

22 February 2019

Commissioner Carolyn Simpson
NSW Law Reform Commission
GPO Box 31,
SYDNEY NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Commissioner,

Consent in relation to sexual assault offences

1. - Women's Legal Service NSW (WLS NSW) thanks the NSW Law Reform Commission for the opportunity to respond to Consent in relation to sexual assault offences consultation paper.
2. - WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual violence, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. - Our work in the area of sexual violence includes advising women who have experienced sexual violence about reporting to police, evidence collection and legal processes; victims support entitlements; privacy and use of sensitive information; and complaints about service providers such as police. We also assist services providing therapeutic support to women to respond to subpoenas and requests for records in court proceedings.

Introduction

4. - Sexual violence is a form of gender-based violence. Approximately one in five women in Australia compared to one in twenty men has experienced sexual violence since the age of 15 years old.¹

¹ ANROWS, *Accurate use of key statistics*, (citing Australian Bureau of Statistics Personal Safety Survey 2016) 2018, p3.



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5. - As Quadara notes, three key drivers of violence against women and girls include: rigid gender stereotypes, attitudes supportive of male dominance and male entitlement; and gender inequality.²
6. - In ANROWS research it is acknowledged that *“entrenched gender inequity and patriarchal ideology are the primary causes of men’s sense of entitlement and men’s belief in the right to exercise power over women”*.³
7. - In order to successfully prevent and end violence against women and children, including sexual violence, male entitlement must be challenged.
8. - We must also address intersecting forms of discrimination based on sex, race, gender identity, sexual orientation and ableism which condone violence and support rape culture. Some examples include the significant delay in prosecuting the sexual assaults and death of Lynette Daley in 2011⁴ and the fetishizing and sexualising, for example, of Asian women.⁵
9. - While it is useful to review consent in relation to sexual offences, as discussed in our preliminary submission, dated 28 June 2018, in order to be responsive to the low levels of reporting sexual violence in NSW and high attrition rates and low conviction rates, a review of consent in relation to sexual assault offences should not be done in isolation. Cultural change and broader systemic changes are also required. Widespread and ongoing education, as discussed below, is essential to bring about cultural change.
10. - We refer again to the Criminal Justice Sexual Offence Taskforce which was established in NSW in 2004 and reported in 2006. Extensive consultations were undertaken, and many important recommendations were made. It is a missed opportunity that this review is not considering the extent to which those recommendations have been implemented and reasons why recommendations have not been implemented.

Use of language

11. - Domestic and/or family violence, which often includes sexual violence, occurs when one person tries to coerce or control another person in a range of “domestic relationships” as outlined in section 5 *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Family violence

² A. Quadara, “The Everydayness of Rape: How Understanding Sexual Assault Perpetration Can Inform Prevention Efforts”, in N. Henry & A. Powell (eds) *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture*, London: Palgrave Macmillan, 2014, p 43; See also, Our Watch, VicHealth and ANROWS, *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia*, 2015 p21(27) – 28(34).

³ Mackay, E., Gibson, A., Lam, H., Beecham, D., *Perpetrator interventions in Australia: State of knowledge paper*. Sydney: ANROWS, 2015, p 11(17).

⁴ Men jailed over Lynette Daley rape, death, *SBS News*, 8 December 2017 at: <https://www.sbs.com.au/news/men-jailed-over-lynette-daley-rape-death>

⁵ Kuo, R., How Rape Culture And Racism Combine To Hurt Asian Women, *HuffPost*, 27 May 2017 at: https://www.huffingtonpost.com/entry/how-rape-culture-and-racism-combine-to-hurt-asian-women_us_592a15ade4b0a7b7b469cb22

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is the preferred term to encompass the complex interaction of kinship structures and extended family relationships in Aboriginal and Torres Strait Islander communities.

12. -When we use the term "domestic violence" in this submission it is intended to also include family violence.
13. -When we use the term "sexual violence" in this submission it is intended to capture all forms of sexual violence.

Recommendations

14. -In summary we recommend:

- 14.1 Clearer guidance is required through further statutory amendment to more clearly articulate an affirmative model of consent.
- 14.2 The development and implementation of an extensive evidence-based education campaign about the drivers of gender-based violence, respectful relationships and ethical sexual practice, developed by experts, that challenges rape myths, male entitlement and victim-blaming attitudes. This needs to be part of a comprehensive primary prevention strategy which includes preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment. Significant and ongoing investment is required.
- 14.3 Adopt the Safe State recommendations relating to creating cultural change to prevent violence and promote gender equality.
- 14.4 Factors negating consent should be included in a single list.
- 14.5 Amend NSW legislation to include in a single list of negating factors harmful conduct and/or fear of harm of any type whether to that person or someone else or an animal or to property.
- 14.6 Any such provision as outlined in Recommendation 5 must make clear the fear of harm need not be present immediately before or during the sexual violence.
- 14.7 Inclusion of jury directions that explain the nature and dynamics of domestic violence and coercion and control and that a threat of harm need not be immediately present in order to affect a person's capacity to consent.
- 14.8 Consider further additional provisions that would better capture sexual violence within the context of domestic violence.
- 14.9 A roundtable with subject experts be held to discuss how the law can better capture sexual violence within the context of domestic violence.
- 14.10 An objective fault element for knowledge of consent be retained.

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- 14.11 We support Rape and Domestic Violence Services Australia's recommendation *"to replace the current three-tier mental element with a simplified "no reasonable belief" test."*
- 14.12 In considering the steps taken by the defendant to ascertain whether the complainant consents to sexual activity, the legislation be amended to stipulate the steps be *"physical or verbal"*.
- 14.13 The proposed new category of sexual offence which *"might cover situations involving a mistaken but unreasonable belief in consent or, potentially, a failure to take reasonable steps to ascertain consent"* and which would have a lesser penalty be rejected.
- 14.14 We endorse the recommendation by Rape and Domestic Violence Services Australia based on the McNamara et al proposal to *"insert an additional provision to provide that when making findings about the mental element, the fact finder must consider the effect that any behaviour of the accused before the alleged offence may have had on the behaviour of the complainant at the relevant time."*
- 14.15 The continued inclusion of s61HE(4)(b) of the *Crimes Act (NSW)* which prevents the fact-finder from being able to consider any self-induced intoxication of the accused.
- 14.16 We endorse the recommendation by Rape and Domestic Violence Services Australia to *"insert an additional provision to provide that when making findings about the mental element, the fact finder must not consider any opinions, values or attitudes held by the accused that do not meet community standards."*
- 14.17 Jury directions to challenge myths about sexual violence and how people respond to sexual violence.
- 14.18 Legislated jury directions on consent and other related issues.
- 14.19 Jury directions are carefully drafted with input from sexual assault, domestic violence and health experts.
- 14.20 The Uniform Evidence Act be amended to specifically enable expert evidence to be admitted in adult sexual violence trials.
- 14.21 All police receive ongoing training in complex trauma, the nature and dynamics of sexual violence, the nature and dynamics of domestic violence, the nature and dynamics of child abuse and child sexual abuse, response-based practice, cultural competency and disability awareness.
- 14.22 Several sexual violence specialist police who are specially trained in responding to sexual violence and also understand the nature and dynamics of sexual violence, including sexual violence perpetrated within the context of domestic violence, be located in every Police Area Command and Police District in NSW.

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- 14.23 Experts such as Aboriginal Community Liaison Officers, Gay and Lesbian Liaison Officers, Youth Liaison Officers and Domestic Violence Liaison Officers be trained in responding to sexual violence and understanding the nature and dynamics of sexual violence, including sexual violence perpetrated within the context of domestic violence.
- 14.24 A complainant is given multiple means of contacting the person they provided their complaint to for an update on their matter.
- 14.25 A sexual violence team within the NSW Police Force located at head office which includes social workers who can help complainants receive updates on their matters.
- 14.26 Just as domestic violence complainants in proceedings for a domestic violence offence can give evidence by audio or visual recording, so too all prescribed sexual offences complainants be able to give evidence this way to limit re-traumatisation.
- 14.27 A safe and accessible “one stop shop” for those who have experienced sexual violence where service providers, including medical and forensic services, counsellors, police, prosecutors and support workers, travel to these facilities to meet the person who has experienced sexual violence.
- 14.28 Early referral and access to specialist women’s legal services and specialist Aboriginal and Torres Strait Islander women’s legal services to help those who have experienced sexual violence to understand their options.
- 14.29 Specialist courts which adopt sexual and domestic violence and trauma-informed practice, including specialist judges and specialist prosecutors.
- 14.30 All who play a role in specialist courts, including police, legal practitioners, judicial officers, interpreters, support services; and court staff have ongoing training in: trauma informed practice and understanding complex trauma; the dynamics and impacts of sexual violence including sexual violence perpetrated within the context of domestic violence; cultural competency; and disability awareness.

Meaning of consent

Affirmative consent standard

15. - The *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* amended the *Crimes Act 1900* to create a new s61HA, introducing a statutory definition of consent for sexual assault offences which commenced on 1 January 2008.
16. - A statutory review of this provision took place in August 2012.
17. - WLS NSW made a submission to the then NSW Department of Attorney General and Justice in response to the statutory review of the consent provisions in the *Crimes Act 1900*, dated 14 September 2012. In that submission, we spoke of the introduction of a statutory definition of consent as “*a very important part of modernising sexual assault laws in NSW*” and

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that “we have no reason to believe that the terms of the amendment do not remain appropriate for securing [the policy] objectives [of the amendment]”, namely to give clear guidance as to what constitutes consent and to provide a more contemporary and appropriate definition of consent.

18. - In his Second Reading Speech introducing the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* the then NSW Attorney General, John Hatzistergos criticised the “outdated” subjective test which “reflects archaic views about sexual activity”. He stated: *‘It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour’*.⁶
19. - With the passing of time, it has become clear that the consent in relation to sexual offences provision is not working as intended and there continues to be a “fail[ure] to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour.” Clearer guidance is required through further statutory amendment in order to more clearly articulate an affirmative model of consent and to better capture sexual violence that occurs within the context of domestic violence.
20. - We agree that some of the benefits of an affirmative model of consent include the challenging of rape myths and victim-blaming views. Further, an affirmative model of consent requires consideration of the steps taken by the defendant to ascertain consent. While s61HE(4) of the *Crimes Act 1900 (NSW)* already provides that in making a finding about knowledge of consent the fact finder must consider “all the circumstances of the case”, “including any steps taken by the person to ascertain whether the alleged victim consents to sexual activity”, we agree with Dyer’s proposal that the legislation be amended to stipulate the steps be “physical or verbal”.⁷ This is consistent with an affirmative model of consent and the intention of the earlier legislation that a “reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour”.
21. - We note the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* extended the definition of consent to also apply to sexual touching and sexual acts. We supported this expanded definition in our 2012 submission to the NSW Department of Attorney General and Justice. We continue to support this expanded definition.

Recommendation 1

Clearer guidance is required through further statutory amendment to more clearly articulate an affirmative model of consent.

⁶ The Hon John Hatzistergos, *Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007*, Second Reading, *NSW Legislative Council Hansard*, 7 November 2007, p3584.

⁷ Dyer, A. *Preliminary submission to the NSWLRC Consent in relation to sexual offences review*, 29 June 2018, p11.

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The role of education and prevention in cultural change

22. -The Consultation Paper refers to research that suggests that *“rape myths continue to influence sexual assault trials in Victoria and Tasmania”*. In particular the Consultation Paper refers to an analysis of sexual assault trials in Tasmania between December 2004 and October 2008 by Cockburn post the introduction of an affirmative consent standard.

*In most of the case Cockburn analysed, prosecutors did not emphasise the absence of clearly communicated consent. Instead they relied on evidence of clear resistance, and/or threats or use of force, to prove non-consent. Prosecutors only argued that consent was not present because the person did not communicate consent in cases where the person was either asleep or grossly intoxicated at the time of the alleged assault.*⁸

23. -This highlights that changes to legislation alone are insufficient to effect real change.

24. -The Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC) in the comprehensive report *Family Violence – A National Legal Response*, considered sexual violence within a family violence context. The Commissions noted the *“implementation gap”* between *“written law and its practice”*.⁹ The Commissions noted the requirement of *“extensive cultural change”*¹⁰ which *“requires general community education, education of police officers, lawyers and judicial officers, as well as changes to policies and procedures.”*¹¹

25. -Professor Eastal in her preliminary submission to this review discusses the *“disconnect”* between the law of consent in NSW and the *“print media narrative on sexual assault and consent”*. She posits this can be attributed to *“the absence of a government-funded education program aimed at informing the community of the new definition of consent”*.

26. -Cultural change requires an accompanying extensive evidence-based education campaign about the drivers of gender-based violence, respectful relationships and ethical sexual practice, developed by experts, that challenges rape myths, male entitlement and victim-blaming attitudes. A comprehensive primary prevention strategy is required that includes preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment.¹² One off training is insufficient. Significant investment must be made into primary prevention and it must be ongoing.

27. -As noted by the ALRC and NSWLRC, *“education of police officers, lawyers and judicial officers”* is also required.

⁸ NSWLRC, *Consultation Paper*, paragraph 3.77.

⁹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National - Legal Response*, Sydney, 2010, paragraph 24.96.

¹⁰ *Family Violence – A National Legal Response*, Paragraph 24.98.

¹¹ *Family Violence – A National Legal Response*, Paragraph 24.99.

¹² For further information see: Quadara, A *“The Everydayness of Rape How Understanding Sexual Assault Perpetration Can Inform Prevention Efforts”* in Henry, N & Powell, A (eds) *Preventing Sexual - Violence: Interdisciplinary Approaches to Overcoming a Rape Culture*, London: Palgrave McMillan, 2014.

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28. - We note the NSW Government in December 2018 announced the #makenodoubt campaign which "will involve interviews, social media videos and posters".¹³ This is a key aspect of the Education component of the inaugural NSW Sexual Assault Strategy 2018 - 2021. The Sexual Assault Strategy states: "The campaign will highlight gender inequality as a driver of sexual assault and harassment".¹⁴ While it is early days, it is unclear how this campaign will create cultural change to prevent violence and promote gender equality. It does not appear to be part of a comprehensive primary prevention strategy.
29. - In *Safe State*, the NSW Women's Alliance makes 49 detailed recommendations for policy and law change to prevent and end sexual, domestic and family violence in NSW. Nine recommendations relate to creating cultural change to prevent violence and promote gender equality. These recommendations focus on the need for a co-ordinated approach to primary prevention; making prevention of gender-based violence a key priority in schools through whole of school programs that are evidence based, developed by experts and focus on the drivers of gender-based violence; ensuring education programs address diversity; and the development of an Aboriginal and Torres Strait Islander people led strategy to prevent violence.¹⁵
30. - WLS NSW is a member of the NSW Women's Alliance and supports these recommendations.

Recommendation 2

The development and implementation of an extensive evidence-based education campaign about the drivers of gender-based violence, respectful relationships and ethical sexual practice, developed by experts, that challenges rape myths, male entitlement and victim-blaming attitudes. This needs to be part of a comprehensive primary prevention strategy which includes preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment. Significant and ongoing investment is required.

Recommendation 3

Adopt the Safe State recommendations relating to creating cultural change to prevent violence and promote gender equality.

¹³ Minister Goward Media Release: Make No Doubt: Consent at the heart of a new campaign, 13 December 2018 at: <https://www.women.nsw.gov.au/news/2018/make-no-doubt-consent-at-the-heart-of-new-campaign>

¹⁴ NSW Government, *NSW Sexual Assault Strategy 2018-2021*, p 14.

¹⁵ NSW Women's Alliance, *Safe State – Acting to end sexual, domestic and family violence*, 2018 at: https://d3n8a8pro7vhmx.cloudfront.net/safensw/pages/41/attachments/original/1540514938/A_Safe_State_-_Final_Policy_Platform_%28Oct_2018-Mar_2019%29.pdf?1540514938

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Negation of consent

31. - We support the inclusion of factors negating consent.
32. - We believe there is merit in having a single non-exhaustive list of factors negating consent rather than the current approach in NSW of factors that negate consent and factors that may negate consent. We support a single non-exhaustive list of negating factors as we believe it simplifies the law.
33. - We refer to s36(2) of the *Crimes Act 1958 (Vic)* as an example of a single list of negating factors. We support the inclusion of factors within s 36(2).
34. - In particular, we support factors that are not clearly articulated in the NSW legislation, for example, the inclusion of withdrawing of consent as framed in s 36(2)(m) of the *Crimes Act (Vic)*. We note withdrawal of consent is also included in s273(2)(e) of the *Canadian Criminal Code*.
35. - We also support inclusion of provisions that address both an incapacity to consent and an incapacity to withdraw consent due to a person being so affected by alcohol or another drug, similar to s36(2)(e) and (f) *Crimes Act (Vic)*. We support the use of language that names the issue and accurately reflects the situation. For example, the Victorian legislation refers to "*the person is so affected by alcohol or another drug as to be **incapable of consenting to the act/incapable of withdrawing consent to the act***" (emphasis added) rather than consent may be negated "*if the person **consents** to the sexual activity while substantially intoxicated by alcohol of any drug*" (s 61HE(8)(a) *Crimes Act 1900 (NSW)*). The person is not consenting so the term "consent" should not be used.

Recommendation 4

Factors negating consent should be included in a single list.

Sexual violence within the context of domestic violence

36. - Many of our clients who have experienced domestic violence have experienced sexual violence perpetrated by this same person. The perpetration of domestic violence, including sexual violence within the context of domestic violence, is a serious breach of trust. There are often significant and long-lasting impacts as a result of such violence. Perpetrators must be held accountable.
37. - In our experience, sexual violence particularly when it is perpetrated within the context of domestic violence, is often not disclosed in our first encounter with clients. The disclosure of such violence requires women to build a relationship of trust and for the woman to feel safe in disclosing such violence.
38. - Domestic violence is a deliberate act perpetrated as a means of power and control. There are many ways this power and control is exerted – sometimes through physical violence, more often through ways other than physical violence.

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39. - Section 61HE (5)(c) of the *Crimes Act (NSW)* provides consent is negated where there are threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person). Section 61HE(8)(b) provides consent *may* be negated "*if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force*".
40. - We believe the law needs to better capture sexual violence that occurs within the context of domestic violence. This also needs to be accompanied with extensive education as well as a specialist response as outlined below.
41. - Victoria's single list of negating factors includes "*the person submits to the act because of force or the fear of force, whether to that person or someone else*" (s36 (2) (a)) as well as "*fear of harm of any type, whether to that person or someone else or an animal*" (s36 (2) (b)).
42. - Further, rather than using the word "*consent*" in a context where there is no consent as occurs in the NSW legislation (see reference to s61HE(8)(b) in paragraph 40 above), the Victorian legislation uses the term "*submits*" (See paragraph 42 above). We support the naming of violence and so prefer the term "*submits*" which more accurately reflects what is happening.
43. - We support such factors as outlined in s36(2)(a) & (b) of *the Crimes Act (Vic)* above being included as negating factors, noting s36(2)(b) more clearly encapsulates non-physical threats. We also support Rape and Domestic Violence Services Australia's inclusion of "or threat to property", noting this can be a form of domestic violence.
44. - We further recommend that any such provision clearly states the fear of harm need not be present immediately before or during the sexual violence.
45. - We further recommend the inclusion of jury directions that explain the nature and dynamics of domestic violence and coercion and control and that a threat of harm need not be immediately present in order to affect a person's capacity to consent.
46. - However, we question if this is enough or whether further additional provisions are also required to fully capture sexual violence within a domestic violence context.
47. - In the Giving Voice Project, 33 women in Australia who had experienced sexual violence were invited to share their experiences "*to develop a picture of how sexual offences are set up, carried out and concealed*".¹⁶ Twenty-two participants had reported at least one instance of sexual violence to police and there were 5 convictions. In the majority of cases the relationship to the offender was an intimate partner or acquaintance. Other relationships included work colleague, friend, stranger. There is no information about which of the matters resulted in conviction, though given research shows that stranger sexual violence

¹⁶ Clark, H & Quadara, A. Insights into sexual assault perpetration Giving voice to victim/survivors' knowledge, Research Report No18, Melbourne: Australian Institute of Family Studies, 2010, p2, accessed at: <https://aifs.gov.au/sites/default/files/publication-documents/rr18.pdf>

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is more likely to be prosecuted and more likely to result in conviction¹⁷ we posit it is unlikely to have been the cases involving intimate partners. We include extracts below from women who shared their experiences of sexual violence perpetrated by their intimate male partner.

48. Trudy reflects:

I had no say whatsoever. I'd end up just laying there. I wasn't going to fight him because I didn't have the strength to fight him, and if anybody thinks that a woman can fight off a rapist, they can't. It is too hard and you end up worse. So I'd end up just laying there, and when he'd finished, I'd cry myself to sleep and wished that I was dead. The rapes used to scare the hell out of me because I had already told him no, but I was supposed to be a good wife. He thought it was funny when he tied me to the bed. I didn't find it funny.¹⁸

49. Holli reflects:

I was dating a guy for maybe about a year and a half and he was extremely emotionally manipulative. I wasn't really aware of that because I hadn't really—I'm not a manipulative person myself. I haven't really been exposed to that sort of thing before. So it was really quite easy for him to sort of gain control over my self-esteem sort of slowly over the relationship. It started out really fantastic. Everything was fantastic and all my friends really liked him.

Then, as time went on, you know, things sort of got worse and worse. I'd had an abnormal pap smear and I had HPV—which causes the cancerous cells—and I had to have an operation to have those removed. So after I had this operation, he still would make me have sex with him and I was just not really ready to do that, because I was just feeling really, you know, it's a really personal thing to go through to have that sort of operation done. He made me do it anyway, not with physical force but just emotional manipulation. Once someone can break down your self-esteem, and they can start to control you, and they can start to control the things you think and what you do. They can basically make you do whatever they want, which is what he did.¹⁹

50. Gaiana reflects:

The violence didn't start until about nine months in and there was a whole grooming process that I now, on reflection, was aware it was going on ... but while I was in it didn't realise. It wasn't probably until about three or four years after that that I started to really reflect on what had happened and what that had meant for me and the situation. We started dating very harmless. At about the five-and-a-half/six month mark he started to become slightly more controlling. He changed the phone number and made it a silent number because he was very big about protection. The only thing I didn't have protection from was him. His basic rule was that I had three orifices and one of them was going to get

¹⁷ Cossins, A. "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England", *The International Journal of Evidence and Proof*, 2013, 17(1), p 77.

¹⁸ Ibid, p18.

¹⁹ Ibid, p19.

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used and that was every day without fail, whether I was interested or not, whether I wanted to or not, whether I was sick or not, whether I had my period or not. That was the deal.²⁰

51. - How can legislation more clearly capture the experiences of Trudy, Holli and Gaiana and hold perpetrators of such violence accountable?
52. - We recommend a roundtable with subject experts be held to discuss how the law can better capture sexual violence within the context of domestic violence.

Recommendation 5

Amend NSW legislation to include in a single list of negating factors harmful conduct and/or fear of harm of any type whether to that person or someone else or an animal or to property.

Recommendation 6

Any such provision as outlined in Recommendation 5 must make clear the fear of harm need not be present immediately before or during the sexual violence.

Recommendation 7

Inclusion of jury directions that explain the nature and dynamics of domestic violence and coercion and control and that a threat of harm need not be immediately present in order to affect a person's capacity to consent.

Recommendation 8

Consider further additional provisions that would better capture sexual violence within the context of domestic violence.

Recommendation 9

A roundtable with subject experts be held to discuss how the law can better capture sexual violence within the context of domestic violence.

Knowledge about consent

53. - WLS NSW supports retaining an objective fault element for knowledge of consent.
54. - An objective fault element is important as sexual violence is a violation of bodily integrity and sexual autonomy and can have very damaging impacts on the victim-survivor. The community expects that perpetrators of such violence should be held accountable.

²⁰ Ibid, p20.

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55. - This is acknowledged in the comments made by then NSW Attorney General, John Hatzistergos in his 2007 Second Reading speech:

The present common law test is subjective, requiring the Crown to prove that the accused knew the complainant was not consenting, or was reckless as to whether the complainant was consenting, solely from the point of view of the accused. The accuser's assertion that he or she had a belief that the other person had consented is difficult to refute, no matter how unreasonable in the circumstances. The law does not adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct. The subjective test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.²¹

56. - The former Attorney General also stated during parliamentary debate on the Bill:

An accused will no longer be simply able to say they had an honest belief that there was consent, no matter how outrageous that belief might be. Belief will also have to be reasonable according to objective standards in the community.²²

57. - We further support actual knowledge and recklessness remaining part of the mental element for sexual violence offences.

"No reasonable belief" test

58. - In NSW one of the tests of knowledge of consent to sexual activity includes the "no reasonable grounds" test. This is framed as there is no consent to sexual activity if "the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity".

59. - We share the concerns raised in the Consultation Paper with the current "no reasonable grounds" test. Namely,

Arguably, ...the presence of any reasonable ground for the accused's beliefs is enough to result in an acquittal – even if there is also "considerable evidence that the mistake was an unreasonable one" (citing McNamara et al's preliminary submission).

60. - We acknowledge there are a number of ways the test could be amended to address this as outlined in the Consultation Paper. For the reasons outlined in Rape and Domestic Violence Services Australia's submission in response to the Consultation Paper, we support Rape and Domestic Violence Services Australia's recommendation "to replace the current three-tier mental element with a simplified "no reasonable belief" test".

²¹ The Hon John Hatzistergos, Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007, Second Reading, *NSW Legislative Council Hansard*, 7 November 2007, p3584.

²² The Hon John Hatzistergos, Debate on the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007, *NSW Legislative Council Hansard*, 13 November 2007, p3907.

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61. - As discussed above, in considering the steps taken by the person to ascertain whether the complainant consents to sexual activity, we agree with Dyer's proposal that the legislation be amended to stipulate the steps be "*physical or verbal*".²³ This is consistent with an affirmative model of consent and the intention of the earlier legislation that a "*reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour*".
62. - If an affirmative model of consent is implemented, as we recommend, Methven and Dobinson note in their preliminary submission that a person cannot rely on a mistaken belief that the complainant was consenting in the absence of the other person's affirmative consent.²⁴

Proposed new offence

63. - WLS NSW strongly rejects the proposed new category of sexual offence which "*might cover situations involving a mistaken but unreasonable belief in consent or, potentially, a failure to take reasonable steps to ascertain consent*" and which would have a lesser penalty.²⁵
64. - Mr Stephen Odgers SC in 2005 proposed a new offence be created:
- Any person who has sexual intercourse with another person without the consent of the other person and who fails to take reasonable steps to ascertain whether the other person consented, is liable to imprisonment for 5 years.*²⁶
65. - As stated in the Consultation Paper, "*the NSW Government did not adopt this proposal because "it sends the message that some rape is not serious". The Government believed "all sexual assault is serious and should have the same penalties"*".²⁷
66. - We continue to hold the view that the penalty must reflect the seriousness of the crime. A new sexual offence with a lesser penalty, for example, of only 5 years is inappropriate for an offence as serious as rape. If the penalty is only 5 years this equates sexual assault with an offence tried summarily in the Local Court. In our view the community sees sexual assault as a substantially more serious crime.
67. - We believe the proposed offence would invite the jury to convict on the new offence with the lower penalty as an alternative verdict. We are concerned it may also encourage plea bargaining.
68. - We are also concerned that the proposal significantly departs from the intention of the 2007 reforms. As the then Attorney General said in his second reading speech

²³ Dyer, A. *Preliminary submission to the NSWLRC Consent in relation to sexual offences review*, 29 June 2018, p 11.

²⁴ Methven, E. & Dobinson, I. *Preliminary submission to the NSWLRC Consent in relation to sexual offences - review*, 29 June 2018, p21.

²⁵ NSWLRC Consultation Paper, paragraph 5.61.

²⁶ Attorney General's Department of NSW, *Responding to sexual assault: the way forward*, December 2005, p50.

²⁷ NSWLRC, *Consultation Paper*, paragraph 5.65.

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"Modernisation of the law relating to consent, in particular, is aimed at bringing about both a cultural shift in the response to victims of sexual assault by the community and by key participants within the criminal justice system".

69. - Sexual violence is a violation of bodily integrity and sexual autonomy. The then Attorney General acknowledged the failure to ensure *a reasonable standard of care is taken to ascertain a person is consenting*²⁸ can have very damaging consequences. A penalty that reflects the seriousness of the crime is required.
70. - We believe the proposal reflects a sense of male entitlement to women's bodies which must continue to be challenged if we as a community are genuinely committed to preventing and ending violence against women and children. To fail to hold offenders fully accountable for sexual violence is to condone violence against women and children.
71. - This highlights again the vital importance of comprehensive education programs referred to above.

Recommendation 10

An objective fault element for knowledge of consent be retained.

Recommendation 11

We support Rape and Domestic Violence Services Australia's recommendation *"to replace the current three-tier mental element with a simplified *"no reasonable belief" test.*"*

Recommendation 12

In considering the steps taken by the defendant to ascertain whether the complainant consents to sexual activity, the legislation be amended to stipulate the steps be *"physical or verbal"*.

Recommendation 13

The proposed new category of sexual offence which *"might cover situations involving a mistaken but unreasonable belief in consent or, potentially, a failure to take reasonable steps to ascertain consent"* and which would have a lesser penalty be rejected.

²⁸ The Hon John Hatzistergos, Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007, Second Reading, *NSW Legislative Council Hansard*, 7 November 2007, p3584.

Considering other matters

72. - We support the proposal by McNamara et al outlined in the Consultation Paper that the fact finder consider *"the effect that any behaviour of the accused may have had on the behaviour of the victim at the relevant time"*.²⁹
73. - We endorse the recommendation by Rape and Domestic Violence Services Australia based on this proposal to *"insert an additional provision to provide that when making findings about the mental element, the fact finder must consider the effect that any behaviour of the accused before the alleged offence may have had on the behaviour of the complainant at the relevant time."*

Recommendation 14

We endorse the recommendation by Rape and Domestic Violence Services Australia based on the McNamara et al proposal to *"insert an additional provision to provide that when making findings about the mental element, the fact finder must consider the effect that any behaviour of the accused before the alleged offence may have had on the behaviour of the complainant at the relevant time."*

Self-induced intoxication of the accused

74. - We support the continued inclusion of s61HE(4)(b) of the *Crimes Act (NSW)* which prevents the fact-finder from being able to consider any self-induced intoxication of the accused. We support the views of the Victorian Department of Justice and Regulation as outlined in the Consultation Paper: *"this approach reflects a basic policy decision that self-induced intoxication should not be allowed to lower the standards of acceptable behaviour"*.³⁰

Recommendation 15

The continued inclusion of s61HE(4)(b) of the *Crimes Act (NSW)* which prevents the fact-finder from being able to consider any self-induced intoxication of the accused.

Excluding other matters

75. - Rape and Domestic Violence Services Australia recommends *"insert[ing] an additional provision to provide that when making findings about the mental element, the fact finder must not consider any opinions, values or attitudes held by the accused that do not meet community standards."*
76. - Rape and Domestic Violence Services Australia explains:

²⁹ NSWLRC, *Consultation Paper*, paragraph 5.95.

³⁰ NSWLRC, *Consultation Paper*, paragraph 5.97.

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The purpose of this provision is to give meaning and expression to the "reasonable belief" standard. It does this by clarifying to the fact-finder that an accused should not be able to rely on some outdated or prejudicial view in order to justify a mistaken belief in consent.

77. -WLS NSW endorses this recommendation.

Recommendation 16

We endorse the recommendation by Rape and Domestic Violence Services Australia to "insert an additional provision to provide that when making findings about the mental element, the fact finder must not consider any opinions, values or attitudes held by the accused that do not meet community standards."

Jury Directions

78. -The 2017 National Community Attitudes Survey on violence against women highlights that rape myths continue to abound. For example:

78.1 more than one in three believe a woman is more likely to be sexually assaulted by a stranger than someone she knows³¹

78.2 Nearly one in five are not clear that coerced sex in marriage is against the law³²

78.3 One in ten either agree that it is only rape if a woman physically resists or do not know³³

78.4 Nearly one in three agree with the statement "*lot of times, women who say they were raped had led the man on and then had regrets*"³⁴

79. -We are also concerned by the continuing prevalence of rape myths in our society which focus on blaming the victim-survivor rather than holding the perpetrator to account. Such myths can influence the decision making by the fact finder in sexual violence trials to the detriment of a proper application of the law of consent. This is an issue that needs to be addressed in law and practice reform. As discussed above, widespread education is required.

80. -We support jury directions to challenge myths about sexual violence and how people respond to sexual violence.

³¹ Webster, K., Diemer, K., Honey, N., Mannix, S., Mickle, J., Morgan, J., Parkes, A., Politoff, V., Powell, A., Stubbs, J. & Ward, A., 2017 NCAS report: *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes Survey towards Violence against Women*, (Research report, 03/2018). Sydney, NSW: ANROWS. p52.

³² Ibid, p51.

³³ Ibid, p48.

³⁴ Ibid, p86.

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81. - We support legislated jury directions on consent and other related issues and agree that this “*might be a way to ensure that judges give consistent directions*”.³⁵
82. - It is important that such jury directions are carefully drafted with input from sexual assault, domestic violence and health experts.

Recommendation 17

Jury directions to challenge myths about sexual violence and how people respond to sexual violence.

Recommendation 18

Legislated jury directions on consent and other related issues.

Recommendation 19

Jury directions are carefully drafted with input from sexual assault, domestic violence and health experts.

Expert evidence

83. - Given the prevalence of rape myths, expert evidence about the behavioural responses of people who experience sexual violence has an important role to play.
84. - We refer to Annie Cossins’ proposed wording to amend s79(2) and s108C of the *Uniform Evidence Act* to enable expert evidence to be admitted in adult sexual violence trials.³⁶

Recommendation 20

The Uniform Evidence Act be amended to specifically enable expert evidence to be admitted in adult sexual violence trials.

Police response

85. - Don Weatherburn notes that since 2000, the rate of sexual assault in NSW has increased by nearly 40% while the rates of murder and crimes against property have halved.³⁷ This highlights the need to ensure police are adequately resourced to respond and investigate complaints and trained to respond to sexual violence.

³⁵ NSWLRC, *Consultation Paper*, paragraph 6.46.

³⁶ Cossins, A. “Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England”, *The International Journal of Evidence and Proof*, 2013, 17(1), p108-110.

³⁷ Jenna Price, “Crime is on the decrease. But there’s one exception”, *SMH*, 1 February 2019.

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86. - The 2016 Personal Safety Survey found that almost 9 out of 10 women did not report their most recent sexual assault by a male to police.³⁸
87. - While acknowledging that the NSW Police Force is working hard to respond to domestic violence and sexual violence, there continue to be examples of poor responses by police to disclosures by women of sexual violence, particularly within the context of domestic violence.
88. - Some women have shared of their distress in having built up the courage to report sexual violence within the context of domestic violence only to feel the police made incorrect assumptions about why they reported or were dismissive and/or minimised the violence.
89. - Other women express concern about the delay in responsiveness to their complaint. For example, they are not regularly provided progress reports about their matter. Additionally, some women feel exposed to further violence as there may be a significant delay in police applying for an apprehended violence order for the woman's protection due to delays in speaking with the accused.
90. - Some women express concern that the process of making a complaint, the supports available and the process leading to the laying of charges and a trial are not clearly explained or articulated in a way they understand. For example, a considerable period of time passed before a woman who had experienced sexual violence by her male intimate partner became aware that Victims Services could assist with security upgrades to her home so she could feel safe at home.
91. - Several women have required our advocacy before they have been able to provide their statement to a female detective.
92. - A specialist, sexual violence, domestic violence, trauma informed and response-based practice response by police is crucial in encouraging people to report sexual violence. Police, as all other professionals, should be trained to have a basic understanding of complex trauma. An understanding of complex trauma will be the foundation for an appropriate response to someone who is reporting sexual violence. This will be crucial both to their recovery and to the decisions that they will make about reporting and following through with their complaint through the criminal justice process.
93. - A negative first encounter with police reduces the likelihood of women reporting any further sexual or other violence to police and so the perpetrator is not held accountable for his violence.
94. - We believe best practice is for all police to have ongoing training in complex trauma, the nature and dynamics of sexual violence, the nature and dynamics of domestic violence, the

³⁸ Australian Bureau of Statistics, *Personal Safety Survey, Australia, 2016*, Cat. No. 4906.0, available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>

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nature and dynamics of child abuse and child sexual abuse, response-based practice, cultural competency and disability awareness.

95. -Response-based training can help police in taking and recording statements by complainants to ensure their language does not *"obscure or mutualise violence, mitigate perpetrator responsibility and/or blame/pathologise the victim."*³⁹
96. -Specialist training is also important. We believe best practice is to have several sexual violence specialist police who are specially trained in responding to sexual violence and also understand the nature and dynamics of sexual violence, including sexual violence perpetrated within the context of domestic violence, be located in every Police Area Command and Police District in NSW. A single, isolated sexual assault expert in each Police Area Command and Police District would be insufficient.
97. -Noting that sexual violence is a gendered crime, it is also important that women sexual violence complainants can access a specialist gendered response, for example, with women detectives taking their statements.
98. -Further, experts such as Aboriginal Community Liaison Officers, Gay and Lesbian Liaison Officers, Youth Liaison Officers and Domestic Violence Liaison Officers should also be trained in responding to sexual violence and understanding the nature and dynamics of sexual violence, including sexual violence perpetrated within the context of domestic violence.
99. -We believe there should also be a practice that a complainant is given multiple means of contacting the person they provided their complaint to for an update on their matter. There should also be a sexual violence team within the NSW Police Force located at head office which includes social workers who can help complainants receive updates on their matters. This is particularly important, for example, for complainants in regional, rural and remote areas who may have travelled several hours to speak to a detective who may be transferred to another office prior to their matter being finalised.
100. Just as domestic violence complainants in proceedings for a domestic violence offence can give evidence by audio or visual recording, so too all prescribed sexual offences complainants should be able to give evidence this way to limit re-traumatisation.

Recommendation 21

All police receive ongoing training in complex trauma, the nature and dynamics of sexual violence, the nature and dynamics of domestic violence, the nature and dynamics of child abuse and child sexual abuse, response-based practice, cultural competency and disability awareness.

Recommendation 22

³⁹ See, for example, Centre for Response Based Practice: <https://www.responsebasedpractice.com> and Safe and Together: <https://safeandtogetherinstitute.com/>

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Several sexual violence specialist police who are specially trained in responding to sexual violence and also understand the nature and dynamics of sexual violence, including sexual violence perpetrated within the context of domestic violence, be located in every Police Area Command and Police District in NSW.

Recommendation 23

Experts such as Aboriginal Community Liaison Officers, Gay and Lesbian Liaison Officers, Youth Liaison Officers and Domestic Violence Liaison Officers be trained in responding to sexual violence and understanding the nature and dynamics of sexual violence, including sexual violence perpetrated within the context of domestic violence.

Recommendation 24

A complainant is given multiple means of contacting the person they provided their complaint to for an update on their matter.

Recommendation 25

A sexual violence team within the NSW Police Force located at head office which includes social workers who can help complainants receive updates on their matters.

Recommendation 26

Just as domestic violence complainants in proceedings for a domestic violence offence can give evidence by audio or visual recording, so too all prescribed sexual offences complainants be able to give evidence this way to limit re-traumatisation.

Specialisation

101. Taskforce Recommendation 66 in *Responding to sexual assault the way forward* (2006) called for a number of changes including: specialised case management hearings; specialist judges; specialist prosecutors who remain on a case throughout the process; proactive case management to ensure matters are dealt with promptly; separate entrances to the court room for victims-survivors; access to CCTV; creation of a case management system within the Office of Director of Public Prosecution to ensure high standards and that complainants are kept informed of the progress of their matter through conferences and any issues impacting upon timely finalisation of their matter is resolved; data collection; *“the creation of a cross-agency monitoring body to assess and evaluate a dedicated and specialised court with alternate listing arrangements and the performance of all contributors to the project”*.

102. We refer to Karen Willis' Churchill Fellowship report in which she outlines models in other jurisdictions which provide a safe and accessible “one stop shop” for those who have experienced sexual violence. Service providers travel to these facilities to meet the person who has experienced sexual violence. For example, medical and forensic services,

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counsellors, police, prosecutors and support workers.⁴⁰ We support such a model in NSW. Additionally, early access to specialist women's legal services and specialist Aboriginal and Torres Strait Islander women's legal services is also important to help those who have experienced sexual violence to understand their options.

103. There is a continued need for specialist courts which adopt sexual and domestic violence and trauma-informed practice, including specialist judges and specialist prosecutors. It is important that all who play a role in these specialist courts, including police, legal practitioners, judicial officers, interpreters, support services; and court staff have ongoing training in: trauma informed practice and understanding complex trauma; the dynamics and impacts of sexual violence, including sexual violence perpetrated within the context of domestic violence; cultural competency; and disability awareness.
104. Those who have experienced violence also need to be able to access the support they need when they need it – for example, wrap around services including intensive case management.

Recommendation 27

A safe and accessible “one stop shop” for those who have experienced sexual violence where service providers, including medical and forensic services, counsellors, police, prosecutors and support workers, travel to these facilities to meet the person who has experienced sexual violence.

Recommendation 28

Early referral and access to specialist women's legal services and specialist Aboriginal and Torres Strait Islander women's legal services to help those who have experienced sexual violence to understand their options.

Recommendation 29

Specialist courts which adopt sexual and domestic violence and trauma-informed practice, including specialist judges and specialist prosecutors.

Recommendation 30

All who play a role in specialist courts, including police, legal practitioners, judicial officers, interpreters, support services; and court staff have ongoing training in: trauma informed practice and understanding complex trauma; the dynamics and impacts of sexual violence including sexual violence perpetrated within the context of domestic violence; cultural competency; and disability awareness.

⁴⁰ Karen Willis, *Churchill Fellowship report to review the practices, processes and outcomes of support services and criminal justice responses to complaints of sexual assault - South Africa, Canada, USA, 2005.*

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If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator or Carolyn Jones, Senior Solicitor on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Janet Loughman
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