SUBMISSION TO THE NSW LAW REFORM COMMISSION CONSULTATION PAPER 21:

CONSENT IN RELATION TO SEXUAL OFFENCES.

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Question 3.1:

I consider that NSW should retain a definition of sexual assault based on an absence of consent compared to the alternative approaches discussed on page 35 where proof of injury is proposed as the central element in a sexual assault offence. The latter approach would necessarily involve intrusive inquiries into the complainant's injuries and mental health.

Since few sexual assaults result in actual physical injury, with many genital injuries typically healing within a few days, and coupled with a delay in complaint, it would be extremely difficult for the prosecution to prove the elements of the offence beyond reasonable doubt. If mental injury was the only physical trauma suffered, would it need to be demonstrable psychiatric condition? Since different people react to trauma differently, would a mental injury less than a psychiatric condition mean that it would then be impossible to prove the elements of sexual assault?

These difficult issues mean that absence of consent is the relevant factual element that needs to be decided in a sexual assault trial.

Question 3.2

I refer back to a comment in my original submission (PCO33) to the Commission:

the sexual assault trial does not operate in a cultural vacuum but in a context imbued with a 'profound suspicion of female sexuality'[1] so that the consent threshold will be a floating standard, dependent on the facts of each particular case and the subjective interpretation of those facts by fact-finders (judge or jurors). The effect of a communicative model of consent is easily counteracted by beliefs that a complainant has behaved in culturally unacceptable ways. The model presumes that men and women communicate about, and

[1] Vanessa E. Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron Law Review* 923, 936.

engage in, sexual behaviour from positions of social and economic equality when, in reality, many sexual interactions are characterised by inequality, control and/or exploitation.

This means *any* definition of consent, whether or not it uses an affirmative standard of consent, is subject to the highly variable social and cultural standards of the fact-finders (judge or jury) in a sexual assault trial. These standards will vary from trial to trial, so that on any one day in Australia you could have a 100 different sexual assault trials in courts around the country applying different social and cultural values and beliefs about women's sexual autonomy.

The task for reformers is to *guide* these variable social and cultural standards away from traditional, sexist attitudes about women's behaviour to standards that recognise women's social autonomy and agency as well as the fact that sexual relations require the free and voluntary agreement of both parties.

While an affirmative model of consent is a positive reform, it still focuses on the complainant's verbal and physical conduct and will still invite the fact-finder to scrutinise the complainant's behaviour, especially in terms of her so-called 'risky' behaviours: style of dress, alcohol/drug consumption, any physical contact she had with the defendant prior to the sexual intercourse, agreeing to go home, get into a car, or go to a secluded place with the defendant and so on.

While I and others have recommended that if a complainant has not actually physically or verbally communicated consent there is no free and voluntary agreement, reformers need to switch their focus to the state of mind of the accused and his conduct in ascertaining the complainant's consent.

Reframing the definition of consent will not solve the fundamental problem with sexual assault trials: the over-emphasised focus on the conduct of the complainant, rather than a focus on the conduct of the defendant.

Question 4.1

I agree that NSW law should continue to list circumstances that negate consent or may negate consent since there are many situations in which consent is negated and about which fact-finders would be unaware.

As the consultation paper recognises, I had suggested adding the following factors that negate consent:

> The fact that a person froze, or was unable to respond to a sexual act, or did not say or do anything to indicate free agreement in response to a sexual act is enough to show that the act took place without that person's consent.

The question posed by the Consultation Paper is whether such a reform 'would best be framed as a factor that negates consent or whether the definition of consent should be amended to require a clear indication of consent'. Without research on how laypeople would interpret these factors, it is hard to say which approach would be preferable in terms of guiding fact-finders away from using their misconceptions regarding women's responsibility for sexual assault.

If the above factors are to be added as vitiating factors they must be factors that negate consent rather than factors that may negate consent.

Nonetheless, it may be preferable to use my above suggestion to emphasise the need for voluntary consent. In terms of framing the law, greater explanation is required than the brevity used under the Tasmanian Criminal Code, s 2A(2)(a). I would elaborate on my suggestion above in the following way (which could easily be drafted as a sub-section of s 61HA of the NSW Crimes Act):

> (2) A person 'consents' to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.
>
> (3) A person does not freely and voluntarily agree to sexual intercourse if the person froze, or was unable to respond, for any reason, or if the person did not say or do anything to indicate free and voluntary agreement.

Some may think that the first clause (highlighted in yellow) would be sufficient to cover the issue of lack of response but I think the second clause (highlighted in green) is also necessary to emphasise the need for affirmative consent. Both clauses could also cover the situation where the person is affected by drug or alcohol intoxication but not substantially so.

Question 5.1

1. Should actual knowledge remain part of the mental element for sexual assault offences?

My answer is yes since there will be circumstances where that actual knowledge requirement would be able to be proved by the prosecution beyond reasonable doubt because of the presence of a video-recording of the incident (given some people's

propensity for recording sexual acts such as through live-streaming) or because of prior or subsequent social media posts, for example.

2. Should recklessness remain part of the mental element for sexual assault offences?

As I stated in my original submission, England and Wales have simplified the law by removing recklessness as part of the mental element. I agree with particular commentators that recklessness is unnecessary if the mental element is covered by actual knowledge and an objective standard (reasonable grounds or reasonable belief).

In reality, recklessness embodies the notion of reasonableness in the circumstances so that if a defendant did not advert to the possibility that the complainant was consenting 'then it is illogical that [he] could have also taken reasonable steps to ascertain consent'.[2]

I expect this question is best answered by prosecutors in terms of how often they run a sexual assault case based on recklessness as the mental element.

Questions 5.2, 5.3, 5.4 and 5.5

In my previous submission I stated that the introduction of an objective standard in England and Wales in 2003 'does not appear to have significantly impacted trial practices and outcomes'[3], with no significant increase in conviction rates since its introduction in 2004. Thus, there appears to be no clear benefit associated with adopting a 'reasonable belief' test in NSW, unless legislative guidance as to what does not amount to a reasonable belief is included. In other words, whether or not reasonable belief or reasonable grounds remains part of the mental element is dependent on adequate legislative guidance.

As I previously argued, the issue is *not* how the objective standard is worded but whether or not fact-finders are given sufficient guidance in applying the standard.

While the present requirement in NSW that the jury must consider 'all the circumstances', including any steps taken by the defendant, amounts to an endorsement of the communicative model of consent[4], the fact-finder is actually being invited 'to scrutinize the complainant's behaviour'[5], compared to legislative guidance about what would or would

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[2] I Dobinson and L Townsley, 'Sexual Assault Law Reform in NSW: Issues of Consent and Objective Fault' (2008) 32 *Criminal Law Journal* 152, 165.

[3] Wendy Larcombe, Bianca Fileborn, A Powell, N Hanley, and Nicola Henry, '"I Think It's Rape and I Think He Would Be Found Not Guilty": Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law (2016) 25 *Social & Legal Studies* 611, 614.

[4] NSW Department of Attorney-General and Justice, *Review of the Consent Provision for Sexual Assault Offences in the Crimes Act 1900*: Department of Attorney-General and Justice, 2013, 22.

[5] Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003:(1) - Rape, Sexual Assaults and the Problems of Consent' (2004) *Criminal Law Review*, 328, 342.

not amount to a belief based on reasonable grounds. In other words, the defendant's state of mind is made with reference to *her* behaviour and credibility which is an inherently subjective process, rather than *his* behaviour. Thus, the inquiry remains the same whether the standard is subjective (an honest belief) or objective (a reasonable belief).

While the communicative model of consent seeks to rectify this, the model does not recognise the conditions of inequality that define many sexual encounters so that the idea of 'free choice' and the power to 'bargain' denies the existence of economic, social and religious contexts in which women and girls are groomed, coerced and/or subject to threats to submit.

The focus on the complainant's behaviour imposes a high standard of sexual responsibility on her part, something that defence counsel exploit during cross-examination since they can easily tap into blame the victim attitudes and entrenched social expectations about women's and rape victims' behaviours, thus providing fact-finders with 'reasonable doubts'.

Indeed, 'reasonableness' is a relative concept. Even if a reasonable belief standard can be justified on the grounds that there has to some measure for protecting bodily integrity and sexual autonomy, it is unlikely that a 'reasonable belief' test will make defendants more accountable. A wide range of rape myths associated with female intoxication, sexually enticing behaviour and standards of morality, allow fact-finders to formulate their own criteria of reasonableness in all the circumstances since the literature shows that juries and laypeople interpret lack of resistance, lack of medical injuries, lack of force, and complainant intoxication as indicative of consent.[6] A global review of the literature found that progression through the criminal justice system was affected by perceptions of the complainant's character and behaviour, for example:

> whether her character or reputation were perceived as being negative … and her behaviours before (e.g., she engaged in "risk-taking" activities such as walking alone at night), during

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[6] J du Mont and D White, *The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review* (World Health Organization, 2007) (http://www.svri.org/sites/default/files/attachments/2016-01-19/medico.pdf; accessed 1/6/17); Louise Ellison and Vanessa E Munro, 'Of "Normal Sex" and "Real Rape" Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 *Social and Legal Studies* 291; Antonia Quadara, Bianca Fileborn and Patrick D Parkinson, *The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault* (Australian Institute of Family Studies, 2013); Natalie Taylor and J Joudo, *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study (Research and Public Policy Series No 68)* (Australian Institute of Criminology, 2005).

(e.g., she did not resist the assailant) and following an assault (e.g., she did not report the assault promptly to the police)'.[7]

Similarly, a more recent review of the literature concluded that:

> stereotypical beliefs around what constitutes 'real' rape … and who is a 'deserving' victim … rather than the availability of forensic or medical evidence availability, continue to have a profound and significant [e]ffect on decision-making processes and case outcomes for sexual offences.[8]

Thus, heuristics can render an actual lack of consent by a complainant ineffective because of cultural beliefs about 'real rape'. Snap judgments based on heuristics may blind the fact-finder to the applicable law:

> [p]eople typically react to ethical dilemmas by first forming snap judgments and then rationalising or modifying [them] through further reflection. … These snap judgments are not arbitrary, but are generally based on rough rules of thumb or heuristics … . The *soundness of the judgments will then depend on the reliability of the heuristics involved*.[9]

The biggest problem

Perhaps the biggest problem with s 61HA(3)(c) is that it *assumes* that the fact-finder will not make unreasonable inferences about the complainant's behaviour in deciding whether or not reasonable grounds existed for the defendant's belief. From one fact-finder to the next, it is impossible to know the community standards each of them will consider to be reasonable. With no criteria specified in the NSW legislation as to what community standards are expected and those that are prohibited, it is an entirely subjective process.

Thus, it is essential that legislative guidance is enacted to inform fact-finders about what will not constitute reasonable grounds or a reasonable belief at the same time as recognising that law reform can only go so far in achieving cultural change.

It must be remembered that any standard of reasonableness is subject to current community standards or 'contemporary morality' about sexual behaviour which filters fact-finders' interpretations of the evidence.

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7 Du Mont and White, above n6, 49.

8 Antonia Quadara, Bianca Fileborn and Patrick D Parkinson, *The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault* (Australian Institute of Family Studies, 2013).

9 J Crowe and L Sveinsson, L, 'Intimidation, Consent and the Role of Holistic Judgments in Australian Rape Law' (2017) 42 *University of Western Australia Law Review* 136, 149; emphasis added.

In order to institute real change, such that a complainant's choice not to have sex is recognised, it is necessary for legislation to not only provide the parameters around free and voluntary agreement in terms of guidance on what does and does not amount to reasonable grounds for a belief in consent.

If the law allows the defendant's subjective state of mind to be taken into account, it should *also require defendants to take into account the complainant's subjective state of mind* (rather than his assumptions about her state of mind) when deciding consent and reasonable grounds for belief in consent.

This was the reason why I suggested the enactment of a rebuttable presumption but I *did not* suggest that this would amount to a defence of an honest but mistaken belief in consent.

My suggestion of a rebuttable presumption embodies an *objective assessment* by the fact-finder of whether or not the evidence presented by the defendant reveals that he held a belief based on reasonable grounds (or a reasonable belief). There is no 'get out of gaol' card in my suggestion that is based on a defendant holding an honest but mistaken belief (which is a subjective belief).

Arguably, a rebuttable presumption should also clearly state that the complainant's style of dress, her consumption of alcohol or drugs, her silence or lack of physical resistance in response to a sexual act are insufficient to amount to reasonable grounds.

No doubt organisations that represent defence counsel will object to a rebuttable presumption on the grounds that it shifts the onus of proof onto the defendant. However, it is common under the criminal law for evidential burdens to be placed on defendants (e.g. defences such as self-defence, provocation etc) and the onus remains on the prosecution to *disprove* the defence beyond reasonable doubt.

Drafting a rebuttable presumption

Under the *Criminal Code* of Canada, s 273.2(b) states:

> It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where …
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

The question is whether a defence of reasonable belief should be drafted in the negative, as in Canada, or as a positive formulation such as the following example:

(1) It is a defence to a charge under ss 61I, 61J or 61JA that the accused believed that the complainant consented to the sexual act that forms the subject matter of the charge where:

  (i) the accused took reasonable steps, including any physical or verbal steps, to ascertain and form a belief based on reasonable grounds that the complainant was consenting.

(2) It is not a defence to a charge under ss 61I, 61J or 61JA that the accused's a belief in consent was based on the complainant's:

  (i) style of dress;
  (ii) prior sexual conduct with the accused or another person;
  (iii) consumption of alcohol;
  (iv) consumption of drugs;
  (v) silence; or
  (vi) lack of physical resistance

An alternative way of drafting (2) is:

For the purposes of sub-section (1), reasonable grounds are not made out if the accused's belief in consent was based on the complainant's:

  (i) style of dress;
  (ii) prior sexual conduct with the accused or another person;
  (iii) consumption of alcohol;
  (iv) consumption of drugs;
  (v) silence; or
  (vi) lack of physical resistance

I agree that before the defence can be raised the judge must be satisfied that there is sufficient evidence to support a belief based on reasonable grounds.

As per Question 5.12, I have left out the words 'in all the circumstances' in the above draft example, since it appears to be a redundant requirement.

Questions 5.8 and 5.9

What is a step is a question that is relevant to the above discussion of a rebuttable presumption. I have included the words, 'any verbal or physical steps' in the above example to reinforce the idea of a communicative model of consent where active steps are required, not just internal thought processes.

Question 5.10

Coercion and intimidation are common enough perpetrator behaviours that have had the effect of influencing a complainant to agree to sexual intercourse, an agreement that hardly amounts to free and voluntary consent.

It is, therefore, essential that fact-finders be required to take into account any coercive or intimidatory behaviours of the accused when deciding whether or not there were reasonable grounds for the accused's belief in consent. Therefore, an additional sub-section could be added to the draft provisions above:

> It is not a defence to a charge under ss 61I, 61J or 61JA if the accused's a belief in consent was based on the complainant's response to any coercive or intimidatory behaviour by the accused.

Question 5.6

I do not agree that NSW should adopt a negligent sexual assault offence for the very good reasons stated by the NSW Government back in 2007. I was on the Taskforce that gave rise to the 2007 draft bill and my opinion on the matter has not changed. I also agree with the view of the Law Reform Commission of Ireland in para 5.67.

Question 5.11

I do not think there are any good reasons to make any changes to the requirement to exclude the accused's self-induced intoxication. It would be a controversial public policy decision to allow an accused's intoxication to be taken into account in a sexual assault trial. I also think setting out the matters listed in para 5.102 would only serve to complicate the fact-finding task for jurors.

Question 5.13

See above my answers regarding Question 5.1. I also think prosecutors are in the best position to answer the question as to whether or not all three forms of knowledge should be retained.

Question 6.3

NSW could do an awful lot to improve jury directions in sexual assault trials particularly regarding issues about which laypeople will have little knowledge such as rape myths, the commonality of the freeze response in sexual assault victims, and something not raised in the Consultation Paper: the effects of trauma on the ability of a person to give best evidence and the likely triggers within the criminal trial process that can re-trigger a person's response to trauma.

As I said in my original submission, the physiological process, known as the 'freeze response' or tonic immobility is an involuntary, reflexive component of the fear response that is characterized by freezing in situations involving extreme fear 'when the options of flight or fight are unavailable as a coping/defense mechanism'.[10] A significant minority or majority of victims will display tonic immobility during a sexual assault.[11]

Thus, there should be a specific jury direction, based on the research, about tonic immobility (the freeze response) and its commonality among sexual assault survivors.

Jury directions regarding the complainant's dress, intoxication and previous consensual sexual activity would not be necessary if these factors were unable to be used as the grounds on which an accused formed his belief as to consent. They are necessary if these factors are not explicitly removed from the reasonable grounds (or reasonable belief) inquiry.

Question 6.5

In order to ensure greater consistency between the conduct of sexual assault trials, I agree that legislated jury directions should be set out as discussed on page 99. The trials and appeals in the *Lazarus* case clearly demonstrates the vast differences in approach between the views of different judges (both trial and appeal) on the factual issues in the *Lazarus* case and it must be remembered that every sexual assault jury trial is comprised of different groups of 12 people. This means that the scope for inconsistency between any group of trials conducted in the District Court is considerable. It is only through greater legislative guidance regarding the elements of the offence (see above suggestions) and through specific jury directions that greater consistency can be achieved in the name of justice.

Question 6.6

My discussions with prosecutors informs me that the problem with adducing expert evidence in sexual assault trials is either the lack of available experts to give evidence, the cost of hiring an expert witness to give evidence or the lack of time available to find such an expert.

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10 Y Atara, 'Trauma from an Enactive Perspective: The Collapse of the K*nowing-How* Structure' (2015) 23 *Adaptive Behavior* 143.

11 J M Heidi, B P Marx, and J P Forsyth, 'Tonic Immobility and Childhood Sexual Abuse: A Preliminary Report Evaluating the Sequela of Rape-Induced Paralysis' (2005) 43 *Behavior Research and Therapy* 1157; G Galliano, L M Noble, L A Travis, and C Puechl, 'Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates, (1993) 8 *Journal of Interpersonal Violence* 109.

It would be very easy to add another sub-section to s 79 along the lines of s 79(2) which refers to specialised knowledge of child development and child behaviour. The question, however, is to what extent will prosecutors routinely employ an expert to give evidence about the behavioural responses of sexual assault victims? Funding, availability of experts and sufficient case preparation time appear to be the present hurdles.