Children's Court of New South Wales

6 February 2019

The Hon Acting Justice Carolyn Simpson
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

Dear Commissioner,

Thank you for providing the Children's Court of New South Wales with the opportunity to comment on the Consultation Paper, 'Consent in relation to sexual offences' ("the Consultation Paper").

The harmful consequences of sexual assault are apparent in matters in both the criminal jurisdiction and the care jurisdiction of the Children's Court of New South Wales. In the criminal jurisdiction, in particular, we see young people who are struggling to develop a proper understanding of interpersonal relationships, including sexual relationships. Children and young people are often inexperienced and are navigating sexual boundaries for the first time and communication is often unclear.

In this context issues of consent in relation to sexual assault are challenging for the Children's Court. It is therefore important that the law is clear, that the rights of both parties are protected and that the law holds people to account for non-consensual sexual activity but does not operate more harshly for young people who, because of their immaturity and lack of experience could potentially be more exposed to criminal law sanctions in situations where the offender/victim dynamic is not always as pronounced as it is with adults.

This submission will respond to specific questions set out in the Consultation Paper that are of particular relevance to the work of the Children's Court.

Question 3.1 (1:) Should the law in NSW retain a definition of sexual assault based on an absence of consent?

The Children's Court is of the view that every person over the age of consent has the right to sexual self-determination and the continuation of a consent based model is supported.

Question 3.2 (1): Is the NSW definition of consent clear and adequate?

The criticisms of the law as it currently operates are valid, to the extent that there is an undue emphasis on the conduct of the complainant, and what indications he or she gave that she was not consenting. This approach is out-dated and does not properly reflect a person's right to sexual self-determination.

The text of the legislative provision should precisely embody the legal norm sought to be achieved, so that, in principle, any person can read the text and know, with absolute clarity, "this is what I must not do." Focusing only on how the provision is applied in the context of a criminal trial ignores its other important purpose as a clear statement of a legal norm.

The Children's Court would support a definition that provided greater clarity.

Question 3.2 (4): What are the potential benefits of adopting an affirmative consent standard?

The Children's Court believes that an affirmative consent model is more closely aligned with contemporary, informed values. The law should make it clear that it is incumbent upon every person embarking upon a sexual encounter to ensure the other person is consenting. Adopting an affirmative consent standard would reduce undue focus on complainants in matters of sexual assault and provide greater guidance for fact finders in determining whether the complainant consented. Further, adopting an affirmative consent standard may facilitate a cultural shift, particularly among children and young people, to actively seek consent.

Question 3.2.(8): Do you have other ideas about how the definition of consent should be framed?

In the Children's Court's experience cases in which there is an issue as to whether the complainant did or did not in fact consent are unusual. The majority of contested cases focus on the issue of the accused's knowledge of lack of consent, and it is in this area that greater clarity is required.

The Children's Court is of the view that greater clarity would be achieved if the issue of the accused's knowledge was moved from s 61HE(3) to the offence provisions itself. In this regard the Children's Court suggests the following two proposals could apply to s61I by way of example;

<u>Proposal 1:</u>

A person commits an offence if he or she has sexual intercourse with another person, and the other person does not consent, unless:

(a) he or she honestly believed that the other person was consenting, and

(b) that belief was reasonable in all the circumstances (having particular regard to anything the person did to ensure that the other person was consenting).

Proposal 2

A person commits an offence if he or she has sexual intercourse with another person, and the other person does not consent, and:

(a) The person knows that the other person does not consent; or
(b) The person is not sure that the other person consents; or
(c) The person believes that the other person consents, but that belief is not reasonable in all the circumstances (having particular regard to anything the person did to ensure the other person was consenting).

Question 5.1 (2): Should "recklessness" remain part of the mental element for sexual assault offences? If so, why? If not, why not?

The Children's Court believes that "recklessness" should not remain part of the mental element for sexual assault offences. The term "reckless" is unnecessarily technical, and is an historical artefact that should not be retained.

Question 5.2 (2): What are the disadvantages of the "no reasonable grounds" test?

Similarly, the Children's Court does not support the continuation of the "no reasonable grounds" test. The "no reasonable grounds test" has been seen to be problematic in its practical application as it is confusing and difficult to apply. Furthermore, the test may be unreasonably hard for the prosecution to satisfy. The test ultimately suggests that the presence of any reasonable ground for the accused's belief is enough to result in an acquittal, even in circumstances where there is evidence that the mistake was an unreasonable one.

Question 5.3 (1): Should NSW adopt a "reasonable belief" test? If so, why? If not, why not?
Question 5.3 (2): If so, what form should this take?

The Court supports a model to ascertain reasonable belief in consent as referred to the alternative proposals suggested in response to Question 3.2(8). The Children's Court would also support a test similar to that currently prescribed by s 36A of the Crimes Act 1958 (Vic) which provides that:

(1) Whether or not a person reasonable believes that another person is consenting to an act depends on the circumstances.

(2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents or, in the case of an offence against section 42(1), would consent to the act.

A reasonable belief test should direct a fact finder to whether the accused believed the complainant was consenting and whether such a belief was reasonable, considering all the circumstances of the case and any steps the accused took.

Education and Diversionary Programs

Community Education

The Children's Court believes that any legislative amendments to consent laws should be accompanied by community education, particularly for children and young people.

Statistics show that children and young people are engaging in sexual activity. In a survey of students in years 10, 11 and 12 in Australia Sixty-eight per cent of the participants had experienced deep kissing; approximately 50% sexual touching; and over one third of the sample had given or received oral sex. Thirty-three per cent of students reported having had sex with a condom and 24% without a condom. Finally, only 9% of the sample reported having had anal sex (Australian Research Centre in Sex, Health and Society, 2014).

While revisions to strengthen the law surrounding consent in relation to sexual assault offences are of high importance, education for the legal community and wider community is an integral part of any discussion of what constitutes free and voluntary consent under the criminal law of NSW. Such discussion is central to changing attitudes around consent. Some schools and universities are implementing education programs focusing on consent and sexual assault. Such programs should be expanded to primary and high school curriculums.

Research has indicated the effectiveness of comprehensive, interactive consent education in reducing instances of, and improving responses to, sexual violence. Education programs addressing consent and sexual offences should be evidence-based and culturally appropriate.

Diversionary programs

Children and young people who have committed sexual offences should have access to appropriate and specialised treatment to address criminal behaviour. A growing body of research shows that programs specialising in

the treatment of young sex offenders result in lower recidivism rates (Worling & Langton, 2012). Early intervention and appropriate treatment are vital if young people who have sexually offended are to lead healthy and respectful sexual lives.

Should you have any further questions in relation to these matters, please contact me or the Children's Court's Executive Officer, Rosemary Davidson,

Yours sincerely,

Judge Peter Johnstone
President