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Greens Member of the NSW Legislative Council



NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

29 June 2018

Dear Madam/Sir,

Re: Submission to Review of Consent Laws in relation to sexual assault offences

Thank you for the opportunity to make a submission to the Law Reform Commission for review of Consent Laws in New South Wales. I make this submission as the Greens NSW Spokesperson for the Status of Women.

There is currently ambiguity in NSW on how legal standards of consent apply in a court of law. At the moment, sexual consent is defined in NSW as, "a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse."¹ It is therefore currently possible for perpetrators of rape or sexual assault to escape a guilty verdict, even when the judge and jury accept that the victim did not consent.² As the NSW Attorney General recently stated, "There's a real question about whether our law in New South Wales is clear enough, is certain enough, is fair enough."³ This review provides an opportunity to clarify and strengthen consent laws and remove any inadequacies.

Sexual consent should be redefined as active, positive, and voluntary. The law must make it clear that a lack of protest or resistance does not equal consent. In addition, consent can be revoked at any time during sexual activity, and a previous or ongoing sexual or intimate relationship does not stipulate current consent.

There is no question as to the prevalence of sexual violence in the world today. Any efforts to address this must consider, and implement, ways to: address the needs of victims, hold perpetrators accountable, and educate the community about how to prevent sexual violence.

These and related matters are discussed in more detail below.

Prevalence of Sexual Assault

When a society does not acknowledge the prevalence of sexual violence, or normalises its existence, it creates a culture where sexual violence could be considered acceptable. The significance of this review is underpinned by the high prevalence of sexual assault in Australia. According to the United Nations, Australia has one of the highest rates of reported sexual assault in the world, with the rate of assault at almost 92 people per

¹ NSW Crimes Act 1900, Section 61HA

² See *R v Lazarus* [2017] NSWCCA 279

³ Louise Milligan & Lucy Carter, 'NSW Attorney-General calls for review of sexual consent laws following Four Corners program', *ABC News*, <http://www.abc.net.au/news/2018-05-08/nsw-attorney-general-calls-for-review-of-sexual-consent-laws/9734988>

100,000 of the population.⁴ The number of sexual assault victims recorded by police increased by 8% across Australia last year, from 23,040 victims in 2016 to 24,957 victims in 2017.⁵

In NSW, there was a 5.3% increase in sexual assault in the 5 years leading up to December 2017,⁶ but less than 1 in 5 victims are reporting their assault to police.⁷ Reversing this negative trend requires both new legislation and changes in social attitudes to restore confidence in the justice system, so more victims of sexual assault feel confident to come forward and report the crime.

Recently, at the request of 39 universities around the country, the Australian Human Rights Commission undertook a national survey to gain greater insight into sexual assault and harassment in universities and colleges.⁸ The results showed that 51 percent of students had been sexually harassed at least once in 2016.⁹ This statistic is unacceptable, and points to an underlying cultural problem.

It is also important to note that over 80% of sexual assault victims in NSW are women,¹⁰ and the perpetrators are overwhelmingly male; 96% of female victims of sexual violence since the age of 15 report the perpetrator as male.¹¹ We live in a culture where misogyny is socially ingrained, and sexism is experienced by women on a daily basis. As seen with the recent #MeToo and #TimesUp movements, and the traction they quickly gained, the concern with what constitutes consent is real and far-reaching.

An understanding of how to give and receive consent is therefore essential to creating cultural change. Sexual consent education has an important role to play in this regard. A study on the effectiveness of a college student-driven sexual consent education campaign at a large, public university in the United States found that “students reported significantly greater positive attitudes about establishing sexual consent before engaging in sexual activity.”¹²

Legal Change in other Jurisdictions

The approach to sexual consent has previously been based primarily on the premise of ‘No Means No,’ which suggests it is the victim’s responsibility to actively show resistance. It

⁴ Stephanie Anderson, ‘Sexual assault: How common is it in Australia?’, *SBS News*, 2015, accessed <https://www.sbs.com.au/news/sexual-assault-how-common-is-it-in-australia>

⁵ Australia Bureau of Statistics, Recorded Crime - Victims, Australia, 2017, online at <http://www.abs.gov.au/ausstats/abs@.nsw/mf/4510.0>

⁶ NSW recorded Crime Statistics, accessed http://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/NSW_Recorded_Crime_December_2017.pdf

⁷ Sexual Assault: The Law and Statistics, *NSW Rape Crisis*, accessed <http://www.nswrapecrisis.com.au/Portals/0/PDF/Sexual%20Assault%20The%20Law%20and%20Statistics.pdf>

⁸ ‘Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities’, Australian Human Rights Commission, 2017, accessed <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>

⁹ University Sexual Assault Report, *ABC News*, 2017, accessed <http://www.abc.net.au/news/2017-08-01/uni-sexual-assault-hrc-report-released/8762638>

¹⁰ NSW Sexual Assault Strategy, *Progress Report: December 2016: Sexual offence statistics in NSW, 12-month period ending June 2016* accessed online at: https://www.women.nsw.gov.au/_data/assets/pdf_file/0009/389133/sexual-assault-report.pdf

¹¹ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018*, report accessed online at: <https://www.aihw.gov.au/getmedia/d1a8d479-a39a-48c1-bbe2-4b27c7a321e0/aihw-fdv-02.pdf.aspx?inline=true>

¹² Ortiz, Rebecca R. (06/02/2018). “Unblurring the lines of sexual consent with a college student-driven sexual consent education campaign”. *Journal of American college health* (0744-8481), p. 1.

could also mean consent is assumed unless protested by the victim. However, the way in which we view sexual consent must change towards an affirmative model of consent.

In Australia, the States of Tasmania and Victoria have made changes to consent laws. Victoria was the first to do so when, in 1991, it legislated jury directions about consent. According to the Australian Law Reform Commission, in Victoria the judge must direct the jury in matters related to consent where that is relevant to proceedings:

“The matters about which the judge must direct the jury include the meaning of consent (free agreement) and the circumstances, prescribed by legislation, in which the complainant does not consent, as well as:

- (d) that the fact that the person did not say or do anything to indicate free agreement to a sexual act at the time which the act took place is enough to show that the act took place without that person’s free agreement;
- (e) that the jury is not to regard a person as having freely agreed to a sexual act just because—
 - (i) she or he did not protest or physically resist; or
 - (ii) she or he did not sustain physical injury; or
 - (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person”¹³

In Victoria, legislation also now states that a person does not consent if “(a) the person submits to the act because of force or the fear of force, whether to that person or someone else; (b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal¹⁴”.

Tasmania has the most rigorous sexual consent laws in Australia, which were introduced in 2004.¹⁵ They require active, affirmative and communicative consent, meaning a person does not agree to an act if they do not “say or do anything to communicate consent.”¹⁶ This means a failure to communicate lack of consent cannot be used as evidence of agreement.

Sweden recently changed the legal definition of sexual assault with the aim of simplifying the law in relation to consent. The law now states that “sex must be voluntary – if it is not, it is illegal,”¹⁷ meaning there can be a conviction for sexual assault when there is no explicit force or threats involved and an absence of consent is enough to prosecute for sexual assault offences.

¹³ Family Violence - A National Legal Response (ALRC Report 114), Section 25: Sexual Offences available online here: <https://www.alrc.gov.au/publications/25.%20Sexual%20Offences/jury-directions-about-consent>

¹⁴ Victorian Crimes Act 1958, Section 34C Consent

¹⁵ Helen Cockburn, ‘The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials’ <https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf>

¹⁶ Tasmanian Criminal Code Act 1924 - Schedule 1, Section 2A

¹⁷ Offices of the Government of Sweden, Ministry of Justice factsheet, April 2018, accessed online at:

<https://www.government.se/498ee7/contentassets/ee1de9e9781046afb784f034565f32e9/consentthe-basic-requirement-of-new-sexual-offences-legislation>

Similarly, the 'Yes Means Yes' law in the US State of California introduces a positive consent standard in the determination of whether consent was given by both parties to sexual activity. The 'Yes Means Yes' campaign led to the law, known as SB695, which requires all public high schools to develop curriculum that cover the notion of consent.¹⁸ This campaign was in response to a host of studies in the United States showing the prevalence of sexual assault on university campuses. The mandatory education policy aims to educate teenagers about having control over their own bodies, and how to give and receive consent for sexual activities.

The Californian law shifted the paradigm away from the assumption of consent in the absence of a "no" response from a victim. The law now defines affirmative consent as follows: "affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity."¹⁹ This puts forward a much clearer minimum standard of consent for sexual contact, and place the responsibility on all parties to be completely aware of the situation at hand and the feelings of their sexual partner/s. The State of New York also passed a similar law in 2015, which "requires all colleges to adopt a set of comprehensive procedures and guidelines, including a uniform definition of affirmative consent."²⁰

These approaches in other jurisdictions which include models of affirmative and communicative consent and jury direction should guide the NSW law review to make our laws the strongest model of consent in the world.

Treatment of Sexual Assault Reports in the Justice System:

A relatively recent snapshot prepared by the Bureau of Crime Statistics and Research on the progress of sexual offences through the NSW Criminal Justice System, looked at incidents from 2011 to 2015.²¹ It is clear from the data that, consistently over the period of four years, each year over 60% of the incidents involving victims aged 16 or older were not cleared up within 6 months of reporting.²²

A clear trend of reported cases never making it to criminal proceedings emerges from statistics. In New South Wales alone in 2015,²³ there were:

- 10,944 reports of sex offences were made to NSW police.
- 1,734 reports resulted in criminal proceedings.
- 1,603 reports went to court.
- 932 reports found guilty.
- 523 offenders received a custodial sentence.

¹⁸ California Legislative information, accessed https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967

¹⁹ SB-967 Student safety: sexual assault. Senate Bill No. 967, Chapter 748 in State of California

²⁰ Media Release, Governor Andrew M. Cuomo, July 7, 2015. Accessed online at: <https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university>

²¹ The progress of sexual offences through the NSW Criminal Justice System, 2011 to 2015, available online here: <http://www.bocsar.nsw.gov.au/Documents/sexualattributiondiagrams.pdf>

²² Ibid.

²³ Jane Gilmore, 'Terrifying truth about rape convictions: 'it shatters your belief that the world is a safe place'', *News.com*, accessed <https://www.news.com.au/lifestyle/real-life/news-life/terrifying-truth-about-rape-convictions-it-shatters-your-belief-that-the-world-is-a-safe-place/news-story/9fc4a65689f180b3534d79f4fd019b8e>

Alarming, according to the Australian Law Reform Commission, in NSW “among all sexual offences reported to police, criminal proceedings are initiated in only 15% of incidents involving child victims and 19% of incidents involving adult victims.”²⁴ It is concerning that researchers have also found “that it was common for incidents to be recorded as cleared by the police, even though there had been no criminal proceedings commenced through the issuing and filing of a court attendance notice.”²⁵

The low reportage of sexual assault, as stated above, points to a trend showing a lack of faith in the justice system. A federal study in Canada found that two-thirds of female sexual-assault victims lacked confidence in the criminal justice system and many women cited this as a major reason for not reporting an attack to the police.²⁶ Providing early support to the victims and a commitment from all tiers of the justice system to follow through on reported sexual assaults will go a long way in building public confidence in the criminal justice system. The United Nations’ program to end violence against women and girls provides extremely useful guidelines on establishing judicial practices and procedures that can have a direct impact on the number of victims that come forward to report sexual violence. The guidelines include the provision of “simplified, free-of-charge reporting procedures and specially-trained female court employees who exhibit a respectful demeanor.”²⁷

In addition, the response of police to sexual assault victims who come to them has been found to be critical to both the “adjudication of sexual assault cases and the experiences of victims within the criminal justice system.”²⁸ The Human Rights Watch suggests that in addition to a victim-centered approach and sensitivity during interviews, an improved response to sexual assault cases by police can be linked to increased transparency, meaningful accountability for investigations, leadership, training, and public outreach to encourage reporting.²⁹ The behavioral and procedural training of frontline workers, such as police, in providing trauma informed sexual violence services that understand the intricacies of sexual assault would go a long way in restoring the confidence of sexual assault victims and also increase the rates of reported crimes.

Conclusion

In summary, our laws are supposed to protect us, and yet the statistics on sexual assault in NSW and the low number of convictions paint a starkly different picture. Sexual assault is a severe and widespread problem. When it comes to the court of law, sexual assault is often linked to or defined in terms of consent.

²⁴ Family Violence - A National Legal Response (ALRC Report 114) Section 26: Reporting, Prosecution and Pre-trial Processes. Available online here: https://www.alrc.gov.au/publications/26.%20Reporting,%20Prosecution%20and%20Pre-trial%20Processes/attribution-sexual-assault-cases#_ftn20

²⁵ *Ibid.*

²⁶ *Sexual-assault victims lack confidence in justice system, study says*, CBC News, 15 Nov 2014, accessed online at: <https://www.cbc.ca/news/canada/sexual-assault-victims-lack-confidence-in-justice-system-study-says-1.2836408>

²⁷ UN, End Violence against Women Program, *Judges should modify court protocols, policies, and processes to support women and girl victims of violence*. Accessed online at: <http://www.endvawnow.org/en/articles/1015-judges-should-modify-court-protocols-policies-and-processes-to-support-women-and-girl-victims-of-violence.html>

²⁸ Burgess, A. W. (1987). Public beliefs and attitudes concerning rape. In R. R. Hazelwood & A. W. Burgess (Eds.), *Practical aspects of rape investigation: A multidisciplinary approach* (pp. 3-18). New York: Elsevier North-Holland.

²⁹ Human Rights Watch, *Improving Police Response to Sexual Assault*, accessed online at: https://www.hrw.org/sites/default/files/reports/improvingSALinvest_0.pdf

Serious efforts need to be made in creating a positive definition of consent where the burden of proof does not lie with the victim, and the obtainment of consent can function as a mechanism to reduce assault, and also to convict perpetrators. In addition, addressing the needs of victims and community education campaigns must be the two other areas of focus alongside any legal changes.

I hope this submission is useful in your review of consent in relation to sexual assault offences

Please do not hesitate to contact me or my office for further information.

Kind Regards



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