



# Ethnic Communities Council of Western Australia Inc.

## LAW REFORM COMMISSION OF WESTERN AUSTRALIA (PROJECT 13)

### REVIEW OF SEXUAL OFFENCES AND THE LAWS RELATING TO CONSENT.

### PRELIMINARY VIEWS OF THE ETHNIC COMMUNITIES COUNCIL OF WA ('ECCWA')

#### BACKGROUND.

For over 40 years ECCWA has been providing advocacy services for multicultural groups and communities in Western Australia and is a member of the national Federation of Ethnic Communities Councils of Australia (FECCA).

As the State's peak umbrella organisation, we provide a consultative advisory and training service to Government and non-Government organisations to ensure that the needs of the CULTURAL and LINGUISTICALLY DIVERSE ("CaLD") communities are heard. We are working hard to break down barriers of key issues affecting the CaLD community such as family and domestic violence, mental health, homelessness, discrimination and, more relevantly with the current issue under discussion, problems within the Justice System.

Against the above background, ECCWA welcomes the opportunity to submit its preliminary views on the proposed review of Sexual Offences under the Criminal Code Compilation Act 1913 (WA) ('CODE') (Chapter XXX1 and sections 186,191 and 192,) and the current campaign of affirmative consent having regard to contemporary understanding of, and community expectations relating to, sexual offences.

ECCWA has made note of the contents of a study conducted by the Australian Law Reform Commission (ALRC Report 114) (Family Violence-A National Legal Response) in which the complex issue of consent in sexual trials was addressed.

ECCWA has also made note of the recent amendments to sexual assault laws in New South Wales (NSW) and the Australian Capital Territory (ACT) including changes to the definition of 'consent' referred to as 'an affirmative consent model'. This model could see defendants convicted unless they have taken active steps to obtain consent for sex. In essence the new rule means that a person should not reasonably believe that another wants to have sex without doing or saying something to make sure that that is the case. Consent can also be withdrawn at any point, meaning the other person has to stop the sexual activity if that happens. The rules apply to sex within a marriage.

In explaining the reforms in NSW Attorney General Mark Speakman stated at a News Conference (Tuesday 25 May 2021) stated as follows:

*"The accused will have to have done something or said something, reasonable in the circumstances, to ascertain consent. A thought process is not such a step, a reasonable step has to be an act or something said to ascertain the complainant's consent. We will*

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*be making it clear, reaffirming your consent is something that is given VOLUNTARILY AND FREELY BY AGREEMENT. That is, can be withdrawn at any time, that consent to one sexual activity is not consent to any other sexual activity and that self-intoxication of the accused is not an excuse for failing to form a 'reasonable belief'."*

He also added that 'Judges will be given the ability to give a number of new directions to juries in a bid to dispel myths about rape'.

The new laws were passed in NSW last November to be effective as of 1st June 2022.

In the ACT, The Crimes (Consent) AMENDMENT Bill 2022 introduces a legal definition of consent into the Crimes Act 1900 where consent is based on a FREE AND VOLUNTARY AGREEMENT. (Press Release 5/5/2022. OUR (ECCWA) SUBMISSION We support and agree with the definitions of 'Consent' proposed and adopted in both the ACT and NSW that consent to sexual activity must be FREELY AND VOLUNTARILY GIVEN'. Our position is that Consent must be strictly defined to include the following: that it needs to be verbal/explicit; and that lack of refusal does not mean provision of consent.

We note that the definition in these terms is essentially subjective, and, in most cases, if not all it will be evidence that is uncorroborated, meaning it is one person's word against the other. We believe that the Director of Public Prosecutions and Defence Counsel who are mentioned on your list of stake holders will be better placed to comment on the difficulties for a prosecution and defence thrown up by this definition. An unwelcome consequence of these changes could result in prosecutions without merit or, victims being further victimised during the investigative process or during gruelling (distressing) cross examination.

Drugs or alcohol or other forms of intoxication invalidate consent, as would any perceived or actual threat. Furthermore, being underaged, or not being in the right mind, as diagnosed by a psychological professional, would also invalidate consent.

ECCWA is mindful of the power dynamics in certain cultures of our members such as husband and wife in patriarchal communities. This could mean that victims just do not come forward. Indeed, some people from patriarchal communities may not even realise that they have the right to refuse consent; and that they may be victims. We believe though that in these circumstances, with adequate education and support, victims can be encouraged to come forward with confidence in the investigative and trial processes. The law of the land is not only a reflection of the social mores of the community but it is an indication of the legislature's intent and as such the LRC through appropriate facilitators has a responsibility to educate the whole community. There must be a concerted effort backed by the LRC to promulgate the laws to specific groups in the community for whom definitions of consent are unfamiliar. In order for people from CaLD communities to be included, education and workshops must also be in languages other than English. There is no value



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in laws for the community as a whole which completely overlook the smaller ethnic communities, with cultural and language obstacles.

Power dynamics can also be at play particularly in cultures from repressive regimes where the face of authority is viewed with fear – even in social contexts such as Teachers and Students, Employer and Employee, Medical personnel and patient. In cases where there is proof of coercion, threat or nepotism/bribery, consent must be considered to be invalid.

In view of the above, ECCWA strongly supports the campaign launched in NSW to educate the public on its new affirmative consent laws prior to the laws coming into effect. ECCWA recognises and accepts that amongst its membership a change in mind-set is required to properly comprehend and comply with the proposed changes. ECCWA is willing to be part of any Education campaign proposed by the Government in the event that such changes to the law takes place. It could entail going out to our member communities and the distribution of all translated fact sheets.

In line with the above we address below the Terms of Reference for Project 113.



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## TERMS OF REFERENCE

**(a) Whether the concept of affirmative consent should be reflected in the legislation.**

Yes -see above

**(b) How section 24 of the Code (dealing with mistake of fact) applies to the offences created by the above-mentioned provisions;**

It is our view that Mistake of Fact would now no longer be applied as Affirmative consent shifts the onus of proof/responsibility to the alleged perpetrator. Currently it falls on the victim to assert that consent was not given, therefore there is now an onus on the perpetrator to affirm that the other participant indeed did consent.

However, we are of the view that this is also a matter better addressed by the Director of Public Prosecutions and Defence Counsel.

**(c) How consent may be vitiated, including through coercion, fraud or deception, for example through "stealthing"**

See above

**(d) Whether special verdicts should be used;**

Special verdicts may not be of assistance to our clientele, as they could only address cases that arise in the broader community. We have just mentioned very briefly the cultural beliefs and mindsets of some of our clientele that could have an impact on their clear understandings of their own obligations under the Affirmative Consent model that is being proposed. As such to rely on special verdicts that do not address this issue may be misleading if not inaccurate.

**You have asked for comment on the general issues canvassed on page 1 of your letter to us.**

We do not believe that we are in a position to adequately respond to the issues raised. Again we believe that the Director of Public Prosecutions could be the authority to address on any changes to Chapter XXX1 of the Criminal Code.

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