



Justice  
Law Reform Commission

4 July 2018

## **Submission Re: Consent in relation to sexual assault offences**

We would like to make the following comments:

The legal concept of consent needs to be informed by the evidence based understanding of what happens to the brain when sexual assault occurs. There is now scientific evidence (Van Der Kolk and Janina Fisher) which shows that the brain responds in certain ways when it experiences a traumatic event. This is the fight, flight, freeze response. Statistics show that approximately 50 per cent of sexual assault victims experience a freeze response. This type of response is always interpreted in the legal and court system as the victim of sexual assault not clearly indicating that they have not given consent. If a victim has a freeze response the issue of consent is always contested and the victim made out to be lying or making it up or they have not clearly let the person of interest know that they are not consenting. Rather than it be seen as an innate response to trauma.

It is our experience that when a person has a previous experience of sexual assault as many victims do, especially childhood sexual assault they are more likely to have a freeze response to another traumatic event. Once again due to the advancement of our knowledge about the brain, there is now scientific evidence about the impacts of trauma on the brain.

Within the legal and court system there needs to be more of a trauma informed understanding and the impacts that this has on the definition of consent

The legal definition of consent needs to include a psychological/social/behavioural/trauma concept of consent.

In the current legal/ court system there seems to be much more of an emphasis for the victim to prove that they did not give consent rather than the person of interest proving that consent was given.

In our experience the issue of consent ie victims' word against person of interest and the current definition of consent is a major barrier for victims not wanting to report or go through the legal system.

In the current legal and court system the dynamics/impacts of grooming techniques and behaviours of the persons of interest/ offenders is not consider in the definition of consent. In some cases, due to the grooming techniques used by an offender, it may be seen by those not trained that the person consented, however when viewed through a framework of grooming it would be very clearly identified that the person did not consent.

In education programs such as Love Bites (a NAPCAN Sexual Assault/ Domestic Violence education program taught in schools in conjunction with Community agencies) has a much broader definition of consent with the emphasis on each person knowing that they have consent from the other person. It is emphasised in these programs that if someone is alcohol/drug affected than the person is not giving consent or if the person says and does nothing (freeze response) than that is not consent. These programs teach young people that they must clearly know that the person is consenting by them saying it as opposed to the legal system which seems to emphasise that the victim needs to make sure that the offender knew they were not consenting

The law appears to be out of touch with what contemporary society understands consent in sexual assault matters

In our experience there seems to be a lot more legal voir dire occurring. These seem to occur around the issue of consent. These are extremely stressful for victims.

Within the legal system it is very difficult in matters were the victim may have consented to some types of sexual activity occurring but not to others. We are now finding that there is a lot more occurrence of this happening. For example, they have consented to penile vaginal sex but not to anal sex. This makes the issue of consent very difficult. This often stops people reporting to the Police

From our experience and speaking with many victims of sexual assault we believe that it would be extremely beneficial if there were Courts that specially only dealt with sexual assault matters. It is our opinion that this would allow a much more trauma informed understanding of sexual assault matters within the Court process. It may also encourage more victims to proceed legally

Thank you

Coffs Harbour Sexual Assault Counsellors.