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Preliminary Submission to Review into Sexual Consent Laws

Feminist Legal Clinic Incorporated is a new community legal service that works to advance the human rights of women and girls through a combination of targeted casework, community legal education and law reform work.

We welcome this review of consent in relation to sexual assault offences. Our Principal Solicitor has experience in criminal law and supporting victims of crime and is familiar with the difficulty securing convictions in this area. Thank you for the opportunity to make a submission on this important issue.

1. Should s61HA be amended?

Sexual assault is gender-based violence. Women are far more likely to be the victim than men. Sexual assault is about power and control and is an abuse of a woman's human rights. Women remain devalued and subordinated in society and the prevalence of sexual violence ensures that women experience fear throughout their lives. Women are constantly subjected to unwanted sexual behaviour. One in six women in Australia have experienced sexual assault,¹ with young women aged 18-24 the most likely victims.² Problems associated with how the justice system deals with sexual assault include 'the extremely low level of the reporting of sexual assault, a high level of attrition of cases following an initial report and a low level of conviction following trial'.³ This indicates a need for legislative reform.

¹ Australia's National Research Organisation for Women's Safety, Horizons Research Report (2015) '*Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012*', 48.

² Australia's National Research Organisation for Women's Safety, Horizons Research Report (2015) '*Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012*', 52.

³ Ian Dobinson and Lesley Townsley, 'Sexual assault reform in New South Wales: Issues of consent and objective fault' (2008) 32 *Criminal Law Journal* 152, 152.

In NSW consent is considered to be the free and voluntary agreement to sexual intercourse.⁴ The intention with the introduction of a statutory definition was to promote communication around consent and acceptable standards of sexual behaviour.⁵ Currently in NSW a person is taken to know that the other person does not consent to sexual intercourse if the person has no reasonable grounds for believing that the other person consents.⁶ To make such a finding all the circumstances of the case must be considered including any steps taken by the person to ascertain whether the other person consents.⁷ This submission contends that these provisions are still insufficient and are not achieving the desired outcome. Section 61HA must be simplified and strengthened to require the seeking and positive confirmation of consent.

2. Experiences of Sexual Assault Survivors in the Criminal Justice System

As we have seen in the Lazarus case, it is possible for a court to find that a woman has not consented to sexual intercourse, but nevertheless acquit the defendant on the basis that he did not know the woman was not consenting.⁸ Despite various safeguards contained in the existing legislation, Lazarus was able to succeed on appeal by claiming that he interpreted the complainant's body language as consent. Unfortunately, the scope for such defences also has the inevitable outcome that victims are effectively put on trial and their actions, rather than those of the defendant, subject to the closest scrutiny. It would therefore appear that it is necessary to amend section 61HA to require evidence of a positive indication of consent to refute a charge of sexual assault. This would reduce the scope for misinterpretation and manipulative defences based on knowledge of consent and would play an important educative role for the community.

3. Sexual assault research and expert opinion

The current law undervalues the importance of consent being communicated and rather than ensuring consent is definitive it remains open to interpretation by the perpetrator. The law as it stands risks sending a message to women that whilst no means no, everything else you do might mean maybe, or at least be sufficient for the accused to claim they had reasonable grounds for believing there was consent. When 'one in five young people between the ages of 12 and 20 believe it's "normal" for a male to pressure a female into sexual acts'⁹, consent should be requested rather than interpreted. A research survey of young people around Australia 'showed that 22 per cent of participants believed it's a female's responsibility to

⁴ *Crimes Act 1900* (NSW) s 61HA(2).

⁵ James Monaghan and Gail Mason, 'Reasonable reform: Understanding the knowledge of consent provision in section 61HA(3)(c) of the Crimes Act 1900 (NSW) (2016) 40 *Criminal Law Journal* 246, 249.

⁶ *Crimes Act 1900* (NSW) s 61HA(3)(c).

⁷ *Crimes Act 1900* (NSW) s 61HA(3)(d).

⁸ <https://www.abc.net.au/news/2017-05-06/luke-lazarus-case-should-make-us-reconsider-consent/8502144>

⁹ Luke Cooper, 'One In Five Young People Think It's OK For A Man To Pressure A Woman Into Sex' (23 February 2017) Huffington Post
https://www.huffingtonpost.com.au/2017/02/22/one-in-five-young-people-think-its-okay-for-a-man-to-pressure-a-woman-into-sex/a_21719078/

make it very clear when sex isn't wanted.¹⁰ Rather than continuing to place responsibility on women, those initiating sexual intercourse should take responsibility for ensuring consent is communicated positively and any misinterpretation of behaviour is eliminated. The current model of consent is also complicated by the attitudes of jurors. 'Jurors do not (because they cannot) make objective judgements about consent and guilt based on the facts presented to them in court'.¹¹ Jurors look for overt signs the complainant was not consenting, if this is not verbalised and there is no resistance jurors can query 'how a defendant could reasonably be expected to know that the complainant was not consenting'.¹²

4. The shift to an Affirmative Model of Consent in other jurisdictions

The United Nations Handbook for Legislation on Violence against Women recommends that a definition of sexual assault '[r]equires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting'.¹³

Our recommendation is for the introduction of an affirmative model of consent. There must be a positive obligation before engaging in sexual intercourse to take steps to ascertain consent. There must be explicit permission to have sex. Where no action is taken to determine the existence of consent and the complainant has not said or done anything to indicate consent, it should be assumed that there was no consent. Silence should not be construed as consent given 'the variety of reasons women are not necessarily empowered to express dissent'.¹⁴ Consent is not vitiated even where it is withdrawn during sex. The requirement of an affirmative consent standard is likely to assist women in asserting their legal right in 'situations where the existence of coercive factors prevents the victim from rejecting or avoiding sex'.¹⁵ Consent given under coercion, duress or peer pressure does not constitute consent. The onus cannot rest on the complainant to debunk the perpetrator's defence that he perceived consent was given. Victim blaming is an affront to equality for women and men, and undermines respect in relationships.

¹⁰ Luke Cooper, 'One In Five Young People Think It's OK For A Man To Pressure A Woman Into Sex' (23 February 2017) Huffington Post

<https://www.huffingtonpost.com.au/2017/02/22/one-in-five-young-people-think-its-okay-for-a-man-to-pressure-a-woman-into-sex-a-21719078/>

¹¹ Natalie Taylor, 'Juror attitudes and biases in sexual assault cases' (2017) Trends & issues in crime and criminal justice no. 344, Australian Institute of Criminology <https://aic.gov.au/publications/tandi/tandi344>

¹² Natalie Taylor, 'Juror attitudes and biases in sexual assault cases' (2017) Trends & issues in crime and criminal justice no. 344, Australian Institute of Criminology <https://aic.gov.au/publications/tandi/tandi344>

¹³ United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), *Handbook for Legislation on Violence Against Women* (2012) 24.

http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?la=en&vs=1502

¹⁴ Helen Mary Cockburn, *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, June 2012) 27.

¹⁵ Helen Mary Cockburn, *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, June 2012) 27; see the research and evaluation findings on participants' sexual experiences, including their experiences of pressured and unwanted sex, and clear communication in Results from the Evaluation of the Sex + Ethics Program with Young People from Wellington, New Zealand by Professor Moira Carmody, Dr Georgia Ovenden and Ms Amy Hoffmann

In Tasmania a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused did not take reasonable steps to ascertain that the complainant was consenting.¹⁶ Before relying on the defence, the accused will need to demonstrate positive evidence of the reasonable steps taken to ascertain consent.¹⁷ In Victoria, jury directions that stipulate that the fact that the person did not say or do anything to indicate free agreement to a sexual act at the time which the act took place is enough to show that the act took place without that person's free agreement.¹⁸

The Canadian Supreme Court has also limited a mistaken belief to the immediate and affirmative communication of consent. In Canada, *R v Ewanchuk* [1999] 1 SCR 330 established that 'for the purposes of mens rea, consent is now established based on the accused's perception of the complainant's words or actions and not on the accused's perception as to the complainant's desire for sexual conduct'.¹⁹ The principle adopted in the case is that 'silence, passivity and ambiguity do not connote consent'.²⁰ The case established that there must be 'an affirmative unequivocal indication of consent to sexual touching',²¹ with consent provided through words or conduct. The defence of mistaken consent is still available to an accused, but 'only a mistaken belief that the complainant communicated consent will raise a reasonable doubt as to mens rea – not a mistaken belief that the complainant was consenting'.²²

This is a preliminary submission in response to the Terms of Reference. If you require any further information in relation to this submission, please contact Anna Kerr on 0402 467476 or by email at anna@feministlegal.org. We would welcome the opportunity to expand on our submission if required.

Yours faithfully



Sophie Duffy
Legal Policy Officer



Anna Kerr
Principal Solicitor

¹⁶ Criminal Code Act 1924 (Tas) s14A 1(c).

¹⁷ Helen Mary Cockburn, *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, June 2012) 6-7.

¹⁸ Crimes Act 1958 (Vic) s 37

¹⁹ Elaine Craig, 'Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009)13 *Canadian Criminal Law Review* 247, 251.

²⁰ Elaine Craig, 'Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009)13 *Canadian Criminal Law Review* 247, 252.

²¹ Elaine Craig, 'Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009)13 *Canadian Criminal Law Review* 247, 258

²² Elaine Craig, 'Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009)13 *Canadian Criminal Law Review* 247, 251.