

22 June 2018

The Executive Director
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001
By email: nsw-lrc@justice.nsw.gov.au

Dear Panel Members

Re: NSW Government review of sexual consent provisions in the *Crimes Act*

The Inner City Legal Centre ('ICLC') welcomes the opportunity to make a submission to the review of the laws surrounding consent in relation to sexual assault.

Introduction

1. The ICLC is a community based general and specialist legal centre that provides access to justice for all vulnerable people in our catchment area of inner Sydney, the eastern suburbs and the northern suburbs of Sydney. We also operate a statewide specialist LGBTIQ legal service, and a statewide legal service for sex workers.
2. We have extensive engagement with both victims and defendants of sexual assault. Many of our clients, who are the victims of sexual assault under s 61HA of the *Crimes Act 1900* (NSW) ('**Crimes Act**'), feel as though the law is confusing and valorises the 'reasonable belief' of the defendant at the expense of the actual experience of the victim.
3. We submit that there is not enough weight placed on whether or not the complainant consented. This is clear in the recent NSW Court of Criminal Appeal acquittal of Luke Lazarus, whose conviction was quashed on the basis that the DPP could not demonstrate that the requirement in s 61HA(3)(c) that '*the person*

*has no reasonable grounds for believing that the other person consents to the sexual intercourse'. We agree with the premise that 'the law of consent should protect vulnerable people from sexual assault and put offenders on notice.'*¹

Current Application of s61HA

4. At present, the law surrounding sexual consent is located in s 61HA of the *Crimes Act*. Section 61HA defines consent as the *'free and voluntary agreement to sexual intercourse'*.² In a sexual assault matter, the Crown must therefore prove that sexual intercourse occurred, that this act was done without free and voluntary consent and that the accused:
 - knew the that complainant did not consent; or
 - was reckless as to whether that other person was consenting; or
 - did not have a reasonable ground for believing that the other person was consenting.
5. It is our submission that the current section outlining the law of consent, as it was highlighted in the appeal judgment of *R v Lazarus* [2017] NSWCCA 279³ (*'R v Lazarus [2017]'*) tends to favour the accused unfairly if they can show that there was no action by the complainant that would reasonably indicate to the accused indicate that the complainant was not consenting.
6. ICLC believes that the application of the law in its current form fails to adequately protect vulnerable people from sexual assault and perpetuates the incorrect notion that silence can be elided with consent. We therefore submit that the law in its current form must be amended.

Our Recommendations

Amendments to s 61HA

¹ NSW Government 'Sexual consent laws to be reviewed' (Tuesday 8 May 2018) <<https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/supreme-court-justice-consent-law-review>>.

² *Crimes Act 1900* (NSW) s61HA(2).

³ *R v Lazarus* [2017] NSWCCA 279.



7. In light of the present status of s 61HA, it is our belief that the *Crimes Act* should be amended to clarify the meaning of consent as a component element of the charge of sexual assault.
8. It is our submission that clarification of this element would better define 'knowledge' and outline the parameters for valid consent so as to avoid the all too common situation that the complainant in *R v Lazarus* [2017] experienced when the accused was acquitted because of his genuine and honest belief that the complainant was consenting despite her own belief that she was not. The complainant's lack of action to move away from the accused and her lack of a verbal 'stop' indication should not have been considered a sign of her consent.
9. The ICLC asks that the Commission take into consideration the current laws in Tasmania that mandate for 'active consent'.
 - 9.1. In Tasmania, consent is defined as a 'free agreement.' Pursuant to s 2A of the *Criminal Code Act 1924 (Tas)*, a person does not freely agree to an act if the person-
 - Does not say or do anything to communicate consent; or
 - Agrees or submits because of force, or reasonable fear of force to him or her or to another person; or
 - Agrees or submits because of a threat of any kind against him or her or against another person; or
 - Agrees or submits because he or she is overborne by the nature or position of another person; or
 - Agrees or submits because of the fraud of the accused; or
 - Is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or
 - Is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or
 - Is unable to understand the nature of the act.
10. It is our submission that these laws are a 'double-edged sword.' While we agree with the NSW government that the law clearly clarifies what can and cannot be

considered to be 'free consent' in the eyes of the accused, regardless of his or her own belief, the law can be seen as unworkable.

11. Active consent can be considered a superior method of consent than the NSW knowledge requirement within the current iteration of s 61HA as it clearly highlights that silence is not synonymous with consent. It is reasonable to suggest that if such laws were active in Australia at the time of *R v Lazarus* [2017], the accused may not have been acquitted. That being said, ICLC submits that, practically speaking, active consent that requires an express permission seems unrealistic when considering the natural progression of many sexual encounters. Moreover, the provision does not properly define 'say or do anything' and is therefore indefinite and open to converse interpretation which is ultimately negative for the accused. It is therefore our submission that the Commission take notions of practicality into consideration when drafting amendments to s 61HA.
12. ICLC recommends that the Commission attempt to find a balance between active consent and the current model to find reword the provision found in s 61HA to place the onus on a person that the other person is consenting. It is our submission that this would clarify the law and the expectation on the individual while also demystifying the requirements needing to be ascertained by judges who, much like Justice Tupman of the District Court in Lazarus' first instance trial, deemed a 'genuine and honest belief' of consent to be found in the mind of the accused in interpreting the inaction of the complainant.

Changes to the Practical Application of s61HA

13. It is our submission that amendments to the law surrounding sexual assault and consent can only go so far to solve current problems with the law of sexual assault. We believe that the practical application of amendments must be considered so as to fully understand the legislative and community based changes that must be made.

Legislative and directive changes

14. We recommend that New South Wales follow the jury directive utilised in Victoria, whereby judges direct the jury to consider lack of consent in conjunction with s

36(2)(l) of the *Crimes Act 1958* (Vic), a provision similar to its counterpart in Tasmania, that mandates that a person does not consent where the person does not do or say anything to indicate consent.⁴ Pursuant to the *Jury Directions Act 2015* in Victoria, it is the ICLC's recommendation that directions about the nature of consent and how to find that a person did not consent should accompany any amendments to s 61HA.

15. We submit that clearer directions will enable juries to understand the laws of consent better and may facilitate a more just outcome for complainants in circumstances where both parties to the matter agree that the complainant did not consent.
16. The ICLC also takes into consideration the comments made by Australian Lawyers Alliance spokesperson Greg Barnes who believes that sexual assault cases may be better facilitated in a restorative justice setting such as the ones adopted in Canada, New Zealand and Britain.⁵ These processes involve the defendant admitting wrongdoing and the complainant having the opportunity to tell the accused the consequences of their actions. Here the outcome is more victim-support focused and rehabilitation focused for the accused, whereby a combination of custodial and community-based sentences is ordered.

Community engagement

17. The ICLC asks that the Commissioner consider methods through the notion of consent can be better discussed and understood not only amongst community but amongst the judiciary community also.
18. We recommend that schools are better trained in ensuring that their students have a working understanding of consent and are able to effectively communicate where sexual relationships are concerned. It is our submission that students should be educated on the laws of consent in relation to sexual assault and are well versed on their right and systems of reporting assaults.
19. The ICLC believes this education on the intricacies of consent should also be extended to police and judicial officers who are sitting on the bench in sexual

⁴ *Crimes Act 1958* (Vic) s 36(2)(l).

⁵ Greg Barnes 'Horrendous Consequences' if sexual consent law reform goes wrong' *Sydney Morning Herald* 8 May 2018 , <<https://www.smh.com.au/national/nsw/horrendous-consequences-if-sexual-consent-law-reform-goes-wrong-20180508-p4ze1e.html>>.

assault cases. We hope that this will better facilitate justice for victims by ensuring that the laws of consent are properly interpreted and applied at trial.

We thank you for considering our submissions. Please contact the Inner City Legal Centre on 9332 1966 should you require further information.

Yours sincerely,

INNER CITY LEGAL CENTRE



Hilary Kincaid
Principal Solicitor

Bibliography

Cases

Lazarus v R [2016] NSWCCA 52

R v Lazarus [2017] NSWCCA 279

Legislation

Crimes Act 1900 (NSW)

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Other Sources

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