OUR REFERENCE

DIRECTOR'S CHAMBERS

ODPP
New South Wales

YOUR REFERENCE

DATE

3 December 2019

The Hon Acting Justice Carolyn Simpson AO
Lead Commissioner
New South Wales Law Reform Commission

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

Dear Commissioner

New South Wales Law Reform Commission
Consent in relation to sexual offences: Draft Proposals

Thank you for the opportunity to comment upon the New South Wales Law Reform Commission's Draft Proposals concerning consent in relation to sexual offences.

As noted in the Office of the Director of Public Prosecution's (ODPP) related submissions of July 2018 and February 2019, sexual assault represents a significant proportion my Office's trial work and I have an active interest in sexual assault policy and law reform.

I make the following comments in response to the Draft Proposals:

Proposal 4.1: Interpretive principles (Draft s61HF)

I support the intent behind the inclusion of the interpretive principles, and support the principles themselves.

Proposal 4.2: Application of subdivision and definitions (Draft 61HG and HH)

I support the enactment of those proposed sections. They serve to inform the readers understanding of the purpose of the consent subdivision and provide additional clarity as to the statutory definition of consent.

Proposal 5.1: The meaning of consent (Draft s61HI(1))

The existing definition of consent has been retained, which I support. The definition is adequate and appropriate and, as noted in the Draft Proposals, generally well-regarded and understood. The concept of consent being present "at the time of the sexual activity", which reflects the common law, has been added. This addition brings together all the "threads" of the consent definition, which aids in understanding and serves an educative purpose.

Proposal 5.3: Absence of resistance (Draft s61HI(3))

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I support the retention of this subsection and the addition of the words "or verbal" as this addresses a very common response misconception or "rape myth", that is, the "freeze" response.

Proposal 5.4: Consent to a particular sexual activity (Draft s61HI(4))

Proposal 5.5: Consent to other sexual activity (Draft s61HI(5))

Proposal 5.6: Consent to sexual activity performed in a particular manner (Draft s61HI(6))

These subsections fit within the legislative intent of Draft s61HI and provide clarity, guidance of approach and general structure to the law of consent. Subject to the following paragraph, I support their inclusion, noting also that they serve an important educative function.

Section 61HI(6) should, I believe, be redrafted to more directly address the use of condoms and the act of "stealthing", which is what it appears to be directed at. I support a more direct approach, such as: "A person does not consent to a sexual activity with or from another person if that person has communicated that a condom has to be used for that sexual activity and the other person deliberately does not use, tampers with or removes the condom before or during the sexual activity."

A single list of circumstances in which there is no consent

The Draft Proposals create a single, non-exhaustive list of circumstances in which a person does not consent to sexual activity. Proposed s61HJ replaces (and combines) the existing s61HE(5), (6) and (8) and the 11 examples contained in those subsections that address circumstances where a person did not consent to sexual activity, or consented under a mistaken belief, or where the grounds may establish no consent.

I support the consolidation of the above three s61HE subsections into what is a more accessible, less complex single section or list, and the use of clearer language that is common to all concepts covered by those subsections. I agree that the circumstances in the current s61HE(8) should be redefined as circumstances in which a person does not consent, and I support the retention of the list's non-exhaustive element. I address each individual circumstance below.

Proposal 6.1: Non-communication of consent (Draft s61HJ(1)(a))

This proposal, which reflects the position in Tasmania and Victoria and introduces a communicative model of consent, provides an impetus for cultural change, arguably to what should be the default position in relation to consent (ie seeking to address the "freeze" response "rape myth"), and could potentially reduce the focus on what the complainant did or said. To that extent, the proposal has clear benefits.

Proposal 6.2: Incapacity – generally (Draft s61HJ(1)(b))

Whilst I support removal of the reference to "age" in the reformulation of the incapacity circumstance, as it has the potential to confuse, I query the removal of the reference to "cognitive" incapacity. It is hard to envisage, given the references to alcohol and drugs, and a person being asleep or unconscious that immediately follow in (1)(c) and (d), what (1)(b) is referring to if not a cognitive impairment.

Proposal 6.3: Incapacity – intoxication (Draft s61HJ(1)(c))

The rewording represents a more modern, realistic and less complex approach to the assessment of the role of alcohol or drugs upon a person's capacity to consent. And, as noted in the Draft Proposals,

redirects attention to the person's "capacity" to consent rather than whether their intoxication level was substantial. As such, it is directed at the correct question.

Proposal 6.4: Asleep or unconscious (Draft s61HJ(1)(d))

I support the retention of this circumstance and the rewording to remove the reference to the potentially misleading "does not have the opportunity to consent".

Proposal 6.5: Force, fear, coercion, blackmail or intimidation (Draft s61HJ(1)(e)(i) and (ii))

I support the extension of these circumstances to cover behaviours prominent in family violence.

Proposal 6.6: Unlawful detention (Draft s61HJ(1)(e)(iii))

I support the extension of this circumstance to include the detention of another person, as it allows for an appropriate reflection of the reality of family violence.

Proposal 6.7: Abuse of authority or trust (Draft s61HJ(1)(e)(iv))

The operative word in this draft subsection is "overborne". That word sets a necessarily high threshold but does not offer any genuine guidance as to what constitutes the requisite degree of abuse of a position of authority or trust. It is a word which has little currency in the community and is therefore unlikely to be understood by lay people. I recommend rewording this subsection.

Proposal 6.8: Mistakes (Draft s61HJ(1)(f))

This proposal splits s61HE(6) into two subsections dealing with mistake in (1)(f) and fraud in (1)(g). The mistake circumstance is reframed so that a person does not consent if the person "participates in the sexual activity because the person is mistaken about" a listed, or another, circumstance (the list is, appropriately, non-exhaustive).

It is intended that a person's mistake need not be the only reason for their consent (see paragraph 6.39). I note that, as presently drafted, the fact that the mistake need not be the only reason for consent is not clear. Perhaps it should be expressly included in the subsection.

With reference to subsection (1)(f)(ii), this subsection is, without the qualifier that appears in s61HE(6)(d), "induced by fraudulent means", too broad and potentially unfair. Without the link between the mistake and the accused's fraudulent inducement of that mistake, a prosecution could potentially be pursued where the mistake about the nature of the sexual activity was the complainant's alone. As the subsection is presently drafted, an accused need do nothing to induce the mistake. I think subsection (1)(f)(ii) could be removed and reliance limited to subsection (1)(g) where a fraud is perpetrated.

Also, with reference to (1)(f)(iii), the purpose of the sexual activity, whilst I support the inclusion of "cosmetic" purposes, and acknowledge the list is non-exhaustive, consideration should be given to also including "religious, ceremonial or initiation" purposes, as a number of cases deal with consent given, by very emotionally or psychologically vulnerable persons, due to a mistaken belief that the sexual activity was for these latter purposes.

Proposal 6.9: Fraudulent inducement (Draft s61HJ(1)(g))

I agree that a person induced by fraud, of any kind, to participate in sexual activity, cannot be said to have agreed freely and voluntarily to do so.

Knowledge of consent

I support the Draft s61HK(1). It is an improvement on s61HE(3)

Proposal 7.1: Knowledge about consent (Draft s61HK(1))

I agree with the use of the words "taken to know" in (1) and with the inclusion of the word "actually" in subsection (1)(a). I also support, for the reasons stated, retaining the existing concept of "recklessness", as per subsection (1)(b).

Likewise, I support the approach to reasonable belief taken in subsection (1)(c).

Proposal 7.2: What fact finders must, and must not, consider (Draft s61HK(2))

Draft s61HK(2)(a) retains the existing reference to "all the circumstances", noting that "flexible and targeted" jury directions are considered the most appropriate way to address concerns about the broadness of the requirement.

The Draft proposal no longer refers to "steps taken", reformulating the concept as to whether the accused person "said or did anything" to ascertain consent, but it does not legislate that steps must be taken. I support this approach.

I support the retention of the reference to self-induced alcohol, as per Draft s61HK(2)(b).

Jury Directions on consent

I support a review of consent directions and the inclusion of directions that, where relevant, would address the various "rape myths" and other common sexual assault and consent misconceptions. As such, I support the course taken in the Draft Proposals, including that directions can be given and repeated at different times, that there is flexibility in the actual wording, and the use of positive wording that does not restate misconceptions. I note the following in relation to the individual directions.

Proposal 8.1: A mandatory direction (Draft s292(2)(a)-(5) CPA)

The mandatory direction at subsection (5) tells jurors to "examine any assumptions" they may have in relation to sexual assault, consent, etc. Whilst I support this direction and its mandatory nature, it will make very little sense to jurors if given in a vacuum.

I note here the contents of paragraph 8.11 of the Draft Proposals, which suggests the mandatory direction be tailored to the facts, but this is not clear on the face of Draft s292(2)(a)-(5).

Asking jurors to "carefully examine any assumptions" requires jurors to firstly, identify any assumptions they may hold - which many will be unable to do without guidance; secondly, to identify flaws in those assumptions – without anything to "compare" them to or to "carefully examine" them against; and, finally, to recognise where the assumptions arise in the evidence.

Unless the trial judge also gives one or more of the non-mandatory directions, relevant to the specific case, or tailors the direction to the facts, thereby enabling jurors to identify relevant assumptions and misconceptions based on the case-specific issues; the mandatory direction has very little real value.

Proposal 8.2: Procedure for directions on specific misconceptions (Draft s292(2)(b)-(4) CPA)

I question whether the reference to "as the judge sees fit" in subsection (4) is the most appropriate terminology or even whether it is strictly required, given it may be considered inherent in the preceding words "a judge may".

Proposal 8.3: Directions on specific misconceptions (Draft s292(6)-(11) CPA)

Direction (6): Circumstances in which non-consensual sexual activity occurs

Consideration should be given to including in (b) "and people who are married or in an established relationship". This would more directly address the misconception many people have that sexual assault cannot occur within marriage or de facto relationships.

Direction (7): Responses to non-consensual activity

I support this direction as worded, particularly the direct reference to "freezing". This addresses a very common "rape myth" and a very common response to sexual assault. I note, though, that the word "sexual" should be included in the descriptive heading.

Direction (8): Lack of physical injury, violence or threats

I suggest deleting the words "of itself" in (b). That phrase adds nothing to "does not mean" and has the potential to reinforce "rape myths" rather than dispel them.

Direction (9): Responses to giving evidence

I agree with this proposed direction.

Direction (10): Behaviour and appearance of complainant

I see a problem in the words "None of the following is, of itself, a reliable indicator" [of consent]. The way a person dresses or their appearance generally, the amount of alcohol or other drug they may have consumed, and their presence in a particular location is <u>never</u> an indicator, of itself or otherwise, reliable or otherwise, that the person consents to a sexual activity.

Whilst I support addressing the very common misconceptions direction (10) is aimed at, I suggest that the direction should be reworded to say: "None of the following indicates that a person consents to sexual activity".

Direction (11): Family violence

This direction should be accompanied by a definition of "domestic and family violence" to combat the common misconception that family violence equals physical violence alone. Consideration should also be given to referring to "any harm" rather than just "harm" and to rewording (b), as it currently has the potential to reinforce the concept of temporal harm, rather than dispel it. The use of the same wording as is used in s61HJ(1)(e)(i) should be considered.

Proposal 8.4: Amendments to existing directions (Draft s293A(2A) and s294(2A) CPA)

I have no issue with expressly permitting judges to give and repeat the two existing statutory warnings at any suitable time during the trial, or with the sections being reclassified as "directions", other than the concerns I expressed previously regarding the use of the words "as the judge sees fit" (see my comments in relation to Proposal 8.2).

Proposal 9.1: Definitions (Draft s61H(4))

I have no objection to a stand-alone definition to recognise surgically constructed body parts.

Proposal 9.2: Meaning of sexual intercourse (Draft s61HA)

I suggest changing the Draft s61HA(a)(ii) provision: "… except where the penetration is carried out for proper medical purposes".

Sexual assaults that occur in the context of medical procedures have, in many cases, more than one purpose: the medical purpose and a sexual gratification purpose. As the subsection is presently worded, the Crown must establish beyond a reasonable doubt that the accused's purpose in conducting the medical procedure was for something other than a proper medical purpose. In some cases, the medical procedure purpose is used to justify or to set the stage for a sexual gratification purpose. The two purposes coincide, one is lawful, one is not.

In my submission, this subsection should be clarified to provide that the existence of a "proper" medical purpose does not preclude the co-existence of another, unlawful purpose, therefore permitting prosecution of an accused on that basis. This could be achieved by adding the word "solely" to the subsection, so that it would read: "… except where the penetration is carried out solely for proper medical purposes".

Proposal 9.3: Add references to continuation (Draft s61HB(1A) and s61HC(1A))

I support the proposed amendment of the sexual touching and sexual act sections to provide for the "continuation" of these offences. This brings these sections in line with the sexual intercourse provisions and reinforces the previous withdrawal of consent provision.

Proposal 9.4: Gender-neutral language (Draft s61HB(2)(a) and Draft s61HC(2)(a))

I have no issue with the use of gender-neutral terms but query whether the removal of reference to a "transgender or intersex person identifying as female" may lead to legal arguments in relation to whether transgender or intersex people fall within the subsections. Perhaps consideration should be given to including an explanation of the intent of the amendment in a Note to accompany the relevant subsections or in the Second Reading Speech.

Finally, I would like to see further discussion on the suggestion raised in Discussion Paper 21 that specific provision be made in the *Evidence Act* for expert evidence to be admitted in relation to adult responses to sexual assault.

Once again, thank you for the opportunity to comment on the Draft Proposals. Please do not hesitate to contact me should you require any further information.

Yours faithfully

Lloyd Babb SC
Director of Public Prosecutions