

Project 113 – Sexual offences

Submission to WA Law Reform Commission

12 April 2023

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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 welcomes the opportunity to have input into the Law Reform Commission of Western Australia's review of Chapter XXXI of the *Criminal Code Compilation Act 1913 (WA)* (Code) and sections 186, 191 and 192 of the Code.
2. The ALA will confine its comments in this submission to concerns relating to the potential problems of adopting an affirmative consent standard.

Problems with adopting an affirmative consent standard

3. The ALA does not support amending section 319(2) of the Code to provide a communicative consent model that requires participants to say or do something in order to indicate their consent to a sexual activity.
4. The current Section 319(2) of the Code currently states:
 - a) consent means a consent **freely and voluntarily given** and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;*
 - b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;*
 - c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.*
5. The ALA submits that introducing an affirmative consent model whereby the definition of consent is amended to require participants to 'say or do something in order to indicate their consent to a sexual activity' introduces a confusing and ambiguous test.
6. The affirmative consent model is problematic for members of the community engaging in consensual sexual acts, as they often occur in a context of no explicit communication between the parties.
7. The ALA believes that ambiguity of the phrase '...say or do 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. 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 their previous sexual history and how consent has been communicated in those instances.²

8. Further, the QLRC did not recommend enacting a requirement that consent be expressed in word or conduct. It was of the view that:

A requirement of unequivocal and express language or actions before there is consent in law presents difficulty. Such a model would reduce the means by which consent is given for the purposes of the law. It takes no account of variations in the dynamics of relationships.

A reform of this nature would be unlikely to produce any positive outcome in terms of shifting the focus at trial from the words or actions of the complainant to those of the defendant; it would still be necessary to consider whether and in what way the complainant gave an unequivocal and express 'yes'.³

9. The ALA contends that a focus on the complainant's conduct could lead to extensive cross-examination about whether the conduct occurred in order to communicate consent. This could likely extend to include cross-examination about their prior sexual history, and how they have previously communicated consent.
10. The ALA is concerned that 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 the 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.
11. The ALA is also concerned that the ambiguity concerning the concept of 'free agreement' will ignite 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, as noted by the NSW Law Reform Commission:

² New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.67].

³ Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.54]-[5.55].

‘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.’⁴

12. The ALA is also concerned that the ambiguity of the concept of ‘free agreement’ and affirmative consent could potentially broaden the application of the criminal law to sexual activity with the effect of rendering a person no longer entitled to infer that the other party was in fact consenting to the sexual activity. For example, where sexual activity between two adults proceeds without action or communication, but where consent is expressed after the fact, this post-fact consent would not overcome the ‘free agreement’ provisions due to the absence of action or communication during the time of the act. Under the Tasmanian, Victorian and NSW provisions⁵, the post-fact consent in these circumstances is no defence. The ALA submits that it is unfair and impractical to introduce a similar provision in WA.
13. The ALA is concerned that the adoption of an affirmative consent standard will introduce a level of ambiguity and confusion that will result in a broadened 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.⁶ The ALA recommends that consent laws must be clear, concise and easily understood by everyone.
14. The ALA strongly recommends that the WALRC research and analyse the impacts of an affirmative consent model, to assess the impact of the change in definition on the conduct of sexual assault trials, the effect of cross-examination on complainants and whether the

⁴ New South Wales Law Reform Commission (2018), *Consent in relation to sexual offences, Consultation paper 21*, October 2018, paragraph 3.77; 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.

⁵ *Criminal Code Act 1924* (Tas) s.2A(2)(a); *Crimes Act 1958* (Vic) s.36(2)(l); *Crimes Act 1900* (NSW) s 61HJ(1)(a)

⁶ ALA Submission to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.54].

reform resulted in any statistically significant increase in the rate of reporting of sexual assaults in WA. The ALA also agrees with a number of additional arguments against an affirmative consent model, namely that such legislation would introduce complexity as opposed to providing further clarity on issues underlying consent involving sexual offences.

15. The ALA agrees that people frequently engage in consensual sexual activities without expressly communicating their willingness to do so in words or actions. Imposing this requirement will unduly criminalise a lot of consensual sexual activities and could lead to injustice.⁷
16. Above all, the ALA is concerned that while not technically shifting the onus of proof, an affirmative consent model will inappropriately shift the focus to the accused to demonstrate that consent had been communicated. In practice, this is likely to require the accused to give evidence. In this respect, the ALA emphasises the ineffectiveness of criminal law as a tool for changing societal attitudes. It would be better to instead focus on educational initiatives about consent.

Conclusion

17. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the WA Law Reform Commissions review of Western Australia's sexual offence laws.
18. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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⁷ D Tuerkheimer, 'Affirmative Consent' (2016) 13 *Ohio State Journal of Criminal Law* 441; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) [3.72].