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Mr. Alan Cameron AO
Chairperson
New South Wales Law Reform Commission

Sent via: nsw-lrc@justice.nsw.gov.au

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Dear Chair,

SUBMISSION TO TERMS OF REFERENCE IN RELATION TO CONSENT AND KNOWLEDGE OF CONSENT

I refer to your invitation for preliminary submissions on matters pertinent to consent and knowledge of consent in relation to sexual assault offences, as currently legislated in section 61HA of the *Crimes Act 1900* (NSW). I submit these recommendations as a PhD candidate in the Department of Criminology at Monash University, under the supervision of Dr Asher Flynn and Professor Jude McCulloch. My research explores the operation of a communicative model of sexual consent in rape trials in Victoria, informed by analysis of rape trial transcripts of cases heard in the County Court of Victoria. I draw upon my findings of the Victorian context to make the recommendations below, which I urge you to consider in the development of the future report(s) and recommendations.

SUBMISSION SUMMARY

By way of summary, the terms of reference directed to the New South Wales Law Reform Commission (herein ‘the Commission’), indicate that in undertaking this review, consideration should be given to how section 61HA can be simplified, the experience of victim-survivors within the criminal justice system, the wealth of research and expert knowledge, and the impact of law reform and relevant case law emerging from other comparable jurisdictions.

My recommendations broadly fall into these areas:

- That the law in New South Wales (NSW) is reformed to more strongly reflect a communicative standard of consent, in light of emerging research and relevant case law in NSW and other states; and
- That the law in NSW maintains a partially objective test in relation to knowledge of consent; and
- That the law is reformed to more clearly assert that a person *must* ‘take steps’ to ascertain consent; a failure to take steps to determine that the other person(s) is consenting, should be considered indicative of recklessness in relation to consent. I submit that this is in line with a communicative approach to sexual consent.

Such reforms will:

- Clarify and modernise the extant consent law in NSW, by strengthening a commitment to a communicative standard of consent, and by responding to emerging research of sexual offences in comparable jurisdictions; and
- Respond to issues facing the practical application of section 61HA, particularly in light of the emerging research of the Victorian experience.

COMMUNICATIVE CONSENT

I argue in favour of a communicative or affirmative consent standard. Such a standard of consent requires that sexual participants actively demonstrate their consent to one another through actions or words (Pineau, 1989). This also requires that a person seeking consent from another takes active steps to determine that they have consent. Drs. Asher Flynn and Nicola Henry (2012; 172) have argued that this approach ‘has the potential to re-educate the broader community on the importance of negotiating consent’. Under an affirmative approach to sexual consent, a person does not need to demonstrate that they are not consenting to a sexual act. There is no requirement that women yell out, resist or fight off the advances of the attacker. There is an onus on the person initiating consent to determine whether the other person(s) is consenting (Flynn and Henry, 2012). Failure to do this could indicate that the act was not consensual (Bronitt and McSherry, 2010). Consent is ongoing, and performative. It must be consistently performed throughout the entirety of the act and can be revoked at any time. Submitting to an act, or lack of active agreement, is not enough to assume consent.

Such a model has, to varying extents, been introduced into the criminal law’s approach in all Australian jurisdictions, including NSW, for example, through the defining of consent as free and voluntary agreement in most states (s 36 *Crimes Act 1958* (Vic); s 2A(1) *Criminal Code* (TAS); s 62HA *Crimes Act 1900* (NSW); s 46(2) *Criminal Law Consolidation Act 1935* (SA); s 192 *Criminal Code* (NT); s 348 *Criminal Code* (Qld); s 319(2) *Criminal Code* (WA)).

The affirmative approach is often considered to more substantially form the legal basis for consent in Victoria and Tasmania. Accordingly, I refer to these jurisdictions for the purposes of comparison with the extant law in NSW. However, my own research exploring sexual consent law in Victoria (Burgin, *unpublished as of date of submission*) indicates that:

- There are substantive problems in how the approach has been legislated in Victoria.
- There are questions about the Victorian approaches’ capacity to address the problems inherent in rape law and rape trials.

The emerging evidence from my research into the Victorian experience provides a unique opportunity for NSW in producing reform that better embeds an affirmative consent standard in the operations and practice of the criminal law.

FREE AND VOLUNTARY AGREEMENT

NSW law currently determines that ‘a person “consents” to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse’ (s 61HA(2) *Crimes Act 1990* (NSW)). Agreement implies specificity in relation to the act (Vandervort, 2012). Any act outside of the agreed parameters should be taken to have occurred without consent.

There is currently no legislative direction to remind the jury to specifically consider the terms of the agreement in the circumstances of the case. However, I submit that clearer signposting of the fact that consent is given to specific parameters of an agreement is required. Recent public discussion has concerned the practice of removing a condom without the knowledge or consent of the other party, known as ‘sleathing’ (for example, *Hack*, 2017). I argue that this practice falls within the legal definition of rape because the law asserts that consent is based on an agreement, implying specific boundaries in terms of the nature of the act. In an instance where a person removes a condom without the knowledge of the other person, that person cannot be seen to be ‘freely agreeing’ to the act. Consent is therefore vitiated.

Data detailing the extent of the practice of ‘sleathing’ is limited, but academic and public narrative sharing (by complainants and by those who admit to committing the act) indicate that it is not uncommon (Brodsky, 2017; *Hack*, 2017). Recent academic work also argues that ‘offenders and their defenders justify their actions as a natural male instinct – and natural male right’ (Brodsky, 2017; 188). Accordingly, action must be taken to reinforce the laws protection of sexual autonomy – the right to participate in a sexual act or not, and the right to determine the nature of the sexual act.

I submit that the phenomenon of ‘sleathing’ should be addressed by the criminal law in order to:

- Ensure the law reflects a standard of consent based on free, active and voluntary agreement; and
- Serve an educative function to the community by condemning the practice of non-consensual condom removal, which victims have identified as ‘a disempowering, demeaning violation of a sexual agreement’ (Brodsky, 2017; 187).

I further submit that this could be achieved by way of expanding the ‘grounds upon which it may be established that a person does not consent to sexual intercourse’, laid out in section 61HA(6), to include that the act went beyond the agreed terms of the consent, initially given, because the condom was removed without the knowledge and/or consent of the other party. This is in line with the communicative model of consent which requires consent to be ongoing throughout the act. As such, without knowledge of the removal of a condom, after sexual intercourse has been agreed to on those terms, it cannot be said that consent was given.

KNOWLEDGE OF CONSENT

Under section 61HA of the *Crimes Act 1900* (NSW), a person is taken to know that another person is not consenting to sexual intercourse if one of three elements is proven: (1) the person *knows* that the other person does not consent; (2) the person is *reckless* as to whether the other person consents; or (3) the person has *no reasonable grounds* for believing the other person consents.

Recklessness remains undefined in the NSW sexual offences legislation but has been found to be established on two wholly subjective grounds: (1) the accused ‘realised the possibility that the complainant was not consenting but went ahead, determined to have intercourse, regardless of whether the complainant was consenting or not’, or (2) the accused ‘simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of sexual intercourse, notwithstanding the risk that the complainant was not consenting’ (see for example, NSW Bench Book; Criminal Law Review Division, NSW Attorney General’s Department, 2007). Recklessness is often raised in cases where there is

debate around whether the complainant was asleep or intoxicated, or in cases where the complainant and the accused had previously been in a sexual relationship (Criminal Law Review Division, NSW Attorney General's Department, 2007).

The third element of 'knowledge of consent', represented in section 61HA(3)(c), concerns whether a person has reasonable grounds for believing that the other person is consenting. The NSW case of *R v Lazarus* provides a case study to explore the inadequacies of the current legal approach to sexual consent in the state and of the interpretation of this element. It is also the case which prompted this review by the Commission.

In *Lazarus*, the accused was convicted at trial, but the conviction was overturned following an appeal heard by the Court of Appeal (herein 'the Court') on two grounds:

Ground 1: The verdict of the jury was unreasonable and contrary to the evidence.

Ground 2: The trial judge's directions as to the appellant having no reasonable grounds to believe that the complainant was consenting to the sexual intercourse:

- (a) imposed an objective test of reasonableness of belief in consent where no such test existed;
- (b) misstated the onus of proof;
- (c) failed to detail or explain the evidentiary basis for the appellant's claim to have reasonably believed that the complainant had consented to the sexual intercourse (*Lazarus v R* [2016] NSWCCA 52 at 21).

In this appeal against conviction, the Court held, in line with previous case law, that section 61HA(3)(c) of the *Crimes Act 1900* (NSW) did not introduce a completely objective test of belief in consent. Instead, the Court confirmed that the test constituted a hybrid approach comprising both subjective and objective elements. As such, the Court found that the trial judge had erred in directing the jury that they must consider whether a belief held by the accused was a reasonable one because it introduced an objective test based on reasonableness that is contrary to the law (*Lazarus v R* [2016] NSWCCA 52). In making this ruling, the Court referred to the decision in *O'Sullivan v R; Flanders v R; Tohu v R & NRH v R* [2012] NSWCCA 45, which earlier found that the test outlined in section 61HA(3)(c) is actually a subjective test based on honest belief in consent, to be measured against whether there were reasonable grounds to hold such a belief. The Court has ruled that this section of the act introduces an objective test only insofar as the grounds upon which a belief in consent is formed must be reasonable. It does not test whether the accused held a reasonable belief in consent, a standard which would be based on the 'reasonable person'. Accordingly, the conviction was quashed, and a re-trial was ordered.

The *Lazarus* case, and the public response after the complainant spoke out about the case and called for a model of enthusiastic consent, highlight the confusions of the law as currently legislated in NSW – and importantly, the disjuncture between the law and community expectations. Considering the trial judge's misdirection to the jury, and the successful appeal that followed, legislative clarity is required around 'mistaken belief in consent'.

I argue that a subjective test of the fault element is inappropriate. Reform in all Australian jurisdictions has sought to remove problematic myths about women's sexuality, often relied on to minimise and deny men's violence against women. International scholarly literature

agrees that ‘rape myths’ continue to permeate rape trials, despite reform (see for example, Powell et al., 2013; Finch and Munro, 2005). Finch and Munro (2005) explored the prevalence of rape myths in the UK using mock jury trials. They found that the ‘jurors’ in their study placed responsibility on the victim in scenarios in which the woman had *unknowingly* consumed drugs which were placed in her drink by the offender, emphasising that she should have taken more care to protect her drink (Finch and Munro, 2005). This was found to be accompanied by a general ‘distaste for women who sought to abdicate responsibility for their behaviour due to intoxication’ (Finch and Munro, 2005). As such, the combination of the expectation of avoidance behaviour by women (for example, protecting their drinks from spiking, not walking alone and so on) and the myth that women lie about or exaggerate rape, were both present in the constructed juries. Further, a subjective test is counter to the affirmative approach because it places the onus on the complainant to demonstrate active non-consent, allowing the accused to hold an unreasonable mistaken belief. This would leave it open to the defence to redirect the jury’s attention to the actions of the complainant.

Accordingly, I argue that there are only two options which are appropriate for the Commission to consider in reforming this element of the law. The first being a hybrid test, comprising subjective and objective elements. The current law reflects a hybrid approach. As explored briefly above in relation to the *Lazarus* case, the current law combines the objective notion of reasonableness, with the subjective element of reasonableness in the circumstances (‘grounds’). As such, the current law stipulates that the belief must be reasonable when considering the circumstances. Therefore, while an objective element of reasonableness is measured, it is measured in relation to the subjective circumstances, which could comprise the context of the offending, and also the characteristics of the accused.

The second option is a completely objective test. This would involve removing reference to the circumstances of the offence, and instead focusing the test on the purely objective reasonableness of the belief. This would not consider the circumstances of the accused, and instead would be based on the principle of the ‘reasonable person’.

Both approaches present distinct challenges. An objective test based exclusively on the notion of the reasonable person is not exempt from criticism. The reasonable person construct has been criticised as representing an inherently masculine perspective. As Jocelyne Scutt (1990; 479) has argued, ‘what a woman actually believes is reasonable, and what the law has traditionally regarded as reasonable are quite different’. As such, it cannot be assumed that a purely objective standard will resolve the issue of men relying on dated and sexist perceptions to claim a reasonable belief in consent. Nor can it be assumed that such an approach will ‘fix’ the problems facing rape law in securing sexual equality.

TAKING STEPS TO ASCERTAIN CONSENT

In retaining a hybrid approach, consideration must be given to the potential of legislating around the ‘circumstances’ or ‘grounds’ which form the objective element of the test. An emphasis on the initiator of sex to ‘take steps’ to determine whether the other person(s) is consenting forms the foundation of the communicative model of consent. The steps taken by the initiator are important in the consideration of the reasonableness of a claimed belief in consent. The notion of the ‘steps’ taken by the initiator is extant law in NSW, Victoria and Tasmania. However, I have argued elsewhere that in Victoria there is no positive obligation placed on the initiator of sex to take steps to ascertain consent (Burgin, *unpublished at date of*

submission). The same can be said of the NSW law. As such, I argue that the communicative model has not been completely nor appropriately legislated in NSW (or Victoria). In these jurisdictions, such steps only form a part of the circumstances of the alleged offence, should steps have been taken by the accused. That an accused failed to take steps to ascertain consent is not considered relevant to the circumstances. Accordingly, in these states, a person initiating sex does not need to take steps to determine whether the other person(s) is consenting.

The Tasmanian approach, however, does place a positive obligation on sexual participants to obtain clear consent. According to section 14A(1) of the *Criminal Code* (TAS), a claim of mistaken belief in consent cannot be considered reasonable nor honest if the accused:

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or
- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

Subsection (c), as stated above, places a positive obligation on the initiator of sex to take steps to determine that they have consent from the other person(s). This is in line with a communicative consent standard. I argue that such an obligation should form the basis of the legislative definition of consent.

The legislated ‘steps’ in NSW were subject to discussion in the *Lazarus* case. The appeal judgement overturning the original conviction details what the accused had responded at trial when asked what steps he took to satisfy himself that the complainant had consented to the act. His response was:

I knew she was consenting because we had kissed a number of times heading up to – she willingly came down the lane with me, I didn’t force her to, we were kissing down in the lane, I didn’t ask her to bend over, she just did it, as I put my penis to her vagina she pushed back towards me, and then as we were having sex she was moving back and forwards with me the whole time. (cited in *Lazarus v R* [2016] NSWCCA 52 at 88).

He continued ‘She was touching my body as well, when I touched her body she never moved my hands away, never said ‘no’, never said ‘stop’. When asked ‘Did you actually turn your mind to the fact of her consenting?’, he responded ‘Of course and her actions told me that she was completely happy to be there as I was’ (cited in *Lazarus v R* [2016] NSWCCA 52 at 88). These responses do not speak to the steps that he took to determine that the complainant was consenting. Instead, he simply points to her behaviour as indicative of consent. He does not point to his own actions taken in the process of his determination of consent. As such, this response should not be considered to respond to the question of what the accused did to determine that she was consenting.

In *Lazarus*’ second trial, a judge only trial, the accused was found not guilty of sexual assault. The Crown subsequently appealed against this decision on the ground that the trial judge had erred in not directing herself (as the finder of fact) to have regard to the steps taken by the accused in attempting to ascertain whether the complainant was consenting (*R v Lazarus*

[2017] NSWCCA 279). The Court ruled that the judge had erred in failing to consider the steps (or lack of steps) taken by the accused. However, a re-trial was not ordered. As such, there is no legal resolution to this case. This ruling by the Court is interesting, because it indicates that the Court believes that the law does require the jury (or judge in this case) to consider the accused's steps – or lack of steps. However, despite this view on the part of the Court, there is confusion at law and in practice about the role these steps play in the findings of fact. I argue that in practice, the law places no positive obligation on a person to take steps towards determining consent. The response by the accused in the first trial of *Lazarus* provides an example of the practical failings of the law requiring steps to have been taken.

In the second trial of *Lazarus*, the accused agreed 'that at no stage did he ask the complainant whether she wanted to have sex with him' (cited in *R v Lazarus* [2017] NSWCCA 279 at 53). Such an act would be a clear step for the accused to have taken. The second appeal judgement also details that the accused's evidence at this second trial was that the complainant did not say anything during the intercourse. This is in contrast to the complainant's evidence, in which she testified that she had said 'stop' and other similar statements throughout (cited in *R v Lazarus* [2017] NSWCCA 279 at 26). While there is an obvious disjuncture in the evidence presented by each witness, if the law truly reflected an affirmative approach, then both statements should be taken to be demonstrations of non-consent on the part of the complainant. Submission does not equate to consent under the affirmative standard. Further, a complainant is not required to demonstrate non-consent to sexual contact. Instead, an affirmative approach to consent determines that parties to a sexual act must actively demonstrate their willingness to participate.

In finding the accused not guilty, the judge in the second trial stated:

As I have found she did not say "stop" or "no". She did not take any physical action to move away from the intercourse or attempted intercourse, either when they were standing up, or when she was down on the ground on all fours. I stress that by none of that behaviour, in her own mind, was the complainant consenting to sexual intercourse and I have already found that the Crown has proved lack of consent beyond reasonable doubt, but I accept that this series of circumstances on the early morning of 12 May 2013 amounts to reasonable grounds, in the circumstances for the accused to have formed the belief, which I accept was a genuine belief, that in fact the complainant was consenting to what was occurring even though it was quick, unromantic, they had both been drinking and in the case of both of them may not occurred (sic) if each had been sober (*R v Lazarus* [2017] NSWCCA 279 at 110).

The accused was acquitted. At appeal the Crown argued that this passage above indicates that the trial judge had failed to consider the steps taken by the accused to determine consent. The Court agreed, indicating that clarity in this aspect of the law is required. The law must clearly outline a positive obligation on a person to take action to determine that consent exists between the parties. The circumstances outlined above, by both the trial judge and the accused himself, do not refer to any action – verbal or physical – by the accused to determine consent. Instead, evidence of the complainant's behaviour was relied upon to support a purely subjective construction of consent in the mind of the accused. For the purpose of illustration, an accused should be able to point to movements and actions that they took to see if the other person(s) was consenting. For example, A might explain that

they asked B whether B was enjoying themselves, or A might detail that they touched B in a certain way, and then B reacted to that by an action or statement. But importantly, A must point to their actions or 'steps' taken first to determine that consent was given by the other person. This also supports the communicative standard of sexual consent because it indorses that 'freezing' or submission does not constitute consent.

The introduction of a legal responsibility for an initiator of sex to 'take steps' should mean that the initiator must point to the actions that they took to determine whether consent was given. This is perhaps only successfully achieved when there is a positive obligation on a person to take these steps, as is the case in Tasmania. I argue that the law in NSW should mandate that a person must point to the active steps that they took to ascertain consent. Without the obligation to describe their own behaviours and actions, an accused should not be able to rely on a defence of mistaken belief in consent. This belief must be proven reasonable in the circumstances, and the circumstances *must* include the steps that the initiator took to 'check' that the other person(s) was consenting. Failure to take steps should mean that the accused *did not reasonably believe* in consent and/or *was reckless* as to whether the complainant was consenting.

Given the reasons outlined above, I argue that the NSWLRC should recommend that NSW law reform should work to:

- Retain a partially objective test in relation to the belief or knowledge of consent.
- In retaining such an approach, more clearly legislate a positive obligation that a person *must* 'take steps' to ascertain consent. The accused must point to their own actions which they took to determine whether the other party(s) was consenting, not simply the complainant's actions which they believed indicated consent. This is in line with the communicative model of consent.
- Include specific provisions highlighting the importance of the notion of consent as an agreement to capture offences of non-consensual condom removal.

These reform efforts will refocus efforts towards strengthening the communicative consent standard in law.

Kind regards,

Rachael Burgin

Cases

O'Sullivan v R; Flanders v R; Tohu v R & NRH v R [2012] NSWCCA 45

Lazarus v R [2016] NSWCCA 52

R v Lazarus [2017] NSWCCA 279

Legislation

Crimes Act 1958 (Vic)

Crimes Act 1900 (NSW)

Crimes Act 1900 (ACT)

Criminal Code (TAS)

Criminal Law Consolidation Act 1935 (SA)

Criminal Code (NT)

Criminal Code (Qld)

Criminal Code (WA)

NSW Bench Book

References

Brodsky, A. (2017), "Rape-Adjacent": Imagining Legal Responses to Non-Consensual Condom Removal', *Columbia Journal of Gender and Law* 32(2), 183-210.

Bronitt, S., and McSherry, B. (2010), *Principles of Criminal Law*. Thomson Reuters.

Burgin, R. (unpublished at date of submission), *Persistent Narratives of Force and Resistance: Rape Trials in the Age of Affirmative Consent*.

Criminal Law Review Division NSW Attorney General's Department. (2007) *The Law of Consent and Sexual Assault*.

Finch, E. and Munro, V. (2005), 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study', *British Journal of Criminology* 45(1), 25-38.

Flynn, A. and Henry, N. (2012), 'Disputing Consent: The Role of Jury Directions in Victoria', *Current Issues in Criminal Justice* 24/2: 167-184.

Hack, (2017, 1 May), 'Sleathing episode', *Triple J*. Available at:
<http://www.abc.net.au/triplej/programs/hack/tuesday-audio/8537530>

Pineau, L. (1989), 'Date Rape: A Feminist Analysis', *Law and Philosophy*, 8/2: 217-243.

Powell, A. Henry, N. Flynn, A. and Henderson, E. (2013), 'Meanings of 'Sex' and 'Consent': The Persistence of Rape Myths in Victorian Rape Law', *Griffith Law Review* 22/2: 456-480.

Scutt, J. (1990), *Women and the Law*, Law Book Co.

Vandervort, L. (2012), 'Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory', *Columbia Journal of Gender and Law* 23/2: 395-442.