

# **The Public Defenders**

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## ***Response to ‘Consent in relation to sexual offences; Draft proposals’***

Dear Commissioners,

Thank you for the opportunity to make submissions to the NSW Law Reform Commission’s ‘Draft proposals’ in connection with consent.

The Public Defenders support the aim of simplification, and of correcting misconceptions about consensual sexual activity.

I have been assisted in the preparation of these submission by fellow Public Defenders Ian Nash (who also participated in round table discussions in Dubbo) and Antony Evers (who with me participated in round table discussions in Sydney).

### ***The meaning of consent***

#### **Temporal requirement (proposal 5.1)**

The Public Defenders oppose the introduction of a necessary temporal connection with consent, as proposed in draft s 61H(1) (proposal 5.1), particularly in the context of a person being asleep as considered regarding the absence of consent in s 61HJ(1)(d). The

criminalising of conduct which is known in advance to be wanted by a sexual partner (be it sexual intercourse or sexual touching) should not be criminalised. The vulnerability of a sleeping person (discussion regarding draft Proposal 6.19) is not an answer to this – if a different person becomes involved or the sexual activity is of a kind different to that which was consented to in advance, then it may be non-consensual.

### **Circumstances in which a person does not necessarily consent (proposals 5.4 – 5.6)**

Introduction of a number of additional considerations which do not, by reason only of their existence, indicate consent (draft sub-sections 61H (4), (5) and (6)) has been proposed (proposals 5.4 – 5.6). The Public Defenders do not agree that adding these provisions helps clarification or simplification of the law, nor that they are necessary to counteract misconceptions about consent. They are potentially quite ambiguous (especially performing sexual intercourse in a ‘particular manner’). However as these draft proposals do not change the substantive law, and are potentially useful educative pronouncements, the Public Defenders do not wish to comment on these proposals more fully.

### ***When a person does not consent***

#### **The person does not do or say anything to communicate consent (proposal 6.1)**

The Public Defenders oppose the introduction, by draft s 61HJ(1)(a), of a deemed absence of consent where the person does not do or say anything to communicate consent.

As indicated through a number of the preliminary submissions, variations in sexuality are profound and actual consent can exist with a whole range of explicitness in terms of expression of consent. It is fundamentally wrong to deem consent to be absent even if it is actually present. It is not an answer to suggest that prosecutions would not occur in such circumstances. This may or may not be right (and may particularly be not right given the existence of so many people recording their sexual activity). More important than this is the proposition that the law should reflect what is right. When actual consent is such an essential issue it is undesirable to lump within non-consensual sexual activity that which is actually consensual.

The proposal raises real difficulty in term of what is required to ‘do’ something to communicate consent. Pivotal: is bodily reaction doing something to demonstrate consent?

Is allowing something to happen (perhaps something asked for previously) doing something to demonstrate consent. Serious problems lie underneath these issues, and the proposal is submitted to mark a significant failure to distinguish between involuntary reactions that are far from uniform in terms of indication of consent.

To take one example, and using anodyne language not necessarily reflective of words likely to be spoken: an extremely attractive young woman says to her male partner, who is extremely strongly attracted to her and has been asking her for fellatio for weeks, 'I want to suck your penis' and proceeds to undo his pants and take his penis and place it in her mouth and performs fellatio to the point of ejaculation, while his penis quickly becomes erect, he sits / lies where he was and allows it to happen, and moans when he ejaculates in her mouth. He truly consented to this occurring. It would be fundamentally wrong to deem him to have not consented because he did not do or say anything to communicate consent.

Or did he do something to communicate consent? What of the fact that they were in a relationship? That he was the one who had always urged that this occur and she had previously resisted? That she was more attractive than him and he was strongly attracted to her? That his penis became erect? That he lay back and allowed it to happen? That he ejaculated? That he made sounds consistent with pleasure when this happened? In context, is inaction, and response and indication of pleasure something done to communicate consent?

In another context similar physical responses and inaction may accord with lack of consent. For example attention needs to be taken to all the tragic situations in which adolescent boys have been preyed upon by paedophiles – given alcohol or drugs, aroused by pornographic material, and whose penises might become erect when stimulated in a way to make them so, and who may ejaculate when masturbated or sucked, and who no doubt may respond in some way with their movements or sounds when such an extreme occurrence occurs - but who really have not in fact consented.

The proposed legislation does not deal with these situations, nor bodily reactions by women. These two vastly different males are lumped together because they have not said anything to indicate consent, and the only things they have done are responses a human male often will make when his mind and / or penis is stimulated. The law as proposed has gone awry in its disconnection of the concept of consent from the genuine mind of the relevant person.

#### **The person is asleep (proposal 6.4)**

See also above regarding consent at time, and vulnerability (cf. Draft proposals 6.19).

The Public Defenders submit that the current law is preferable to this proposal, in the sense that it refers to the person not having had the opportunity to consent because asleep. If the person has had the opportunity to consent and has done so this should amount to consent. Obviously the fact that one person in a sexual activity was asleep may bear very strongly on whether her or she consented to that activity.

For example two people are in a relationship and one says to the other ‘I would love you to wake me up by sucking my penis.’ If the other decides to wake him up by inserting a simulated sex object into his anus then he has not consented to it. If she decides to wake him up by having her best friend suck his penis then he has not consented to it. This is not difficult material to navigate. If the person changes his or her mind when they wake and expresses this then this is dealt with as withdrawal of consent.

### **Fraudulent Inducement (proposal 6.9)**

The Public Defenders submit that this proposal is drafted far too widely and criminalises behaviour which may be unethical but should not be brought within the ambit of the criminal law. Sexual and romantic relationships are lubricated by a great deal of flattery and self-promotion, and playful puffery. There is an enormous range of conduct across the spectrum of this behaviour, and part of experiencing and living life is working out which values are important to us in other people and ourselves, and working other people out. For some, absolute sincerity and transparency is essential in mateship with others. For many, this is not the absolute pinnacle of importance of attraction to another, and varying degrees of illusion are tolerated.

The proposal on its face would cover sexual activity ‘induced’ by lies about whether one person loves the other, is single, regards the other as the most beautiful / interesting / intelligent person s/he has ever met, whether the person is interested in poetry, books, sport, is widely travelled, is wealthy, is a writer, has not been able to stop thinking about the other person, is a virgin, has only had one previous sexual partner etc.

### ***Knowledge of Consent***

**Any belief the person has ... is not reasonable in the circumstances (Proposal 7.1)**

As submitted in the Public Defenders' round table meeting in Sydney, this situation should amount to a separate offence with a lower penalty provision, for the reasons set out in the Bar Association's preliminary submission.

### ***What Fact Finders Must Consider***

#### **Trier of fact must have regard to all the circumstances of the case ... what the person said or did' (proposal 7.2)**

The Public Defenders submit that this provision is illogically and unfairly skewed against an accused person. It is wrong, even without proposal 6.1 which deems absence of consent where the person does not do or say anything to communicate consent (which the Public Defenders oppose, as set out above). It is significantly worse if such a proposal is actually introduced. Indeed as the consultation paper made clear, much of the background of impetus for and discussion about the issue of an accused person taking steps arose in the context of the other person not having done or said anything to indicate consent.

While continuing to oppose proposal 6.1, the Public Defenders submit that whether or not such provision is introduced the appropriate legislation regarding what the trier of fact is to take into account is as follows:

'(a) must have regard to all the circumstances of the case, including anything the accused person said or did to ascertain if the other person consented to the sexual activity, and anything the other person said or did to communicate consent or the absence of consent to the accused'

The content of this is more balanced. The proposal in its current terms tends to give an impression of an accused person necessarily wanting sexual activity and the other person perhaps not wanting sexual activity, contrary to the mutual concept of sexual activity that the proposals as a whole endeavour to promote. It is also clearer and simpler because it does not require two steps (whether something happened and additionally what it was)

### ***Amending Meaning of Sexual Intercourse***

#### **61HA(b) 'the touching of any part of the genitalia or anus of a person with the mouth or tongue of another person' (proposal 9.2)**

It is not clear what the rationale for this proposal is. It is not covered in the consultation paper. It extends the substantive law to include as sexual intercourse conduct which would currently be treated as indecent assault. The Public Defenders oppose this extension. There is no known difficulty with terms of the current legislation such as cunnilingus. Conceivably, discussion about extension of the law to licking or sucking of the anus could be considered. However there is otherwise no warrant for singling out a mouth or tongue from any other body part.

The proposal is submitted to irrationally single out genital / anal contact with mouth or tongue. Fleeting wiping a penis across a person's face (including mouth) would become sexual intercourse. Stimulating a male penis to the point of ejaculation with a hand would still be sexual touching. A particularly serious form of indecent assault (but one which does not infrequently come before the courts) is simulated intercourse where a male rubs his penis between the buttocks of a victim, often for a prolonged period and sometimes to the point of ejaculation. This would remain sexual touching but a kiss on the anus or penis would come to be treated as sexual intercourse.

Yours sincerely,

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