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ARTICLES

Reasonable reform: Understanding the knowledge of consent provision in section 61HA(3)(c) of the Crimes Act 1900 (NSW) – *James Monaghan* and *Gail Mason*

In 2007, a novel fault element for the crime of sexual assault was introduced in s 61HA(3)(c) of the Crimes Act 1900 (NSW). This section provides that a defendant is taken to know that the complainant was not consenting to sexual intercourse if the defendant had no reasonable grounds for believing that the complainant was consenting. This article presents three possible readings of the legal test in s 61HA(3)(c), arguing that an early reading of the provision ought to be rejected, and that the current prevailing reading has unintended and unacknowledged consequences for the law of recklessness. A third, preferred, reading best fulfils the purposes of the legislation, without encroaching on the law of recklessness. 246

Presumption of innocence in Australia: A threatened species – *Anthony Gray*

Legislation in Australia is increasingly departing from the presumption of innocence for those accused of a crime. After documenting specific instances in the current statute book, this article considers the High Court's response to date to legislative abrogation of the presumption. Though the presumption is of ancient vintage and is supported by strong rationale and links with other fundamental fair trial principles, the High Court has often validated laws departing from the presumption on the basis that parliaments have power to enact rules of evidence. However, in recent jurisprudence on Ch III of the Constitution, the High Court has found that it is an essential characteristic of the criminal trial in Australia that proceedings be accusatorial and adversarial in nature. Through this means, the High Court has created the constitutional potential for reverse onus provisions to be challenged, particularly where they practically permit the possibility of a person being convicted despite the existence of reasonable doubt as to their guilt. 262

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