the person with respect to whom the act was done.

Section 319 of the *Criminal Code Act Compilation Act 1913* (WA):

For the purposes of this Chapter –

(a) *consent* means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and

> voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means …