Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Consent in relation to sexual assault offences

Submission to the NSW Law Reform Commission

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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 appreciates the opportunity to make a submission to the NSW Law Reform Commission (NSWLRC) 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 for this review.

2. The ALA submits that there should be no change to s61HA. The ALA will confine its comments in this submission to concerns relating to the potential problems of adopting an affirmative consent standard.

Question 3.2: The meaning of consent

Problems with adopting an affirmative consent standard

3. The ALA submits that the NSW definition of consent should not be amended to adopt an affirmative consent standard. The ALA notes that in 2004, s2A of Schedule 1 of the *Criminal Code Act* 1924 (Tasmania) was amended to adopt an affirmative consent standard. The amended s2A states:

> (1) In the Code, unless the contrary intention appears, 'consent' means free agreement.
>
> (2) 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; or
>
> (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or
>
> (c) agrees or submits because of a threat of any kind against him or her or against another person; or
>
> (d) agrees or submits because he or she or another person is unlawfully detained; or
>
> (e) agrees or submits because he or she is overborne by the nature or position of another person; or

(f) agrees or submits because of the fraud of the accused; or

(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or

(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or

(i) is unable to understand the nature of the act.

4. The ALA submits that the Tasmanian provision is ambiguous and open to differing interpretations. The concept 'free agreement' is not defined in the Tasmanian provision, and is therefore nebulous and open to considerable misapplication.

5. The ALA submits that the phrase '… does not say or do anything to communicate consent' (s2A((2)(a)) 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.

6. The ambiguity of the phrase '… does not 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.

7. 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.

8. 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 in the Commission's Consultation Paper:

> 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]

9. The ALA is also concerned that the ambiguity of the concept of 'free agreement' and the affirmative 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 'free agreement' provisions due to the absence of action or communication during the time of the act. Under the Tasmanian provisions, 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 NSW. The ALA refers the Commission to its preliminary submission to this inquiry dated 29 June 2018, which included a hypothetical case study to illustrate this concern (at paragraph 7).

10. The ALA is concerned that the adoption of affirmative consent standard 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

[2] 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.

consent laws make for ambiguity and confusion. The ALA recommends that laws that adopt a free agreement standard should not be introduced in NSW.

Conclusion

11. The ALA welcomes the opportunity to respond to the NSWLRC Consultation paper 21, Consent in relation to sexual offences. The ALA would welcome the opportunity to provide further information regarding the application of the relevant provisions in Tasmania if the Commission so requires.

Joshua Dale

On behalf of the Australian Lawyers Alliance NSW