

9 June 2022

The Hon Lindy Jenkins
Chairperson
Law Reform Commission of Western Australia
Level 23, David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

Email: ircwa@justice.wa.gov.au

Dear Commissioner

REVIEW OF SEXUAL OFFENCES AND THE LAW RELATING TO CONSENT (PROJECT 113)

Thank you for your letter dated 31 March 2022 seeking preliminary views on the law relating to consent.

The Law Society notes that ‘affirmative consent’ laws have recently passed the legislatures in New South Wales¹ and the Australian Capital Territory.²

For example, New South Wales, consent involves ‘ongoing and mutual communication’ and ‘free and voluntary agreement’ and ‘is not to be presumed’ (Crimes Act, s 61HF). One of the circumstances in which there will be no consent is if ‘the person does not say or do anything to communicate consent’ (Crimes Act, s 61HJ(1)(a)). Further, generally an accused person’s belief in consent ‘is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity’ (Crimes Act 1900, s 61HK(2)).

The Law Society recognises that community standards are evolving to reflect the trauma impacts of assaults on victims, and is generally supportive of the Criminal Code in this State appropriately reflecting those standards.

Further, whilst the fact of reform may be considered, so may the timing. It may be instructive to monitor the situation in other jurisdictions as prosecutions are brought and to reconsider law reform in Western Australia with the benefit of the lived experience in other Australian States and Territories.

In Western Australia, ‘consent’ is defined in Section 319(2) of the *Criminal Code Act Compilation Act 1913* (WA) (the Code) as a consent freely and voluntarily given. Consent is taken not to be free and voluntary if it is obtained by force, threat, intimidation, deceit or fraudulent means. Section 319(2)(b) specifies that a person is not to be taken to consent simply because they do not offer any physical resistance.

¹ Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 (NSW)

² Crimes (Consent) Amendment Bill 2022 (ACT)

The Law Society notes that there are number of combinations and permutations in the Code as it stands that cater for a wide variety of potential circumstances, and the impact of any amendments need to be considered to minimise impact on the effectiveness of those aspects currently in existence. In particular, care needs to be taken in ensuring the presumption of innocence for an accused.

In summary the position of the Law Society in response to the questions in your letter are set out below.

1. Should there be any change to the terminology used in and the scope of the existing offences and, if so, what changes should be made?
The step from 'a lack of physical resistance not equating with consent' to 'affirmative consent' being required should be seriously but carefully considered.
2. Are there any omissions in the existing sexual offences that should be remedied by the addition of new sexual offences and, if so, what offences should be added and why?
The existing sexual offences are sufficiently broad to cover emerging issues such as 'stealthing'.
3. Are there other changes that should be made to Chapter XXXI and the other offences the subject of the Terms of Reference?
Not presently.

Given the preliminary nature of this review, the Society reserves its position to confirm its support for any amendments once it has had the opportunity to review the detail of the draft amendments to the Criminal Code and perhaps also had the opportunity to consider the effectiveness of similar reforms in other Australian jurisdictions.

The Law Society also wishes to note that not every social or political problem requires a solely legislative solution. Issues associated with consent to sexual activity also need to be addressed through comprehensive, widespread, evidence-based community education about the drivers of gender-based violence, respectful relationships and ethical sexual practice.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely



Rebecca Lee
President

cc: Law Society's Criminal Law Committee