

Consent in relation to sexual assault offences

Preliminary submission

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The NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001
Email: nsw-lrcl@justice.nsw.gov.au

Contact: **Lauren Mendes**
Chair, NSW Young Lawyers Criminal Law Committee

Contributors: Lexie Henderson-Lancett (Submissions Coordinator), Lauren Mendes, Uzma Sherieff, Vanessa Chan

The NSW Young Lawyers Criminal Law Committee (Committee) makes the following preliminary submission in response to the review of: s 61HA of the *Crimes Act 1900* (NSW), dealing with consent in relation to sexual assault

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Criminal Law Committee is responsible for the development and support of members of NSW Young Lawyers who practise in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Preliminary Submission

The Committee welcomes the opportunity to contribute to the Law Reform Commission's review of this complex and significant area of criminal law and practice. The breadth of the Committee's views at this preliminary stage reflects the complexity of the issue, and the Committee is thus interested in providing targeted submissions in response to any future question papers and discussion points that the Law Reform Commission releases in the course of this review.

By way of this preliminary submission, the Committee provides the following views of its members, canvassed at our May meeting:

➤ *Definition of consent*

In considering the adequacy of the current definition of consent in s 61HA(2), (4)-(7) of the *Crimes Act 1900* (NSW) and the necessity of modifying the definition, the Committee is conscious that the definition should remain at all times clear and comprehensible. First, this is in keeping with the

fundamental rule of law principle that laws should be clear, predictable and accessible, such that community members are cognisant of proscribed behaviour that may attract criminal liability. Secondly, however, there is an evident utility object in maintaining clarity in this area of the law. An over-complicated definition of consent reduces the value of s 61HA as a meaningful and enforceable standard for use in context. A fundamental objective of the definition, and any modification to its framing, should always be to assist community members in distinguishing between what is and is not consent.

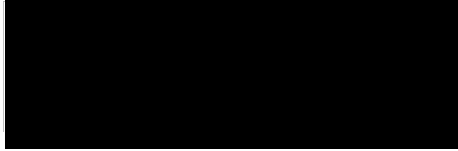
The Committee has preliminarily considered the adequacy of the definition in reflecting community standards and in balancing the rights and expectations of multiple parties in the criminal justice system, including victims and accused persons. The Committee has preliminarily reviewed the statutory models of consent in jurisdictions around Australia and limited overseas jurisdictions (including the United Kingdom and state jurisdictions of the United States, such as California).

The Committee supports further exploration of the proposal that NSW adopt an affirmative statutory model of consent, in line with the model operating in Tasmania (as per Sch 1, s 2A of the *Criminal Code Act 1924* (TAS)); that is, the introduction of a necessary positive act to constitute consent. The Committee is supportive of such a model taking into account verbal and non-verbal means of communication. The Committee considers that such an approach may be successful in balancing the often competing interests of parties in the criminal justice system. In noting that this appears to be a key issue for debate in the current review, the Committee is interested in providing a further submission on the prospect of adopting an affirmative model.

➤ *Beyond Statutory Reform*

The Committee considers that there is a cultural need for change in the understanding of consent in NSW. The Committee welcomes consideration of the issue via a law reform process, but is of the view that greater community education is both a necessary and valuable path to addressing this issue holistically. The Committee acknowledges that legislative reform on the issue of consent has in the past had constructive social and cultural effects, but considers that legislative reform of itself can be a limited approach. This is because the law can be a blunt instrument for addressing underlying social and cultural issues, and requires an educative tool to supplement and bolster its effect. Committee members have suggested that comprehensive education programs on the standard of consent should be introduced as early as high school. Broader community education initiatives (including those at universities and other tertiary education institutions) should also be welcomed.

Contact:



President

NSW Young Lawyers

Email: 



Lauren Mendes

Chair

NSW Young Lawyers Criminal Law Committee

Email: 