NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 17/709

25 June 2018

Acting Justice Carolyn Simpson
Commissioner
New South Wales Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

Dear Commissioner,

Preliminary submission to NSWLRC review on consent in relation to sexual assault offences

The NSW Law Reform Commission ("NSWLRC") has been given a reference "on consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the *Crimes Act 1900* (NSW)". In undertaking this review, the Commission has been expressly required to have regard to:

1. Whether s 61HA should be amended, including how the section could be simplified or modernised;

2. All relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system;

3. Sexual assault research and expert opinion;

4. The impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia, and internationally, on the content and application of s 61HA; and

5. Any other matters that the NSWLRC considers relevant.

The NSWLRC has invited preliminary submissions on this reference.

The NSW Bar Association ("the Association") considers that s 61HA is unduly complex, both with respect to the provisions dealing with "consent" and the provision dealing with "knowledge about consent". This complexity means that it is difficult for trial judges to direct juries regarding the law and

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difficult for juries to understand that law. It also increases the risk that appeal courts will find it necessary to order a new trial because of misdirections regarding that law by a trial judge.

Section 61HA(2) provides that "a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse". The words "freely and" are problematic. "Freedom of choice" is an ambiguous concept. In *R v Mueller* [2005] 62 NSWLR 476, Hulme J noted that the Dictionary definition of "freely" is "of one's own accord, spontaneously; without restraint or reluctance; unreservedly, without stipulation; readily willingly".

Criminal offences must be defined in a way that catches only conduct that is generally regarded as so culpable as to be deserving of punishment. Consent which is obtained after persuasion is still consent, at least for the purposes of the criminal law. Crimes of sexual assault should be confined to cases where sexual choice is non-existent.

Further, the Association does not support retention of a statutory list of factual circumstances that may vitiate consent. Such provisions serve no useful purpose and are potentially misleading. They serve no useful purpose because they do not assist the tribunal of fact in determining when the circumstances do vitiate consent. For example, a statutory provision stating that consent may be vitiated if the complainant was "substantially intoxicated by alcohol or any drug" (s 61HA(6)(a) does not assist in determining whether the level of intoxication does have that consequence. Even without the statutory provision, it may be assumed that the prosecution will advance the submission that the fact that the complainant was affected by alcohol or drugs had the consequence that there was no (real) consent. A trial judge reading out a statutory provision that such a circumstance may vitiate consent will not assist the jury and may mislead the members of the jury into concluding that there is some kind of presumption that it will have that consequence.

Some support has been expressed for a Tasmanian provision which states that "a person does not freely agree to an act if the person … does not say or do anything to communicate consent". In the view of the Association, this kind of provision illustrates some of the dangers in this area. First, it confuses the question of "free agreement" with the issue of communication of consent. There may be consent, indeed there may be "free agreement", whether or not that state of mind is communicated and regardless of how it is communicated. Second, it appears that the real purpose behind this provision is a focus on the state of mind of the accused, not the state of mind of the complainant. The goal may be to prevent an accused from avoiding criminal responsibility where consent has not been communicated, that is, to impose a duty to inquire regarding consent where it has not been communicated in some way. It is not appropriate to seek to advance that goal by means of a definition of consent that may have the consequence that what is real consent is defined not to be consent. Third, the concept of communicating consent is nebulous. Consent is communicated in different ways and there will be a comparable lack of uniformity in the way that what is communicated will be understood. Signals about consent, or lack of consent, are susceptible to misinterpretation. Such a provision should not be adopted in NSW.

Turning to the provision dealing with "knowledge about consent" (s 61HA(3)), s 61HA(3)(b) provides that a person who is "reckless as to whether the other person consents" is deemed to know there is no consent. On one view of the current law, a jury may be directed, in effect, that recklessness is established if the accused:

> (a) was aware that there was a "possibility" that consent was absent; or
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> (b) simply failed to consider whether or not consent was present, notwithstanding that a risk that consent was absent would have been obvious to someone with the accused's mental capacity if he or she had turned his or her mind to it.

Both of these alternative bases for a finding of recklessness are problematic.

If recklessness is deemed to be the same as knowledge of lack of consent, it should involve a comparable level of criminal culpability or moral blameworthiness to knowledge. Merely taking a risk that consent is absent, particularly if the risk is perceived to be small and there are reasons available to explain why the risk was not eliminated, does not necessarily import a comparable level of culpability to knowledge of absence of consent. A person may honestly believe that consent is present while harbouring a doubt about it. In some circumstances, taking a risk regarding consent might be regarded by a jury as reasonable or justifiable. Even if not reasonable by the standards of a jury, the accused may have thought he was acting reasonably, so that he may be regarded as negligent or stupid but not in the same league of culpability as the person who knows that consent is absent.

As for the second alternative basis of recklessness, where there is true inadvertence regarding consent it is inappropriate to impose liability for such a serious offence. Realistically the only circumstance where an accused might have failed completely to even advert to the question of consent is where he was extremely intoxicated or suffers from a significant mental disability. In *DPP (NT) v WJI* [2004] HCA 47 the High Court considered a case where an intermediate appellate judge considered that criminal liability should extend to a person who was so drunk that "he did not advert to the question of consent at all". Kirby J stated at [104]:

> "Sexual intercourse without consent is a very serious offence and an affront to the human rights and human dignity of the victim. However, conviction of that crime carries very serious consequences for the liberty, life and reputation of the prisoner. The suggestion of the dissenting judge below that his construction should be adopted lest an accused person 'in drink and lust ... does not advert to the question of consent at all' is unpersuasive."

It is equally unpersuasive where the accused suffers from a significant mental disability.

There is authority which suggests that neither basis for a finding of recklessness is good law. In *R v Daly* [1968] VR 257 the Victorian Full Court held that, for the purposes of rape under the common law:

> "... the Crown must establish beyond reasonable doubt that the accused either was aware that the woman was not consenting or else realised she might not be and determined to have intercourse with her whether she was consenting or not" (at 258-9).

Under that approach, a state of mind of intention to have intercourse "whether she was consenting or not", that is, not caring if there was in fact absence of consent. Similarly, in *DPP v Morgan* [1976] AC 182 Lord Edmund-Davies in the UK House of Lords observed at 225F that "the man would have the necessary mens rea if he set about having intercourse either against the woman's will or recklessly, without caring whether or not she was a consenting party" (see also Lord Cross of Chelsea at 203D, Lord Hailsham at 215C). Such formulations appear to convey a requirement that would not be satisfied simply by an awareness of risk. The accused must be "indifferent" to whether there was consent or not, that is, to intend to proceed even if it were known that consent was absent. Awareness of risk and proceeding notwithstanding that risk might support an inference of indifference. But if the accused was not indifferent and would not have proceeded if it were known that consent was absent, the accused would not be "reckless". It is noted that, in *Banditt v The Queen* [2005] HCA 80, 224 CLR 262, Gummow, Hayne and Heydon JJ at [39] rejected an argument that an awareness of a risk of absence of consent would not be sufficient to constitute recklessness for the purposes of the NSW statutory sexual assault offences and that there would need to be "indifference" about the risk in the sense that the person thought: "Even if I knew [consent was absent], I would continue. It does not matter to me." However, some years later, in *Gillard v The Queen* [2014] HCA 16, 308 ALR 190 the High Court stated at [26] that such formulations as "indifference as to consent" or "not caring whether the victim consents or not" had been "approved" in *Banditt* "as an appropriate means of explaining the concept of recklessness to a jury".

The Association supports a clarification of s61HA(3)(b) in the following terms: "the person is indifferent as to lack of consent by the other person to the sexual intercourse". The problems discussed above arising from the use of the term "recklessness" would be avoided if the term "indifference" were adopted. A state of mind of indifference to lack of consent is much closer to knowledge of lack of consent than merely taking a risk that consent is absent. A jury would not be required to investigate levels of possibility or probability in the mind of an accused. Culpability would not extend to the person who failed completely to even advert to the question of consent. In addition, a definition in terms of indifference would simplify the direction that would need to be given to a jury. A direction that the prosecution must prove that the accused did not care as to a complainant's lack of consent would be sufficient. Thus, if the prosecution case was knowledge of lack of consent or, in the alternative, indifference, the trial judge would direct the jury that the prosecution must prove that the accused either knew there was no consent to sexual intercourse or was indifferent to his/her lack of consent.

As regards s61HA(3)(c), the Association considers that a person should not be liable to conviction for a sexual assault in circumstances where he or she honestly believes that there is consent. Expressing the same point in a different way, the criminal law should not make a person guilty of a sexual assault where, notwithstanding such an honest belief, the accused failed to satisfy some "objective" standard. Particular reasons supporting this conclusion include:

(a) Sexual assault is a serious crime with severe maximum penalties, reserved for behaviour that is so seriously wrong as to be deserving of such criminal punishment – it should not be satisfied by a form of negligence. Although there are strict liability offences with substantial penalties within the criminal law, such as dangerous driving occasioning grievous bodily harm, these are the exception, rather than the rule.

(b) In practice, a jury that concludes that an accused had no reasonable grounds for believing that the complainant had consented will, in most circumstances, then conclude that the accused did not believe that consent was present.

(c) An accused who is so stupid or negligent as to fail to appreciate that there are good reasons to conclude that consent is absent should not be regarded as in the same league of culpability as an accused who knows that consent is absent or is indifferent as to lack of consent.

(d) An accused who lacks the capacity of a hypothetical reasonable person (for example, an accused with a mental disability) and who mistakenly believes that consent is present should not be held to the standard of people who have full capacity.

For these reasons, the Association opposes the current objective basis for deeming "knowledge of lack of consent" in s61HA(3)(c) and would oppose any modification of the test which retained an objective component.

However, if the view were to be taken that an objective basis for imposing criminal responsibility should be retained, the Association opposes the current approach where the same offence may be made out on either a subjective or objective basis.

It is unjust to make an offender who honestly believed there was consent but lacked reasonable grounds for that belief liable to the same maximum penalty as the offender who knows that consent is absent or is indifferent as to lack of consent. The maximum penalty for negligent manslaughter (25 years) is lower than the maximum penalty for murder (life imprisonment). The maximum penalty for negligently causing grievous bodily harm (2 years) is lower than the maximum penalties for intentional infliction of grievous bodily harm (25 years) and reckless infliction of grievous bodily harm (10 years). Thus, the existing criminal law treats the subjectively culpable and negligent infliction of harm separately, with very different applicable maximum penalties. There is absolutely no justification for adopting a different approach in relation to sexual offences.

Furthermore, because s 61HA(3) deems knowledge of absence of consent to be established on alternative subjective and objective bases, a jury will be directed that they need not agree regarding the basis on which they find such "knowledge" proved and, even if the jury were agreed that the accused honestly believed there was consent but lacked reasonable grounds for that belief, the sentencing judge would not know this. It would be entirely conceivable that the offender could be sentenced on a significantly more culpable basis than found by the jury. Conversely, if there were alternative discrete offences, with different fault elements, the jury would be required to agree on the applicable fault element and the sentencing judge would sentence on that factual basis.

In addition, such a distinction between subjective and objective fault elements would permit a much more coherent approach to the issue of intoxication. At present, s 61HA(3)(e) provides that "self-induced intoxication" is to be disregarded when determining whether there was "knowledge" of absence of consent. This would make sense in respect of an objective fault element. It makes no sense at all where a subjective fault element, such as actual knowledge of absence of consent, must be established. The criminal law should not deem an accused to know that there is absence of consent when the accused actually believes that consent is present, even if one reason for that mistaken belief is self-induced intoxication.

It follows that, if an objective basis for criminal conviction is to be retained, it should be in a discrete offence with a substantially lower maximum penalty than the penalties currently applicable to sexual assault.

Finally, the Association suggests that consideration should also be given to expanding restorative justice processes in this area, as has occurred in New Zealand. Such processes are empowering for victims and encourage pleas of guilty. They give an opportunity to the victim to tell the offender how he or she was hurt and focusses on addressing the offender's underlying behavioural issues. While not strictly within the terms of reference, such processes would have particular application in those cases where criminal responsibility is imposed on the basis of an objective test.

If the Commissioner and the NSWLRC would like to meet with members of the Association to further discuss any of the issues raised in this preliminary submission, we would be delighted to make such arrangements.

Any queries regarding this submission may be directed to [redacted]

Yours sincerely,

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President