



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EErgCrim: 1636893

4 February 2019

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

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

Dear Mr Cameron,

Consultation Paper: Consent in relation to sexual offences

The Law Society welcomes the opportunity to respond to the Law Reform Commission's consultation paper on consent in relation to sexual offences.

Our response to the questions raised in the consultation paper are contained in the attached submission.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on [REDACTED]

Yours sincerely,

[REDACTED]

Elizabeth Espinosa
President

3. The meaning of consent

Question 3.1: Alternatives to a consent-based approach

- 1. Should the law in NSW retain a definition of sexual assault based on an absence of consent? If so, why? If not, why not?**

We support the retention of a definition of sexual assault based on an absence of consent.

From a criminal justice perspective, we consider that section 61HE strikes the right balance between the complainant, who states she/he did not consent (to a sexual act) and the accused, who states he/she did not know that the complainant was not consenting.

The Law Society strongly supports standards which reflect the reasonable views of contemporary society and which promote respect and communication in relation to the issue of consent. In our view, section 61HE effectively provides the capacity for the trier of fact to apply such standards, in particular through the inclusion of the 'no reasonable grounds' aspect of the test and the requirement for the trier of fact to take into account 'any steps taken by the person to ascertain whether the other person consents'.

- 2. If the law was to define sexual assault differently, how should this be done?**

N/A

Question 3.2: The meaning of consent

- 1. Is the NSW definition of consent clear and adequate?**

We consider that the NSW definition of consent is clear and adequate, and reflects a positive or communicative model of consent. We note that the NSW Department of Justice reviewed what was then section 61HA, and concluded that the policy objectives of the section remained valid.¹

- 2. What are the benefits, if any, of the NSW definition?**

The NSW definition appropriately balances the rights of an accused, consistent with the seriousness of the offence, as well as consideration of the complainant through the objective element of the offence, which enables the fact finder to apply contemporary standards.

- 3. What problems, if any, arise from the NSW definition?**

We do not see an issue with the definition itself, but rather how it is explained to a jury, which is a directions issue. Ongoing judicial education and assisting juries to understand

¹NSW Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900*, October 2013, p18.

complex directions are areas which require attention to ensure consistent and fair outcomes in sexual assault trials.

We note that in its preliminary submission to the Law Reform Commission, the Office of the Director of Public Prosecutions (NSW) sought examples from its lawyers and Crown Prosecutors of acquittals that demonstrated that the consent provisions were deficient. The Director concluded that there was “a very limited response to this request ...which tends to suggest there are not significant problems”.²

As disturbing as some aspects of the Lazarus case are, in our view significant law reform should not be embarked upon in response to one case, particularly when twice the Court of Criminal Appeal ultimately corrected errors made at trial. We consider that the focus should be on mitigating the stress and trauma of trial processes on complainants via procedural reforms, such as reducing delays in the District Court and the expansion of the use of pre-recording evidences where appropriate.

4. What are the potential benefits of adopting an affirmative consent standard?

The arguments in favour of an affirmative consent standard referred to in the consultation paper include that it may:

- facilitate a cultural shift and encourage people to seek consent actively;
- reduce any undue focus on complainants during sexual assault trials, and
- provide better guidance for fact finders in determining whether the complainant consented.³

We note that a legislative change to the definition of consent may not achieve the desired cultural shift around consent. Loughnan and co-authors contend that:

While the criminal law is increasingly used to educate the public about community values, there is evidence that it is not an effective tool, particularly for offences that are impulsive or that occur in circumstances of high emotion.⁴

An affirmative model may, in fact, heighten the scrutiny placed on a complainant's conduct to determine whether they did or said anything to communicate consent.

We consider that the possible benefits of an affirmative consent standard could be better achieved through judicial and community education and jury directions. We do not consider that legislative amendment is necessary or desirable.

5. What are the potential problems with adopting an affirmative consent standard?

The arguments against an affirmative consent standard referred to in the consultation paper include that it:

- is unclear and would unduly broaden the criminal law;

² Office of the Director of Public Prosecutions, Preliminary Submission PCO100, p5.

³ NSW Law Reform Commission, Consultation Paper 21: *Consent in sexual offences*, October 2018, para 3.53.

⁴ A Loughnan, C McKay, T Mitchell and R Shackel, Preliminary Submission PCO65, p5.

- is onerous for the accused;
- would retain the undue focus on the conduct of complainants during sexual assault trials, and
- would not reduce the influence of “rape myths”.⁵

We agree with these concerns. We consider that an affirmative consent standard is unclear as people do not communicate consent in a standardised way, and would risk broadening the criminal law, which may lead to injustice.

An affirmative consent model does not adequately reflect the infinite and complex variety of sexual conduct amongst consenting individuals. It also assumes that both parties have a certain level of capacity/ability to communicate. This assumption risks disproportionately criminalising individuals who, due to relative youth, cognitive or mental impairment, may for example, misinterpret silence to mean consent. Whereas, in the context of long-standing behaviour between two adults (where capacity is not an issue), silence can equate to consent. As observed by Loughnan and co-authors, innumerable instances of consensual sex occur in the absence of words and such instances are not morally problematic.⁶

The affirmative consent model may not reduce undue focus on complainants during sexual assault trials: it may in fact increase the focus on what he or she did/did not communicate, instead of consideration of a broader range of relevant features as per the current no reasonable grounds test. Arguably, focussing on what the complainant does/does not communicate conflates the issue of the *presence* of consent with *knowledge* regarding consent.

We note that research suggests that rape myths continue to influence sexual assault trials in Victoria and Tasmania despite the affirmative consent standard.⁷

6. If NSW was to adopt an affirmative consent standard, how should it be framed?

We do not support the adoption of an affirmative consent standard.

7. Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?

As noted in the consultation paper, the definition of sexual intercourse already includes the “continuation” of sexual intercourse, which implies that consent is relevant to all stages of sexual activity. If necessary, the issue of withdrawal or revocation of consent can be addressed in directions to the jury.

We query whether the use of contraception, and the issue of “stealthing”, would be covered by section 61HE(6)(d), “any other mistaken belief about the nature of the activity induced by fraudulent means”.

⁵ Consultation Paper 21, para 3.54.

⁶ Ibid, para 3.72.

⁷ Ibid, paras 3.76, 3.77.

8. Do you have any other ideas about how the definition of consent should be framed?

See 5.1(4) below.

4. Negation of consent

Question 4.1: Negation of consent

1. Should NSW law continue to list circumstances that negate consent or may negate consent? If not, in what other ways should the law be framed?

We support the current provisions relating to negation of consent.

2. Should the lists of circumstances that negate consent, or may negate consent, be changed? If so, how?

We support amending section 61HE(6)(a) by replacing the current reference to “substantial intoxication” of the complainant with a provision to the effect of the relevant Victorian provision, which negates consent where the complainant is so affected by alcohol or another drug as to be incapable of consenting to the act.⁸ This more appropriately focusses on the impact of the intoxication on the complainant, rather than the level of intoxication.

5. Knowledge about consent

Question 5.1: Actual knowledge and recklessness

1. Should “actual knowledge” remain part of the mental element for sexual assault offences? If so, why? If not, why not?

We strongly support the retention of actual knowledge as part of the mental element for sexual assault offences. It is a cornerstone of the criminal justice system that a person charged with a serious offence carrying a heavy sentence should have the requisite guilty mind to accompany the guilty act.

2. Should “recklessness” remain part of the mental element for sexual assault offences? If so, why? If not, why not?

Further consideration should be given to replacing “recklessness” with “indifference” (see 5.1(4) below).

3. Should “reckless” be defined in the legislation? If so, how should it be defined?

If recklessness is retained as a mental element for sexual assault offences, it should not be defined in the legislation. The Bench Book could be redrafted if further clarity is required.

⁸ *Crimes Act 1958* (Vic) section 36(2)(e).

4. Should the term “reckless” be replaced by “indifferent”? If so, why? If not, why not?

We support the Bar Association’s recommendation that section 61HE(3)(b) should be amended to read: “the person is indifferent as to lack of consent by the other person to the sexual intercourse”.

We agree with the Bar Association’s position that “[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”.⁹

Question 5.2: The “no reasonable grounds” test

1. What are the benefits of the “no reasonable grounds” test?

We consider that the test allows the fact finder to apply standards that reflect the reasonable views of contemporary society which promote respect and communication in relation to the issue of consent. The hybrid test of subjective and objective elements strikes the right balance between the complainant and the accused.

We support Justice Fullerton’s position that the relevant issues are:

- Whether the accused believed the complainant was consenting, and
- If so, whether the accused had reasonable grounds for this belief.¹⁰

2. What are the disadvantages of the “no reasonable grounds” test?

We support the retention of the “no reasonable grounds” test.

Question 5.3: A “reasonable belief” test

1. Should NSW adopt a “reasonable belief” test? If so, why? If not, why not?

We do not consider that replacing the “no reasonable grounds” test with a “reasonable belief” test would simplify the law, and see no benefit in changing the test.

2. If so, what form should this take?

We support the retention of the “no reasonable grounds” test.

Question 5.4: Legislative guidance on “reasonable grounds”

1. Should there be legislative guidance on what constitutes “reasonable grounds” or “reasonable belief”? If so, why? If not, why not?

We do not consider legislative guidance is required. Jury directions can be given in appropriate matters and allow for changes in attitudes and community expectations. Jury

⁹ NSW Bar Association, Preliminary Submission PCO47, 4.

¹⁰ *Lazarus v R* [2016] NSWCCA [156].

directions are more flexible than legislation and can therefore be tailored to the particular circumstances of the case.

2. If so, what should this include?

N/A.

Question 5.5: Evidence of the accused's belief

1. Should the law require the accused to provide evidence of the "reasonableness" of their belief? If so, why? If not, why not?

We are strongly opposed to this proposal. The onus is on the prosecution to prove beyond a reasonable doubt all the elements of the offences. The proposal is also contrary to the right to silence.

2. If so, what form should this requirement take?

We are strongly opposed to this proposal.

Question 5.6: "Negligent" sexual assault

1. Should NSW adopt a "negligent" sexual assault offence? If so, why? If not, why not?

We do not support the creation of a new separate "negligent" sexual assault offence with a lower maximum penalty.

Question 5.7: "No reasonable grounds" and other forms of knowledge

1. Should a test of "no reasonable grounds" (or similar) remain part of the mental element for sexual assault offences?

A test of "no reasonable grounds" should remain part of the mental element for sexual assault offences.

2. If not, are other forms of knowledge sufficient?

N/A

Question 5.8: Defining "steps"

1. Should the legislation define "steps taken to ascertain consent"? If so, why? If not, why not?

We do not consider that "steps taken to ascertain consent" needs to be defined. We support Justice Bellew's interpretation of the law:

[A] "step" for the purposes of s 61HA(3)(d) must involve the taking of some positive act. However, for that purpose a positive act does not necessarily have to be a physical one. A positive act, and thus a "step" for the purposes of the section, extends to include a person's

consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.¹¹

This section must be flexible in application (and include a person's consideration of the situation they are involved in) to account for the wide range of cases which come before the courts. We note that in many cases there is a combination of steps, which may include a consideration of how the accused reasons what they hear and perceive, as well as things the accused says or does. We consider that it may be unfair for a jury to be told that they can only take into account the physical or verbal acts and not the accused's explanation as to how they reasoned the situation at the time (which may or may not be accepted by the jury).

2. If so, how should "steps" be defined?

N/A.

Question 5.9: Steps to ascertain consent

1. Should the law require people to take steps to work out if their sexual partner consents? If so, why? If not, why not?

The law should not require people to take steps to work out if their partner consents. The current law is adequate (see 3.2(5) and 5.8(1) above).

We agree with Loughnan and co-authors that adopting something similar to the Tasmanian legislation would create an absolute liability offence, which would have the potential to create unjust convictions.¹² We strongly agree with the commentary in the consultation paper that is "is well-recognised that it is harsh, and goes against fundamental criminal law principles, to hold a person criminally responsible for acts committed without any criminal intention or fault on their part".¹³

2. If so, what steps should the law require people to take?

N/A.

Question 5.10: Considering other matters

1. Should the law require a fact finder to consider other matters when making findings about the accused's knowledge? If so, why? If not, why not?

The current provision permits fact finders to consider other matters as part of "all the circumstances of the case", which we consider appropriate.

2. If so, what should these other matters be?

N/A.

¹¹ *R v Lazarus* [2017] NSWCCA 279 [147]

¹² A Loughnan, C McKay, T Mitchell and R Shackel, Preliminary Submission PCO65, p5.

¹³ Consultation paper 21, para 5.92.

Question 5.11: Excluding the accused's self-induced intoxication

- 1. Should a fact finder be required to exclude the accused's self-induced intoxication from consideration when making findings about knowledge? If so, why? If not, why not?**

We note that the exclusion of self-induced intoxication reflects the general rule in section 428D(a) of the *Crimes Act*.

We acknowledge the position of Quilter and the NSW Bar Association¹⁴, however, we accept the policy decision behind the provision that self-induced intoxication should not be allowed to lower the standards of acceptable conduct.

- 2. Should the legislation provide detail on when the accused's intoxication can be regarded as self-induced? If so, what details should be included?**

We consider that this proposal would complicate the task of determining whether an accused's intoxication can be regarded as self-induced and create inflexibility.

Question 5.12: Excluding other matters

- 1. Should the legislation direct a fact finder to exclude other matters from consideration when making findings about the accused's knowledge? If so, what matters should be excluded?**

No. It is important for the fact finder to consider all the circumstances of the case.

- 2. Is there another way to exclude certain considerations when making findings about the accused's knowledge? If so, what form could this take?**

We do not support excluding certain considerations when making findings about the accused's knowledge.

Question 5.13: A single mental element

- 1. Should all three forms of knowledge be retained? If so, why? If not, why not?**

We support the retention of three forms of knowledge (with "recklessness" possibly being replaced by "indifference" as discussed at 5.1(4) above).

- 2. If not, what should be the mental element for sexual assault offences?**

N/A.

¹⁴ Consultation paper para 5.100, 5.101.

Question 5.14: Knowledge of consent under a mistaken belief

- 1. Does the law regarding knowledge of consent under a mistaken belief need to be clarified? If so, how should it be clarified?**

We do not consider that the law regarding knowledge of consent under a mistaken belief needs to be clarified.

Question 5.15: Other issues about the mental element

- 1. Are there any other issues about the mental element of sexual assault offences that you wish to raise?**

We have no further issues to raise.

6. Issues related to s 61HA

Question 6.1: Upcoming amendments

- 1. What are the benefits of the new s 61HE applying to other sexual offences?**

We note that having one definition of consent may be less confusing for jurors to understand.

- 2. What are the problems with the new s 61HE applying to other sexual offences?**

We opposed the expansion of the statutory definition of consent beyond the sexual assault offences when it was first proposed by the Department of Justice, noting that the new offences of sexual acts and sexual touching cover a much wider range of conduct than the previous offences of act of indecency and indecent assault. However, we note that the legislative definition of consent and the knowledge element already apply to the new offences.

- 3. Do you support applying the legislative definition of consent and the knowledge element to the new offences? If so, why? If not, why not?**

As noted above, that the legislative definition of consent and the knowledge element already apply to the new offences.

Question 6.2: Language and structure

- 1. Should changes be made to the language and/or structure of s 61HA (and the new s 61HE)? If so, what changes should be made?**

The structure of section 61HE could be changed by reordering the sub-sections so that the actus reus elements are all addressed first, followed by the mens rea elements.

2. Should the definition of “sexual intercourse” be amended? If so, how should sexual intercourse be defined?

To address the issue raised in the consultation paper, the word “female” could be deleted from the definition in section 61HA.

Question 6.3: Jury directions on consent

1. Are the current jury directions on consent in the NSW Criminal Trial Courts Bench Book clear and adequate? If not, how could they be improved?

We note that the aims of jury directions are to: ensure a fair trial for the accused; be accurate and adequate with regards to the law, the alleged facts and the arguments of counsel; they should be understandable to the jurors, and assist them in coming to a verdict.

The model directions on consent should be reviewed to ensure that they are both legally accurate and readily understandable by jurors in order to ensure a fair trial.

Question 6.4: Jury directions on other related matters

1. Should jury directions about consent deal with other related matters in addition to those that they currently deal with? If so, what matters should they deal with?

Revised jury directions could address rape myths where necessary, as in Victoria, where the judge may inform the jury that people respond differently to sexual assault and may freeze and not do or say anything.

We would also support directions that deal with previous or different consensual activity and withdrawal of consent.

The Law Society supports a general review of the Bench Book by the NSW Judicial Commission in consultation with relevant legal stakeholders. It may also be useful to engage appropriate experts to assist in drafting directions relating to more modern views of responses such as the freeze response.

Question 6.5: Legislated jury directions

1. Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed?

The Law Society is of the view that jury directions should not be legislated. Legislation is inflexible and cannot comprehensively address the changing circumstances in which judicial directions may need to be given.

We note that the Law Reform Commission considered and rejected codification of jury directions in its report *Jury Directions*¹⁵. The Law Reform Commission concluded that:

... there is an inherent potential for inflexibility in the introduction of a statutory scheme or codification that seeks to anticipate the issues on which a jury will

¹⁵ NSW Law Reform Commission, Report 136: Jury Directions, 2012.

need instruction. It is our view that the adoption of such a scheme could pose a risk to the fairness of the trial process if it detracts in any way from the ability of the trial judge to assess the needs of the particular case and to tailor the directions to the jury to accommodate those needs. A trial judge is in the best position to understand the dynamics of any particular trial and to devise directions that meet the demands of that trial.¹⁶

The Law Reform Commission's preferred approach was to retain and strengthen the existing Bench Book framework, noting that suggested directions can be tailored to the individual case that can evolve in response to appellate decisions.¹⁷

2. What are the benefits of legislated jury directions on consent and/or other related matters?

We do not support legislated jury directions. We note that directions in the Bench Book provide a more flexible means of communicating modern views of sexual relationships, such as the communicative model and the freeze response, which are relevant to the "no reasonable grounds" test.

3. What are the disadvantages of legislated jury directions on consent and/or other related matters?

See 6.5(1) above.

Question 6.6: Amendments to expert evidence law

1. Is the law on expert evidence sufficiently clear about the use of expert evidence about the behavioural responses of people who experience sexual assault? If so, why? If not, why not?

The use of expert evidence about the behavioural responses of people who experience sexual assault should be further explored and used in appropriate cases.

2. Should the law expressly provide for the introduction of expert evidence on the behavioural responses of people who experience sexual assault? If so, why? If not, why not?

We do not consider this necessary, as the *Evidence Act 1995*¹⁸ already provides that this type of evidence can be introduced.

¹⁶ Ibid. p41.

¹⁷ Ibid, pxii.

¹⁸ Sections 79, 108C *Evidence Act 1995*.