

***Submission to the NSW Law Reform Commission's inquiry
concerning consent in relation to sexual offences law***

Victims Support Unit, CSNSW

Thank you for the invitation to provide a response to your consultation.

The Victims Support Unit (CSNSW) has had a long history of supporting victims of sexual assault in a post-sentence context, through the Victims Register and Restorative Justice service.

While the offenders have been successfully prosecuted, it does not follow that our clients are uniformly or fully satisfied that 'justice was done', let alone that the harm that they have suffered has been 'repaired'. For instance, the main reason victims apply to be on the Victims Register is that they are experiencing intense fear and distress at the prospect of the offender's release from prison; and so they want to keep informed about any release dates, and also have a 'voice' in determining parole conditions.

We understand that the Law Reform Commission's review is only focused on "whether the approach to consent in the law should be reformulated", and we will restrict our response to this issue. However, given our experience of working with victims within the NSW legal system as it stands, we do so with two related caveats:

First, as many consultees have already indicated, while reforming the law may be necessary, it is not sufficient—both in terms of achieving justice for victims of sexual assault, or with respect to repairing the (ongoing) harm that has been caused to the victim and their respective 'communities of care'.

Second, as the only government funded restorative justice service for offences in the adult criminal justice system in NSW, we have acquired considerable experience in delivering safe and effective restorative justice processes in a post-sentence context, including cases of sexual assault. We would therefore concur with the view of those consultees who have suggested that "restorative justice processes should be used" in cases of sexual assault. We are therefore planning to facilitate a wider discussion with relevant partners about the potential for increasing the use of restorative justice in such cases.

In relation to the question of whether the existing law should be reformed, we do not have the legal expertise to suggest any specific changes to the legislation. However, we wish to express a view on the core principles that should guide the relevant legislation, whether or not these require any specific changes to the legal formula. Please note that, whilst we believe that these principles would, in general, reflect the views of many clients, we have relied on our collective experience supporting victims of sexual assault, rather than representing the views of any individual clients. In addition, many of these principles have already been expressed by other consultees or in legislation from other jurisdictions, as presented in your consultation paper. In such cases, we reiterate them here to register our support for these particular views.

Principles

1. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent [i.e. affirmative, conscious, and voluntary agreement] of the other or others to engage in any sexual activity.¹
2. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.²
3. Legislation should require fact finders to consider whether the accused asked the complainant or took other active measures to determine whether the complainant consented.³
4. In defence of any claim that they took active measures to discern whether the complainant was consenting to sexual activity, the accused should be required to establish that they took into account the *total evidence* available to them at the time. It is not sufficient for the accused to provide evidence that they took into account *only* the presence or absence of a single speech act by the complainant. The accused must also show that they took into consideration the complainant's non-verbal cues, body language, relevant personal history, the circumstances of the act (and so on), especially when these other factors were or appeared to be in conflict with what the complainant did or did not say.⁴
5. Because of the moral significance of sexual activity, the accused needs to show that they took greater care than would normally be the case to ensure that their belief that the complainant had consented was justified.⁵
6. The legal requirement of affirmative consent should not be taken to entail that the focus of the trial should be on the complainant's conduct, sexual history or whether or not they had *effectively* communicated consent. The focus should instead be placed on the accused's conduct and on whether they met their obligation to ensure the complainant had given (and continued to give) their affirmative consent to the sexual activity.⁶

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¹ *Education Code* (California) § 67386(1) definition of "affirmative consent".

² *Ibid.*

³ Cf. A Dyer, *Preliminary Submission PCO50* [5], [28]; A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4–5.

⁴ See Guerrero, A. (forthcoming) "The Epistemology of Consent," in *Applied Epistemology*, ed. Jennifer Lackey. (Oxford University Press). Pre-published version: <https://tinyurl.com/yboqyztzk>: p. 25.

⁵ See Guerrero, A. (forthcoming): p. 25.

⁶ See A Dyer, *Preliminary Submission PCO50* [14]. Cf. "[T]he central focus of most rape trials which adopt consent based models concerns the state of mind and/or actions of the victim. This has only encouraged the tendency to 'put the victim on trial' in rape trials, involving the problematic use of sexual history evidence." Tadros, V. (2006) "Rape Without Consent", *Oxford Journal of Legal Studies*, 26(3), 515-543: p. 516: p. 517.