



Victims Of Crime Assistance League Inc NSW

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NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

Submission: Consent in relation to sexual offences

Victims of Crime Assistance League (VOCAL) Inc NSW welcomes the opportunity to contribute to the NSW Law Reform Commission review of consent in relation to sexual offences.

VOCAL Inc NSW was established in 1989 in Newcastle NSW, arising out of the personal struggles of individuals facing poor legal responses to their experiences of crime.

Today we are an organisation that provides a range of trauma informed support services to crime victims and their families, as they navigate complex personal challenges, including the legal system. We assist individuals to deal with the effects of trauma in their everyday life and we believe timely and accurate information along with emotional support is paramount to recovery after crime.

We also continue our advocacy work to push for a changed social agenda that sees better outcomes for victims of crime.

Submission approach

Consent is often the pivotal issue in any sexual assault trial. In every case, the prosecution must establish beyond reasonable doubt that the complainant did not consent to sexual intercourse and that the defendant had knowledge of this. Taking into account the realities of how and when sexual assaults occur, determining whether there was consent is not only pivotal, but also extremely complex.

We acknowledge that sexual violence is a gendered issue, with the majority of sexual assaults being perpetrated by men, against women. We acknowledge that female sexual assault offenders are in the minority.



With regards to the terms of reference, our submission will broadly address:

- Retaining a definition of sexual assault based on an absence of consent
- The meaning of consent
- Negation of consent
- Knowledge of consent
- Jury directions

The meaning of consent

Should the law in NSW retain a definition of sexual assault based on an absence of consent?

The consent-based approach to the sexual assault offences taken in NSW should be retained.

Most sexual assault criminal trials turn on the question of consent, with the accused believing and/or assuming that the complainant consented to sexual intercourse. Proving that the complainant did not consent is difficult, and the way in which consent is constructed in law has for a long time been the subject of considerable criticism.^[1] Australian Institute of Family Studies concluded that sexual assault is one of the most - if not the most - difficult offences to successfully prosecute and obtain a conviction for.^[2] Nevertheless, we believe that a definition of sexual assault based on an absence of consent is the correct framing.

Defining sexual assault with reference to an absence of consent is important for a number of reasons:

- It helps to establish a clear and adequate notion of what consent means, as well as what the absence of consent looks like. This is vital in providing a benchmark for society to reference.
- A clear definition in the legislation can be pivotal for community education on healthy relationships and sexual behaviours, in turn reducing offending behavior.
- It appropriately highlights the uniquely degrading nature of non-consensual sexual intercourse, which in itself has serious, ongoing physical and psychological health implications for the complainant.

Alternative proposals such as focusing on the consequences (for example, physical injury) or the circumstances (for example, with force) of the sexual assault are, in our view, not adequate bases for a changed legislative definition.

¹ Australian Law Reform Commission Report 114: *Family Violence - A National Legal Response* 24.71.

<https://www.alrc.gov.au/publications/24.%20Sexual%20Assault%20and%20Family%20Violence/history-activism-and-legal-change> Accessed 15 January 2019

² Otlowski, M. (undated) *A Critical Assessment of Consent to Sexual Intercourse: Is the Law at Odds with Current Realities?* <https://www.lawreform.nsw.gov.au/Documents/CwTel11-projects/ConsentIPC045.pdf> Accessed 7 January 2019.

Is the NSW definition of consent clear and adequate?

NSW is at a critical turning point regarding legislation on consent in sexual offences. Our view is that previous changes in legislation have not met community expectations and we feel there are some difficulties with the current definition.

The *Crimes Act 1900* (NSW) s 61HA(2)³ currently provides that a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse. Consent is an agreement between both parties to participate in sexual activity and consent must not be assumed. Social attitudes around sexual violence, domestic violence, consent and a woman's right to safety have, for some time now, been at the forefront of Australian media. We urge that this section of the Crimes Act to be updated and modernised, ensuring that it is relevant and accessible to the public's understanding of sexual violence. For example, the phrasing in subsection s 61HA(3)⁴ is unnecessarily longwinded, stating:

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if...

Simplifying and modernising legislation will complement the first two priority areas identified by Women NSW in their 2018 Sexual Assault Strategy⁵:

- 1) Prevention and early intervention, and
- 2) Education.

There are varying interpretations of the meaning of free and voluntary, and what one person's beliefs are can be significantly different from another person's belief. As publically highlighted in the *Lazarus* case⁶, there are serious issues in practice with interpretation. For example, it was established at trial that "the complainant, in her own mind, did not consent to the anal sexual intercourse that occurred"⁷ but despite this, the defendant was later acquitted on the basis of his 'genuine and honest belief' that the complainant was consenting. The Judge found the complainant "did not say 'stop' or 'no'" and

³ *Crimes Act 1900* (NSW) s 61HA(2)"

⁴ *Crimes Act 1900* (NSW) s 61HA(3).

⁵ {2018}. *Women NSW Sexual Assault Strategy 2018-2021*.

https://www.women.nsw.gov.au/violence_prevention/nsw-sexual-assault-strategy

⁶ Tupman (2017) R v Luke Andrew Lazarus 2013/002424040 Judgement.

http://static1.1.sqspcdn.com/static/f/556710/27630007/1500427752463rfupman_Lazarus.pdf?token=mHtsYtApoYyV2KbLbivgb0GxWmc%3D

⁷ Tupman (2017) R v Luke Andrew Lazarus 2013/002424040 Judgement.

http://static1.1.sqspcdn.com/static/f/556710/27630007/1500427752463rfupman_Lazarus.pdf?token=mHtsYtApoYyV2KbLbivgb0GxWmc%3D Page 70.

⁸ Tupman (2017) R v Luke Andrew Lazarus 2013/002424040 Judgement.

http://static1.1.sqspcdn.com/static/f/556710/27630007/1500427752463rfupman_Lazarus.pdf?token=mHtsYtApoYyV2KbLbivgb0GxWmc%3D Page 73.

"did not take any physical action to move away from the intercourse or attempted intercourse."⁸

The issues with misinterpreting the notions of 'free' and 'voluntary' arguably leads to an undue focus given to the complainant's conduct. Our work frequently brings us into contact with sexual assault trials involving similar confusion around the subject of consent, although these issues are not addressed or publicized due to suppression orders. Equally concerning is the victim blaming attitudes in cross examination that add further psychological damage to an already distressed complainant. We believe there should be more focus on the steps taken by the accused rather than on the conduct of the complainant, which will be discussed further in this submission.

Effective and successful school and community education around consent, social expectations and NSW legislation can only be achieved when individuals without legal training can understand what is required by law. For this reason, using 'the accused' and 'complainant' (rather than 'person') would improve this section of the Act, making it more powerful in courts and more accessible in community settings. It is imperative that citizens understand the legal notion of consent, so as to ensure that they avoid breaking the law and minimise sexual harm to others.

The potential benefits of adopting an affirmative consent standard

VOCAL Inc NSW wholeheartedly supports the introduction of an affirmative standard of consent. We hold the view that a revised definition of consent should clearly require mutual agreement between two consenting parties involved in sexual activity. It is not sufficient for the offender to assume or believe the complainant is consenting.

We recommend strengthening the definition to include an emphasis on the communicative element of affirmative consent, requiring each party to give explicit, informed and voluntary agreement to participate in a sexual act. This is in line with the United Nations Handbook for Legislation on Violence against Women, which recommends consent include the existence of unequivocal and voluntary agreement⁹ It is our view that by legislating an affirmative consent standard, people will be encouraged to actively seek consent throughout the sexual encounter ('checking in') and have a greater understanding that sexual activity is an equal and respectfully shared undertaking.

We acknowledge some critics argue this does not reflect how people truly behave in intimate encounters. For people in healthy and mutually respectful relationships, consent is typically not an issue of serious concern. If one person does not consent to sexual intercourse, the other person does not force, intimidate or continue with the act. However in the context of domestic violence, there is a significantly high number of complainants living in unhealthy and relationships that are exposed to repeated sexual violence.

⁹ (2010). United Nations: Handbook for Legislation on Violence against Women. <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20Legislation%20on%20Violence%20against%20Women.pdf> Page 26

We believe to reject the affirmative consent standard because it does not reflect how people behave in sexual encounters is dangerous. The affirmative consent model can help ensure the rights and health of future generation, and creating cultural shifts is essential to the prevention and intervention of future sexual violence.

Negation of consent

Should NSW law continue to list circumstances that negate consent or may negate consent?

VOCAL Inc NSW argues that there is value in listing circumstances that negate, or may negate, consent. NSW law currently specifies factors such as incapacity, intoxication, being unconscious or asleep, unlawful detention, intimidation or coercive behaviour, and abuse of authority. Listing circumstances such as these arguably supports a positive cultural shift in the way society understands sexual activity.

Recognizing sexual violence within the context of domestic violence

VOCAL Inc NSW is concerned that the current legislation does not adequately assist complainants who experience sexual violence within contexts of family and domestic violence. We submit that the following two subsections in particular need modification:

- 61 HA (4)(c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person).¹⁰
- 61 HA (6)(b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force.¹¹

NSW Bureau of Crime Statistics and Research (2018) found that in the 12 months to March 2018, 86.1 % of victims experienced sexual offences by someone known to them.¹² Of this group, sexual violence often occurs in the context of a relationship, and these relationships often also include physical violence, financial control, psychological abuse and threats to harm or kill family members or pets. Put differently, VOCAL Inc NSW submits that sexual assault is a significant component of relationships involving family and domestic violence. Clients regularly disclose unwanted sexual intercourse, even in cases where they have overtly resisted, had forced pregnancies, and experiences of sexual manipulation or control. These occurrences are less frequently reported to police due to the complex dynamics of domestic violence, central to which is a woman's fear for own safety or her children's safety.

¹⁰ *Crimes Act 1900* (NSW) s 61HA(4)(c).

¹¹ *Crimes Act 1900* (NSW) s 61HA(6)(b).

¹² (2018). *Women NSW Sexual Assault Strategy 2018-2021*.

https://www.women.nsw.gov.au/violence_prevention/nsw-sexual-assault-strategy

In reality, we regularly see complainants struggle to convince police, and then civil/criminal magistrates, that they were in fear, intimidated or felt threatened by the accused. Add to this the complexity of an intimate relationship where consensual sex is most likely to have taken place previously, proving beyond a reasonable doubt that the offender instilled fear and/or coercive control over the complainant is extremely challenging, again especially in the absence of physical injury. Earlier studies revealed disparities in sentencing sexual assault offenders depending on their relationship to the victim-with spousal rapes traditionally being seen as less serious than stranger sexual assault.¹³

VOCAL notes that reports of domestic and sexual violence can be trivialized by general duties police officers, who lack appropriate training to handle the complexity of such matters. In reality, sexual assaults in intimate relationships are difficult to prosecute. Associate Professor Lisa Featherstone states the law is quite clear, but you still see low rates of prosecution of intimate partner violence, and you still see low rates of [the] guilty verdict.¹⁴ This is in part owing to persistent rape myths. It is not uncommon that women are painted as more vexatious, vindictive, and revengeful when the sexual assault is alleged to have occurred within a relationship rather than by a stranger.

Proving to the fact finder, beyond a reasonable doubt, that a complainant was in fear, intimidated, under coercive control is challenging given the complexities of domestic violence. Often intimidation, threats and manipulation are non-verbal behaviors, such as a look, or a gesture. The meaning is clear to both offender and victim, however expecting prosecution to prove this beyond a reasonable doubt in relation to the above sections is unjust.

Knowledge about consent

Should the term "reckless be replaced by "indifferent"?

Sexual assault is a crime about power and control and we stand firm that there is nothing indifferent about an offenders' actions to sexually violate another person. Many victims we assist report they either say 'no' directly before or during the assault, have (unsuccessfully) pushed the offender away or have been visibly upset (crying) during the assault.

¹³ ALRC Report 114 () Family Violence - A National Legal Response 24.71.
<https://www.alrc.gov.au/publications/24.%20Sexual%20Assault%20and%20Family%20Violence/history-activism-and-leirnl-change> Accessed 15 January 2019

¹⁴ Johnson, S & King, C (2018) *Jury rejects 'scorned women' defence in a rare marital rape conviction.* <https://www.abc.oet.au/news/2018-09-21/scorned-woman-defence-rejected-marital-rape-case/10285202>

The definition of reckless is heedless of danger or the consequences of one's actions; rash or impetuous. On the other hand, the term "indifferent" means having no particular interest or sympathy; unconcerned. For an offender to have non-consensual sexual intercourse with a complainant, is a gross violation of the complainant's basic human rights; a physical, psychological and moral violation. VOCAL Inc NSW believes there is nothing indifferent about sexual assault, and given the traumatic nature of sexual violence, we believe the term "reckless" is more appropriate than the proposed term on "indifferent".

Defining Steps and Steps taken to ascertain consent.

VOCAL Inc NSW recommends clarifying and modernizing s 61HA(3)(d)¹⁵ which is currently ambiguous when referring to "steps".

The affirmative model places the onus on both parties to obtain such permission to engage in a sexual act. In almost all sexual assault cases that make it to trial, the behaviour of the victim is unfairly scrutinised. A central strategy in sexual offence proceedings is to discredit the victim/survivor, and Defence lawyers may seek to cross-examine child and adult victims/survivors with irrelevant and demeaning questions about their previous sexual history and sexual knowledge.¹⁶

We encourage that there be stronger focus placed on the positive "steps" (actions and behaviours) the accused took in order to seek consent from the complainant. Some may believe this impinges on the rights of the accused, and findings from the ALRC Family Violence study found "the 'rights of the accused' are frequently raised as a powerful rhetorical tool to limit possible changes in law and procedure..... Measures that might assist complainants are sometimes opposed by lawyers on the basis of perceived incursion into the rights of the accused without an appreciation of exactly what the measure is, what it is designed to do, and how it operates".¹⁷

We argue that previous changes in legislation have not met community expectations, and the Lazarus case, only because it was publicised, highlighted that two Judges misinterpreted the law of knowledge of consent. Victims often end up feeling on trial for their actions, as they are questioned about their actions, words, location and clothing and 'they will face the unimaginable in being told they are liars, exaggerators, or that they are promiscuous ...'¹⁸

¹⁵ Crimes Act 1900 (NSW) s61HA(3)(d)

¹⁶ Taylor S. C. (2004) *Surviving the Legal System: A handbook for adult and child sexual assault survivors and their supporters*. Coulomb Communications (p 69).

¹⁷ (ALRC Report 114) *Family Violence-A National Legal Response* 24.80
<https://www.alrc.gov.au/publication/24.%20Sexual%20Assault%20and%20Family%20Violence/bisto-ry-activism-and-legal-change> Accessed 15 January 2019

¹⁸ Taylor S. C. (2004) *Surviving the Legal System: A handbook for adult and child sexual assault survivors and their supporters*. Coulomb Communications. (p 2)

Many victims report that their experience within the criminal justice system was "equally traumatic" and "they will never report a crime again" for fear of experiencing the same humiliating treatment. This is unacceptable and something has to change to ensure fairness to both complainant and accused.

We urge that changes to this section can be made to reflect society's expectation and improves how the judicial system handles sexual violence matters. We encourage that there be a stronger focus placed on the positive "steps" (actions and behaviours) the accused took in order to seek consent from the complainant. We believe that such a change, in conjunction with community education and awareness, has the potential to create a positive social change around accountability and affirmative consent expectations.

In addition, as previously stated, making the section clearer in relation to "accused" and "complainant" would assist in using modernized legislation in community education programs.

Jury directions

Victim blaming attitudes and rape myths continue to plague society, which in turn can be problematic in jury trials. Typically, Jurors do not have knowledge of trauma related behaviors. Fight, flight or freeze behavioural responses are automatic, uncontrollable responses to a threatening event and given the large volume of research done on the various trauma reactions, we strongly recommend that a legislative direction or warning be given to the jury incorporating relevant trauma informed information. For example, that a victim's inaction and/or lack of physical or verbal communication cannot be taken as a sign that she gave consent to sexual intercourse. It is widely known in a therapeutic setting that while the freeze response protects the individual from the greater threat of the consequences of fighting back or running away, it is often experienced [and interpreted] as passive submission.¹⁹

Submission to an offender does not mean the victim gives consent, and it is dangerous for a jury to interpret such actions. Her inaction and lack of physical or verbal communication must not be taken as a sign that she gives consent. We recommend that jury directions incorporate this knowledge or alternatively use an expert opinion in sexual assault cases, specifically to express to the trier of facts the multiple, unconscious ways a victim may behave during and after the sexual assault.

¹⁹ Sanderson, C (2013) *Counselling Skills for Working with Trauma. Healing from Child Sexual Abuse, Sexual Violence and Domestic Abuse*. Jessica Kingsley publishers. (p. 30)

In closing

VOCAL Inc NSW is grateful for the opportunity to have input on such important legislative changes. In our work with sexual assault survivors we regularly see the ramifications of a harsh and insensitive legal system experience. We remain firm that any changes in legislation around sexual consent need to be met with widely publicised education programs in schools and universities, as well as through social media. This is essential in helping people understand the law on sexual consent and in creating a continual standard of respectful and safe sexual relationships.



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