

18 November 2019

The Commissioner
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001
By email: nsw-lrc@justice.nsw.gov.au

NSW Law Reform Commission's draft proposals on consent in relation to sexual offences

Dear Commissioner,

Community Legal Centres NSW welcomes the opportunity to comment on the Law Reform Commission of NSW's draft proposals on consent in relation to sexual offences.

Broadly, Community Legal Centres NSW welcomes the Commission's proposed approach to reform. In our view, the Commission's proposals embody a balanced approach to reform and represent a clear intent to simplify and clarify the law of consent in NSW.

In particular, Community Legal Centres NSW supports the:

- Inclusion of a statement of principles to guide the application of the law. We particularly welcome the Commission's suggestion that the principles could form the basis for community education initiatives about consent. We remain strongly of the view that without such initiatives, changes to the law are likely to be ineffective. We also support Women's Legal Service NSW's recommendations that the principles be expanded to include the principles outlined in Recommendation 25-9 of the ALRC and NSWLRC *Family Violence – A National Legal Response Final Report*.
- Creation of a single list of circumstances in which there is no consent. In particular, we welcome the reformulation of the factors currently listed in s61HE (8) (substantial intoxication, intimidating and coercive conduct and abuse of position of trust) as mandatory rather than discretionary considerations for fact finders when determining whether a person consented.
- Proposed approach to the test for knowledge of consent, including:
 - the reformulation of the 'reasonable belief' test, to make clear it is satisfied if 'any belief' of the accused person that is not reasonable (rather than requiring the prosecution to show that the accused person had no reasonable grounds for believing the complainant consented)

- the requirement that fact finders must not have regard to the accused person's self-induced intoxication when determining whether or not they knew the other person did not consent.
- Introduction of legislated jury directions, which appropriately balance the need for clear directions about complex issues like family violence against the importance of maintaining judicial discretion and flexibility to determine when specific directions are relevant to specific factual circumstances.
- Use of plain, modern and inclusive language throughout.

However, in our previous submissions, Community Legal Centres NSW argued strongly that legislative reform alone will not:

- sufficiently improve access to justice for sexual assault victims-survivors
- ensure their safety and wellbeing through the court process
- address the cultural norms around sexuality and sexual relationships, which allow so much sexual violence to happen with impunity.

While we acknowledge the Commission has had to work within narrow terms of reference, we are disappointed that our recommendations to address these broader issues continue to be overlooked. We once again urge the NSW government to complement the proposed legislative reforms with:

- A comprehensive strategy to educate the police, legal professionals and the public about safe relationships and ethical sexual conduct, and to address misogynist, sexist, racist, ableist and homophobic views that underpin a culture of impunity for sexual violence
- Investment in safer court facilities and improved and expanded court and social supports and services for victim-survivors, including community-based legal assistance.

Below, we set out our high-level response to the Commission's draft proposals. We also make a number of recommendations we believe will further strengthen the proposals, particularly for women experiencing sexual violence in the context of domestic and family violence, including:

- Revising proposed s61HJ(1)(e)(i) to read, '... because of fear of force or harm of *any type*'
- Removing the words 'of itself' from the proposed jury directions in draft sections 292(8(b) and 292(10)
- Removing the word 'reliable' from the proposed jury direction in draft section 292(10)
- Strengthening the proposed definition of family violence included in draft section 292(11)
- Commissioning Australia's National Research Organisation for Women's Safety (ANROWS) or another appropriate research body to undertake research on the impact of directions on jurors' decision-making in sexual assault trials
- Including a legislated review mechanism to allow regular and ongoing monitoring and oversight of the operation of the new subdivision, including any unintended consequences.

In addition to these recommendations, Community Legal Centres NSW endorses the detailed recommendations made by our member centres Women's Legal Service NSW and Wirringa Baiya Aboriginal Women's Legal Centre. We also endorse the submissions made by Rape and Domestic Violence Services Australia (R&DVSA).

MEANING OF CONSENT

Community Legal Centres NSW strongly supports an affirmative model of consent, which requires both that consent be actively sought and clearly communicated in every instance. As such we support the inclusion of:

- 'verbal resistance' in draft section 61HI (3) (proposal 5.3)
- draft section 61HI (5), which makes clear that a person does not necessarily consent to sexual activity because they have consented to such activity in the past (proposal 5.5).

Further, we reiterate our support for R&DVSA's recommendation that the meaning of consent be amended to read 'a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity *and communicates this agreement through words or actions*' for the reasons set out in our submission in June 2019.

WHEN A PERSON DOES NOT CONSENT

Community Legal Centres NSW supports the Commission's proposal to remove the language of 'negation' from draft section 61HJ and to replace it with the phrase 'circumstances in which a person does not consent.' As set out in our June 2019 submission, we believe this change in language is more consistent with an affirmative model of consent. This is because it removes the implied assumption in the current formulation that the starting point for decision-making is that consent is present and will only be overturned if one of the factors listed is established.

We support the proposed creation of a single list of circumstances in which there is no consent, which operate as absolute thresholds. The removal of discretionary considerations from the law makes clear to fact finders that all of the listed circumstances are relevant to determining whether the complainant consented, including the factors currently listed in s61HE (8) (substantial intoxication, intimidating and coercive conduct and abuse of position of trust).

Community Legal Centres NSW also supports the proposed change in language in draft section 61HJ(1)(c), which deals with the impact of intoxication on consent. We believe that the change in focus from an assessment of the complainant's degree of intoxication (substantial) to an assessment of the impact of intoxication on the complainant's capacity to consent is positive.

Finally, we welcome the Commission's efforts to better address sexual violence that occurs in the context of domestic and family violence by removing the requirement that the complainant's consent be obtained by an immediate threat of force or harm in draft section 61HJ(1)(e)(i).

Making clear that consent obtained through threats of force or harm 'regardless of when the ... conduct giving rise to the fear occurs' better recognises that domestic and family violence is typified by patterns of coercive and intimidating behaviour perpetrated over months or years and that, in this context, a threat does not need to be immediately present to affect a complainant's capacity to consent.

However, we recommend that the Commission further revise the section so that it reads 'because of fear of force or harm *of any type*.' We believe that this will make clear that all forms

of intimidating and coercive conduct against the complainant, another person, animals or property are captured by the provision.

KNOWLEDGE OF CONSENT

Community Legal Centres NSW supports the maintenance of an objective standard of fault in the test for knowledge of non-consent in NSW. Overall, we believe the proposal to revise the ‘no reasonable grounds’ test so that the accused knows the complainant did not consent if ‘any belief that the person has ... that the other person consents to the sexual activity is not reasonable in the circumstance’ is positive.

We also welcome the proposal to clarify the scope of the test in 61HK (2) by replacing the reference to ‘steps taken’ by the accused to determine consent with a reference to ‘whether the accused person *said or did* anything to ascertain if the other person consented to the sexual activity.’ However, we note that organisations like Women’s Legal Service NSW have questioned whether this change goes far enough. This ongoing uncertainty highlights the importance of ongoing research and review recommended below.

However, Community Legal Centres NSW recognises that this is the most contested area of the law on consent in NSW. We note the high volume of submissions that argued that changing the objective test for knowledge would not have changed the outcome in *R v Lazarus* and will not necessarily lessen the influence of ‘rape myths’ (outdated views about consent that fall below community standards - for example that a lack of resistance amounts to consent) on fact finders’ decision-making processes.

For these reasons, we believe that it is critical that all of the proposed changes to the knowledge provisions are supported by:

- A legislated, mechanism for regular, ongoing review of the new laws (see below)
- A comprehensive community education campaign on consent and respectful relationships, which targets legal professionals, judicial officers and the general public (discussed above and in our previous submissions).

JURY DIRECTIONS ON CONSENT

In principle, Community Legal Centres NSW welcomes the introduction of legislated jury directions with respect to the law of consent in NSW. We believe that, if drafted appropriately, they can provide greater consistency in how jurors apply consent laws to the sexual assault cases they must decide. Further, we believe that the Commission’s approach (which proposes one mandatory direction with the remainder being subject to the judge’s discretion) strikes the right balance between the need for certainty and the importance of judicial discretion and flexibility.

It is important we get the drafting of legislated jury directions right, particularly those aimed at challenging rape myths. For this reason, legislated jury directions must be developed with the input of experts, including sexual and domestic violence experts, they should be tested with research assessing their effectiveness and there should be regular legislated review.

Of immediate concern, is the use of the term ‘of itself’ and in draft sections ‘292(8)(b). We believe that the phrase is unnecessary and may, in fact, reinforce rape myths surrounding the relevance of a complainant’s appearance or behaviour to whether they consented to sexual activity. We recommend that this phrase be removed.

For similar reasons, we recommend that the Commission removes the words ‘of itself’ and ‘reliable’ from draft sections 292 (9)(b) and 292 (10). To us, the phrases ‘of itself’ and ‘reliable’ operate together in these sections to imply that in some circumstances the factors listed may be reliable indicators of truthfulness or of consent. To ensure no such confusion arises, we recommend section 292 (9)(b) be amended to simply state, ‘the presence or absence of emotion or distress is not an indicator an indicator of whether someone is telling the truth’. And section 292 (10) be amended to ‘none of the following is an indicator that a person consents to sexual activity.’

To ensure the efficacy and adaptability of jury directions about consent over the longer-term, we support the detailed submissions and recommendations made by Women’s Legal Service NSW and R&DVSA, including that:

- That a body with relevant expertise in sexual assault, like ANROWS, be commissioned test jury directions to determine whether they are effective at addressing the influence of misconceptions and ‘rape myths’ on decision-makers.
- The new laws include a legislated mechanism for regular, ongoing review (see below).

Finally, we recommend that the Commission considers strengthening the jury direction on *family violence* in section 292(11). This could be done by adopting the definition included in sections 5 of the *Family Violence Act 2008 (Vic)* and the definition of *domestic relationship* in section 5 of the *Crimes (Domestic & Personal Violence) Act (NSW)*, which sets out the kinds of relationship family violence can occur in. Finally, we support Women’s Legal Service of NSW’s recommendation that the direction include an explanation of the term *coercive and controlling behaviour*, which are not widely understood.

REVIEW MECHANISM AND ONGOING RESEARCH

Community Legal Centres NSW recognises this is a complex area of law and welcomes the Commission’s efforts to propose changes that will improve access to justice for complainants. However, the impacts of any changes ultimately made will not be fully understood until they are put into practice by lawyers, judges and juries. We share concerns expressed by R&DVSA, Domestic Violence NSW, Women’s Legal Service of NSW and Wirringa Baiya Aboriginal Women’s Legal Centre, that some proposed changes may give rise to unintended consequences. For example, the proposed changes to the ‘no reasonable belief’ test to determine the accused’s knowledge and proposed jury directions designed to reduce the influence of rape myths on decision-making.

As such, we endorse the recommendations made by Women’s Legal Service NSW, Wirringa Baiya Aboriginal Women’s Legal Centre and R&DVSA that the mechanism be based on section 119 of the *Victims Rights and Support Act 2013*. Critically, the review mechanism should require the Minister to review the laws as soon as possible after 3 years of the legislation’s commencement and at regular intervals after that (no longer than five years). These reviews should be conducted by an expert taskforce, whose membership represents diverse stakeholders interested in the criminal justice response to sexual violence in NSW.

Further, we also support Women’s Legal Service of NSW recommendation that the implementation of any legislative changes should be complemented by independent research, which examines the handling and outcomes of all sexual assault matters in the District Court at regular intervals.

ABOUT COMMUNITY LEGAL CENTRES NSW

Community Legal Centres NSW is the peak body for almost 40 community legal centres in NSW. Our team supports and represents our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW. We are advised on issues related to sexual assault and domestic and family violence by our Domestic Violence and Victims Support Network.

Community legal centres are independent non-government organisations that provide free legal services to individuals and communities, at times when that help is needed most, particularly to people facing economic hardship.

Community legal centre solicitors generally do not practice criminal law. However, many centres, including Women's Legal Service NSW and Wurringa Baiya Aboriginal Women's Legal Centre, work daily to support people who have experienced sexual violence to navigate the legal process. Through this work, they witness first-hand the significant barriers to justice victim-survivors face, from first reporting to prosecution.

Our interest in this issue is to improve access to justice for victim-survivors of sexual violence whether or not their matter is heard in court, improve the safety and well-being of those who do pursue charges through the justice system, and ideally reduce the number of sexual assaults perpetrated in the first place.

MORE INFORMATION

Thank you for taking the time to consider our submission. If you have any questions or require further input, please contact our Acting Advocacy & Communications Manager Emily Hamilton via [REDACTED] or [REDACTED].

We look forward to the opportunity to review the Commission's final report in early 2020.

Yours faithfully,

[REDACTED]

Tim Leach

Executive Director

Community Legal Centres NSW