

18 November 2019

Commissioner Carolyn Simpson  
NSW Law Reform Commission  
GPO Box 31  
Sydney NSW 2001

By email: [nsw\\_lrc@justice.nsw.gov.au](mailto:nsw_lrc@justice.nsw.gov.au)

Dear Commissioner,

**Re: Submission on Consent in relation to sexual offences – Draft Proposals**

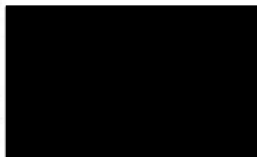
Thank you for the opportunity to provide a submission to the NSW Law Reform Commission's Consent in relation to sexual offences – Draft Proposals.

Please find enclosed our submission.

If you have any questions or would like to discuss further, please do not hesitate to contact me on [REDACTED] or by email at [REDACTED].

Yours faithfully,

**Rape and Domestic Violence Services Australia**



**Karen Willis**

**Executive Officer**

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Funded by NSW Health, the Commonwealth Bank,  
and the Australian Government Department of  
Social Services.

ABN 58 023 656 939

**Counselling Services**

24/7 NSW Rape Crisis 1800 424 017

CBA Domestic &

Family Violence Line 1800 222 387

Sexual Assault

Counselling Australia 1800 211 028

[rape-dvservices.org.au](http://rape-dvservices.org.au)

**Submission to NSW Law Reform Commission**

**Consent in relation to sexual  
offences – Draft Proposals.**

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## Summary of recommendations

Recommendation 1: That the NSW Government establish a Taskforce to conduct a comprehensive review of the criminal justice response to complaints of sexual offences. The Taskforce should comprise all relevant stakeholders including government and non-government agencies, legal actors, sexual assault service providers, academics, and if willing, those who have experienced sexual violence.

Recommendation 2: That in conjunction with legislative reform, there should be broad community education around the realities of sexual violence and the law of consent in order to improve criminal justice outcomes and encourage ethical sexual practice.

Recommendation 3: That there be a further mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

Recommendation 4: That the NSWLRC recommend a draft provision be included with these draft proposals such as the provisions contained within Section 119 of the *Victims Rights and Support Act 2013* (NSW) that the Minister review this legislation within 3 years, and then at intervals no less than 3 years and no more than 5 years from any amendments becoming law.

Recommendation 5: That any review conducted in the future as to the effectiveness of laws regarding consent be conducted by an Expert Taskforce. The membership of this Taskforce should reflect the diverse stakeholders with an interest in the criminal justice response to sexual violence.

Recommendation 6: That “*of any type*” be inserted after “*because of force or fear of force or harm,*” in the draft Section 61HJ(1)(e)(i) to better reflect that domestic and/or family violence can take many forms of abuse and/or control.

Recommendation 7: That the NSWLRC consider a revision of the wording of draft Section 61HJ(1)(f)(iii) to “*the purpose of the sexual activity (including about whether the sexual activity is for health, hygienic or cosmetic purposes or monetary exchange.)*”

Recommendation 8: That the NSWLRC consider a revision of draft Section 61HK(2)(b) to create two subsections that the fact finder must not have regard to any self-induced intoxication as well as any personal opinions, values or attitudes held by the accused person, with reference to the new Interpretative Principles contained in draft Section 61HF.

Recommendation 9: That the NSWLRC recommend that further research as to the impacts of particular jury directions on consent, especially in the context of rape myths be commissioned and undertaken by an organisation such as ANROWS.

Recommendation 10: That the NSWLRC undertake further consultation with sexual violence organisations as well as considering mock jury studies in order to assess the potential of jury directions in combatting juror reliance on rape myths.

Recommendation 11: That the NSWLRC consider a revision of draft Section 292(7) to “*responses to non-consensual sexual activity*” rather than “*responses to non-consensual activity,*” as in circumstances where this jury direction is read in isolation the inclusion of the term “*sexual*” would be beneficial in providing context.

Recommendation 12: That the NSWLRC consider a revision of draft Sections 292(8)(b) and 292(10) in removing *“of itself”* as this may reinforce rape myths.

Recommendation 13: That the NSWLRC consider a revision of draft Section 292(10) to read: *“None of the following is an indicator that a person consents to a sexual activity....”*

## 1. Background

- 1.1 Rape & Domestic Violence Services Australia welcome the opportunity to contribute to the NSW Law Reform Commission's ('NSWLRC' or 'the Commission') review of consent in relation to sexual offences – Draft Proposals ('this review' or 'the draft proposals').
- 1.2 Rape & Domestic Violence Services Australia is a non-government organisation that provides a range of trauma specialised counselling services for those who have experienced sexual, domestic or family violence and their supporters.<sup>1</sup>
- 1.3 Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers and staff who are seeking to escape domestic or family violence.
- 1.4 In the 2018/19 financial year, Rape & Domestic Violence Services Australia provided 34,877 occasions of service to 14,649 clients nationally, with 90% of callers identifying themselves as female, and 92% identifying themselves as someone who had experienced sexual, domestic and/or family violence.
- 1.5 When referencing to our recommendations throughout this submission, we are referring to the recommendations made in our final submission to the review of consent in relation to sexual offences dated 21 February 2019. If there is reference to our recommendations in our preliminary submission dated 29 June 2018, then we indicate same.
- 1.6 In making this submission, Rape & Domestic Violence Services Australia do not propose to address each draft proposal as set out by the NSWLRC.

## 2. Language and Terminology

- 2.1 In this submission, Rape & Domestic Violence Services Australia use the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is designed to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.
- 2.2 Rape & Domestic Violence Services Australia use the term *people who have experienced sexual assault/violence and/or domestic and family violence* to

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<sup>1</sup> Generally, Rape & Domestic Violence Services Australia prefer the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person's life, they nevertheless do not define that person. However, in this submission, Rape & Domestic Violence Services Australia will sometimes use the term victims as this accords with the language used in the legislation.



describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This language acknowledges that, although experiences of violence are often very significant in a person's life, they nevertheless do not define that person. Moreover, the process of recovery from trauma is complex, multifaceted and non-linear and will often involve experiences of survival in combination with experiences of victimisation.

2.3 Rape & Domestic Violence Services Australia use gendered language when discussing sexual, domestic and family violence. This reflects the fact that sexual, domestic and family violence are predominantly perpetrated by men against women. However, we acknowledge that gendered language can exclude the experiences of some people impacted by sexual, domestic and family violence. We acknowledge that:

2.3.1 Women can also be perpetrators of sexual, domestic and family violence.

2.3.2 Sexual violence occurs within LGBTIQ+ relationships at a similar rate to sexual violence within heterosexual relationships.<sup>2</sup>

2.3.3 Sexual violence is perpetrated against transgender and gender-diverse people at a higher rate than against cis gender people.<sup>3</sup>

2.4 Some other key terms used throughout this submission are defined below:

2.4.1 *Communicative or affirmative consent* is characterised in the affirmative rather than the negative – as the positive act of communicating 'yes' rather than the mere absence of a communicated 'no'. The goal of this model is to displace the former legal standard that equates submission with consent, instituting in its place an affirmative model which obligates each party to communicate in order to reach a mutual agreement before engaging in sexual contact.

2.4.2 *Rape myths* are defined by Gerger et al as "descriptive or prescriptive beliefs about sexual aggression (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexually aggressive behaviour that men commit against women."<sup>4</sup>

2.4.3 *Victim-blaming attitudes* are beliefs that imply that the person who has experienced sexual violence was to blame, or partially to blame, for what happened, as a result of their choice to engage in behaviours deemed

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<sup>2</sup> B. Fileborn 'Accounting for space, place and identity: GLBTIQ young adults' experiences and understandings of unwanted sexual attention in clubs and pubs' (2013) 22(1) *Critical Criminology* 81.

<sup>3</sup> K. O'Halloran, 'Family Violence in an LGBTIQ context' (2015) 2 *Royal Commission In Brief*, <<https://www.dvrcv.org.au/sites/default/files/Family-violence-in-an-LGBTIQ-context-Kate-OHalloran.pdf>>

<sup>4</sup> H. Gerger, H. Kley, G. Bohner, F. Siebler, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33(5) *Aggressive Behavior* 422, 423.

risky such as wearing particular clothes, consuming drugs or alcohol, behaving in a flirtatious way, or engaging in sex work.<sup>5</sup>

### 3. Endorsements

3.1 The following organisations have provided endorsements of this submission:

- 3.1.1 Community Legal Centres NSW;
- 3.1.2 No to Violence;
- 3.1.3 Sydney Women’s Counselling Centre;
- 3.1.4 Women’s Health NSW; and
- 3.1.5 Domestic Violence NSW.

### 4. Introduction

4.1 Rape & Domestic Violence Services Australia again commend the NSW Government on its commitment to improving the criminal justice experience for people who have been impacted by sexual violence. However, we reiterate that legislative changes alone are unlikely to result in any significant improvement for complainants, unless accompanied by broader cultural change.

4.2 We also commend the NSWLRC on the formulation of these draft proposals in reforming consent laws. However, consent is only one piece of the criminal justice response framework. To achieve justice for those who have experienced sexual violence; a more detailed review is required.

4.3 Within this submission, we discuss the need for broader community education regarding consent, as well as the necessity for a mechanism of ongoing review and evaluation of the draft proposals should they become law.

4.4 Further, we provide commentary on ways in which some of the draft proposals could better consider the variety of contexts in which sexual violence occurs, as well as the need for further consultation and research as to legislated jury directions.

### 5. Legislative reform is only the first step

#### Consent laws, while important, are only one piece of the puzzle

5.1 There is an urgent need to improve the responsiveness of the criminal justice system to sexual violence in all jurisdictions across Australia. In particular, there is a need to improve the experience of those who have experienced sexual violence

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<sup>5</sup> Our Watch, *Reporting on Sexual Violence* (September 2014), 2.



which continues to be characterised by uncertainty, delay, distress and, very commonly, re-traumatisation.

- 5.2 Rape & Domestic Violence Services Australia state that the implementation of consent law is significantly affected by procedural constraints, the knowledge and expertise of legal actors, and the accessibility of support services for those who have experienced sexual violence.
- 5.3 As such, Rape & Domestic Violence Services Australia reiterate Recommendation 1 from our preliminary submission<sup>6</sup> that an Advisory Taskforce ('the Taskforce') be formed with a direction to undertake a full review of the criminal justice response to sexual offences, including:
  - 5.3.1 All legislative and procedural matters relating to the prosecution of sexual offences;
  - 5.3.2 Alternative justice models including Specialist Courts;
  - 5.3.3 The provision of support services for people who have experienced sexual violence; and
  - 5.3.4 Access to behaviour change programs for those at risk of sex offending.
- 5.4 We reiterate that the Taskforce membership should reflect the diverse stakeholders who have an interest in the criminal justice response to sexual offences and include both government and non-government agencies, legal actors, sexual assault service providers, academics and, if willing, those who have experienced sexual violence and, as a result accessed the criminal justice system. The inclusion of stakeholders is critical to ensuring that legislative reform initiatives respond to the practical realities of the criminal justice process.
- 5.5 The Taskforce could review national and international practices and evidence and put forward recommendations for a Court model and laws that will improve the responsiveness of the NSW legal system to the needs of people who have experienced sexual violence.

Recommendation 1: That the NSW Government establish a Taskforce to conduct a comprehensive review of the criminal justice response to complaints of sexual offences. The Taskforce should comprise all relevant stakeholders including government and non-government agencies, legal actors, sexual assault service providers, academics, and if willing, those who have experienced sexual violence.

### Beyond the trial

- 5.6 Rape & Domestic Violence Services Australia again state that any legislative reforms to the criminal justice system must be supported by broader reforms designed to improve the community response to sexual violence. We would

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<sup>6</sup> Rape & Domestic Violence Services Australia, *Preliminary Submission PCO88*, Recommendation 1, 8.

assert that the Interpretative Principles as included in draft Section 61HF could be used as the basis for community education and/or an educative tool on consent in relation to sexual offences. We discuss this further below.

### **Community education**

- 5.7 Broad community education about the realities of sexual violence and the law of consent is critical both to improve criminal justice outcomes and to prevent the occurrence of sexual violence in the first place.
- 5.8 In their 2010 Report on Family Violence, the Australian Law Reform Commission ('ALRC') and NSW Law Reform Commission ('NSWLRC') stated, "*legislation alone is too blunt a tool to effectively inform community understandings, attitudes and beliefs about appropriate sexual interactions*".<sup>7</sup> For this reason, they recommended "*that law reform driven by communicative understandings of consent should be supported by community education*".<sup>8</sup> For example, they proposed that education and training about myths, facts and law in relation to sexual assault could be delivered to school students, teachers, parents and carers, social workers, guidance officers, nurses, doctors, Police recruits and journalists.<sup>9</sup>
- 5.9 Rape & Domestic Violence Services Australia strongly support the above proposal. We believe that community education is vital if legislative reform is to shift community standards and encourage ethical sexual practice.
- 5.10 Community education about legislative reform measures is also critical to increasing rates of reporting. This is because community perceptions of the criminal justice response to sexual violence may influence victims' decisions about whether to report sexual assaults to police or access support services.<sup>10</sup> For example, research shows that a person who has experienced sexual violence will be less likely to report where they fear their account may not be believed or treated seriously by authorities, that the events would not meet the criminal standard, or that their chance of "*finding fairness*" in the justice system is poor.<sup>11</sup> In order to improve public confidence in the legal system, it is critical that legislative reforms are communicated to the public.

**Recommendation 2:** That in conjunction with legislative reform, there should be broad community education around the realities of sexual violence and the law of consent in order to improve criminal justice outcomes and encourage ethical sexual practice.

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<sup>7</sup> Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010), 1150.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> W. Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27, 41.

<sup>11</sup> *Ibid.*

## 6. Addressing any unintended consequences in the future

- 6.1 Rape & Domestic Violence Services Australia recommends that if any changes are made to the existing legislation then there should be a mechanism for ongoing monitoring and evaluation of these changes. The process for ongoing monitoring should include an opportunity to examine the effectiveness of any change to the legislation and ensure that no unintended consequences have arisen.
- 6.2 We would recommend that a further draft provision be included in the Draft Proposals such as the provisions contained in Section 119 of the *Victims Rights and Support Act 2013* (NSW), that it be legislated any amendments made to the *Crimes Act 1900* (NSW) be reviewed by the Minister within 3 years, and then at intervals no less than 3 years and no more than 5 years from any amendments becoming law.
- 6.3 Rape & Domestic Violence Services Australia state that any review of the effectiveness of consent laws in the future should be conducted by an Expert Taskforce, such as the Taskforce proposed above. The membership of this Taskforce should reflect the diverse stakeholders with an interest in the criminal justice response to sexual violence.

Recommendation 3: That there be a further mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

Recommendation 4: That the NSWLRC recommend a draft provision be included with these draft proposals such as the provisions contained within Section 119 of the *Victims Rights and Support Act 2013* (NSW) that the Minister review this legislation within 3 years, and then at intervals no less than 3 years and no more than 5 years from any amendments becoming law.

Recommendation 5: That any review conducted in the future as to the effectiveness of laws regarding consent be conducted by an Expert Taskforce. The membership of this Taskforce should reflect the diverse stakeholders with an interest in the criminal justice response to sexual violence.

## 7. Changes to structure and language of Section 61HE

- 7.1 Rape & Domestic Violence Services Australia assert that the current language contained in Section 61HE is confusing and outdated, and this language is not in keeping with community standards.
- 7.2 Rape & Domestic Violence Services Australia are supportive of the NSWLRC's draft proposals in creating subdivisions and grouping them accordingly as to '*consent generally*,' '*circumstances in which there is no consent*,' and '*knowledge about consent*.' These are distinctive categories that should be considered separately by the fact finder when deliberating on the guilt of the accused.

- 7.3 The inclusion of the new subdivisions assists in removing the ambiguity of the current Section 61HE and makes it clear from the outset that active communication is a core element in consenting to sexual activity.
- 7.4 Rape & Domestic Violence Services Australia are supportive of the position taken by the NSWLRC to remove reference to “*alleged victim*” within the provisions of the legislation. In removing expressions such as “*victim*” or “*alleged victim*” this acknowledges that, although experiences of violence are often very significant in a person’s life, they nevertheless do not define that person.
- 7.5 We also agree that the use of the expression of “*negation of consent*” in the legislation is confusing, as the language of ‘*negation*’ implies a starting assumption of consent; and is therefore inconsistent with an overall affirmative model of consent. We provide further commentary regarding this below.

## 8. New Interpretative Principles

- 8.1 Rape & Domestic Violence Services Australia state that the centrality of consent reflects the fundamental principle of sexual autonomy: the right of a person to have control over their own body, but also to grant permission to another to engage in sexual activity. As stated in our submission, the absence of consent is the most appropriate basis for criminal liability regarding sexual offences.<sup>12</sup> The Interpretative Principles set out in draft Section 61HF should serve as the building block for broad community education and/or an educative tool.
- 8.2 Within a consent framework, sexual violence should be understood as an offence against a person’s agency rather than merely against their body.<sup>13</sup> This understanding makes sense of the complex harms of sexual violence, which extend far beyond physical injury. There should also be ongoing dialogue between both or all of the parties to the sexual activity. As Munro argues, “*some concept of consent is needed to allow people to act, and be respected, as moral agents who police the boundaries of their own personal intimacy by inviting as well as denying sexual access.*”<sup>14</sup>
- 8.3 Rape & Domestic Violence Services Australia is supportive of the incorporation of Interpretative Principles as set out in the draft Section 61HF in interpreting the subdivisions regarding consent in the *Crimes Act 1900* (NSW).

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<sup>12</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, 10.

<sup>13</sup> B. Fileborn, ‘Sexual Assault Laws in Australia’ (2011) *ACSSA Resource Sheet No 1*, <https://aifs.gov.au/publications/sexual-assault-laws-australia>.

<sup>14</sup> V. E. Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 940.



## 9. The meaning of “consent”

### Free and voluntary agreement at the time of the activity

- 9.1 Rape & Domestic Violence Services Australia has been a long supporter of the inclusion of “*freely and voluntarily*” within the meaning of consent. However, we stated that the meaning of consent should incorporate the words: “*communicates this agreement through words or actions,*” in line with Recommendation 3 made in our submission.<sup>15</sup>
- 9.2 Traditionally, this responsibility has rested asymmetrically with the complainant, who has been expected to respond to any unwanted sexual advances with forceful resistance. Instead, the law should be changed to impose a responsibility onto the person initiating the sexual activity to take steps to find out whether the other person is consenting.
- 9.3 Rape & Domestic Violence Services Australia specifically state that we have many clients who contact our counselling services, often querying whether the law would see it as they were consenting to a particular sexual activity because they had consented to another sexual activity. Clients often ask us this question in the context of when they were asleep or in other circumstances such as intoxication, where it was clear they could not have consented. We commend the NSWLRC on proposing to clarify this position in draft Section 61HI within the law.

## 10. When a person “does not consent”

### A single list of circumstances in which there is no consent

- 10.1 In our submissions to this review, we have expressed our concern that the language of ‘*negation*’ implied a starting assumption of consent and was therefore inconsistent with an affirmative model of consent. The language of ‘*negation*’ did not actively encourage the fact finder to apply a positive definition of consent, but rather considered the absence of consent as a legal technicality.
- 10.2 We note that replacing the current lists contained in Sections 61HE(5), (6) and (8) is in line with Recommendations 4 and 5 in our submission.<sup>16</sup> The reformulating of the current Sections 61HE(5), (6) and (8) was necessary to clarify to the fact finder that the circumstances in which there is no consent are absolute thresholds rather than mere discretionary considerations. This will assist the fact finder by confirming the relevance of these factors to the question of consent.

### Sexual Violence in the context of Domestic and/or Family Violence

- 10.3 Rape & Domestic Violence Services Australia and many other key stakeholders highlighted in submissions to this review that there was a need for the NSW

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<sup>15</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, Recommendation 3, 21.

<sup>16</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, Recommendations 4 and 5, 24- 25.

consent laws to better capture sexual violence that occurred within the context of domestic and/or family violence. This includes a need for a shift in the language included in the legislation.

- 10.4 The advantage of the formulation in draft Section 61HJ(1)(e) is that it does not require the prosecution to prove causation between the complainant's purported consent and any specific act of *"intimidatory or coercive"* carried out by the perpetrator. Instead, the prosecution need only prove that the complainant's consent was caused by fear, which may have been the cumulative result of a pattern of ongoing coercive and controlling behaviour over several months or years. In other words, this formulation recognises that in the context of domestic and/or family violence, a threat of harm need not be immediately present in order to affect a person's capacity to consent.
- 10.5 In their 2010 Report on Family Violence, the ALRC and the NSWLRC recognised this problem and recommended that legislation provide that a person does not consent if they *"[submit] because of fear of harm of any type against the complainant or another person."*<sup>17</sup>
- 10.6 We state that the draft Section 61HJ(1)(e) goes a long way in addressing our concerns with the current Section 61HE(8)(b). However, we recommend that the NSWLRC consider the insertion of: *"of any type"* after *"because of force or fear of force or harm,"* in draft Section 61HJ(1)(e)(i). The insertion of: *"of any type"* would be in line with the approach adopted in Victoria and Recommendation 7 in our submission.<sup>18</sup>
- 10.7 We also state that the jury direction contained in draft Section 292(11) of the *Criminal Procedure Act 1986* (NSW) as to family violence should provide clarity for the fact finder as to family violence, although we believe this jury direction could go further; and we discuss this below.

Recommendation 6: That *"of any type"* be inserted after *"because of force or fear of force or harm,"* in the draft Section 61HJ(1)(e)(i) to better reflect that domestic and/or family violence can take many forms of abuse and/or control.

### Abuse of authority or trust

- 10.8 Rape & Domestic Violence Services Australia endorse the submission of Women's Legal Service NSW regarding the draft Section 61HJ(1)(e)(iv) in the consideration of more clearly capturing situations where, for example, a person with a disability is dependent or reliant on their carer.

<sup>17</sup> Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010), Recommendation 25-5(c).

<sup>18</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, Recommendation 7, 27.



## Mistakes

- 10.9 We commend the NSWLRC on the formulation of draft Section 61HJ(1)(f). As stated in our submission, it is entirely appropriate to criminalise the act of impersonating another individual in order to engage in sexual activity. This behaviour is clearly identifiable and represents an obvious contravention of community standards.<sup>19</sup>
- 10.10 Rape & Domestic Violence Services Australia also assert that consideration ought to be given to circumstances where sexual violence occurs within a religious framework such as a sect or cult-type environment, and mistaken beliefs that could occur in these contexts. We understand anecdotally that in recent times this has been a factual matter in a number of sexual assault trials.
- 10.11 However, Rape & Domestic Violence Services Australia state that Recommendation 16 in our submission should be reflected in some capacity within the draft proposals.<sup>20</sup> This recommendation dealt with misrepresentation on the basis that the sexual activity is for the purposes of monetary exchange.
- 10.12 Rape & Domestic Violence Services Australia believe that NSW law should provide explicitly that a person does not consent where they submit under a mistaken belief that the sexual activity is for the purposes of monetary exchange. This is intended to capture circumstances where a client fraudulently misrepresents to a sex worker their agreement to pay, but subsequently refuses payment. This position is informed by the perspective of sex worker organisations, including Sex Workers Outreach Project (SWOP)<sup>21</sup> and Vixen Collective.<sup>22</sup>
- 10.13 We again reiterate Recommendation 17 in our submission that within this provision there is inclusion of: *“for the purposes of monetary exchange.”* Therefore, we would propose that the NSWLRC consider revising draft Section 61HJ(1)(f)(iii) to read: *“(including about whether the sexual activity is for health, hygienic or cosmetic purposes or monetary exchange)”*.

Recommendation 7: That the NSWLRC consider a revision of the wording of draft Section 61HJ(1)(f)(iii) to *“the purpose of the sexual activity (including about whether the sexual activity is for health, hygienic or cosmetic purposes or monetary exchange.)”*

<sup>19</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, 29.

<sup>20</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, Recommendation 16, 31.

<sup>21</sup> Sex Workers Outreach Project, *Preliminary Submission PCO103*, 10.

<sup>22</sup> Michael McGowan and Christopher Knaus, “‘It absolutely should be seen as rape’: When sex workers are conned”, *The Guardian*, 13 October 2018, <https://www.theguardian.com/australia-news/2018/oct/13/it-absolutely-should-be-seen-as-when-sex-workers-are-conned>.

## 11. Knowledge of consent

### When the accused person “knows” there is no consent

- 11.1 Rape & Domestic Violence Services Australia assert that we are not opposed to the simplified language in draft Section 61HK; nor are we opposed to the overall policy intention of the draft section in moving towards an objective standard of fault.
- 11.2 The judgments of *XHR*<sup>23</sup> and *Lazarus*<sup>24</sup> demonstrated that judicial officers continue to rely on rape myths when determining an objective standard of fault, and in fact may be misinterpreting an objective standard against a subjective judgement. In both matters, the trial judge found that a lack of resistance amounted to reasonable grounds for the defendant’s belief in consent.<sup>25</sup> In other words, the judges relied on the outdated perception that submission equates to consent when determining the objective standard of “reasonableness”.
- 11.3 However, we state that to further clarify and simplify this provision, the adoption of a single mental element based on a “*no reasonable belief*” test may be more appropriate. Rape & Domestic Violence Services Australia assert, with respect, that we do not want any circumstances where draft Section 61HK can be used as “*a get out of jail free*” card by defendants.
- 11.4 We agree with concerns raised in several preliminary submissions to this review that the current “*no reasonable grounds*” test requires the fact finder to engage in confusing and “*convoluted analysis*.”<sup>26</sup> However, we are unsure as to whether the provisions contained in draft Section 61HK(1) alleviate these concerns entirely.
- 11.5 Rape & Domestic Violence Services Australia again reiterate our earlier recommendations that should the draft proposals become law, there must be a mechanism for ongoing review and evaluation, as well as a legislated provision for the Minister to review the provisions within 3 years, and then at intervals no less than 3 years and no more than 5 years from any amendments becoming law.

### What fact finders must, and must not, consider

- 11.6 Currently, Section 61HE(4)(a) states that when determining the issue of knowledge, the fact finder must have regard to “*any steps taken by the person to ascertain whether the other person consents to the sexual intercourse.*”
- 11.7 While, Rape & Domestic Violence Services Australia support the intention of current Section 61HE(4)(a), which is to highlight to the fact finder that the actions or omissions of the accused – and not just the behaviour of the complainant –

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<sup>23</sup> *R v XHR* [2012] NSWCCA 247.

<sup>24</sup> *R v Lazarus* [2017] NSWCCA 279.

<sup>25</sup> Professor Annie Cossins, *Final Submission CO17*.

<sup>26</sup> G Mason and J Monaghan, *Preliminary Submission PCO40*, 22.

may be relevant to whether or not a mistaken belief in consent is reasonable;<sup>27</sup> we share the concerns highlighted by the NSWLRC that the word 'steps' is interpreted too broadly. In particular, we are concerned that Bellew J's interpretation of the word 'steps' in *Lazarus* implies that a step need be nothing more than a subjective state of mind.<sup>28</sup>

- 11.8 We acknowledge that the removal of 'steps' in the draft Section 61HK(2) is proactive in addressing concerns particularly as a result of *Lazarus*, with the clarification as to "*whether the accused person said or did anything to ascertain if the other person consented to the sexual activity.*" Steps that involve only an internal thought process, rather than any communication with the complainant, do not achieve the desired effect in terms of the legislation.
- 11.9 Rape & Domestic Violence Services Australia support the policy intention of draft Section 61HK(2), noting that the intention is similar to the redrafted Section 61HE(4) included in our submission.<sup>29</sup> Further, the inclusion of not having regard to the accused person's self-induced intoxication is also in line with Recommendation 26 in our submission.<sup>30</sup>
- 11.10 However, we do highlight our concerns as to draft Section 61HK(2)(b) only dealing with self-induced intoxication, and not setting out consideration within this draft provision as to the personal opinions, values or attitudes held by the accused person that do not meet community standards, with reference to the new Interpretative Principles in draft Section 61HF. We state that the inclusion of this within the scope of a knowledge of consent provision could clarify to the fact finder that an accused should not be able to rely on outdated or prejudicial views in order to justify a mistaken belief in consent.
- 11.11 This recommendation is similar to the proposal included by the NSW Attorney General's Department in its 2007 draft bill – where they recommended excluding the consideration of "*the personal opinions, values and general social and educational development of the person.*"<sup>31</sup>
- 11.12 Therefore, we would propose that draft Section 61HK(2)(b) could be as follows:

"(b) must not have regard to:

(i) any self-induced intoxication of the accused person; or

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<sup>27</sup> A Loughnan, C McKay, T Mitchell and R Shackel, *Preliminary Submission PCO65*, 4. See also G Mason and J Monaghan, *Preliminary Submission PCO40*, 17.

<sup>28</sup> *R v Lazarus* [2017] NSWCCA 279 at [147] (Bellew J).

<sup>29</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, Appendix A, 59.

<sup>30</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, Recommendation 26, 46.

<sup>31</sup> "A Bill for Crimes Amendment (Consent – Sexual Assault Offences Bill) 2007" sch 1 cl 4 in NSW, Attorney General's Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault*, Discussion Paper (2007) Appendix 3.

- (ii) *any personal opinions, values or attitudes held by the accused person that do not meet community standards, with reference to Section 61HF.*"

Recommendation 8: That the NSWLRC consider a revision of draft Section 61HK(2)(b) to create two subsections that the fact finder must not have regard to any self-induced intoxication as well as any personal opinions, values or attitudes held by the accused person, with reference to the new Interpretative Principles contained in draft Section 61HF.

## 12. Jury directions on consent

### New jury directions on common misconceptions

- 12.1 As stated in our submissions to this review,<sup>32</sup> jury directions may be one way of minimising juror's reliance on rape myths. However, we do urge the NSWLRC to consider recommending in its final report that an organisation such as Australia's National Research Organisation for Women's Safety ('ANROWS') undertake further research to determine the impacts of jury directions, particularly in the context of rape myths. While, in principle we are supportive of legislated jury directions to provide greater consistency, we state that if they are legislated, this must occur within the context of an ongoing review mechanism and further research occurring as to juror's reliance on rape myths. Any legislated jury directions should be carefully framed to ensure they do not reinforce rape myths.
- 12.2 We acknowledge that the discussion as to whether further jury directions on consent should be legislated or not in NSW is a difficult task for the NSWLRC. Rape & Domestic Violence Services Australia state that the addition of further jury directions, particularly as to jurors examining their own misconceptions and assumptions is important, however we remain cautious as to whether legislating jury directions is the most appropriate course forward. We are concerned that legislated jury directions may lock NSW into directions that are not effective in the combatting of rape myths, and state that further research in this space may be beneficial.
- 12.3 While, Rape & Domestic Violence Services Australia do consider that legislated jury directions may improve the criminal justice system response to sexual violence, particularly in terms of greater consistency in judicial officer's handling of sexual violence trials and their directions aligning with community standards; we do reiterate that overall greater judicial education and specialisation regarding sexual violence might achieve similar benefits with fewer disadvantages.

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<sup>32</sup> Rape & Domestic Violence Services Australia, *Preliminary Submission PCO88*, 41; Rape & Domestic Violence Services Australia, *Final Submission CO28*, 52.



- 12.4 We reiterate from our submission<sup>33</sup> that legislated jury directions may have the following benefits:
- 12.4.1 Greater consistency in judicial officers' handling of sexual violence trials, regardless of their personal views or level of knowledge in relation to sexual violence;
  - 12.4.2 Reduced incentive for defence lawyers to craft arguments which assume jurors' reliance on rape myths, due to their knowledge that these perspectives will be corrected by the judicial officer; and
  - 12.4.3 Increased confidence for complainants and the general public that jury decision-making will be informed by accurate understandings of sexual violence.
- 12.5 However, Flynn and Henry (2012) noted several disadvantages in relation to Victoria's model of legislated jury directions. For example, legislated jury directions may:
- 12.5.1 Increase possibilities for appeal where judicial officers stray from the legislated directions, which may create "a financial and resource burden on the court[s]" and "immense emotional strain for the parties involved."<sup>34</sup>
  - 12.5.2 Result in judicial directions becoming so lengthy, and so complex, that they have a minimal impact on jury decision making or may even reinforce juror reliance on rape-myths.<sup>35</sup>
- 12.6 We reiterate from our submission<sup>36</sup> that increased education, training and specialisation for judicial officers may have a more positive impact in combatting rape myths.
- 12.7 We again also reiterate that any proposed jury direction should be thoroughly tested through consultation with sexual violence organisations as well as mock jury studies in order to assess their potential for combatting juror reliance on rape myths.
- 12.8 Rape & Domestic Violence Services Australia assert that we are not fundamentally opposed to legislated jury directions, however in these circumstances, jury directions should only be legislated provided there is a mechanism for ongoing monitoring and evaluation and/or draft provision was included such as the provisions included in Section 119 of the *Victims Rights and Support Act 2013*

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<sup>33</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, 56.

<sup>34</sup> A. Flynn and N. Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167, 175.

<sup>35</sup> *Ibid.*

<sup>36</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, 56.

(NSW) as included in our Recommendations 3, 4 and 5 above. We are concerned that legislated jury directions may lead to unintended consequences, which could in turn create further barriers in the criminal justice response to sexual violence.

Recommendation 9: That the NSWLRC recommend that further research as to the impacts of particular jury directions on consent, especially in the context of rape myths be commissioned and undertaken by an organisation such as ANROWS.

Recommendation 10: That the NSWLRC undertake further consultation with sexual violence organisations as well as considering mock jury studies in order to assess the potential of jury directions in combatting juror reliance on rape myths.

### Directions dealing with specific misconceptions

12.9 Rape & Domestic Violence Services Australia argued in both of our submissions that jurors are not well positioned to make accurate and informed evaluations about the credibility of sexual violence complaints as a result of several factors, including the prevalence of rape myths.<sup>37</sup>

12.10 Research shows that jurors commonly rely on ignorant or biased assumptions when determining guilt in sexual violence matters.<sup>38</sup> For example, a 2007 study conducted by the Australian Institute of Criminology revealed that:

*pre-existing juror attitudes about sexual assault not only influence their judgements about the credibility of the complainant and guilt of the accused, but also influence judgements more than the facts of the case presented and the manner in which the testimony is given.<sup>39</sup> [emphasis added]*

12.11 Rape & Domestic Violence Services Australia do make some specific recommendations as to the provisions in draft Section 292, and these are set out below.

12.12 In draft Section 292(7) this should state “responses to non-consensual sexual activity,” rather than “responses to non-consensual activity,” as if this subdivision is read in isolation, it would be beneficial to include a reference to “sexual” in the provision.

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<sup>37</sup> Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 20; Rape & Domestic Violence Services Australia, *Final Submission CO28*, 52.

<sup>38</sup> See, for example, W. Lacombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27, 32; L. Ellison and V. Munro, ‘Of “Normal Sex” and “real rape”’: Exploring the use of socio-sexual scripts in (mock) jury deliberation’ (2009) 18 *Social Legal Studies* 291; N. Taylor, ‘Juror attitudes and biases in sexual assault cases’, *Trends and Issues in Crime and Criminal Justice No 344* (Canberra: Australian Institute of Criminology, 2007); J. Temkin and B. Krahé, *Sexual assault and the justice gap: A question of attitude* (Oxford and Portland, Oregon: Hart Publishing, 2008); N. Taylor and J. Joudo, ‘The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: An experimental study’, *Research and Public Policy Series No 68* (Canberra: Australian Institute of Criminology, 2005).

<sup>39</sup> N. Taylor, ‘Juror attitudes and biases in sexual assault cases’, *Trends and Issues in Crime and Criminal Justice No 344* (Canberra: Australian Institute of Criminology, 2007), 2.



- 12.13 We state that “*of itself*” in draft Sections 292(8)(b) and 292(10) is unnecessary and may in fact reinforce rape myths being a relevant factor as to a complainant’s behaviour, appearance or injuries (or lack thereof). We urge the NSWLRC to remove this unnecessary wording.
- 12.14 Further, Rape & Domestic Violence Services Australia highlight our concern with the use of “*reliable*” in draft Section 292(10) and state for clarity this subsection should read: “*None of the following is an indicator that a person consents to a sexual activity....*” for ease of the fact finder as a “*reliable indicator*” may be subjective.
- 12.15 Rape & Domestic Violence Services Australia state that the inclusion of “*immediately before or during the sexual activity,*” within the draft Section 292(11) as to family violence may divert the fact finder’s attention to the threat or fear of harm needing to be immediate, and this does not encompass all contexts in which sexual violence occurs within the dynamics of domestic and/or family violence.
- 12.16 The direction regarding family violence as contained in draft Section 292(11) should be more comprehensive, noting that domestic and/or family violence can take many forms of abuse and/or control. We would recommend the inclusion at the very least of a definition of domestic and/or family violence as well as examples of the behaviour that may constitute domestic and/or family violence. We again recommend adopting the Victorian definitions of family violence in Sections 5, 6 and 7 of the *Family Violence Act 2008* (Vic) or similar provisions, which sets out a range of behaviours that may constitute domestic and/or family violence as well as examples.<sup>40</sup>

Recommendation 11: That the NSWLRC consider a revision of draft Section 292(7) to “responses to non-consensual sexual activity” rather than “responses to non-consensual activity,” as in circumstances where this jury direction is read in isolation the inclusion of the term “sexual” would be beneficial in providing context.

Recommendation 12: That the NSWLRC consider a revision of draft Sections 292(8)(b) and 292(10) in removing “*of itself*” as this may reinforce rape myths.

Recommendation 13: That the NSWLRC consider a revision of draft Section 292(10) to read: “*None of the following is an indicator that a person consents to a sexual activity....*”

### **Admissibility of evidence relating to sexual experience – Section 293 Criminal Procedure Act 1986 (NSW)**

- 12.17 Rape & Domestic Violence Services Australia understand that there has been commentary on proposed amendments to Section 293 of the *Criminal Procedure Act 1986* (NSW). While, we note this section does not form part of the draft proposals, we assert that we are against any significant amendments

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<sup>40</sup> See Appendix A.

to this section as to the inadmissibility of evidence regarding the sexual reputation of complainants.

- 12.18 Although, we confirm that Rape & Domestic Violence Services Australia do intend to respond formally to the NSW Department of Communities and Justice's Issues Paper on the review of Section 293 with further particulars on this.

### **13. Sexual intercourse, sexual touching and sexual act**

- 13.1 Rape & Domestic Violence Services Australia are supportive of the proposed amendments to draft Sections 61H and 61HA; which is in line with Recommendation 30 in our submission<sup>41</sup> that the definition of sexual intercourse be more inclusive of the experiences of transgender, gender diverse and intersex people. It is imperative that legislation is inclusive in order to increase access to justice for all communities.

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<sup>41</sup> Rape & Domestic Violence Services Australia, *Final Submission CO28*, Recommendation 30, 51.

## Appendix A

### Extract from the *Family Violence Protection Act 2008 (Vic)*:

#### 5 Meaning of family violence

(1) For the purposes of this Act, *family violence* is—

- a. behaviour by a person towards a family member of that person if that behaviour—
  - i. is physically or sexually abusive; or
  - ii. is emotionally or psychologically abusive; or
  - iii. is economically abusive; or
  - iv. is threatening; or
  - v. is coercive; or
  - vi. in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
  - vii. behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

#### Examples

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a)—

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member's property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

(2) Without limiting subsection (1), *family violence* includes the following behaviour—

- a. assaulting or causing personal injury to a family member or threatening to do so;
- b. sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;

- c. intentionally damaging a family member's property, or threatening to do so;
- d. unlawfully depriving a family member of the family member's liberty, or threatening to do so;
- e. causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.

(3) To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

## 6 Meaning of *economic abuse*

For the purposes of this Act, *economic abuse* is behaviour by a person (the *first person*) that is coercive, deceptive or unreasonably controls another person (the *second person*), without the second person's consent—

- a. in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
- b. by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

Examples—

- coercing a person to relinquish control over assets and income;
- removing or keeping a family member's property without permission, or threatening to do so;
- disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;
- without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;
- preventing a person from seeking or keeping employment;
- coercing a person to claim social security payments;
- coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;
- coercing a person to sign a contract for the purchase of goods or services;
- coercing a person to sign a contract for the provision of finance, a loan or credit;
- coercing a person to sign a contract of guarantee;
- coercing a person to sign any legal document for the establishment or operation of a business.

## 7 Meaning of *emotional or psychological abuse*

For the purposes of this Act, *emotional or psychological abuse* means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.

## Examples—

- repeated derogatory taunts, including racial taunts;
- threatening to disclose a person's sexual orientation to the person's friends or family against the person's wishes;
- threatening to withhold a person's medication;
- preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity;
- threatening to commit suicide or self-harm with the intention of tormenting or intimidating a family member, or threatening the death or injury of another person.