Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Consent laws and the excuse of mistake of fact

Preliminary Submission to the Queensland Law Reform Commission

15 October 2019

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

CONTENTS

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA appreciates the opportunity to make a preliminary submission to the Queensland Law Reform Commission (QLRC) as it commences its review on consent laws and the excuse of mistake of fact.

Consideration of the operation of the Tasmanian provision in relation to concerns in sexual assault offences

2. The ALA is concerned about moves in several Australian jurisdictions to consider adoption of the Tasmanian approach to defining 'consent', in sexual offences.[2]

3. In 2004 s2A of Schedule 1 of the *Criminal Code Act* 1924 (Tasmania) was amended to state:

> (1) In the Code, unless the contrary intention appears, 'consent' means free agreement.
>
> (2) Without limiting the meaning of 'free agreement', and without limiting what may constitute 'free agreement' or 'not free agreement', a person does not freely agree to an act if the person:
>
> (a) does not say or do anything to communicate consent; or
>
> (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or
>
> (c) agrees or submits because of a threat of any kind against him or her or against another person; or
>
> (d) agrees or submits because he or she or another person is unlawfully detained; or
>
> (e) agrees or submits because he or she is overborne by the nature or position of another person; or
>
> (f) agrees or submits because of the fraud of the accused; or

[2] https://www.smh.com.au/national/nsw/enthusiastic-yes-nsw-announces-review-of-sexual-consent-laws-20180508-p4zdyn.html

(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or

(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or

(i) is unable to understand the nature of the act.

4. The ALA is concerned that the concept of 'free agreement' as not defined in the Tasmanian provision, and is therefore nebulous and open to considerable misapplication. In particular, the phrase '… does not say or do anything to communicate consent' (s2A((2)(a)) introduces a confusing and ambiguous test into the definition which is open to different interpretations and modes of communication. This is problematic for members of the community engaging in consensual sexual acts, as they are not entitled to infer from the circumstances in which they find themselves that the other party to a consensual encounter is in fact consenting to the sexual acts.

5. The ambiguity of the phrase '… does not say or do anything to communicate consent' introduces a subjective element that is likely to be the subject of detailed cross-examination within a sexual assault trial, given that there is no normative or standardised way in which notions such as 'consent' are communicated or understood.

6. Given the ambiguity and lack of certainty in the definition of 'consent' there is a heightened risk of extensive defence cross-examination of prosecution witnesses in relation to previous sexual history and how consent has been communicated in those instances. This can also ignite pre-existing juror assumptions and perceived stereotypes around rape and sexual assault. This may result in further victim trauma and a reduction in the reporting of sexual assaults.

7. To illustrate the confusion consider the following hypothetical scenario:

> X a man, and Y a woman, are engaged in consensual kissing in a bedroom. They each then remove their clothing. X places his hand on Y's breast, without asking, and without words or actions of invitation from Y. Even if Y were to admit that she did not object to X touching her breast, s2A(2)(a) renders X's conduct unlawful because Y had not done any act or said anything to communicate her consent to the touching of her breast. The mere fact of Y kissing X and then removing her clothes could not be

construed as consent to the touching of her breast. Consequently, this exposes X to criminal liability for indecent assault. This is a consequence of Y's consent being *ex post facto*. At trial, X would allege mistake as to consent, however, given the definition found in Section 2A (2)(a), coupled with the provisions in s14A (Mistake as to Consent) of the Code, X would be found guilty at trial. As can be seen, X is an unintended victim of poorly designed consent laws.

8. The ALA recommends that consent laws must be clear, concise and easily understood by everyone. The Tasmanian consent laws make for ambiguity and confusion. The ALA recommends that the Tasmanian consent laws model should not be adopted in Queensland.

9. The ALA strongly recommends that the QLRC research and analyse the impacts of the 2004 Tasmanian amendment that resulted in the abovementioned definition of 'consent', to assess the impact of the change in definition on the conduct of sexual assault trials, the effect of cross-examination on complainants and whether the reform resulted in any statistically significant increase in the rate of reporting of sexual assaults in Tasmania.

The opportunities of restorative justice processes to acknowledge sexual assault victims

10. While many commentators suggest that increased criminalisation and stigmatisation of offenders will provide greater recognition and acknowledgment of the trauma experienced by victims of sexual assault, such responses have tended to result in fewer offenders taking responsibility for their offending, and the majority of sexual assault victims being further disempowered by the criminal justice system.[3] This manifests in low reporting and conviction rates for sexual offences.

11. The failings of the criminal justice system to engender a confidence among victims of sexual assault to engage, whether by reporting offences or participating as witnesses in the prosecution of those who are charged with offences, indicates a need to move beyond responses that purportedly advocate stricter sentences, or redefinitions of legal defences

[3] Naylor, B. (2010), 'Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways', (2010) 33(3) *University of New South Wales Law Journal*, 662-684; Daly, K (2014), 'Reconceptualizing Sexual Victimization and Justice, in I Van Fraechem, A Pemberton and F Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation*, Routledge 2014, 318.

aimed at making convictions more likely. If the justification of such proposed reforms is to prioritise the needs of the victim, the continuing decline in victim reporting and prosecution rates suggests that alternative and innovative justice mechanisms should now be considered.

12. Accordingly, the ALA strongly recommends that the QLRC consider as part of this review the potential to develop appropriate, victim-centred restorative justice processes for sexual offences.

13. The ALA acknowledges that there is considerable dispute as to whether restorative justice conferencing is appropriate for sexual offences. Moreover, in 2010 the NSW Law Reform Commission (NSWLRC) indicated that the dynamics of power in a relationship where sexual offences have been committed suggest that the use of restorative justice processes for sexual offences is inappropriate and carries a risk of secondary victimisation for victims.[4] However, given the failure of existing criminal justice processes to provide adequate recognition and acknowledgment of the primary trauma for sexual assault victims, the ALA considers that the QLRC should give careful consideration to more recent examples of sexual offence restorative justice processes in Australia and New Zealand. The evaluations for these programs have indicated positive results in terms of victim satisfaction, reduced offending and a reduction in re-victimisation through the justice process.[5]

14. The ALA submits that the QLRC should carefully consider the New Zealand experience of restorative justice conferencing in sexual offences, which has been available since 2002. In New Zealand, restorative justice conferencing is provided for any type of sexual offence at a number of stages throughout the criminal justice system (though usually at pre and post-sentencing). The key principle underlying the process is that of being victim-centred, with the victim's ongoing safety being of primary importance.[6]

---

[4] Australian Law Reform Commission and New South Wales Law Reform Commission (2010), 'Family Violence: Improving Legal Frameworks, April 2010, Consultation Paper, 559, online at <https://www.alrc.gov.au/family-violence-improving-legal-frameworks-cp-1>

[5] Daly, K, Bouhours, B and Curtis-Fawley, S (2007), 'Sexual Assault Archival Study (SAAS): An Archival Study of Sexual Offence Cases Disposed in Youth Court and by Conference and Formal Caution in South Australia', July 2007, *South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing*, Technical Report No. 3, 3rd Edition, 64. At <http://www.griffith.edu.au/__data/assets/pdf_file/0004/50287/kdaly_part2_paper4.pdf>.

[6] New Zealand Ministry of Justice, 'Restorative Justice Standards for Sexual Offending' (June 2013), 26. At <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CEUQFjAE&url=http%3A%

15. The ALA notes that in 2014 the Victorian-based Centre for Innovative Justice, RMIT, undertook a comprehensive exploratory research project to identify innovative justice processes that display the potential to meet the needs of victims of sexual offending, to address public interest concerns, and to prevent reoffending in ways that the conventional justice system has limited capacity to achieve.[7] The ALA strongly recommends that the QLRC carefully consider the resulting report in this inquiry.

Conclusion

16. The ALA welcomes the opportunity to have input to the QLRC on the key areas to which it should have regard in conducting the review on laws and the excuse of mistake of fact. The review provides an opportunity to undertake a mature and thorough approach to consider alternative processes to traditional criminal justice prosecutions for sexual assault matters. It also provides an opportunity to review the practical effects of legislative change in relation to the definition of 'consent' to assess whether adopting the Tasmanian approach may actually result in a further traumatising trial experience for complainants and a consequent further loss of confidence for victims reporting sexual assaults.

Greg Spinda

Queensland President

Australian Lawyers Alliance

2F%2Fwww. justice.govt.nz%2Fpublications%2Fglobal-publications%2Fr%2Frestorative-justice-standards-for-sexual-offendingcases%2Fpublication%2Fat_download%2Ffile&ei=CZ>.

[7] Centre for Innovative Justice (2014), *Innovative Justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community*, Centre for Innovative Justice, RMIT University, Melbourne, May 2014.