

## **SUBMISSION TO NEW SOUTH WALES LAW REFORM COMMISSION RE. SEXUAL CONSENT**

### **Introduction**

I am a former academic lecturer and writer of academic texts. For several years, I worked for various law firms. In 1997, I wrote and presented a Submission in relation to proposed rape reforms at a public forum held in Victoria. I am interested and involved in various human and animal rights movements, and have written other submission in relation to certain issues.

Rape and sexual abuse are abhorrent but unfortunately, extremely common in our society and globally. Many women, regardless of their age, culture, colour and background, fear rape, even if they do not always voice those fears. Despite some advances, there are still myths and stereotypes surrounding rape which are difficult to change. These include the myth that rapists have uncontrollable sexual urges and that women are a temptation that many men simply cannot resist.

Thus, women are still receiving well-intended but mistaken advice regarding their appearance/ clothing, alcohol/ drug consumption, and that they should avoid travelling alone. In other words, there is still sometimes a perception that it is a woman's responsibility to take steps to avoid being raped, rather than the responsibility of men to ensure that they do not indulge in sexual predatory behaviours. It is also conveniently forgotten that women of all ages and appearances are raped and what is, perhaps, most important of all, that in many cases, women know their attackers.

It is quite obvious that most men are not rapists. However, it is equally obvious that the number of rapes, reported or otherwise, is still far too high. Whilst some men, particularly gay men, may also be raped, this is still predominantly a crime perpetrated by a man/ men against a woman/ women. It is important to ensure that men who report being raped are taken seriously and not discriminated against.

### **How should we define 'consent'?/ Asking specific questions**

The matter of what constitutes consent in relation to sexual relations is obviously a thorny subject. Defendants accused of rape have defended themselves, sometimes successfully, on the basis that they believed that consent had been given. It can be difficult to ascertain whether an alleged offender truly and genuinely, even if mistakenly, holds this belief, or whether he is simply using it as an 'excuse' for his actions.

In order to clarify consent, a male wishing to have sexual relations needs to ask specific question. Vague questions such as 'How about it?' or 'Do you want to do it?' are insufficient. This could mean anything. The same applies to vague statements, e.g. 'I suppose we could/ should have sex.' A question such as 'I would like to have sex with you. How do you feel about that?' is clearer. It needs to be clearly spelled out that one party wishes to have sex with the other. Asking specific and relevant questions that can be answered with 'relative' ease is important. Vague, ambiguous and open-ended questions may be confusing to the other party and increase the potential for misunderstandings.

### **Type of sexual activity**

It is also important to spell out the nature of the sexual activity, e.g. vaginal intercourse, anal intercourse or oral sex. A person may be uncomfortable with the idea of one type of sexual relations and/ or there may be 'assumptions' regarding what type of sexual activity is involved.

### **Listening to responses**

It is extremely important that the male asking for sex listens carefully to the responses. If the woman shows any signs of discomfort, he might ask her a few questions and open up the discussion. There may be many and diverse reasons why she does not wish to have sexual relations. However, the male should not in any shape or form attempt to coerce his partner into having sex with him, using verbal and/ or any physical pressure. Any attempt to do is at the very least abusive.

### **Non-verbal behaviours**

It is important to observe non-verbal behaviours carefully, but not to make assumptions based on such behaviours. Nodding one's head and/ or smiling should not be taken as consent to sexual relations. In some cultures, smiling may indicate nervousness. Clear consent must be spelled out verbally in no uncertain terms.

### **Relationship status/ Relationship termination**

It is sometimes wrongly assumed that if a man and a woman are involved in an intimate relationship, that the woman will always have sex with the male, regardless of the circumstances. The nature and length of the relationship does not, or should not, entitle a man to coerce or force his partner into having any form of sexual relations against her will. Unfortunately, there are still many people in our community who do not accept rape in marriage, including some members of religious communities. It is highly likely that many married or de fact women never report being raped at least in part for this reason.

Some men also find it difficult if not impossible to accept the termination of a relationship. They believe they are still entitled to control and dominate their former partners. This can take the form of bullying, harassment, stalking, and, of course, violence and rape. Sadly, many women are killed by their current or former partners.

### **A request is not a demand**

A man may request that a woman have sexual relations with him. This may also take the form of a suggestion or an invitation. A request or invitation allows the other person to accept or refuse as they see fit, whereas a demand insists that the other person must give in, regardless of the circumstances and / or the other person's feelings.

Our laws make it clear that an agreement in which one party is acting under duress is not a binding agreement. In a sexual encounter, any form of coercion, whether verbal and/ or physical, precludes real consent. It is arguable that on this basis, any sexual encounter of this nature might constitute rape or at the very least, some form of sexual assault.

### **Alcohol and drugs**

The use of drugs and / or alcohol can clearly change people's behaviours and alter their ability to make appropriate decisions. People are not forced to drink excessively and/ or take drugs. A man who rapes a woman under the influence of drugs and/ or alcohol should not be given leniency on this basis. Similarly, if a woman is affected by drugs and/ or alcohol, it should not be assumed by any male that she will want to have sex with him. An unconscious person is unable to give consent and thus, if a man has sex with her, this is obviously rape

## **Age and mental capacity**

People lie about their ages for many reasons. Having sex with a minor is a serious offence. A male may say that the woman said she was of age and/ or that was his understanding. This can be complex. Using some probing questions and careful observation may sometimes reduce this problem. However, if a male has any doubts regarding the age of a woman with whom he would like to have sexual relations, it is probably better if he desists, even if he is the one being pressured. It can be difficult, but where one or both parties are very young, there should probably be some discussion regarding their past sexual experiences and whether one or both is a virgin.

The age of the alleged offender may also be important. A very young male obviously lacks maturity, skills and experience. On the other hand, one has to exercise care in ensuring that young males are not automatically exonerated for their actions on the basis of their youth. This could easily send all the wrong messages to young males, and make it even more difficult for women to decide whether to report a rape.

Sexual relations where one or both parties has / have diminished mental capacity can be complex. Our laws generally protect people with a physical and/ or mental impairment including in terms of allowing sexual relations – within reason. A male needs to exercise careful judgment in relation to sexual relations with a female whom he knows or suspects has a mental impairment. However, this can be difficult if not impossible to ascertain unless one has expert knowledge. No male should take advantage of a female whose mental capacity may be diminished and which would preclude her consent from being informed and genuine. Similar conditions should apply in relation to physical defects, but again, only on the basis that a male is taking advantage of the situation.

## **Assumptions/ Withdrawing consent**

A great deal has changed since the days in which inviting a man into a woman's apartment for coffee was interpreted as a desire and willingness to have sexual relations. Most people would not automatically assume that this is the case. It is not entirely uncommon for a woman to ask a man out or to a social function or to her home. A woman may also proposition a man, and if she does, he should have the same right of refusal as she might expect of him, even if the reverse still tends to apply.

Kissing and cuddling may lead to sexual relations, but this should automatically be assumed. A man or woman or both parties may decide not to take the relationship further or to get to know one another better before taking the relationship to the next level.

Even if consent to have sexual relations has been clearly stipulated, one or both parties may withdraw consent at any time. A party may feel uncomfortable and change their minds, for a number of reasons. This is where some men may become insistent and even violent. They may wrongly believe that the woman is 'playing hard to get' or that she is saying no, when she really means yes.

## **Conclusion**

Rape and sexual assaults are usually not witnessed. Thus, many cases hinge upon the actions and behaviours of the accused and the accuser. In order to try and reduce the potential for 'misunderstandings', the matter of consent needs to be as clear and unambiguous as possible, given the sometimes complex nature of sexual relations. Non-verbal behaviours, attempting to 'read' someone's mind and making often erroneous assumptions are, or should be, considered insufficient 'defences' that the accused believed consent had been given. Excessive consumption of alcohol

and/ or drugs may affect a person's capacity to make appropriate choices and decisions, and should not be used as 'excuses' for sexually predatory / violent behaviours. Age, sexual experience and mental capacity are all factors that also need to be considered. Sexual relations with a minor and/ or with a person who does not have a clear understanding of what is asked of them, should be deemed to be sexual abuse/ rape.

Clear verbal communication is required, whereby one party makes a suggestion or invites the other party to have sexual relations with them, and spells out the nature of that activity. Listening skills are very important so that there is no basis for misunderstandings between the parties.

Whether a prior relationship exists, the nature of that relationship and its duration should probably have no bearing on rape cases. It should not be automatically assumed that one party will always be willing to have sexual relations with the other party, even if they have been in a relationship for many years, the relationship is ongoing or has been terminated by one or both parties.

Any form of coercion, whether verbal and/ or physical should be considered as duress. Consent cannot or should not be deemed to have been given in such circumstances. Any 'prelude' to sexual activity should not automatically be considered as a form of consent. Consent can be withdrawn at any time and the other party must adhere to a request to cease and desist. Failing to do so should constitute sexual abuse/ rape.

## **Recommendations**

The following recommendations should be considered:

- Ensuring that consent to any form of sexual activity is provided verbally and not in any other form
- Obtaining such consent needs to take the form of clear questions and/ or statements that can be answered without ambiguity
- 'Real' consent can only take place between two consenting adults, without any form of coercion and or threats, perceived or otherwise
- The community needs to be 'educated' regarding the matter of consent. This may include advertising campaigns, as well as school and university 'lectures'. Appropriate sexual behaviours need to be taught from a fairly early age and reinforced throughout a person's scholastic, working and personal life

## **Other issues**

Whilst the matter of sexual consent is of great importance, there are other areas which need improvement. There can be no real progress in relation to rape and sexual abuse, unless there are changes in community attitudes as well as legislative changes which are enforced. In considering such changes, we need to be cognisant of the following points:

- Rape is not generally about uncontrollable sexual urges. Sex is used as a weapon to assert authority, control and domination over another
- Although reporting rates have increased, the majority of rapes are still never reported
- Rape cases rarely go to trial
- Conviction rates are extremely low
- A victim is likely to suffer physical, mentally and/ or emotionally, sometimes for years. We sometimes underestimate the trauma suffered by rape victims, as well as the effects on their family and friends

- Some victims find it difficult to decide whether to report the rape or keep silent
- Rape victims who decide to go public face a long, gruelling process which in some cases, may actually worsen their trauma
- There are still myths and stereotypes regarding both the alleged offender and the victim. The ‘burden’ of responsibility still tends to rest upon the victim’s shoulders rather than the alleged offender. Women are expected to take steps to avoid rape, but there are no real instructions or campaigns to dissuade men from abusing and raping women
- Sexual offenders are often notoriously difficult to treat / rehabilitate. There is some likelihood that a rapist will re-offend and in some cases, murder a victim/ s

### **Further Recommendations**

There needs to be strenuous campaigns to educate and re-educate the community regarding what constitutes rape. The ‘respect’ campaign is a beginning, but does not go nearly far enough. Education has to start at a very early age, but of course, education starts in the home. Gender equality is still a pipe dream for many women. Workplaces need to be actively encouraged to teach and foster mutual respect and equity between the sexes, and to provide a safe workplace. Institutional abuse is a common problem. Handling reports of sexual abuse, including rape, ‘in-house’ is fraught with problems and is at least one reason why many rapes are never reported, including at universities/ colleges and within some religious communities.

We also have to consider the penalty for a rape conviction in terms of whether it is appropriate. Even if a gaol sentence is imposed, it is important to monitor the offender after release takes place. In order to avoid future offences – or worse – offenders need to be re-educated. In this way, they can also help other men, thus reducing sexual abuse. Punishment alone should not be the goal.

### **State and Federal Governments**

Since rape is a problem common to all States, it is arguable that all States should have similar laws. There should be no valid reason why a rape committed in one State should be treated less seriously than if that rape was committed elsewhere. The Federal Government needs to take more strenuous action in relation to the health, safety and well-being of all women – and men, as well as children.

There needs to be increased co-operation between all levels of government, regardless of other political considerations, including local government. Greater funding and resources need to be provided including specialised police officers, members of the judiciary, medical and psychological experts, special trainers, and wider consultation with all relevant stakeholders. Women who have been raped should be encouraged to come forward and at least tell their stories, even if they are unsure as to whether they wish to take the matter further. Their privacy must be protected, but we need to hear from actual victims, in their own words.

Thank you.

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