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WOMEN'S SAFETY NSW

Response to the NSW Law Reform Commission's Draft Proposals on Consent in Relation to Sexual Offences

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Table of Contents

Table of Contents	1
1 Introduction	2
2 Summary of Submission	2
3 Changes to the structure and language of s 61HE	4
4 How to interpret and apply the new sections	4
5 The meaning of consent	5
5.1 Consent and withdrawal of consent.....	5
5.2 The absence of resistance – the “freeze” response	5
6. When a person “does not consent”	6
6.1 Single, non-exhaustive list of circumstances in which a person “does not consent”	6
6.2 Force or fear of force or harm – of any kind	7
6.3 Where a person does not consent due to an abuse of authority or trust	8
7. Knowledge of consent	9
7.1 Less subjective test – but not objective	9
7.2 What fact finders must, and must not, consider in the making of a finding under the section	10
8. Jury directions on consent	11
9. A definition of family violence	12
10. Conclusion	14

1 Introduction

Women's Safety NSW is a peak representative body for women's specialist domestic and family violence services in NSW- including all Women's Domestic Violence Court Advocacy Services working in 114 Local Courts across NSW and in the Family Law Courts and coordinating the NSW Government's Victim Safety Response – Safer Pathway.

We advocate on behalf of our members for systemic reform to increase women's safety, justice and wellbeing in the context of domestic and family violence.

Our previous submission centred on women's experiences particularly as they relate to disclosure and reporting of sexual offences in the context of domestic and family violence.

Women's Safety NSW welcomes the draft proposals of the NSW Law Reform Commission ("the Commission") on consent in relation to sexual offences. Following our previous submission (see [WDVCAS submission](#) dated 16 April 2019), this response includes our views, the majority of which are positive and supportive, on the draft proposals, and further recommendations for crucial elements not yet addressed.

2 Summary of Submission

Overall, Women's Safety NSW support the Commission's draft proposals. More specifically, we support the:

- new interpretive principles under draft s 61HF;
- proposed adoption of a model of affirmative consent in s 61HE;
- changes to the meaning of consent in proposed s 61HI;
- non-exhaustive single list of circumstances where there is no consent under proposed s 61HJ;
- change to the element of "knowledge" of consent in s 61HE which we regard as a modest improvement; and
- legislated jury directions in the *Criminal Procedure Act 1986* (NSW) ("Criminal Procedure Act") to counter rape myths and violence supportive community attitudes.

Further recommendations have been made to strengthen the proposals as follows:

- A strengthening of the "knowledge" of consent requirement in proposed s 61HK(2)(a) to require that fact finders in the making of a finding under

the section must consider the “steps taken by a person to ascertain consent” but must not consider “any personal opinions, values or attitudes held by the accused person which do not meet community standards”.

- Removal of the words “by words or conduct” in proposed s 61HI(2) to ensure the onus for consent remains on the person seeking to obtain it;
- Extend the reference to “harm” in proposed s 61HJ(1)(e)(i) of the *Crimes Act* and s 292(11)(b) of the *Criminal Procedure Act* to encompass “harm of any kind” to ensure relevant application in cases involving non-physical forms of harm as is common in the context of domestic and family violence.
- Amend proposed s 61HJ(1)(e)(iv) dealing with abuse of position or authority to remove reference to being “overcome” and include reference to “particular dependence” to account for situations where the complainant may have a particular dependence on the accused where for example they live with a disability and rely upon care. Specifically: “A person does not consent to a sexual activity if— (e) the person participates in the sexual activity— (iv) because of an abuse of a position of authority or trust or particular dependence.”
- Amend the jury direction in s 292(10) of the *Criminal Procedure Act* on the behaviour and appearance of the complainant to avoid inadvertent messaging reinforcing inaccurate and violence supportive community attitudes. Specifically, by replacing the words “of itself, a reliable” with “an” – so that it says: “None of the following is an indicator that a person consents to a sexual activity... the person’s clothing or appearance...”
- Include a comprehensive definition of family violence in s 4 which sets out a non-exhaustive list of behaviours which may constitute family violence- similar to that which has been drafted in the federal *Family Law Act 1975* (Cth) and Victorian and Queensland domestic and family violence legislation.

Women’s Safety NSW believe the above changes represent an important step forward in ensuring laws in NSW are adequately drafted so as to afford justice to victims of sexual violence in this State.

However, law reform, on its own will not resolve all the substantive issues. We only need to look to the experiences of women currently going through the process – and those who will not, cannot, subject themselves to it – to understand this. To achieve real change, we also need specialisation, reforms to court procedure, increased support for victim-survivors, and substantial investment in cultural and attitudinal change.

Women's Safety NSW also supports Women's Legal Service NSW's recommendation for a review mechanism of these and any related reforms relevant to the prosecution of sexual offences similar to that included in s 119 of the *Victims Rights and Support Act 2013* (NSW), and the commissioning of research that involves the examination of all sexual assault matters in the District Court over time to inform such review processes.

3 Changes to the structure and language of s 61HE

Women's Safety NSW supports the Commission's proposed changes to the language and structure of the *Crimes Act* in order to simplify and modernise it. We support the proposed streamlined split structure and agree it will make it easier to follow.

We also support the proposed changes to certain expressions used, such as "alleged victim", "negation of consent", etc.

Draft Proposal 3.7 suggests removing the expression "negation of consent." We support this change.

Draft Proposal 3.8 suggests changing the wording from "consents" to "participates" in the *Crimes Act 1900* (NSW) s 61HE(5)(c).

Women's Safety NSW supports this change.

4 How to interpret and apply the new sections

Women's Safety NSW supports the proposed new interpretive principles which reflect the dynamic nature of consent and the requirement for communication and free and voluntary agreement.

Draft Proposal 4.1 suggests in interpreting and applying the Subdivision:

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

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

Women's Safety NSW supports this change.

5 The meaning of consent

Women's Safety NSW is supportive of maintaining the definition of consent with the stipulation that consent must be present at the time of the sexual activity as per s 61HI(1) and adding the proposed s 61HI(2) which signals that a person may withdraw their consent at any time before or during the sexual activity.

5.1 Consent and withdrawal of consent

However, in order to give effect to the intention of the proposed new section, Women's Safety NSW recommends the deletion of "by words and conduct". The existence of this framing would otherwise, it is feared, in practice, place the onus on the complainant to prove through their own words or conduct that they in fact withdrew their consent – negating the effect of the reforms which aim to provide for an affirmative model of consent, whereby the onus remains on the person seeking consent to take steps to ascertain that consent.

Draft Proposal 5.1 proposes an amended definition of consent:

(1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.

Women's Safety NSW supports this change.

Draft Proposal 5.2: deals with withdrawal of consent.

Women's Safety NSW supports this proposed new provision but as amended:

"A person may withdraw consent to a sexual activity at any time before or during the sexual activity. Sexual activity that occurs after consent has been withdrawn occurs without consent."

5.2 The absence of resistance – the "freeze" response

Women's Safety NSW is also supportive of Draft Proposals 5.3-5.6 but is particularly pleased to see the substantive efforts in Draft Proposal 5.3 to address the issues of the common "freeze" response and circumstances where a person may not consent to a sexual activity in the context of domestic and family violence.

As detailed in our submission to the review, women experiencing domestic and family violence regularly report instances of 'freeze', such that they may be too frightened to resist the aggressor for fear of violence in that moment, as well as submission, such that they may be too frightened to resist the aggressor for fear of the repercussions which may follow for themselves or their children or other dependents.

Proposal 5.3: proposes an amendment to clarify that in absence of resistance:

A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.

Women's Safety NSW supports this change.

The specific articulation of these other **characteristics of consent** which equate to consent not being assumed are consistent with our recommendations and are welcomed:

- "consent to a particular activity" does not by reason only of that fact, mean consent to the sexual activity in question
- "consent to a particular activity" does not is not, by reason only of that fact, mean consent to any other sexual activity
- "consent to sexual activity being performed in a particular way" does not, by reason only of that fact, mean consent to the sexual activity being performed in another way.

Proposals 5.4-5-6: propose amendments to clarify that consent cannot be assumed.

Women's Safety NSW support these changes.

6. When a person "does not consent"

6.1 Single, non-exhaustive list of circumstances in which a person "does not consent"

Women's Safety NSW is supportive the insertion of a single, non-exhaustive list of circumstances in which a person "does not consent" to a sexual activity as per Draft Proposals 6.1-6.9.

6.2 Force or fear of force or harm – of any kind

Of particular importance to women who experience sexual violence in the context of domestic and family violence is Draft Proposal 6.5 which specifically recognises that “a person does not consent to a sexual activity if—

(e) the person participates in the sexual activity—

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

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

Women’s Safety NSW further recommends that in order to give practical effect to this provision the reference to “harm” should be extended to “harm of any kind” to recognise the many and varied forms of abuse which may occur within the context of domestic and family violence. Further, the words “such as in the context of ongoing intimidatory and coercive conduct in family violence” could be added at the end of the provision for clarity.

Proposals 6.5 clarifies that a person does not consent to a sexual activity if—

(e) the person participates in the sexual activity—

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

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

Women’s Safety NSW support this new provision and recommend the following re-drafting in order to give practical effect to its intention:

“a person does not consent to a sexual activity if— (e) the person participates in the sexual activity—

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

(ii) because of coercion, blackmail or intimidation occurring at any time, such as in the context of ongoing intimidatory and coercive conduct in family violence”

6.3 Where a person does not consent due to an abuse of authority or trust

Proposal 6.7 deals with situations where a person does not consent due to an abuse of authority or trust. Women's Safety NSW is pleased to see an attempt to strengthen the provision governing such circumstances. A significant proportion (approximately 4,000) of women supported by Women's Safety NSW member services in 2018 in the context of domestic and family violence identified as living with a disability. Women with disability report higher rates of sexual violence at increased levels of severity, and in many cases, the offender is someone on whom they have significant material reliance.

Women's Safety NSW therefore propose that in order to give more practical effect to the provision for women with disability who are at a particular risk and experience significant barriers to justice, the proposed s 61HJ(1)(e)(iv) be amended to include reference to "particular dependence".

Further, whilst recognising the intent of utilising the word "overborne" in the provision as a stricter standard to recognise cases of abuse of power, Women's Safety NSW is concerned that this word could be too subjective and place too much onus on the complainant to prove the extent to which they were affected by the abuse of power.

In Women's Safety NSW's view, the use of the word "overborne" is unnecessary and could be removed to more appropriately place the onus on the accused to demonstrate that there was not in fact an abuse of power which occurred. Again, it is submitted that this is in line with the spirit of the reforms to create a more affirmative model of consent.

Proposals 6.7 deals with situations of abuse of authority or trust

Women's Safety NSW support a new provision and recommend the following re-drafting in order to give practical effect to its intention:

"a person does not consent to a sexual activity if— (e) the person participates in the sexual activity—

(iv) because of an abuse of a position of authority or trust or particular dependence."

Women's Safety NSW is supportive of the other proposed circumstances where a person "does not consent".

Proposals 6.1-6.4, 6.6-6.8 deal with circumstances with a person "does not consent".

Women's Safety NSW supports these changes.

7. Knowledge of consent

7.1 Less subjective test – but not objective

Women's Safety NSW is supportive of the proposed changes to the element of “knowledge” of consent to encompass a less subjective test of “any belief that the person has, or may have, that the other person consents to the sexual activity” being “reasonable in the circumstances”, regarding this as a modest move in the right direction.

Proposal 7.1 deals with knowledge about consent, and proposes the following:

- (1) A person is taken to know that another person does not consent to a sexual activity if—
 - (a) the person actually knows the other person does not consent to the sexual activity, or
 - (b) the person is reckless as to whether the other person consents to the sexual activity, or
 - (c) any belief that the person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

Women's Safety NSW is supportive of this proposed change to the knowledge requirement as a modest move in the right direction.

However, Women's Safety NSW recognise that the test is still a subjective one, something that we are concerned remains the position of the Commission.

It is of concern to Women's Safety NSW, when the rates of sexual violence are so high, and yet reporting rates, prosecution rates and conviction rates are so low, and national community attitudes have been found to support these continuing rates, that we are still in a situation where there is hesitancy to introduce an objective standard of reasonableness in belief that a person has consented to a sexual activity.

Women's Safety NSW's first recommendation therefore would be to introduce this objective standard.

For initial drafting suggestions for such a standard, the Commission could look to the Exposure Draft Bill put together by the NSW Attorney General's Department in 2007 - Proposed Sexual Assault Amendments to the *Crimes Act 1900* – Consent, which contained the following formulation of an objective fault test:

“Reasonable belief that person consents

In determining whether a person has reasonable grounds to believe that another person consents to having sexual intercourse with the person, regard is to be had to all the circumstances of the case:

- (a) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but*
- (b) not including the personal opinions, values and general social and educational development of the person.”*

7.2 What fact finders must, and must not, consider in the making of a finding under the section

Failing this, Women's Safety NSW recommend the inclusion of an additional requirement in s 61HK(2) as per the recommendation made by Rape and Domestic Violence Services Australia (RDVSA) as to what fact finders must, and must not, consider in the making of a finding under the section. Specifically, that fact finders must not consider “any personal opinions, values or attitudes held by the accused person which do not meet community standards, with reference to s 61HF”.

In order to give the desired effect to reforms so as to provide a more affirmative model of sexual consent, Women's Safety NSW also recommend a strengthening of the requirements set out in proposed s 61HK(2) to require a person to take steps to ascertain consent, making this a mandatory consideration of the fact finder in the determination of consent.

Without this requirement, efforts to place the onus on the accused to establish – that they actually knew, were not reckless or had belief that was reasonable in all the circumstances that the other person consented to the sexual activity, will be watered down.

Proposal 7.2: deals with what fact finders must, and must not, consider

Women's Safety NSW recommends the following redrafting of s 61HK(2):

(2) For the purposes of making any finding under this section, the trier of fact—

- (a) Must have regard to what the accused person said or did to ascertain if the other person consented to the sexual activity;
- (b) Must have regard to all the circumstances of the case;
- (c) Must not have regard to any self-induced intoxication of the accused person; and
- (d) Must not have regard to any personal opinions, values or attitudes held by the accused person which do not meet community standards, with reference to s 61HF”.

8. Jury directions on consent

Women’s Safety NSW recognises and supports the Commission’s proposed changes to jury directions to improve common misconceptions with one specific recommendations around redrafting to avoid inadvertent messaging which reinforces rape myths or violence supportive attitudes.

Specifically, Women’s Safety NSW recommends jury direction in s 292(10) of the *Criminal Procedure Act* on the behaviour and appearance of the complainant be redrafted, replacing the words “of itself, a reliable” with “an”.

The inclusion of the words “of itself” or even “a reliable” in this direction could be seen as reinforcing the problematic and erroneous belief that any or each of these factors **may even contribute** as an indicator of a person’s consent.

Proposals 8.1-8.3 deal with one mandatory and ten discretionary legislated jury directions to deal with misconceptions about consent.

Women’s Safety NSW is supportive of these changes with the following recommended redrafting of s 292(10) of the *Criminal Procedure Act*:

Behaviour and appearance of complainant Direction—

None of the following is an indicator that a person consents to a sexual activity—

- (a) the person’s clothing or appearance,
- (b) the consumption by the person of alcohol or any other drug,
- (c) the person’s presence in a particular location.

9. A definition of family violence

Evidence 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.¹ It is therefore essential that sexual consent laws are designed in a way to cover circumstances of sexual assault within the context of family violence.

Women's Safety NSW are pleased to see a number of draft proposals which set out to achieve this objective, including a specific jury direction referencing circumstances of family violence.

However, in order for these reforms to have practical effect, it is important that those applying and interpreting the law have a working understanding of the nature and dynamics of family violence. At the very minimum, it is recommended that a comprehensive definition of family violence be added to s 4.

This definition should set out a non-exhaustive list of behaviours which may constitute family violence- similar to that which has been drafted in the federal *Family Law Act 1975* (Cth) and Victorian and Queensland domestic and family violence legislation.

For example, the Victorian definition of family violence as set out in s 5 of the Family Violence Protection Act 2008 is as follows:

6 FAMILY VIOLENCE PROTECTION ACT 2008 - SECT 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
 - (i) is coercive; or

¹ 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.

- (ii) 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
- b) 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

1 The following behaviour may constitute family violence under paragraph (a)—

- using coercion, threats, physical abuse or emotional or psychological abuse to cause or attempt to cause a person to enter into a marriage;
- using coercion, threats, physical abuse or emotional or psychological abuse to demand or receive dowry, either before or after a marriage.

2 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.

Additional Recommendation

Women's Safety NSW recommend the inclusion of a comprehensive definition of family violence in s 4 which sets out a non-exhaustive list of behaviours which may constitute family violence- similar to that which has been drafted in the federal *Family Law Act 1975* (Cth) and Victorian and Queensland domestic and family violence legislation.

10. Conclusion

Women's Safety NSW would like to thank the Commission for the opportunity to make this submission. Overall, we see the proposed reforms as progressive. When we see the levels of sexual violence being perpetrated against women (and children) in our communities, and the extremely steep, if not insurmountable battle faced by these same women in obtaining justice in our current system, we must acknowledge that the current system is failing and in need of substantive reform.

But law reform is the first step. It sets the tone and a framework for change. For ultimately, if we want to change community attitudes and set new norms of acceptable behaviour, behaviour which respects the right of every person to safety, justice and wellbeing, then we first need to change the law.

The next essential step will be to address the culture of the criminal justice system to ensure processes are accessible and trauma-informed for those seeking protection and justice.

In this regard, specialisation, reforms to court procedure, increased support for victim-survivors, and substantial investment in cultural and attitudinal change will be instrumental. Women's Safety NSW looks forward to the opportunity to work with community and justice partners, towards these goals in the not too distant future.

Women's Safety NSW also supports Women's Legal Service NSW's recommendation for a review mechanism of these and any related reforms relevant to the prosecution of sexual offences similar to that included in s 119 of the *Victims Rights and Support Act 2013* (NSW), and the commissioning of

research that involves the examination of all sexual assault matters in the District Court over time to inform such review processes. For it is only with this quantitative and qualitative evidence that we will be in the position to effectively monitor the efficacy of the reforms in practice – as they affect the real lives of the people accessing safety and justice through our criminal justice system.