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

By email: [nsw-lrc@justice.nsw.gov.au](mailto:nsw-lrc@justice.nsw.gov.au)

Dear Judge

## REFERENCE ON CONSENT AND SEXUAL OFFENCES

Thank you for the opportunity to make a submission in response to the Consultation Paper (October 2018).

The Consultation Paper covers an impressive range of important issues in relation to the Terms of Reference. This submission primarily addresses question 3 ‘The meaning of consent’ with some shorter reference to questions 4, 5 and 6.

Where relevant, cross-reference is made to my preliminary submission to the Inquiry (J Quilter, *Preliminary Submission PCO92*) without repeating the substance of that preliminary submission. For convenience, it is attached as **Attachment 1**.

It is noted that while the amendments made to the *Crimes Act 1900* (NSW) by the *Criminal Legislation Amendment (Child Sexual Assault) Act 2018* (NSW) had not commenced at the time the Consultation Paper was published, they commenced on 1 December 2018. As a result, where relevant, reference to both the former s 61HA and the new s 61HE will be made.

### 3. The meaning of consent – questions 3.1 and 3.2

In my *Preliminary Submission PCO92* I outlined (see ‘2. ACTUS REUS OF SEXUAL ASSAULT: CONSENT’ specifically ‘**Background: free and voluntary consent**’) how the current legislative focus on non-consent importantly altered the old common law focus on ‘rape’ being *against the woman’s will*, towards a communicative model of consent. In theory, it was intended that this would shift the common law’s problematic focus on physical resistance and injury towards a requirement that those engaged in sexual relations should actively communicate about consent.

I continue to support the retention of a first principles definition of ‘consent’. I have reflected further, however, on whether the words ‘free and voluntary agreement’ are serving the purpose of achieving a ‘communicative’ model of consent or an ‘affirmative’ consent

standard. While some version of the statutory formula ‘free and voluntary agreement’ has been widely adopted in Australian jurisdictions, it is no longer clear to me that these words adequately perform the intended function.

The word ‘freely’ suggests unencumbered, unambiguously given; and ‘voluntary’ presumably means both conscious, but also not coerced. It is noted, however, that the term ‘voluntary’ has a specific criminal law meaning in the context where a defendant raises evidence that a conduct component of an offence was not voluntary – such as in constructive murder. In this context, voluntariness simply means: minimum mental control over bodily actions (see *Ryan v The Queen* (1967) 121 CLR 205). This is a far more limited understanding of ‘voluntariness’ than is required to produce an affirmative consent standard. Arguably, this may cause confusion or limit the intended ‘richness’ of a communicative or affirmative consent standard.

Further, while the word ‘agreement’ may impart an ethical dimension to the concept of consent, it evokes ideas and values from contract law which may be problematic. Much feminist work has critiqued contract theory, particularly for assuming that ‘*individuals*’ freely contract and do so equally.<sup>1</sup>

The repetition of the words ‘free and voluntary agreement’ in many jurisdictions, including NSW, means that it is a formula that is familiar and, on the surface at least, reassuring. There is something performative about its use, because this suggests that its meaning is simple and widely understood. Yet, as the brief discussion above suggests, the definition is not self-evident or self-executing. On reflection (and contrary to my own earlier support for this formula), it tells us little about what consent is, what it should look like, or how we are to recognise it. We *are* of course told what it is *not* – for example, in the list of factors that automatically vitiate consent (ss 61HA(4) and (5); 61HE(5) and (6)) – but there are dangers in this negative approach to definition too (elaborated on below).

It is possible that the definition itself opens a ‘gap’ between what may be *intended* by the phrase and how that gap is filled in practice. Unfortunately, research suggests that such gaps are too often filled by ‘common knowledges’ (the things we are all assumed to know about a subject) based on stereotypes and rape myths. By rape myths I mean how closely the rape approximates what Estrich, more than 30 years ago, called ‘real rape’: perpetrated by a stranger; committed in a public place; results in injuries or a weapon is used.<sup>2</sup> Research has highlighted the continued impact of these myths despite the fact that most rapes do not occur under these circumstances<sup>3</sup> and despite extensive progressive legislative reform aimed at eroding them.<sup>4</sup> Numerous studies in Australia and in comparable jurisdictions have identified the preponderance of ‘rape myths’ as a continuing cause of the failure to deliver justice to victims.

For example, the NSW *Criminal Trial Courts Bench Book* standard direction on consent seems to play to rape myths, particularly around questions of resistance and persuasion:

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<sup>1</sup> See, for example, the early work of Carole Pateman in *The Sexual Contract* (1988).

<sup>2</sup> Susan Estrich, *Real Rape* (Harvard University Press, 1987).

<sup>3</sup> Liz Wall and Antonia Quadara, ‘Under the influence’ Considering the role of alcohol and sexual assault in social contexts’ (2014) ACSSA No 18

<sup>4</sup> For example, see Kathy Daly & Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ in M Tonry ed *Crime & Justice: A Review of research* v 39 (U Chicago Press, 2010) 565-650; Elisabeth McDonald, ‘From “real rape” to real justice? Reflections on the efficacy of more than 35 years of feminism, activism and law reform’ (2014) 45(3) *VUWLR* 487-508; Rachael Burgin, ‘Persistent Narratives of Force & Resistance: Affirmative Consent’, (2018) *Brit J Crim* (Online, 12 Oct).

## 2. Consent

[*The accused*] does not have to prove that [*the complainant*] consented; it is for the Crown to prove beyond reasonable doubt that [*she/he*] did not. What then, is meant by consent?

Consent involves a conscious and voluntary agreement on the part of [*the complainant*] to engage in sexual intercourse with [*the accused*]. It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways **such as the offering of resistance** although this is not necessary as the law specifically 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 ... [*see repealed s 61R(2)(d) Crimes Act 1900*]. **Consent which is obtained after persuasion is still consent** provided that ultimately it is given freely and voluntarily. ...

References to resistance and persuasion (which evoke the infamous 1993 remarks of Justice Bollen in the South Australian Supreme Court, referring to the acceptability of ‘rougher than usual handling’) are problematic and should be removed. The mention of such out-dated understandings of consent (even where it afterwards adds ‘*although this is not necessary as the law...*’) re-entrenches concepts of consent back into out-dated understandings of resistance and injury. Given my concern with this direction, it follows that in relation to **question 6.3** of the Consultation Paper, I would recommend improving the NSW *Criminal Trial Courts Bench Book* direction on consent to remove these aspects.

In relation to **question 3.1**, I am in favour of retaining a positive or expressed definition of consent. In relation to **question 3.2**, I recommend that consideration be given to another way of defining consent other than ‘free and voluntary agreement’ that might more powerfully indicate what consent to ‘sexual intercourse’ (‘sexual activity’) actually means.

## 4. Negation of consent

### Question 4.1: Negation of consent

In J Quilter, *Preliminary Submission PCO92*, I discussed the history of how the provisions leading to the list of automatic negation and ‘may negate’ consent provisions developed over time. Here too I acknowledge that there have been good reasons for developing this list. Nevertheless, ironically (given the legislative intent), such a list may be contributing to a reduction in the communicative power of the criminal law.

One issue in relation to the accumulated list of negation factors is that it reflects a tendency to legislate as a response to the identified need to ‘fix’ discrete problems – without necessarily looking holistically at the effect such ‘additions’ may have. The list is derived from particularly heinous cases where the courts found that consent was given to the act and hence there was no sexual assault (eg *Mobilio* [1991] VR 339 leading to s 61HA(5)(c)/61HE(6)(c) or *Papadimitropoulos* (1957) 98 CLR 249 leading to s 61HA(5)(b)/s 61HE(6)(b)). In this way, discrete problems are often ‘fixed’ with more law, via finer grained details that ‘immortalise’ the circumstances of the particular case in which the prevailing law did an injustice to an individual victim. This method of ‘fixing’ a problem may, however, have at least two unintended effects.

First, given that such amendments are usually a response to extreme/atypical cases, the new law does not reflect the majority of cases. Juries are given clarity about the extremes, leaving large 'grey areas' where most cases are likely to fall. For example, a jury is told consent cannot be given when a person is asleep or unconscious but what about where the complainant is awake but drowsy or tired; sleepy but awake and affected by alcohol? And probably more importantly, how do these factors assist juries in addressing questions where the complainant does not fit any of the categories created by the expressed factors? Most sexual assaults do not occur in doctor's surgeries, or relate to a person to whom the complainant thought they were married to or when a person is asleep or unconscious or unlawfully detained. There is a danger that outside these atypical scenarios, rape myths and associated assumptions about the presence of consent, might continue to operate.

Secondly, and relatedly, many of the express statutory exceptions codify consent around categories of what might be termed 'vulnerability' or incapacity. The person who is: cognitively impaired; asleep; under the age of consent; under a person's authority; unlawfully detained; threatened with force; mistaken as to the identity of the person etc. What is the wider effect of legislating categories of vulnerability and around extreme circumstances? What does it mean for the majority of sexual assault victims who may not fit the relevant criteria of 'vulnerability'?

Do these statutory arrangements exacerbate the traditional assumption that non-vulnerable persons can (and, by default, do) freely and voluntarily contract, based on their inherent capacity to consent to sexual intercourse. Is the Crown's task of proving that they did not agree/consent on this occasion made harder – or indeed, may it have the effect that matters falling outside such categories are not prosecuted at all? Is it possible that the legislation may amplify rather than mute a troubling social message: *'You should have made it clearer you weren't consenting because you have the capacity and personhood to do so – and there is nothing about YOU or the CIRCUMSTANCES that place you outside the traditional assumption that when sex occurs the parties consent.'*

It is true that the solution of 'fixing' proof of consent issues with more law may afford some victims the protection of the law to which they are entitled and avoid injustice. However, the unintended consequence may be that problematic dichotomies that have been at the heart of feminist criticisms of the criminal justice system for decades – true versus false victims; real versus false rapes – may be reproduced.

The submissions made in J Quilter, *Preliminary Submission PCO92* about the factors that 'may' negate consent are affirmed here; specifically in relation to the failure, in s 61HA(6)(a)/61HE(8)(a), to define 'intoxication' (and 'substantially intoxicated') and the risk that the provision may be operating as a 'double-edged sword'.

As I also submitted in J Quilter, *Preliminary Submission PCO92* it is strongly recommended that an evaluation of the current operation of the consent provisions including the negation provisions be undertaken. It is difficult to know how the automatic negation and 'may negate' consent provisions are functioning in practice and with what effects (both intended and unintended) without such an evaluation. We have had no systematic evaluation of the laws since the NSW Department of Women's *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996).

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

## 5. Knowledge about consent

In relation to **questions 5.2-5.9** I repeat the submissions made in J Quilter, *Preliminary Submission PCO92* ('3. MENS REA OF SEXUAL ASSAULT: KNOWLEDGE').

The submissions made in J Quilter, *Preliminary Submission PCO92* ('1. Preliminary Issues') regarding the new sub-sections 61HE(3) and (4) (which replace the former s 61HA(3)) are also repeated. In particular, I highlight the fact that the new s 61HE(4) does not simply reformat the final paragraph of the former s 61HA(3) into a new sub-section. Instead, '*For the purpose of making any such finding,*' it is no longer confined to sub-s (3) as it previously was. Arguably, the drafting of s 61HE(4) means the trier of fact must have regard to s 61HE(4)(a) and (b) in making 'any such finding'. Alternatively, s 61HE(4) will need to be read down to apply only to findings related to 'knowledge' (ie s 61HE(3)). This must be so given that the trier of fact can have regard to 'any self-induced intoxication of the person' (namely the complainant) in s 61HE(8)(a).

It is submitted that the Commission should recommend re-drafting s 61HE(4) to clarify that it applies '*For the purpose of making a finding in relation to s 61HE(3)...*'.

In relation to **question 5.11** the submissions made in J Quilter, *Preliminary Submission PCO92* (under '3. MENS REA OF SEXUAL ASSAULT: KNOWLEDGE' specifically '**self-induced intoxication: s 61HA(3)(e)**') are repeated.

In relation to **question 5.14** I repeat the submissions made in J Quilter, *Preliminary Submission PCO92* (under 3. MENS REA OF SEXUAL ASSAULT: KNOWLEDGE' specifically, '**Interaction between mistakes in s 61HA(5) and knowledge**').

## 6. Issues related to s 61HA

**Question 6.2 (1):** if s 61HE is to be retained in its current structure, the submissions made in J Quilter, *Preliminary Submission PCO92* regarding the position of the former s 61HA(7) are repeated in relation to the new s 61HE(9).

Similarly, if the list of automatic and may negate consent factors are to be retained, the submissions in J Quilter, *Preliminary Submission PCO92* as to the placement of *actus reus* elements first and *mens rea* second is repeated.

In relation to **question 6.3** the above suggested amendment to the NSW *Criminal Trial Courts Bench Book* direction on consent should be urgently made.

Yours sincerely



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