Children's Court of New South Wales

15 November 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 draft proposals in the review of law relating to consent in relation to sexual offences.

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 proposals set out in the Draft Proposals Paper that are of particular relevance to the work of the Children's Court.

Proposal 4.1: Interpretive principles

Whilst the Children's Court is supportive of the content of the proposed interpretive principles, the Court is of the view that their characterisation as

"interpretive principles" means they may have little practical utility in court proceedings. It is unlikely that questions of statutory interpretation will commonly arise, so their role in guiding interpretation will be very limited. Indeed, unless they are made the subject of a jury direction, it is difficult to see any practical role for the interpretive principles to play. They may have more practical utility if they were characterised in some other way, for example as objectives.

Proposal 7.1: Knowledge about consent

As per our earlier submission, the Children's Court disagrees that the concept of recklessness is "well-developed and well understood". It is an idiosyncratic term with a technical meaning that would not be well understood by a non-lawyer. Nor is its content well-settled; indeed, it appears to have a different legal content depending upon the offence to which it is applied. For example, in sexual offences, both advertent and non-advertent recklessness create a guilty state of mind (i.e. the accused considered the possibility the complainant wasn't consenting but went ahead anyway; or the accused did not consider the possibility at all, even though the risk would have been obvious). However, since *Blackwell v R* (2011) 81 NSWLR 119 and the subsequent enactment of the *Crimes Amendment (Reckless Infliction of Harm) Act 2012*, non-advertent recklessness does not appear any longer to create a guilty state of mind in relation to offences of violence involving the reckless infliction of injuries (e.g. s 33, s 35, s 112 *Crimes Act 1900*). The Children's Court recommends dispensing with the term "reckless", and replacing it with a short substantive alternative which actually encapsulates its intended meaning.

Within the context of the draft proposals, the Children's Court strongly supports the draft reasonable belief test, and the accompanying s 61HK(2).

Proposal 8.1: A mandatory direction

The Children's Court agrees that jury directions are highly desirable in order to displace a number of misconceptions about sexual assault which appear to be deeply held by some sections of both the legal profession and the community. The topics addressed by the proposed directions are generally appropriate and well-considered. However, the content of some of the proposed directions, particularly that in s 292(5), is so vague as to provide no meaningful guidance to a tribunal of fact. The issue of examining assumptions, stereotypes and preconceptions is critical to accurate fact finding, as has been demonstrated by an abundance of research. Accordingly, the Children's Court recommends that an expert panel be convened to prepare more useful content for the proposed directions. Such a

panel should include members with expertise in psychology, criminology, victimology and jury research.

Proposal 9.1: Definitions

In the experience of the Children's Court, the term "Sexual act" has created confusion since its introduction, both to lawyers and to lay people. Although the term is given a very limited and specific meaning in the *Crimes Act 1900*, many people naturally tend to view it as encompassing any conduct with a sexual component, including more serious conduct that is separately defined. This is not surprising – sexual intercourse and sexual touching are, in a lay sense, patently sexual acts, though they are not defined as such. The risk of confusion becomes greater when dealing with legislation outside the context of the *Crimes Act 1900* – for example, when dealing with issues under the *Child Protection (Offenders Registration) Act 2000.* The Children's Court recommends that consideration be given to renaming the "Sexual Act" offences.

Should you have any further questions in relation to these matters, please contact me or my Research Associate, Darcy Jackman, on [redacted].

Yours sincerely,

[redacted]

Judge Peter Johnstone
President