

# Police Association of NSW

## Preliminary Submission

Law Reform Commission

Consent in relation to sexual assault offences



*The Police Association of New South Wales (PANSW) represents the professional and industrial interests of approximately 16,500 members, covering all ranks of NSW Police Officers in New South Wales.*

*This submission is written on behalf of our members.*

Police officers receive reports from thousands of victims of sexual assault every year.

The experience of our members indicates that the criminal justice system fails survivors of sexual assault. This is due to a variety of reasons, one of which is the operation of s61HA in criminal proceedings.

Too often, victims who, in the view of our members have clearly not consented to the sexual conduct that occurred, are not believed by the criminal justice system.

It is incredibly difficult to prove to the criminal standard that the victim did not consent, and that the accused knew they did not consent according to the definitions in s61HA.

These provisions contribute to:

- A high rate of attrition of sexual assault cases at all stages of the criminal justice system,
- Disheartening, traumatic and unsatisfactory criminal justice processes and outcomes for survivors of sexual assault, and
- A considerable gap between what is considered acceptable sexual conduct, and what the criminal law prohibits.

The current formulation of 61HA is not meeting the needs of victims, and is not consistent with reasonable expectations the community holds for people who seek to participate in sexual activity.

The Police Association of NSW supports reforms to consent provisions that:

- Establish standards of consent consistent with affirmative, enthusiastic conceptions of consent, and clear requirements for communicated consent, and
- Require persons who engage in sexual activity to actively ensure sexual partners consent to all activity engaged in.

## Failing survivors of sexual assault

According to the Australian Bureau of Statistics' *2016-17 Crime Victimization Survey* 31,300 adults in NSW were sexually assaulted in the previous 12 months.

The vast majority of victims of sexual assault are overwhelming women and children. Men are also victims of sexual assault, and suffer trauma as a result of the sexual assault and the deficiencies of the criminal justice system, but it is undeniable that overwhelmingly the victims of sexual assault are women and children. LGBTQI people are likely victimised at a higher rate than many other members of the community.

The attrition of sexual assault matters through all stages of the criminal justice system is unacceptably high, and higher than most other categories of crime.

Sexual assault is significantly under-reported, there is a low rate of charging accused persons, low rates of proceeding with a prosecution, a high rate of not guilty pleas, and a low rate of conviction.

The law is currently inappropriate for a large number of people who legitimately believe they have been subjected to sexual conduct to which they did not consent.

These trends are caused by a multitude of factors, and will not be addressed by reform of 61HA alone, but establishing a better conception of consent, and creating active obligations for people to seek and confirm consent from a person they wish to engage in sexual activity with would certainly have a profound and positive impact on:

- Addressing the attrition of sexual assault cases in the criminal justice process,
- The perception of justice by survivors of sexual assault,
- Victim satisfaction with the criminal justice system, and
- Provision of a clear statement regarding the reciprocated respect and consideration people should give to the autonomy and decisions of another when seeking to engage in sexual activity.

According to the experience of our members, in the vast majority of cases, the most difficult component of investigating sexual assault is obtaining evidence to prove to the criminal standard:

- The victim did not consent, and
- The accused knew the victim did not consent.

This seems to be confirmed by analysis of criminal proceedings; a large proportion of adult sexual assault cases hinge on these issues.

Too often, these questions are determined by evidence which plays to archaic notions of acceptable sexual conduct and consent. Our members often see evidence adduced regarding:

- A victim's conduct well in advance of the assault, which the victim in no way intended to communicate consent to that act, and which should have nothing to do with whether they consent to the specific act at the time of the assault,
- A victim's conduct after the assault, which is often consistent with common behaviour for victims of sexual assault, but which is used to retrospectively imply consent, or
- Acts during the time of the sexual activity, which were not intended by the victim to communicate consent, but are considered reasonable grounds for the accused to believe that the other person consents to the sexual activity.

As a result, what is really put on trial is the reliability of the victim, not the criminality of the accused. The victim, who in the vast majority of cases is a woman, will have her behaviour at the time of the assault, and throughout her adult life, scrutinised and questioned, with the aim of discrediting her legitimate belief she was assaulted.

Of course, we are not suggesting that convictions should be secured on the belief of the victim alone. Proceedings subsequent to any reforms will no doubt still require evidence demonstrating beyond a reasonable doubt the victim did not consent, and that the accused did not take steps to ascertain whether there was consent. When similar reforms were considered in Victoria and Tasmania, there was an outcry from some opponents saying it would be impossible to defend allegations of sexual assault, but that has simply not occurred; convictions for sexual assault remain incredibly difficult to secure, and the attrition rate for sexual assault cases is an ongoing concern.

Also, there would be few categories of serious crimes against the person where such large numbers of people believe they have been the victims of a crime without the criminal justice system recognising any wrongdoing even when the crime is reported and investigated.

Our members are dismayed at how daunting and traumatic it is for a victim to realise what is needed to prove she did not consent, that the accused knew she did not consent, how little she will be believed throughout proceedings, and how unlikely a conviction is.

It is also incredibly distressing for a victim to realise her actions may be construed as reasonable grounds for belief in consent, when the victim had no intention those actions been interpreted as such by the accused.

This occurred in the case that contributed to the Attorney General requesting this review occur. A judge accepted that a survivor of sexual assault had not consented, but found the prosecution had not shown the accused had no reasonable grounds for believing that the other person consents to the sexual intercourse. While that decision was appealed, no retrial was ordered, and that particular survivor of sexual assault has been let down by the criminal justice system as a result.

## Expectations for participating in sexual activity

The laws of sexual assault have, for a long time, operated based on 'rape myths', and have therefore not appropriately dealt with the issue of seeking and giving consent.

For a long time, the absence of resistance was sufficient to establish consent.

Section 61HA does represent an improvement on those archaic conceptions.

However, our members still report that in the absence of at least vocal opposition on the part of the victim, it is incredibly difficult to obtain evidence sufficient to prove a lack of consent and the accused person's knowledge of the lack of consent.

This fails to take account of the common reactions of victims of sexual assault, who may be in a state of shock, may freeze, or may comply with directions by the accused out of fear.

People in NSW and the community as a whole now recognise that in order to engage in sexual activity, a person should actively seek the consent of their prospective sexual partner, and only act in accordance with the consent which is wilfully and enthusiastically given.

Opponents of such conceptions of consent being adopted into the definitions of sexual assault cite traditional criminal justice principles which require a guilty mind, arguing the defence of mistaken belief is necessary, and that progressive reforms of sexual assault provisions that meet the needs of victims are not consistent with this requirement.

The Police Association does not think it is an unwarranted standard of behaviour; if a person has not clearly and enthusiastically consented to sexual activity, don't do it.

No longer does the community accept that possible ambiguity or awkwardness about obtaining consent is sufficient justification for ignoring the tens of thousands of people in NSW who suffer unwanted sexual conducted every year.

No longer does the community consider it acceptable that a person does not consent to sexual activity, but another engages in that activity anyway due to a mistaken belief regarding consent.

A mistaken belief is brought about by the accused's lack of care for the person they want to have sex with, and a failure to establish what the victim consents to. That course of events should no longer be a justification for having sex with someone without their consent.

We should also be cognisant of the fact traditional criminal justice principles have, for as long as they have been in existence, severely failed victims of sexual assault, so it is no longer sufficient justification to resist reform based on any perceived inconsistency.

People in NSW now expect the criminal justice system to meet the needs of these victims of sexual assault. Changing the provisions defining consent and establishing a person's obligations to obtain consent is a necessary part of that expectation.

## Conclusion

The Police Association thanks you for the opportunity to contribute to this review.

We understand that the process of this review will be to receive preliminary submissions, and then provide a further opportunity to make a more extensive submission, possibly in response to a consultation paper.

The Police Association has made this submission on that basis, and would welcome the opportunity for further consultation.

Please feel free to contact the Police Association if we can provide any further useful information.