

Ms Erin Gough
Policy Manager
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

Ref AF18/36173

By email: nsw-lrc@justice.nsw.gov.au

Dear Ms Gough

Consultation paper 21 – consent in relation to sexual offences

Thank you for the opportunity to provide comments on consultation paper 21 – Consent in relation (consultation paper) to sexual offences.

The Department of Family and Community Services (FACS) has included some general comments about the consultation paper, as well as considerations around some of the particular vulnerabilities experienced by many FACS clients including those impacted by domestic and family violence.

General comments

On the 6 July 2019, the NSW Sexual Assault Strategy (SAS) was released.¹ The SAS is a comprehensive framework to improve prevention and response to sexual assault, delivering a three year, whole-of-government approach to sexual assault in NSW for the first time. The SAS was informed by a wide evidence base, a comprehensive state-wide consultation process, and advice from experts in the field, frontline workers, non-government service providers, peak organisations and government agencies.

The SAS recognises that consent is at the heart of the continuum of sexual offending, whether that be the failure to seek consent, refusal to recognise when someone cannot consent, ignoring their refusal or acknowledging that they have withdrawn their consent. Reviewing the current NSW legislation around consent is an action in the SAS.² FACS is supportive of the consideration of sexual consent provisions by the NSW Law Reform Commission.

FACS considers consent to be the foundation of respectful relationships and sex, and that consent should never be assumed. A requirement for an affirmative expression of consent may help facilitate cultural change, including improved awareness of responsible sexual behaviour and harmful attitudes towards sexual assault victim survivors. Social and cultural attitudes play a large role in the ways individuals and communities view sexual assault.

However, FACS notes that law reform by itself cannot effectively change community attitudes around consent and violence against women. Community education and discussion around consent, sexual ethics and respectful behaviour is crucial to facilitating cultural change. As such, any law reform should be accompanied by prevention and early intervention strategies

¹ Department of Family and Community Services (2018) *NSW Sexual Assault Strategy* <https://www.women.nsw.gov.au/violence_prevention/nsw-sexual-assault-strategy>

² Ibid

and accessible, consistent education around sexuality, relationships, what constitutes consent, how consent can be obtained, and situations where someone cannot consent.

Education around consent should start from a young age. FACS currently seeks to incorporate principles of respectful, relationship-based and dignity-based practice, as well as trauma-informed approaches, to ensure children and young people are kept safe from harm. FACS has made a submission to the New South Wales Education Standards Authority (NESA) as part of its curriculum review advocating for age appropriate curriculum on the importance of respectful relationships and the continuum of sexual violence, including sexual assault.

A key action under the SAS is the delivery of a community education campaign around consent. The campaign (#makenodoubt) was launched in December 2018 and features a diverse range of people sharing their experience of asking for and giving consent.³ The #makenodoubt campaign was created in collaboration with the community, universities and peak bodies, including Domestic Violence NSW, Rape and Domestic Violence Services Australia and the University of Technology Sydney, who shared their experiences. #makenodoubt is the first stage of the NSW Government's commitment under the Strategy to improve community education about consent and address the role of the bystander and community in identifying sexual offending and speaking out.

Many of FACS clients currently experience significant barriers to disclosing sexual assault, reporting it and accessing the support they need, including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people and people experiencing sexual assault in the context of domestic and family violence (DFV). Any legislative changes should be accompanied by a victim-centred and trauma informed approach from the police and court system. This should include an understanding of complex trauma, the impact of sexual violence, the dynamics and impacts of intimate partner sexual violence, cultural competency and disability awareness.

Some particular issues pertaining to FACS clients are explored below.

Women

Sexual assault disproportionately affects women and is known as a gendered crime. In Australia, almost one in five women (18 per cent or 1.7 million) have experienced sexual violence since the age of 15.⁴ In NSW, women and girls were nearly four times more likely to be a victim of reported incidents of sexual offence in the 12 months up to December 2017.⁵ Nearly 90 per cent of females under 18 in NSW who experience sexual assault are known to their perpetrators.⁶

The SAS recognises that primary prevention that promotes gender equality, respectful and non-violent relationships and a better understanding of consent will benefit the whole community.

People experiencing sexual assault in the context of DFV

Victims who have existing relationships with offenders are often at risk of repeat sexual victimisation. People who have experienced sexual assault have often experienced other forms of violence, including DFV.

It should be noted that affirmative consent may not be protective in instances where the relationship is characterised by chronic manipulation, exploitation and/or threats of violence.

Children and Young People

Currently, children and young people under the age of 16 are presumed to be incapable of consenting to sexual intercourse. Recently the *Criminal Legislation Amendment (Child*

³ Women NSW (2018) 'Make No Doubt: Consent at the Heart of New Campaign' <<https://www.women.nsw.gov.au/news/2018/make-no-doubt-consent-at-the-heart-of-new-campaign>>

⁴ Department of Family and Community Services, *NSW Sexual Assault Strategy*, p. 8

⁵ Ibid

⁶ Ibid p. 23

Sexual Abuse) Act 2018, introduced a limited defence of 'similar age' to prevent the criminalisation of children and young people by recognising that children under 16 may engage in consensual sex which should not be criminalised.

The criminal law also protects young people aged 16 and 17 from misuse of authority in particular relationships where a power imbalance exists. This law recognises that a 16 or 17 year old cannot freely consent to sexual intercourse where a 'special care' relationship exists. FACS also has policies in place to guide caseworkers working with young people aged 16 and 17, as it can be difficult for caseworkers to discern whether a young person is engaging in consensual sexual activity or if there is a risk of exploitation.⁷

Any law reform should take into account the particular vulnerabilities and power imbalances of children and young people. In particular, children and young people involved with the child protection system or the out-of-home-care (OOHC) system are vulnerable to sexual exploitation, grooming and predatory behaviours. The law around consent should be formulated to protect children and young people from sexual exploitation, such as grooming for sex. Legislation that promotes steps to determine enthusiastic or affirmative consent has the potential to improve the safety and well-being of young people in care.

It should also be noted that the NSW Government is in the process of implementing the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The Royal Commission's recommendations centre on preventing child sexual abuse, early intervention, responding to children with harmful sexual behaviour and improving resources, treatment and support for child and adult survivors.

People with disability

Adults with an intellectual disability are over 10 times more likely than the general population to be victims of sexual assault. Those living in residential or institutional settings are the most vulnerable to abuse.

Consent provisions should consider the complexities of consent for those with limited physical and/or cognitive capacity. There are a range of reasons people with disability may not convey their lack of consent. For example, physical disabilities may limit a person's ability to communicate their wishes, or a person may be too afraid to express their objections.

Law reform should balance the inherent right of people with disability to consensually participate in sexual activity, with the need to recognise the position of vulnerability many people with disability may experience. Any affirmative consent model should recognise that people may express their consent in different ways.

Should you require further information please contact [REDACTED]

Yours sincerely

[REDACTED]
Michael Coutts-Irotter
Secretary

⁷ Department of Family and Community Services (2016) *Working with young people at risk of sexual exploitation: See, understand and responds to child sexual abuse*