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Submission to the NSW Law Reform Commission review into Consent in Relation to Sexual Offences: Draft Proposals 18 November 2019

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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

Dear Judge

SUBMISSION ON NSWLRC – CONSENT IN RELATION TO SEXUAL OFFENCES: DRAFT PROPOSALS

Thank you for the opportunity to make a submission in response to the Commission's Draft Proposals (October 2019).

The Draft Proposals cover an impressive range of important issues. This submission focuses on the draft proposal in '6.3 Incapacity – Intoxication' with some brief reference to related proposals.

Building on the foundation of research we have undertaken with others (Seear and Room), which was discussed by Quilter in her preliminary submission (dated 29 June 2018), this submission draws on further research on intoxication evidence in sexual assault trials that we are currently undertaking.

1. Proposal 6: A single list of circumstances in which there is no consent

The Draft Proposals at 6 provides for a single list of circumstances in which there is no consent. As previously submitted by Quilter in her preliminary submission there is little utility in the current 'may' negate list contained in s 61HE(8) given that the Crown still has to prove there was no consent on the occasion in question. Quilter concluded:

> … at best the factors in sub-s (6) are symbolic; at worst, they may impact negatively on the complainant and the Crown case.

We therefore agree with shifting the factors contained in s 61HE(8) into the new proposed single list in s 61HJ.

2. Proposal 6.3 Incapacity – Intoxication

In her preliminary submission, Quilter identified a number of issues in relation to the current s 61HE(8)(a). These included the failure to define 'intoxication' and 'substantial' intoxication in s 61HE(8)(a) and the fact that, in practice, 'common knowledge' tends to fill this gap. Furthermore, our research raised concerns that intoxication evidence may be a 'double-edged sword': it may assist the Crown to prove non-consent but may nevertheless be used by the defence to argue that the complainant is less credible/reliable as a witness.

We accept that, as the Commission indicates, it is difficult to 'create a test that resolves' these issues completely. However, we have concerns about the wording of Proposal 6.3 for at least three reasons.

First, the proposed wording sets a very high level of intoxication: '*so affected* by alcohol or another drug as to be incapable of consenting'. We question whether such a factor, expressed in this way, will have utility over-and-above the primary definition of consent. Proposal 6.3 seems to simply be another way of saying that a person does not freely and voluntarily agree to the sexual activity and hence it is unclear what further guidance fact finders receive from this circumstance.

Secondly, the wording of proposed s 61HJ(1)(c) may overlap with at least two of the other proposed circumstances in which there is no consent, namely, Proposal 6.2 'the person does not have the capacity to consent' and Proposal 6.4 'the person is asleep or unconscious'. As the Commission notes in relation to Proposal 6.3, the phrasing 'directs attention to the complainant's *capacity* to consent,' which needs to be 'so affected' as to render the complainant incapable of consenting. In other words, this seems to be another way of saying that the person does not have capacity to consent (ie Proposal 6.2).

Furthermore, our current research suggests that the proposal sets such a high bar for intoxication ('so affected … as to be incapable') that it brings this circumstance very close to Proposal 6.4 ('asleep or unconscious'). We have reviewed more than 60 Australian appeal decisions in sexual assault matters (from 2010 to 2018) and our preliminary analysis suggests that the cases in which the fact of the complainant's non-consent/incapacity to consent were those instances in which the complainant was so intoxicated that she was asleep or unconscious.

Proposal 6.3 does not provide assistance for fact finders in determining when a person is so affected by alcohol or another drug that she is incapable of consenting to the sexual activity. How does a jury determine when that bright line has been crossed? What is the relationship between intoxication and capacity to consent to sexual activity? The provision provides no guidance on these crucial questions. Our current research suggests that there is presently little guidance in the courtroom in relation to the relationship between intoxication and cognitive functions such as consent. To the extent that evidence is admitted about the effects of

intoxication it is generally in relation to capacity to perform certain physical motor functions (such as walk, talk, text etc), or in relation to the effects of intoxication on memory. To the extent that expert evidence about the effects of intoxication features in trials (which is rare), such evidence tends to be related to the effects on a complainant's memory or reliability in recalling the events – important matters, but not illuminating on the crucial question of whether the Crown can prove non-consent, and whether evidence of the complainant's intoxication can be engaged to this end. Indeed, in only one case in our current study did an expert's evidence even touch on consent, and the nature of that mention was that the expert 'could not venture an opinion as to whether that had deprived the complainant of the capacity to consent.'[1]

Overall, we are concerned that Proposal 6.3 will be a circular exercise that will not materially assist fact finders in complex questions about the relationship between intoxication and consent.

If there is to be an express reference in proposed s 61HJ(1) to the circumstance of complainant intoxication – and given the available evidence of the association between sexual violence and alcohol/other drug consumption[2] we think there should be – we recommend that the circumstance should be worded in such a way as to give it meaning and significance, independent of other mentioned circumstances.

In expressing reservations about the proposed new wording, we acknowledge both that the current wording ('substantially intoxicated') is inadequate, and that the drafting exercise is a challenging one Nonetheless, given the importance of the matter, we recommend that further efforts be made to fashion an appropriate reference to intoxication in s 61HJ(1).

3. Proposal 8.3: Directions on specific misconceptions:

Draft Proposal 8.3 recommends amending the *Criminal Procedure Act* to include specific directions about misconceptions of sexual assault. Sub-section 10 includes:

> (10) **Behaviour and appearance of complainant**
> Direction—
> None of the following is, of itself, a reliable indicator that a person consents to a sexual activity—
> (a) the person's clothing or appearance,
> (b) the consumption by the person of alcohol or any other drug,
> (c) the person's presence in a particular location.

[1] *Mitic v The Queen* [2011] VSCA 373 (30 November 2011), [24].
[2] D Lievore, 'Prosecutorial decisions in adult sexual assault cases', *Trends & Issues in Crime & Criminal Justice* No 291 (AIC, 2005); V Stern, *Report By Baroness Vivien Stern CBE Of An Independent Review Into How Rape Complaints Are Handled By Public Authorities In England And Wales* (Home Office, 2010); H Flowe & J Maltby, 'An experimental examination of alcohol consumption, alcohol expectancy, and self-blame on willingness to report a hypothetical rape' (2018) 44(3) *Aggressive Behavior* 225-234.

We are supportive of attempts to break the implied nexus between intoxication and assumed consent to sexual activity. It is not clear, however, how a direction to a jury that 'of itself' 'the consumption by the person of alcohol or any other drug' is not a 'reliable indicator that a person consents to sexual activity' will be effective. In fact, this way of framing such a direction seems to underscore the improper process of reasoning that the proposed direction is designed to interrupt – that is, that intoxication may well be a reliable indicator of consent.

While we accept that the Commission does not propose specific words for any such direction, we believe it would be more useful if a proposed direction provided greater guidance. For example, using a similar model to the warning in s 293A of the *Criminal Procedure Act 1986* (NSW) (differences in complainant's account), it might be possible to add further information about what the available evidence tells us about how intoxication can affect cognitive processes associated with consent formation. Such a warning would appear to have a greater chance of breaking the nexus between intoxication and consent.

Further research/evaluation required

We submit that any proposals made by the Commission should be accompanied by a general proposal that a thorough evaluation be undertaken of any law reform that results from the Commission's proposal.

In the early 'era' of rape law reform, major evaluations of legislative amendments were undertaken. For example, the operation of the 1981 sexual assault amendments were monitored by BOCSAR. The findings were presented in a series of reports: BOCSAR, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation, Interim Report No 1, Characteristics of the Complainant, the Defendant and the Offence* (1985); *Interim Report No 2, Sexual Assault-Court Outcome: Acquittals, Conviction and Sentence* (1985); *Interim Report No 3, Court Procedures* (1987). The BOCSAR monitoring studies examined transcripts of all rape and sexual assault offences entering committal in two separate 18-month periods. The first period involved all charges of rape or attempted rape in the 18 months immediately before the 1981 reforms and the second period covered sexual assault categories 1-3 or attempt under the *Crimes (Sexual Assault) Amendment Act 1981* in the 18 months following the reforms.

The conclusions from the reports were used to introduce the later 1989 reforms to sexual assault laws (by the *Crimes (Amendment Act) 1989*).

The effect of the various legislative reforms on the experience of complainants as witnesses in the criminal justice process was also extensively evaluated by the NSW Department of Women in *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996). This Report found that while legislative reforms were designed to protect complainants giving evidence in proceedings, as the name of the Report suggests, in practice complainants were not so protected.

However, there has not been another major evaluation of the effects of legislative change in this area in the two decades since the *Heroines of Fortitude* report.

It is submitted that the Commission should strongly recommend that there be an evaluation of any changes made as a result of the Draft Proposals.

Yours sincerely

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