

1 February 2019

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

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

Dear Judge

Thank you for the opportunity to make a submission in response to the NSW Law Reform Commission's *Consent in Relation to Sexual Assault* (Consultation Paper 21, October 2018).

This submission is written by members of the Centre for Crime, Law and Justice, at the Faculty of Law, University of New South Wales. The views expressed in this submission are the views of the undersigned individuals.

In this submission we address the following questions posed in the Consultation Paper: 5.1(3), 5.3 and 5.8-5.10.

Q 5.1(3) Should "reckless" be defined in the legislation?

A: Yes.

We maintain the position expressed in our preliminary submission (McNamara et al, *PCO85*): given that recklessness has a unique meaning in the context of sexual offences, that meaning should be expressed in the *Crimes Act 1900* (NSW). We propose no change to the current common law definition (accurately reflected in the NSW Bench Book); simply that it be expressed in the current s 61HE(3).

Q 5.3(1) Should NSW adopt a "reasonable belief" test?

A: Yes.

Although we did not use the label "reasonable belief" test" in our preliminary submission (McNamara et al, *PCO85*), we note the Consultation Paper characterisation of our recommended amendment – replacing the current 'no reasonable grounds for believing' formulation with a "reasonable belief" test". We have no objection to that characterisation. Our position is that the current 'no reasonable grounds' formulation has not achieved Parliament's intention in adding a reasonableness component to the

fault element for sexual assault. We are aware that there is a view that the NSWCCA's interpretation of the current phrase is not as narrow as we contended in our preliminary submission (McNamara et al, *PCO85*) and that a reformulated 'reasonable belief' test would not be materially different to the status quo (see Dyer, *PCO50*, in Consultation Paper, p 73). Nonetheless, we remain of the view that legislative amendment is warranted so as to produce clarity. The alternative we suggested in our preliminary submission (McNamara et al, *PCO85*) – 'the person's belief in consent was not reasonable in all the circumstances' – will assist in ensuring that finders of fact undertake a holistic assessment of all of the relevant circumstances in determining whether the accused had the relevant 'knowledge'. This is preferable to leaving open the possibility that future trials may adopt a myopic focus on discrete grounds, given that, as the NSWCCA noted in *Lazarus v R* [2016] NSWCCA 52, [156], in 'contested cases ... there might be a reasonable possibility of the existence of reasonable grounds for believing (mistakenly) that the complainant consented and other reasonable grounds suggesting otherwise'.

Q 5.8(1) Should the legislation define "steps taken to ascertain consent"?

A: Yes.

It is highly likely that Parliament's intention in adding this phrase to the legislation was that it should refer to positive or explicit steps – usually words and/or actions. However, in *R v Lazarus* [2017] NSWCCA 279, [146]-[147], the NSWCCA interpreted 'steps' to include the accused's unexpressed thoughts ('consideration', 'reasoning'). Such an interpretation risks making the statutory reference to 'steps taken' largely redundant. Section 61HE(4)(a) should be amended to make it clear that the relevant inquiry is to words used (or not used) and/or actions performed (or not performed). Where the accused provides evidence of his unexpressed thoughts, this should not be regarded as evidence of 'steps taken'.

Q 5.10(1) Should the law require a fact finder to consider other matters when making findings about the accused's knowledge?

A: Yes.

We note that the Consultation Paper locates under this heading a recommendation contained in our preliminary submission (McNamara et al, *PCO85*): that the legislation should expressly identify as a relevant factor: 'the effect that any behaviour of the accused may have had on the behaviour of the victim at the relevant time'. In our view, depending on the facts of a case, this may be a relevant consideration in making a finding about whether the accused had 'knowledge' of the absence of consent. It is a consideration that sits alongside the 'steps taken' inquiry (discussed above) and both of these are matters which are particularly likely to be relevant where the Crown seeks to prove beyond reasonable doubt that the accused did not have a reasonable belief in consent (discussed above).

We would be happy to provide further elaboration on these recommendations.



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Yours sincerely

(on behalf of)

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