



Submission to the NSW Law Reform Commission's
draft proposals on consent for sexual offences

Prepared by
Domestic Violence NSW
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About Domestic Violence NSW

Domestic Violence NSW Inc (DVNSW) is the peak body for specialist domestic and family violence services in NSW. DVNSW provides a representative and advocacy function for specialist services and the women, families and communities they support.

DVNSW's mission is to eliminate domestic and family violence through leadership in policy, advocacy, partnerships and the promotion of best practice. We work with our members, government at all levels, and communities to create a safer NSW for all.

DVNSW member services represent the diversity of specialist services working in NSW to support women, families and communities impacted by domestic and family violence including:

- Crisis and refuge services
- Transitional accommodation and community housing providers
- Family support services
- Neighbourhood centres and drop in centres
- Specialist homelessness service providers
- Men's behaviour change programs and networks
- Community organisations working with high risk communities
- Specialist women's legal support services
- Women and children's support services
- Safe at Home programs

DVNSW members are all non-government organisations, some entirely government funded, others supported through philanthropic donations or partnerships with industry or the corporate sector. Many of our members have multiple government and non-government funding streams.

DVNSW advocates for best practice, continuous system improvements, developing innovative policy responses to domestic and family violence, building workforce capacity and ensuring representation at all levels of government. We provide policy advice to multiple departments in the NSW Government on prevention and response. We work with communities and the media to increase awareness and represent the sector on a number of state and federal advisory bodies. We co-convene and provide a secretariat function for the NSW Women's Alliance with Rape and Domestic Violence Services Australia.

We acknowledge the work and practice wisdom of specialist women's services and domestic and family violence practitioners in the sector that underpin the recommendations in this submission. DVNSW thanks the specialist services that have developed best practice over decades of working with women and children and shared their expertise with us. We also pay tribute to those who have experienced domestic or family violence and to our advocates, colleagues and partners in government and non-government agencies.

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Endorsement of other submissions

Domestic Violence NSW endorses the submission of Rape and Domestic Violence Services Australia (RDVSA), and refers to our previous submission on the Law Reform Commission's review paper of early 2019.

Domestic Violence NSW commends the NSW Government on efforts to improve criminal and justice system responses for victims of sexual violence. However, as stated in our previous submission, legislative changes alone are unlikely to result in long lasting or significant improvements for victims impacted by sexual violence unless these are accompanied by broader cultural change.

DVNSW welcomes the NSWLRC's draft proposals to reform consent laws in NSW, however, these are but one part of the entirety of the criminal justice system response to sexual violence. DVNSW recommends a more extensive system review to ensure that outcomes for those impacted by sexual violence is examined and improved.

Community Education

Recommendation: Education should accompany any legislative amendments to create much need cultural change

As part of a broader response, DVNSW recommends community and lawyer/ practitioner education programs about consent. For example, education and training about the myths, facts and laws relating to sexual assault should be delivered to school students, their teachers, parents, and carers, through either the school system or more flexibly, though sporting and other community based associations. Further, social workers, medical practitioners and hospital workers, doctors, the legal profession, police and emergency services responders and journalists might also be included.

Review Mechanism

Recommendation: a review mechanism should be included in any legislative amendment to ensure the changes are operating efficiently and as intended.

Should any of the proposals contained within the NSWLRC discussion paper on consent become law, DVNSW recommends a review mechanism be factored into any resulting legislation, to ensure the effective and intended operation of any amendment and to ensure there are no unintended consequences. DVNSW supports a statutory review of any legislation and for a review mechanism to be required by the Minister, for example, on intervals each and every three years of the operation of the relevant legislation.

Language and Structure of Section 61E

Section 61E of the *Crimes Act 1900 (NSW)* are outdated and its language is not in keeping with community standards. DVNSW supports the NSWLRC draft proposals to group new subdivisions, labelled as 'consent generally', 'circumstances in which there is no consent' and 'knowledge about consent' and consider these remove the confusing components of the section as currently drafted.

Sexual Violence and Family Violence

Recommendation: the language and definition contained within the draft proposals related to domestic violence be re-examined.

DVNSW supports changes in language to better reflect the incidence of sexual violence in the context of family and domestic violence.

The draft new provision s61HJ(1)(e) provides for the existence of the complainant's fear, that fear a very real consequence, and a direct result of, a pattern of ongoing coercive and controlling behaviour. In the context of family and domestic violence there does not need to be an immediate threat of harm to affect a person's consent; the fear of violence itself is sufficient for consent to be 'granted' on order for that person to avoid further or escalated violence and abuse. The recommended wording of the new provisions may need further amendment to capture the nuanced nature of coercion and fear within the context of family and domestic violence to reflect that consent cannot ever be freely or lawfully given under such circumstances.

Jury Directions

Recommendation: that jury directions be legislated, and that a review mechanism be established to ensure they are operating effectively and as intended.

Recommendation: the language and definitions applied to the direction of domestic violence be re-examined.

DVNSW is cognisant that the issue of legislated jury directions is complex.

However, DVNSW has come to the conclusion that in the context of sexual violence offences and where sexual violence occurs in the context of domestic and family violence, the use of jury directions would be useful and instructive in contesting rape myths and victim blaming and to enabling the explanation of coercion and the abuse of power in intimate partner relationships.

DVNSW would assert, however, that the introduction of jury directions should be introduced simultaneously with education programs at community level and within the legal profession for the judiciary and for lawyers/practitioners.

DVNSW suggests some rewording to the directions as currently drafted to ensure clarity and remove any possibility of misinterpretation. Terms 'of itself' and 'reliable' should be avoided

in these contexts as they may introduce doubt and not entirely alleviate rape myth or victim blaming. In relation to family and domestic violence, juries may need a more thoroughgoing definition and explanation of the impact of coercion and controlling behaviour, noting further that the threat of harm, or the fear of the threat of harm, need neither be made nor felt immediately before or during the sexual activity, but ought to be recognised as an ongoing and omnipresent characteristic of domestic violence.

Additionally, the implementation and use of jury directions should be incorporated into any review mechanism and that an appropriately independent research organisation, such as ANDROWS or the Gendered Violence Research Unit, UNSW, undertake research to establish the utility of such directions and to ensure they are operating efficiently and as intended.

Admissibility of Evidence – S293 of the *Criminal Procedure Act 1986 (NSW)*

Recommendation: that any proposed legislative reform proceed on the basis of systems improvements for the complainant.

While not included in these draft proposals, DVNSW understands that consideration is being given to review and/or amendment of S293 of the *Criminal Procedure Act (NSW)*. DVNSW opposes any proposed amendment to this section that would undermine the inadmissibility of evidence about the sexual reputation of complainants. This review process is designed to improve systems responses to victims of sexual violence. To be consistent all reviews, reforms and proposed legislative amendment, should proceed on the basis of this principle.

Conclusion

DVNSW welcomes the opportunity to comment on the NSWLRC's draft proposals on consent in relation to sexual offences and submits our recommendations for due consideration.