

Submission for the New South Wales Law (NSW) Reform Commission

Consent in Relation to Sexual Assault Offences

1. Thank you for inviting submissions on *Crimes Act 1900* (NSW) s 61HA Consent. As you have noted this provision could be simplified. The complexity arises because there are so many subsections and paragraphs in this provision. Some of the subsections are framed positively while others are negative in nature. Some of the subsections explain what consent includes but others explain what consent does not include. In some subsections, the negative appears at the beginning of the subsection while in others the negative appears towards the end of the subsection. Some of the wording is repetitive and could be drafted more succinctly.
2. This submission draws on the definitions of consent in Queensland, Western Australia and New Zealand, which offer a legislative framework for reviewing *Crimes Act 1900* (NSW) s 61HA Consent.
3. In *Crimes Act 1900* (NSW) s 61HA(2), the reference to ‘freely and voluntarily agrees’ is a useful starting point in defining consent. Similar wording has been used in both Queensland and Western Australia.¹ This phrase should be retained in any proposed NSW law reform in this area.
4. In New Zealand, it is acknowledged that a person who allows sexual activity including ‘acquiesces in, submits to, participates in, and undertakes’ does not necessarily consent to the sexual activity.² Such a legislative provision is absent in NSW, Queensland and Western Australia. This provision perhaps draws attention to the fine line between with consent and without consent. Further, this legislative provision shows how the society’s conceptualisation of consent has shifted over the last 50 years.³ This wording from the equivalent provision in New Zealand would be a worthy inclusion in any proposed NSW law reform in this area.
5. In *Crimes Act 1900* (NSW) s 61AH(7), the point made is that a person who does not offer physical resistance to sexual intercourse is not to be regarded as consenting by that reason alone. This is an important point and is worth keeping in any proposed NSW law reform in this area because a person may not be physically capable of offering physical resistance or a person may fear further harm to oneself in doing so. In Western Australia and New Zealand, this point is recognised in the equivalent definition of consent.⁴ Unfortunately, the equivalent Queensland legislative provision currently overlooks this point.
6. In *Crimes Act 1900* (NSW) s 61HA(3)(d), the trier of fact is able to have regard to the person’s steps taken to ascertain whether the other person is consenting to sexual

¹ *Criminal Code* (Qld) s 348(1); *Criminal Code Compilation Act 1913* (WA) s 319(2).

² *Crimes Act 1961* (NZ) s 128A(9).

³ *Holman v The Queen* [1970] WAR 2, 6. In that case, Jackson CJ stated that a woman’s consent may be ‘hesitant, reluctant, grudging or tearful’, and if the woman’s consent is not vitiated by force, threats, fear or fraud; and the woman consciously permits the sexual activity, there is no rape. Regarding the shifting boundaries of consent, please refer to P W Young, ‘Is there any Law of Consent with Respect to Assault?’ (2011) 85 *Australian Law Journal* 23.

⁴ *Criminal Code Compilation Act 1913* (WA) s 319(2)(b); *Crimes Act 1961* (NZ) s 128A(1).

intercourse. This appears to be progressive as this is not explicitly provided for in the Queensland, Western Australian or New Zealand equivalent definitions of consent.

7. In *Crimes Act 1900* (NSW) s 61HA(3)(e), the reference to the trier of fact not having regard to ‘self-induced intoxication of the person’ is confusing. Does this person refer to the accused person or the victim? Why is self-induced intoxication not taken into account? Are there other circumstances that should or should not be taken into account by the trier of fact? The equivalent definitions of consent in Queensland, Western Australia and New Zealand do not refer to ‘self-induced intoxication’. If this is a worthwhile point to retain in any proposed NSW law reform in this area, is there a better place to give this statutory effect, for example, the rules of evidence, excuses or defences?
8. In *Crimes Act 1900* (NSW) s 61HA(5)(b), the reference to word ‘married’ is antiquated because it only values one type of relationship within which consensual sexual intercourse may occur. Introducing the term ‘partner’ may not resolve this issue as it also does not capture all of the possible scenarios where there might be a mistaken identity in a sexual context. Perhaps the Queensland equivalent provision offers a solution as it includes wherever there is a mistaken identity induced by the accused person, regardless of the relationship between the accused person and victim.⁵ In contrast in New Zealand, the equivalent provision focuses on the victim making a mistake rather than the accused person inducing the victim to make a mistake.⁶ In addition in Queensland, there is a provision recognising that consent is vitiated where it is ‘obtained by false and fraudulent representations about the nature or purpose of the act’.⁷ Similarly in New Zealand, this is framed as a mistake as to ‘nature and quality’.⁸ The Western Australian definition of consent adopts a broader approach than Queensland and New Zealand to this issue and refers to ‘deceit, or any fraudulent means’.⁹
9. A summary of the Queensland, Western Australia and New Zealand statutory provisions relating to consent in a sexual context, indicate that that a person does not consent to sexual intercourse with another person if the consent is obtained:
 - (a) by the person’s cognitive incapacity;¹⁰
 - (b) by the person’s incapacity including age, sleep, unconsciousness, or by any intoxicating substance;
 - (c) by force or unlawful detention;
 - (d) by threat, coercion, intimidation or fear;
 - (e) by exercise of authority or abuse of trust;
 - (f) by false and fraudulent representations about the nature or purpose of the sexual intercourse;¹¹ and
 - (g) by mistaken belief as to the identity of the other person induced by the accused person.¹² I agree with Jonathan Crowe that a non-exhaustive list identifying where

⁵ *Criminal Code* (Qld) s 348(2)(f).

⁶ *Crimes Act 1961* (NZ) s 128A(6).

⁷ *Criminal Code* (Qld) s 348(2)(e).

⁸ *Crimes Act 1961* (NZ) s 128A(7).

⁹ *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).

¹⁰ The New Zealand provision is more expansive and refers to ‘affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity’: *Crimes Act 1961* (NZ) s 128A(5).

¹¹ *Crimes Act 1900* (NSW) s 61H(5)(c) refers to ‘health or hygienic purposes’. However, perhaps additional relevant examples should be included in the legislation such as ‘law enforcement purposes’.

consent is vitiated should be retained as '[r]apists can be horribly inventive in their methods of exploiting their victims'.¹³ Such a non-exhaustive list provides decision makers with a framework to enable both consistency in common cases and flexibility in unusual cases.¹⁴

10. Arguably, *Crimes Act 1900* (NSW) s 61HA(3) regarding 'knowledge about consent' is conceptually difficult to understand and is challenging for prosecutors to prove beyond reasonable doubt. Importantly, the accused person's knowledge is not solely subjectively ascertained, but rather comprises subjective (know or reckless) and an objective component (reasonable grounds for believing). Any proposed NSW law reforms in this area should retain a subjective and objective component. Queensland, Western Australia and New Zealand avoid this complication because the accused person's knowledge or recklessness is not an element of the relevant sexual offences.¹⁵ Further, in Queensland mistake of fact in *Criminal Code* (Qld) s 24 cannot be argued as an excuse in relation to rape in *Criminal Code* (Qld) s 349 because intention is not an element of this offence. However, an attempt to commit rape in *Criminal Code* (Qld) s 350 contains the element of attempt, which is defined in s 4 and includes intention. As a result, a mistake of fact in *Criminal Code* (Qld) s 24 could be argued in relation to *Criminal Code* (Qld) s 350. Whether mens rea is part of the offence or relevant to an excuse impacts the prosecution's and accused person's onus of proof. Perhaps it is easier for the prosecution to negative an excuse beyond reasonable doubt than prove an element of an offence beyond reasonable doubt. An accused person needs to raise some evidence of an excuse but they do not need to prove their innocence.
11. In my PhD, I discussed the conceptual boundaries of consent and various approaches to the role of consent, albeit in a different context (criminalisation of making and distributing visual recordings).¹⁶ Some of the approaches included quantitative approach, quantitative plus exceptions approach, individual autonomy approach, paternalistic approach and morality approach. Where appropriate in my PhD, I explained these approaches with reference to non-fatal offences against a person. A person should not be able to consent to a sexual activity that is likely to kill or do grievous bodily harm.¹⁷
12. Often in the context of sexual offences, there is no express consent and the boundaries of implied consent are critical. In this way, sexual offences are similar to the offences that I examined in my PhD, that is, making and distributing visual recordings. In my PhD chapter on consent, I developed a contextual approach, which offers 'a pragmatic approach to implied consent'.¹⁸ The list of factors to be taken into account in determining whether there is implied consent are not exhaustive, nor do they indicate how they should be prioritised. The factors include the relationship history between the parties; the acts and omissions of both the accused person and victim immediately before, during and after

¹² *Criminal Code* (Qld) s 348(2); *Crimes Act 1961* (NZ) s 128A(2)-(7); *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).

¹³ Jonathan Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38 *Criminal Law Journal* 236, 245.

¹⁴ *Ibid* 247.

¹⁵ For example, *Criminal Code* (Qld) s 349; *Criminal Code Compilation Act 1913* (WA) s 325; *Crimes Act 1961* (NZ) s 128B.

¹⁶ Kelley Burton, *A Principled Approach to Criminalisation: When Should Making and/or Distributing Visual Recordings be Criminalised?* (PhD Thesis, University of Southern Queensland, 2008).

¹⁷ David Ross, 'Consent in Criminal Law' (2009) 32 *Australian Bar Review* 62. Ross' conclusion makes 10 points regarding consent in a sexual context.

¹⁸ Burton, above n 16, 141.

the sexual activities; the purpose of the accused person; where the sexual activities occurred; who was present at the time the sexual activities occurred; whether the victim had the ability to retreat from the sexual activities; whether the victim had the ability to contact a friend or relative immediately before or during the sexual activities; and the harm done to the victim.

13. The boundaries of consent in sexual offences deserves a comprehensive and co-ordinated response. In addition to any proposed criminal law reforms, perhaps an education campaign explaining the scope of consent by way of examples is essential. Further perhaps an education campaign could provide some practical strategies on how to check whether the other person is consenting to a sexual activity; how to communicate consent in a sexual context; how to protect oneself from being the victim of a sexual offence; how to communicate a withdrawal of consent during sexual activities; and how to protect oneself from being wrongly accused of sexual offence by collecting evidence of the other person's consent.

Best wishes for reforming this area of the law. NSW is not alone in Australia in needing to review this area of the law. Hopefully, Queensland and Western Australia will follow suit. If you would like to discuss these issues further, please do not hesitate to email me ■

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