Submission to NSW Law Reform Commission

Consent in relation to sexual assault offences

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My Name is Dr Ellie Freedman and I work as the Medical Director of the Northern Sydney Sexual Assault Service. This service provides acute medical and forensic care to recent victims of sexual assault and works with the Sexual Assault counselling team to provide crisis and follow up psychological care and court support.

This submission is written on behalf of the entire Sexual Assault team

While the definitions of consent seem to be spelled out clearly in law, their application is inconsistent. There are many factors that seem to influence this and perhaps it is drafting guidance to legislation that clarifies the intended application of the law that would be beneficial to the practice of law. Moreover any legislative change needs to be accompanied by proper education for judiciary and jurors on the these changes that reflect dynamics of sexual assault. We also call for adequate resourcing to ensure that sexual assault matters can be fairly represented in court.

Our experience of sexual assault cases going to trial is that the onus is on the victim to prove that they did not consent to sexual activity rather than on the alleged offender to prove they "took steps" to ascertain that the complainant consented.

The nature of most sexual assaults is that they occur within a social contract between perpetrator and victim. This maybe an ongoing relationship or merely a recent acquaintance but it is this that allows the perpetrator access to the victim. The nature of this relationship is often what is explored in court and used to demonstrate implicit consent to a sexual act by the victim. For example, a woman who spends time with a man in a bar drinking, who may consent to getting in a taxi with him and may even consent to going home with him will still be seen as consenting to sex. Knowing that 85% of perpetrators are known to victims, legislation should reflect the grooming process that is part of the process toward targeting and assault of a victim. Grooming for adults includes a collection of behaviours and actions that cumulate toward the violation of someone's rights to consent to sex, including pressuring victims to consume more drugs or alcohol than desired, isolating them from friends or taking them to an unfamiliar location. These interactions are presented in court as "reasonable grounds for believing that the other person consents to the sexual intercourse" . It may be hard to "prove" that a person does not consent to sexual intercourse in the absence of the below

conditions *(6) The grounds on which it may be established that a person does not consent to sexual intercourse include:*

(a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or

(b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or

(c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

These actions should be acknowledged as being a part of the perpetrator tactics used in Sexual Assault rather than being seen as evidence of a relationship between victim and assailant that implies conset to sexual activity.

General public opinion on sexual assault as represented by the jurors and perhaps even the judiciary to an extent, continue to reflect the stigma and myths of sexual assault. This affects their ability to synthesize the evidence that they are hearing in a way that reflects the reality of sexual assault. In the course of trial, the judge provides the jury with instructions that outline their obligations. In a sexual assault trial, this should include instructions to the jury on the definition of consent as it appears in law.

Part of the issue of adult consent is the different social responses to complaints brought about by different complainants. Consent seems to be weighed on the basis of whether or not the complainant is likely to have been sexually attractive to the perpetrator or whether the complainant is deemed likely to have wanted to have sex with the perpetrator, for example complaints of sexual assault made by men and those made by women. Complaints brought forward by men are met with an assumption of belief by law enforcement and consequently, the proceeding investigation seeks to support the assumption that a man would not want to be assaulted by another man (as is the situation in 99% of cases). Conversely, the assumption that seems to be made about women is that the complaint about sexual assault can be faked or malicious, due to change of mind.

Victims of sexual assault are often seen as either consenting to sexual activity or at least not making it clear to the perpetrator that they do not consent due to their lack of physical resistance.

Reactions to trauma are widely poorly understood. Victims of sexual assault may respond to the experience in many different ways and an acknowledgement of the role of fight-flight-freeze response may be crucial to jurors and the judge being able to identify that an absence of fight does not equate with consent. If part of the law reform on consent is able to include acknowledgement

that human reactions to trauma such as freeze do not indicate consent, this may benefit the course of fair justice on this issue.

The process of a criminal trial in sexual assault matters sometimes seems to be set up to cause more trauma. Defence lawyers appear to use delay tactics to draw out the process in the hopes of benefitting from natural attrition of the victims. Protracted cases increase psychological harm to victims and are a form of re - victimisation whereby the dynamics of assault are replayed. Those dynamics being that the victim has no power or voice to be able to influence what is being done to their lives and the suffering that they are enduring in the process. Changes to the legislation should include vigorous rules that prevent as much as possible, the protraction of sexual assault trials. I have witnessed clients being subject to their trials being protracted after continuous errors and continued postponements that appear to be driven by defence lawyers for minor reasons. These actions seem to represent a subversion rather than promotion of the justice system.

I have included 2 accounts of recent cases that have gone to trial, with the consent of the complainants to record them here. I feel they illustrate some of the issues at stake.