

Patron, the Honourable Jane Mathews AO

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

Re: Preliminary Submissions to NSW Law Reform Commission – review of consent laws in relation to sexual assault offences

Dear Chairperson,

We have carefully reviewed the decision of *Lazarus v R* [2017] NSWCCA 279 and make the following submissions in relation to potential reforms to consent laws in New South Wales.

In our view, on balance, the law as presently drafted is adequate and there is no discernible basis upon which the applicable legislation (ie s 61HA *Crimes Act 1900* (NSW)) should be substantially amended. In that regard, we note that the decision of the Court of Criminal Appeal in *Lazarus* held that the trial judge had failed to take into account a mandatory consideration, namely the ‘*steps taken*’ by the accused to ascertain whether consent was forthcoming (see s 61HA(3)(d)). A re-trial was refused only having regard to the peculiar discretionary factors applicable in that case. Given the verdict of guilty in the first trial (quashed on appeal), it is reasonable to posit that the present legislation would potentially allow for a verdict of guilty in the *Lazarus* matter, were that matter to be re-tried.

It is further noted that the existing legislative framework (by virtue of s 61HA(3)(c)) involves the application of community standards in assessing knowledge of consent (as defined).

Notwithstanding the above, in the context of the Law Reform Commission review of consent in relation to sexual assault offences, we wish to highlight the following matters which in our view could be given more emphasis to promote the proper application of existing legislation.

Judicial Training

Judicial training could be enhanced in relation to gender issues and recognition that these issues are not homogenous.

Judicial officers should be provided with more extensive training to address the dynamics of sexual assault, the experiences of sexual assault victims and how this may impact on their physical responses to being assaulted, in addition, to the range of relevant social and cultural issues that also arise. This can be important particularly in the context of judge alone trials (which was the case in the second *Lazarus* trial). It is also important in jury trials as potentially bearing upon the interlocutory decisions made during the course of the trial, and also when the trial judge comes to summarise the parties’ respective cases to the jury and provide appropriate directions of law.

The Judicial Commission of NSW publishes Bench Books for the assistance of the NSW judiciary, including the *Sexual Assault Trials Handbook* and the *Equality before the Law Bench Book*.

The *Sexual Assault Trials Handbook* at 7-000 contains a list of relevant legal and non-legal literature which has an almost exclusive focus on children. While issues relating to child complainants are important and deserve special attention, it is recommended that this list could be usefully supplemented by further references relevant to adult sexual assault complainants.

The *Equality before the Law Bench Book* in its section on women includes at section 7.3.3.2, a list of points to consider regarding the impact of gender on behaviour in domestic violence and sexual assault matters, with references in the footnotes. This material could be improved by being updated and expanded upon. The *National Domestic and Family Violence Bench Book* published by the Australasian Institute of Judicial Administration in 2017 provides a good model.

Furthermore, it is important to bare in mind cross-cultural factors that may further impact on gender considerations.

We also recommend that the resources available to judges relevant to adult sexual assault complainants be improved and given greater prominence, to assist judges to maintain their familiarity with current research in the field and improve the quality of sexual assault trials.

Directions to the jury

In judge alone trials, directions of law that the trial judge proposes to give him or herself should be indicated to the parties in advance of the final judgment so that any flaws contended for by either party can be corrected at that time (or potentially be dealt with by way of an interlocutory appeal). It is noted that this course may be adopted as a matter of practice under the present regime, but there is no formal requirement to do so. In that context, it is considered desirable to formalise the process, so that, as much as possible, the trial can proceed to finality without error. To use the decision of *Lazarus* as an example, had the judge made her formal directions of law available to the parties in advance, it may be that the aspect of her judgment successfully impugned on appeal could have been dealt with prior to final judgment being given.

ALRC recommendations

We note that the ALRC (Federal) Recommendations at 25–5 recommended a non-exhaustive list of circumstances that should be incorporated in State and Territory legislation that may vitiate consent, at a minimum. Those recommendations are substantially reflected in the current New South Wales provisions, (see **Appendix A**). We are of the view that the current legislative regime, adequately reflects those recommendations.

Community Education

In our view community change should be effected by long term engagement, starting in schools to:

- eradicate underlying community attitudes which contribute to the prevalence of violence against women
- have respect for the people they engage in sexual relations with; and
- seek positive assurance in relation to ensuring the people they have sex with are consenting.

Lower level offence

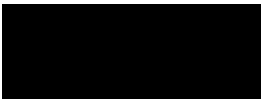
Committee members were not unanimous in their support for the introduction of a lower level offence, in circumstances where the subjective element is removed and would welcome further research and analysis.

Who we are

The Women Lawyer's Association of NSW is the peak professional body representing women lawyers in NSW. We have been committed to improving the status and working conditions of women lawyers since 1952. Today we have a diverse membership of 9000 ranging from female pioneers of the legal profession, senior legal leaders and the emerging next generation.

We thank you for your consideration of the above. Please be advised we would be grateful for the opportunity to make further submissions to any preliminary proposed recommendations.

Yours sincerely,



Larissa Andelman
Acting President
28 September 2018

Appendix A

Summary of ALRC Recommendations

Recommendation 25–5 Federal, State and Territory sexual offence provisions should set out a non-exhaustive list of circumstances that may vitiate consent including, at a minimum:

- (a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;
- (b) where a person submits because of force, or fear of force, against the complainant or another person;
- (c) where a person submits because of fear of harm of any type against the complainant or another person;
- (d) unlawful detention;
- (e) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused);
- (f) abuse of a position of authority or trust; and
- (g) intimidating or coercive conduct, or other threat, that does not necessarily involve a threat of force, against the complainant or another person.

ALRC recommendation as reflected in current NSW provision:

(a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent:

s. 61HA(4)(b): A person does not consent to sexual intercourse: *'(b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, (...)'*

s. 61HA(6): The grounds on which it may be established that a person does not consent to sexual intercourse include:

- '(a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or*
- (b) where a person submits because of force, or fear of force, against the complainant or another person;(...)'*

s. 61HA(4)(c): A person does not consent to sexual intercourse: *'(c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person)(...)'*

(c) where a person submits because of fear of harm of any type against the complainant or another person

s. 61HA(4)(c): A person does not consent to sexual intercourse: *'(c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person)(...)'*

(d) unlawful detention

s. 61HA(4)(d): A person does not consent to sexual intercourse: *'(d) if the person consents to the sexual intercourse because the person is unlawfully detained.'*

(e) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused)

s. 61HA(5): A person who consents to sexual intercourse with another person:

- (a) under a mistaken belief as to the identity of the other person, or*
- (b) under a mistaken belief that the other person is married to the person, or*
- (c) under a mistaken belief that the sexual intercourse is for health or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means), does not consent to the sexual intercourse.*

(f) abuse of a position of authority or trust

s. 61HA(6) The grounds on which it may be established that a person does not consent to sexual intercourse include: *'(c) if the person has sexual intercourse because of the abuse of a position of authority or trust.'*

(g) intimidating or coercive conduct, or other threat, that does not necessarily involve a threat of force, against the complainant or another person

s. 61HA(6) The grounds on which it may be established that a person does not consent to sexual intercourse include: *'(b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, (...).'*

Recommendation 25–6: Federal, State and Territory sexual assault provisions should provide that it is a defence to the charge of *'rape'* that the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

Section 61HA(3) provides:

'(3) Knowledge about consent

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

- (a) the person knows that the other person does not consent to the sexual intercourse, or*
- (b) the person is reckless as to whether the other person consents to the sexual intercourse, or*
- (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.'*