



Women's Electoral Lobby | 8-10 Victoria Street, Newtown, NSW 2042

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29 June 2018  
Acting Justice C Simpson  
Commissioner  
NSW Law Reform Commission  
GPO Box 31, SYDNEY NSW 2001, AUSTRALIA

By email: [nsw-lrc@justice.nsw.gov.au](mailto:nsw-lrc@justice.nsw.gov.au)

Dear Judge

Thank you for the opportunity to make a preliminary submission to the NSW Law Reform Commission with respect to its review into 'consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the *Crimes Act 1900* (NSW)'.

Women's Electoral Lobby NSW is pleased to make this submission (attached) to the review you are leading.

WEL looks forward to further opportunities to be involved in this important review.

Yours sincerely

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Helen L'Orange AM

Jozefa Sobski AM

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WEL NSW Executive Members on behalf of WEL NSW

Attachment: Preliminary Submission from Women's Electoral Lobby NSW



**NSW Law Reform Commission  
Review of consent in relation to sexual assault offences**

**Preliminary Submission from Women's Electoral Lobby  
NSW**

**29 June 2018**

## WOMEN'S ELECTORAL LOBBY

Women's Electoral Lobby (**WEL**) is an independent, non-party aligned feminist lobby group dedicated to creating a society where women's participation and their ability to fulfil their potential are supported and respected. Founded in 1972, WEL promotes equality between men and women. WEL particularly advocates policy solutions to issues that continue to disadvantage or endanger women, including those relating to women's health, safety, economic security, and participation in public life.

Since its founding, WEL has advocated for the reform of sexual assault laws as well as supporting the establishment of counselling and other support services for victims of rape.

WEL thanks the NSW Law Reform Commission for the opportunity to make a preliminary submission to this inquiry into sexual assault offences.

## AFFIRMATIVE CONSENT

The Australian Bureau of Statistics (**ABS**) has reported that sexual assault has reached a seven year high in the last reporting period of 2016 – 2017. WEL acknowledges that sexual assault can be experienced by people of any gender. In NSW, according to the ABS, 4 of 5 sexual assault victims were female. Women are also more likely to be victims of family and domestic violence sexual assault, and the Australian Bureau of Statistics reports that most victims of sexual assault knew their offender.<sup>1</sup>

According to the Australian Institute of Criminology, more than 70 percent of sexual assault incidents are not reported to police and only about one in 10 reported then result in a guilty finding. Sexual assault has among the highest rates of acquittal and lowest rates of proven guilt compared with other offences, and the Australian Institute of Criminology has reported on juror biases in sexual assault cases.<sup>2</sup>

WEL welcomes this opportunity to contribute to a review of section 61HA of the *Crimes Act 1900* (NSW) (**the Act**). WEL submits that 61HA should be amended, and supports changes to the statutory definition of consent. As it currently stands, the legal definition of consent does not adequately protect the autonomy of people who do not consent to sexual intercourse, and may inadvertently sanction gendered stereotypes or notions of entitlement as to what constitutes consent. In recent high profile sexual assault cases, this failing of the current law has clearly been exposed.

WEL supports the notion of an affirmative model of consent. This would bring the law into line with society's expectations, particularly noting the rise of movements around the world such as #MeToo and 'Time's Up'. An affirmative model of consent would better protect the rights of victims/survivors of sexual assault and would assist in ensuring that belief systems predicated on victim-blaming.

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<sup>1</sup> Australia Bureau of Statistics, 4510.0 - Recorded Crime - Victims, Australia, 2016, available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2016~Main%20Features~New%20South%20Wales~7>

<sup>2</sup> Taylor N. 2007. Juror attitudes and biases in sexual assault cases. Trends & issues in crime and criminal justice No. 344. Canberra: Australian Institute of Criminology, available at: <https://aic.gov.au/publications/tandi/tandi344>

Gendered misconceptions and prejudices do not have a place in Australian law or society.

WEL notes that an affirmative model of consent has been introduced in other jurisdictions, including in California. The California legislation applies to colleges, and sets out that a lack of protest or resistance does not mean consent, and consent must be clearly obtained:

*“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.*<sup>3</sup>

Tasmania’s legislation also requires active consent, meaning a person does not consent if they do not actively communicate, either verbally or non-verbally, their consent. The legislation relevantly sets out:

*a person does not freely agree to an act if the person –  
(a) does not say or do anything to communicate consent;*<sup>4</sup>

These models of consent acknowledge that ‘freeze responses’ often occur when a non-consenting party feels fearful or unsafe.

## **OTHER REFORMS AND POLICY**

WEL endorses the submission of the Women’s Legal Service NSW (WLSNSW) and agrees that the establishment of an Advisory Group would be beneficial in assisting the Commission with reform. WEL supports the inclusion of WLSNSW as a member. WEL also encourages the Commission to draw on the recommendations of the Royal Commission into Child Sexual Abuse in Institutional Settings.

WEL submits that along with reform to consent laws, other policy should be introduced to enable victim/survivors better opportunities to obtain justice in the prosecution of sexual assault offences, in a manner that minimises harm or further traumatisation. WEL endorses the submission from the Women’s Legal Service NSW in relation to the implementation of specialist measures in the criminal justice system to ensure victims/survivors are able to engage with the system and are treated with dignity and respect.

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<sup>3</sup> Senate Bill No. 967, Chapter 748, An act to add Section 67386 to the Education Code, relating to student safety available at: [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967)

<sup>4</sup> *Criminal Code 1924* (Tas) section 2A.

WEL particularly emphasises that it is critical that all those who play a role in assisting victims/survivors of rape are adequately trained to understand the trauma an individual may have suffered, and the intersection of other important characteristics such as gender identity, sexual orientation, cultural background, disability and the dynamics of family and domestic violence.

WEL also submits that education must accompany legislative reform. In Tasmania, research has suggested that the state's affirmative consent model is often misconstrued by juries, legal practitioners and the judiciary.<sup>5</sup> Training to legal practitioners, prosecutors and the judiciary on any changes to the NSW legislation is essential in ensuring that reforms better serve victims. WEL also supports the implementation of community education to foster better societal understandings of consent. WEL advocates for the implementation of high school programs focused on consent and sexual assault prevention for students, such as the SASS program in Tasmania,<sup>6</sup> and programs focussed on universities including residential colleges.

WEL hopes that these comments are helpful and considered in revising NSW's sexual assault laws.

Prepared by Isobel McGarity for WEL NSW

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<sup>5</sup> Helen Mary Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (2012) available at: <https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf>.

<sup>6</sup> SASS Tasmania, 'Media Release: Primary Prevention in Schools Promotional Video' (22 August 2017) available at: <https://www.sass.org.au/media-releases/primary-prevention-schools-promotional-video>.