29 June 2018

Acting Justice C Simpson
Commissioner
NSW Law Reform Commission
GPO Box 31, SYDNEY NSW 2001, AUSTRALIA

By email: nsw-lrc@justice.nsw.gov.au

Dear Judge

Thank you for the opportunity to make a preliminary submission to the NSW Law Reform Commission with respect to its review into 'consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the *Crimes Act 1900* (NSW)'.

This submission is written by members of the Centre for Crime, Law and Justice, at the Faculty of Law, University of New South Wales. The views expressed in this submission are the views of the undersigned individuals.

In this submission we address only the Commission's first term of reference: 'Whether s 61HA should be amended, including how the section could be simplified or modernised'.

Our submission is that s 61HA[1] *should* be amended. We recommend three amendments, to s 61HA(3)(b); s 61HA(3)(c); and s 61HA(4).

Recommendation 1: amendment to s 61HA(3)(b).

Subsection 3(b) currently provides that a person has knowledge that the other person is not consenting to sexual intercourse if 'the person is reckless as to whether the other person consents to the sexual intercourse'. 'Reckless' is not defined in the *Crimes Act 1900* (NSW).

[1] We note that the Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 will repeal s 61HA and replaced it with s 61HE. However, in light of the language used in the Commission's terms of reference, in this submission we will refer to s 61HA.

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In a context where the courts now recognise that 'reckless' has two discrete meanings – advertent recklessness and non-advertent recklessness (*Banditt v R* [2005] HCA 80; 224 CLR 262**)** – we are of the view that the meaning of reckless should be expressly codified in s 61HA(3)(b).

The suggested direction contained in the *Criminal Trial Courts Bench Book* offers a useful formulation for drafting an amended s 61HA(3)(b):

> To establish that [*the accused*] was acting recklessly, the Crown must prove, beyond reasonable doubt, either:
>
> (a) [*the accused's*] state of mind was such that [*he/she*] simply failed to consider whether or not [*the complainant*] was consenting at all, and just went ahead with the act of sexual intercourse, even though the risk that [*the complainant*] was not consenting would have been obvious to someone with [*the accused's*] mental capacity if they had turned [*his/her*] mind to it, or
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> (b) [*the accused's*] state of mind was such that [*he/she*] realised the possibility that [*the complainant*] was not consenting but went ahead regardless of whether [*he/she*] was consenting or not. ([5-1566])

Recommendation 2: amendment to s 61HA(3)(c)

Subsection (3)(c) currently provides that a person has knowledge that the other person is not consenting to sexual intercourse if: 'the person has no reasonable grounds for believing that the other person consents to the sexual intercourse'.

In its current form, and as interpreted by the NSW Court of Criminal Appeal, s 61HA(3)(c) fails to achieve what was widely understood to be the parliamentary intention at the time of enactment of the *Crimes Amendment (Consent-Sexual Assault Offences) Act 2007* (NSW). In his Second Reading Speech on the Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007, the then Attorney General explained the rationale for s 61HA(3) as follows:

> The accuser's assertion that he or she had a belief that the other person had consented is difficult to refute, no matter how unreasonable in the circumstances. The law does not adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct. The subjective test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.
>
> Proposed section 61HA (3) retains recklessness, but offers an additional third limb for what is meant by that element of these offences 'knows that the other person does not consent'. It provides that the person knows that the other person does not consent to the sexual intercourse if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.[2]

[2] The Hon John Hatzistergos (Attorney General, and Minister for Justice), Legislative Council, NSW Parliament, *Hansard*, 7 November 2007, p 3584.

Similarly in a 2013 *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900*, the NSW Department of Attorney General and Justice stated:

> The policy objective of the amendment was to give clear guidance as to what constitutes consent. It was to provide a more contemporary and appropriate definition of consent than that found in the common law. *This was so particularly in the adoption of an objective fault test that requires a person to have reasonable grounds for their belief that another person consents to sexual intercourse with them.* The test reflects the increased equality in today's sexual relationships, and the dialogue that should take place between individuals prior to sexual intercourse to reach a necessary mutuality of understanding in relation to consent. In this way, section 61HA represented a significant reform in the prosecution of sexual assault cases in NSW, adopting the reforming approaches in other common law jurisdictions such as the United Kingdom, Canada and New Zealand.[3]

In *Lazarus v R* [2016] NSWCCA 52, the Court of Criminal Appeal held that the trial judge had erred by explaining s 61HA(3)(c) in such a way as to suggest that the jury could consider the reasonableness of the accused's (mistaken) belief in consent. If the accused's belief was unreasonable in all the circumstances, he could be regarded as having knowledge of non-consent. In upholding the defendant's appeal against conviction the CCA said (per Fullerton J; Hoeben CJ at CL and Adams J agreeing):

> The Crown submitted (correctly) that, properly understood, s 61HA(3)(c) does impose an objective test, in the sense that (ignoring the onus of proof) the grounds which might lead to a belief of consent must be objectively reasonable. However, this is not the equivalent of the trial judge's direction that it was for the jury to 'consider whether such a belief [that the complainant was consenting] was a reasonable one'. The latter formulation implies that the jury should ask what a reasonable person might have concluded about consent, rather than what the accused himself might have believed in all the circumstances in which he found himself and then test that belief by asking whether there might have been reasonable grounds for it. In many such contested cases, perhaps all, there might be a reasonable possibility of the existence of reasonable grounds for believing (mistakenly) that the complainant consented and other reasonable grounds suggesting otherwise. A reasonable person might conclude one way or the other but the statutory test is whether the Crown has proved the *accused* 'has no reasonable grounds for believing' that there was consent.[4]

The decision in *Lazarus v R* [2016] NSWCCA 52 confirms that the objective test contained within the s 61HA(3)(c) formulation is significantly narrower than had previously been appreciated. If the Crown is unable to negative beyond reasonable doubt an assertion by the accused that there was a single 'reasonable ground' to support his mistaken belief in consent (even in the face of considerable evidence that the mistake was an unreasonable one) an acquittal will result.

We recommend that subsection 3(c) be amended, by replacing the current words with the following:

> 'the person's belief in consent was not reasonable in all the circumstances'.

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[3] NSW Department of Attorney General & Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (October 2013) p 4 (emphasis added) https://www.justice.nsw.gov.au/justicepolicy/Documents/consent_review.pdf

[4] *Lazarus v R* [2016] NSWCCA 52, [156].

In our view, this formulation better reflects the legislative intent behind the 2007 amendments: that criminal liability for sexual assault should extend to those who hold an honest but unreasonable belief in consent. Such a provision would be more likely to 'ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour'.[5] It would, however, continue to base liability on the state of mind of the accused, rather than an entirely objective third party's viewpoint.

Recommendation 3: amendment to s 61HA(3)(d)

Subsection (3)(d) currently provides that for the purpose of making a finding about knowledge of consent under s 61HA(3), 'the trier of fact must have regard to all the circumstances of the case: (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse …'. This provision is based on what is sometimes described as a 'communicative model' of consent. We believe that s 61HA(3)(d) would be improved if words to the following effect were added:

> 'including the effect that any behaviour of the accused may have had on the behaviour of the victim at the relevant time'.

This recommendation is designed to ensure that the trier of fact attends to the ways in which the accused's demeanour (e.g. aggressive or authoritative) may influence the behavioural 'cues' of the victim (e.g. producing passivity or compliance) on which the defendant relies to dispute the Crown assertion that he or she knew that the other person was not consenting.

We would be happy to provide further elaboration on these recommendations.

Yours sincerely

[redacted]

(on behalf of)

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[5] The Hon John Hatzistergos (Attorney General, and Minister for Justice), Legislative Council, NSW Parliament, *Hansard*, 7 November 2007, p 3584.