

Consent in relation to sexual assault offences

Submission to the NSW Law
Reform Commission Draft proposals

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CONTENTS

Who we are	3
Introduction	4
Problems with adopting a communicative model of consent	4
Conclusion	6

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA appreciates the opportunity to make a submission to the NSW Law Reform Commission (NSWLRC) draft proposals from the review on consent and knowledge of consent in relation to sexual assault offences, as dealt with in s61HA of the *Crimes Act 1900* (NSW). The ALA previously provided a preliminary submission to the NSWLRC in June 2018, and a full submission in January 2019 for this review.
2. The ALA does not support the Draft s61HJ(a) that states that a person does not consent to a sexual activity if the person does not do or say anything to communicate consent. This is consistent with the ALA's earlier submissions, which said that there should be no change to s61HA. The ALA will confine its comments in this submission to concerns relating to the adoption of a communicative model of consent.

Problems with adopting a communicative model of consent

3. The ALA submits that the NSW definition of consent should not be amended to adopt a communicative model of consent. As noted in our earlier submissions, s2A of Schedule 1 of the *Criminal Code Act 1924* (Tasmania) was amended in 2004 to adopt a communicative model of consent. The amended s2A states:
 - (1) Without limiting the meaning of 'free agreement', and without limiting what may constitute 'free agreement' or 'not free agreement', a person does not freely agree to an act if the person:
 - (a) does not say or do anything to communicate consent...
4. The NSWLRC draft s61HJ(1)(a) uses similar wording to s2A of the Tasmanian *Criminal Code*. As noted in our earlier submissions, the ALA submits that the phrase used in Draft s61HJ(a), '... does not do or say anything to communicate consent' introduces a confusing and ambiguous test into the definition, which is open to different interpretations and modes of communication. This is problematic for members of the community engaging in consensual sexual acts, as they are not entitled to infer from the circumstances in which they find themselves that the other party to a consensual encounter is in fact consenting to the sexual acts.

5. The ambiguity of the phrase ‘... does not do or say anything to communicate consent’ introduces a subjective element that is likely to be the subject of detailed cross-examination within a sexual assault trial, given that there is no normative or standardised way in which notions such as ‘consent’ are communicated or understood.
6. Given the ambiguity and lack of certainty in the definition of ‘consent’ there is a heightened risk of extensive defence cross-examination of complainants in relation to previous sexual history and how consent has been communicated in those instances. Increased focus on the complainant’s sexual history and how consent has been communicated in the past, combined with a likely increased focus on the complainant’s conduct to assess whether her/his conduct amounted to communication of consent, undermines the objective of placing greater emphasis on the accused’s conduct. This may result in further trauma for complainants and a reduction in the reporting of sexual assaults.
7. The ALA is also concerned that this ambiguity will continue to exploit pre-existing juror assumptions and perceived stereotypes around rape and sexual assault. This is supported by the experience in Tasmania, based on the analysis by H M Cockburn:

Cockburn’s analysis of Tasmanian sexual assault trials between December 2004 and October 2008 found that prosecutors still relied on “traditional” views when arguing non-consent. In most of the cases Cockburn analysed, prosecutors did not emphasise the absence of clearly communicated consent. Instead, they relied on evidence of clear resistance, and/or threats or use of force, to prove non-consent. Prosecutors only argued that consent was not present because the person did not communicate consent in cases where the person was either asleep or grossly intoxicated at the time of the alleged assault.²

8. The ALA is also concerned that the communicative model of consent could potentially broaden the application of the criminal law to sexual activity in circumstances where a person is no longer entitled to infer that the other party was in fact consenting to sexual activity. For example, where sexual activity between two adults proceeds without action or communication, but where their consent is expressed post fact, this post-fact consent would not overcome the communicative model of consent provisions due to the absence of action

² Cockburn, H M (2012), *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials*, PhD Thesis, University of Tasmania, 2012, 129.

or communication during the time of the act. The ALA submits that such a provision is unfair and impractical.

9. The ALA is concerned that the adoption of a communicative model of consent will introduce a level of ambiguity and confusion that will result in a broadening of the application of the criminal law to sexual activity, an intense focus on complainants' conduct and previous sexual history as to how sexual consent has been communicated in the past, and confusion for prosecutors and jurors. The ALA recommends that consent laws must be clear, concise and easily understood by everyone. There is considerable evidence to indicate that the Tasmanian consent laws make for ambiguity and confusion. The ALA strongly opposes the Draft s61HJ(1)(a) as it is currently worded.

Conclusion

10. The ALA welcomes the opportunity to respond to the NSWLRC Draft proposals regarding consent in relation to sexual offences. However, the ALA does not support the draft s61HJ(1)(a) included in the proposals.



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