NEW SOUTH WALES
BAR ASSOCIATION

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Acting Justice Carolyn Simpson
Commissioner
New South Wales Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

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

Dear Commissioner

Response to the NSWLRC Consultation Paper 21: Consent in relation to sexual offences

Thank you for the opportunity to make a submission following the release of Consultation Paper 21 on "Consent in relation to sexual offences" ("the Consultation Paper") by the New South Wales Law Reform Commission ("NSWLRC").

The New South Wales Bar Association ("the Association") expresses its appreciation for the very clear delineation of issues in the Consultation Paper and will endeavour to address each question in this submission in order. However, as a preliminary matter, the Association wishes to acknowledge the important and wide-ranging issues raised by the NSWLRC within the scope of the reference and the commitment by the NSW Government to ensure that the law is meeting its objectives of ensuring that perpetrators of sexual assault are brought to justice and sentenced according to the moral culpability of the offence. The Association also recognises that sexual intercourse without consent, where there is knowledge as to the lack of consent, is a very serious offence and an affront to the human rights and human dignity of the victim: cf. *DPP (NT) v WJI [*2004] HCA 47 at [104]. The Association also acknowledges the importance of the fundamental tenets of the criminal justice system in the trial process, including the onus of proof being on the prosecution and the right to silence of accused persons. It is within this framework and with the experience of criminal trial and appellate practitioners both prosecution and defence over many years that the Association approaches this submission. The Association bears at the forefront the experience of participants in

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the criminal justice system and seeks to propose reform in a manner that will enhance that experience and lead to just results.

The first fundamental change that the Association supports is a simplification of the law in this area, including the language of section 61HA/61HE, in order that the law can apply equally and evenly in the myriad of circumstances in which sexual assault may occur and that trial directions can be fashioned to the case at hand. This means that any "myths" that may arise on the facts of a particular case can be addressed without the confusion of introduction of other matters through directions that do not really arise on the facts of the particular case. Such matters may be addressed sooner rather than later in a trial in order that the evidence may be taken in its proper context. The second is that in order to make the task of juries easier and in order to avoid juries having to engage in mental gymnastics, the language of the law follow as best as possible the task the jury must perform, and language such as "whether or not" be eliminated altogether, or conform with the fundamental questions as to lack of consent and knowledge of lack of consent. The submission of the Association seeks to respond with these matters in mind.

The other fundamental change that the Association supports is the creation of an offence for 'negligent' sexual assault as further outlined below. Having given further consideration to the issue of self-induced intoxication, the Association supports the retention of a fact finder being required to exclude an accused's self-induced intoxication when making the determination as to whether the Crown has proved beyond reasonable doubt that an accused person knew that there was a lack of consent to sexual intercourse.

Question 3.1 Alternatives to a consent-based approach

(1) Should the law in NSW retain a definition of sexual assault based on absence of consent? If so, why? If not why not?
(2) If the law was to define sexual assault differently, how should this be done?

3.1.1 The law in NSW should have a definition of sexual assault based on absence of consent. This State and many other jurisdictions have moved away some time ago from a definition of sexual assault based on force. The Association agrees that sexual assault may take place in circumstances of "non-consensual" submission by a victim and in circumstances where evidence of injury should not be a determinant to the criminal actions of an accused. Moving from a lack of consent based model to one that focuses on the circumstances and consequences of sexual assault would lead to injustices and perpetuate a focus on injury to complainants that risks further trauma to victims of sexual assault.

3.1.2 However, the definition currently moves between definitions of consent, lack of consent and "whether or not" there is consent in a manner which may well be confusing for jurors. The language should be clear and focused on lack of consent in order to both conform with the onus of proof and to assist in simplifying the reasoning process that juries must engage in to facilitate proof of an offence. At the moment because of the statutory definition, juries are directed in both positive and negative terms about consent which could unwittingly create confusion.

3.1.3 The Association stated in its preliminary submission that there may also be a further avenue for confusion around the word "freely", as, in some circumstances, consent (as opposed to non-consensual "submission") may be voluntarily given after persuasion. Should the definition be focused on lack of consent, which is what needs to be proved, rather than consent in positive terms, the language of the section may also be simpler. To give an example, both the onus and the language issue may be addressed if the provision in subsection (1) read:

> *"There is lack of consent to sexual intercourse if agreement to the sexual intercourse was not voluntary on the part of any party to the sexual intercourse".*

3.1.4 However, the Association acknowledges that every other State and Territory does use the word "free" and that its concerns may also be a matter that is better addressed through judicial directions. In these circumstances, the subsection may read:

> *"There is lack of consent to sexual intercourse if agreement to the sexual intercourse was not free or was not voluntary on the part of any party to the sexual intercourse".*

Question 3.2

(1) Is the NSW definition of consent clear and adequate?
(2) What are the benefits if any of the NSW definition?
(3) What problems, if any, arise from the NSW definition?
(4) What are the potential benefits of adopting an affirmative consent standard?
(5) What are the potential problems with adopting an affirmative consent standard?
(6) If NSW was to adopt an affirmative consent standard, how should it be framed?
(7) Should the NSW definition of consent recognize other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?
(8) Do you have any other ideas about how the definition of consent should be framed?

3.2.1 The Association has addressed 3.2 (1) – (3) above at [3.1.2]-[3.1.4].

3.2.2 The Association regards it as very important that s 61HA (2), or a section to that effect, which provides that 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" is retained. To put this in a different way, in terms of the proof required, there does not need to be actual physical resistance in order for the prosecution to prove that there was a lack of consent to sexual intercourse.

3.2.3 The Association does not share concerns as to confusion arising from the definition as to non-consent to particular kinds of sexual intercourse. The definition is clear in this respect when read together with the definition of various kinds of sexual intercourse. This is not a confusion that has been observed in practice so far as the Association is aware. On the contrary, it is the case that matters are prosecuted with charges being individually laid for different acts of sexual intercourse against a single complainant, consideration given to each on the basis of lack of consent and knowledge of lack of consent, with verdicts taken in relation to each individual count without the suggested controversy arising.

3.2.4 The Association regards it as important that the definition retain a list of circumstances in which consent *is* negated, with the focus on non-consensual intercourse both essential to proof of the offence and the proper focus for the tribunal of fact. It is where a "positive and mutual agreement as to sexual intercourse between parties"[1] is lacking, and the single consenting party knows or is indifferent to a lack of consent on the part of the other, that the conduct is criminal conduct. The focus in the criminal law rightly focuses on the criminal conduct.

3.2.5 The Association acknowledges the concerns of the Rape and Domestic Violence Services Australia that there may be a "presumption that submission equates to consent" that has not been addressed in s 61HA (7). The Association considers that the fraught area of lack of consent and "submission" is best addressed by judicial directions which are flexible rather than a "one size fits all" legislative provision. The Association acknowledges that there are cases where there is non-consensual "submission" to sexual intercourse, and knowledge of this, making it criminal conduct. However, the word itself is amorphous in the context of

[1] Cf. Consultation Paper para [3.19].

sexual relations such that there may also be cases of free and willing "submission". The law has sought to address this through the negation of consent provisions, such as s 61HA (4) (c) and (d), and the legislative guidance as to what "may" amount to negation (6) (b) and (c). While the Association considers that in order to simplify the law and avoid confusion (as explained further below) subsection (6) should be removed, we acknowledge that in appropriate cases tailored directions should be given addressed to matters such as intimidatory or coercive conduct or threats where the factual circumstances of the case raise these issues.

3.2.6 Rape "myths" are also best addressed by judicial direction based on admissible evidence where such a myth has the potential to arise given the facts in a particular case. The law has recognized for some time that distress of a complainant not only at the time of the offence but also soon following the offence and early complaint may be evidence corroborating the occurrence of an offence: *Papakosmas v The Queen* (1999) 196 CLR 297. This is often very powerful evidence in a prosecution case. That is not to say that this is always the reaction for all complainants. Distress has been addressed through directions to juries where the evidence arises in the case. A similar approach is appropriate where there is evidence of a "freeze reaction". There is then the flexibility to address the individual complainant's experience and reaction in a particular and cogent manner while at the same time highlighting those matters relied on by the prosecution in proof of knowledge of lack of consent.

3.2.7 An affirmative onus would not displace rape myths, would not address 'outdated' views among a jury and would not remove scrutiny of a complainant's conduct as the conduct of both parties to the sexual intercourse is the focus of the very questions to be addressed by the jury even in an affirmative standard model. An affirmative consent model also has the potential to criminalise a vast range of conduct that Loughnan and co-authors describe as the "innumerable instances of consensual sexual intercourse" that "occur in the absence of words and such instances are not morally problematic"[2]. As the Association stated in our preliminary submission, there may be "free agreement" whether or not the complainant communicates that state of mind and regardless of how a complainant communicates it. The focus should be on circumstances where there is a lack of consent and judicial directions to inform considerations in this respect, rather than changes made to the law in a manner that

[2] A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC 065, 5.*

has been ineffective in other jurisdictions in addressing many of the concerns raised in the Consultation Paper. The Association does not support a definition that a person does (or may) not consent where the person does not say or do anything to communicate their consent for these reasons.

3.2.8 In relation to withdrawal of consent or consent conditional on the use of contraception, in the Association's submission if this is to be addressed through law reform, it is relevant to negation of consent rather than the definition of consent and could be addressed, should there be such a need in s 61 HA (4), (5) or (6). The definition of consent arguably already covers withdrawal of consent and subsection (5) (d) arguably already addresses consent conditional on use of contraception. These areas are usually addressed in trials through judicial direction, which again, can be moulded to address the particular circumstances of a case.

Question 4.1 Negation of consent

(1) Should NSW law continue to list circumstances that negate consent or may negate consent. If not, in what other ways should the law be framed?
(2) Should the lists of circumstances that negate consent or may negate consent, be changed? If so how?

4.1.1 The Association supports the retention of the list of circumstances that negate consent. However, in accordance with the proposal of simplification of the law and judges having the flexibility to give judicial directions that address the particular circumstances of a case, the Association suggests removal of the circumstances that *may* negate consent from the legislation. While the Consultation Paper suggests that the Association was of the opinion that there should be legislative amendment of all negating circumstances, it is only those that *may* negate consent that were addressed in the preliminary submission in the terms addressed at paragraph [4.84] of the Consultation Paper.

4.1.2 Where necessary, matters such as those currently in the list of circumstances that *may* negate consent can form the basis of considered judicial direction focused on the particular circumstances of a case as to the issue of consent. A direction that certain circumstances *may* amount to lack of consent on those matters currently in subsection (6) may add undue complexity and cause undue confusion when given in combination with a direction that a finding of fact amounting to one of the matters in subsection (4) does amount to a lack of

consent. A judicial direction on the other hand may address those issues raised by the Director of Public Prosecutions as summarised in the Consultation Paper at p.54 [4.38], including 'rape myths' in any given case. The Association considers that concerns raised in relation to lack of consent proved by submission on the basis of fear is also a matter best addressed in the given factual circumstances of cases tailored to the evidence in an individual case and appropriately framed directions.

4.1.3 The Association considers that non-consensual removal of a condom without knowledge of the complainant is a circumstance already captured by subsection (5) (c) ("under any other mistaken belief about the nature if the act induced by fraudulent means"), which provides broad wording to capture such circumstances as negation of consent.

4.1.4 The Association considers that while withdrawal of consent is currently addressed by the law, in order to provide clarity, the law may be improved by a provision such as that in Victoria which provides that there is a lack of consent where a person having consented "later withdraws consent to the act taking place or continuing". However to avoid confusion, the word "later" should not be used. Juries should be in no doubt that the earlier consensual intercourse remains consensual and that it is only from the point of withdrawal of consent that there is a lack of consent.

4.1.5 In relation to fraudulent means, the Association considers that the factual circumstances are so many and varied in these instances (such as those outlined in the Consultation paper at paragraph [4.40]), many of which may not be considered by a jury to amount to negation of consent, that subsection (5) should not be amended, noting that fraudulent misrepresentation can still be the basis for lack of consent where negation of consent is proved beyond reasonable doubt.

4.1.6 As outlined above, the Association does not support the amendment of the law to provide for negation of consent where a person does not say or do anything to indicate consent to the act. Sexual assault may be proved in these circumstances under the law and is best addressed in the manner outlined above for the reasons given. The Association has also addressed this proposal and the reasons why it is not supported in its preliminary submission.

Question 5.1 Actual knowledge and recklessness

(1) Should "actual knowledge" remain part of the mental element for sexual assault offences? If so, why? If not, why not?
(2) Should "recklessness" remain part of the mental element for sexual assault offences? If so why? If not, why not?
(3) Should "reckless" be defined in the legislation? If so, how should it be defined?
(4) Should the term "reckless" be replaced with "indifferent"? If so, why? If not why not?

5.1.1 The Association maintains its position as to actual knowledge, recklessness and indifference for the reasons outlined in our preliminary submission.

5.1.2 The Association is strongly of the view that actual knowledge of lack of consent should remain part of the mental element for sexual assault offences. In this respect and in conformity with the Association's stated aim of recommendations to simplify and clarify the law, the heading should be amended to read "Knowledge of lack of consent".

5.1.3 The preferred terms for a provision based on indifference as to lack of consent and reasons for that is set out in the preliminary submission. To be clear the Association does not merely advocate the replacement of the term "reckless" with the term "indifference". The Association supports a clarification of the law in s 61HA (3) (b) in the following terms: "the person is indifferent as to lack of consent to the sexual intercourse by the other person".

5.1.4 A further reason to adopt the indifference test set out above is the simplification of the matters for a jury to consider. The proposed language also maintains focus on the question to be decided by the jury in the context of the onus of proof so as to not confuse the jury and direct attention to the actual question the jury should be determining or assist judges in framing directions to the jury. The indifference test would also work well and in a straightforward manner where there is consideration of issues such as lack of consent in circumstances where a complainant may "submit" to sexual intercourse out of fear or in cases of ongoing domestic violence, where recklessness might not be as easy to prove in such cases.

5.1.5 Should the NSWLRC determine that recklessness should be retained, in accordance with the clarification that the Association has suggested, to make directions simpler and easier to follow, subsection (b) should be reworded to read: "the person is reckless as to lack of consent to the sexual intercourse by the other person".

Question 5.2 The "no reasonable grounds" test

(1) What are the benefits of the "no reasonable grounds" test?
(2) What are the disadvantages of the "no reasonable grounds" test?

5.2.1 The disadvantage of the "no reasonable grounds" test is that it allows for the conviction of an accused person in circumstances where the jury have accepted that the person held an honest belief in the consent of the complainant. By retaining an objective element in the test, the Association is concerned about the possibility of unfair outcomes where the objective standard being applied is not one that is known or easily quantifiable.

5.2.2 The test may not be one that applies to all people equally. For example, in the case of a person with a mental disability, particularly where that disability involves cognitive functioning of the accused, there is some identifiable unfairness in applying a standard that imports the idea of 'reasonableness' to the grounds for belief. It is acknowledged that the tribunal of fact is directed that consideration is not be given to what a hypothetical reasonable person might have concluded but rather the grounds for the belief of the accused, when taking into account all of the circumstances, that themselves must be reasonable. However, the Association still considers that the test retains the potential for unfairness to flow to a person who suffers from a mental disability or impairment where it is accepted that such an accused did hold an honest belief as to consent. The mental state of such a person is far removed from a person with proper cognitive functioning, who has a mental state of actual knowledge or recklessness.

5.2.3 Other arguments against the retention of an objective test combined with the subjective concern the severity of the maximum penalty. The severity of the maximum penalty for sexual intercourse without consent (14 years imprisonment) ought to reflect the heinous conduct of the accused in subjecting the complainant to an act where there is a lack of consent that the accused has actual knowledge of or is indifferent to lack of consent and proceeds regardless. Where the accused holds an honest belief as to consent, that accused ought not to be liable to the same serious maximum penalty.

5.2.4 Another reason for removal of the "reasonable grounds" limb of the test for proof of knowledge of lack of consent is that it appears to have unwittingly permitted the introduction of matters such as "rape myths" such as those outlined in the Consultation Paper at [2.94] –

[2.96] as to the behaviour of complainants into the trial. A further difficulty is that this subsection at its essence asks a positive question about consent rather than focussing on the lack of consent of the complainant. A jury considering knowledge of lack of consent has already been satisfied that lack of consent has been proved beyond reasonable doubt. The questions for the jury should be focussed on constructive knowledge of *lack of* consent without the confusing introduction of constructive knowledge through the introduction of the reliance on "no reasonable grounds" for belief in "consent". The jury are asked to analyse knowledge in this respect through the lens of grounds for belief in consent rather than the already proved lack of consent. The Association suggests that it is the indifference to the lack of consent that lies at the heart of the criminality sought to be captured in this limb of constrictive knowledge and the "reasonable grounds" limb does not reflect the objectives of the reform introducing it.

Question 5.3 A "reasonable belief" test

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

5.3.1 The Association considers that in circumstances where s 61HA (3) (c) is to be retained, that a "reasonable belief" test should not be adopted. One reason for this is that such a test is unlikely to have a practical or positive impact on the way that complainants are currently cross-examined or on the matters that juries are asked to take into consideration in making their determination at trial. It suffers the same flaws outlined above at [5.2.4].

5.3.2 A "reasonable belief" test would continue to result in attention being paid to the actions of the complainant that informed the conduct and reasoning process of the accused in determining the question of whether the prosecution has proved that there was a lack of consent. This would not have the desired effect of shifting the focus of attention to the actions of the accused as inevitably attention will still be paid to the actions of the complainant and what s/he did that informed the belief that the accused held.

5.3.3 A further reason for not introducing such a change from the test of "reasonable grounds" to "reasonable belief" is that it would not serve to simplify the legislation nor the reasoning process that juries are asked to engage in when deliberating. Adoption of a "reasonable belief"

test entails consideration of "the grounds", that is, the basis upon which the accused formed their belief.

Question 5.4: Legislative guidance on "reasonable grounds"

(1) Should there be legislative guidance on what constitutes "reasonable grounds" or "reasonable belief"? If so, why? If not, why not?
(2) If so, what should this include?

5.4.1 The Association does not support legislative guidance, as opposed to guidance in the NSW Criminal Trial Courts Bench Book ("the Bench Book"), on what may constitute "reasonable grounds" or "reasonable belief". The notion of "reasonableness" is one that fact finders are familiar with-indeed the concept of "reasonable" is ingrained in the criminal standard of beyond reasonable doubt. That expression of "reasonable" is one that Courts have repeatedly stated it is undesirable to explain or attempt to embellish when dealing with the meaning of the phrase beyond reasonable doubt: *Green v The Queen* (1971) 126 CLR 28 at [32]-[33]. The circumstances of sexual assault, particularly now that the definition in this section applies also to sexual touching and the like, are so multiple and varied that to adopt such a change as legislative guidance of what constitutes "reasonable grounds" or "reasonable belief" may ultimately defeat the purpose of any such changes, namely to facilitate a jury's understanding of the large variety of circumstances in which knowledge of lack of consent may be present.

5.4.2 It is for the tribunal of fact to determine what is reasonable in all of the circumstances of a given case. To try to provide legislative guidance on this issue fails to adequately take into account the fact that the tribunal of fact is relied upon to apply common sense and experience of life to assess the complexity of interaction and communication surrounding human sexual relations that was identified by Loughnan and co-authors in their submission[3]. As discussed elsewhere in these submissions, the jury can be assisted in their deliberations by directions that address specific issues such as distress or a lack thereof or the "submission" of the complainant and how submission in a particular case may reflect a lack of consent.

Question 5.5: Evidence of the accused's belief

(1) Should the law require the accused to provide evidence of the "reasonableness" of their belief? If so, why? If not, why not?

[3] A Loughnan, A McKay, T Mitchell and R Shackel, Preliminary Submission PC065, 5

(2) If so, what form should this take?

5.5.1 The Association considers that there should be no legislated requirement that the accused provide evidence of the "reasonableness" of their belief. We recognise that the jury will require some evidence of what the accused thought and why they formed that view. In the usual course the accused, either by way of recorded interview with police, or by giving evidence at trial, would need to give some explanation of what they were thinking in the circumstances in order for a jury to have some basis to consider the "reasonableness" of their position. Where the version of the accused is at odds with that of the complainant, it is even more likely that the accused will give evidence, as there are rarely other witnesses to such an event.

5.5.2 Placing an evidentiary onus on an accused to give evidence of an objective standard does not make sense as the accused can only ever give his or her subjective account of what occurred. The "reasonableness" of this is the objective element of the test if it is to be applied.

Question 5.6: "Negligent" sexual assault

Should NSW adopt a "negligent" sexual assault offence? If so, why? If not, why not?

5.6.1 As raised above in answer to the questions at 5.2, the Association considers that the introduction of a "negligent" sexual assault offence has merit because of the unfairness of punishing an accused who has been accepted as having an honest belief as to consent. In so doing the accused can therefore be said to be negligent rather than to have knowingly committed the offence. The introduction of such a lesser offence is consistent with the way the criminal law addresses many offences of personal violence. It provides an appropriate gradation of offences, recognising that knowingly sexually assaulting a person is a more heinous offence than honestly believing a person is consenting but having engaged in sexual intercourse in circumstances considered by others to be unreasonable. This is a different and lower standard to indifference. In our submission it warrants a lower maximum penalty given the honestly held belief that there was no lack of consent.

5.6.2 Offences of personal violence contained within the *Crimes Act 1900* are structured such that the most serious penalty applies to that offence that involves the highest level of moral culpability, both in terms of the mental element and the harm inflicted. An example of the

graduated approach to offences of personal violence is contained in sections 33 and 35 of the *Crimes Act 1900*. Section 33 addresses the infliction of a wound or grievous bodily harm with the intent to do so. It carries a maximum penalty of 25 years imprisonment. Section 35 concerns the reckless infliction of both grievous bodily harm: s 35(2) which has a maximum penalty of 10 years imprisonment, and infliction of a wound: s 35(4) which has a maximum penalty of 7 years imprisonment.

5.6.3 Further examples are frequently seen in more "modern" legislative schemes. For example,s 400.3(1) *Criminal Code (Cth)* criminalises the dealing with property (the value of the property being in excess of $ 1 million) in circumstances where the person believed the property to be the proceeds of crime. That offence carries a maximum sentence of 25 years imprisonment. The lesser offence of dealing with property, being reckless that it is the proceeds of crime (subsection (2)), carries a maximum penalty of 12 years imprisonment. A still lesser of offence of dealing with property, being negligent that it is the proceeds of crime (subsection (3)), carries a lesser maximum penalty of 5 years imprisonment.

5.6.4 Such graduated penalties, varying according to the culpability of the offender's state of mind, recognise that the punishment prescribed by the legislature should be commensurate with the offender's culpability. This is not achieved simply by recognising that a sentencing judge would reflect an offender's lesser culpability by imposing a lesser sentence: cf. *He Kaw Teh v. The Queen* (1985) 157 CLR 523 at 535 *per* Gibbs CJ.

5.6.5 It is the position of the Association that there should be such gradation of offences in relation to sexual assault. This may also have the benefit of making directions to juries simpler in cases where the prosecution elects to run on this offence alone as directions would be more targeted when it comes to consideration of the mental element of the case.

Question 5.7: "No reasonable grounds" and other forms of knowledge

(1) Should a test of "no reasonable grounds" (or similar) remain part of the mental element for sexual assault offences?
(2) If not, are other forms of knowledge sufficient?

5.7.1 As addressed in response to question 5.2 above, the Association considers that the "no reasonable grounds" test should not be retained as part of the mental element for sexual assault offences unless it is part of a separate offence.

5.7.2 The Association considers that it is preferable to have two forms of knowledge of lack of consent:

- Actual knowledge of lack of consent; and
- Indifference to lack of consent.

5.7.3 Our submissions on the benefit of importing the concept of 'indifference' over 'recklessness' have been set out above and in our preliminary submission. Such a change would have the desired effect of simplifying the legislation in order to make the task of judges easier in directing juries or themselves on the legal issues and importantly, easier for juries. Simplification is less likely to result in errors that serve to draw out the process for all those involved, particularly complainants and witnesses, and ensure finality of proceedings. Greater understanding should result in just convictions and acquittals rather than acquittals based on misunderstandings of the law or legal directions

Question 5.8: Defining "steps"

(1) Should the legislation define "steps taken to ascertain consent"? If so, why? If not, why not?
(2) If so, how should "steps" be defined?

5.8.1 The Association recognises that in proceedings concerning sexual misconduct there is a desire to ensure greater scrutiny of the conduct of the accused, including that conduct by the accused that may have induced a "freeze" response or other conduct that is not necessarily recognised by juries as expected of someone who has been the victim of a sexual offence. In *R v Lazarus* [2017] NSWCCA 279 at [147] Bellew J. formulated what is meant in s 61HA (3) (d) as to the nature of the 'steps' required by the accused in finding out whether the other person consents to the sexual activity. The criticism of Bellew J's formulation is that the absence of a requirement for some physical or verbal step serves to reinforce distorted views about sex and rape in particular.

5.8.2 It is respectfully submitted that any attempt to address such distorted views by introducing a legislative definition of physical and verbal or other "steps" required to be taken by an accused to ascertain consent is not appropriate. As noted above in answer to question 5.4, human sexual relations are recognised as often occurring in the absence of words and

oftentimes are reliant on gestures which can be quite nuanced and in a multitude of varying circumstances. The understanding of such gestures might be dependent on the experience of the parties in cases where they have been in a relationship. In other circumstances, the understanding may be based on the events leading up to the sexual activity. Observations may form the basis for "reasonable grounds" for belief in consent.

5.8.3 The circumstances in which consent may be understood are many and varied but cannot be said to be only limited to the physical and verbal. Steps should not be limited to 'physical and verbal' for the very reason of the nuanced nature of sexual activity.

Question 5.9: Steps to ascertain consent

(1) Should the law require people to take steps to work out if their sexual partner consents? If so, why? If not, why not?
(2) If so, what steps should the law require people to take.

5.9.1 The Association considers that it is appropriate that the law requires scrutiny of the consideration given by a person as to whether their sexual partner is not consenting. However, for the reasons given above, the requirement of taking "steps" may be problematic as it currently appears in the legislation in the context of consideration of knowledge of lack of consent but refers to "steps taken to consider whether the other person consents" It could be improved by reading "steps taken to consider whether the other person *does not consent*". This may have the desired effect of casting scrutiny on the conduct of an accused to ascertain if the other person is not consenting and may assist with proof of indifference.

5.9.2 Such other scrutiny as is already required by virtue of the broad terms of s 61HA (3) (d) is appropriate. It directs the attention of the tribunal of fact to "*all* of the circumstances of the case". It is the broad nature of this section that provides the scope for the tribunal of fact to be directed to the pertinent circumstances in particular cases. An example might be, where admissible, a history of domestic violence between the parties and the complainant's likelihood of non-consensual submission in the face of such a history. It provides for a consideration of a multiplicity of factors that were identified as being potentially relevant in *R v XHR* [2012] NSWCCA 247 at [62].

5.9.3 For these reasons the Association supports retaining the current requirement for steps in s 61HA (3)(d) however with the language corrected to both clarify and assist the jury as set out

at 5.9.1 above and, as supplemented with appropriate directions including those consistent with the comments of Bellew J in *Lazarus* clarifying that the steps might be limited to a mental process based on observations, perceptions or experience which would constitute matters about which there was evidence from the complainant or others in the case.

5.9.4 The Association is of the opinion that the proposal in 5.9.1 above is more likely to direct attention to the conduct and perceptions of the accused. The Association does not agree that including a person's consideration or reasoning in response to things or events that he or she hears, observes or perceives is erroneous or requires amendment. It is not merely a subjective thought that provides reasonable grounds and this would be a misreading of the judgment in R v Lazarus *[2017]* NSWCCA 279 at [147]. It is the consideration or reasoning in combination with the things or events heard, observed or perceived that may form the reasonable grounds. Sexual intercourse may often occur as an interaction between two people with an absence of words. There should not be criminalisation of sexual intercourse (and each act of it) in the absence of verbally sought and given consent, just as it should not be necessary to prove lack of consent that there was a verbal rejection of consent. The Association does not support the need for there to be "positive action" to constitute a "step". There will always be attention given to the actions of the complainant during the course of cross-examination because of both the nature of sexual relations and the consideration of lack of consent in a consent-based model. The Association suggests that the simplification of the task in relation to steps as set out at 5.9.1 above will assist in both requiring scrutiny of the steps taken by an accused and casting the consideration in terms that are in line with the issues faced by the jury, thereby assisting the formulation of judicial directions.

Question 5.10: considering other matters

(1) Should the law require a fact finder to consider other matters when making findings about the accused's knowledge? If so, why? If not, why not?
(2) If so, what should the other matters be?

5.10.1 The law should not require the fact finder to consider other specific matters in making findings about the accused's knowledge beyond those matters to which their attention is already drawn in the legislation.

5.10.2 The directions that a judge gives the jury or themselves should be sufficient to take into account those matters that might be raised in the course of the evidence.

5.10.3 So far as the issue of "other matters" in concerned, the issue of self-induced intoxication is dealt with in the following question.

Question 5.11: Excluding the accused's self-induced intoxication

(1) Should a fact finder be required to exclude the accused's self-induced intoxication from consideration when making findings about knowledge? If so, why? If not, why not?
(2) Should the legislation provide detail on when the accused's intoxication can be regarded as self-induced? If so, what details should be included?

5.11.1 The Association's concerns about retaining s 61HA (3) (e) are set out in our preliminary submissions[4] and are canvassed in the Consultation Paper[5].

5.11.2 Where the fact finder is being asked to assess the knowledge of the accused, disregarding the self-induced intoxication of the accused when there is a subjective component to the question of knowledge is potentially unrealistic and, at times, may result in unjust results. When both adults are self-intoxicated and one is deemed not to be intoxicated, this may also be perceived as a potentially unfair way to assess the activity between them leading to the difficulties observed by Quilter set out in the Consultation Paper at [5.100][6].

5.11.3 However, self-induced intoxication should not be a defence to sexual assault and is not taken into account in many very serious crimes. For this reason, and contrary to our preliminary submission, the Association considers that a fact-finder should be required to exclude the accused's self-induced intoxication when making findings about knowledge. The Association considers the law imposing this level of accountability may encourage responsible decisions antecedent to embarking on a course of self-induced intoxication.

5.11.4 Self-induced intoxication is defined in s 428A of *the Crimes* Act and this definition is clear and sufficient.

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[4] NSW Bar Association, Preliminary Submission PC047, 6
[5] NSWLRC Consultation Paper 21 at 5.101
[6] J Quilter, Preliminary Submissions PC092, 12

Question 5.12: Excluding other matters

(1) Should the legislation direct a fact finder to exclude other matters from consideration when making findings about the accused's knowledge? If so, what matters should be excluded?
(2) Is there another way to exclude certain considerations when making findings about the accused's knowledge? If so, what form could this take?

5.12.1 The Association does not consider that the fact finder should be directed by the legislation to exclude other matters from consideration. It is for the fact finder to consider those matters that inform their decision about the knowledge of the accused. An attempt to legislate such a matter is undesirable in light of the multiplicity of scenarios in which an allegation of sexual assault might arise.

Question 5.13: A single mental element

(1) Should all three forms of knowledge be retained? If so, why? If not, why not?
(2) If not what should be the mental element for sexual assault offences?

5.13.1 The Association has addressed this above. Actual knowledge of lack of consent should be retained and a test based on indifference adopted for the reasons outlined above and in the preliminary submission.

Question 5.14: Knowledge of consent under a mistaken belief?

Does the law regarding knowledge of consent under a mistaken belief need to be clarified? If so how should it be clarified?

5.14.1 The Association considers that the law regarding knowledge of consent under a mistaken belief does not need to be clarified.

Question 5.15: Other issues about the mental element

Are there any other issues about the mental element of sexual offences that you wish to raise?

5.15.1 The Association has no further issue to rise about the mental element of sexual offences.

Question 6.1 Upcoming amendments

(1) What are the benefits of the new s 61HE applying to other sexual offences?
(2) What are the problems with the new s 61HE applying to other sexual offences?

(3) Do you support applying the legislative definition of consent and the knowledge element to the new offences? If so, why? If not, why not?

6.1.1 A benefit of the new s 61HE applying to other sexual offences is that it will simplify directions in trials where there is a combination of sexual conduct alleged by harmonising the law as to lack of consent across various sexual offences. However, the Association considers that the potential difficulties outweigh the benefits and repeats the matters raised in the submission above in relation to the current s 61HA.

6.1.2 In addition, the word "victim" where it appears in s 61HE (3) and (4) should be replaced with the words "the other person". This preserves the domain of the jury to determine in accordance with the onus of proof whether the accused is guilty or not guilty of the conduct alleged and preserves for sentencing the term "victim" as opposed to "complainant" which is used prior to conviction.

6.1.3 The new provision is also complicated by the adoption of the words "with or towards" and "incite". A jury will now need these additional elements explained to them. The term "towards" has not previously applied to sexual assault and it is likely that there may be appeals to determine the scope of the provision if it is relied on in a sexual assault trial. The most recent High Court guidance on these words in the context of sexual activity was in the decision of *Crampton v The Queen* (2000) 206 CLR 161, where a distinction between "with" (actual participatory conduct voluntary or involuntary with the other person/complainant) and "towards" (an act committed in the presence of the other person for the sexual satisfaction of the first person) was explored and maintained in an act of indecency case. The High Court was "content" to maintain the distinction given a lack of sufficiency in the evidence in that case. Different considerations will be raised by a case alleging sexual assault by sexual intercourse towards a complainant. It is submitted that the use of this term may unwittingly capture conduct that is in truth not sexual assault but a lesser offence. It may also lead to problems in directions to juries if directions on lack of consent are given as one in relation to several different kinds of conduct, without distinction between the evidence relied on as acts, lack of consent and knowledge of lack of consent on each count. It should not promote the running together of the states of mind of an accused at different times and on different counts which are to be considered on many occasions, as a matter of fairness to both the complainant and the accused, as separate incidents.

6.1.4 The heading in subsection (3) should read "Knowledge of lack of consent". The Association repeats its call for the simplification of the language in terms that accord with the jury's task as to determination of lack of consent. Should the substance of s 61HE be retained, subsections (3) (b) and (c) should be reworded to make the task of the jury simpler, as should subsection (4) (a) (which in Appendix B is numbered (4) (d)).

Question 6.2: Language and structure

(1) Should changes be made to the language and/or structure of s 61HA (and the new s 61HE)? If so, what changes should be made?
(2) Should the definition of "sexual intercourse" be amended? If so, how should sexual intercourse be defined?

6.2.1 The Association has outlined several concerns with the language and structure of s 61HA and the new s 61HE in this submission and made suggestions for the amendment of the section to simplify and streamline the issues for consideration of the jury.

6.2.2 The Association supports the proposed amendment of the definition of "sexual intercourse" to remove the words "(including a surgically constructed vagina) of a female person" and instead use the phrase "penetration of the genitalia or anus of a person". The Association agrees that penetration of the penis may also occur and should be included in the definition of sexual intercourse. If necessary the words including surgically constructed genitalia" could also replace the words currently in brackets in the definition.

Question 6.3: Jury directions on consent

Are the current directions on consent in the NSW Criminal Trial Courts Bench Book clear and adequate? If no, how could they be improved?

6.3.1 The Association considers that the current directions in the Bench Book do not provide the clarity or sufficiency that is desirable. The suggested directions could be improved through a review being conducted with a focus on the task of the jury in determining lack of consent and knowledge of lack of consent and on the onus of proof. This submission has sought to highlight ways in which this could occur. The Association does not intend to conduct a word for word review of the current directions in the Bench Book given that first, new provisions are about to commence and second, the report from the NSWLRC may recommend further changes to the legislation. Instead the Association suggests that when

the law is settled, a review should be conducted of the suggested Bench Book direction beyond the immediate corrections required to avoid confusion and as recommended in the body of this submission as to the proper focus in the context of the current legislative provisions on lack of consent and knowledge of lack of consent. The Association has also submitted that given the large variety of circumstances in which sexual assault may take place, there should be matters cast as suggested alternatives if arising in the factual circumstances of the case to guide judges' directions on matters such as withdrawal of consent and other matters as set out above at paragraphs [3.2.8] and [4.1.4]-[4.1.6].

Question 6.4 Jury directions on other related matters

Should jury directions about consent deal with other related matters in addition to those that they currently deal with? If so, what matters should they deal with?

6.4.1 The current law already addresses a number of "rape myths". Section 294 *Criminal Procedure Act 1986* requires a trial judge to direct that the absence of complaint or a delay in complaining does not necessarily indicate that the allegation that the offence was committed is false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault. Section 61HE(9) *Crimes Act 1900* provides that a person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity. The newly introduced s 293A *Criminal Procedure Act 1986* addresses the reasons why there may be differences in the accounts given by complainants in matters involving prescribed sexual offences. These directions are also buttressed by s 294AA *Criminal Procedure 1986*, which prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant, eliminating what used to be known as a *Murray* direction.

6.4.2 It is therefore clear that the legislature has already gone some way to the eradication of "rape myths". In those circumstances, the Association sees only a limited need for further directions related to the topic of consent. Nevertheless, the Association submits that it would be appropriate for the Bench Book to contain guidance for cases where on the facts it is relevant for jurors to be directed that "lack of consent may be established even where there is no violence and a lack of physical injury".

6.4.3 The Association does not see a need for a specific legislated direction concerning the withdrawal of consent. As was noted by the Consultation Paper at [3.80], the present definition of "sexual intercourse" in s 61HA (d) *Crimes Act 1900* includes the "continuation of sexual intercourse..." and so the issue of withdrawal is already sufficiently addressed by the legislation. Again, guidance may be given in the model directions in the Bench Book for cases where this issue arises on the facts.

6.4.4 The Association submits that the appropriateness of other directions should be left to be determined on a case-by-case basis by the trial judge. While at first blush it might seem beneficial to guide the jury's fact-finding process as much as possible by providing still further directions, an appropriate balance must be struck. Every additional direction will invariably add to the length of the summing-up and the number of considerations operating on the jurors' minds. As McHugh J. observed in *KRM v The Queen* (2001) 206 CLR 221 at [37], *"The more directions and warning juries are given the more likely it is that they will forget or misinterpret some directions or warnings."* Accordingly, the introduction of ever more mandatory directions may well detract jurors from their task. Instead, guidance in directions which may arise in a given case should be in the Bench Book.

Question 6.5 Legislated jury directions

(1) Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed?
(2) What are the benefits of legislated jury direction on consent and/or other related matters?
(3) What are the disadvantages of legislated jury directions on consent and/or other related matters?

6.5.1 While the Association acknowledges that consistency in the directions given is to be encouraged, this should be achieved by the availability of model directions in the Bench Book. The experience of the Association's members is that the Bench Book is relied on by trial judges and practitioners alike for guidance

6.5.2 The introduction of statutorily mandated directions may constrain the ability of trial judges to tailor the directions to the particular circumstances of the individual case. Moreover, as is noted by the Consultation Paper at [6.46], directions enshrined in statute would require a

formal statutory amendment to be altered. The present system of amendment by the Judicial Commission is a swift and effective way of giving effect to changes.

6.5.3 For those reasons, the Association does not support a model which would require directions to be defined by statute and instead supports the present system of amendment by the Judicial Commission.

Question 6.6 Amendments to expert evidence law

(1) Is the law on expert evidence sufficiently clear about the use of expert evidence about the behavioural response of people who experience sexual assault? If so, why? If not, why not?
(2) Should the law expressly provide for the introduction of expert evidence on the behavioural responses of people who experience sexual assault? If so, why? If not, why not?

6.6.1 While in the experience of the Association's members, the prosecution does not often rely upon expert evidence relating to the behavioural response of persons who experience sexual assault, that is not due to any deficiency in the current law. Section 79 *Evidence Act 1995* permits expert evidence to be given. Moreover, s 108C of the *Evidence Act* excludes from the operation of the credibility rule (with leave) expert evidence which could substantially affect the assessment of the credibility of a witness. Subject to the court being satisfied, to use Gleeson CJ's characterisation of the such evidence in *HG v R* (1999) 197 CLR 414, that the evidence is not a 'combination of speculation, inference, personal and second-hand views as to the credibility of the complainant' involving a process of reasoning which went well beyond the field of expertise, the present law (therefore) clearly allows for the admissibility of appropriately qualified expert evidence of the kind envisaged by the Consultation Paper at [6.53]-[6.54]. This is illustrated by cases both at first instance and on appeal, see, e.g., *Hoyle v. R* [2018] ACTCA 42; *MA v. R* (2013) 40 VR 564.

6.6.2 Accordingly, there is no deficiency in the law which needs to be remedied. Instead, it is a matter for those appearing to elect whether to present such evidence in the particular case or not. Such forensic decisions would not be assisted by an amendment along the lines of s 79(2) and s 108C (2) *Evidence Act 1995*, relating to child sexual offences.

Conclusion

As stated in the preliminary submission made on behalf of the Association, should the Commissioner and the NSWLRC like to meet with members of the Association to further discuss any of the issues raised in these submissions, we would be delighted to make such arrangements.

If you have any questions please do not hesitate to contact the Association's Executive Director, Mr Greg Tolhurst on

Yours sincerely

Tim Game SC
President