

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

25 JUN 2018

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

Dear Ms Gough,

Preliminary submission to NSW Law Reform Commission- Consent in relation to sexual assault offences

Thank you for the opportunity to provide comments on the Terms of Reference for the NSW Law Reform Commission's review into s 61HA of the Crimes Act 1900 (NSW), which deals with consent in relation to sexual assault.

The Department of Family and Community Services (FACS) is very supportive of this review and considers the Terms of Reference sufficient to ensure a useful evaluation of the consent provisions for sexual assault offences.

FACS has included some comments and potential considerations about some of the particular vulnerabilities many FACS clients experience.

Comments about the review

FACS is supportive of the review considering whether s 61HA should be amended, including any relevant issues relating to the practical application of s 61HA. It should be noted that women and girls were nearly four times more likely than males to be a victim of reported incidents of sexual offence in the 12 months up to December 2017.

Section 61HA could be amended to incorporate the reasoning of Bellew J, in relation to the steps taken by an accused person to ascertain whether the other person is consenting. This would require evidence of some positive action, whether physical or mental, however characterised, to determine whether the person was consenting to the sexual activity. This would reflect community belief that consent to sexual activity should never be assumed and active consent should be required.

FACS also supports the review considering sexual assault research and expert opinion, and relevant case law and developments in law, policy and practice on the content and application of s 61HA. Also the consideration of other jurisdictions such as the sexual consent provisions in Tasmania and Victoria which require active consent.

FACS is strongly supportive of the review considering the experiences of sexual assault survivors in the criminal justice system, as these stories will form a critical evidence base. These experiences should be drawn from a diverse range of people, including young people, culturally and linguistically diverse people, Lesbian, Gay, Bisexual, Transgender, Queer and Intersex people, Aboriginal and Torres Strait Islanders and people with disability.

Children and Young People

Two-thirds (66.3 per cent) of victims of sexual assault were children in the 12 months to December 2017.

Sexual expression in young people is normal and developmentally appropriate. The age of consent is 16 in NSW, increasing to 18 in 'special care' relationships. The review should consider the impact of vulnerabilities experienced by many children and young people, including those that FACS works with.

The consent provisions could be clarified in relation to power imbalances between a young person and their partner for the purposes of ascertaining whether the young person has provided consent to the sexual activity.

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) provided insight into the impact of sexual assault on children and adult survivors.

The Royal Commission recommended a number of education and prevention initiatives. The review should consider the importance of education around consent, sexual ethics, respectful behaviour and how consent can be obtained, and that this needs to start at a young age, at home and in institutions including schools.


The Royal Commission also made recommendations in relation to identifying, early intervention and response to children with harmful sexual behaviour. Successful early intervention requires families, pre-schools, schools, out-of-hours school care services, health services and other services being able to recognise harmful sexual behaviour and connect children and young people with specialist services.

People with Disability

Adults with an intellectual disability are more than 10 times likely than the general population to be victims of sexual assault. Further, more than 70 per cent of women with disability have experienced violent sexual assault at some time in their lives. Those living in residential care or institutional settings are the most vulnerable to abuse.

The review should consider how to balance the inherent right of people with disability to consensually participate in sexual activity, with the need to recognise the position of vulnerability that many people with disability find themselves in.

In the context of disability, there are a range of reasons why a person 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. As such, the review should consider that people may express their consent in different ways.

If you require further information on the FACS submission, please contact 

Yours sincerely



Michael Coutts-Trotter
Secretary