THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EErgCrim:1795379

18 November 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,

Draft Proposals: Consent in relation to sexual offences

The Law Society welcomes the opportunity to respond to the Law Reform Commission's ("LRC") draft proposals on the law of consent in relation to sexual offences.

Our response to the draft proposals is contained in the attached submission.

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

Yours sincerely,

[redacted]
Elizabeth Espinosa
President

Introduction

The LRC has acknowledged that the law of consent is highly complex and controversial, which is why it has released its draft proposals before preparing final recommendations.

We are concerned that if implemented, the proposals may result in lengthier trials, more potential for appeals and retrials and an increased focus on the conduct of complainants during sexual assault trials. We are of the view that the proposed sub-division is unnecessarily complex, many of the provisions are too broadly drafted, and the amendments do not add clarity.

We note the following observations of the Office of the Director of Public Prosecutions:

> The current provision has been in operation for more than ten years and there has been very little appellate consideration, which is indicative of the provision being understood and working well. In our submission, there is no particular advantage in making changes modelled on formulations used in other jurisdictions such as Victoria or Tasmania.[1]

We consider that rather than legislative amendments, 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-recorded evidence where appropriate.

A legislative change to the law 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.[2]

We agree with the DPP that education about consent - in schools, universities, sports clubs and within the wider community - would have a greater impact on dispelling "rape myths" and sexual assault generally, than any change to the law.[3]

We note that the provisions related to consent apply to the complete range of sexual offences, from sexual acts to sexual touching, and apply in the Local Court before Magistrates, not just to sexual assault matters in front of judges and juries. Given the high volume of matters before the Local Court it is important that any amendments to the current provisions are clear and workable.

New interpretive principles

The LRC proposes that the following principles should govern the interpretation and application of the new subdivision:

> **61HF Principles to be used in interpreting and applying Subdivision**
> Regard must be had to the following principles when interpreting or applying this Subdivision—
> (a) every person has a fundamental right to choose whether or not to participate in a sexual activity,

[1] Office of the Director of Public Prosecutions, Submission CO14, p3.
[2] A Loughnan, C McKay, T Mitchell and R Shackel, Preliminary Submission PCO65, p5.
[3] Office of the Director of Public Prosecutions, Submission CO14, p3.

(b) a person's consent to a sexual activity should not be presumed,
(c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

The interpretive principles add an unnecessary layer of complexity and should be deleted. The more layers of legislative prescription added, the more potential for confusion and appeals. We query what the interpretive principles will achieve. Further, draft s 61HI is prescriptive and addresses the matters in draft s 61HF(a) to (c), making the interpretive principles redundant.

If interpretive principles are to be included, they should include reference to the rights of an accused, including the right to a fair trial and the presumption of innocence.

The meaning of "consent"

The LRC does not propose that the meaning of "consent" be changed, but proposes to explicitly provide for the following new matters in draft s 61H(2) to (6) below:

61HI Consent generally

(1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent.
(3) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
(4) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.
(5) A person who consents to a sexual activity with a person on an occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with —
    (a) that person on another occasion or
    (b) any other person on that or any other occasion.
(6) A person who consents to a sexual activity being performed in a particular manner is not, by reason only of that fact, to be taken to consent to the sexual activity being performed in another manner.

We support the proposed retention of the definition of consent in draft s 61HI(1) that a person consents to a sexual activity if the person freely and voluntarily agrees to it.

We consider that the NSW definition of consent is clear and adequate and reflects a positive or communicative model of consent. 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.

We do not object to the additional subsections in draft s 61HI (subsection (2) to (6)). However, we are concerned that the additional subsections may detract from, or subsume, the core definition of consent in s 61HI(1), which is that a person consents to a sexual activity if the person freely and voluntarily agrees to it.

When a person "does not consent"

The LRC proposes that the law should include a non-exhaustive list of circumstances in which a person "does not consent" to a sexual activity.

Draft s 61HJ provides as follows:

> **61HJ Circumstances in which there is no consent**
> (1) A person does not consent to a sexual activity if —
> (a) the person does not do or say anything to communicate consent, or
> (b) the person does not have the capacity to consent, or
> (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
> (d) the person is asleep or unconscious, or
> (e) the person participates in the sexual activity—
> (i) because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs, or
> (ii) because of coercion, blackmail or intimidation occurring at any time, or
> (iii) because the person or another person is unlawfully detained, or
> (iv) because the person is overborne by the abuse of a position of authority or trust, or
> (f) the person participates in the sexual activity because the person is mistaken about—
> (i) the identity of the other person, or
> (ii) the nature of the sexual activity, or
> (iii) the purpose of the sexual activity (including about whether the sexual activity is for health, hygienic or cosmetic purposes), or
> (g) the person is fraudulently induced to participate in the sexual activity.
> (2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.

Draft section 61HJ(1)(a)

We are concerned that, rather than reduce the focus on complainants during sexual assault trials, an affirmative model is likely to 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 the proposed legislative amendment is necessary or desirable.

We continue to be concerned that an affirmative consent standard:

- would be unclear and would unduly broaden the criminal law;
- would be onerous for the accused;
- would retain and possibly increase the focus on the conduct of complainants during sexual assault trials, and
- would not reduce the influence of "rape myths".[4]

An affirmative consent model does not adequately reflect the 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. As observed by Loughnan and co-authors,

[4] NSW Law Reform Commission, Consultation Paper 21: Consent In relation to sexual offences, 2019, para 3.54.

innumerable instances of consensual sex occur in the absence of words and such instances are not morally problematic.[5]

We note that research suggests that rape myths continue to influence sexual assault trials in Victoria and Tasmania despite the affirmative consent standard.[6]

Draft section 61HJ(1)(b)-(d) and (g)

We support these draft subsections.

Draft section 61HJ(1)(e) and (f)

Draft s 61HJ(1)(e) is broad and in combination with its mandatory nature, negating consent in all circumstances, could lead to unjust outcomes. The subsection should be redrafted so that it is much narrower in scope and only covers circumstances that would definitely negate consent. As currently drafted, it covers a very broad range of behaviour that may not always negate consent.

For instance, draft s 61HJ(1)(e)(i) provides that consent is negated due to fear of harm to property, regardless of when the conduct giving rise to the fear occurs. Under this proposal, if a person threatens to destroy another person's mobile phone, and a week later sexual intercourse occurs, and the complainant claims that they participated in the sexual activity because of fear the other person would destroy their mobile phone, consent would be negated.

Similarly, draft s 61HJ(1)(e)(ii) provides that consent is negated because of coercion, blackmail or intimidation occurring at any time. There should be a nexus between the participation in sexual activity and the coercion, blackmail or intimidation.

The addition of "overborne by" the abuse of a position of authority or trust in draft s 61HJ(1)(e)(iv) does not simplify the current provision.

We do not support draft s 61HJ(1)(f)(ii) in its current form, which negates consent where the participant is mistaken about the nature of the sexual activity. It is very broad and risks potentially unjust convictions. It is a significant expansion of the current s 61HE(6)(d), which links the mistaken belief as to the nature of the sexual activity with fraudulent behaviour. That link should be maintained, otherwise entirely morally acceptable sexual conduct will be criminalised.

Knowledge of consent

Draft s 61HK provides:

> **61HK Knowledge about consent**
> (1) A person is taken to know that another person does not consent to a sexual activity if—
> (a) the person actually knows the other person does not consent to the sexual activity, or
> (b) the person is reckless as to whether the other person consents to the sexual activity, or

[5] Ibid, para 3.72.
[6] Ibid, paras 3.76, 3.77.

(c) any belief that the person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

(2) For the purposes of making any finding under this section, the trier of fact—
(a) must have regard to all the circumstances of the case, including whether the accused person said or did anything to ascertain if the other person consented to the sexual activity, and if so, what the person said or did, and
(b) must not have regard to any self-induced intoxication of the accused person.

Draft s 61HK(1)

The Law Society strongly supports the proposed retention of actual knowledge as part of the mental element for sexual 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.

We agree with the LRC that "recklessness" should not be defined in legislation.

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.

We consider that the current 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.[7]

Draft s 61HK(2)

We agree with the LRC that jury directions are the appropriate mechanism to address concerns raised during consultations about the requirement to consider "all the circumstances of the case".

We do not support replacing "steps taken to ascertain consent" with a requirement that the judge or jury consider whether the accused person said or did anything to ascertain if the complainant consented, and if so, what the accused person said or did.

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.[8]

This subsection 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

[7] *Lazarus v R* [2016] NSWCCA [156].
[8] *R v Lazarus* [2017] NSWCCA 279 [147].

courts. We consider that it may be unfair for a jury to be told that they must 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).

New jury directions on consent and sexual offending

The Law Society is strongly opposed to the proposal to codify jury directions. Sexual assault matters are often highly complex, and directions should be tailored to the facts at the court's discretion, rather than at the request of the prosecution or defence to issue a direction unless there is a "good reason" not to do so.

We agree with the observation of the LRC that "[t]here is a risk that judicial comment, if overdone, will be seen to intrude onto the jury's domain and diminish the appearance of an impartial system of justice".[9]

We consider a preferable focus of any reform to jury directions should be on the simplification of Bench Book directions rather than on legislative change including partial codification of jury directions on consent.

Legislation is inflexible and cannot comprehensively address the changing circumstances in which judicial directions may need to be given.

We note that the LRC considered and rejected codification of jury directions in its report *Jury Directions*.[10] In its Consultation Paper at that time, the LRC expressed the view that too many appeals are allowed on the basis of judicial misdirections:

> A substantial number of successful appeals based on misdirections ultimately result in re-trials. The waste of resources — including the costs to the criminal justice budget, the legal costs incurred by both the prosecution and the defence — and the personal strain occasioned to victims, witnesses and persons accused of criminality and their families, resulting from such re-trials, are obvious. The increasing incidence of appeals relating to judicial instructions must be viewed in the more general context of increasing resort to appellate courts in criminal matters.[11]

The LRC's concerns were highlighted in the analysis of conviction appeals undertaken by the Judicial Commission of NSW in 2011. The Judicial Commission found that a significant number of successful sexual assault appeals in NSW result from the trial judge giving one or more misdirection (in 33.5% of misdirection cases).[12]

The Law Reform Commission ultimately 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 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

[9] NSW Law Reform Commission, Report 136: Jury Directions, 2012, p13.
[10] Ibid.
[11] NSW Law Reform Commission, Consultation Paper 4: Jury Directions, 2008, para 1.36.
[12] Judicial Commission of NSW, Monograph 35: Conviction Appeals in NSW, 2011, pxvi. This study involved an empirical and legal analysis of conviction appeals for matters dealt with on indictment in New South Wales for the period between 1 January 2001 and 31 December 2007 reporting on both success rates of conviction appeals and the predominant legal reasons why these appeals were allowed.

> 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.[13]

The LRC'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.[14] We continue to endorse that conclusion.

We also share the concerns of the LRC in the present consultation that another disadvantage is that formal statutory amendment would be required to update the directions. Currently the Criminal Trial Courts Bench Book Committee of the Judicial Commission can update the Bench Book in response to appellate decisions or legislative change.

The Victorian experience

We consider the draft proposals will make the law of consent more complex, and will increase the risk of juror confusion, complex directions and legal argument and appeals.

We note that, similar to the current draft proposals, reforms in Victoria were designed minimise outdated perceptions of rape and ensure consistency and clarity in their delivery. However, Flynn and Henry observe that the complex nature of the law instead led to a set of convoluted and confusing jury directions.[15] This led to a high number of appeals and overturned convictions resulting from judicial misdirections "which have implications that extend to reducing public and judicial confidence in the law... reducing reporting rates.... and ultimately forcing jurors to rely upon their preconceived ideas about rape and consent in making decisions".[16]

Draft s 292(2)-(4)

Draft s 292(2)-(4) would create a statutory presumption in favour of certain jury directions in sexual assault trials, where:

- There is good reason to give the direction, or
- The direction is requested by a party, unless there is a good reason not to give the direction.

The proposal is said to be based on the process adopted in the *Jury Directions Act 2015* (Victoria). However, the proposal is put in isolation from the comprehensive framework of the Victorian scheme and does not reflect a number of important safeguards of the right to a fair trial and the respective roles of the judge and jury contained in that scheme.

In particular, the Victorian legislation provides that jury directions should be as clear, brief, simple and comprehensible as possible. Judges should avoid technical legal language wherever possible and should only direct the jury on points of law that the jury needs to know (s 5 *Jury Directions Act 2015*). Guiding principles also provide, inter alia:

- that it is the role of a jury to determine the issues that are in dispute between the prosecution and the accused;

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[13] NSW Law Reform Commission, Report 136: Jury Directions, 2012, p41.
[14] Ibid, pxii.
[15] Flynn and Henry, Disputing Consent: The Role of Jury Directions In Victoria, Current Issues in Criminal Justice, http://www.austlii.edu.au/au/journals/CICrimJust/2012/28.pdf
[16] Ibid.

- it is the responsibility of the trial judge to determine the matters in issue, the directions that should be given and the content of the directions; and
- one of the responsibilities of legal practitioners appearing in a criminal trial is to assist the judge to determine the matters in issue, the directions that should be given and the content of the directions (s 5 *Jury Directions Act 2015*).

Sections 65 and 66 of the *Jury Directions Act 2015* require the judge to relate the directions on consent and reasonable belief in consent to the facts in issue, and to the elements of the offence being tried in respect of which the direction is given, so as to aid the jury's comprehension of the direction.

We are also concerned that the proposed new s 292(2)-(4) *Criminal Procedure Act 1986* omits important safeguards in the equivalent Victorian provision (s 14(2) *Jury Directions Act 2015*) namely:

> (2) In determining whether there are good reasons for not giving a requested direction to the jury, the trial judge must have regard to—
> (a) the evidence in the trial; and
> (b) the manner in which the prosecution and the accused have conducted their cases, including—
> (i) whether the direction concerns a matter not raised or relied on by the accused; and
> (ii) whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented his or her case.

Alternative submission

Should our primary position on jury directions, that is, to simplify Bench Book directions, not be supported, we would not object to the inclusion of the proposed mandatory direction (draft s 292(5)), in the *Criminal Procedure Act 1986* as a warning alongside the current warnings in ss 293A to 294AA.

We consider that proposed s 292(9) "Responses to giving evidence" is an inappropriate direction. The way in which a person responds to giving evidence is something that the jury has seen, and is a matter for the parties to make submissions on, rather than a matter for the judge to comment on.

The remaining directions should be included in the Bench Book and should not be legislated.

Definitions of "Sexual intercourse", "sexual touching" and "sexual act"

A number of amendments are proposed to the definition of "sexual intercourse". As acknowledged by the LRC, the amendments would expand the definition of sexual intercourse. While reforms to the elements of sexual assault offences were not canvassed in any detail in the LRC's consultation paper, and the proposed amendments go beyond clarification, we do not object to the expanded definition.