



ODPP
New South Wales

**Submission to the Law Reform
Commission - Consultation Paper 21
Consent in relation to sexual offences**

Office of the Director of Public Prosecutions

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Introduction

The Office of the Director of Public Prosecutions is responsible for the prosecution of serious criminal offences in NSW. As noted in our preliminary submission to this reference, sexual assault represents a significant proportion of the work undertaken by the ODPP.

Our responses to the questions posed in Consultation Paper 21 are as follows:

3. The meaning of consent

Question 3.1: Alternatives to a consent-based approach

- 1 *Should the law in NSW retain a definition of sexual assault based on an absence of consent? If so, why? If not, why not?*
- 2 *If the law was to define sexual assault differently, how should this be done?*

In our submission, lack of consent is an essential element of the offence, as it is the lack of consent that criminalises what is otherwise lawful conduct. Consent also recognises and preserves an individual's autonomy over their bodies. As such, we believe the absence-of-consent approach should be retained.

Question 3.2: The meaning of consent

- 1 *Is the NSW definition of consent clear and adequate?*
- 2 *What are the benefits, if any, of the NSW definition?*
- 3 *What problems, if any, arise from the NSW definition?*

In our submission, the current definition is adequate and appropriate, as it reflects a positive, communicative model of consent.

The current provision has been in operation for more than 10 years and there has been very little appellate consideration, which is indicative of the provision being understood and working well. In our submission, there is no particular advantage in making changes modelled on formulations used in other jurisdictions such as Victoria or Tasmania.

- 4 *What are the potential benefits of adopting an affirmative consent standard?*
- 5 *What are the potential problems with adopting an affirmative consent standard?*
- 6 *If NSW was to adopt an affirmative consent standard, how should it be framed?*

Changing the standard to one of affirmative consent would likely be an impetus for a cultural change but one that would have limited effect without corresponding changes in other areas. We consider that education about consent - in schools, universities, sporting clubs, and within the wider community - is warranted and necessary in order to dispel "rape myths" and reduce sexual violence generally and that this would have a greater impact than any change to the law.

Arguably, a change in standard may in some trials reduce the focus on the complainant's conduct prior to and during the assault, but not necessarily so. It could have the opposite effect and increase focus on what the complainant said or did rather than what the accused did or did not do.

A change in standard may also provide better guidance for fact finders in determining consent.

Our main concern with an affirmative consent model is that it would broaden the criminal law, as it does not reflect how all people behave in sexual encounters, and it may not allow room for inference in a determination of consent. The affirmative model would be particularly artificial in the context of established sexual relationships, as it is not reflective of sexual conduct within those relationships.

An affirmative standard might encourage people to actively seek consent and this makes particular sense in the context of casual sexual encounters. If an affirmative standard was to be adopted, any model applied must be sufficiently flexible to work in the context of both long-term relationships and casual encounters. It could be framed by requiring willingness to be expressed by words, actions or in another way.

7. *Should the NSW definition of consent recognise other aspects of consent, such as withdrawal of consent and use of contraception? If so, what should it say?*
8. *Do you have any other ideas about how the definition of consent should be framed?*

As noted in the Consultation Paper, the definition of sexual intercourse refers to the "continuation" of sexual intercourse, the implication being that consent can be withdrawn, however, the words withdrawal of consent do not feature in the consent provisions. Withdrawal of consent and other factors that make consent conditional, such as the use of contraception, have been relied on in prosecutions in NSW.

Therefore, whilst amendments to reflect these other aspects of consent are not strictly necessary, we would not object to amendments designed to clarify or further highlight these issues.

Such amendments could be included in the list of negating circumstances.

4. Negation of consent

Question 4.1: Negation of consent

1. *Should NSW law continue to list circumstances that negate consent or may negate consent? If not, in what other ways should the law be framed?*
2. *Should the lists of circumstances that negate consent, or may negate consent, be changed? If so, how?*

We generally support the current framing of the lists of factors that negate or may negate consent. The fact that these lists are non-exhaustive ensures that other relevant factors may be relied upon. As mentioned above, we support consideration of additions to this list.

We would also support the inclusion of the infliction of violence or force, to bring NSW in line with the other States and Territories.

Further, reference to the freeze response - where a person does not do or say anything to indicate consent - could be included in s61HA(7). Sub-section (7) provides that a person who does not offer physical resistance cannot, by that fact alone, be regarded as having consented. The sub-section could be amended to also say that a person's silence cannot be taken, by that fact alone, as an indication of consent. Such inclusion would directly address a "rape myth" and would provide guidance, and education, in relation to a common, but greatly misunderstood, response scenario.

In our preliminary submission we raised the point that there are problems in proving lack of consent beyond reasonable doubt on the basis of "substantial intoxication". We support reframing the issue of intoxication so that it does, rather than may, negate consent. A standard similar to the Victorian provision "the person is so affected by alcohol or another drug as to be incapable of consenting to the act" or "incapable of withdrawing consent to the act" would be appropriate.

5. Knowledge about consent

Question 5.1: Actual knowledge and recklessness

- 1 *Should "actual knowledge" remain part of the mental element for sexual assault offences? If so, why? If not, why not?*
- 2 *Should "recklessness" remain part of the mental element for sexual assault offences? If so, why? If not, why not?*
- 3 *Should "reckless" be defined in the legislation? If so, how should it be defined?*
- 4 *Should the term "reckless" be replaced by "indifferent"? If so, why? If not, why not?*

We consider that the current requirements as to knowledge, including actual knowledge and recklessness, are appropriate and should remain. They cover a range of knowledge possibilities, reflect the reality of different types of non-consensual sexual intercourse/activity, and ensure that an accused with the requisite "guilty mind" is subject to criminal sanction.

We do not support defining "recklessness" within the legislation, as we consider it would be difficult to define without creating further complexity and a level of inflexibility. The current Bench Book Direction as to advertent and inadvertent recklessness is clear, adequate and flexible.

Question 5.2: The "no reasonable grounds" test

- 1 *What are the benefits of the "no reasonable grounds" test?*
- 2 *What are the disadvantages of the "no reasonable grounds" test?*

The "no reasonable grounds" test reflects a contemporaneous view of sexual activity, updating the outdated "honest, but mistaken belief" test; it ensures that any belief an accused has must reach a certain standard, that of reasonableness, and it supports a communicative model of consent.

The test may now be overly complex and confusing since *Lazarus*¹, and is arguably narrower than parliament originally intended.

Question 5.3: A "reasonable belief" test

- 1 *Should NSW adopt a "reasonable belief" test? If so, why? If not, why not?*
- 2 *If so, what form should this take?*

We would support a "reasonable belief" test, formulated along the lines of "the person's belief in consent was not reasonable in all the circumstances". This achieves a balance between the objective and subjective perspectives.

¹ *Lazarus v R* [2006] NSWCCA 52

This test would be simpler and cement the higher standard for an accused's sexual responsibility, namely, to act reasonably. The suggested formulation would sit comfortably within the current legislation, as "all the circumstances of the case" is an existing concept.

Question 5.4: Legislative guidance on "reasonable grounds"

- 1 *Should there be legislative guidance on what constitutes "reasonable grounds" or "reasonable belief"? If so, why? If not, why not?*
- 2 *If so, what should this include?*

We do not think that general legislative guidance is warranted, as the circumstances of offences are infinitely variable. It is preferable that Directions are given to the jury that are appropriate to the facts of the case.

Question 5.5: Evidence of the accused's belief

- 1 *Should the law require the accused to provide evidence of the "reasonableness" of their belief? If so, why? If not, why not?*
- 2 *If so, what form should this requirement take?*

There should be no requirement for the accused to provide evidence of the reasonableness of their belief, as this would tend to reverse the onus of proof.

Question 5.6: "Negligent" sexual assault

Should NSW adopt a "negligent" sexual assault offence? If so, why? If not, why not?

The creation of an offence of negligent sexual assault is a significant policy change. We can see arguments for and against this proposal. Views within the ODPP are split on whether this would be a desirable reform.

The creation of a lesser offence would be a significant change to the hierarchy of sexual offences and would effectively create two classes of sexual assault. There is real risk that even the use of the word "negligent" would inappropriately convey the message to the community and complainants that that type of sexual assault is not as serious.

However, an accused may be more willing to plead to the lesser offence of negligent sexual assault, which would in appropriate cases, benefit the complainant and the criminal justice system as a whole.

Even where matters proceed to trial, given how traumatic the court process can be for complainants, there are cogent arguments for the disposition of some allegations of sexual assault in a manner that does not involve a jury trial. Such disposition may reduce the traumatic impact of a criminal trial and may offer speedier resolution of matters. If a negligent offence was introduced there should be consideration of making it capable of summary disposal.

Question 5.7: "No reasonable grounds" and other forms of knowledge

- 1 *Should a test of "no reasonable grounds" (or similar) remain part of the mental element for sexual assault offences? If so, why? If not, why not?*
- 2 *If not, are other forms of knowledge sufficient?*

A test of "no reasonable grounds" should remain part of the mental element for sexual assault offences.

Question 5.8: Defining "steps"

- 1 *Should the legislation define "steps taken to ascertain consent"? If so, why? If not, why not?*
- 2 *If so, how should "steps" be defined?*

We do not consider it necessary for the legislation to define "steps taken to ascertain consent". The meaning of the term is plain and any legislative definition would likely over complicate a jury's task.

Question 5.9: Steps to ascertain consent

- 1 *Should the law require people to take steps to work out if their sexual partner consents? If so, why? If not, why not?*
- 2 *If so, what steps should the law require people to take?*

Whilst we support retaining the reference to the taking of steps, and the relevance of any steps taken, we do not support a requirement that people take steps to ascertain consent. It would be an artificial requirement not reflective of the reality of sexual encounters; it may place an unfair burden on an accused, and would replace a communicative model with an affirmative one, which we do not support.

Question 5.10: Considering other matters

- 1 *Should the law require a fact finder to consider other matters when making findings about the accused's knowledge? If so, why? If not, why not?*
- 2 *If so, what should these other matters be?*

The current law already requires the fact finder to have regard to all the circumstances of the case. This, in our submission, is adequate and there is no need to specify certain circumstances or provide general examples.

Question 5.11: Excluding the accused's self-induced intoxication

- 1 *Should a fact finder be required to exclude the accused's self-induced intoxication from consideration when making findings about knowledge? If so, why? If not, why not?*
- 2 *Should the legislation provide detail on when the accused's intoxication can be regarded as self-induced? If so, what details should be included?*

We support the underlying policy in relation to exclusion of an accused's self-induced intoxication. It is consistent with the general rule in s428D(a) of the Crime's Act. To do otherwise would mean accepting that an intoxicated accused should be held to a lower standard than a non-intoxicated accused. This is unacceptable given the relationship between alcohol and sexual assault and violence.

Self-induced intoxication arises in trials for other types of criminal offences and there appears to be no need for further legislative assistance as to what is meant by the concept. It seems, in our submission, a fairly straight-forward notion and specifying what self-induced intoxication means would over-complicate the issue.

Question 5.12: Excluding other matters

- 1 *Should the legislation direct a fact finder to exclude other matters from consideration when making findings about the accused's knowledge? If so, what matters should be excluded?*
- 2 *Is there another way to exclude certain considerations when making findings about the accused's knowledge? If so, what form could this take?*

We support continued reference to consideration of all relevant circumstances of the case and do not believe there should be any exclusions beyond an accused's self-induced intoxication.

Question 5.13: A single mental element

- 1 *Should all three forms of knowledge be retained? If so, why? If not, why not?*
- 2 *If not, what should be the mental element for sexual assault offences?*

We support the retention of all three forms of knowledge, as these "cover the field" in terms of the basis of knowledge.

Question 5.14: Knowledge of consent under a mistaken belief

Does the law regarding knowledge of consent under a mistaken belief need to be clarified? If so, how should it be clarified?

No, we do not believe that this area of the law needs clarification.

Question 5.15: Other issues about the mental element

Are there other issues about the mental element of sexual assault offences you wish to raise?

In our submission the above discussions have touched upon all relevant issues.

6. Issues related to s 61HA

Question 6.1: Upcoming amendments

- 1 *What are the benefits of the new s61HE applying to other sexual offences?*
- 2 *What are the problems with the new s61HE applying to other sexual offences?*
- 3 *Do you support applying the legislative definition of consent and the knowledge element to the new offences? If so, why? If not, why not?*

In our submission it is desirable that the same definition applies across all sexual offences. Juries often will need to consider different types of offences within the one indictment. Differing definitions can be confusing and overly complicate cases. As a matter of law it makes no sense to have different standards. In our submission, it is also appropriate that all beliefs in relation to consent, irrespective of the offence at issue, be based on reasonable grounds.

Question 6.2: Language and structure

- 1 *Should changes be made to the language and/or structure of s61HA (and the new s61HE)? If so, what changes should be made?*
- 2 *Should the definition of "sexual intercourse" be amended? If so, how should sexual intercourse be defined?*

We do not see any necessity for the redrafting and reordering of s61HE and nor do we believe the definition of sexual intercourse requires amendment. We note that if the definition was to change to remove reference to "a female person", the reference to "including a surgically constructed vagina" should be retained.

Question 6.3: Jury directions on consent

Are the current jury Directions on consent in the NSW Criminal Trial Courts Bench Book clear and adequate? If not, how could they be improved?

We support a review of the current jury Directions on consent, with a view to ensuring that the directions are simplified and modernised.

Question 6.4: Jury directions on other related matters

Should jury directions about consent deal with other related matters in addition to those that they currently deal with? If so, what matters should they deal with?

We support the inclusion of Directions that, where relevant, would address the various "Rape Myths", including the types of responses to sexual assault such as the "freeze response". We would also support the inclusion of Directions that address the other areas raised in the Consultation Paper: the wearing of particular clothing by complainants; complainants who are intoxicated; immediate responses to sexual assault such as a lack of emotion, and how different complainants will present differently when giving evidence; that agreement to certain sexual acts does not correspond to agreement about other sexual acts, and that consent can be withdrawn.

Question 6.5: Legislated jury directions

- 1 *Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed?*
- 2 *What are the benefits of legislated jury directions on consent and/or other related matters?*
- 3 *What are the disadvantages of legislated jury directions on consent and/or other related matters?*

In NSW some jury Directions have been legislated and others are in the Bench Book. All of the legislated jury Directions have been in response to law reform considered necessary in relation to the prosecution of the sexual assault of children and these Directions reflect issues common to most every prosecution. In our submission, this is the most effective way to achieve a balance between policy change and responsiveness to legislative change and case law. We do not support legislating all jury directions.

The benefit of jury Directions being in a Bench Book are that they may be amended and updated in response to legislation or case law quickly and efficiently. Bench Book Directions also give Judges greater discretion as to the formula of words used, which prevents a formulaic style of direction that may not effectively meet the particular issues in a trial.

The benefits of having legislative Directions are that it signals a clear policy change or response by the government to particular issues.

Question 6.6: Amendments to expert evidence law

- 1. Is the law on expert evidence sufficiently clear about the use of expert evidence about the behavioural responses of people who experience sexual assault? If so, why? If not, why not?*
- 2. Should the law expressly provide for the introduction of expert evidence on the behavioural responses of people who experience sexual assault? If so, why? If not, why not?*

Expert evidence has been used in NSW in relation to the behavioural responses of adults who experience sexual assault. In our submission, it would be used more often if the *Evidence Act* was amended to expressly allow evidence in relation to adult responses to sexual assault.

We hope that the use of this evidence will have an educative effect and assist in dispelling "Rape Myths" in sexual assault trials, with the ultimate outcome that it will not be necessary to use this evidence in every case.

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