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29 June 2018

Acting Justice C Simpson

Commissioner

NSW Law Reform Commission

GPO Box 31, SYDNEY NSW 2001, AUSTRALIA

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

Dear Judge

Thank you for the opportunity to make a preliminary submission to the NSW Law Reform Commission with respect to its review into 'consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the *Crimes Act 1900* (NSW)'.

This submission responds primarily to the Commission's first term of reference: 'Whether s 61HA should be amended, including how the section could be simplified or modernised' with some further related discussion of terms of reference 2-5. However, it also addresses a preliminary issue, relating to the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*.

The submission is in four parts.

1. PRELIMINARY ISSUES

On 27 June 2018, assent was given to the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* ('the CSA Act'). This Act will repeal s 61HA and replace it with s 61HE. The Act, however, does more than simply re-number provisions which potentially affects the Commission's terms of reference.

First, this Act expands the list of offences for which the new s 61HE will apply. Thus, in addition to applying to the current offences of ss 61I, 61J and 61JA, once commenced, it will also apply to what will now be ss 61KC ('sexual touching'), 61KD ('aggravated sexual touching'), 61KE ('sexual act') and 61KF ('aggravated sexual act'). These new offences repeal and replace the current s 61L 'indecent assault', s 61M 'aggravated indecent assault', s 61N 'act of indecency' and s 61O 'aggravated act of indecency'. These offences are often understood to be 'less serious' forms of sexual offences to those contained in ss 61I, 61J and 61JA, in terms of the actus reus components, common law understandings of mens rea, and in terms of maximum penalties.

In other words, any amendments to the definition of consent and knowledge recommended by the Commission will apply beyond the offences of ss 61I, 61J and 61JA – and hence to less serious offences. Arguably, this was not foreseen at the time the Commission was given terms of reference which originated from events following the acquittal of Luke Lazarus (*Lazarus* [2016] NSWCCA 52; *R v Lazarus* [2017] NSWCCA 279) and the subsequent Four Corners show 'I am That Girl' (aired on 7 May 2018).

Despite these events, it is my submission that the current definition of consent (in s 61HA(2)) and the deeming provision on knowledge in s 61HA(3) ought to have applied previously to indecent assaults and acts of indecency (together with their aggravated versions). This is because otherwise recourse must be had to the common law for these elements which may be confusing and potentially inconsistent with the other sexual offences (in ss 61I, 61J and 61JA). For example, while for indecent assault and acts of indecency, the definition of consent at common law is consistent with s 61HA(2) the *mens rea* of knowledge is not (see Brown et al 2015, 708-716). For these offences it must be either (actual) knowledge of non-consent or being reckless as to whether the complainant consented – including both advertent and inadvertent recklessness (see *Fitzgerald v Kennard* (1995) 28 NSWLR 185 at 195 applying *Kitchener* in the context of indecent assault).[1]

Secondly, the new 'meaning of consent' in s 61HE(2) while continuing the emphasis on 'the person freely and voluntarily' agreeing, the relevant act is now 'sexual activity'. Sexual activity is defined in s 61HE(1): '***sexual activity*** means sexual intercourse, sexual touching or a sexual act'.[2] Thus, the definition of consent will now apply not simply to 'sexual intercourse' but sexual activity which includes 'sexual touching' and 'sexual acts' define in s 61HC:

> (1) For the purposes of this Division, ***sexual act*** means an act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual.
>
> (2) The matters to be taken into account in deciding whether a reasonable person would consider an act to be sexual include:
>
> > (a) whether the area of the body involved in the act is a person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed, or
> >
> > (b) whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification, or
> >
> > (c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual.
>
> (3) An act carried out for genuine medical or hygienic purposes is not a sexual act.

Thirdly, the new sub-sections 61HE(3) and (4) will replace the current s 61HA(3). However, the new sub-sections are not in the same terms:

> A person who without the consent of the other person (the ***victim***) engages in a sexual activity with or towards the victim, incites the victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the victim, knows that the victim does not consent to the sexual activity if:
>
> > (a) the person knows that the victim does not consent to the sexual activity, or
> >
> > (b) the person is reckless as to whether the victim consents to the sexual activity, or
> >
> > (c) the person has no reasonable grounds for believing that the victim consents to the sexual activity.

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[1] See also D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter & M Schwartz, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney: Federation Press, 6th ed, 2015), 711.

[2] It is unclear why this definition is contained outside the general definition section in s 61H(1) and is recommended that it should be relocated to there.

(4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

(a) including any steps taken by the person to ascertain whether the victim consents to the sexual activity, but

(b) not including any self-induced intoxication of the person.

Not only is the new s 61HE(3) directed to 'sexual activity' (rather than sexual intercourse), its phrasing has been expanded so as to encompass the elements of the offences in ss 61KC, 61KD, 61KE and 61KF – namely, to cover acts *with or towards* the victim and *inciting* a third person to engage in a sexual activity. It is unclear what, if any, effect these additional phrases may have in relation to offences involving 'sexual intercourse'.

Further, 61HE(4) does not simply reformat the final paragraph of the current s 61HA(3) into a new sub-section. This is because 'For the purpose of making any such finding,' is no longer confined to sub-s (3) as it currently is. Arguably, the drafting of s 61HE(4) means the trier of fact must have regard to s 61HE(4)(a) and (b) in making 'any such finding'. Alternatively, s 61HE(4) will need to be read down to a finding related to 'knowledge' only (ie s 61HE(3)). This must be so given that the trier of fact can have regard to 'any self-induced intoxication of the person' (namely the complainant) in s 61HE(8)(a). To the extent that the Commission is empowered to recommend changes to the amendments introduced by the CSA Act, consideration should be given to re-drafting s 61HE(4) to clarify that it applies 'For the purpose of making a finding in relation to s 61HE(3)…'.

It is unfortunate that the CSA Act was assented to in such close proximity to the Commission's reference yet *before* the Commission has had an opportunity to report and make any recommendations.

The remainder of this submission addresses the issue of consent and 'knowledge'.

2. *ACTUS REUS* OF SEXUAL ASSAULT: CONSENT

The offence of sexual assault has two *actus reus* (AR) components: a conduct component (sexual intercourse) and a circumstance component (non-consent). This submission addresses only the latter AR element.

Background: free and voluntary consent

The current legislative approach in s 61HA to the circumstance of non-consent shifted the old common law focus on 'rape' being *against the person's will* which focused on physical resistance and injury[3] towards a so-called 'communicative' model of consent.

This process began with the 1981 amendments (*Crimes (Sexual Assault) Amendment Act 1981)* which expressly stated that a person who does not offer actual physical resistance to sexual intercourse is not by that reason only to be regarded as having consented – in line with the current s 61HA(7). It also inserted a list of circumstances (certain 'mistakes' and the presence of threats or terror) which deemed that a person did not consent to sexual intercourse. Some of these amendments are still contained in the current s 61HA(4) and (5).

The move towards the communicative model of consent, was most significantly accomplished by the 2007 amendment (by the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007*). The 2007 reforms enacted the current express or positive definition of consent in s

[3] See, for example: J Quilter, 'Re-framing the rape trial: Insights from critical theory about the limitations of legislative reform' (2011) 35 *Aust Feminist LJ* 23; J Quilter, 'From *Raptus* to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law & History* 89.

61HA(2) of a person 'freely and voluntarily agrees to the sexual intercourse'. While this section needs to be read in conjunction with the other parts of s 61HA dealing with matters that *automatically* negate consent (s 61HA(4)-(5)) or *may* negate consent (s 61HA(6)), the express definition provides the 'first principles' starting point when analysing whether or not the complainant has consented to sexual intercourse. The statutory definition, while new in 2007, in effect enacted your Honour's judgment in *Clark* (unreported, NSWCCA, 17 April 1998): '"Consent" for the purposes of NSW law … means consent freely and voluntarily given'.

As noted above, the positive definition of consent is based on a 'communicative model' of consent[4] or an 'affirmative' consent standard.[5] This embodies an expectation that persons communicate and agree to sexual intercourse, in contrast to the old common law position that required the complainant to demonstrate non-consent largely through physical resistance and/or physical injuries.[6]

The provision of a positive definition of consent has been extensively discussed over the past two decades. It is also noted that it is the most commonly used definition in other jurisdictions. For example, the Victorian legislature moved in 1991 to provide a positive definition of consent as 'free agreement' in the *Crimes Act 1958*. In 1999, the Model Criminal Code Committee recommended the adoption of a positive definition of consent as 'free and voluntary agreement' and noted, '[d]efining consent in positive terms has been a focal point of reform in recent years, on the basis that to do so more properly reflects two objectives of sexual offences law: the protection of sexual autonomy and freedom of choice of adults'.[7]

Recommendation

This submission is in favour of retaining the definition of consent in s 61HA(2). It is submitted that the primary focus of this AR component should be, as a matter of first principles, on whether there was free and voluntary agreement to the act. As will be discussed further below, the long list of factors that automatically or may negate consent distract from this first principles reasoning and are arguably superfluous if full meaning is given to this definition.

In the alternative, if the Commission were minded to set out a list of circumstances that do not amount to free and voluntary agreement (for example, as in *Criminal Code Act 1924* (Tas) s 2A(2)) such a list should encompass that a complainant does not have to demonstrate physical resistance in order to show non-consent (similar to sub-s 61HA(7)). As discussed above the concept of 'consent' was designed to shift sexual assault trials away from a focus on physical resistance and injuries.

Further, if the current definition and list of factors that automatically and may negate consent (more on this below) is to be retained, it is submitted that consideration should be given to re-locating the current sub-section (7) ('A person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse'). It is submitted that this sub-section has a 'tacked on' feel and is lost in the long list of factors that automatically and may negate consent.[8] Shifting the emphasis from 'requiring' a complainant to demonstrate physical resistance was at the heart of the move to

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[4] See M Heath, 'The law and sexual offences against adults in Australia', *ACSSA Issues* (No 4, 2005).

[5] S Cowan, 'Choosing freely: Theoretically reframing the concept of consent' in R Hunter and S Cowan (eds), *Choice and consent: Feminist engagements with law and subjectivity* (2007), 91-105.

[6] See J Quilter, 'Re-framing the rape trial: Insights from critical theory about the limitations of legislative reform' (2011) 35 *Aust Feminist LJ* 23; J Quilter, 'From *Raptus* to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law & History* 89.

[7] *Model Criminal Code, Chapter 5 Sexual Offences Against the Person* (1999), 43.

[8] The location of this sub-s in the new CSA Act is arguably worse (ie s 61HE(9)).

the communicative model of consent and so any factors relating to non-consent should give priority to this aspect.

Factors that automatically and may negate consent

Section 61HA(4) and (5) provide a long list of factors that *automatically* negate consent and s 61HA(6) lists factors that *may* negate consent. These factors have been added (from 1981) as legislative 'solutions' to problematic issues that have arisen in the case law. Thus, the list in s 61HA(5) (consent induced by various mistakes or frauds) are derived from specific cases such as *Mobilio* [1991] VR 339 where the Victorian Court of Criminal Appeal followed *Papadimitropoulos* and held that a radiographer who had inserted an ultrasound transducer into the vaginas of numerous patients, not for medical purposes but for sexual gratification, was not guilty of rape, as the patients' mistake did not go to the nature and character of the act.[9] The Victorian legislature stepped in to reverse the effect of *Mobilio* by statute (*Crimes Act 1958* (Vic) s 36(f)) and the NSW legislature followed suit in the *Criminal Legislation (Amendment) Act 1991* (now s 61HA(5)(c)).

Each of the factors in s 61HA(4)-(6) may be traced back to similar problematic decisions.[10] They were introduced as principled evidenced-based reforms. However, they were largely introduced prior to the introduction of the express definition of consent in s 61HA(2) in 2007. It is submitted that the long list of factors has now made the law of consent complex and diverted attention from what should be the focus: namely, free and voluntary consent to the relevant act. Arguably, the current s 61HA provision contributes to a sense that there are 'no clear or consistent legal standard[s]'[11] for sexual assault. It may also – ironically given the legislative intentions behind these additions – be contributing to a reduction in the communicative power of the criminal law.[12]

More problematic than the automatic negations of consent, however, are the sub-s (6) *may* negate factors. Unlike sub-s (4) and (5) these factors do not negate consent. Even if the Crown proves one of the factors in sub-s (6)(a)-(c) the Crown still needs to prove that in the circumstances the complainant did not consent to sexual intercourse. This is reflected in the recommended direction in the New South Wales Criminal Trial Courts Bench Book:

> In considering whether the Crown has proved beyond reasonable doubt that [the complainant] did not consent you may have regard to the following matters if you have found them proved on the evidence before you:
>
> - that the complainant had sexual intercourse while substantially intoxicated by alcohol or any drug, or
> - that the complainant had sexual intercourse because of intimidatory or coercive conduct, or other threat, even though that conduct does not involve a threat of force, or

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[9] For a critique of the decision, see J Morgan, "Rape in medical treatment: The patient as victim" (1991) 18 *MULR* 403.

[10] On these issues, see D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter & M Schwartz, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney: Federation Press, 6th ed, 2015), 674-678.

[11] W Larcombe, 'Limits of the Criminal Law for Preventing Sexual Violence' in N Henry & A Powell (eds), *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming A Rape Culture* (Palgrave Macmillan, 2014) 64, 79.

[12] A Ashworth, *Principles of Criminal Law* (Oxford University Press 6th ed, 2009); J Chalmers and F Leverick, 'Fair labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217; RA Duff, 'Penal Communities' (1999) 1(1) *Punishment and Society* 27; RA Duff, *Punishment, Communication and Community* (Oxford University Press, 2000).

- if the complainant had sexual intercourse because of the abuse of a position of authority or trust.

It does not follow simply because you find that fact proved that you should be satisfied beyond reasonable doubt that the complainant did not consent, but it is a relevant fact that you should consider in deciding whether the Crown has proved this element [non-consent] of the offence as it must do so before you can convict the accused.

If the Crown fails to prove that the complainant was not consenting, the accused is 'not guilty' of this charge. ([5-1566])

It is submitted that at best the factors in sub-s (6) are symbolic; at worst, they may impact negatively on the complainant and the Crown case. This issue will be illustrated through subsection (6)(a).

Consent and intoxication

Subsection 61HA(6) provides that:

> The grounds on which it may be established that a person does not consent to sexual intercourse include:
>
> > (a) if the person has sexual intercourse while *substantially intoxicated* by alcohol or any drug… (emphasis added)

As with other areas of the criminal law, no definition is provided in this section (nor in the *Crimes Act* generally) of what amounts to 'intoxication' – let alone what is meant by *substantially* intoxicated.[13] In the absence of a precise definition, research (with McNamara, Seear and Room) has found that there is an emphasis on self-assessment by witnesses, victims and defendants which are in vague and colloquial terms.[14] Sometimes judges use similarly vague language.[15] Expert evidence appears to play a relatively minor role in establishing that someone was relevantly intoxicated; trial judges call on juries to apply their 'common sense' or 'common knowledge of the effects of alcohol (and other drugs) and the relationship to complex legal questions (e.g. consent; intent formation).[16] This of course assumes that juror's have the relevant knowledge to make these assessments. All of this makes it very unsatisfactory listing *substantial intoxication* as a factor that may negate consent.

Further, even if the Crown proves that the person has sexual intercourse while substantially intoxicated, it must still prove that on this occasion the complainant did not consent. It is submitted, therefore, that there is little role for sub-s (6)(a) to play over and above the key definition of consent as free and voluntary agreement.

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[13] On the failure of the criminal law to adequately define what amount to intoxication and the consequences for this omission see: J Quilter & L McNamara, 'The Meaning of "Intoxication" in Australian Criminal Cases: Origins and Operation' (2018) 21(1) *New Criminal Law Review* 170; J Quilter, L McNamara, K Seear & R Room, 'Criminal law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of "Intoxication" In Australian Legislation' (2016) 39(3) *University of New South Wales Law Journal* 913; L McNamara, J Quilter, K Seear and R Room, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43(1) *Monash University Law Review* 148; J Quilter, L McNamara, K Seear and R Room, '*The significance of 'intoxication' in Australian criminal law' (2018) Trends & issues in crime and criminal justice* No. 546. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/tandi/tandi546; J Quilter, L McNamara, K Seear and R Room, '*Intoxication' and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks*. Report to the Criminology Research Advisory Council. Grant: CRG 20/14-15 (May 2018).

[14] J Quilter & L McNamara 'The Meaning of 'Intoxication' in Australian Criminal Cases: Origins and Operation' (2018) 21(1) *New Criminal Law Review* 170, 179, Table 1.

[15] Ibid, 183, Table 2.

[16] Ibid.

The policy intent behind this provision was to make it easier for the Crown to prove non-consent in situations where the complainant is substantially intoxicated. There is good reason for this with studies undertaken in Australia, the UK and the US, demonstrating that alcohol is a relevant factor in approximately half of all sexual assaults.[17] There are also numerous studies that indicate there is a 'group of predatory men who target women when they are drunk, so drunk in a number of cases that their capacity to consent had to be impaired'[18] and that alcohol is often strategically used by men to facilitate sexual assault.[19]

On the other hand, there is a body of evidence that suggests that emphasising the complainant's intoxication may be a 'double-edged sword'. Studies demonstrate that police and prosecutorial discretion is likely to be exercised against proceeding where the complainant has been drinking or using drugs.[20] Other studies indicate that police are more likely to attribute blameworthiness to complainants and view them as less credible where they have consumed alcohol.[21] Studies have consistently demonstrated that consumption of alcohol by the complainant significantly impacts on juror perceptions of credibility.[22] Mock jury studies show that jurors attribute greater responsibility and blameworthiness to victims who are intoxicated whereas it is more likely to reduce responsibility and blameworthiness of an accused if the complainant was drunk.[23] These views clearly undermine the intended operation of s 61HA(6)(a).

In more recent research, undertaken (with McNamara, Sear and Room) we found that in Australian cases there is a divergence of attitudes and approaches to the implications of victim intoxication for proof of non-consent:

> For example, in *Still v The Queen*, the complainant's intoxication was seen as supporting the Crown's ability to prove non-consent:
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> > The complainant was heavily affected by alcohol, incoherent in her speech shortly before entering the taxi and probably bordering upon being comatose. These were significant aspects bearing upon the giving of consent to sexual activity with the Appellant, who was a complete stranger.

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[17] See, for example, the Statewide Steering Committee to Reduce Sexual Assault, Victoria (SSCRSA) at para [78] *A Study of reported rapes in Victoria 2000-2003: Summary research report* (based on a study by M Heenan and S Murray) (2006, Office of Women's Policy, Department of Victorian Communities)). See also T Zawacki et al, "Perpetrators of alcohol-involved sexual assaults: How do they differ from other sexual assault perpetrators and nonperpetrators?" (2003) 39 *Aggressive Behavior* 366; D Davis and E Loftus, "What's good for the goose cooks the gander: Inconsistencies between the law and psychology of voluntary intoxication and sexual assault" in *Handbook of Forensic Psychology* (2003); M Heenan and S Murray, *Study of Reported Rapes in Victoria 2000-2003: Summary research report*, Office of Women's Policy, Department for Victorian Communities (2006); H Clark and A Quadara, "Insights into sexual assault perpetration: Giving voice to victim/survivors' knowledge", Australian Institute of Family Studies Research Report (No 18, 2010) at 40-5; A Finney, "Alcohol and sexual violence: key findings from the research", Home Office (2004) Findings 215.

[18] L Kelly, J Lovett and L Regan, *A Gap or a Chasm? Attrition in reported rape cases*, Home Office Research Study (No 293, 2005), 81.

[19] H Clark and A Quadara, "Insights into sexual assault perpetration: Giving voice to victim/survivors' knowledge", Australian Institute of Family Studies Research Report (No 18, 2010), 40-5.

[20] For instance, the SSCRSA study found where complaints were "drinking and using drugs around the time of the offence, [these] two factors ... proved the most powerful predictors of investigations not going ahead" (SSCRSA (2006) at para [119]). See also Lievore's 2005 study indicating that where the complainant had consumed alcohol, this reduced the prospects of prosecution: D Lievore, 'Prosecutorial decisions in adult sexual assault cases', Trends and Issues in Crime and Criminal Justice No 291 (Australian Institute of Criminology, January 2005).

[21] R Schuller and A Stewart, 'Police responses to sexual assault complaints: The role of perpetrator/complainant intoxication' (2000) 24(5) *Law and Human Behaviour* 535, 547.

[22] N Taylor, 'Juror attitudes and biases in sexual assault cases', AIC *Trends & Issues in crime and criminal justice* (No 344, 2007), 2-3.

[23] E Finch and V Munro, 'Juror stereotypes and blame attribution in rape cases involving intoxicants' (2005) 45 *Brit J Criminol* 25.

However, surprisingly, and sometimes despite the legislative provisions that are underpinned by a contrary policy purpose, some cases appeared to validate the position that a person can be both extremely intoxicated and nonetheless consenting to sexual intercourse, even in the face of her/his claim that s/he was not consenting. In *Mitic v The Queen* the Victorian Court of Appeal endorsed the following passage from the Queensland Court of Appeal's decision in *R v Francis*:

> It is not correct as a matter of law that it is rape to have [sexual intercourse with] a woman who is drunk who does not resist because her submission is due to the fact that she is drunk. The reason why it is not is that that at least includes the case where the [intercourse] is consensual notwithstanding that the consent is induced by excessive consumption of alcohol. The critical question in this case was whether the complainant had, by reason of sleep or a drunken stupor, been rendered incapable of deciding whether to consent or not.'

Such an approach is also reflected in the recommended direction in the *New South Wales Criminal Court Bench Book* ...

It is clear, then, that the statutory guidance that is offered in most Australian jurisdictions has not produced a consistent practice of treating complainant intoxication as synonymous with the absence of consent. It might be said that this is unsurprising given the qualified language of relevant legislative provisions [as discussed above].[24]

The manner in which s 61HA(6)(a) has been drafted means that the central inquiry in sexual assault trials is whether the Crown has established an absence of 'free and voluntary' consent or agreement. It is not obvious that the Crown derives any significant benefit from statutory provisions that address victim intoxication. We further concluded:

> Indeed, to the extent that they encourage complainant candour and disclosure about their intoxication — on the basis that this evidence will assist in proving at least one element of the prosecution case (i.e. non-consent) — such evidence also has the potential to weaken the Crown case by providing the defence with a basis on which to impugn the complainant's reliability or credibility. This is one of the ways in which evidence of complainant intoxication may be said to be a double-edged sword in sexual assault cases.[25]

3. *MENS REA* OF SEXUAL ASSAULT: KNOWLEDGE

There are two *mens rea* (MR) components to the offence of sexual assault: intent to perform the conduct (sexual intercourse) which is never in issue and knowledge of the circumstance (of non-consent). The second MR component is the focus of this submission.

In 2007 the *Crimes Amendment (Consent - Sexual Assault Offences) Act 2007* repealed s 61R and introduced a "deeming" provision in s 61HA(3) as to what amounts to knowledge. In addition, to actual knowledge and recklessness, s 61HA(3) was widely understood to overturn the *DPP v Morgan* doctrine of honest (though not reasonable) mistake of fact and expressly deem that where a person has "no reasonable grounds for believing that the other person consents to the sexual intercourse' the person is deemed to *know* that the other person is not consenting (s 61HA(3)(c)).

In his Second Reading Speech on the Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007, the then Attorney General explained the rationale for s 61HA(3) as follows:

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[24] L McNamara, J Quilter, K Seear and R Room, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43(1) *Monash University Law Review* 148, 165-166.
[25] Ibid, at 167.

> The accuser's assertion that he or she had a belief that the other person had consented is difficult to refute, no matter how unreasonable in the circumstances. The law does not adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct. The subjective test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.
>
> Proposed section 61HA (3) retains recklessness, but offers an additional third limb for what is meant by that element of these offences 'knows that the other person does not consent'. It provides that the person knows that the other person does not consent to the sexual intercourse if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.[26]

In a 2013 *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900*, the NSW Department of Attorney General and Justice stated:

> The policy objective of the amendment was to give clear guidance as to what constitutes consent. It was to provide a more contemporary and appropriate definition of consent than that found in the common law. *This was so particularly in the adoption of an objective fault test that requires a person to have reasonable grounds for their belief that another person consents to sexual intercourse with them.* The test reflects the increased equality in today's sexual relationships, and the dialogue that should take place between individuals prior to sexual intercourse to reach a necessary mutuality of understanding in relation to consent. In this way, section 61HA represented a significant reform in the prosecution of sexual assault cases in NSW, adopting the reforming approaches in other common law jurisdictions such as the United Kingdom, Canada and New Zealand.[27]

When originally introduced, it was understood that NSW was the only legislature in Australia to expressly overturn the 'honest mistake of fact' doctrine, thereby introducing an *objective* dimension into the *mens rea* for sexual assault. This was until the NSW Court of Criminal Appeal decision in *Lazarus v R* [2016] NSWCCA 52.

As is now widely known, the NSWCCA found that the trial judge (in the first trial) was found to have erred by directing the jury that they could consider the reasonableness of the accused's mistaken belief in consent ie a purely objective test. The NSWCCA held (Fullerton J; Hoeben CJ at CL and Adams J agreeing):

> The Crown submitted (correctly) that, properly understood, s 61HA(3)(c) does impose an objective test, in the sense that (ignoring the onus of proof) the grounds which might lead to a belief of consent must be objectively reasonable. However, this is not the equivalent of the trial judge's direction that it was for the jury to 'consider whether such a belief [that the complainant was consenting] was a reasonable one'. The latter formulation implies that the jury should ask what a reasonable person might have concluded about consent, rather than what the accused himself might have believed in all the circumstances in which he found himself and then test that belief by asking whether there might have been reasonable grounds for it. In many such contested cases, perhaps all, there might be a reasonable possibility of the existence of reasonable grounds for

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[26] The Hon John Hatzistergos (Attorney General, and Minister for Justice), Legislative Council, NSW Parliament, *Hansard*, 7 November 2007, p 3584.

[27] NSW Department of Attorney General & Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (October 2013) p 4 (emphasis added)
https://www.justice.nsw.gov.au/justicepolicy/Documents/consent_review.pdf

> believing (mistakenly) that the complainant consented and other reasonable grounds suggesting otherwise. A reasonable person might conclude one way or the other but the statutory test is whether the Crown has proved the *accused* 'has no reasonable grounds for believing' that there was consent.[28]

The NSWCCA's decision thereby significantly narrowed the test in s 61HA(3)(c) from one which overturned the *DPP v Morgan* 'defence' outright to a test which requires consideration of whether the accused had *any* reasonable ground(s) for his mistaken belief. Any such ground would mean that the Crown has failed to prove knowledge of non-consent.

Much has been discussed in the media and elsewhere about the facts of the *Lazarus* case. It is noted that while the second trial by judge alone resulted in an acquittal, on appeal the NSWCCA arguably did not confirm that Lazarus had such reasonable grounds. In finding the second ground of appeal was made out in *R v Lazarus* [2017] NSWCCA 279, the Court found that the trial judge had failed to have regard to the steps taken by the accused to ascertain consent:

> It follows that in my view, 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.
>
> However, even allowing for that interpretation, it remains the case that those passages of her Honour's reasons upon which the respondent relied do not comply with s 61HA(3)(d). As I have said, those passages amount to nothing more than a recitation of factual findings.
>
> It follows that this ground has been made out. ([147]-[149])

It was because the Court found that '*it would give rise to oppression and unfairness*' (at [168]) to re-try the accused for a third time that Lazarus may be said to have been acquitted.

One reading of this part of the NSWCCA's decision suggests that the current test in s 61HA(3)(c) is adequate to cover a case such as *Lazarus*. However, it is submitted that in light of the Court's finding in *Lazarus v R* [2016] NSWCCA, s 61HA(3)(c) should be re-drafted to accord with the original intention – namely, to overturn the *DPP v Morgan* honest though not reasonable mistake fact.

Recommendation

This submission recommends that section s 61HA(3) be re-drafted to: 'the person's belief in consent was not reasonable in all the circumstances'.

It is also submitted that if the list of 'negations of consent' is to be maintained, s 61HA(3) should be relocated to a position after these. This way the AR elements are addressed first followed by the MR in order to provide more logical sequencing.

Interaction between mistakes in s 61HA(5) and knowledge[29]

Another issue that should be addressed more clearly is what possible effect the High Court decision in *Gillard* [2014] HCA 16 has on MR in cases where the Crown seeks to rely on the automatic negation of consent via the mistakes set out in s 61HA(5).

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[28] *Lazarus v R* [2016] NSWCCA 52, [156].

[29] This section of the submission draws on work written for chapter 8 of D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter & M Schwartz, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney: Federation Press, 6th ed, 2015).

In *Gillard* the High Court unanimously allowed an appeal from the ACT Court of Appeal's decision which dismissed an appeal of multiple convictions for sexual intercourse without consent under s 92D (now s 54(1) of the *Crimes Act 1900* (ACT)), and one conviction for act of indecency without consent under s 92J (now s 60(1)) of the *Crimes Act 1900* (ACT). Each of those offences expressly provides that the mens rea for these offences is either knowledge or recklessness as to non-consent. The complainants DD and JL were sisters, and the appellant was a friend of their father. The complainants, from the age of 11 and 12 in 1993 until 2003, spent some part of each January school holiday staying with the appellant in his care. The appellant was convicted on numerous grounds, including three counts of sexual intercourse without consent (when the complainants were aged 16 and over), and one count of act of indecency, also when the complainants were aged 16 and over.

The appeal was confined to the appellant's convictions for the four offences which were alleged to have occurred when DD and JL were aged 16 years and hence the prosecution was required to prove the non-consent of DD or JL. In proving non-consent, relevantly, the Crown relied on s 67(1)(h) which provides that consent is negated where there is an abuse of a position of trust. Importantly, s 67(3) provides that, if the person knows that the consent of another person has been caused by one of the factors in s 67(1), the person is deemed to know that the other person does not consent to the sexual intercourse or the act of indecency – while not identical, this is equivalent to the final clause in s 61HA(5) of the NSW provision.

The issue on appeal was, where s 67(1)(h) is engaged to negate consent, is the mental element of the offence established by proof of knowledge that consent was given because of the abuse of the position of authority or would recklessness as to that circumstance suffice, as the mens rea is in relation to the substantive offences in ss 54(1) and 60(1)? The High Court unanimously held that recklessness as to s 67(1) circumstances does not establish the mental element of liability for the offence to which it applies and the mental element must be estahlished by knowledge:

> At a trial in which the prosecution relies on the causal relation between a s 67(1) circumstance and the complainant's consent to sexual intercourse, or the act of indecency, to establish the absence of consent, the mental element of the offence is likely to be proved by establishing that the accused had the knowledge stated in s 67(3). Putting to one side the redundant "who" in the first line, s 67(3) deems knowledge that the consent of the complainant has been caused by a s 67(1) circumstance to be knowledge that the complainant did not consent to sexual intercourse or the act of indecency. Strictly, s 67(3) is declaratory. As s 67(1) negates consent where a specified circumstance is the cause of the complainant's consent, knowledge of the causal relation between the circumstance and the complainant's consent is knowledge that the sexual intercourse or act of indecency was without consent. Section 67(3) serves to remove any doubt that the knowledge of which it speaks is inconsistent with a belief that the complainant was consenting. (at [28])

The High Court found (at [39]) that it was a material misdirection to leave open that the jury might reason to guilt on the issue of consent that the appellant was reckless as to the risk that DD's or JL's consent was occasioned by the abuse of his position of authority over her.

In NSW in spite of the reference to 'For the purposes of subsection (3)' in s 61HA(5)[30], if the reasoning of the High Court were strictly applied to the final clause in sub-s (5), where the Crown relies on one of the mistakes to prove non-consent, the Crown would need to prove that the accused had actual knowledge that the complainant only consented to sexual intercourse under that mistaken belief rather than having recourse to the broader definition of knowledge

[30] Relocated to s 61HE(7) by the CSA Act.

in s 61HA(3). In effect, this would oust the operation of the deeming provision in s 61HA(3) for the purposes of s 61HA(5) and confine the mens rea to actual knowledge.

Recommendation

This submission recommends that the extended meaning of 'knowledge' in s 61HA(3) should apply to matters involving mistakes under s 61HA(5).

Self-induced intoxication: s 61HA(3)(e)

Currently s 61HA(3)(e) requires that the trier of fact in making a finding under s 61HA(3) must have 'regard to all the circumstances' but 'not including any self-induced intoxication of the person.' Sexual assault is not an offence of specific intent. Therefore, s 61HA(3)(e) seems to unnecessarily replicate the general rule contained in s 428D(a) of the *Crimes Act 1900* (NSW) that self-induced intoxication cannot be take into account for crimes of general intent.

A further issue is that it may send a problematic message to the jury: intoxication can be taken into account in relation to the complainant's capacity to consent but cannot be used to remove the defendant's responsibility for the offence. As mentioned above, studies of mock jurors consistently show that jurors attribute greater responsibility and blameworthiness to victims who are intoxicated whereas it is more likely to reduce responsibility and blameworthiness of an accused if the complainant was drunk.[31] It is not clear how s 61HA(e) addresses adequately such juror beliefs.

4. LAW REFORM AND THE PRACTICES OF THE LAW

The final and larger issue to which this submission draws attention is the question of how law reform affects the practices of the law. It is unquestionable that 'sexual assault' is an area in which there has been abundant 'good will' law reform for decades now and those changes have quite literally transformed how the law 'on the books' is conceptualised from the old common law offence of 'rape'. This should be a success story for feminists and progressive law reformers who have made significant contributions to the legal and political analysis of sexual assault and to the successive waves of legislative reform in this area since the 1980s.

Yet, when we analyse the *practices* of the law together with the (continued) under-reporting of the offence, high attrition rates, low conviction rates and high rates of successful appeals,[32] the picture looks very different. Furthermore, analysis of which allegations of sexual assault continue through the process of investigation, charge, prosecution and ultimately conviction, shows a depressing picture of the criminal justice system continuing to closely conform to the old common law forms of rape.[33]

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[31] E Finch and V Munro, 'Juror stereotypes and blame attribution in rape cases involving intoxicants' (2005) 45 *Brit J Criminol* 25.

[32] See Australian Bureau of Statistics, 'Recording of sexual assaults reaches eight-year high', Media Release, 28 June 2018; S Rawsthorne and N Gladstone, 'Sexual assault on the rise in Sydney while conviction rate remains low' *Sydney Morning Herald*, 29 June 2018 https://www.smh.com.au/national/nsw/sexual-assault-on-the-rise-in-sydney-while-conviction-rate-remains-low-20180628-p4zoc6.html

[33] See J Quilter, 'Re-framing the rape trial: Insights from critical theory about the limitations of legislative reform' (2011) 35 *Aust Feminist LJ* 23; J Quilter, 'From *Raptus* to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law & History* 89; also D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter & M Schwartz, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney: Federation Press, 6th ed, 2015), 703-708.

In early times, major evaluations of legislative reforms have heen undertaken. For example, the operation of the 1981 sexual assault amendments were monitored by BOCSAR. The findings were presented in a series of reports: BOCSAR, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation, Interim Report No I, Characteristics of the Complainant, the Defendant and the Offence* (1985); *Interim Report No 2, Sexual Assault-Court Outcome: Acquittals, Conviction and Sentence* (1985); *Interim Report No 3, Court Procedures* (1987). The BOCSAR monitoring studies examined transcripts of all rape and sexual assault offences entering committal in two separate 18-month periods. The first period involved all charges of rape or attempted rape in the 18 months immediately before thc 1981 reforms and the second period covered sexual assault categorics 1-3 or attempt under the *Crimes (Sexual Assault) Amendment Act 1981* in the 18 months following the reforms.

The conclusions from the reports were used to introduce the later 1989 reforms to sexual assault laws (by the *Crimes (Amendment Act) 1989*).

The effect of the various legislative reforms on the experience of complainants as witnesses in the criminal justice process was also extensively evaluated by the NSW Department of Women in *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996). This Report found that while legislative reforms were designed to protect complainants giving evidence in proceedings, as the name of tbe Report suggests, in practice complainants were not so protectcd.

There has not been another major evaluation of the effects of legislative change in this area in the two decades since the *Heroines of Fortitude* report.

It is submitted that the Commission should strongly recommend an evaluation of the current operation of sexual assault laws and of any future amendments that may be introduced.

Yours sincerely

[redacted]

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