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NSW Law Reform Commission
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Submission to Review into Sexual Consent Laws

Feminist Legal Clinic Inc. is a community legal service that works to advance the human rights of women and girls through a combination of targeted casework, community legal education and law reform work.

We refer to our preliminary submission in relation to this review dated 27 June 2018. We do not intend to rehash its contents but just add the following observations having reviewed the other submissions posted on the NSW Law Reform Commission's website.

Majority of submissions support an Affirmative Consent Model

Our preliminary submission proposes that evidence of positive confirmation of consent or explicit permission should be required to negate a charge of sexual assault. We note that of the 43 preliminary submissions posted on the Law Reform Commission's website, the clear majority are also in favour of an affirmative consent model being adopted.

We agree with the suggestions in these submissions in relation to shifting the evidential burden regarding consent onto the defendant, providing clarification that acquiescence is insufficient to constitute consent and removing the possibility of a defendant escaping conviction purely based on a defence of "mistaken belief".

We counted 29 submissions that were in favour of adopting a positive model of consent. These submissions were largely made on behalf of academics or organisations focused on victim's interests, and we note that in most cases women signed these submissions.

Submissions favouring the Status Quo

In contrast we counted only 14 submissions that either favoured retaining the status quo, explicitly opposed strengthening the requirement for positive consent, or which did not express a clear view on this question either way. Of these submissions, almost all contained at least one male signatory with a couple of notable exceptions including the Women Lawyers Association of NSW.

Unfortunately, a number of these submissions represent significant legal establishment interests. Submissions such as that from the Law Society and Bar Association have a strong focus on defendant rights and favour maintaining the status quo. In view of this it is essential that the membership of any task force considering this issue should reflect the weight of community opinion on this topic rather than the vested interests of defence lawyers. Furthermore, the gendered nature of this crime must be considered when determining membership of the taskforce.

While we are in favour of models of restorative justice generally, suggestions such as that made by the Australian Lawyers Alliance, are problematic in this context because of the potential for victims to be pressured to engage with their assailants. This would be completely unsuitable in the more serious cases. In less serious cases it may be problematic as there is already a societal failure to fully recognise the criminality of non-consensual sex and hold males adequately accountable for transgressions in this area. A restorative justice approach is therefore potentially harmful to victims and has the potential to undercut the educative value of legislative reform in this area.

“Consent after persuasion is still consent” or is it? Coercive Factors.

We were particularly concerned by the Bar Association’s assertion that “consent after persuasion is still consent”. This is reminiscent of Justice Bollen’s comments on the acceptability of “rougher than usual handling”¹ and leads us to speculate what level of “persuasion” members of the bar would regard as acceptable? Are they just talking about flowers and a massage? Or are they talking about financial incentives, veiled threats, bargaining and relentless badgering? Would they be happy with the same level of “persuasion” being used to extract confessions from defendants?

This certainly raises the question of when does “persuasion” become duress or coercion? There is a need to take account of power imbalances between the parties, a history of abuse or other coercive elements. In this regard several submissions, including those by the RDVSA and ANROWS, make the point that violence or threat of violence, including a context of domestic violence even without a proximate threat, should be regarded as negating consent.

SWOP also submits that violence, fraud or deception should negate consent and we would suggest that economic duress should also be added to this list.² This would capture not only coercive activity in the context of prostitution but in the workplace generally and any other circumstances where there is an imbalance in bargaining power with women vulnerable to the kind of #me too experiences currently being

¹ <http://www.austlii.edu.au/au/journals/AltLawJl/1993/30.pdf>

² Feminist Legal Clinic Inc. supports adoption of the [Nordic Model](#) in relation to the regulation of prostitution.

widely reported. An affirmative consent model combined with an expanded list of factors that negate consent including violence and economic duress, would assist women asserting their rights in circumstances where coercive factors are operating.

Two levels of offence?

In her recent musings “On Rape” Germaine Greer points out that most rapes are ‘just lazy, careless and insensitive’ and don’t involve injury³. She distinguishes between violent rapes causing significant injury and banal non-consensual sex that is occurring more widely. Her suggestion is that the latter crime should be punishable by 200 hours community service and perhaps an “r” tattooed on the perpetrator’s hand, arm or cheek. Greer’s argument recognises that rape is endemic in our society and the legal system cannot cope with so many cases that ultimately come down to an argument as to whether there was consent.⁴

Perhaps if legislative amendments are introduced that criminalise all forms of coercive sex and enable effective prosecution of the same, the legal system will be overwhelmed and the prisons will be bursting with a sizable portion of the male population. Nevertheless, as a community we cannot progress towards ideal standards of behaviour if we forever shy away from articulating these standards for fear of opening the floodgates. In any case the reality is that most low-level assaults, whether sexual or just common assault, go unreported because not every physical transgression is worthy of the effort of a report to police.

The submission of the NSW Bar Association also suggests introducing a lesser charge for cases involving mere recklessness in relation to consent, as in the case of intoxicated perpetrators. Classic date rape, marital transgressions and the milder #me too offences would be more readily prosecuted by applying an objective standard of proof rather than insisting on establishing mens rea in relation to consent. Certainly, there is an argument that a conviction for a less serious offence would be preferable to the current situation where most cases of non-consensual sex fail to be reported, let alone result in conviction.

Greer suggests that in cases of obviously violent rape, the courts should concentrate on the violence which should attract bigger sentences, rather than having lengthy trials in which women are humiliated for long periods.⁵ This is in line with the suggestion from Professors Rush and Young from the University of Melbourne that we adopt a new offence eliminating consent as an element and requiring only that harm be established. However, Rush and Young do not seem to propose any lesser offence for those rapes where there has been no violence resulting in harm. Indeed, their submission proposes that a woman’s distress, anger and grief should be excluded from the definition of harm. This clearly sends a problematic message, that there is no crime if there is no substantive harm done to the victim.⁶

³ <https://www.theweek.co.uk/93968/germaine-greer-rape-is-rarely-a-violent-crime-and-four-other-controversial-quotes>

⁴ <https://www.theguardian.com/books/2018/may/30/germaine-greer-calls-for-punishment-for-to-be-reduced>

⁵ <https://www.theguardian.com/books/2018/may/30/germaine-greer-calls-for-punishment-for-to-be-reduced>

⁶ Conversely it is also flawed in that it would also capture consensual sex that has caused harm, such as through the unwitting transmission of a sexually transmitted disease.

Removing the element of consent altogether therefore does not constitute the solution. While there is a need not to trivialise more serious violent crimes by grouping them with milder instances of non-consensual sex, it is nevertheless essential that the criminality of both are acknowledged.

Comparison with Consent in Larceny

The submission of UTS lecturers Elyse Methven and Ian Dobinson draws a comparison with larceny where the accused who asserts a claim of right to the taking of property of another bears the evidential burden to raise this as a possibility.⁷ This does not seem to attract any outcry in relation to reversing the onus of proof or eroding the element of mens rea. Indeed, the offence in section 154a of the NSW *Crimes Act 1900* of "taking a conveyance without consent of owner" does not seem to evoke the same debate over the element of consent. Even if an owner leaves their car unlocked with the keys in the ignition, this is insufficient to constitute consent and they are unlikely to be subjected to harrowing cross-examination on this point. Furthermore, it is accepted that a criminal transgression has occurred even if a vehicle is returned unscathed after a quick joy ride. It would seem society is clearer about its boundaries in relation to the use of someone's car than the use of a woman's body.

Need for Education of Community and Profession

We strongly agree with the many submissions that propose that community education, including inclusions in school curriculum, must accompany any legislative change. We also support calls for greater levels of specialisation within the legal system itself, including training on how victims respond, particularly if they have a history of trauma and the role of grooming by defendants.⁸ We also note our strong opposition to any degendering of the language of the legislation. Sexual assault continues to be gendered crime in which the overwhelming majority of perpetrators are male and victims are female and any alteration of the language to obscure this reality would serve a negative purpose.

To summarise, victims must no longer be subject to harrowing cross examination in efforts by defence lawyers to establish that they have given consent. Judges and juries must be directed that a lack of physical resistance does not constitute consent. In the absence of explicit permission, a victim's assertion that there was no consent should be accepted and any consent should also be negated in cases where there any incapacity on the part of the victim or the presence of coercive element. In cases involving violence or injury the need to establish that sexual activity was without consent should be dispensed with altogether. Less serious cases of coercive sex should attract lesser penalties and should have an objective test in relation to consent enabling easier prosecution and eliminating a Lazarus defence of mistaken belief.

⁷ <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/PCO77.pdf>, p18-19.

⁸ Submission of NSW Health – Mid North Coast

Thank you for the opportunity to make this submission. We are happy to be contacted to expand on any element of it if required.

Yours faithfully



Anna Kerr
Principal Solicitor