THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

RESPONSE TO THE DRAFT PROPOSALS OF THE NSW LAW REFORM COMMISSION'S INQUIRY INTO CONSENT IN RELATION TO SEXUAL OFFENCES

Submission to the NSW Law Reform Commission

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The NSW Young Lawyers Criminal Law Committee ("the Committee") makes the following submission in response to the Draft Proposals of the NSW Law Reform Commission's Inquiry into Consent in relation to Sexual Offences.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Criminal Law Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Overview of Submissions

The Committee has made two previous submissions to the New South Wales Law Reform Commission ("the NSWLRC") in the course of its review of consent in relation to sexual offences. The Committee also participated in a roundtable discussion as a part of the review process. Throughout this process the Committee has broadly maintained a consistent position on the reforms we consider necessary. That position can be summarised as:

- The Committee supports a communicative model of consent and amendments that further incorporate that model within the statutory definition of consent;
- An affirmative statutory model of consent, such as that adopted in Tasmania, has many benefits, but also has some limitations;
- Any change to the statutory model of consent – be it toward a communicative, affirmative or affirmative communicative model – will be limited in its effect if it is not accompanied by community education initiatives;
- A list of non-exhaustive factors that negate or may negate consent *must* be maintained within the legislation; and
- The current jury directions on consent suffer from a lack of clarity.

The Committee is now pleased to confirm our support for many of the NSWLRC's Draft Proposals. The Committee is particularly supportive of the suggested s 61HI and is pleased to see the adoption of sub-divisions concerning the withdrawal of consent and the use of contraception; these are areas on which the Committee has previously made strong submissions.

However, the Committee retains some concerns. Our concerns fall into four areas:

- That the proposed s 61HJ(1)(b) lacks clarity and guidance as to when a person will lack the capacity to consent;
- That the proposed s 61HJ(1)(g) concerning where consent is "fraudulently induced" is overly vague and broad;
- That the proposed s 61HK should clearly state what must be known about a circumstance in which there is no consent; and
- That the proposed jury directions may not fulfil their purposes.

This submission will first address the proposals the Committee supports, and then the above four areas of concern in turn.

Proposals supported by the Committee

The Committee strongly supports the proposed s 61HI in its entirety, and strongly supports proposed s 61HJ(1)(a) as a complimentary provision enshrining a communicative model of consent.

The Committee previously made submissions in support of a communicative model of consent. The communicative model, as the Committee previously submitted, has many advantages as well as a sound policy basis. The proposed ss 61HI and 61HJ(1)(a) together provide guidance as to when a person "freely and voluntarily" consents to sexual activity, and also reduces any undue burden on a complainant to resist or communicate their lack of consent. In this way, the Committee recognises that the proposal appropriately militates against concerns an affirmative model might not recognise the practical reality of how consent is often negotiated and communicated through non-verbal actions, a matter that was previously of concern to the Committee.

Notwithstanding the Committee's strong support, the Committee again recognises that the affirmative communicative model may, in the realities of a jury trial, cause undue focus on the behaviour of complainants. In particular, the Committee is concerned it may cause an increased pursuit of lines of cross-examination focussing on a complainant's sexual history and the ways they have previously communicated consent by non-verbal means. Although s 293 of the *Criminal Procedure Act 1986* operates to prevent such lines of questioning, and is commonly and appropriately applied in practice, the Committee remains concerned that the protection afforded by that section may, in practice, be limited if such evidence is interpreted as falling within the exceptions contained in sub-paras (4)(a)(i) and (4)(b) of s 293. While the Committee recognises that proposed ss 61HI(5) and 61HK(1)(c) may ameliorate the situation referred to above, the Committee encourages close attention be paid to the use of evidence of past sexual activity in trials for sexual offences to monitor for such unintended consequences of the proposed reforms.

The Committee also strongly supports the adoption of paras (2), (4) and (6) of proposed s 61HI concerning the withdrawal of consent and the use of contraception.

Proposed s 61HF, "the interpretive principles", has the broad support of the Committee; however, the Committee submits that the scope of their use would be clearer were the "principles" referred to as the "purposes" of the subdivision. The Committee suggests "purposes" provisions are commonly used as interpretive principles in situations requiring application and interpretation; referring to them as such provides greater guidance as to their use.

With the exception of proposed sub-paras (1)(b) and (1)(g) (discussed below), the Committee strongly supports proposed s 61HJ, and in particular we welcome the simplification of the circumstances in which there is no consent. The Committee is also pleased by the simplification of the "no reasonable grounds test" contained in s 61HK(1)(c).

The Committee supports the proposed changes to the meaning of "sexual intercourse". In particular, the Committee supports the widening of "sexual intercourse" to include the licking of a person's anus as contained in the proposed s 61HA(b). The Committee also supports the modification of s 61HA to include the licking of a penis within the definition of "sexual assault".[1] This will in effect render s 61HA gender-neutral. Currently s 61HA(b) refers only to the introduction of any part of the penis into another's mouth and therefore requires an element of penetration. The Committee submits that penetration of the mouth need not be the demarcation between sexual assault and sexual touching, as there is no good reason to render the licking of a penis a lesser criminal act than the entry of the penis into the mouth, or the licking of a vagina. In each of these situation, the person's genitalia is subject to oral contact by another person. When such contact occurs without consent, the Committee's view is, on balance, that the degree to which the complainant's sexual autonomy is invaded is commensurate. Accordingly, what is commonly referred to as "oral sex" is distinguishable, and should be distinguishable from sexual touching.

Finally, the Committee broadly supports the introduction of a single legislated mandatory jury direction, and several legislated discretionary jury directions; however, the Committee has some reservations about their ability to address problems that arise in jury trials for sexual offences. We note that the Committee previously opposed legislated directions. The Committee, upon reflection, supports the flexible model adopted by the NSWLRC that leaves to a judge's discretion the words of each direction in each case. The Committee recognises that the NSW Judicial Commission will be required to re-draft many current directions on consent should the NSWLRC's proposals be enacted. The Committee would welcome the opportunity to be heard in relation to the re-drafting process.

Proposed s 61HJ(1)(b) – Capacity to consent

The proposed s 61HJ(1)(b) does not provide adequate guidance as to its application to people with cognitive impairments.

[1] No change has been caused to the licking of female genitalia as the licking of the of the vagina fell within the definition of sexual intercourse regardless of the degree of penetration per *BA v R [*2015] NSWCCA 189 at [9].

It has been the experience of Committee members that unique issues arise in trials in which a person is accused of a sexual offence against a person with a cognitive impairment.[2] Committee members expressed that, in their experiences, it can be difficult to ascertain a clear lack of "actual consent" from complainants with cognitive impairment in the sense that these complainants do not always express "I did not want the accused to do that act." In Committee members' experiences, complainants with cognitive impairments will often express an equivocal view about consent, deferring instead to related considerations such as how the act felt or whether they were in a romantic relationship with the accused. Accordingly, cases involving complainants with cognitive impairments turn on ascertaining their capacity to consent, rather than their "actual consent".

The Committee recognises that proposed s 61HJ(1)(b) largely replicates the current s 61HE(5)(a), notwithstanding the removal of the words "including because of age or cognitive incapacity". The Committee understands, but does not agree, with the NSWLRC's reasons for omitting those words. Indeed, it is unclear what else s 61HJ(1)(b) could possibly contemplate other than lacking capacity for cognitive impairment, given the remaining sub-paragraphs of s 61HJ. Accordingly, the Committee submits that it is better to retain the words "because of cognitive impairment", or that further legislative guidance should be provided as to the other types of incapacity which the NSWLRC contemplate should be captured by the sub-paragraph.

Notwithstanding that issue, the Committee's submission, both the current s 61HE(5)(a) and the proposed s 61HJ(1)(b) do not provide guidance as to how to deal with the issue of consent in relation to people who may or may not lack capacity due to a cognitive impairment. There are two limbs to the Committee's concerns in this regard.

First, the Committee is concerned that the terms of s 61HJ(1)(b) are capable of conveying that a person with a cognitive incapacity can never consent to sexual activity. The Committee supports the principle that all people have a fundamental right to choose whether or not to participate in a sexual activity, including people with a cognitive impairment. The Committee recognises that this is one of the NSWLRC's proposed interpretive principles. Accordingly, the Committee recognises that the NSWLRC did not intend to frame s 61HJ(1)(b) in a way that would permit an interpretation that cognitively impaired people cannot consent to sexual intercourse. However, the chapeau of s 61HJ(1) is in mandatory terms: a person *does not consent* if they do not have the capacity. While the interpretive principle in s 61HF(a) would militate against that construction, the Committee submits that it is preferable to express s 61HJ(1)(b) in terms that clearly convey that a person with a cognitive impairment does not consent to sexual activity where they "lack the capacity to

[2] The Committee notes that s 66F only covers situations in which the accused is a person responsible for the care of a cognitively impaired person, and situations in which the Crown can prove that the sexual activity was committed with the intention of taking advantage of the person's cognitive impairment. Accordingly, s 66F does not cover the field of sexual offences with people with cognitive impairments.

consent to *that* sexual activity". Alternatively, the Committee would also support the inclusion of the words "in that situation," at the beginning of 61HI(1)(b).

The second limb of the Committee's concerns is that no guidance is provided as to what constitutes a lack of capacity. If it is accepted that people with cognitive impairments do not always lack capacity to consent, that capacity becomes situational. Therefore, a non-exhaustive list of factors dictating situational capacity to consent should be included in the legislation. Such a list has multiple advantages. First, it is a hallmark of good law reform that the law is able to be known. It would provide certainty to people with cognitive impairments, people who have sexual relationships with those people, and carers of people with cognitive impairments. Second, it would also provide guidance to legal practitioners, judges and juries when it falls to determine the issue at trial. Third, a non-exhaustive list would focus jurors' minds on considerations relevant to the assessment of a capacity to consent, rather than irrelevant considerations, such as the child-like manner in which people with cognitive impairments may present, or the expectation that a person with a cognitive impairment will present in a child-like manner but does not in an individual case.

In the Committee's submission, a non-exhaustive list of things a jury *should* consider in determining whether a person lacked the capacity to consent due to a cognitive impairment should include: (i) that the person with the cognitive impairment understood the nature of the sexual act (i.e. that it was sexual); and (ii) that the person with the cognitive impairment understood the possible consequences of a sexual act of that kind (e.g. sexually transmitted diseases or pregnancy). The Committee submits that further considerations will arise in various cases, such as the specific circumstances of the sexual activity, but that they are better left to the discretion of a trial judge in the individual case. In order to refine this suggestion, it may be that the NSWLRC is required to undertake further consultation with experts in the social habilitation of people with cognitive impairments and stakeholders. The Committee supports this approach.

Proposed s 61HJ(1)(g) – No consent where a person "is fraudulently induced to participate in the sexual activity"

The Committee submits that s 61HJ(1)(g) is overly broad.

The Committee is concerned that, at present, the proposed sub-paragraph does not place a limit on the types of fraud that would constitute a circumstance in which there is no consent, other than that they must induce a person to participate in sexual activity. From common experience, people engage in sexual activity for diverse

reasons, and the current proposal could encompass fraudulent representations ranging from serious to trivial. While the Committee appreciates that the Draft Proposals envision false representations that can sensibly vitiate consent (the example given is where someone represents they will pay for the sexual activity but do not), the words of the proposed section do not reflect this, and capture fraud of "any kind". A limitation must be applied.

However, not all misrepresentations are easily categorised into "trivial" or "serious", and it is undesirable to leave the ultimate discretion to the prosecuting authorities. For example, it is unclear whether false representations about the following would constitute circumstances in which there is no consent:

- False representation as to someone's age;
- False representation of someone's biological sex; or
- False representation as to someone's HIV status.

The Committee submits that it is undesirable, and likely unintended by the NSWLRC, to punish these forms of misrepresentation. Indeed, recent amendments to health legislation were intended to decriminalise non-disclosure or false representation about a person's HIV status, in favour of ensuring compliance with a health-based regime with penalties for failing to take "reasonable precautions against spreading the disease".[3] From the Second Reading Speech for the Bill in the Legislative Council, it is clear that the amendments followed the recommendation of the NSW Health "Report on the Statutory Review of the NSW Public Health Act 2010" which found that criminalising non-disclosure was counter-productive to public health outcomes.[4] In the Committee's submission, this is particularly salient where it may not be safe for a person to communicate their HIV status, despite taking reasonable precautions against spreading the disease. Similarly, it may not be safe for a person to communicate the sex they were assigned at birth. The Committee is concerned that these kinds of misrepresentations or "frauds" would be captured by the proposed s 61HJ(1)(g). The Committee accordingly submits that the sub-paragraph must be amended or removed.

In the Committee's submission, the behaviour with which the sub-paragraph is concerned is largely captured in the foregoing sub-paragraphs to the section. Importantly, it is possible to capture the common mistaken beliefs that might arise from fraudulent inducement by including these in the proposed s 61HI(1)(f), such as by retaining the provisions of the current s 61HE(6) as they relate to a mistaken belief that a person is married to another person. Further, it is possible to draft a standalone provision to deal with sexual activity entered into for the purposes of payment where payment is not made. The Committee submits the certainty of specifically

[3] See *Public Health Amendment (Review) Act 2017*, Schedule 1 [32] which commenced in October 2017 and is now found in. s 79 of the *Public Health Act 2010.*
[4] NSW Health, Report on the Statutory Review of the NSW Public Health Act 2010 (17 November 2016) p 36.

capturing those examples is preferable to the uncertainty created by the proposed s 61HJ(1)(g), particularly in the face of the way in which the proposed s 61HJ(1)(g) may disproportionally affect LGBTIQ people.

Proposed s 61HK and knowledge of negating circumstances

The Committee respectfully disagrees with the NSWLRC's analysis of the proposed s 61HK at paragraphs 7.26 – 7.28 of the proposals paper. The Committee submits it would be helpful to include a paragraph clearly stating what an accused person must know in respect of circumstances in which a person does not consent.

While the Committee accepts that it will largely be clear that a person knows another person doesn't consent where they know of, for example, their intoxication, other circumstances included in s 61HJ are not as clear. In particular, the Committee submits that it is not clear whether, in respect of the circumstances contained in s 61HJ(e) – (g), whether an accused person must know only about the force/coercion/mistake/fraud/etc, or whether the accused person must also know that the person participates in the sexual activity *because of* force/coercion/mistake/fraud/etc. The Committee submits that the position should be made clear in s 61HK.

Proposed jury directions

In principle, the Committee broadly supports the mandatory direction and the discretionary directions proposed by the NSWLRC. However, members of the Committee expressed concern that while the directions encourage jurors to interrogate their assumptions and not reason according to "rape myths", directions may have little effect on jurors' pre-conceived prejudices.

While the law may assume that jurors follow directions in accordance with their oath,[5] from a law reform perspective, the concern that juries will not follow directions is of concern. Indeed, the Committee notes the recent empirical research suggesting that jury directions make little difference to mock juries' deliberations.[6]

The Committee submits that its previously stated positions are more likely to reduce the use of rape myths and improper reasoning in jury deliberations. That is, the Committee reiterates its support for increased clarity of jury directions regarding consent (the Committee notes this is facilitated by the NSWLRC's focus on the simplification of the provisions), increased public education on issues surrounding consent and the importance

[5] See e.g. *Gilbert v The Queen* (1999) 201 CLR 414 at 425.
[6] Goodman-Delahunty, Cossins, and Martschuk *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* (2016, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney) p 204.

of a communicative approach to consent, and increased use of question trails in trials. Indeed, the above research cited can be contrasted with the same research that showed that question trials overall increase the efficiency of jury deliberations and decreased the amount of hung juries.[7]

Conclusion

The Committee welcomes the proposals of the NSWLRC and congratulates the NSWLRC on the progress made to date. Despite the areas of concern expressed above, the Committee looks forward to the reform process continuing, and we welcome any opportunity to discuss the above submissions further.

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[7] Ibid, p 222.