THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Consent in relation to sexual assault offences: Review of s 61HA of the *Crimes Act 1900* (NSW)

Submission in response to Consultation Paper 21

8 February 2019

The NSW Law Reform Commission

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The NSW Young Lawyers Criminal Law Committee (Committee) makes the following submission in response to Consultation Paper 21, issued by the NSW Law Reform Commission in its review of: s 61HA of the *Crimes Act 1900* (NSW), dealing with consent in relation to sexual assault

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 making 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.

Submission

In June 2018, the Committee made a preliminary submission to the Law Reform Commission in relation to its review of **s 61HA** (now replaced by **s 61HE**) of the *Crimes Act 1900* (NSW). That preliminary submission chiefly:

- emphasised the need to create and maintain clarity in the definition of consent in s 61HA;
- expressed an interest in further discussing and considering the possibility of adopting an affirmative statutory model of consent in NSW, akin to that operating in Tasmania; and,
- highlighted the Committee's view of the limitations of law reform in this area without accompanying community education initiatives.

The Committee welcomes the opportunity to further explore the above views and outline the considered views of its members in response to the questions posed in Consultation Paper 21.

Summary of the Committee's position

In brief, the Committee is of the view that the law in NSW regarding consent in relation to sexual assault offences would benefit from some reform. The Committee supports select and limited changes to the law, such that the law is amended for clarity and to better reflect contemporary standards and community expectations. For example, the Committee is in favour of changes to the circumstances in which consent is negated, how the law treats the use of contraception and changes to the definition of "sexual intercourse".

In respect of more significant proposed changes (such as the adoption of an affirmative model of consent), the Committee is supportive, in principle, of having a more express recognition of a communicative standard within the definition of consent, and acknowledges that the adoption of an affirmative standard has numerous benefits. However, the Committee also identifies a number of serious practical difficulties in adopting an affirmative standard that would need to be addressed if such a change is to be justifiable and of any efficacy. As such, the Committee is not unequivocally in favour of that change, and considers that the benefits and potential problems need to be carefully balanced.

Ultimately, the Committee's strongest view is that irrespective of whether or not the law is changed to introduce an affirmative standard of consent (or, indeed, changed at all), the operation of consent laws in NSW should be improved by way of better and ongoing community education measures and further development of suggested jury directions. Those changes may ultimately be more effective in addressing the current inadequacies and shortfalls that the law faces than overhauling the law itself.

Responses to questions posed in Consultation Paper 21

The Committee has opted to respond specifically to Questions 3, 4 and 6 posed in Consultation Paper 21, as below.

QUESTION 3: The meaning of consent

3.1: Alternatives to a consent-based approach

(1) Should the law in NSW retain a definition of sexual assault based on an absence of consent? If so, why? If not, why not?

The Committee is strongly of the view that the law in NSW should retain a definition of sexual assault based on the absence of consent. Consent and the absence of consent provide the most appropriate and relevant benchmark by which to judge the acceptability of sexual behaviour, both in a societal and criminal context. This is notwithstanding the complexity of defining consent and knowledge of consent.

Fundamentally, it is the absence of consent that renders otherwise acceptable sexual behaviour unwanted and thus invasive, degrading and traumatic. Furthermore, it is the absence of consent that transforms sexual behaviour from behaviour that is acceptable by community standards to behaviour that should be rejected and subject to criminal liability. Amending the definition of sexual assault such that it is based on alternative factors (such as physical, emotional or other violence, force or injury) would not provide an appropriate alternative basis for the offence, particularly as those elements are not always present in instances of sexual assault. Such factors should therefore not be fundamental to defining instances of sexual assault as such. It is the absence of consent that is fundamental. The Committee is thus of the view that consent should not be "de-prioritised".

3.2: The meaning of consent

(1) Is the NSW definition of consent clear and adequate?
(2) What are the benefits, if any, of the NSW definition?
(3) What problems, if any, arise from the NSW definition?

Recognising the difficulties inherent in defining consent, the Committee considers that the current definition of consent in NSW contains the basic elements needed to convey the central importance of free agreement. The current definition frames consent as a social contract that is freely agreed to between parties, with pre-determined boundaries on acceptable conduct, and it includes the necessary ingredients of a true agreement – that is, that it must be both free and voluntary. The Committee considers that, at the time of its introduction, the definition helpfully reflected a shift in public perception regarding sexual assault offences, and a considered push to move away from victim-blaming standards. The Committee also considers that the definition has, on balance, assisted in advancing the understanding and prosecution of sexual assault crimes, despite issues in its operation. However, the Committee does recognise the problematic potential for ambiguity in some aspects of the definition.

First, the Committee recognises concerns that the term "*freely and voluntarily*" in the definition may be the cause of some ambiguity, because s 61HE(2) itself does not indicate circumstances that are inconsistent with free and voluntary agreement. However, the preferred view of the Committee is that the inclusion in s 61HE of circumstances that negate or may negate consent should be considered as providing relevant legislative guidance as to some of the circumstances that are

incompatible with free and voluntary agreement, such as because a person was coerced, threatened, or unlawfully detained.

Secondly, the Committee also notes that the term "*freely and voluntarily*", by itself, does not necessarily convey that consent must be communicative. The Committee outlines its views on this in its response to the following questions concerning an affirmative consent standard.

(4) What are the potential benefits of adopting an affirmative consent standard?

The Committee is supportive of the original move towards a communicative standard initiated by the adoption of s 61HA and, in principle, considers that this standard would be better realised if it were expressly recognised in the definition of consent, so as to address the abovementioned ambiguity as to whether the term "*freely and voluntarily*" means that consent must be communicated. The express terms that the Committee proposes would best achieve this outcome are outlined in response to Question 3(6) below. The Committee does not, however, have a unified and unequivocal view as to whether the benefits of adopting such an affirmative standard of consent outweigh the potential problems with doing so.

The Committee identifies the following benefits of adopting an affirmative consent model in particular:

1. <u>Supporting a shift in societal values and encouraging better communication</u>

The criminal law has an educative effect by demarcating the boundaries as to what constitutes acceptable (and therefore non-criminal) behaviour. A significant benefit of adopting an affirmative consent standard is that it would legislatively entrench a standard of behaviour whereby persons are expected to actively seek the consent of their sexual partners before engaging in sexual activity. Consent necessarily exists first in the mind of individuals. Without the communication of consent, individuals wanting to engage in sexual relations should not presume that consent exists. Sexual relations can be ambiguous, and the harmful consequences of unwanted sexual relations justify the law taking a position that expects participants to ensure that they receive some indication of consent (whether verbal or non-verbal) before proceeding with sexual activity. Mandating affirmative consent would ideally increase clarity between people engaging in sexual activity regarding one another's consent. Adopting an affirmative consent model, if accompanied by effective community education regarding the importance of communicating consent, could also shape a positive cultural shift towards better communication about sexual intimacy, and towards making conversations about consent the norm in creating healthy, positive and safe sexual relationships.

2. <u>Reducing acquittals and rates of attrition</u>

In principle, adopting such a standard may also reduce acquittals in cases where a complainant has not positively indicated consent, as by that mere fact alone, consent is not established. In such cases, the focus of the case and the determination of criminal liability would be dependent on the state of mind of the accused.

(5) What are the potential problems with adopting an affirmative consent standard?

The Committee recognises that there are a number of potential problems with adopting an affirmative model of consent, with many of these being practical difficulties. Each of these problems is discussed in turn.

1. Is an affirmative standard of consent realistic and reflective of everyday sexual encounters?

The biggest problem with adopting an affirmative standard of consent rests in translating the ideals of the affirmative model into practice in everyday sexual encounters. Whilst it is helpful to visualise consent as a set of terms and boundaries that are actively spoken about and negotiated, this also creates an unnecessarily artificial image of how people engage in everyday sexual encounters.

Sexual encounters often involve non-verbal cues and signals that can be interpreted variably. This is a grey area that will undoubtedly pose a significant challenge in determining whether active communication of consent has actually taken place. In saying this, the Committee is of the view that the law itself can only do so much to resolve these grey areas and practical difficulties. It is important that the law is complemented by community education efforts that attempt to de-stigmatise conversations about people's sexual behaviours and limits, and that emphasise the centrality of seeking and clarifying the existence of consent.

The Committee also acknowledges some force to the view that an affirmative model of consent may cause people to feel that they cannot engage in sexual activity in circumstances short of obtaining, at the outset, a verbal indication of consent to all types of sexual activity contemplated by the parties. Such a perception could have a negative impact on the spontaneity of intimacy.

2. Overcriminalisation of sexual conduct

It would appear that consent laws in their current form have not been as easily understood within the community as envisaged, and inadequate sex education and the hallmarks of gender stereotypes in intimate relationships will likely act as obstacles to community members understanding affirmative consent, just as they have in relation to the existing laws of consent. The Committee sees a need to be conscious of the significant consequences of a conviction for sexual assault, and that criminal

liability in this area should not be imposed lightly, nor as a reflex response to highly publicised cases such as *Lazarus*.[1] There is a risk that in adopting an affirmative standard of consent, we may open the doors to the overcriminalisation of sexual conduct if affirmative consent is not well understood. As such, any adoption of an affirmative model in NSW must again be accompanied by community awareness campaigns regarding the new standard set by the law, the fact of it being a higher standard, and best practice guidance on navigating the new standard and avoiding engaging in impermissible criminal conduct, particularly out of ignorance.

3. An affirmative standard of consent may not address the problems of the existing NSW law

It is possible that certain fundamental issues would remain even if an affirmative standard of consent were adopted. Primarily, while introducing an affirmative standard of consent is, in theory, a positive means of endorsing a culture of communication within sexual encounters; it may be difficult to translate that standard into courtroom processes.

As noted in Consultation Paper 21 and its summary of a number of preliminary submissions, some have argued that an affirmative consent standard may flip the focus from the complainant's conduct to the accused's conduct. In practice, however, defence lawyers may choose to focus on aspects of a complainant's behaviour that are said to indicate communication of consent. Indeed, adopting an affirmative consent standard may result in the continuation of the already problematic focus on complainants during the trial process. The Committee submits that the conduct of *both* the complainant and the accused should be subject to robust examination in a fair manner in determining whether consent was communicated, and the Committee is concerned that, notwithstanding a move to an affirmative consent standard, undue focus may still be placed on matters such as the complainant's sexual history and methods of "communication" in the past. Further, adopting an affirmative model of consent may not, in fact, reduce the risk of rape myths and stereotypes being drawn upon, consciously or unconsciously, in sexual assault trials.

Due to the inherent nature of sexual relations and the context in which such relations take place, there would still be issues relating to "word against word" cases and difficulties in corroborating evidence. In trying to prove that consent existed or did not exist, prosecutors and defence lawyers may continue to rely on narratives that draw on the factfinder's pre-existing notions of consent and sexual behaviour.

Finally, it is noted that the affirmative model of consent has arguably not had its desired effect in some jurisdictions in which it has been adopted. In her doctoral thesis, Helen Cockburn has

[1] *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* (Unreported, District Court of NSW, Tupman DCJ, 4 May 2017); *R v Lazarus* [2017] NSWCCA 279.

researched the implementation of a positive consent standard in Tasmania.[2] She highlights concerns that the model is not well understood or properly implemented by some judges, legal practitioners and jury members, and that issues arising due to preconceived and prejudicial notions of consent continue to exist. Her research highlights the limits of the law as an educative tool, particularly where attitudes in relation to consent, including those held by jury members and judicial officers, are not in alignment with the position entrenched in the law. The Committee notes that research into the efficacy of the model continues.

Committee consensus view: The ongoing need for education and the way forward

The Committee is ultimately not unequivocal in its support for an affirmative standard of consent in practice, and considers that the above identified factors need to first be carefully evaluated and balanced prior to any such significant change being adopted. However, the Committee submits a strong consensus view that, irrespective of whether an affirmative standard of consent is adopted (or, indeed, any changes made to the current NSW laws at all), there is an overwhelming need for community education in this area. That education should extend beyond schools and universities to include community campaigns aimed at shifting outdated and gender-stereotyped attitudes regarding sex and consent held amongst adults, as well as education of those working within the criminal justice system.

Such education may resolve some of the issues that have affected the operation of the 2007 reforms to NSW consent laws, and may also create a greater emphasis on obtaining and communicating consent. Such education may be a key means of improving conviction rates where offences are made out and lowering attrition rates in trials of sexual offences. Suggested jury directions may also assist in this endeavour, as discussed below in response to Question 6.3. The Committee does recognise, however, that neither community education about the nature of consent nor improved jury directions are a panacea, and that these approaches have their own limitations.

(6) If NSW was to adopt an affirmative consent standard, how should it be framed?

If the above benefits and problems are able to be reconciled and NSW does adopt an affirmative standard of consent, the Committee prefers that a positive framing is adopted. The Committee also considers that the standard should build on that adopted in Tasmania, notwithstanding the above discussion of that model.

2 Helen Mary Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (Phd Thesis, University of Tasmania, 2012).

The Committee supports a framing of the definition of consent in s 61HE(2) in terms to the effect of "*a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity, and this agreement is communicated by verbal or non-verbal means.*" Such a definition recognises the various and unique ways that consent can be communicated in the context of sexual relationships, and that a person must say or do something to communicate consent to be considered to be consenting in the legal sense. This definition also establishes that not doing anything to communicate consent would mean that no consent was given. In so doing, such a definition would better reflect contemporary standards against presuming the existence of consent unless it is communicated, and would better serve the initial objective of the 2007 reforms in moving to a communicative standard.

The above framing is preferred to a framing of affirmative consent in the negative, as exists in Victoria, where s 36(2)(1) of the *Crimes Act 1958* (Vic) states that consent is negated where "*the person does not say or do anything to indicate consent to the act*". It is considered that a framing in the negative unnecessarily complicates the operation and application of the law.

The laws of consent should retain a version of the current s 61HE(9). Further, as discussed below, a non-exhaustive list identifying situations in which consent is negated, such as that contained in s 61HE(5), should also be retained, as this allows for both consistency and flexibility.

(7) Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?

With regard to the withdrawal of consent, the Committee is of the view that the scope of consent could be clarified in the NSW provisions on consent to stipulate that consent may be withdrawn at any time before or during conduct, from which point on, if the conduct continues to take place, it takes place without consent. If an affirmative standard of consent is adopted, this clarification should be formulated in terms of withdrawal of consent being communicated.

With regard to the use of contraception, the Committee recognises that circumstances where persons agree to engage in sexual intercourse involving the use of contraception, and where one party then does not use or removes contraception, raise significant concerns. There are a number of reasons why a person may agree to engage in sexual intercourse using contraception, but would be unwilling to engage in unprotected sexual intercourse, including due to concerns of unwanted pregnancy and contraction of sexually transmitted diseases. The Committee considers that every person should have the autonomy to choose to engage in protected sexual intercourse, and failure to afford that opportunity vitiates the basis for their consent. The Committee submits that the law should recognise this. It could do so by expanding s 61HE(5) to include a circumstance in which

consent is negated where a person intentionally removes or tampers with contraception without the consent of the other party, and in circumstances where the other party has specifically requested that such contraception be used. The Committee recognises that there are circumstances in which the use of contraception may be subject to accidental failure, and submits the above limited framing so as to avoid exposing to criminal liability persons who, in good faith, attempt but fail to use contraception.

QUESTION 4,1: Negation of consent

(1) Should NSW law continue to list circumstances that negate consent or may negate consent? If not, in what other ways should the law be framed?

(2) Should the lists of circumstances that negate consent, or may negate consent, be changed? If so, how?

The Committee is of the view that a non-exhaustive list identifying circumstances in which consent is or may be negated, such as that contained in s 61HE(5)-(9), should be retained.

The inclusion of a non-exhaustive list of circumstances that negate or may negate consent plays an important role in directing the attention of judges and juries to those circumstances that Parliament (and, by extension, the community) has non-exhaustively deemed to be inconsistent with free and voluntary consent. It operates to reflect community values, protect vulnerable persons, promote clarity and consistency in the law and its operation, and remove the possibility of any confusion as to the ability of people who are underage, cognitively incapacitated, unconscious or asleep, threatened, forced, terrorised or unlawfully detained, to consent.

The Committee submits that these provisions should be retained in the NSW laws of consent regardless of whether or not an affirmative model is adopted.

The Committee supports the following amendments to the list of circumstances that negate consent set out in s 61HE(5)-(7) and (9):

1. In respect of s 61HE(5)(c): The language of "*if the person consents to the sexual activity because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person)*" should be expanded to include "*or the unlawful infliction of force*". It is inconsistent that the threat of force negates consent, whereas the unlawful infliction of force ostensibly does not.

2. In respect of s 61HE(8)(b): The circumstance of "*if the person consents to the sexual activity because of intimidating or coercive conduct, or other threat, that does not involve a threat of*

force" should be a circumstance that will negate consent, instead of a circumstance that "*may*" negate consent. The Committee submits that there should not be a distinction between violent threats and coercive conduct/threats that do not amount to force. If such coercive or intimidating conduct (as opposed to persuasion or teasing) influences a person's decision to submit to have intercourse, it cannot be said that the person's agreement is "free" or "voluntary".

3. The Committee supports the adoption of a provision, similar to that in Victoria, that consent is negated where the person is "*so affected by alcohol or another drug as to be incapable of consenting to the act*" or "*incapable of withdrawing consent to the act*". This would make it clear that a person in such a state does not have the capacity to consent to sexual activity, whilst leaving for the factfinder the question of whether the complainant was affected by alcohol and drugs to that extent. Such a provision could be adopted within the current s 61HE(5). The suggested framing of this provision would mean that the mere consumption of drugs or alcohol of itself is insufficient to negate consent, although any intoxication of a complainant (short of reaching the level at which the complainant is incapable of consenting) should continue to properly remain a circumstance which may be considered when determining that a person did not consent to sexual activity.

   Inclusion of this provision as a circumstance negating consent would strengthen the message to the community that when a person is affected by drugs or alcohol, care should be taken to ensure that he or she is still in a position to form a rational and conscious decision to consent to sexual activity. If a person cannot be certain of a potential sexual partner's capacity, sexual activity should not occur.

   The Committee submits that being affected by alcohol or drugs to the extent of being incapable of consenting or withdrawing consent is an equivalent state to being unconscious or asleep, which is currently a circumstance that negates consent.

4. It is noted here that the Committee's further proposal of an amendment to the circumstances negating consent to include a circumstance regarding the withdrawal of contraception is canvassed above in response to Question 3(7).

5. Finally, the Committee notes that the current drafting of provision s 61HE(7) creates some ambiguity as to the necessary level of awareness an accused person must have regarding the existence of the circumstances in s 61HE(6) in order to be legally considered as "knowing" that a complainant is not consenting. In particular, following the decision of the High Court in *Gillard v The Queen* [2014] HCA 16, it is unclear whether the use of the term "knows" in s 61HE(7) relates to knowledge in a strict sense, or whether the extended

definition of knowledge contained in s 61HE(3) (including recklessness and a "no reasonable grounds test") applies. The Committee submits that the position should be clarified in the legislation.

QUESTION 6: ISSUES RELATED TO SECTION 61HA

6.2: Language and Structure

(2) Should the definition of "sexual intercourse" be amended? If so, how should sexual intercourse be defined?

The Committee submits that the definition of "sexual intercourse" should be amended by removing "*female person*" in s 61HA(a) and replacing it with "*person*". This is because the relevant act that constitutes sexual intercourse referred to in s 61HA(a) should be penetration of the genitalia. A focus on the gender of the person possessing those genitalia does not change the fact of penetration, and could operate in a discriminatory manner, particularly in relation to persons who do not identify as female but have a vagina, persons who are not considered to be female but might identify as such, or intersex people.

6.3: Jury directions on consent

Are the current jury directions on consent in the NSW Criminal Trial Courts Bench Book clear and adequate? If not, how could they be improved?

The Committee is of the view that the jury directions on consent currently included in the NSW Criminal Trial Courts Bench Book (NSW Bench Book) could be improved so as to be clear and adequate. It is essential that any amendments use simple and commonly used terms. The Committee submits that a good starting point for considering how the directions could be amended is s 46(3) of the *Jury Directions Act 2015* (Vic).

The Committee submits that the current suggested direction in the NSW Bench Book in relation to "*freely and voluntarily*" should be reformulated to read that:

> "*A person consents to sexual intercourse if [she/he] freely and voluntarily agrees to have sexual intercourse with another person. A person can only consent to sexual intercourse if [she/he] is capable of consenting, and is free to choose whether or not to engage in or allow the act of sexual intercourse to occur. Consent must be consciously given".*

The suggested directions on consent should also continue to state that consent "*can be given verbally, or expressed by actions*", that the absence of consent can be communicated through

non-verbal means (as opposed to only verbal means), and 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. The Committee submits, however, that these issues could be more clearly expressed in the directions by including a formulation to the effect that:

> "*Consent can be given verbally, or expressed by actions. However, a person who does not consent to an act of sexual intercourse might not verbally protest or physically resist, and should not be regarded as consenting to the sexual intercourse by reason only of the absence of verbal protest, physical resistance or physical injury".*

The Committee notes that, importantly, s 46(3)(b) of the *Jury Directions Act 2015* (Vic) acknowledges that although a person may freely and voluntarily agree to sexual intercourse, the person is entitled to withdraw that consent at any time either before the act takes place or at any time while the act is taking place. This dynamic and ongoing understanding of consent is not acknowledged in the current suggested NSW Bench Book directions. In order to ensure that jurors are aware of the dynamic nature of consent and the ongoing obligations of anyone engaging in sexual activity to ascertain that their sexual partner is consenting for the duration of a sexual encounter, the Committee submits that the NSW Bench Book directions should be amended to include reference to the unequivocal entitlement to revoke consent at any point before or during a sexual encounter. A potential reformulation of the NSW Bench Book direction is:

> "*Where a person has consented to engage in an act of sexual intercourse, the person may withdraw that consent either before the act takes place or at any time while the act is taking place. From that point on, if the act continues to take place, it takes place without consent.*"

The Committee submits that amendments to the NSW Bench Book directions such as those proposed above are necessary in order to address issues relating to the clarity and adequacy of the present jury directions.

Some Committee members suggested that staged summaries and flow charts of questions that jurors need to address could be a helpful tool in enabling jurors to understand: 1) the need to establish consent; 2) the circumstances in which consent is or may be negated; and, if the outcome of those preliminary questions is that there was no consent, then 3) the ways in which the requisite mental state of the accused can be established.

Finally, if the law is changed to adopt an affirmative standard of consent, consideration should also be given to any changes necessary to the suggested jury directions regarding consent. In such a scenario, the Committee submits that the suggested directions above should be reformulated to incorporate the language of a communicative, affirmative standard. For example, the direction regarding "*freely and voluntarily*" should emphasise that it is insufficient for a person to have the capacity to consent and freely and voluntarily consent in his or her mind, unless that person then

communicates that consent to the other person, as otherwise the person is not relevantly consenting in the legal sense. The direction should make it clear that consent may be communicated in means other than words. Examples of such non-verbal indications should be given, taking care that these examples do not rely on gender stereotypes or outdated notions of sexual behaviour. The relevant direction should also include the directions suggested above as to lack of verbal protest or physical resistance, as well as the current NSW Bench Book directions regarding circumstances negating consent. The Committee submits that such suggested directions may help to ameliorate the difficulties in moving to an affirmative standard of consent (if such a standard is adopted) by clearly explaining what such a standard entails and how it differs from previous understandings of the law of consent. Such a suggested direction would also encourage consistency in the directions given by judges regarding the communication of consent.

6.5: Legislated jury directions

(1) Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed?

The Committee submits that directions on consent or other related matters should not be set out in NSW legislation. The essential function of jury directions is to ensure that an accused receives a fair trial. The existing common law framework in respect of the suggested NSW Bench Book directions allows for flexibility, as judges can tailor suggested directions to the specific facts of a case to ensure that they are relevant, clear and concise. Not all directions will be relevant to the circumstances of each case, and the creation of legislated directions may result in directions being given that are irrelevant and unwieldy. Further, this flexibility allows directions to be updated as appellate decisions are handed down without the need for legislative amendment. Ultimately, matters such as the timing and precise content of directions should be left to the discretion of the individual judge to determine with regard to the appropriateness or utility of such directions to the case at hand.

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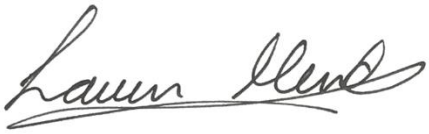

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