



**RESPONSE TO THE
NEW SOUTH WALES LAW REFORM COMMISSION'S
CONSENT IN RELATION TO SEXUAL OFFENCES – DRAFT
PROPOSALS**

1. The New South Wales Bar Association (**the Association**) thanks the New South Wales Law Reform Commission (**NSWLRC**) for the opportunity to respond to the *Consent in relation to sexual offences – draft proposals* (**the Draft Proposals**). This follows the Association's previous submission to the NSWLRC's *Consultation Paper* on 26 February 2019 (**February Submission**). The Association has carefully considered each of the Draft Proposals and is pleased to assist the NSWLRC by providing the following further submissions on this important issue.
2. In the February Submission, the Association recommended the creation of a separate, lesser offence of “negligent” sexual assault to ensure that knowingly sexually assaulting a person is marked as a more heinous crime than engaging in sexual activity where one person honestly – though unreasonably – believes the other person is consenting. This recommendation has not been adopted by the NSWLRC. Instead the Draft Proposals would, if enacted, significantly diminish the status of the existing grave offence of sexual assault by reducing it to a crime that includes negligence, without adequate regard to gradations in an accused's culpability, reflected in appropriately balanced maximum penalties.
3. The Association has consistently maintained that the definition of sexual assault should be based, as it currently is, on an absence of consent. The implementation of the NSWLRC's proposals would, however, impinge in unexpected ways on normal human relations through the statutory measures and in particular, the deeming provisions, in the current Draft Proposals. Practical examples of this are set out in the body of the submission.
4. The Association has also expressed support for many of the changes that are now reflected in the Draft Proposals. Where there are associated practical difficulties in

the Draft Proposals, the Association has endeavoured to identify these for the assistance of the NSWLRC.

Changes to structure and language

5. The Association acknowledges the NSWLRC's proposed changes to the structure and language of relevant provisions of the *Crimes Act 1900* (NSW). These changes are intended to make the law easier to read and replace certain expressions with simple, modern alternatives. This reflects, in part, the Association's recommendation in its February Submission that the NSWLRC's review should drive fundamental change to simplify the law in this area, including the language of the relevant sections. It is a key tenet of the rule of law that the law should be accessible and easily understood.

Discretionary directions

6. In its February Submission the Association also recommended drafting appropriately worded directions to juries based on the facts in each particular trial. Although the Association suggested in the February Submission that such directions be fashioned in the Bench Book, the NSWLRC has largely adopted the Association's recommendation of tailored discretionary directions.

Proposal 4.1: Interpretive principles

7. The Association supports both the principle proposed in draft paragraph 61HF(a) and including this fundamental human right in the interpretive section. However, the Association is concerned that fundamental principles of the interpretation of the criminal law should also be acknowledged and included in this section to avoid confusion and to minimise the risk of any unintended consequences in applying the provisions. Accordingly, the Association recommends that explicit recognition of the presumption of innocence and onus of proof be included, at minimum. If the NSWLRC is minded to retain paragraph 61HF(b) as drafted, the Association recommends that the words "or lack of consent" be added so the provision reads as follows:

a person's consent **or lack of consent** to a sexual activity should not be presumed.

Proposal 5.1: Meaning of “consent” and “at the time of sexual activity”

8. The Association does not agree with the proposed draft subsection 61H1(1), which, when read in conjunction with Proposal 6.4, appears to exclude the giving of advance consent. The Association’s position is that consent to sexual activity may be given in advance of the activity.
9. The Association would, therefore, support the addition of the words “**before or** at the time of the sexual activity” to the current statutory definition to ensure that a person’s consent in advance of a sexual activity is recognised by the law.
10. The Association otherwise repeats its comments at [3.1.1] to [3.1.4] of its February Submission regarding the definition of consent.

Proposal 5.2: Withdrawal of Consent

11. This proposal addresses the Association’s concerns raised in the February Submission.

Proposal 5.3: Absence of Resistance

12. The Association supports draft subsection 61HI(3).

Proposal 5.4: Consent to one type of sexual activity is not on its own consent to another sexual activity

13. The Association does not support the current proposed draft subsection 61HI(4) and maintains the position set out in the February Submission. The Association is concerned the draft subsection 61HI(4) may introduce confusion to an area of the law that is operating well at a practical level. Sexual activity means “sexual intercourse, sexual touching or a sexual act” under the proposed section 61HH. Applying draft subsection 61HI(4) literally, consistent with the proposed interpretive provisions, consent to sexual intercourse would not on its own constitute consent to sexual touching. However, in some instances, sexual touching may be inseparable from the other sexual activity occurring simultaneously, such as sexual intercourse. Proposal 5.4 as currently drafted is too broad and would be problematic in practice, creating uncertainty and confusion which may prevent the proposal from achieving its intended purpose.

Proposal 5.5: Consent to a particular sexual activity

14. The Association supports the draft subsection 61HI(5).

Proposal 5.6: Consent to sexual activity performed in a particular manner

15. The Association opposes the draft subsection 61HI(6). As currently drafted, use of the words “performed”, “in a particular manner” and “in another manner” give the proposal much wider scope than the stated intention. The proposal arguably captures cases where the consent is to a sexual activity performed quickly but the sexual activity is performed slowly, or the consent is to a sexual activity performed in a competent manner but the sexual activity is not.

16. The Association has previously expressed the opinion that the current paragraph 61HE(6)(d) (and arguably proposed subparagraph 61HJ (f)(ii)) already captures consent conditional on the use of contraception or a device to prevent transmission of a sexually transmitted disease. However, if the law is to be amended to provide greater certainty regarding the removal of barrier protective and/or contraceptive devices and/or ‘stealthing’, the current draft should be re-worded to capture such conduct more specifically and avoid unnecessarily broad reach.

Proposal 6.1: Non-communication of consent

17. Draft subparagraph 61HJ(1)(a) deems consent to be absent even if a person is consenting to sexual activity but has not communicated such consent by words or actions. The Association is, therefore, opposed to the proposal 6.1 introduction of a communicative model of consent. That nothing was said or done by one person where consent is absent is clearly a material consideration to whether the other person knew there was a lack of consent. However, this is a different matter to deeming consent to be absent, even where it was present but nothing was said or done to communicate such consent. The Association consequently opposes this provision as currently drafted.

18. Proposal 6.1 is built upon a view of consent as an activity rather than a state of mind. The communicative model of consent conflates the evidence from which a person’s consent can be inferred (namely what was said or done by the person) with

consent itself. As the Association noted in its February Submission, there may be free agreement to sexual activity regardless of whether a person communicates that consensual state of mind. Draft subparagraph 61HJ(1)(a) would lead to a situation where consent would be deemed absent simply because it was not manifested in the prescribed manner. Such a change in the law would, in turn, result in a lack of consent being irrebuttably presumed even when a person was, in fact, consenting. The Association agrees that “innumerable instances of consensual sexual intercourse occur in the absence of words and [that] such instances are not morally problematic”.¹ However, under proposal 6.1, “innumerable instances” of sexual activity would be considered non-consensual and criminal sanctions for a wide range of unproblematic sexual activity would follow.

Proposal 6.2: Incapacity - Generally

19. The Association supports this proposal, which reflects the current law. The Association encourages the NSWLRC to consider and address specific care directives or enduring guardianship consents in relation to persons who are cognitively incapacitated but sexually active, as a potential exclusion from the operation of this provision.

Proposal 6.3: Incapacity - Intoxication

20. The Association does not support draft paragraph 61HJ(1)(c) as currently drafted, as the meaning of the phrase “to be incapable” is not defined. It is not clear that this phrase means incapacity in the legal sense, although this appears to be the intention based on discussion at [6.15] of the Draft Proposals. If the proposal was amended to make this clear, the Association would then support it. As currently drafted, a mere expression of opinion by a complainant that he or she was “incapable” owing to drugs or alcohol may be thought to satisfy the provision. If paragraph 61HJ(1)(c) stated, consistent with proposed paragraph 61HJ(1)(b), that “the person is so affected by alcohol or another drug that the person does not have the capacity to consent” this may cure the issue.

¹ A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PC 065*, 5.

Proposal 6.4: Asleep or Unconscious

21. The Association does not oppose the proposal insofar as it relates to a person being unconscious, as this is an important protection for people during a state of vulnerability.
22. However, as outlined in draft paragraph 61HF(a), the Association also recognises that “every person has a fundamental right to choose whether or not to participate in a sexual activity”. Accordingly, the Association does not support removing the words “does not have the opportunity” from the negation of consent provision in relation to a person who is asleep, as proposed in paragraph 61HJ(1)(d). This is because a person may purposefully consent in advance to sexual activity occurring when the person is asleep, or consent to being woken by sexual activity, which inevitably means the activity is to occur while the person is asleep. Excluding advance consent may, in some instances, be inconsistent with the interpretive principle in draft paragraph 61HF(a) as a limited temporal notion of consent encroaches upon a person’s fundamental right to choose to participate in sexual activity during a period such as sleep. Criminalising such conduct does not safeguard or enhance sexual autonomy and freedom between capable and consenting adults.
23. While close attention would need to be given to the substance of the prior consent and the later activity, the Association does not support the amendment to exclude the words “does not have the opportunity” from the current deeming provision in relation to being asleep.

Proposal 6.5: Force, fear, coercion, blackmail or intimidation

24. The Association supports the policy rationale behind draft subparagraph 61HJ(1)(e)(i), including the intention to capture forms of violence such as family violence. The Association appreciates the critical importance of ensuring the safety and rights of victims of family violence are protected.
25. However, the Association is concerned that the provision as currently drafted does not strike the right balance between protecting victims of violence and upholding

the presumption of innocence, which is also an important safeguard for victims in promoting the integrity of trials and convictions secured.

26. As currently drafted, the subparagraph provides that the absence of consent would be irrebuttably presumed if the person participated in the sexual activity because of “force” or “fear of force” or “fear of harm”. The Association is concerned with the breadth and subjective nature of the latter two.

27. “Fear of force” and “fear of harm” are very low, subjective thresholds for consent to be presumed absent, without any opportunity to rebut this presumption. The Association is of the view that the draft provision is therefore too broad as currently drafted.

28. The Association supports proposed paragraph 61HJ(e)(ii).

Proposals 6.6 and 6.7: Overborne by Abuse of position of Authority or Trust

29. The Association supports the proposed subparagraphs 61HJ(1)(e)(iii) and (iv).

Proposal 6.8: Mistakes

30. The Association supports the proposed paragraph 61HJ(1)(f), which largely reflects the current law.

Proposal 6.9: Fraudulent Inducement by Any Means

31. Draft paragraph 61HJ(1)(g) proposes that a person does not consent to sexual activity “if the person is fraudulently induced to participate in the sexual activity”. However, there is no definition provided of such fraudulent inducement. The Draft Proposals state at [6.50] that a person “who is induced by fraud, *of any kind*, to participate in a sexual activity, cannot be said to have agreed freely and voluntarily to do so”. The Association is concerned that, in the absence of a definition for fraudulent inducement, the provision may capture conduct that is immoral and unsavory but not necessarily criminal.

32. Under the current law, some fraudulent inducement, such as misleading a person about the purpose of sexual activity, may mean there is an absence of consent. The law is clear in that regard.

33. However, to provide that *any* fraudulent inducement whatsoever to participate in sexual activity negates consent may result in the imposition of a disproportionate criminal penalty for behaviour that is morally wrong but may not necessarily be deserving of a very serious criminal conviction.
34. As currently drafted, proposed paragraph 61HJ(1)(g) could capture any untrue statement or false assurance relied on as an inducement to sexual activity. This could include false statements such as “I love you” or “I am single” or “I will leave my current partner”, or a promise of marriage, overseas travel or use of a place as a home. While such behaviour is morally reprehensible, and could in some circumstances give rise to actions to enforce rights under other areas of civil law, the Association asks whether it is the intention of this draft provision to treat such behaviour alike with heinous criminal behaviour that demands serious criminal punishment.
35. If the proposal is to proceed, the Association recommends the term “fraudulent inducement” be defined to capture behavior that is criminally dishonest, rather than merely morally dishonest, to ensure the provision and its associated punishment are proportionate to the behaviour in question.

Proposal 7.1: Knowledge about consent

36. The Association does not support the draft subsection 61HK(1), for the reasons outlined in the February Submission to the extent of the proposals in the previous Consultation Paper.
37. Additionally, the Association notes the draft proposal extends the current law to impose liability on the basis of negligence: that is, a failure to meet a reasonableness standard. Importantly, in contrast with other criminal offences that currently exist under NSW and federal law, the offence committed is the same regardless of whether there is *actual* knowledge of lack of consent or a negligent failure to appreciate there was a lack of consent. The Association does not believe it is appropriate for criminally negligent behaviour to be treated identically to criminal behaviour performed with actual knowledge of the lack of consent. This would mean the same severe maximum penalty would apply. In addition, a sentencing

court would not be aware of the basis on which the jury determined the offence was made out. A jury may be satisfied a defendant was negligent, however the sentencing court may sentence on the basis an accused possessed actual knowledge.

38. If a negligence-based offence is to be created, it must be a discrete offence with an appropriate and proportionate lower maximum penalty, consistent with the gradation of other criminal offences under NSW and federal law.
39. The Association maintains concerns raised in the February Submission concerning confusion in the language of the subsections, which still refer to consent rather than lack of consent, and remain in the current draft.

Proposal 7.2: What fact finders must and must not consider and deletion of current s 61HE (7)

40. The Association reiterates concern set out in its February Submission regarding the language of this proposed draft. The Association otherwise supports proposed draft subsection 61HK(2).
41. The Association does not oppose the deletion of the current subsection 61HE(7).

Proposals 8.1-8.4: Jury Directions

42. The Association supports there being one mandated jury direction that jurors carefully examine any assumptions, as set out in draft proposal subsections 292(2)-(5), with further directions to be given only should they be relevant in the case. While the Association suggested in its February Submission that this flexibility be achieved through model *Bench Book* directions, the alternative model proposed by the NSWLRC addresses the Association's concerns. The Association supports all of the proposed mandatory and discretionary directions on specific misconceptions and the procedure by which the directions may be raised and given in a trial.

Proposal 9.1: Definitions and proposed draft s 61H(3)

43. The Association supports the proposed reforms in draft subsections 61H(3) and (4) to include incitement in the definition and provide that a reference to a part of the body includes a surgically reconstructed part of the body.

Proposal 9.2: Meaning of sexual intercourse

44. Proposed paragraph 61HA(a) is uncontroversial. However, proposed paragraph 61HA(b) expands the definition of sexual intercourse to include matters which would currently be charged and, upon conviction, punished as sexual touching. This would be a substantial change as the activity is currently captured by the definition of sexual touching and would expose alleged offenders to significantly higher maximum penalties and standard non-parole periods upon conviction. The proposed expansion of the meaning of sexual intercourse in paragraph 61HA(b) is not supported by the Association.

45. The Association also notes that genitalia is not simple language and is not defined. It generally refers to external genitalia – labia minora and majora, clitoris and vagina, penis, scrotum and testes. If the term “genitalia” is to be retained, it should be defined. The proposed draft means that a touching with the tongue on these parts of the body or on the anus without any penetration would be considered sexual intercourse, replacing the current part of the definition which specifies “cunnilingus” or “fellatio”, both of which are easily explained to a jury. While cunnilingus currently does not require proof of penetration and consists of licking or sucking of the genitals, it does not extend to a mere touching with the tongue. The Association does not support the extension of the meaning as set out in draft proposal subsection 61HA(b). The Association supports the retention of the terms “cunnilingus” and “fellatio” or, if these terms are to be simplified, the replacement of both terms with a reference to the sucking and/or licking of the genitals.

Proposals 9.3 and 9.4: Proposed Amendments to “sexual touching” and “sexual act” provisions

46. The Association supports the proposed reforms to the meanings of “sexual touching” and “sexual act” and the use of the words “other person” rather than “victim” or the use of gender specific terms.