



Submission to the NSW Law Reform Commission

Consultation paper 21:

Consent in relation to sexual offences

24 January, 2019

Friday, 1 February 2019

The Commissioner
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

**Re: Submission to the NSW Law Reform Commission
Consultation paper 21:
Consent in relation to sexual offences**

Dear Commissioner

Sex Workers Outreach Project welcomes the opportunity to make a submission to the review of the laws surrounding consent in relation to sexual assault as follows.

Yours sincerely



Cameron Cox
CEO, Workers Outreach Project Inc.

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Introduction

The Sex Workers Outreach Project (SWOP) would like to thank the New South Wales Law Reform Commission (NSWLRC) for the invitation to respond to *Consultation Paper 21: Consent in relation to sexual offences*. We were delighted to see so many mentions of our *Preliminary Submission PCO103* contained in this consultation paper, particularly in relation to the non-consensual removal of a condom, popularly known as ‘stealthing’. We believe this is a significant issue that should be reflected in any changes to the law in NSW.

In the pages that follow, we address some of the issues outlined in the consultation paper.

About Us

SWOP is a non-government organisation that exists to provide NSW sex workers with the same access to health, safety, human rights and workplace protections as other Australian workers.

SWOP is focused upon sustaining the low rates of sexually transmitted infections (STIs) amongst sex workers; sustaining the virtual elimination of HIV transmission within the sex industry; and reducing hepatitis infections in sex workers. We do this by bringing together sex workers, researchers and clinicians, government and non-government organisations from a range of disciplines, and advocating for a collaborative, holistic approach to the health services provided to NSW sex workers.

SWOP has its origins in the Australian Prostitutes Collective. We have operated continuously since 1984; making us Australia’s longest running sex worker community organisation, and the earliest sex worker organisation to receive direct government funding. SWOP has the highest level of direct contact with sex workers of any agency, government or non-government, in Australia.

3 The meaning of consent

3.1 (1) SWOP submits that the law in NSW should move on from a definition of sexual assault based on an absence of consent. The current law does not effectively communicate what an affirmative, positive model of consent looks like and SWOP submits that the law should work towards preventing sexual assault, and not be framed as responding to sexual assault as an inevitability. By moving to affirmative consent, the law better communicates its intent and what is expected of sexual participants.

3.1 (2) The Tasmanian example, Section 2A(1) of the Tasmanian *Criminal Code*, which defines consent as “free agreement” goes some way towards what we see as an appropriate model of affirmative consent. We note that the word ‘agreement’ is defined as a “negotiated and typically legally binding arrangement between parties as to a course of action”, which very much reflects the way consent is negotiated in sexual services provided by NSW sex workers. It is our view that when we make sexual agreements, if the eventual actions deviate from the agreed course, a return to affirmative consent is required. For example, if sex with a condom was agreed upon initially, removing the condom during sex requires affirmative consent.

3.2 (4) The benefit of an affirmative consent standard would be facilitating a cultural shift in how people in NSW think about consent. The hope would be to inspire a set of sexual practices that make communicating consent enthusiastically (and often) the norm.

A positive definition of consent (rather than the absence of non-consent) should help to shift the focus of conversations when cases attract public interest. Instead of focusing upon what the complainant didn’t do to prevent unwanted sex (like say no, or push the perpetrator away), we would hope to see discussed of the ways in which the perpetrator worked to ensure consent.

By shifting the focus onto the accused (and the requirement that they obtain affirmative consent) and away from examining the behaviour of complainants, we would hopefully see some restoration of confidence in the NSW judicial system. With this we would hope to see some shifts in the high rate of underreporting, the low number of convictions, and the high attrition rate on sexual assaults that are reported. This process goes hand in hand with changing how we engage in consensual sex. While we don’t expect a law change to achieve all of these things, in and of itself, changing the law to include an affirmative definition of consent would definitely herald that here in 2019 our understanding of sexual consent has evolved, and there is an expectation for people engaging in sexual relations to evolve with it.

3.2 (7) The NSW definition of consent should definitely support public health and safer sex practices by recognising that consent can be conditional upon the use of safer sex paraphernalia where consent has been given, inter alia, on the basis that certain safe sex standards or methods would be employed. SWOP would argue against the use of words like ‘contraception’ because people of all gender persuasions negotiate sex, and safer sex paraphernalia is used to prevent the transmission of sexually transmitted infections, not just pregnancy.

We also believe it is important for the updated definition of consent to express that consent must be ongoing, and can be withdrawn at any time.

3.2 (8) SWOP reiterates that we would also like to see it specified that payment for sex, in cash or favours, does not alter the right of the person being paid to withdraw sexual consent. Payment is not an obligation when it comes to consent. While this proviso is directed specifically at NSW sex service providers who accept payment for sexual services, writing this into broader context of NSW law speaks toward addressing underlying consent myths about money – including buying someone dinner on a date - entitling you to sex. We believe there is public benefit to clarifying that there are no circumstances where a person has to go through with unwanted sex, including when it is paid sex, if their consent changes.

SWOP notes that the preliminary submissions to this inquiry expressed varying opinions on whether verbal consent should be required, or if non-verbal consent would be sufficient. While we see verbal consent as having clear advantages, we work with diverse people who have sex in diverse situations. Sometimes sex is negotiated in places where talking is difficult, like nightclubs and strip clubs, so non-verbal indicators like placing someone's hands on your genitals might stand in for verbal consent. Some sex workers provide sexual services to people with disability, and in the course of their work use a variety of non-verbal methods to ascertain consent, including visual cue cards offering up a menu of sexual activities. Some sex workers use hoods, gags, masks and mummification in their provision of bondage and discipline services, which make it impossible for one party to speak. These workers have developed a variety of non-verbal signals - like dropping a ball held in one hand - to enable the client to indicate they wish to cease sexual activities.

The problem with using non-verbal cues is they can be easily misinterpreted, and can be subject to popular myths about arousal. For example, an erect penis might be the result of prostate stimulation that can occur consensually or non-consensually, and so, in and of itself, it is insufficient to show consent. The vagina can become lubricated during sex as a defence mechanism against tearing and pain, regardless of one's consent, so that the vagina was 'wet' is, in and of itself, insufficient to show consent.

As a result of working with sex workers and clients who negotiate consent in diverse ways, SWOP can see advantages and disadvantages to NSW law requiring verbal indications of consent.

4 Negation of consent

4.1 (1) It is SWOP's view that NSW law should continue to list circumstances that negate consent, or that may negate consent.

4.1 (2) SWOP is, by and large, happy with the existing non-exhaustive list of circumstances that negate consent to sexual intercourse set out in s 61HA(4)-(5). Below we outline some minor changes to the current list, some new additions, and finally one suggestion presented in the consultation paper that we do not support.

Minor Changes:

We would add our voice to the preliminary submission that critiques the word 'married' on the basis that it only captures one type of relationship. We would advocate for de facto relationships to be added to this criterion.

SWOP also lends our support to broadening the threats of force or terror criterion to include blackmail, particularly when a person threatens to post intimidating images on social media. We have anecdotal evidence of sex workers being blackmailed into sex in this manner, including being blackmailed by the use of threats to report them to immigration for visa violations (whether or not they are in possession of the correct visa). Blackmail may also include threats about 'outing', where through stigma, the complainant is fearful that the perpetrator revealing their occupation to their friends, families, and other employers will result in negative consequences, including the removal of children through the family court system, or the termination of employment.

While decriminalisation in NSW does reduce incidents and opportunities for blackmail of sex workers using threats of reporting them to police, we also have a significant number of recently immigrated sex workers, who might be unaware that their work here in NSW is legal. This circumstance creates opportunities for coercive sex, as does being outed to strata or local councils. We would like to see NSW law strengthened to make it clear all of these actions negate consent and make the perpetrators vulnerable to being prosecuted for sexual assault.

Additions:

SWOP would like to see the following added to the non-exhaustive list of circumstances that negate consent to sexual intercourse:

i. The non-consensual removal, or damage to, or deception about, the use of a condom or other safer sex paraphernalia employed to prevent the transmission of sexually transmitted infections or pregnancy.

ii. We believe consent is negated when private investigators, police, prison officers, and other law enforcement officers, like immigration or border control, initiate sexual contact under false pretences, or engage in sexual intercourse with people, either in the process of investigating them, arresting or detaining them, or while they are in custody or detention.

Sexual contact between law enforcement officers and suspects creates a serious potential for abuse with very little crime prevention upside. This sort of condition has precedents in other jurisdictions, including a number of American states. As Katharine Bodde and Erika Lorshbough from the New York Civil Liberties Union explain, the *“power dynamic makes consent impossible in this circumstance. Anyone in police custody implicitly understands this and knows that not going along with a police officer’s wishes could have serious adverse consequences.”*¹

SWOP’s direct experience working with NSW sex workers who have been tricked into sex with police and private investigators, is that they experience the sexual intercourse as sexual assault when the perpetrator’s true identity and purpose are revealed. We imagine the same feeling is likely for suspects tricked into sex by police and private investigators who work in other occupations. We do not think this particular circumstance is adequately covered by abuse of trust in the list of grounds that *may* negate consent.

iii. SWOP is also of the opinion that when sex is consented to on condition of payment, non-payment negates consent. As we set out in our preliminary submission, sex workers tricked into providing sexual services by clients who they later find out have defrauded them, experience the same feelings of having been sexually assaulted, making it clear their consent was conditional upon receiving the pre-agreed payment. NSW law, as it stands, makes justice for sex workers who have experienced consent negated by fraud unlikely; however in the ACT, this constitutes an offence. The ACT Supreme Court upheld a conviction in *R v Livas* negating consent obtained by fraud when *Livas* did not pay for the sexual services he obtained.²

¹ American Civil Liberties Union, *There’s No Such Thing as ‘Consensual Sex’ When a Person Is in Police Custody*, accessed 30 January, 2018 at <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/theres-no-such-thing-consensual-sex-when-person>

² *R v Livas* [2015] ACTSC 50 accessed 10 July, 2018 at <http://courts.act.gov.au/supreme/judgments/r-v-livas>

iv. As per our preliminary submission³, we continue to believe that acts of violence during sexual intercourse negate consent.

v. SWOP supports the addition of withdrawal of consent, because it captures the dynamic and ongoing nature of consent. We endorse the suggestion of the Scottish law that states consent may be withdrawn at any time, before or during the conduct, and that continuing after this is done so without consent. From our perspective working with NSW sex workers, the right to withdraw consent at any time holds true irrespective of whether or not money has been exchanged.

vi. SWOP heartily endorses the Australian Queer Students' Network (AQSN) preliminary submission that adds: "the threat of 'outing' someone as an LGBTQIA+ person, as someone of HIV+ status, or as a sex worker."

Changes we do not support:

SWOP does not support the addition of 'failure to disclose HIV/AIDS positive status' as we believe the *Crimes Act* is an inappropriate vehicle to deal with public health matters. We also point out that from the 18 October 2017 the NSW Parliament amended *Public Health Act 2010* to say that people with sexually transmissible infections are no longer required to disclose their infection to a prospective partner prior to sexual intercourse.

³ Sex Workers Outreach Project, *Preliminary Submission PCO103*, 7.

5 Knowledge about consent

5.4 (1) As sex workers, we are subject to a lot of mistaken beliefs about our consent. Rape myths like that sex workers are 'unrapeable', or that non-consensual sex with a sex worker is just 'shoplifting', or that payment for sexual intercourse entitles the purchaser to enact any and all sexual activities, still persist. Working in a stigmatised profession can position us outside what a reasonable person might have believed about the complainant's consent, even when non-consent is clear to us and our colleagues.

5.4 (2) We believe for marginalised groups like sex workers, there needs to be legislative guidance on what constitutes 'reasonable grounds' or 'reasonable belief' because stigma and discrimination against sex workers make accurate interpretation of our consent unlikely.

5.8 (1) SWOP supports Rape and Domestic Violence Services Australia (RDVSA)'s suggestion to replace 'any steps' with 'reasonable steps'. We feel that this change better reflects affirmative consent, and that it is reasonable to expect the defendant to have taken some steps to find out whether the other person consents.

5.9 (1) SWOP endorses RDVSA's wording as a good way to support affirmative consent:

*A person does not reasonably believe that the other person consents where
a) the other person did not say or do anything to indicate consent; and
b) they took no steps to find out whether the other person was consenting*

6 Issues related to s 61HA

6.2 (1) SWOP supports NSW law using inclusive, non-gendered language, such as ‘penetration of the genitalia or anus of a person’.

6.4 SWOP is supportive of juries being given instructions that help to combat the persistence of rape myths. We endorse Victorian example outlined at 6.32 as appropriate to explain freezing, and a lack of physical or verbal resistance. We see merit in the jury directions outlined in 6.34 in SA, VIC, ACT and the NT, which make it clear that a lack of violence or physical injuries do not necessarily mean that the sex was consensual.

SWOP advocates that a sexual service provider’s occupation might merit specific jury instruction to ensure specific rape myths about sex workers do not colour their decisions. SWOP is supportive of directions about previous and different consensual activity, as we agree that consent to one kind of sexual activity does not necessarily mean consent to any or all kinds of sexual activity. This is illustrated quite clearly in sex services, where many sex workers charge premiums for certain sexual activities, but include other sexual activities in their general service rate.

We continue to advocate for the necessity for the withdrawal of consent to be addressed directly in NSW law. Failing this important addition, we are supportive of the jury instructions used in Victoria, as outlined in 6.42.

6.5 (1) We see merit in the Victorian model where the prosecution or defence can request that the judge give jury directions on certain matters. We also support judges being able to give directions irrespective of requests, if they believe there are substantial and compelling reasons for doing so.