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Submission

to the New South Wales Law Reform Commission's Draft Proposals

on Consent in Relation to Sexual Offences

November 2019

Introduction

Thank you for the opportunity to comment on the Draft Proposals you have prepared on the important issue of consent in relation to sexual offences. We note the considerable input you have already had from a wide range of stakeholders. We will keep our review concise and focused on what we perceive as the possible practical effects flowing from the proposals. We will draw on our experience to illustrate our views. We have used the chapters of the Draft Proposal document to structure our response.

Expertise in the UNSW School of Social Sciences

As Head of the School of Social Sciences UNSW Sydney, Academic Lead of the Gendered Violence Research Network and a Research Fellow with the Australian Human Rights Institute, I lead a knowledge translation stream of research 'Gendered Violence and Organisations' which provides expert services to government, private and third sector organisations on organisational responses to domestic and family violence, sexual assault and sexual harassment.

The team at Gendered Violence and Organisations translates research into accessible materials for a wider audience and then delivered as face to face training or eLearning products, and develops and reviews policy for organisations looking to support and/or respond to people affected by sexual and domestic and family violence.

Gendered Violence and Organisations employs staff with research and practice expertise domestic and family violence, sexual assault and sexual harassment. In the area for sexual assault and sexual harassment, the team

- works with Universities and residential colleges to improve responses to people affected by sexual assault and sexual harassment
- develops (in consultation with students) and delivers face to face workshops and e-learning modules relating to sexual assault and sexual harassment
- provides face to face training for other identified student groups within universities, including the Student Representative Council, PhD students in several faculties and Indigenous Students
- trains networks of "First Responders" within universities who can be approached regarding experiences of sexual assault and sexual harassment.

The training programs are designed to be interactive and generate conversation, inviting participants to contribute their thoughts on various issues including consent to sex. Training programs for students have a significant proportion of international students as well as students from culturally and linguistically diverse backgrounds. The team has a unique insight into the attitudes of a diverse cohort of young people to sexual consent, and their understanding of the issues.

Response to Chapter 4 – New Interpretive Principles

We welcome the inclusion of the Interpretive Principles in the Draft Proposals. As you have noted, the Principles: "provide a firm foundation for community education initiatives about consent". The Principles reflect and articulate the positive approach to consent, whereby persons "communicate and agree to sexual intercourse" and people will "actively display their willingness to participate in sexual activity".

We can envisage this clear statement of Principles assisting students and those attending our training to better grasp the legal approach to consent to sex in NSW. They will be a useful tool in empowering

people to understand their rights in negotiating consent and also recognising when unlawful conduct occurs. If adopted and widely understood, the Principles would also shape the perspective of anyone responding to an alleged sexual assault, in turn producing better outcomes for those affected by sexual assault.

We do, however, have concerns that the Interpretive Principles are undermined by, or conflict with, Proposal 7.2, which is addressed later in our response.

Response to Chapter 5 – The meaning of “consent”

We support the definition of consent set out in Proposal 5.1 and welcome the points of clarification and the amendments to the law captured in Proposals 5.2, 5.3 and 5.4. In particular, we welcome the amendment clarifying that the absence of verbal resistance does not constitute consent. This is particularly relevant for the significant proportion of victims who experience a “freeze” response at the time of the offence.

We are pleased to see the inclusion of Proposal 5.6, criminalising acts such as what is known in the community as “stealthing”. This issue has been discussed frequently in our training sessions with students and College residents. We have formed the impression that there is a relatively high level of awareness of this practice being wrong, even if not clearly unlawful, as you note. We also formed the view that there was widespread acceptance that stealthing can cause considerable distress and possible harm, in the form of sexually transmitted infections, unwanted pregnancy, mental health issues and impacts on work and University performance.

Response to Chapter 6 – When a person “does not consent”

We support the inclusion of Proposal 6.1, which furthers the notion of a positive approach to consent, as expressed in the Interpretive Principles. The legislation provides clarity on this point by explicitly stating that a person does not consent to sex if they have not communicated their consent in any way. As you note, this removes a barrier to successful prosecution in cases where a person has experienced a freeze response in relation to unwanted sexual contact. However, we have some concerns about whether this also conflicts with the provisions in Proposal 7.2.

The amendments contained in Proposal 6.3, relating to incapacity due to intoxication, may make the law slightly clearer. We agree that it is difficult to create a test that resolves this issue. When we cover this point in training, students often seek clarification on the meaning of “substantially intoxicated”. When we worked with the residential colleges, we were told that this is an important issue as many sexual encounters occur in the context of heavy drinking. Participants in the training often expressed frustration around the ambiguity of the existing provisions. Despite the proposed changes, we suspect that, unfortunately, when this issue affects consent in trials, jurors will still rely on “... non-scientific and possibly incorrect lay opinions about the effects of alcohol”.

We support the changes you suggest in Proposals 6.5 and 6.6, reflecting an understanding of the dynamics of domestic and family violence and the role that sexual violence often play in terrorising people in situations of domestic and family violence.

The wording of s 61HJ(1)(e)(ii) in Proposal 6.5 would seem to cover situations where a person participates in sexual activity due to threats of image based abuse (for example, intimate images being shared). We anticipate consent to sex in such circumstances eventually being tried at law (and note that threatening to share such images is already a criminal offence in NSW).

Response to Chapter 7 – Knowledge of consent

In our view, the tensions in the communicative model become evident at this point in the Draft Proposals. Some of the key concepts of the communicative model highlighted in the Draft Proposals and the Consultation Paper are that the model:

- assumes that people will actively display their willingness to engage in sexual activity
- refutes the notion that submission alone equates to consent
- emphasises that no one can assume consent is present
- reflects the idea that consent should be positively communicated
- reflects the notion that agreement to sex must be sought.

In Proposal 7.2 fact finders will now be required to consider whether the accused said or did anything to find out if the person consented. This sits comfortably alongside the communicative model of consent. They will also be required to consider whether the steps taken were sufficient - although we note this is commentary in the Draft Proposals and does not form part of the subsection.

However, the absence of a requirement to take steps to ascertain consent (noted in para 7.24 of the Draft Proposals) is hard to reconcile with the spirit of the Draft Proposals to this point. The distinction between the communicative model and affirmative consent, in practice, appears very fine.

We appreciate the slight improvements that the changes to this provision will bring, but we are concerned that, on the whole, the amendments do not simplify the issue in the way that requiring someone to take steps to ascertain consent would. It is also a missed opportunity to offer more protection to people who freeze during the commission of a sexual offence. The absence of a requirement detracts from the Interpretive Principles and could cause more confusion.

In our view, the limited amendments contained in this chapter of the Draft Proposals will prove a stumbling block to achieving the objectives of the review, in several ways:

- They do not make the law simpler
- They will not significantly increase rates of successful prosecutions
- They will not encourage more people affected by sexual assault to report the offences to police
- They will not prompt or produce cultural change in the broader community around consent.

The amendments as they currently stand would not dramatically change the content of our training courses around consent. Our discussions on this topic would not be more straightforward, and the practicalities of negotiating consent would not be any easier to grasp, particularly for students for whom English is a second language. The "...firm foundation for community education initiatives about consent" offered by the Interpretive Principles is undermined by this section, in our opinion.

Response to Chapter 8 – Jury directions on Consent

We have no objections to the Proposals relating to jury directions but have reservations about how effective they will be in countering stereotypes for a proportion of jurors who hold very prejudicial attitudes about victims of sexual assault.

Response to Chapter 9 – Sexual intercourse, sexual touching and sexual act

We welcome the changes proposed in Chapter 9, to ensure that the language in the definitions is gender neutral, and that male, intersex and transgender people who are affected by sexual assault do not face additional barriers when seeking justice.

We also support the clarification of the law in relation to withdrawal of consent to sexual touch and sexual acts contained in Proposal 9.4.

Conclusion

In the Consultation Paper it is noted that the many people believe that past reforms of sexual assault law have not achieved their objectives, which "...may be due to wider cultural factors, which legislative change alone cannot address."

We share the view that to significantly reduce rates of sexual assault in our community, as well as reduce attrition rates of sexual assault cases in the criminal justice system, a more comprehensive approach is required.

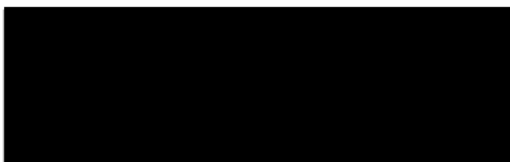
However, simplifying and clarifying the law around consent remains an important exercise. If adopted, the Draft Proposals would decrease the barriers to justice for male, intersex and transgender people affected by sexual assault. They also reflect a more nuanced understanding of the diversity of victim behaviour, including people who participate in sexual activity in the context of family violence. The proposals also ensure that "stealth" constitutes a criminal act. We support all of these changes.

We are not as confident that the Proposals relating to jury directions and intoxication will make a significant difference in practice.

Our biggest concerns with the Draft Proposals lie with the "Knowledge of Consent" section. We feel that the changes in Proposal 7.2 will add to the confusion and complexity around consent, particularly when they are read alongside the Interpretive Principles and Draft Proposal 6.1.

Thank you for your work on this important topic and for the opportunity to contribute to the discussion.

Yours sincerely,



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