

ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

The Law Reform Commission

New South Wales Law Reform Commission
SYDNEY NSW 2001
By email: nsw-lrc@justice.nsw.gov.au

Re: Consent in relation to sexual offences (draft proposals)

Dear Commissioner,

Australia's National Research Organisation for Women's Safety (ANROWS) thanks the NSW Law Reform Commission for the opportunity to make a submission on the draft proposals arising from the review of consent and knowledge of consent in relation to sexual assault offences in s 61HA of the *Crimes Act 1900* (NSW).

ANROWS is an independent, not-for-profit organisation established as an initiative under Australia's National Plan to Reduce Violence against Women and their Children 2010-2022. ANROWS is jointly funded by the Commonwealth and all state and territory governments of Australia. ANROWS was set up with the purpose of establishing a national level approach to systematically address violence against women and their children.

Our mission is to deliver relevant and translatable research evidence which drives policy and practice leading to a reduction in the incidence and impacts of violence against women and their children. Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

This submission applies relevant ANROWS research evidence to address the practical effect of the draft proposals for change put forward by the Commission in October 2019.

We would be very pleased to assist the Commission further, if required.

Yours sincerely



Dr Heather Nancarrow
Chief Executive Officer

18 November 2019

Introduction

ANROWS supports the draft provisions put forward by the Commission, specifically the changes to structure and language, interpretive principles and clarifications concerning the definition of consent. We commend the Commission on the use of simpler, modern and inclusive alternatives to the language currently used in Section 61HE of the *Crimes Act 1900 (NSW)*. We believe this will make the law easier to understand and help to provide a firm foundation for community education initiatives about consent. ANROWS supports the draft proposal's single, non-exhaustive list of circumstances in which a person "does not consent" to a sexual activity. We also support the definitional clarity on what constitutes "sexual intercourse", "sexual touching" and a "sexual act".

With most adult sexual assaults perpetrated by intimate partners (Black et al.; Logan, Walker, & Cole; Tjaden & Thoennes, all cited in Cox, 2015), we have chosen an intimate partner context as the main lens to assess the practical effect of the draft provisions. The category of "intimate partners" spans dating relationships, as well as longer-term relationships where partners are, or had been cohabiting (see [Accurate Use of Key Statistics](#), ANROWS 2017), that may be characterised by ongoing violence.

In line with the remit of ANROWS, and noting that women comprise the majority of victims/survivors of adult sexual assault, our submission focuses upon violence against women only. There is limited data on the prevalence of domestic and family violence for LGBTIQ people in Australia, and a lack of understanding as to what constitutes domestic and family violence and sexual assault within LGBTIQ communities, arguably due to the dominance of normative understandings and paradigms of gendered power dynamics (LGBTIQ Domestic and Family Violence Interagency & The Centre for Social Research in Health UNSW; Pitts, Smith, Mitchell & Patel; and Leonard, Lyons & Bariola; all cited in Mitra-Kahn et al., 2016). Lesbian and bisexual women in particular may struggle to identify experiences of sexual violence as violence due to dominant understandings of women being considered incapable of committing rape (Ristock, cited in Mitra-Kahn et al., 2016). Forthcoming ANROWS research by Bear and colleagues will investigate the experiences of LGBTIQ people as victims/survivors and as perpetrators of violence in intimate relationships.

In this submission ANROWS specifically addresses draft proposals 4.1 New interpretive principles; 5.6 Consent to sexual activity performed in a particular way; 6.5 Force, fear, coercion, blackmail or intimidation; and 8.3 Directions on specific misconceptions.

Proposal 4.1 New interpretive principles

Crimes Act 1900 (NSW)

Draft s 61HF Principles to be used in interpreting and applying Subdivision

Regard must be had to the following principles when interpreting or applying this Subdivision—

- (a) every person has a fundamental right to choose whether or not to participate in a sexual activity,
- (b) a person's consent to a sexual activity should not be presumed,
- (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

ANROWS supports the inclusion of these interpretive principles. We believe the principles could be enhanced further with the inclusion of “intimate partner” terminology. For example: *(a) every person, including an intimate partner, has a fundamental right to choose whether or not to participate in a sexual activity.* Alternatively, the interpretive principles could state: *(b) a person's consent to a sexual activity should not be presumed, including in the context of an intimate partner relationship.*

The value of including this terminology directly within the interpretive principles is that it emphasises that sexual assault is also perpetrated by intimate partners. Women are more likely to be sexually assaulted by an intimate partner than by a stranger or acquaintance (Cox, 2016). Despite this, intimate partner sexual violence continues to lack public visibility. Heenan (cited in Breckenridge et al., 2015) noted that it is only since 1985 that Australian laws have allowed for the possibility of rape being recognised as a criminal offence when it occurs within marriage or an intimate partnership.

There is evidence that the community consistently views intimate partner sexual violence as both less serious and more justifiable than sexual violence by a stranger or acquaintance (Christopher & Pflieger, cited in Cox 2015). The 2017 National Community Attitudes towards Violence against Women Survey (NCAS 2017) conducted by ANROWS investigated whether or not Australians would justify non-consensual sex in different circumstances. The survey found that few Australians believed a man would be justified in his behaviour if he tried to have sex with a woman he was kissing after she had pushed him away, however the proportion of Australians justifying the behaviour was 1% higher when the scenario depicted the couple as married (Webster et al., 2018). NCAS 2017 also identified that 18% of Australians disagreed with the statement that “women are more likely to be raped by someone they know than by a stranger”, and 16% said they didn't know (Webster et al., 2018), giving rise to the false assumption that “stranger rape” is more prevalent than intimate partner sexual violence. Intimate partner sexual offences are worth specifically mentioning because they are unique, as they typically happen in the context of consensual sexual relations before and after the assault, inside patterns of sexual activity that are established and often do not include verbalised consent (Easteal; Heenan; Logan et al.; Martin, Taft, & Resick; all cited in Cox, 2015).

With a key stated purpose of these principles being to provide a firm foundation for community education initiatives around consent, the inclusion of intimate partner terminology puts intimate partner sexual violence on the agenda. This is in line with National Outcome 2 of the [National Plan to Reduce Violence against Women and their Children](#): Relationships are Respectful. Further, the National Risk Assessment Principles (Toivonen & Backhouse, 2018) identify intimate partner sexual violence as a high risk for intimate partner homicide.

Proposal 5.6 Consent to sexual activity performed in a particular way

Crimes Act 1900 (NSW)

Draft s 61HI(6)

(6) A person who consents to a sexual activity being performed in a particular manner is not, by reason only of that fact, to be taken to consent to the sexual activity being performed in another manner.

Note. For example, a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.

ANROWS is supportive of this inclusion about consent generally, and of the Note that explains what it covers, as it is an area of sexual violence that was not adequately covered by the existing legislation. It is our view that the Note should be strengthened to also provide support to women experiencing reproductive coercion without losing the emphasis on safer sex paraphernalia, or having an impact upon inclusivity. We suggest the Note should state: *For example, a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections **and/or reproduction** is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device.*

There is an inextricable connection between reproductive coercion and intimate partner sexual violence (Bagwell-Gray et al., 2015, cited in Toivonen & Backhouse, 2018; Cox, 2015). Intimate partner sexual violence refers to sexual activity without consent in heterosexual and non-heterosexual intimate relationships (Bagwell-Gray et al., 2015, cited in Toivonen & Backhouse, 2018). It includes vaginal, oral or anal sex which is obtained by physical force or psychological/emotional coercion, any unwanted, painful or humiliating sexual acts, and tactics used to control decisions around reproduction (e.g. refusing to wear a condom) (Bagwell-Gray et al., 2015, cited in Toivonen & Backhouse, 2018).

Research highlights that intimate partner violence interferes with reproductive and sexual autonomy through pregnancy promotion, contraceptive sabotage and pregnancy outcome control (Kerr, 2018).

While contraceptive sabotage and pregnancy outcome control are self-explanatory, pregnancy promotion refers to the ignoring or disregard by a sexual partner for reproductive preferences through behaviours that prevent effective contraceptive use, including the removal or sabotage of contraceptive devices (i.e. vaginal rings and intrauterine devices) (Kerr, 2018).

Research suggests that domestic and family violence does not facilitate safe negotiation of contraception or sex, reproductive coercion often co-occurs with other violent controlling behaviours, and women may consent to sexual activity to prevent the escalation of physical violence (Kerr, 2018). Further, where the pregnancy is unintended, women are four times more likely to experience physical violence from their partner (Kerr, 2018).

ANROWS views this Note as an opportunity to ensure that any person engaging in sexual activity can indicate that their consent hinges upon the use of a condom (or other safer sex paraphernalia) irrespective of whether their intended use is to prevent the transmission of sexually transmitted diseases, or for reason of reproductive control.

Proposal 6.5 Force, fear, coercion, blackmail or intimidation

***Crimes Act 1900* (NSW)**

Draft s 61HJ(1)(e)(i), s 61HJ(1)(e)(ii)

(1) A person does not consent to a sexual activity if—

(e) the person participates in the sexual activity—

(i) because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs, or

(ii) because of coercion, blackmail or intimidation occurring at any time, ...

As we did in our submission in response to consultation paper 21, ANROWS continues to advocate for the inclusion of domestic and family violence directly within the legislation, rather than simply in the jury directions. Sexual assault that occurs within the context of intimate partner relationships is often repetitive and forms part of a larger pattern of coercive control that is intended to dominate, humiliate and denigrate (Kerr, and Schafran, both cited in Cox, 2015; Fredericton Sexual Assault Crisis Centre, cited in Backhouse & Toivonen, 2018). Domestic and family violence creates a climate of ongoing fear such that consent, arguably, cannot be freely given (Logan & Cole; McOrmond-Plummer, both cited in Cox, 2015). In the context of sexual assault, domestic and family violence would most commonly be intimate partner violence, however, some women may participate in sexual activity under duress to protect other members of the family (or indeed non-family members, as evidenced in the quote below) from their partner's violence (see *Liyanage v The State of Western Australia*, 2017 cited in Tarrant, Tolmie & Giudice, 2019).

Chamari was managing her own immediate safety by strategies such as enduring painful anal and vaginal rapes whilst trying to look as though she was enjoying herself. However, whilst too terrified of him and exhausted by his behaviour at this point to overtly defy him, she continued covert acts of resistance. For example, when she was alone with K, she warned her that she could not protect her from Dinendra and told her not to answer the phone if she didn't want to pursue the "relationship" with them (Tr, p. 1031).

Tarrant, Tolmie & Giudice, 2019

61HJ (1) (e) would be the obvious place to include domestic violence within the non-exhaustive list of circumstances that involve non-consent, as this circumstance already covers a number of tactics used by perpetrators of domestic and family violence, including coercion, fear and force. It is ANROWS's view that force, fear and coercion don't adequately capture the complete range of behaviours that might be employed by a perpetrator in situations of sexual non-consent. The tactics are developed over time by trial and error by the aggressor, and are uniquely tailored for the individual victim/survivor (Tarrant, Tolmie & Giudice, 2019). Some of these behaviours can be subtle, and can appear non-violent to an observer, requiring a social entrapment context of intimate partner sexual violence to make sense as non-consent: "It reached the point where it was enough for him to give her a "look" and she became extremely scared and would do as he wanted (Tr, p. 1096)." (Tarrant, Tolmie & Giudice, 2019). There is also the danger that when removed from the wider context of domestic and family violence, terms like coercion can be levelled at the victim by the perpetrator of domestic and family violence, creating a false impression of mutuality, rather than seeing the impact of coercion as part of "a pattern of harmful behaviour" (Tarrant, Tolmie & Giudice, 2019).

As well as covering unwilling participation in sexual acts achieved through subtle emotional or psychological manipulation, by adding *61HJ (1) (e) (iii) domestic or family violence* into the draft legislation, the resulting law would be more effective in recognising non-consent when it involves humiliating, unwanted or painful sexual acts. In practical terms, adding this criterion would make it easier to identify non-consent when it includes pressure to perform sexual acts that the victim is not comfortable with, or to engage in acts at a time that they do not wish to do so (Cornelius & Resseguie, 2007; Macleod, 2014a; Shorey, Cornelius, & Bell, 2008, cited in Cox, 2015). "He felt entitled to her assistance in satisfying his desires no matter how distasteful, morally repugnant, painful and humiliating she found those desires to be (Tr. p. 462, 986)." (Tarrant, Tolmie & Giudice, 2019).

By adding domestic and family violence directly into the body of the act, this implied body of knowledge would also come to bear in situations where the non-mandatory jury directions are not delivered.

Proposal 8.3: Directions on specific misconceptions

As jury directions can be important to address common community misconceptions and attitudes towards consent, ANROWS is supportive of the changes outlined in *Subdivision 3 Directions to jury* that will sit within *Criminal Procedure Act 1986 No 209 (secs 292, 293A and 294)*.

ANROWS suggests intimate partner terminology should be inserted into *s 292(6) (b)* so it reads: *between different kinds of people, including people who know each other **and people in intimate partner relationships***. Our rationale being the same as was outlined in our response to proposal 4.1.

ANROWS also recommends that *s 292(11)* be renamed to **Domestic and family violence** to recognise that there are different attributes to both sorts of violence, and to ensure consistency.

We suggest that *s 292(11)* also needs some information about intimate partner sexual violence. Intimate partner violence can look very different from other forms of sexual assault because it occurs within the context of sexual routine, among experiences of prior consensual activity and within a presumption of continuous consent. This can create contexts where unwanted sex is agreed to, or where asking for sex to stop is not seen as a possibility (Clark & Quadara, 2010; Lazar, 2010; Schafran, 2010, cited in Cox 2015). The incidence and impact of intimate partner sexual violence is significant, with Australian domestic and family violence workers estimating 90-100% of their female clients have experienced intimate partner sexual violence (Heenan, cited in Backhouse & Toivonen, 2018).

One way to ensure juries are aware that intimate partner sexual violence has characteristics that may differ from sexual assault/violence in other contexts would be to add in *s 292(6) (11) (c)*: *within a context of intimate partner sexual violence that can employ subtle and unique forms of coercion, sexual degradation and sexual bargaining*.

ANROWS also recommends a review mechanism similar to s119 Victims' Rights and Support Act. We also think there would be value in research into effective jury directions and the testing of jury directions, which could inform the reviews of the legislation (including jury directions).

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