



**Women's Domestic Violence**  
Court Advocacy Service NSW Inc

## Women's Domestic Violence Court Advocacy Services NSW

### Submission to the New South Wales Law Reform Commission Review of Sexual Consent Laws

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## 1. About WDV CAS NSW

Women's Domestic Violence Court Advocacy Services NSW (WDVCAS NSW) is the state-wide peak body, representing the 29 WDV CASs across New South Wales (NSW). WDV CASs encompass the Women's Domestic Violence Court Advocacy Services (WDVCASs), Local Coordination Points (LCPs) and Family Advocacy Support Services (FASSs). We provide the primary specialist response for women who have experienced domestic and family violence in NSW in a fully integrated way with key Government and non-Government partners across all frontline service portfolios. During 2017-18, WDV CASs provided 176,678 services to 43,947 women, with 36,912 accompanying children.

WDVCAS NSW supports better outcomes for women and children; identifying and advocating on these issues within social, political and legal contexts. WDV CAS NSW operates from a human rights and feminist perspective to support better outcomes for women and children experiencing domestic and family violence. We are funded by Legal Aid NSW's Women's Domestic Violence Court Advocacy Program and by our members.

## 2. Overview

**Current sexual consent laws in NSW are not producing justice for victims of sexual assault.** Currently, the vast majority of sexual assault victims, disproportionately women and children, have little confidence in the system and choose not to report the violence which has been inflicted upon them. Where women and their children do report the assaults, the experiences of secondary traumatisation and unsuccessful prosecution is far too common.

**This submission focusses on the experiences of women who have been subjected to sexual assault in the context of domestic and family violence.** Despite evidence which shows that sexual assault is more likely to be perpetrated against a woman by someone that she knows, and most commonly a partner or ex-partner,<sup>1</sup> media and policy attention, and the law, continues to focus upon the sexual assault which is perpetrated by strangers in public.

As the peak body for the primary specialist domestic and family violence response for women in NSW, WDV CAS NSW is in a unique position to describe how the current sexual assault laws, and the application of them, impacts upon women in this particular context, and to make recommendations for stronger legislative provisions and more effective legal processes.

The submission draws together material from specialist women's domestic and family violence workers working with women in across NSW in WDV CASs and commences with a detailed section on the experiences of women who have experienced sexual assault in the context of domestic and family violence. The following section then provides specific submissions in relation to current sexual consent

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<sup>1</sup> Australian Bureau of Statistics (ABS), *Personal Safety Survey*, Australia, 2016; Michele Black, Kathleen Basile, Matthew Breiding, Sharon Smith, Mikel Walters, Melissa Merrick, and Mark Stevens. 'The national intimate partner and sexual violence survey: 2010 summary report' (2011) *National Center for Injury Prevention and Control, Centers for Disease Control and Prevention* 19, 39-40.



laws in NSW and the legal processes surrounding them with reference to the grassroots perspectives of WDV CAS workers who work with women throughout NSW who have experienced sexual violence in the context of domestic and family violence.

### 3. The experiences of women and the barriers they face

*'Sexual violence in NSW is the hidden part of domestic and family violence – buried deep within layers of fear, shame and self-preservation. It's there, but we don't want to name it. What's there to gain? More trauma, more humiliation, more blame.'* – WDV CAS Worker

This section seeks to provide direct insight into the experiences of women across NSW who have experienced sexual assault in the context of domestic and family violence.

#### 3.1 Initial disclosure of sexual violence and seeking assistance

WDV CASs contact women across NSW after a domestic violence related police incident to offer information, support, referral and safety planning. If police have initiated protection order proceedings, WDV CAS will also talk to women about this process, what it means for them and how orders can be proposed to suit her unique circumstances. WDV CAS is then there to meet women at court to support and advocate for them through this process.

When WDV CAS workers speak with women, it may be their first point of contact in relation to a sexual assault.

*'Following a referral from police or a support service, we ring the woman, or she may contact us directly. Women will often tell us whether they reported a sexual assault, what happened when they reported and whether they are pursuing the matter any further.'*

*'We have, in a way, become a first responder to sexual assault. Some women are talking about the sexual assault for the first time when they talk to us as they haven't reported to it to police or a medical facility because there has been no physical injury'* – WDV CAS Worker

#### 3.2 High prevalence of sexual assault in the context of domestic and family violence

Since 1 July 2015, Police and WDV CASs have both utilised a comprehensive risk assessment tool called the Domestic Violence Safety Assessment Tool (DVSAT) to determine the current threat level to women in the context of domestic and family violence. Police complete this assessment with the woman in the first instance, and WDV CASs follow up with the woman within the following business day to revisit this assessment.

Questions 25 and 26 of the DVSAT specifically relate to sexual assault. However, an evaluation undertaken of the initial 12 months of the DVSAT's operation undertaken by the NSW Bureau of Crime Statistics and Research ('BOCSAR') found that only 3.5 per cent of WDV CAS clients disclosed sexual



assault to the police.<sup>2</sup> It is often only when WDVCS workers follow up with women to revisit this risk assessment that they feel more comfortable disclosing. **Data has not yet been captured of the WDVCS statistics, however, in a survey to WDVCS workers in January 2019, a rate of between 10 and 20 percent disclosure of sexual assault was reported.** This is consistent with the findings from the Australian Bureau of Statistics (ABS) *Women's Safety Survey*, which found that approximately 1 in 5 women report experiencing sexual violence since the age of 15 and the extensive research which shows the comorbidity of domestic and family violence and sexual assault.<sup>3</sup>

*'With the introduction of the DVSAT we now directly ask the question, within the context of domestic violence, whether the woman has also been sexually assaulted by their partner or ex-partner. Previously we did not ask this question as a matter of routine. The responses we receive to this question confirm significant underreporting of sexual assault within the context of domestic or family violence' – WDVCS Worker*

### 3.3 Barriers to disclosure

*'When we ask the question about sexual assault, women often present as feeling awkward, shy and reluctant to answer. There is often a pause before answering' - WDVCS Worker*

There are a multitude of barriers facing women who seek to disclose an experience of sexual violence. These mirror the barriers women face in disclosing domestic and family violence, however, disclosure rates are lower for sexual violence.<sup>4</sup> Some of the barriers women talk about include the following:

- Fear of not being believed;
- The trauma of disclosing the incident(s) of sexual violence;
- Myths surrounding violence in relationships, such as 'you can't be raped by your husband';
- Lack of specialist, trauma informed resources for support, which is a particular issue in regional, rural and remote areas;
- A belief the law will let her down or the perpetrator will 'just get away with it';
- Fear of consequences of disclosure from the perpetrator, family and community; and
- Previous negative experiences with police and courts and a fear of having to engage with these institutions and their processes.

The use of the DVSAT, whilst not overcoming all of the issues with regards to disclosure, have enabled WDVCS workers to get a better picture of the historical and current sexual violence experienced by our clients.

However, more often than not, as is evidenced in the data,<sup>5</sup> disclosures to WDVCS in relation to sexual violence do not translate into disclosures or reports to the Police.

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<sup>2</sup> Winifred Agnew-Pauley and Suzanne Poynton, 'The Domestic Violence Safety Action Tool (DVSAT): Results from the first 12 months of implementation' (2017) Bureau Brief No. 128, *NSW Bureau of Crime Statistics and Research ('BOCSAR')*.

<sup>3</sup> Peta Cox, 'Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper' (2015) *ANROWS Landscapes*.

<sup>4</sup> *Ibid.*

<sup>5</sup> BOCSAR, 'New South Wales Recorded Crime Statistics Quarterly Update September 2018, NSW Statistical Areas and Local Government Areas' (2018) *BOCSAR*.



### 3.4 Barriers to reporting

**It is rare that women report sexual assault to police in the context of domestic and family violence.**

*'We ask women whether they have reported before and whether they want to report. Mostly, women say they do not want to report' – WDV CAS Worker*

The barriers to reporting sexual violence in the context of domestic and family violence seem almost insurmountable.

*'By the time women talk to us, they have already decided that they would lose in court, experience the indignity of a public trial and suffer further repercussions within their family' - WDV CAS Worker*

**Women talk of being fearful that they would not be believed,** and this fear is compounded by their experience engaging with police and court processes.

*'Women describe all the usual barriers that exist in the context of domestic violence such as fear, shame, guilt, financial insecurity, impacts on children, and repercussions from family. In addition to that, however, it is often the thought of a public trial and public humiliation that is way too much for women to go there.' – WDV CAS Worker*

In cases where **women** disclose sexual assault to WDV CAS workers in conjunction with the other forms of violence and abuse they are experiencing in the context of domestic and family violence, they **often prefer to focus upon the other forms of violence and abuse when cooperating with Police around the ADVO and charges.**

*'The usual response is: "No, I do not want to report the sexual assault." Women are more likely to engage with support services and legal action in relation to other physical assaults but not the sexual assault.' - WDV CAS Worker*

### 3.5 Barriers to pursuing sexual assault prosecution

When women, despite the barriers, do report to police, they often later decide not to 'take it further' based on police information regarding the court process and the low likelihood of a finding of guilt.

*'Police gain an awareness of how courts will view cases. Women tell us that police told them there is not enough evidence to convict. One woman I supported, for example, disclosed that she had been sexually assaulted by her husband. She reported the assault to police at the time and was treated in the hospital. However, when she went to pursue the matter a few months later, she said police advised her: "You should have acted at the time. I have seen stronger cases than this not get up." The woman decided not to take legal action' – WDV CAS Worker*

**Women also commonly decide not to pursue the matter once they know what is involved in the process.** The possibility of having to face the perpetrator in court, of having to retell their story and be cross-examined on their experience and having their most traumatic experiences 'put on show' for a group of strangers who are there to judge what happened, make the path to justice practically untravellable.



**Where women share children with the offender**, as is often the case in the context of domestic and family violence, **there are also added complications in relation to child protection interventions, family law, and dynamics with extended family.**

In the few cases where women want to report the sexual assault in the context of domestic and family violence, **a lack of appropriate support can be a crucial factor in the process discontinuing at an early stage.**

*'Some women have told me they have felt unsupported through the process. On one occasion, I attended the police station with a woman from a migrant background to support her in her reporting sexual assaults by her husband. She was extremely nervous and ashamed. The detective told me that I could not go into the interview room as a support person, even though I would say nothing because I may contaminate evidence. When the client came out of the room, she said that she was unable to disclose. So, at that point, the legal action ceased.'* – WDV CAS Worker

**In some cases**, women have reported that **it was the poor response by various officials** which caused them to lack confidence in the justice system.

*'Another woman from a migrant background, who had multiple call outs as a victim of domestic violence, told me that she called police after her partner raped her. The woman said that she waited on the street for two hours and police did not arrive. The woman said that police later told her that there was no police car available. The woman did not take further action.'* – WDV CAS Worker

*'I supported a woman in a Local Court whose apprehended domestic violence order (ADVO) was withdrawn by police at her request. The woman disclosed that she had been raped by her husband. She told police about the rape, received medical assistance, and was taken to hospital where further evidence was taken. An interim ADVO was obtained, however, the woman did not want to take legal action regarding the rape so would not provide a formal statement to police. Police then agreed to withdraw the ADVO because she would not provide a statement regarding the rape which was the 'grounds' for the ADVO'* – WDV CAS Worker

### 3.6 Reported experiences of the justice system

Women who have attempted to access justice for the sexual assaults perpetrated against in them in the context of domestic and family violence overwhelmingly report negative experiences, including **retraumatisation from having to retell, explain and be cross-examined on their traumatic experiences, having to face the perpetrator in court, drawn out court proceedings, a lack of access, in practice, to services such as audio-visual link facilities or a secure waiting room, increased threats from the perpetrator and extended family, a lack of appropriate support, and a feeling that they were the ones 'on trial', with their own actions and credibility being made the focus of proceedings and legal questions, rather than those of the accused. Women also report being publicly identified through local crime reports in newspapers and social media.**

### 3.7 Sexual 'consent' in the context of domestic and family violence

*'Women often say that they did "consent", but that they "did not want to consent"'* – WDV CAS Worker



The experiences of WDV CAS workers who encounter women disclosing sexual violence in the context of abusive relationships indicate that **current sexual consent laws and their legal interpretations are not trauma informed, and do not, in practice, incorporate an understanding of the complex dynamics of power and control which exist within abusive relationships.**

Whilst much of the emphasis of the current provisions and the manner in which they are interpreted is on the particular incident of the offence, and the accused's 'knowledge', 'recklessness' or 'reasonable grounds for belie[f]' in relation to this incident, **in the context of a relationship characterised by coercive control, a wider lens must be applied.**

Some statements from women themselves:

- *'He kept persisting, so I just gave in.'*
- *'I am too scared to say 'no.'*
- *'I can't say 'no' because he will get angry and I don't want the kids to hear.'*
- *'He won't give me child support unless I agree to have sex with him.'*

## 4. WDV CAS NSW submissions

### 4.1 Section 61HE of the *Crimes Act 1900*

WDV CAS NSW submits that the definition of consent under s 61HE of the *Crimes Act 1900* should be amended to include the requirement of 'affirmative' or 'communicative' consent. At its simplest level, a lack of verbal and physical indicators of consent should mean that a person is not freely and voluntarily agreeing to an act.

As the section above demonstrates, WDV CAS clients regularly report instances of 'freeze', such that they were too frightened to resist the aggressor for fear of violence in that moment, as well as submission, such that they were too frightened to resist the aggressor for fear of the repercussions which may follow for themselves or their children.

The definition of consent must therefore require that the person seeking consent has taken steps to ensure that the other person is freely and voluntarily consenting throughout the sexual activity and provide the space and opportunity for them to communicate their consent both verbally and physically.

Outside of a domestic and family violence context, this may be more straightforward. Although, victim-blaming assumptions or 'rape myths' which may be employed by fact-finders to attribute 'communicated consent' must be counteracted. Specifically, it should be articulated in a new provision s 61HE(9A) that **'a person does not communicate their consent to sexual activity by the nature of the choice of their attire, where they go, or with whom they choose to spend time'**. Further, it should be articulated in a new provision s 61HE(9B) that **'a person does not consent to a particular sexual activity merely because they consented to a different or previous sexual activity'**.

In the context of an abusive relationship, whereby the person seeking consent has been subjecting the other person to coercive control, the bar for affirmative or communicative consent should be even higher. This is because, as can be seen from the above examples provided by WDV CAS workers across





NSW, where a person is subject to coercive control in a violent and abusive relationship, their ability to freely agree to sexual activity with the aggressor is fundamentally compromised. Thus, in the context of domestic and family violence, a longer and more expansive view must be taken, such that the violent and abusive behaviour of the aggressor within the relationship more generally must be taken into account in the determination of the reasonableness of that person's belief that the other person consents to the sexual activity.

More specifically, WDVCAS NSW recommends the amendment of s 61HE(5)(c) to better reflect the range of threats which are made in the context of domestic and family violence and to introduce a more flexible temporal element: *'A person does not consent to a sexual activity... if the person **submits** to the sexual activity because of **fear of harm of any type against the complainant, another person, an animal, or damage to property, and whether the threat is immediate or in the context of ongoing fear and intimidation**'.*

Further, WDVCAS NSW recommends an amendment to s 61HE(8)(b) to specifically provide that intimidatory and coercive conduct and other threats may negate sexual consent both within the context of an abusive domestic or familial relationship, and outside of it: *'a person does not consent to a sexual activity... if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, **whether this is in within the context of an ongoing domestic or familial relationship or not**'.*

## 4.2 Cultural change

The WDVCAS workers surveyed regarded cultural change as being just as important as legislative change for the purpose of improving processes and outcomes for women impacted by sexual violence in the context of domestic and family violence.

To achieve this cultural change, towards a more trauma-informed, domestic, family and sexual violence aware criminal justice system, the following were equally weighted as the most important reforms:

- i. Legislative changes to *Crimes Act 1900* (NSW) and *Criminal Procedure Act 1986* (NSW) to strengthen the definition of consent;
- ii. Training of existing legal practitioners, court staff and experts and judicial officers; and
- iii. Specialised courts, with specialist processes, legal practitioners, court staff and experts and judicial officers.

### 4.2.1 Specialisation

Whilst both legislative changes to the definition of sexual consent and the training of existing legal practitioners, court staff, experts and judicial officers are important, the experiences of WDVCAS clients clearly point to the need for specialisation. It is the court process itself, including the manner of giving, and re-giving of evidence, and of being cross-examined, and the public nature of this, as well as the manner in which clients are treated throughout this system which makes the process so inaccessible and intimidating.

In this regard, WDVCAS NSW makes a number of specific recommendations:

- I. The recruitment of specialist judicial officers to manage cases involving allegations of domestic, family and sexual violence;
- II. Amendment to ss 86, 185-185A, 283C, 283D and 306U of the *Criminal Procedure Act 1986* to extend the protections afforded to 'vulnerable persons' in relation to the provision of



- evidence through the recording of interviews and the playing of original evidence in subsequent proceedings;
- III. Corresponding application of Domestic Violence Evidence in Chief (DVEC) technologies and processes to alleged sexual violence offences;
  - IV. Whilst acknowledging the general principle of open justice, WDVCAS NSW submits that in the special case of domestic, family and sexual violence offences, a requirement should be established that consent be obtained by the complainant for media access to the proceedings;
  - V. The establishment of a special domestic, family and sexual offences unit within the Office of the Department of Public Prosecutions with specialist solicitors and prosecutors to handle serious domestic, family and sexual violence offence prosecutions;
  - VI. The establishment of a specialist police prosecution operation to handle all other domestic, family and sexual violence offence prosecutions; and
  - VII. The provision of specialist domestic, family and sexual violence witness support across the various court processes.

#### 4.2.2 If specialist judicial officers were appointed, judge-only trials

Whilst acknowledging the general principle of a right to trial by jury, WDVCAS NSW maintains that, in the special case of domestic, family and sexual violence offences, were specialist judicial officers appointed to preside over sexual offence matters, justice would be more often served by judge-only trials than by jury trials.

Sexual assault and domestic and family violence are highly specialised fields, and current research shows that erroneous views and attitudes are held by the broader community in support of gender inequality, disrespectful attitudes towards women and indeed violence against women. (ANROWS: [National Community Attitudes Survey 2017](#))

It is the view of WDVCAS NSW, that judge-only trials where the judge is a specialist would not only likely lead to a fairer outcome in domestic, family and sexual offence matters, but also reduce the feelings of intimidation felt by complainants in accessing the courts and judicial process.

### 4.3 Supporting complainants through the process

When asked whether they thought the court support and advocacy services women receive when navigating the various court processes at the local, district and federal (Family Court) levels, should be provided by multiple agencies depending upon the jurisdiction or by a single agency, all WDVCAS workers surveyed said that they thought this should be provided by a single agency.

Sexual assault complainants accessing the criminal court in the context of domestic and family violence will likely be navigating a number of other court processes. The universal feedback WDVCAS NSW receives is that for complainants, having to move from service to service to retell their story, having vital information lost in the process, is not serving their interests. Currently, however, specialist court advocacy services, such as WDVCAS, are not funded to provide specialist advocacy and support at Local or District Court hearings, nor at Federal Circuit Courts in regional areas.

WDVCAS NSW submits that specialist court advocacy and support services be adequately funded to ensure complainants are supported throughout the process from charge to verdict.



## 5. Conclusion

The criminal justice system in NSW currently fails to produce justice for the vast majority of victims of sexual assault. Complainants presently have little confidence in the system and choose not to report assaults when they occur. Of the complainants who do report an assault, many report experiences of secondary traumatisation and unsuccessful prosecution.

As the peak body for the primary specialist domestic and family violence response for women in NSW, WDV CAS NSW has focussed on the experiences of the high volume of women who have been subjected to sexual assault in this particular context, describing how the current sexual assault laws, and their application impact upon complainants, and making recommendations for stronger legislative provisions and a more effective legal process.

To this end, **WDVCAS NSW reiterates the importance of:**

- I. Amending s 61HE to require an 'affirmative', 'communicative' model of consent, which takes into account the deleterious effects of coercive control exerted in domestic and family violence contexts, and broad range of threats which may exist in such circumstances, and the fact that such threats may exist within the broader context of the relationship, and not just at the moment consent is sought for the sexual act in question.
- II. Creating a new provision in s 61HE to specifically counteract victim-blaming assumptions or 'rape myths' which may be employed by fact-finders to attribute 'communicated consent'.
- III. Valuing changes aimed at cultural change as much as legislative changes to the definition of sexual consent for the purpose of achieving a more trauma-informed, domestic, family and sexual violence aware criminal justice system.
- IV. Taking steps to specialise courts, with specialist processes, legal practitioners, court staff and experts and judicial officers.
- V. Adequately fund specialist domestic, family and sexual violence court advocacy and support services to ensure complainants are appropriately supported throughout the process by a single, specialist agency from charge to verdict.

WDVCAS NSW is appreciative of the opportunity to provide input into this important review and looks forward to working with the NSW Government and partners in implementing the reforms which flow from this work.